INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

GABRIEL RESOURCES LTD.
AND GABRIEL RESOURCES (JERSEY) LTD.

Applicants

V.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

APPLICANTS' PROPOSAL TO DISQUALIFY PROF. DR. MAXI SCHERER

November 16, 2024

WHITE & CASE LLP

Counsel for Applicants

APPLICANTS' PROPOSAL TO DISQUALIFY PROF. DR. MAXI SCHERER

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1. In accordance with ICSID Convention Article 57 and ICSID Arbitration Rule 9(1) (2006), Applicants propose the disqualification of Prof. Dr. Maxi Scherer on account of facts indicating a manifest lack of independence and impartiality under ICSID Convention Article 14(1).

I. THE ICSID CONVENTION PROVIDES FOR DISQUALIFICATION WHERE A COMMITTEE MEMBER WOULD APPEAR TO AN OBJECTIVE OUTSIDER TO LACK THE REQUISITE IMPARTIALITY OR INDEPENDENCE

2. ICSID Convention Article 57 provides in its first sentence, "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14."

3. ICSID Convention Article 14(1) specifies the qualities required of arbitrators and members of *ad hoc* Committees: "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment…."

4. While the English version of Article 14 refers to "independent judgment," the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.[1]

5. Impartiality refers to the absence of bias or predisposition towards a party.[2] Independence relates to the absence of external control, particularly of relationships with a party that might influence an arbitrator's decision.[3] Thus, independence and impartiality "both

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[1] *See, e.g.*, *Blue Bank v. Venezuela*, ICSID Case No. ARB/12/20, Disqualification Decision dated Nov. 12, 2013 ("*Blue Bank v. Venezuela*") (AL-14) ¶ 58 n.37; *Caratube v. Kazakhstan*, ICSID Case No. ARB/13/13, Disqualification Decision dated Mar. 20, 2014 ("*Caratube v. Kazakhstan*") (AL-43) ¶ 52 n.32; *İmeks İnşaat v. Turkmenistan*, ICSID Case No. ARB/21/23, Disqualification Decision dated Oct. 31, 2023 ("*İmeks İnşaat v. Turkmenistan*") (AL-49) ¶ 71.

[2] *Blue Bank v. Venezuela* (AL-14) ¶ 59; *Caratube v. Kazakhstan* (AL-43) ¶ 53; *İmeks İnşaat v. Turkmenistan* (AL-49) ¶ 73.

[3] *Blue Bank v. Venezuela* (AL-14) ¶ 59; *Caratube v. Kazakhstan* (AL-43) ¶ 53; *İmeks İnşaat v. Turkmenistan* (AL-49) ¶ 73.

protect parties against arbitrators being influenced by factors other than those related to the merits of the case."[4] Indeed, "there can be no greater threat to the legitimacy and integrity of the proceedings or the award than the lack of impartiality or independence of one or more of the arbitrators."[5] For that reason, "the parties' confidence in the independence and impartiality of the arbitrators deciding their case is essential for ensuring the integrity of the proceedings and the dispute resolution mechanism as such."[6]

6. It is well established that the legal standard for establishing a lack of independence or impartiality is objective and does not require proof of actual dependence or bias:

> Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.
>
> The applicable legal standard is an "objective standard based on a reasonable evaluation of the evidence by a third party."[7]

7. Thus, the standard is "whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality."[8] The relevant perspective is that of a third party – "a reasonable independent observer."[9] The task of deciding a disqualification proposal in accordance with ICSID Convention Article 58 and Arbitration Rule 9(4) (2006) therefore requires the unchallenged Committee members to assess the

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[4] *Blue Bank v. Venezuela* (AL-14) ¶ 59; *Caratube v. Kazakhstan* (AL-43) ¶ 53; *İmeks İnşaat v. Turkmenistan* (AL-49) ¶ 73.

[5] *Eiser Infrastructure v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (AL-18) ¶ 175.

[6] *Suez v. Argentina*, ICSID Case No. Arb/03/19, Annulment Decision dated May 5, 2017 ("*Suez v. Argentina*") (AL-16) ¶ 77.

[7] *İmeks İnşaat v. Turkmenistan* (AL-49) ¶ 73 *quoting Blue Bank v. Venezuela* (AL-14) ¶¶ 59-60. *See also Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Disqualification Decision dated Dec. 13, 2013 (AL-15) ¶ 66; *EDF International v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated Feb. 5, 2016 ("*EDF International v. Argentina*") (AL-12) ¶ 109.

[8] *EDF International v. Argentina* (AL-12) ¶¶ 109, 111. *See also Suez v. Argentina* (AL-16) ¶ 78.

[9] *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No. ARB/05/24, Ruling on Participation of David Mildon QC dated May 6, 2008 (AL-7) ¶ 47. *See also Caratube v. Kazakhstan* (AL-43) ¶ 54 ("the applicable legal standard is 'an objective standard based on a reasonable evaluation of the evidence by a third party' or, in other words, on the 'point of view of a reasonable and informed third person'").

facts and circumstances from the perspective of a reasonable independent third party observer – not from the perspective of a member of the international arbitration community.

8. ICSID Convention Article 57 uses the term "manifest," which "simply means that the result of the analysis as to the lack of independence and impartiality, or the appearance thereof, is 'evident' or 'obvious' from the perspective of a reasonable observer, not that the process of analysis must necessarily be easy or simple, or that little reasoning or argumentation is needed to justify a disqualification."[10]

II. WHILE APPLICANTS HOLD PROF. DR. SCHERER IN HIGH REGARD, HER CONNECTIONS TO RESPONDENT'S COUNSEL AND TO PROF. TERCIER HAVE ACCUMULATED IN A WAY THAT RAISES REASONABLE GROUNDS TO DOUBT HER IMPARTIALITY AND INDEPENDENCE

9. In her message to the Parties on November 12, 2024, Prof. Dr. Scherer reaffirmed that she "will judge fairly as between the Parties, according to the applicable law, and that no circumstances exist that affect [her] impartiality and independence." Applicants appreciate that statement and emphasize that they hold Prof. Dr. Scherer in high regard and do not impugn her professional integrity. Applicants respectfully submit, however, that Prof. Dr. Scherer's professional integrity and her intention to judge fairly are not the applicable test, as other tribunals have observed:

> [T]he issue is not whether the arbitrator whose disqualification is sought subjectively feels capable of adjudicating between the parties with full independence and impartiality. What is necessary as well under Article 57 of the ICSID Convention is that, from the perspective of a reasonable third party, there is not, as stated in *Caratube*, 'an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.' The rationale for this high standard for the independence and impartiality of ICSID arbitrators can be gleaned from the

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[10] *İmeks İnşaat v. Turkmenistan* (AL-49) ¶ 76 (observing that "[a] conclusion that the lack of independence and impartiality is 'manifest' can, as with the same element in Article 52(1)(b) of the ICSID Convention, also be the result of 'extensive argumentation and analysis … as long as it is sufficiently clear and serious'"). *See also, e.g.*, Loretta Malintoppi and Alvin Yap, *Challenges of Arbitrators in Investment Arbitration: Still Work in Progress?*, Chapter 8 in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO KEY ISSUES (Katia Yannaca-Small, ed.), Oxford University Press 2018 ("Malintoppi & Yap") (AL-45) ¶ 8.16 (observing that the Chairman's decision in *Blue Bank v. Venezuela* shows that "'manifest' is merely a rule of evidence, not a qualitative modifier to the standard of disqualification").

> famous dictum by the then Lord Chief Justice of England: 'Justice must not only be done, but must also be seen to be done.' This dictum holds true not only for the administration of justice in the English courts, but in any system of adjudication, whether domestic or international, including in ICSID arbitration. It implies that not only an actual lack of independence and impartiality but an apparent lack compromises the proper administration of international justice. Such appearance, consequently, must result in the disqualification of any arbitrator who is at the origin of an appearance of dependence or bias, even if he or she were subjectively fully capable of adjudicating the case before them with full independence and impartiality.[11]

10. In an annulment proceeding, *ad hoc* Committee members must be – and must appear to be – impartial and independent from all participants in the arbitration, including not only the Parties and their legal counsel, but also the Tribunal members.[12] That requirement is especially important in this case where the grounds for annulment include the many undisclosed personal, institutional, and professional connections between the Tribunal President Prof. Tercier, Respondent's party-appointed arbitrator Prof. Douglas, and Respondent's counsel team at LALIVE.[13] Prof. Dr. Scherer's recent disclosure on October 23, 2024, and the recent social media posts highlighted in Applicants' letter of October 30, 2024, raise concerns that Prof. Dr. Scherer has multiple connections to Respondent, to its counsel team, and to Prof. Tercier beyond the disclosures made at the time of her proposed appointment. Prof. Dr. Scherer's succinct message of November 12, 2024, concluding without explanation, that no circumstances exist that affect her impartiality and independence, gives rise to further uncertainty from the perspective of a reasonable outside observer as to whether Prof. Dr. Scherer can be impartial about the question being posed in this annulment proceeding concerning whether undisclosed interpersonal connections could undermine the impartiality and independence of one or more arbitrators to warrant annulment of the Award. In these circumstances, Applicants respectfully submit that,

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11 *İmeks İnşaat v. Turkmenistan* (AL-49) ¶ 79. *See also, e.g.*, *Caratube v. Kazakhstan* (AL-43) ¶ 75 (observing that "what is at issue is Mr. Boesch's perceived impartiality and independence from an objective point of view" and that "while it may well be that Mr. Boesch might be able to maintain a proverbial 'Chinese wall' in his own mind and remain fully impartial, the objective view of a reasonable and informed third party would be that expressed in the two cases referred to").

12 It is for this reason that ICSID Convention Article 52(3) expressly prohibits any committee member from having the same nationality of any tribunal member or of any party.

13 *See* Application for Annulment ¶¶ 42-105.

despite her best intentions, a reasonable independent observer would justifiably doubt that Prof. Dr. Scherer can impartially and independently decide this annulment application.

11. Prof. Dr. Scherer's connections to Respondent, to its counsel team, and to Prof. Tercier are described in Applicants' letter of October 30, 2024[14] and, in brief, are as follows:

a. Prof. Dr. Scherer disclosed on October 23, 2024 that a named member of Respondent's legal team, Ms. Isabel San Martín of LALIVE, is the "group advisor" of the ICCA group of mentees for whom Prof. Dr. Scherer is the mentor, and that as such Prof. Dr. Scherer has met remotely with Ms. San Martín and with their group of mentees 5-6 times over the past 2 years.[15]

b. Prof. Dr. Scherer posted on LinkedIn in September 2024[16] that she was leaving the law firm WilmerHale after 20 years. The Tribunal Assistant in this case, Ms. Maria Athanasiou, was an associate at WilmerHale from 2007-2009.[17] Prof. Tercier proposed to appoint Ms. Athanasiou as Tribunal Assistant while disclosing that she worked at Bureau Pierre Tercier since 2016 as "an associate in Prof. Tercier's firm."[18] Ms. Athanasiou thus was a longtime colleague of Prof. Tercier's. Ms. Athanasiou also is a subject of the annulment application in this case because, in a reflection of the camaraderie and personal and professional interconnection among Prof. Tercier, Prof. Douglas, and LALIVE that took place during the arbitration without disclosure, Ms. Athanasiou, Prof. Douglas, LALIVE partner Catherine Anne Kunz, and LALIVE associate Trisha Mitra-Veber worked on the organizing committee that planned an event celebrating Prof. Tercier on his 80th birthday.[19] Ms. Athanasiou also is closely

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[14] Applicants mistakenly indicated that Prof. Dr. Scherer co-authored a publication with LALIVE partner Joachim Knoll. *See* Letter from Applicants to the Committee dated Oct. 30, 2024 at 2. Applicants understand that Prof. Dr. Scherer and Mr. Knoll wrote separate book chapters and were not co-authors.

[15] Email from Committee Secretary to the Parties dated Oct. 23, 2024.

[16] The precise date of Prof. Dr. Scherer's post is unclear. LinkedIn currently indicates that the post was made two months ago, but as of the date of Applicants' October 30, 2024 letter, LinkedIn indicated that the post had been made one month beforehand.

[17] Letter from Tribunal to the Parties dated Apr. 14, 2018 enclosing Maria Athanasiou CV (A-12) at 6.

[18] Letter from Tribunal to the Parties dated Apr. 14, 2018 enclosing Maria Athanasiou CV (A-12) at 4, 6.

[19] *See* Application for Annulment ¶¶ 83.b, 90, fn.89.

linked to Prof. Dr. Scherer. Ms. Athanasiou thus commented on Prof. Dr. Scherer's post, "I could not have been more fortunate to have started my arbitration career under your guidance, dear Professor Dr. Maxi Scherer.... You are one of the few who are not only outstanding lawyers and academics, but also fearlessly pass on knowledge and advice. As they say, 'second to none'. I wish you every success with all my heart." Prof. Dr. Scherer replied, "Yes Maria Athanasiou what a great time it was when you were there! Thanks a lot and see you soon."[20]

c. Prof. Dr. Scherer left WilmerHale to co-found the two-partner law firm ArbBoutique with Niuscha Bassiri,[21] who worked for 18 years at Hanotiau & van den Berg.[22] The Tribunal Assistant Ms. Athanasiou was an associate at Hanotiau & van den Berg from 2011-2013 and listed Ms. Bassiri as a reference on her CV.[23] Ms. Athanasiou commented on Ms. Bassiri's LinkedIn page, "It has been a true privilege to work with you and learn from you dear Niuscha Bassiri. I wish you all the very best for your next step which I am sure will be a great success. Again, many congratulations!" Ms. Bassiri replied, "Thank you so much, Maria Athanasiou! I have great memories of working together with you. So talented and precise, dedicated, and sharp!"[24]

d. Prof. Dr. Scherer's sole partner Ms. Bassiri published a report last year for the Delos Guide to Arbitration Places (GAP) with Crenguta Leaua, a senior member of Respondent's counsel team. Dr. Leaua posted on LinkedIn that the report "was drafted with the major contribution of Niuscha Bassiri," and added that, "Niuscha – a genuine

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20 LinkedIn Post of Prof. Dr. Maxi Scherer available at https://www.linkedin.com/posts/professor-dr-maxi-scherer-88a141195_after-20-yearstoday-is-my-last-day-at-wilmerhale-activity-7235168098729754624-c0f4/.

21 ArbBoutique available at https://www.arb-boutique.com/.

22 Niuscha Bassiri, Professional Background available at https://www.arb-boutique.com/lawyers/niuscha-bassiri.

23 Letter from Tribunal to the Parties dated Apr. 14, 2018 enclosing Maria Athanasiou CV (A-12) at 6-7.

24 LinkedIn Post of Niuscha Bassiri available at https://www.linkedin.com/posts/niuscha-bassiri-28636b4_newyorkconvention-activity-7235793810247618560-zrhT/.

pleasure to work on this project with you!" She also thanked Prof. Dr. Scherer as GAP co-chair "for this beautiful opportunity."[25]

e. Prof. Dr. Scherer disclosed in her CV that she guest lectured at Université de Fribourg in 2009, 2011, and 2013.[26] Prof. Tercier has spent decades at Université de Fribourg as a professor from 1973-2008, as dean of the law faculty from 1987-1989, and since 2008 as professor emeritus, teaching master courses in arbitration from 2014.[27] It is unclear whether Prof. Tercier had invited Prof. Dr. Scherer to give those guest lectures or otherwise had a role in relation to her experience at Université de Fribourg.

f. Prof. Dr. Scherer disclosed at the time of her proposed appointment that she is "currently chairing ICSID Case No. ARB/20/15, in which Romania is the respondent party. The proceedings are in the final stages with a decision to be rendered shortly."[28]

12. Prof. Dr. Scherer has not addressed any of these observations.

13. Respondent argues that Applicants' objections are "spurious" and that their "ulterior motive" is "to soften up the Commission to arguments of this nature and to try to make them palatable."[29] Applicants categorically reject that baseless assertion. It should be obvious that Applicants would not invite a Committee member to resign or propose to disqualify her – with all the attendant risks that procedure entails – if their concerns about impartiality and independence were not genuine, serious, and abiding.

14. Respondent mischaracterizes the connections at issue, as summarized below:

a. Respondent argues that White & Case is "closely involved with the Young ICCA Mentoring Programme."[30] That is a false equivalency, however, as there is nothing

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[25] LinkedIn Post of Crenguta Leaua available at https://www.linkedin.com/posts/professor-crenguta-leaua-065b395_gap-arbitration-arbitralawards-activity-7072567515050106880-OH8f/.

[26] Prof. Dr. Maxi Scherer CV at 6.

[27] Pierre Tercier CV available at https://tercier.net.

[28] Letter from ICSID Acting Secretary-General to the Parties dated Sept. 18, 2024 at 2.

[29] Letter from Respondent to the Committee dated Nov. 8, 2024 ¶¶ 2-3, 14.

[30] *Id.* ¶ 13 (eighth subparagraph).

wrong with support for Young ICCA or its mentorship program.[31] The imbalance between the Parties arises because Prof. Dr. Scherer was paired to mentor a group of mentees alongside one of the named LALIVE lawyers working on this case, Ms. San Martín. Respondent incorrectly describes Ms. San Martín as a "junior" member of its counsel team,[32] but its own website promotes her publicly as a "Senior Associate" who has nearly a decade of practice experience.[33] Respondent asserts that as the "group advisor" for Prof. Dr. Scherer, Ms. San Martín "assists with the organizational aspects and keeping the mentees engaged."[34] That statement provides no insight into the level of coordination between Prof. Dr. Scherer and Ms. San Martín. In addition, while Respondent contends that the group met virtually and not in person,[35] the advent of social media and video conferencing "permit virtual 'relationships' to blossom, even between people who have never actually met in person."[36]

b. Respondent observes that Prof. Dr. Scherer's LinkedIn post about leaving WilmerHale elicited 1,255 "likes" and comments, including from a White & Case partner in Paris who has never been involved in this matter.[37] The number of likes and comments on Prof. Dr. Scherer's post is inconsequential as those merely reflect support for her new venture with Ms. Bassiri at ArbBoutique. By contrast, the Tribunal Assistant Ms. Athanasiou's comment and Prof. Dr. Scherer's reply reveal that Ms. Athanasiou worked directly for Prof. Dr. Scherer "under [her] guidance" and that they maintain an ongoing personal connection as reflected in Prof. Dr. Scherer's remark, "see you soon."

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31 It is irrelevant, for example, that White & Case's Paris office hosted an ICCA mentoring event at the end of last year that "was apparently 'conceived by Professor Pierre Tercier'" and that a White & Case partner from Paris spoke on a panel at that event. *See id.*.

32 *Id.* ¶ 9.

33 LALIVE, Isabel San Martín available at https://www.lalive.law/isabel-san-martin/.

34 Letter from Respondent to the Committee dated Nov. 8, 2024 ¶ 13 (seventh subparagraph).

35 *Id*.

36 Jean Kalicki and Mallory Silberman, *Social Media and Arbitration Conflicts of Interest: A Challenge for the 21st Century*, Kluwer Arbitration Blog dated Apr. 23, 2012 (AL-42).

37 Letter from Respondent to the Committee dated Nov. 8, 2024 ¶ 13 (first subparagraph).

c. Respondent makes a similarly meaningless observation that Ms. Bassiri's LinkedIn post "was 'liked' by 470 persons and has 140 comments," including by one White & Case associate among the hundreds who work at the firm.[38] The import of Ms. Athanasiou's comment and Ms. Bassiri's reply is that they show that Ms. Bassiri worked with Ms. Athanasiou and was close enough to her to provide a professional reference and to "have great memories of working together with you." As described below, a partner's activities may be assimilated to her partners, especially for co-founders of a two-partner law firm as in the case of Prof. Dr. Scherer and Ms. Bassiri.

d. Respondent acknowledges that Ms. Bassiri prepared a "joint submission" for GAP with a senior member of Respondent's legal team, Dr. Leaua, but adds extraneously that lawyers from "59 law firms" including White & Case prepared other GAP chapters or participated in its review.[39] The difference is that Dr. Leaua worked directly with Ms. Bassiri on a chapter, describing her "major contribution" to the publication and stating that it was "a genuine pleasure to work on this project with you!"

e. Respondent refers to Prof. Dr. Scherer's teaching position at Université de Fribourg as "temporary,"[40] without acknowledging Prof. Tercier's decades-long tenure there. In the absence of disclosure or clarification, it is unclear whether Prof. Tercier facilitated Prof. Dr. Scherer in obtaining her position at Université de Fribourg, or whether and to what extent they spent time together or developed a personal kinship at the university.

15. Contrary to Respondent's argument that Applicants urge "standards" where "there could be no social network participation, no cooperation on scientific publications or in academic and educational fora in the field of international arbitration,"[41] Applicants fully support and their counsel routinely participate in networking, mentorship, and scholarly initiatives. The consequence, however, is that the relationships developed through these activities may give rise to justifiable doubts about the ability of the arbitrator to be independent and impartial

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38 *Id.* ¶ 13 (second subparagraph).

39 *Id.* ¶ 13 (third subparagraph).

40 *Id.* ¶ 13 (fifth subparagraph).

41 *Id.* ¶ 15.

in some circumstances and thus may preclude the arbitrator from sitting in certain cases. The self-regulatory nature of international arbitration demands vigilance in this regard to safeguard the integrity and legitimacy of the process.

16. Respondent refers to the color-coded lists in the IBA Guidelines on Conflicts of Interest in International Arbitration.[42] Soft law instruments such as the IBA Guidelines may provide "useful references," but are not binding.[43] Some leading arbitral institutions indeed flatly reject the Guidelines as insufficient to protect against potential conflicts of interest:

> The ICDR does not apply the IBA's Guidelines on Conflicts of Interest in International Arbitration as there are a number of scenarios where these Guidelines do not establish a duty to disclose and would not be consistent with the ICDR policy of broad disclosure which requires that all disclosures be made sufficient to providing the parties in every instance with the ***option*** to waive them if they wish to proceed with the arbitrator.[44]

17. The IBA Guidelines also explain that the "Orange List" "is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence," and that other situations not mentioned equally may raise justifiable doubts about impartiality or independence:

> [T]he arbitrator needs to assess on a case-by-case basis whether a given situation, even though not mentioned in the Orange List, is nevertheless such as to give rise to doubts in the eyes of the parties as to the arbitrator's impartiality or independence. Because the Orange List is a non-exhaustive list of examples, there may be situations not mentioned, which, depending on the circumstances, may need to be disclosed by an arbitrator.[45]

18. The commentary to the IBA Guidelines further observes that the color-coded application lists "deal with some of the varied situations that commonly arise in practice" and "are

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[42] *Id.* ¶ 12.

[43] *Blue Bank v. Venezuela* (AL-14) ¶ 62; *İmeks İnşaat v. Turkmenistan* (AL-49) ¶ 77; *Caratube v. Kazakhstan* (AL-43) ¶ 59.

[44] Luis Manuel Martinez, *A Guide to ICDR Case Management*, Chapter 1 in ICDR AWARDS AND COMMENTARIES, Volume 1 (Grant Hanessian, Derek Soller, eds.), International Center for Dispute Resolution 2012 (AL-40) at 19 (emphasis in original).

[45] IBA Guidelines on Conflicts of Interest in International Arbitration dated May 25, 2024 (AL-19) Part II ¶¶ 3, 6.

therefore necessarily illustrative and non-exhaustive. *The absence of a particular situation from the Application Lists does not necessarily indicate that no disclosure must be made, much less that any conflict of interest does or does not exist*."[46]

19. In this case, Prof. Dr. Scherer's service as an arbitrator in a pending ICSID case involving Romania as a party is on the IBA's "Orange List,"[47] and thus by itself may give rise to justifiable doubts about her impartiality and independence.

20. The IBA Guidelines also emphasize that "the existence, or otherwise, of relationships is core to the arbitrator's independence and impartiality. This includes determining who must be assimilated with an arbitrator to appreciate whether that arbitrator is or is not impartial and independent from another arbitrator, a party, counsel or expert."[48] The Orange List thus includes, among other things, a "[r]elationship between an arbitrator and another arbitrator or counsel" and a "[r]elationship between arbitrator and party and/or others involved in the arbitration," including through a "close personal friendship."[49] As noted above, the lack of disclosure or clarification about Prof. Dr. Scherer's tenure at Université de Fribourg raises questions about the scope of any relationship with Prof. Tercier.[50]

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[46] IBA Commentary on the Revised Text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration (AL-50) at 2 (emphasis added).

[47] IBA Guidelines on Conflicts of Interest in International Arbitration dated May 25, 2024 (AL-19) Part II § 3.1.5 ("The arbitrator currently serves, or has served within the past three years, as arbitrator or counsel in another arbitration on a related issue or matter involving one of the parties, or an affiliate of one of the parties.").

[48] IBA Commentary on the Revised Text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration (AL-50) at 10.

[49] IBA Guidelines on Conflicts of Interest in International Arbitration dated May 25, 2024 (AL-19) Part II §§ 3.2, 3.2.6, 3.3, 3.3.3.

[50] While the 2004 IBA Guidelines indicated that a "close personal friendship" entails "regularly spend[ing] considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations," that definition was considered unduly restrictive and was dropped from the 2014 and 2024 Guidelines. *See* Ramón Mullerat, "The IBA Guidelines on Conflicts of Interest Revisited: Another Contribution to the Revision of an Excellent Instrument, Which Needs a Slight Daltonism Treatment," *Iurgium* (2012) (AL-41) at 86 (observing that the definition at that time was "too restrictive" and that "existing 'a close personal friendship' should be enough for the arbitrator to disclose, without the need that the arbitrator and the counsel 'spend considerable time together'"); IBA Commentary on the Revised Text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration (AL-50) at 22 (concluding that "a definition or guidance for what 'close personal friendship' may be is largely to be assessed on a case-by-case basis").

21. The Orange List also refers to association "in a professional capacity, such as a former employee or partner."[51] Through Ms. Athanasiou's comments on the social media posts of Prof. Dr. Scherer and Ms. Bassiri, it has come to light that the Tribunal Assistant in this case worked almost her entire professional career for Prof. Dr. Scherer (from 2007-2009), for her sole partner Ms. Bassiri (from 2011-2013),[52] and for Prof. Tercier (from 2016 onward), which closely links Prof. Dr. Scherer not only to the Tribunal Assistant who is herself a subject of the annulment application but, by extension, to Prof. Tercier.

22. In any event, it is established in arbitral practice that an accumulation of factors may create justifiable doubts about an arbitrator's impartiality or independence even where none of the individual circumstances, if viewed in isolation, would be sufficient:

> Under the ICC Rules, the ICC Court has faced the situation in which two or more existing grounds which, if analysed individually would not seem to demand disclosure or lead to disqualification, when analysed as a whole may create a perception in the eyes of the parties that the arbitrator's independence may be called into question and may lead to disqualification. A review of the cases in which arbitrators have not been confirmed by the ICC Court suggests that non-confirmation does not result from a single fact or circumstance but from an accumulation of factors that convince the Court that confirmation is not the proper way to proceed.[53]

23. The decisions and guidelines of other courts and tribunals similarly confirm that the facts and circumstances should be considered collectively, not individually.[54] Thus, for

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[51] IBA Guidelines on Conflicts of Interest in International Arbitration dated May 25, 2024 (AL-19) Part II § 3.3.2; IBA Commentary on the Revised Text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration (AL-50) at 23 (observing that, "[a]s before, there is no temporal limit to which this disclosure applies"). While this provision refers to "an expert, a party, or an affiliate of one of the parties," in the context of an annulment proceeding it should be understood to apply equally to the Tribunal members and to the individuals affiliated with them, for the reasons described above.

[52] *See* IBA Guidelines on Conflicts of Interest in International Arbitration dated May 25, 2024 (AL-19) Part I § (6)(a) (observing that an arbitrator "is in principle considered to bear the identity of the arbitrator's law firm or employer").

[53] Karel Daele, *Standards for Disqualification*, Chapter 5 in CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION, Kluwer International Law 2012 (AL-39) ¶ 5-082.

[54] *See, e.g.*, LCIA Reference No. UN3490 (Oct. 21 and Dec. 27, 2005) ¶ 6.1 (AL-35) ("It was also clear to the Division that an accumulation of circumstances may have spawned justifiable doubts where each circumstance, viewed in isolation, might have been insufficient to do so."); SCC Practice Note: SCC Board Decisions on Challenges to Arbitrators 2016-2018 dated Aug. 2019 (AL-46) at 25 ("When a party presents several grounds for challenge, the SCC Board will make an overall assessment, taking all relevant

example, the Madrid Court of Appeal recently set aside an award because an accumulation of connections between the tribunal president and the law firm representing one of the parties revealed a "close and cooperative relationship" that raised justifiable doubts about his impartiality and should have disqualified him from presiding in the arbitration, even if none of the connections would have sufficed on its own:

> Such circumstances, if considered in isolation, would not have the potential to support the challenge of Mr. Arbitrator; however, taken as a whole, on the one hand, they reveal a relationship of proximity and connection with the firm that defends the interests of one of the parties, and allow us to affirm the existence of grounds for the challenging party to doubt the impartiality and independence of the challenged arbitrator. It should be remembered that this issue is not about determining whether the arbitrator is in fact impartial or independent, but rather about analyzing to what extent his relations with the parties or their defenders allow the other party to have well-founded doubts about such attributes of Mr. Arbitrator, and obviously it will be difficult to be able to dispel the legitimate doubt about the impartiality and independence of Mr. Arbitrator to the party that sees the decision on its claims entrusted to a Tribunal in which one of the arbitrators presents a relationship with the firm that defends the interests of the opposing party that goes beyond a punctual relationship and that also reveals the harmony, so to speak, of Mr. Arbitrator with said firm . . .[55]

24. Applicants submit that Prof. Dr. Scherer's connections to Respondent, its legal counsel, Prof. Tercier, and his Tribunal Assistant, taken together with her decision not to step down

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circumstances into consideration. It may be that several relationships or circumstances, when viewed in combination, are sufficient to sustain a challenge, even where, seen separately, they would not warrant release of the arbitrator."); Malintoppi & Yap (AL-45) ¶ 8.50; Thomas W. Walsh and Ruth Teitelbaum, "The LCIA Court Decisions on Challenges to Arbitrators: An Introduction," *Arbitration International* (2011) (AL-37) at 283 ("The practice of considering facts cumulatively is at least in part in recognition of the reality that on occasion an accumulation of circumstances may create justifiable doubts as to an arbitrator's independence or impartiality, whereas each circumstance, if viewed in isolation, would be insufficient to uphold the challenge.").

[55] *Delforca 2008, Sociedad de Valores, SA v. Banco Santander, SA*, Case No. 3/2009, Sentencia de la Audiencia Provincial de Madrid (Sección Decimosegunda), N° 506/2011, June 30, 2011 (AL-38) § 10 (counsel's translation of Spanish original). *See also*, *e.g.*, Chambre Commerciale Internationale Arrêt No. 4/2023 dated Jan. 10, 2023 (AL-48) (Paris Court of Appeal setting aside a partial award in an ICC arbitration because the tribunal president's eulogy of the claimant's deceased counsel revealed that the two individuals were close in a way that raised reasonable doubts about the independence and impartiality of the tribunal president); Oberlandesgericht Frankfurt, 2008 SchiedsVZ 199, Judgment dated Jan. 10, 2008 (AL-36) at 200 (removing presiding arbitrator who failed to disclose he was a tenant in the same building where the claimant's counsel had his office and that they were on close personal terms as reflected in their use of the familiar "du" with one another).

from the Committee, without explanation, when presented with these connections, raise similar justifiable doubts from the perspective of a reasonable third party about Prof. Dr. Scherer's impartiality and independence to decide this case, given that the grounds for annulment include the undisclosed personal, institutional, and professional connections between Prof. Tercier, Prof. Douglas, and Respondent's counsel.

III. THIS DISQUALIFICATION PROPOSAL IS TIMELY

25. ICSID Arbitration Rule 9(1) (2006) provides that a party proposing the disqualification of an arbitrator pursuant to ICSID Convention Article 57 shall file its proposal and reasons "promptly, and in any event before the proceeding is declared closed."

26. The ICSID Convention and Arbitration Rules do not specify a deadline in terms of days. Thus "the timeliness of a proposal must be determined on a case by case basis."[56]

27. In earlier cases tribunals have held that a period of as many as 37 days was timely,[57] whereas waiting 53 days or more was too long.[58]

28. In this case, Applicants set out their grounds for inviting Prof. Dr. Scherer to step down within a week of her disclosure about her connection to Ms. San Martín.[59] Applicants filed this formal disqualification proposal a mere four days after Prof. Dr. Scherer declined to resign.[60] Applicants therefore "promptly" raised their objections and filed this proposal in accordance with ICSID Arbitration Rule 9.

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[56] *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Disqualification Decision dated Dec. 13, 2013 (AL-15) ¶ 73.

[57] *See, e.g.*, *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Disqualification Decision dated Oct. 14, 2023 (AL-44) ¶¶ 72-73 (observing that "[e]very submission requires preparation and coordination between lawyers and clients," and that filing after 28 days is timely under ICSID Arbitration Rule 9); *Misen Energy v. Ukraine*, ICSID Case No. ARB/21/15, Disqualification Decision dated Apr. 15, 2022 (AL-47) ¶ 122 (finding that a lapse of 37 days did "not exceed acceptable margins of timeliness").

[58] *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Disqualification Decision dated Dec. 13, 2013 (AL-15) ¶ 73.

[59] Email from Committee Secretary to the Parties dated Oct. 23, 2024; Letter from Applicants to the Committee dated Oct. 30, 2024.

[60] *See* Email from Committee Secretary to the Parties dated Nov. 12, 2024.

29. Respondent argues that Applicants' objections are untimely because they did not make any comments when ICSID proposed to appoint Prof. Dr. Scherer on September 18, 2024 or when she submitted her declaration pursuant to ICSID Arbitration Rule 6(2) on October 8, 2024.[61] That is without basis because Prof. Dr. Scherer's only disclosure at that time was that she was chairing an ICSID case in which Romania was the respondent party.[62] If that were the only connection at issue, Applicants would not be proposing to disqualify Prof. Dr. Scherer. Rather, overall circumstances must be considered alongside the further disclosure about Prof. Dr. Scherer's connection to Respondent's counsel Ms. San Martín and the revelations about her and her partner's connections to Respondent's counsel Dr. Leaua and to the Tribunal Assistant and longtime employee of Prof. Tercier, Ms. Athanasiou.

30. Respondent argues that, apart from Prof. Dr. Scherer's connection to Ms. San Martín, all the other circumstances "were publicly available" when ICSID proposed to appoint Prof. Dr. Scherer.[63] That is not established as it appears that Prof. Dr. Scherer, Ms. Bassiri, and Ms. Athanasiou made the LinkedIn posts and comments described above concurrently with the appointment process in this case.[64] In any event, it is undisputed that Applicants raised the facts revealed in these posts within several weeks of their posting to social media, and weeks before the scheduled First Session in this proceeding.

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[61] Letter from Respondent to the Committee dated Nov. 8, 2024 ¶¶ 5-8.

[62] Letter from ICSID Acting Secretary-General to the Parties dated Sept. 18, 2024 at 2.

[63] Letter from Respondent to the Committee dated Nov. 8, 2024 ¶ 9.

[64] As noted above, the precise dates of these posts are not indicated.

IV. REQUEST FOR RELIEF

31. For the reasons set forth in Applicants' letter of October 30, 2024 and above, Applicants respectfully request that the unchallenged Committee members decide to disqualify Prof. Dr. Scherer from the Committee.

Respectfully submitted,

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November 16, 2024

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