INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Total S.A.

Claimant

v.

Argentine Republic

Respondent

ICSID Case No. ARB/04/1

Annulment Proceeding

ARGENTINE REPUBLIC'S ADDITIONAL OBSERVATIONS ON THE PROPOSAL TO DISQUALIFY MS. TERESA CHENG

Courtesy Translation

24 August 2015

PROCURACIÓN DEL TESORO DE LA NACIÓN
Posadas 1641
C1112ADC Buenos Aires
Argentine Republic

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GLOSSARY OF TERMS

(Argentina-France) BIT/Treaty	Agreement between the Government of the Argentine Republic and the Government of the French Republic for the Reciprocal Promotion and Protection of Investments, signed on 3 July 1991, in force since 3 March 1993
(ICSID) Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
§(§)	section(s)
¶(¶)	paragraph(s)
Application for Annulment	Application for Annulment and Stay of Enforcement of the Award filed by the Argentine Republic, 27 March 2014
Arbitration Rule(s)	Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes
Argentina	Argentine Republic
Argentina's Additional Observations	Argentine Republic's Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, 24 August 2015
art(s).	article(s)
Award	Award of 27 November 2013
Centre / ICSID	International Centre for Settlement of Investment Disputes
Claimant	Total S.A.
Decision on Jurisdiction	Decision on Objections to Jurisdiction, 25 August 2006
Decision on Liability	Decision on Liability, 27 December 2010
Freshfields	Freshfields Bruckhaus Deringer LLP
Grounds for the Disqualification Proposal	Grounds for the Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, 12 August 2015
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration
ICJ	International Court of Justice
Ms. Cheng's Explanations of 18 August	Ms. Teresa Cheng's Explanations in relation to the Proposal for Disqualification filed by the Argentine Republic, 18 August 2015
Opposition to the Disqualification Proposal	Total S.A.'s Opposition to Argentina's Proposal to Disqualify Ms. Teresa Cheng, 17 august 2015
p(p).	page(s)
Respondent	Argentine Republic
Total	Total S.A.
UNCITRAL	United Nations Commission on International Trade Law
USD	US dollars

ARGENTINE REPUBLIC'S ADDITIONAL OBSERVATIONS ON THE PROPOSAL TO DISQUALIFY MS. TERESA CHENG

The Argentine Republic hereby respectfully submits its Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng (hereinafter, Argentina's Additional Observations) in the case styled *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) – Annulment Proceeding, pursuant to Article 57 of the ICSID Convention and Arbitration Rule 9, on the basis of Ms. Teresa Cheng's manifest lack of the qualities required by Article 14(1) of the ICSID Convention.

I. INTRODUCTION

1. Ms. Cheng is the only one responsible for the fact that this proposal for disqualification was submitted so close to the date of the hearing. Her past connections with Freshfields, which were not publicly known, should have been disclosed prior to her acceptance of the appointment in this proceeding, and her contemporaneous link—i.e. that of April 2015—should have been notified before she agreed to receive instructions from Freshfields. In particular, with respect to this extremely serious event, if she had informed the Argentine Republic in a timely fashion, Argentina would have vehemently objected to Ms. Cheng receiving instructions such as those given in April 2015—regardless of the subject-matter and the amount involved—by Freshfields, which represents the claimants in 10 arbitrations against the Argentine Republic. Now, the damage is done and, at the very least, reasonable and justifiable doubts about her independent judgment already exist and are concrete.

2. Only a few days before the commencement of the hearing on annulment in this proceeding, Ms. Cheng informed—for the first time—that in April of this year she received instructions from Claimant's counsel, Freshfields. This fact—i.e. both the relationship and her failure to disclose it—is in itself sufficiently serious for the Argentine Republic to have lost its confidence in the independent judgment of Ms. Cheng, as any third-party observer would have.

3. The links between Ms. Cheng and Freshfields are direct. This applies to both her past links and those contemporaneous with this arbitration. Unlike other cases, here it was Ms. Cheng herself who received instructions—both before and during this proceeding—from Freshfields.

4. Worse still, Ms. Cheng insists on her position that she is under no obligation to inform the parties to an arbitration proceeding in which she acts as arbitrator or member of an annulment

committee about her past or contemporaneous links with counsel for one of the parties. This position is to be coupled with her deliberate failure to include her past links with Freshfields in her *curriculum vitae*—submitted at the time of accepting her appointment as a member of this Committee. What is more, upon a review of the different declarations presented by Ms. Cheng in the other annulment committees involving Argentina, it is clear that Ms. Cheng changed, in this proceeding, the declaration she had made in the other proceedings (*El Paso v. Argentina* and *EDF v. Argentina*) **and deliberately removed all references to who were and who are the legal representatives for the claimants. She only referred to the person representing the Argentine Republic.**

5. Ms. Cheng's behaviour after her letter of 27 July 2015 exponentially increased the justifiable doubts about her independent judgment. First, it was only when the Argentine Republic requested more information that Ms. Cheng disclosed her other links with Freshfields. Second, such information continues to be incomplete and ambiguous, which shows a lack of cooperation on the part of Ms. Cheng, even in her message of 20 August, where she failed to answer any of the inquiries expressed by the Argentine Republic. This regrettable lack of transparency to address the Argentine Republic's reasonable and justifiable doubts about the independent judgment of one of the members of this Committee, which stem from her links with the counsel for the Claimant both prior to and during this arbitration, constitutes sufficient grounds for Ms. Cheng to be disqualified.

6. Claimant's mere insinuation that the challenge mechanism does not apply to the members of annulment committees is ridiculous and amounts to a direct attack against the ICSID dispute settlement system. This view about the members of the committee and their connection with values of impartiality and independence, which are inherent in all persons vested with the power to settle a dispute, confirms Argentina's concerns about the relationship with Ms. Cheng.

7. There are no doubts about the applicability of the challenge mechanism during annulment proceedings. As a matter of fact, the required level of independence and impartiality of the members of an annulment committee is even higher because of their duty to protect the integrity of the arbitration proceedings under their jurisdiction. In any case, as will be discussed below, proposals for disqualification have been filed within the framework of the ICSID Convention and they were not rejected on the grounds that the challenge mechanism does not apply to the members of annulment committees.

8. The distinction that Ms. Cheng and Claimant's counsel seek to make regarding the solicitor-

barrister relationship, by invoking domestic rules of procedure, is both inadmissible and useless. Apart from the fact that those rules do not apply to ICSID proceedings, the very rules governing that relationship confirm that the link between Ms. Cheng and Freshfields as a result of the event of April 2015 affects Ms. Cheng's independent judgment to decide on this proceeding. Ms. Cheng was given instructions by Freshfields, Ms. Cheng billed Freshfields, Ms. Cheng was paid her fees by Freshfields—which was personally responsible for the payment of her fees—and Ms. Cheng owes Freshfields for having been recommended in the past and for being recommended in the future. **And all of this happened during this proceeding!**

9. It is also extremely serious that all the links informed after 27 July 2015 were notified as a result of specific requests made by the Argentine Republic and were not voluntarily disclosed by Ms. Cheng. She is the one who assumed the obligation to inform about "any other circumstance that might cause [her] reliability for independent judgment to be questioned by a party," and she is the one who breached such obligation.

10. In this case, Ms. Cheng even had an advantage as regards the discussion on the duty of disclosure. She is part of the annulment committee in *EDF v. Argentina*, where one of the grounds for annulment refers to the proposal to disqualify arbitrator Kaufmann-Kohler in view of her conflicts of interest and her failure to disclose circumstances that could affect her independent judgment. As a matter of fact, Ms. Cheng was very interested in these matters at the hearing held in May 2014. It is thus unthinkable that, after such a detailed discussion, Ms. Cheng should have decided to accept instructions from Freshfields and not to disclose this to the Argentine Republic.

11. In conclusion, considering the multiple direct contacts between Ms. Cheng and Claimant's counsel in this arbitration, with special emphasis on the event of April of this year, if Ms. Cheng chooses not to resign, then each of the Members of this Committee should ask themselves in deciding on this disqualification proposal: "**would I agree to receive instructions from the counsel of one of the parties during a proceeding in which I act as arbitrator or member of a committee?**" The Argentine Republic is confident that the answer will be "**no, not at all**."

II. PURPOSE

12. This submission supplements the Grounds for the Argentine Republic's Proposal to

Disqualify Ms. Teresa Cheng submitted on 12 August 2015 (hereinafter "Grounds for the Disqualification Proposal") and responds to Total S.A.'s Opposition to Argentina's Proposal to Disqualify Ms. Teresa Cheng filed on 17 August 2015 (hereinafter "Opposition to the Disqualification Proposal") and to Ms. Teresa Cheng's Explanations on the Argentine Republic's Disqualification Proposal presented on 18 August 2015 (hereinafter "Ms. Cheng's Explanations of 18 August").

13. Furthermore, these Additional Observations also respond to Ms. Cheng's message of 20 August 2015, referring to the request by the Argentine Republic for her to answer certain inquiries expressed in a letter sent on 19 August 2015. In such letter, which was sent in light of the content of Ms. Cheng's Explanations of 18 August, the Argentine Republic stated as follows:

> Firstly, in the submission Grounds for the Disqualification Proposal (Grounds for the Proposal), the Argentine Republic requested Ms. Cheng to "accurately identify the decision of the Hong Kong Court to which she refer[red]" in her letter dated August 4, 2015, at 2. Ms. Cheng failed to respond to such inquiry in her letter of today.
>
> Secondly, in the Grounds for the Proposal, Argentina pointed out Ms. Cheng's lack of transparency regarding the proceedings that gave rise to the Ms. Cheng's letter dated July 27, 2015, since she did not give "any details whatsoever as to who the parties to that case are, whether Freshfields is also involved in the case, whether she finally accepted the appointment or not, etc." Ms. Cheng failed to provide details pursuant to such inquiry in her letter of today.
>
> Thirdly, in her letter of August 18, 2015, at 3, Ms. Cheng stated "[a]t the time of the appointment in this annulment proceeding in 2014, I had two matters where Freshfields (Hong Kong) was involved. Both these matters have closed and my involvement has long ceased." The Argentine Republic understands that Ms. Cheng is referring to the two cases mentioned in points 1 and 2 of her letter dated August 5, at 2. However, Ms. Cheng failed to specify the proceedings in which she "sat and/or (is) sitting as co-arbitrators and have acted as co-counsels in arbitrations with former members/partners of Freshfields Bruckhaus Deringer LLP (Hong Kong office) after they have left Freshfields Bruckhaus Deringer LLP (Hong Kong office). Some of the former members/partners of Freshfields Bruckhaus Deringer LLP (Hong Kong office) have acted and/or are acting as counsel in arbitrations before (her)." In particular, Ms. Cheng must inform which party designated her as arbitrator and which party was or is represented by partners/members/former partners/former members of Freshfields.
>
> The Argentine Republic requests that Ms. Cheng urgently answers to all the

> inquiries hereby expressed, since they are necessary for the Disqualification discussion. Furthermore, the Argentine Republic requests to the remaining Members of the Committee that the deadline of two days for the parties to file their simultaneous submissions starts running on the day the parties receive Ms. Cheng's answers and the translation into Spanish.[1]

14. With regard to that letter, Ms. Cheng sent the following message:

> I refer to the letter from Argentine Republic dated 19 August 2015.
>
> I have already stated in the message dated 4 August 2015, the oral advice related to an overview of Hong Kong court procedures and as can be clearly seen in the judgments identified in the link provided with the 4 August message, they dealt with interlocutory applications relating to the appointment of interim receiver.
>
> As to the second point, I have already confirmed that no appointment was made.
>
> In relation to the last point, I highlight the word "former" in the message quoted. These professional relationships have nothing to do with Freshfields.
>
> I have nothing further to add.[2]

15. These Additional Observations must be considered and analyzed in conjunction with, and as a supplement to, the Grounds for the Disqualification Proposal.

III. GROUNDS FOR FILING A DISQUALIFICATION PROPOSAL IN AN ANNULMENT PROCEEDING AND LEGAL STANDARD FOR DISQUALIFICATION UNDER THE ICSID CONVENTION

16. Before discussing the merits of the disqualification proposal filed by the Argentine Republic, Claimant's counsel—precisely the ones who maintained during this arbitration the link that gave rise to this disqualification proposal—present different arguments to support their view that such proposal should be deemed inadmissible, in particular:

- That accepting the disqualification proposal would make it impossible for "the long-programmed annulment hearing to take place," and "would cause great disruption and cost in a matter that needs to be fully concluded as promptly as possible given its eleven year history;"[3]

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[1] Letter PTN No. 152/AI/15 from the Treasury Attorney-General's Office to the Members of the *ad hoc* Committee, 18 August 2015.

[2] E-mail message from the Secretary of the *ad hoc* Committee to the parties, 20 August 2015 (conveying Ms. Cheng's message).

[3] Opposition to the Disqualification Proposal, ¶ 2; *see also ibid.* ¶ 15.

- That the disqualification proposal is allegedly just another one of the "tactical arbitrator challenges" raised by the Argentine Republic in other investment arbitrations;[4] and
- That the challenge mechanism is allegedly inapplicable to the members of annulment committees.[5]

17. As will be explained below, those arguments do not constitute grounds for declaring the Disqualification Proposal inadmissible or for depriving the Argentine Republic of its fundamental right to be heard by an independent and impartial tribunal.[6]

18. With regard to the time of submission of the Disqualification Proposal, it was not the Argentine Republic that delayed the filing thereof; rather, it was Ms. Cheng who waited until all annulment submissions were filed and the hearing was only one month away to provide the parties with information that she should have disclosed in a timely fashion. In effect, she should have informed about the instruction given by Freshfields **before** providing the advice in question and not months after the matter came to an end. The rest of the links between Ms. Cheng and Claimant's law firm already existed when she accepted her appointment as member of the *ad hoc* Committee and, hence, they should have been disclosed at that time. The Argentine Republic should not be punished for Ms. Cheng's failure to disclose information in a timely fashion.

19. Contrary to Claimant's statements, the Disqualification Proposal was not filed for any tactical or dilatory reasons, but as a result of the information belatedly provided by Ms. Cheng. As previously indicated, the Argentine Republic is not the one who engaged in dilatory behaviour; rather, it was Ms. Cheng who waited until the last moment to provide information that should have been disclosed much earlier. Likewise, Total failed to disclose the links between the law firm representing it and one of the members of the *ad hoc* Committee.

20. The submission of disqualification proposals is not a practice exclusive to the Argentine

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[4] Opposition to the Disqualification Proposal, ¶ 1.

[5] Opposition to the Disqualification Proposal, ¶¶ 3, 16-21.

[6] *See, e.g., Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion of 12 July 1973, ¶ 92 (referring to the right to an independent and impartial tribunal as an element of the right to a fair hearing); *Wena Hotels Limited v. the Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of 5 February 2002, ¶ 57 ("It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal".); *CDC Group plc v. the Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment of 29 June 2005, ¶ 49; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. the Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment of 21 March 2007, ¶ 49.

Republic, but is much more common than what Claimant suggests, even if only the proposals that were disclosed to the public are taken into account. Both investors and States have frequently resorted to the challenge mechanism. In this respect, investors have proposed the disqualification of arbitrators on several occasions,[7] many of which involved disqualification proposals filed by Freshfields itself on behalf of investors.[8] States other than the Argentine Republic have also proposed the disqualification of arbitrators in many cases.[9]

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[7] *See*, e.g., *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Disqualification Proposal filed by the claimants in March 2001, *cited in* Luke Peterson and Damon Vis-Dunbar, *World Bank President will rule on Chile's effort to disqualify tribunal in ICSID case*, INVESTMENT TREATY NEWS, 14 December 2005; *Methanex Corporation v. the United States of America*, NAFTA/UNCITRAL Arbitration, Notice of Challenge submitted by the claimant, 28 August 2002; *SGS Société Générale de Surveillance v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Disqualification of 19 December 2002; *Telekom Malaysia Berhad v. Ghana*, UNCITRAL Arbitration, Motion to Challenge filed by the claimant on 12 August 2003, *cited in* Republic of Ghana v. Telekom Malaysia Berhad, Civil Law Section of the District Court of The Hague, Provisional Measures Judge, Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision on the Challenge to Professor Emmanuel Gaillard of 18 October 2004, § 1; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, Award of 31 January 2006, ¶¶ 5, 9; *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Decision on Disqualification of 26 April 2008, *cited in* Procedural Details, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C112&actionVal=viewCase; *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL Arbitration, Decision on Challenge of 14 October 2009; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Decision on Disqualification of 12 August 2010; *Tidewater Inc. and others v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Disqualification of 23 December 2010; *TECO Guatemala Holdings, LLC v. Guatemala*, ICSID Case No. ARB/10/23, Proposal for Disqualification filed by the claimant on 15 February 2011, *cited in* Procedural Details, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1280&actionVal=viewCase; *OPIC Karimum Corporation v. Venezuela*, ICSID Case No. ARB/10/14, Decision on Disqualification of 5 May 2011; *Universal Compression International Holdings, S.L.U. v. Venezuela*, ICSID Case No. ARB/10/9, Decision on Disqualification of 20 May 2011; *Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jamie Jurado v. Panama*, ICSID Case No. ARB/06/19, Annulment Proceeding, Decision on Challenge of 7 September 2011; *Murphy Exploration & Production Company – International v. Ecuador*, UNCITRAL Arbitration, Claimant's Challenge of 28 November 2011.

[8] *See, e.g.*, *BG Group plc v. Argentine Republic*, UNCITRAL Arbitration, Decision of the ICC International Court of Arbitration on the challenge to an arbitrator pursuant to Article 10 of the UNCITRAL Rules filed by the claimant, 22 January 2004; *Vladimir Berschader and Moïse Berschader v. the Russian Federation*, SCC Case No. 080/2004, Award of 21 April 2006, ¶ 19; *World Duty Free Company Limited v. the Republic of Kenya*, ICSID Case No. ARB/00/7, Award of 4 October 2006, ¶ 49; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Disqualification of 25 February 2008, *cited in* Procedural Details, *at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C111&actionVal=viewCase; *Saint-Gobain Performance Plastics Europe v. Venezuela*, ICSID Case No. ARB/12/13, Decision on Disqualification of 27 February 2013.

[9] *See*, e.g., *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Decision on Disqualification of 14 June 2013, *cited in* Procedural Details, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C2360&actionVal=viewCase; *Tethyan Copper Company Pty Limited v. Pakistan*, ICSID Case No. ARB/12/1, Proposal for Disqualification filed by the respondent on 23 July 2012, *cited in* Procedural Details, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C1980&a

21. The disqualification proposals filed by the Argentine Republic in other investment arbitration proceedings were not baseless or dilatory in nature, as suggested by Claimant,[10] but each of them was based upon justified grounds. None of the authorities who decided on those proposals considered that there was any dilatory tactic and there are no reasons to find otherwise. Even in rejecting a proposal for disqualification submitted by the Argentine Republic, account was taken of "the sincerity with which Argentina ha[d] advanced and

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ctionVal=viewCase; *Albertis v. Bolivia*, UNCITRAL Arbitration, Decision on Challenge of 12 July 2012, *cited in* Luke E. Peterson, *After arbitrator disqualification process, ad-hoc tribunal to hear Spanish company's investment treaty claims against Bolivia*, IAREPORTER, 20 March 2013; *Merck Sharpe & Dohme (I.A.) Corporation v. Ecuador*, UNCITRAL Arbitration, Decision on Challenge of 1 April 2012, *cited in* Luke E. Peterson, *Arbitration by Merck pharmaceutical company resumes after unsuccessful effort by Ecuador to disqualify claimant's arbitrator, Stephen Schwebel*, IAREPORTER, 22 April 2012; *ConocoPhillips Company and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Disqualification of 27 February 2012; *Getma International and others v. Republic of Guinea*, ICSID Case No. ARB/11/29, Decision on Disqualification of 28 June 2012; *Murphy Exploration & Production Company – International v. Ecuador*, UNCITRAL Arbitration, Respondent's Challenge of 21 December 2011; *Universal Compression International Holdings, S.L.U. v. Venezuela*, ICSID Case No. ARB/10/9, Decision on Disqualification of 20 May 2011; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Disqualification of 19 March 2010; *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, PCA's Decision on Challenge of 8 December 2009; *Participaciones Inversiones Portuarias SARL v. Gabon*, ICSID Case No. ARB/08/17, Decision on Disqualification of 12 November 2009; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Venezuela*, ICSID Case No. ARB/08/15, Decision on Disqualification of 6 November 2009; *Glamis Gold, Ltd. v. United States of America,*, NAFTA/UNCITRAL Arbitration, Award of 8 June 2009, ¶ 188 No. 548; *S&T Oil Equipment & Machinery Ltd. v. Romania*, ICSID Case No. ARB/07/13, Disqualification Proposal filed by the respondent, *cited in* Procedural Details, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C105&actionVal=viewCase; *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Disqualification of 23 September 2008, *cited in* Procedural Details, *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=ListCases&caseId=C87&actionVal=viewCase; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award of 8 May 2008, ¶ 35; *Grand River Enterprises et al. v. United States of America*, NAFTA/UNCITRAL Arbitration, Decision on Challenge of 28 November 2007; The Republic of Poland v. Eureko BV, Court of First Instance of Brussels, 4th Chamber, RG: 2006/1542/A, Judgment of 22 December 2006; *Vladimir Berschader and Moïse Berschader v. the Russian Federation*, SCC Case No. 080/2004, Award of 21 April 2006, ¶ 28; Republic of Ghana v. Telekom Malaysia Berhad, Civil Law Section of the District Court of The Hague, Provisional Measures Judge, Challenge No. 17/2004, Petition No. HA/RK 2004.778, Decision of 5 November 2004; *Telekom Malaysia Berhad v. Ghana*, UNCITRAL Arbitration, Motion to Challenge filed by the respondent on 10 August 2003, *cited in* Republic of Ghana v. Telekom Malaysia Berhad, Civil Law Section of the District Court of The Hague, Provisional Measures Judge, Challenge No. 13/2004, Petition No. HA/RK 2004.667, Decision on the Challenge to Professor Emmanuel Gaillard of 18 October 2004, § 1; *The Loewen Group, Inc. and Raymond L. Loewen v. the United States of America*, ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003, ¶¶ 21-22; *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Decision on Disqualification of 19 January 2001, *cited in Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Challenge of 3 October 2001, ¶ 23; *Amco Asia Corporation, Pan American Development Limited, PT Amco Indonesia v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction of 25 September 1983, ¶ 2.

[10] *See* Opposition to the Disqualification Proposal, ¶ 1 and fn. 1.

argued its Proposal."[11]

22. As for the outcome of the proposals for disqualification submitted by the Argentine Republic, Total merely states that some disqualification proposals filed by Respondent in other investment arbitration proceedings were dismissed.[12] However, it conveniently fails to mention that, in *ICS v. Argentina I*, Argentina's proposal to disqualify Stanimir Alexandrov—to whom Total refers as one of the arbitrators challenged by Argentina[13]—was granted.[14] Claimant also fails to explain that, in *ICS v. Argentina II*, following Argentina's proposal to disqualify Francisco Orrego Vicuña—to whom Total also refers as an arbitrator challenged by Respondent[15]—the arbitrator resigned from those proceedings.[16] In addition, with regard to the proposal to disqualify Gabrielle Kaufmann-Kohler[17]—which is cited by Claimant[18]—it

[11] *Suez, Sociedad General de Aguas de Barcelona S.A. and Interaguas Servicios Integrales del Agua S.A. v. Argentine Republic,* ICSID Case No. ARB/03/17, *Suez, Vivendi Universal S.A. and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, and *Anglian Water Limited (AWG) v. Argentine Republic,* UNCITRAL Arbitration¸ Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal of 22 October 2007, ¶ 43.

[12] Opposition to the Disqualification Proposal, ¶ 1 and fn. 1.

[13] Opposition to the Disqualification Proposal, fn. 1.

[14] *ICS Inspection and Control Services Limited v. Argentine Republic*, UNCITRAL Arbitration, Decision on Challenge to Mr. Stanimir A. Alexandrov, 17 December 2009 (accepting Respondent's challenge). In that case, arbitrator Alexandrov indicated that he and his law firm represented the claimants in another investment arbitration proceeding against the Argentine Republic (*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*), even though no more action was required from Mr. Alexandrov in that proceeding. *Ibid.*, p. 4 ¶¶ 1, 3. In the decision on challenge, the Secretary-General of the Permanent Court of Arbitration concluded that Mr. Alexandrov was in "a situation of adversity towards Argentina, a situation that is often a source of justified concerns". *Ibid.* p. 4, ¶ 1. He added that the conflict in question was "sufficiently serious to give rise to objectively justifiable doubts as to Mr. Alexandrov's impartiality and independence". *Ibid.* p. 4, ¶ 2.

[15] Opposition to the Disqualification Proposal, fn. 1.

[16] The Argentine Republic submitted its notice of challenge of Francisco Orrego Vicuña in the case *ICS Inspection and Control Services Limited v. Argentine Republic* (UNCITRAL Arbitration) on 17 September 2014. Following Argentina's submission of that notice of challenge to the Secretary-General of the Permanent Court of Arbitration on 17 October 2014, Francisco Orrego Vicuña handed in his resignation on 4 November 2014.

[17] On 29 November 2007, the Argentine Republic proposed the disqualification of Gabrielle Kaufmann-Kohler as a member of the tribunals in the cases: (i) *Suez, Sociedad General de Aguas de Barcelona S.A. and Interaguas Servicios Integrales del Agua S.A. v. Argentine Republic,* ICSID Case No. ARB/03/17, (ii) *Suez, Vivendi Universal S.A. and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, (iii) *Anglian Water Limited (AWG) v. Argentine Republic,* UNCITRAL Arbitration¸ (iv) *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic,* ICSID Case No. ARB/03/22 and (v) *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic,* ICSID Case No. ARB/03/23.

[18] Opposition to the Disqualification Proposal, fn. 1.

bears noting that the *Vivendi II* annulment committee, based on the same grounds as those which led to this proposal for disqualification, acknowledged that there were conflicts of interest that affected Ms. Kaufmann-Kohler and explained how they should have been dealt with.[19] It is to be noted that the conflicts of interest affecting Gabrielle Kaufmann-Kohler and her failure to investigate, disclose and inform are some of the issues that were submitted to the annulment committee of which Ms. Cheng was a member in the case *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23). The reasonable doubts, from the point of view of an objective observer, regarding Ms. Cheng's ability to impartially deal with those issues are more than evident, in light of the conflicts of interest personally affecting her, as well as her failure to disclose those situations and the position she assumed in relation to the duty of disclosure.

23. As for the possibility of seeking the disqualification of a member of an *ad hoc* committee, Claimant states that it is questionable whether the challenge mechanism applies to annulment proceedings.[20] In this respect, Total affirms that "[t]here is accordingly no basis in the ICSID Convention for seeking the disqualification of annulment committee members."[21]

24. In this regard, it should be stressed that Total has failed to mention a single case where a decision was made that the challenge mechanism does not apply to annulment proceedings. Quite on the contrary, the challenge mechanism was already used "in two annulment proceedings in which the *ad hoc* Committees found that they had the power to rule on disqualification."[22]

25. The first annulment committee in asserting its competence to rule on a disqualification proposal was the *Vivendi I* committee. Such committee made the following analysis in order

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[19] *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 10 August 2010, ¶¶ 200-242. The annulment committee finally decided not to annul the award upon finding that the conflicts of interest that affected Ms. Kaufmann-Kohler had no material effect on the award in that specific case and that she had allegedly only learned of those conflicts of interest after the award was rendered. *Ibid.* ¶¶ 234-235.

[20] Opposition to the Disqualification Proposal, ¶¶ 3, 16-21.

[21] Opposition to the Disqualification Proposal, ¶ 16.

[22] Background Paper on Annulment for the Administrative Council of ICSID, 10 August 2012, ¶ 51 (*prepared by* the ICSID Secretariat) (citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001; *Nations Energy Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19 – Annulment Proceeding, Decision on the Proposal to Disqualify Dr. Stanimir A. Alexandrov, 7 September 2011).

to explain the basis of its competence:

> Rule 53, which is entitled "Rules of Procedure," states:
>
> "The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee."
>
> The effect is to apply the procedure referred to in Arbitration Rule 9 to proposals to disqualify any member of a Committee. Pursuant to Rules 9 and 53, the undersigned were called on promptly to decide on the Respondent's proposal.
>
> ….
>
> The rule-making powers of the Administrative Council are set out in Article 6 of the Convention. This provides, *inter alia*, that:
>
> ….
>
> (3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention."
>
> … [T]he Council has power under Article 6 to regulate the procedures to be applied on a request for annulment, procedures which are only skeletally set out in Article 52. In particular it would have such power under Article 6 (3), on the basis that to establish orderly procedures for dealing with annulment requests can plainly be regarded as "necessary for the implementation of the provisions of this Convention." No doubt any such Rules must be consistent with the terms of the Convention and with its object and purpose. But subject to this, the judgement whether they are necessary is a matter for the Council.
>
> … It would clearly be appropriate for the Administrative Council under Article 6 (3) to provide a procedure for challenging the appointment of an *ad hoc* Committee member. It seems equally clear that the Council has actually done so.… There can be no doubt as to the competence of the Administrative Council to apply the Arbitration Rules *mutatis mutandis* to proceedings relating to the interpretation, revision or annulment of an award, since this can clearly be seen as "necessary for the implementation of the provisions of this Convention." Nor—if such a characterisation is relevant—is there any difficulty in describing proceedings on a request for disqualification, including the identification of those who will make the decision, as procedural questions for the purposes of Rule 53.
>
> The intention of the Administrative Council to apply Arbitration Rule 9 to the membership of *ad hoc* Committees can be inferred from the history of the Rules. Rule 53 of the initial Arbitration Rules of 1968 provided that:
>
> "Chapter II to V (excepting rules 39 and 40) of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision and annulment of an award, and Chapter VI shall similarly apply to the decision by the Tribunal or Committee."

Rule 39 concerned provisional measures; Rule 40, ancillary claims. These corresponded to Articles 46 and 47 of the Convention, which likewise were not applied by Article 52 (4) to annulment proceedings. Apart from these two Rules, the only significant exclusion from former Arbitration Rule 53 was Chapter I, which dealt with the establishment of the Tribunal, and which included the procedures for dealing with challenges. In 1984, the Administrative Council adopted a new set of Arbitration Rules, including Rule 53 in the terms set out above. The substantial effect of new Arbitration Rule 53 as compared with its predecessor was to apply *mutatis mutandis* the provisions of Chapter I and of Rules 39 and 40 to annulment procedures. We are informed that Parties to the Convention, who were given the opportunity to comment on the new Rules, made no comments on Rule 53. The new Rules were adopted without debate or dissent.

Thus it can be inferred that the intention of the Council in 1984 was to apply all the Arbitration Rules, so far as possible, to annulment proceedings, including Rule 9. In our view the only reason why the procedure laid down in Arbitration Rule 9 could not be applied to members of *ad hoc* Committees *mutatis mutandis* would be if to apply such a procedure was inconsistent with the Convention, having regard to its object and purpose. We see no reason to regard it as such.

As to the object and purpose of the Convention, there is no difficulty. *Ad hoc* Committees have an important function to perform in relation to awards (in substitution for proceedings in national courts), and their members must be, and appear to be, independent and impartial. No other procedure exists under the Convention, expressly or impliedly, for deciding on proposals for disqualification. The only question then is whether it is literally inconsistent with the terms of the Convention, given that Chapter V is not applied by Article 52 to annulment, for the Rules to step in and make equivalent provision.…

….

… [A]s Schreuer also notes, the *travaux préparatoires* of the Convention do not suggest that there was any particular reason for excluding the application of Chapter V. It appears that no State party at the time of the adoption of Arbitration Rule 53 suggested any such reason. That Rule was adopted unanimously and was treated by the Members of the Administrative Council as uncontroversial. In the circumstances, the unanimous adoption of Arbitration Rule 53 can be seen, if not as an actual agreement by the States parties to the Convention as to its interpretation, at least as amounting to subsequent practice relevant to its interpretation.

For all these reasons, we accept that Arbitration Rule 53 was within the competence of the Administrative Council under Article 6 (3) of the Convention, to the extent that it applies Chapter V *mutatis mutandis* to

> proposals to disqualify any member of an *ad hoc* Committee.[23]

26. The *ad hoc* committee in *Nations Energy v. Panama* subsequently reaffirmed the competence of an annulment committee to decide a proposal for disqualification:

> Article 52 (4) stipulates that: "The provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee." Although it does not mention Chapter V, Rule 53, which is part of Chapter VII entitled "Interpretation, Revision and Annulment of the Award," states:
>
> *"The provisions of these Rules shall apply mutatis mutandis to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee."*
>
> It is clear that the effect of Article 52 is to incorporate by reference the procedures referred to in the Arbitration Rules to the procedures relating to interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.
>
> In the present case, Article 52 incorporates Arbitration Rule 9 ("Disqualification of Arbitrators") into the annulment proceeding in order to regulate Claimants' Proposal to disqualify Dr. Alexandrov, President of the *ad hoc* Committee.[24]

27. Therefore, there is no doubt that, contrary to Claimant's submissions, there are sufficient grounds for seeking to disqualify a member of an annulment committee.

28. Another reason why Total maintains that the challenge mechanism does not apply to annulment proceedings is that "[t]he context in which annulment committee members are appointed supports the conclusion that they are not subject to disqualification," since "[u]nlike arbitrators, all committee members are chosen by the Chairman of ICSID's Administrative Council."[25] If that was a justifiable reason for excluding the application of the challenge mechanism, then it would also not be possible for a party to file a proposal to disqualify an arbitrator appointed by the Chairman of ICSID's Administrative Council, which is not true.

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[23] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, ¶¶ 3, 6-13. For an analysis of the interpretation process carried out by the annulment committee in *CAA and Vivendi v. Argentine Republic I* in this regard, see Richard K. Gardiner, *Treaty Interpretation*, Oxford, 2015, pp. 389-390.

[24] *Nations Energy Corporation, Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama*, ICSID Case No. ARB/06/19, Annulment Proceeding, Decision on the Proposal to Disqualify Dr. Stanimir A. Alexandrov, 7 September 2011, ¶¶ 44-46 (unofficial translation).

[25] Opposition to the Disqualification Proposal, ¶ 17.

The truth is that, regardless of who appoints an arbitrator or member of an annulment committee, no one is *a priori* exempt from being affected by situations that may have an impact on his or her impartiality or independent judgment.

29. Claimant adds that "the committee members are tasked only with the limited task of reviewing the procedural propriety of the award (i.e., the work of the arbitrators), not deciding the merits of the parties' dispute."[26] The fact that a member of an *ad hoc* committee does not have competence to decide the merits of the dispute, but to determine whether there are grounds for annulment, does not mean that he or she is exempt from the duty to act with independence and impartiality.

30. Total also contends that "[t]he only qualifications to individuals that the Chairman may appoint to annulment committees are listed in Article 52(3)" and that "Chapter V of the Convention and its criteria for disqualification are not found in the list of applicable provisions to annulment proceedings."[27] In this regard, it bears noting that Article 52(3) of the ICSID Convention provides that "the Chairman shall forthwith appoint **from the Panel of Arbitrators** an *ad hoc* Committee of **three persons**,"[28] and Article 14(1) states that "[p]ersons designated to serve on the Panels [of Conciliators and Arbitrators] shall be persons […] who may be relied upon to exercise independent judgment." This means that, contrary to Claimant's suggestion, since the members of an annulment committee are appointed from the Panel of Arbitrators, they must possess the general qualities required under Article 14(1) of the Convention,[29] including that of being persons who may be relied upon to exercise independent judgment. As stated in the Grounds for the Disqualification Proposal,[30] this means that the members of an annulment committee must inspire full confidence in both their

[26] *Ibid.*

[27] *Ibid.*

[28] ICSID Convention, art. 52(3) (emphasis added).

[29] *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, ¶ 8 ("members of *ad hoc* Committees […] must be Panel members (and may therefore be presumed to have the general qualities required)").

[30] Grounds for the Disqualification Proposal, ¶ 11.

impartiality and **independent** judgment,[31] in light of the three authentic texts of the ICSID Convention.[32] As a matter of fact, Aron Broches explained that "partiality or lack of independence was undoubtedly a lack of the qualities required under Article 14 paragraph (1) which requires *inter alia* that the arbitrators be persons who may be relied upon to exercise independent judgment."[33]

31. In sum, as stated by the annulment committee in *Vivendi I*, "*[a]d hoc* Committees have an important function to perform in relation to awards […] **and their members must be, and appear to be, independent and impartial**."[34] This requirement is of vital importance in the case of the members of an annulment committee, owing to the fact that, while a circumstance affecting the independence or impartiality of an arbitrator is subject not only to the challenge mechanism but also to the annulment proceeding, when a circumstance like this affects a member of an *ad hoc* committee, the only remedy is the challenge mechanism, without any subsequent control.

32. Finally, with regard to the legal standard for disqualification, Claimant agrees with the Argentine Republic about the fact that the qualities required under Article 14(1) include that of inspiring full confidence in both impartiality and independence judgment,[35] and that the

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[31] *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, ¶ 11 ("*Ad hoc* Committees have an important function to perform in relation to awards […] and their members must be, and appear to be, **independent and impartial**" (emphasis added); *see also Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 58; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013, ¶ 65; *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V., Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015, ¶ 50.

[32] Pursuant to Article 14(1) of the ICSID Convention, arbitrators and members of annulment committees are required to *"inspirar plena confianza en su imparcialidad de juicio"* (inspire full confidence in their impartiality of judgment) (according to the authentic Spanish text of the ICSID Convention), be persons who "may be relied to exercise independent judgment"(according to the authentic English text of the Convention), and *"offrir toute garantie d'indépendance dans l'exercice de leur fonctions"* (offer every guarantee of independence in the exercise of their functions (according to the authentic French text).

[33] *History of the ICSID Convention*, 1968, vol. II-2, p. 993 (Meeting of the Committee of the Whole of 23 February 1965).

[34] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, ¶ 11 (emphasis added).

[35] Opposition to the Disqualification Proposal, ¶ 23.

term "manifest" that qualifies the lack of those qualities refers to the ease with which such lack of qualities may be perceived.[36] However, Total calls into question the fact that the legal standard for disqualification consists in establishing the appearance of dependence or bias.[37] In this regard, it is sufficient to refer to the most recent decisions on disqualification rendered in ICSID proceedings, which confirm that the challenge mechanism of ICSID does not require proof of actual dependence or bias; rather, it is sufficient to establish that there is an evident **appearance** of dependence or bias based on a reasonable evaluation of the facts of the case from the point of view of a third-party observer.[38] It is precisely for that reason that Rule 6(2) of the Arbitration Rules establishes the duty to disclose any link or circumstance that may cause a party to question the reliability for independent judgment of an arbitrator or member of an annulment committee.

IV. GROUNDS FOR THE DISQUALIFICATION PROPOSAL

A. Ms. Teresa Cheng's relationship with Claimant's law firm warrants her disqualification

33. Ms. Cheng should have never received instructions from Claimant's counsel, irrespective of the nature and the magnitude of such instructions. From the moment in which she accepted

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[36] *Ibid*, ¶ 24.

[37] *Ibid.*

[38] *See, e.g., Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/3, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, ¶ 64. ("the issue is not Mr. Boesch's actual independence and, even more so, not his actual impartiality, his state of mind, his ethical or moral strength, but rather whether a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case"); *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013, ¶¶ 66-67 ("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'".); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶¶ 59-60. ("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'".); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic,* ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010, ¶ 43 ("The requirements of independence and impartiality serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case. In order to be effective this protection does not require that actual bias demonstrate a lack of independence or impartiality. An appearance of such bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality").

such instructions without disclosing this circumstance in this arbitration, and in view of her insistence that it is not necessary to disclose this type of links, she has made the decision to prioritize her relationship with Freshfields over her duty to exercise, and appear to exercise, independent judgment in this arbitration. Ms. Cheng's acceptance of instructions from Freshfields in the course of this proceeding is reproachable, and her conduct must have consequences.

34. In addition, there are a series of past links that were disclosed neither by Ms. Cheng nor by the law firm Freshfields. Ms. Cheng should understand that it is not possible for the Argentine Republic to accept the fact that one of the arbitrators of this Committee had and still has links with Freshfields, which not only represents the Claimant in the present case but also claimants in other nine arbitration proceedings against the Argentine Republic.

35. The attorneys of Freshfields imply that the instructions given to Ms. Cheng in April 2015 were not contemporaneous with this annulment proceeding, which is clearly incorrect. In effect, they hold that:

> The implicit suggestion in Argentina's application is that litigation lawyers in the Hong Kong office of Freshfields… instructed Ms Cheng on a minor consultation for a Chinese client on questions of Hong Kong civil procedure…, for which the client paid approximately US$5,000 in order to seek to influence her decision in an **eventual** annulment application related to another client (Total)….

36. In this regard, it should be noted that at the time of receiving instructions from Freshfields in April 2015, the Application for Annulment in the present case was not "eventual." As a matter of fact, the Application for Annulment, the Memorial on Annulment and the Response on Annulment had already been filed. Thus, the instructions were contemporaneous with these proceedings.

37. Claimant does not dispute that Freshfields gave instructions to Ms. Cheng. Claimant's only possible argument is to emphasize that the disputed contact was remote and insignificant,[39] not linked with Claimant itself but rather with its counsel.

38. Likewise, both Claimant and Ms. Cheng underline the difference between barristers and solicitors. Notwithstanding the irrelevance of such distinction for the purposes of this

[39] Opposition to the Disqualification Proposal, ¶ 14.

arbitration, it is essential to take into consideration that—even in the capacity of barrister—it was Freshfields that called and gave instructions to Ms. Cheng. Thanks to said law firm, Ms. Cheng received USD 5,000 for only an hour and a half of advice.[40] What is more, the payment of such sum for that amount of time confirms the economic convenience that encourages sympathy—at the very least—between Ms. Cheng and Freshfields.

39. In this regard, the fact that "it is the professional duty of a solicitor to ensure that [her] fees are acceptable to the lay client"[41] is not minor. In consequence, it may be presumed that there is a link with the law firm representing Claimant, which not only delivers the money but also has the power to determine the amount. From the very moment in which Freshfields contacted Ms. Cheng to instruct her and request her advice, it is not possible to think that Freshfields was not aware that Ms. Cheng was a member of an annulment committee in a case in which Freshfields represented one of the parties. This conduct by Freshfields is as reproachable as that of Ms. Cheng.

40. However, it is possible to understand Freshfield's motivation. Freshfields is the second firm in importance that represents claimants in arbitration proceedings against Argentina, so it will seek to use the decisions that favour its position in other arbitration proceedings, especially considering that two of such cases are *Suez I* and *Suez II,* which also deal with the issue of lack of impartiality, and *EDF v. Argentina,* in which a decision is pending on the omission of the duty of disclosure by arbitrator Kaufmann-Kohler. Ms. Cheng is an arbitrator in the latter case.

41. Claimant sought to downplay the amount paid by making reference to the case *Vivendi II*.[42] Claimant alleges that in that case the arbitrator's firm had received USD 216,000 from the claimant's affiliates, whereas Ms. Cheng received no more than USD 5,000 for four hours of work.[43] What Claimant does not mention is that those USD 216,000 were paid for four years of work and that they were collected by the firm.

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[40] This is a significant amount when considering the pay of an ICSID arbitrator. It should be taken into account that in this case Ms. Cheng prioritized a link with Freshfields for USD 5,000 for one hour and a half of work over two complete days of work as an arbitrator in this proceeding.

[41] Ms. Cheng's explanations of 18 August.

[42] Opposition to the Disqualification Proposal, ¶ 34.

[43] *Ibid.*

42. Even if it was considered that the amount paid is small, the Chairman of the Administrative Council in the case *Blue Bank v. Venezuela* admitted the proposal for disqualification of one of the arbitrators in spite of the fact that the impact on his income of any profit derived from a client of his firm with an interest contrary to that of Venezuela would be "nonexistent or insignificant."[44] Likewise, the annulment committee in the case *Vivendi II* established, quoting Professors Wolfram and Mistelis, that "[a]s to the basic issue of the compatibility of a directorship in a major international bank and the function of international arbitrator, […] a director in the exercise of his or her function is under a fiduciary duty *vis-à-vis* the shareholders of the bank to further the interests of the bank and therefore postpone conflicting interests," and that "[t]hat is fundamentally at variance with his or her duty as independent arbitrator in an arbitration involving a party in which the bank has a shareholding or other interest, **however small it may be**."[45]

43. In the case *Gallo v. Canada*, the then Deputy Secretary-General of ICSID affirmed that, when considering if there is a conflict of interest, it is irrelevant whether the link involves payment or not:

> Where arbitral functions are concerned, any paid or gratis service provided to a third party with a right to intervene can create a perception of a lack of impartiality. The amount of work done makes no difference. What matters is the mere fact that work is being performed.[46]

44. Claimant holds that there has never been a case in which a proposal for disqualification was admitted based on the link between an arbitrator and the counsel of one of the parties.[47] Claimant is wrong. The link between an arbitrator and the counsel of one of the parties, not the party itself, has been regarded by the Chairman of the Administrative Council as a link that affects the arbitrator's independence, or at least its appearance. In the case *Blue Bank v. Venezuela*, the Chairman admitted the proposal for disqualification of one of the arbitrators precisely due to his links with the claimant's counsel in an arbitration proceeding against

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[44] *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela,* ICSID case No. ARB/12/20), Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 40.

[45] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID case No. ARB/97/3), Decision on Annulment, 10 August 2010, ¶¶ 217-218 (emphasis added).

[46] *Vito G. Gallo v. Canada*, UNCITRAL case, administered by PCA, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009, ¶ 32.

[47] Opposition to the Disqualification Proposal, ¶ 25.

Venezuela.[48] In that case, the link was even less direct than is the case of Ms. Cheng in this proceeding since the link that generated the conflict of interest and warranted the disqualification proposal was between the arbitrator, Mr. Alonso, and claimant's counsel in **another arbitration proceeding** against Venezuela (*Longreef v. Venezuela*).[49] All the more reason why the link between Ms. Cheng and the counsel of one of the parties in an arbitration proceeding in which she is a member of the Committee constitutes grounds for disqualification.

45. Claimant attempts to differentiate this case from *Grand River v. Unites States* by arguing that the latter was an UNCITRAL case, not an ICSID case.[50] However, as can be observed, ICSID Arbitration Rule 6(b), in relation to the statement "any other circumstance that might cause my reliability for independent judgment to be questioned by a party," uses the same language as Article 11 of UNCITRAL Arbitration Rules:

> When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose *any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.* An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, *shall without delay disclose any such circumstances to the parties and the other arbitrators* unless they have already been informed by him or her of these circumstances (emphasis added).

46. In the case *Grand River v. United States,* in which the ICSID Secretary General decided to admit the disqualification proposal, there was no connection between the proceedings in which the arbitrator (Mr. Anaya) was involved and the attorneys with whom he had a link. The advice provided by Mr. Anaya in the other case did not concern a dispute between an investor and a State or the law on investments. The situation in this case is the same, based on the little information provided by Ms. Cheng in this regard.

47. In fact, despite the requests made by the Argentine Republic, unfortunately Ms. Cheng has been unable to clearly state the subject on which she has provided advice in April of the current year. At first, she affirmed without any doubt that it was about "mainly shareholders'

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[48] *Blue Bank International & Trust (Barbados) Ltd. c. Venezuela,* ICSID case No. ARB/12/20), Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, 12 November 2013, ¶¶ 66-68.

[49] *Ibid,* ¶ 69.

[50] Opposition to the Disqualification Proposal, ¶¶ 26-27.

disputes."[51] Then she added that, to the best of her recollection, it had to do with procedural steps and provided the website in which it is possible to access the decisions on which she had given her advice.[52] As such website contains many decisions on the proceedings identified by Ms. Cheng (HCA 1661/2014 and 1766/2014), the Argentine Republic requested that she clearly stated which decision she made reference to. Ms. Cheng "adjusted" her answer again and stated that her advice was about interlocutory applications relating to the appointment of an interim receiver.[53] This "change or adjustment" to her explanations denotes a lack of transparency by Ms. Cheng.

48. Claimant's attempt to differentiate this case from the resignations of the arbitrators in the cases *Favianca v. Venezuela* and *Nations Energy v. Panama*[54] is also of no use. In those cases, the arbitrators' resignation on account of the objections submitted due to their links with the counsel of one of the parties demonstrates that such links should not be allowed in this kind of arbitration.[55]

49. With regard to the case *Favianca v. Venezuela*, the fact that Ms. Cheng has not received a more stable appointment from Freshfields does not constitute grounds for rejecting this disqualification proposal. On the contrary, if Ms. Cheng's acceptance of instructions from the counsel of one of the parties is not penalized, it will be very easy to use that mechanism to conceal the influence that firms like Freshfields may exert on the arbitrators that act in the arbitration proceedings in which those firms are involved. If Ms. Cheng's defence were accepted, it would all be a matter of "keeping formalities." In this regard, the Argentine Republic argues that it is not the legal appearance of the link between Ms. Cheng and Freshfields that should be considered but the undeniable fact that Ms. Cheng has received instructions from said law firm.

50. In relation to the case *Nations Energy v. Panama*, Ms. Cheng's situation in the present case is much worse as it is herself, not a firm, who received instructions from Freshfields. In that

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[51] Letter from Ms. Teresa Cheng to the parties, 27 July 2015.

[52] Letter from Ms. Teresa Cheng to the parties, 4 August 2015, p. 2.

[53] E-mail message from the Secretary of the *ad hoc* Committee to the parties, 20 August 2015 (conveying Ms. Cheng's message).

[54] Opposition to the Disqualification Proposal, ¶¶ 28-32.

[55] The analogy with Mr. Mourre's case has been observed by commentators on this situation.

case, the arbitrator whose disqualification was proposed belonged to a firm in which other attorneys had worked for one of the parties and, what is more, those links took place before the arbitration in question. In the present case, Ms. Cheng received instructions directly from Freshfields during the annulment proceeding. This is why cases like *Vivendi I* do not apply to the present situation[56] as Ms. Cheng herself is involved with Claimant's counsel.

51. The foregoing is especially true considering that, in this annulment proceeding, Ms. Cheng modified the declaration made upon accepting her appointment in relation to her involvement in other annulment proceedings in which the Argentine Republic is a party. In those other cases, upon accepting her appointment, Ms. Cheng identified the annulment proceedings in which she was involved, as well as the parties and **their counsel**. However, at the time of accepting her appointment in the present case, Ms. Cheng removed the reference to counsel for the claimants in her declaration, as can be seen in the table below. Only reference to counsel for the Argentine Republic is made. This change in her declarations is also an element of the lack of impartiality in relation to the links between the members of a committee and counsel for the parties.

El Paso c. Argentina	***EDF c. Argentina***	***Total c. Argentina***
"Please be informed that I am a member of the ad-hoc Committee in Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, and that Impregilo S.p.A. is **represented by King & Spalding** while the Argentine Republic is represented by the **Attorney General (Procuradora del Tesoro de la Nación)**."[57]	"Please be informed that I am a member of the ad-hoc Committee in Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, where Impregilo S.p.A. is **represented by King & Spalding** while the Argentine Republic is represented by the **Attorney General (Procuradora del Tesoro de la Nación)**, and the ad-hoc Committee in El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15) where El Paso Energy International Company is **represented by Vinson & Elkins RLLP** while the Argentine Republic by the **Attorney General** (**Procuradora del Tesoro de la Nación)**."[58]	"Please be informed that I was a member of the ad-hoc Committee in the annulment proceeding of Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, and currently member of the ad-hoc Committee in the annulment proceeding of EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, and member of the ad-hoc Committee in the annulment proceeding of El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15. In all of these proceedings, the Argentine Republic has been represented by 'Dra. Angelina Maria Esther Abbona, **Procuradora del Tesoro de la Nación**.'"[59]

[56] Opposition to the Disqualification Proposal, ¶ 33.

[57] Additional declaration by Ms. Cheng, *El Paso v. Argentina*, ICSID case No. ARB/03/15, Annulment Proceeding, 23 May 2012 (emphasis added) (Exhibit A).

[58] Additional declaration by Ms. Cheng, *EDF v. Argentina*, ICSID case No. ARB/03/23, Annulment Proceeding, 21 December 2012 (emphasis added) (Exhibit B).

[59] Additional declaration by Ms. Cheng in this annulment proceeding, 24 April 2014 (emphasis added).

52. Claimant considers that the additional facts stated by the Argentine Republic—i.e., the past links—cannot "themselves demonstrate a manifest lack of dependence or impartiality."[60] However, apart from the importance that each fact has in itself, all of them considered together make it undoubtedly impossible to rely on the independence and impartiality of Ms. Cheng's judgment. In cases where the circumstances that warrant a disqualification proposal are the "result of a gradual process and a fact finding mission, during which doubts gradually turn into hard facts, the time for bringing a challenge only starts running from the day that these hard facts become known to the challenging party."[61] As it has been explained:

> Facts and circumstances cannot be ignored, in analyzing an arbitrator's independence and impartiality [or his or her competence], merely because they occurred in the past. Rather, in assessing the arbitrator's independence [or his or her competence], all relevant facts must be considered, even if they were previously known to a party and did not result in a challenge. Of course, a challenge can only be asserted if new facts are discovered or occur, requiring consideration of previous events, but if such new facts do exist, they should be interpreted in light of the entire factual setting.[62]

53. In Ms. Cheng's case, the fact that she deliberately omitted, at the time of accepting her appointment in this proceeding, to disclose her past links with Freshfields constitutes an additional reason—apart from the circumstances of April 2015—that impairs her impartiality and independence.

54. Her several links with Freshfields, which add to the most serious fact that Ms. Cheng was "instructed by counsels of Freshfields Bruckhaus Deringer LLP" in April of the current year,[63] were deliberately omitted by Ms. Cheng and Claimant's counsel in this arbitration. Notwithstanding the lack of transparency of Ms. Cheng's answers, a summary is provided below:

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[60] Opposition to the Disqualification Proposal, ¶ 12.

[61] K. Daele, "Chapter 3: The Timing of a Challenge", *in Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012, p. 141.

[62] Gary B. Born, "Selection, Challenge and Replacement of Arbitrators in International Arbitration", in *International Commercial Arbitration*, Kluwer Law International, 2014, pp. 1943-1944.

[63] E-mail message from the Secretary, 27 July 2015.

- Ms. Cheng was instructed by Freshfields to act as counsel of one of the parties in an arbitration proceeding, which was submitted to the Telecommunications Appeal Board in September 2008.[64]
- Ms. Cheng's son had an internship with Freshfields Bruckhaus Deringer LLP in mid-2011, a few months from Ms. Cheng's first appointment in an annulment proceeding in which the Argentine Republic is involved.
- Ms. Cheng "ha[s] been elected/appointed to various offices/positions of various professional associations/bodies/arbitral institutions over the years as set out in [her] CV. Over these periods, some members/partners and/or former members/partners of Freshfields Bruckhaus Deringer LLP have been or may have been members or office bearers in these professional associations bodies/arbitral institutions." In spite of the ambiguity of her answer, it was possible to verify the following based on her vague statements:
    - Foundation for International Arbitration Advocacy (FIAA): Ms. Cheng is a member of the body that oversees FIAAS's activities together with Mr. Paulsson, who has great influence in the firm Freshfields Bruckhaus Deringer LLP.[65]
    - London Court of International Arbitration (LCIA): Mr. Paulsson is currently an honorary vice-president of this institution. However, between 2004 and 2010, he presided this Court. In this regard, it is worth mentioning that, pursuant to the Constitution of the LCIA Users' Council,[66] the Court appoints the members of said Users' Council.[67] For her part, Ms. Cheng was a member of the LCIA Asia Pacific Users' Council from 2007. Thus, it is evident that she was appointed while Mr. Paulsson was President of the Court.
    - International Council for Commercial Arbitration (ICCA): According to the website of the institution, Ms. Cheng is a member of its Governing Board.[68] Article 5 of ICCA Bylaws establishes that the Governing Board may elect honorary presidents. Mr. Jan Paulsson was elected Honorary President in 2010, while Ms. Cheng was a member of the Governing Board.[69]

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[64] Letter from Ms. Cheng to the parties, 5 August 2015.

[65] See FIAA's Board of Trustees, available at http://www.fiaa.com/leadership.html (last visit: 21 August 2015).

[66] Constitution of the LCIA Users' Council, available at http://www.lcia.org/Membership/LCIA_Users_Council_Constitution.aspx## (last visit: 21 August 2015).

[67] Article E(5), Constitution of the LCIA Users' Council, available at: http://www.lcia.org/Membership/LCIA_Users_Council_Constitution.aspx## (last visit: 21 August 2015).

[68] ICCA website, *ICCA Governing Board*, available at http://www.arbitration-icca.org/about/governing-board.html (last visit: 21 August 2015).

[69] See ICCA website, *ICCA Governing Board*, available at http://www.arbitration-icca.org/about/governing-board.html (last visit: 21 August 2015); Curriculum Vitae of Mr. Paulsson, submitted to the ICSID Secretariat, available at: https://icsid.worldbank.org/apps/icsid/_layouts/WB.ICSID.SearchCases/FormServer.aspx?XmlLocation=https://icsid.worldbank.org/apps/icsid/ICSID%20Arbitrator/Jan%20PAULSSON.xml&ClientInstalled=true&DefaultItemOpen=1 (last visit: 21 August 2015).

- Hong Kong International Arbitration Centre (HKIAC): Ms. Cheng holds several positions, such as the Chair of the Council of Members since 2014. She was vice chairperson between 1998 and 2013 and has been a member of the Council since 1996. On 3 April 2015, Mr. Jan Paulsson was appointed member of the Advisory Board.

55. In view of the above, it is clear that each of the facts listed above, and all of them together, strongly and irrevocably impair Ms. Cheng's independence and impartiality in this case.

56. Should the proposal for disqualification be rejected, the damage that may be caused to the ICSID system and the trust of the parties involved in it will be terrible. As stated by Mr. Mourre when insisting on the importance to disclose the circumstances that involve a conflict of interest as the basis of the parties' reliance upon the independent judgment of arbitrators, "it is the arbitral institutions that should continue to take responsibility for sanctioning failures in this regard and should be as demanding as possible."[70] In the present case, the Committee has the responsibility to prevent that such conduct damages the trust that the parties may have in this dispute settlement mechanism. This responsibility is borne by Ms. Cheng, who may either resign or, alternatively, upon the decision of the Committee, be disqualified through the acceptance of the disqualification proposal.

57. Ms. Cheng is well aware of her responsibility as she herself decided not to accept the appointment by the Chairman of the Administrative Council in the case *Conoco v. Venezuela* in view of the objections submitted by the Bolivarian Republic of Venezuela due to Ms. Cheng's links with Freshfields, which acted as counsel for claimant in that case. In consequence, it is not possible for her to continue clinging to her role as a member in this arbitration considering that she rejected a past appointment on account of her links with Freshfields in another case.

B. Ms. Cheng's breaches of the duty of disclosure and her lack of transparency warrant her disqualification

58. As a preliminary matter, it should be reiterated that Ms. Cheng breached her duty to disclose

[70] Joanne Greenaway (Associate Editor), Celebrating a Vision: Queen Mary School of International Arbitration Turns 30 and Looks Ahead to the Next 30 Years, Kluwer Arbitration Blog, 1 de mayo de 2015, available at http://kluwerarbitrationblog.com/blog/2015/05/01/celebrating-a-vision-queen-mary-school-of-international-arbitration-turns-30-and-looks-ahead-to-the-next-30-years/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+KluwerArbitrationBlogFull+%28Kluwer+Arbitration+Blog+-+Latest+Entries%29

any previous relationship with the parties and their lawyers, as it has been made clear by the Chairman of the Administrative Council in the aforementioned case entitled *Universal Compression International Holdings S.L.U. v. Bolivarian Republic of Venezuela*, when he stated that "an arbitrator's Arbitration Rule 6(2) declaration should include details of prior appointments by an appointing party."[71] Of course, the rationale is that the relevance of the disclosure (and its possible implications in terms of impartiality and independence) should be assessed by the parties in a timely manner, and so it cannot be a matter for the members of arbitral tribunals and annulment committees to judge.

59. In this sense, the following points are in order. It should be stated that the timing of the declaration made by arbitrators and members of annulment committees is essential to the transparency and impartiality of the proceedings in question and that failure to make such declaration in a timely manner constitutes a breach of Arbitration Rule 6(2). Arbitration Rule 6(2) itself provides that the declaration shall be issued "[b]efore or at the first session of the Tribunal," thus clearly establishing the moment in which all relevant information must be disclosed. Similarly, and for clarification purposes, it has been noted that "[t]his means that an arbitrator can wait to make a disclosure until he/she has been appointed by a party or an appointing authority and even until the Tribunal has been constituted."[72] In fact, declarations are rarely made late since the arbitration rule is very clear on this regard:

> [A]rbitrators do generally not wait until the constitution or the first session to make disclosures. In the great majority of cases in which a challenge was based on a disclosure made by the challenged arbitrator, the disclosure was made before the constitution of the Tribunal. Only in a few cases, was disclosure made after the constitution of the Tribunal. In Generation Ukraine v. Ukraine, disclosure was made three weeks after the constitution of the Tribunal but prior to the first session. In Vivendi v. Argentina I, disclosure was made one month after the constitution of the Tribunal and three days before the first session. In Zhinvali v. Georgia, disclosure was made at the first session of the Tribunal.[73]

60. Regarding the answers provided by Ms. Cheng in connection with her duty to disclose her

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[71] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011, ¶ 92.

[72] K. Daele, "Chapter 1: Disclosure," *in Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012, p. 38.

[73] *Id.*

relationship with the parties' lawyers, account should be taken of the following considerations.

61. First, it is unfortunate, in addition to demonstrating the gravity of her situation, that in her explanations of 18 August Ms. Cheng based much of her defence on the fact that, under the rules of the Hong Kong Bar Association, she did not have a "contractual relationship" with Freshfields,[74] instead of answering the merits of the proposal for disqualification: the existence of a contemporaneous professional relationship with the law firm representing one of the parties, which, in addition, was not disclosed properly. It is worth recalling that the section of the Grounds for the Disqualification Proposal to which Ms. Cheng refers concludes as follows:

> In brief, Ms. Cheng's relationships with Freshfields and her failure to adequately and timely disclose them, be they past or contemporaneous with this proceeding, mean that, as stated above, she manifestly cannot be relied upon to exercise independent judgment.[75]

62. It is unacceptable for a member of an international tribunal to attempt to justify her failure to disclose contemporaneous professional links with the law firm representing one of the parties by invoking formal distinctions derived from specific domestic rules. Ethical issues related to members of ICSID tribunals and committees are not only subject to international standards and practices, but they must also be resolved based on the merits of the facts in question and not on formal distinctions.

63. Claiming that the existence of a duty of disclosure depends on formal distinctions and domestic law is against basic notions of transparency, and renders the arbitrators' duty of disclosure irrelevant. Nobody should be arguing this: Ms. Cheng should have timely disclosed that she received instructions from Freshfields (that is, she had a professional relationship with it) at the same time the firm represented one of the parties to a case being heard by a Committee of which Ms. Cheng was a member.

64. Now, according to the text cited by Ms. Cheng—which is not a rule or decision, but questions and answers appearing on the website of one of the Hong Kong Bar Associations—on the one

[74] Ms. Cheng's Explanations of 18 August.

[75] Grounds for the Disqualification Proposal, ¶ 54.

hand, "[t]here is no contractual relationship between a barrister and his instructing solicitor or between a barrister and the lay client."[76] However, on the other hand, "[t]he remedy of a barrister is to lodge a complaint to the Law Society against the solicitor for failing to pay his fees. In the absence of a reasonable excuse, **a solicitor is personally liable as a matter of professional conduct for the payment of a barrister's proper fees**."[77]

65. This means that the text transcribed by Ms. Cheng herself shows that she had a professional relationship with Freshfields by virtue of which Freshfields was "personally liable" for the payment of Ms. Cheng's fees, who potentially could lodge a complaint in this regard before the Bar Association *against Freshfields and not against Freshfields' client*. Since it was Freshfields which gave instructions to Ms. Cheng and it was legally responsible for paying her fees, whether this relationship is classified as "contractual" or not under the law of Hong Kong is totally irrelevant for the purposes hereof:[78] this professional relationship, whatever the nature thereof under domestic law, should have been disclosed.

66. It is relevant to recall the findings of the tribunal in *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, when it decided that a lawyer appointed by the respondent—who belonged to the same Chambers as the president of the tribunal—could no longer participate in the proceedings. In that case, the tribunal confirmed that "Chambers are not law firms" and that "[o]ver the years it has often been accepted that members of the same Chambers, acting as counsel, appear before other fellow members acting as arbitrators."[79] However, "it is equally true that this practice is not universally understood let alone universally agreed."[80]

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[76] Ms. Cheng's Explanations of 18 August, p. 2.

[77] *Id.* (emphasis added).

[78] Even though it is also irrelevant, from the point of view of Civil Law, it is difficult to conclude that the relationship between Freshfields and Ms. Cheng is not contractual in nature, at least as regards the payment of fees given Freshfields' liability in this regard. *See, e.g.,* Article 1101 of the French Civil Code: "Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelque chose." Available at http://www.legifrance.gouv.fr/affichCode.do;jsessionid=0D8E6F195A01E75E14D29047A236D759.tpdila18v_1?idSectionTA=LEGISCTA000006136340&cidTexte=LEGITEXT000006070721&dateTexte=20150821. See also Article 957 of the Argentine Republic's Civil and Commercial Code: "Definition. A contract is the legal act by which two or more parties express their consent to create, govern, alter, transfer or terminate pecuniary legal relations". Available at http://www.infoleg.gob.ar/infolegInternet/anexos/235000-239999/235975/texact.htm#20.

[79] *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision of the Tribunal of 6 May 2008, ¶ 17.

[80] *Id.*, ¶ 18.

67. Such tribunal also stated that: "It is true that many parties would readily accept that a member of such a professional grouping [i.e. the Chambers] would not be affected by any favouritism when considering submissions made by a fellow member, but by the same token other parties may take a different view."[81] In short, the tribunal in *Hrvatska* concluded that it was compelled to "preserve the integrity of the proceedings and, ultimately, its Award," referring to the following facts (which in some aspects are remarkably similar in substantive terms to the facts hereof):

> The Tribunal does not believe there is a hard-and-fast rule to the effect that barristers from the same Chambers are always precluded from being involved as, respectively, counsel and arbitrator in the same case. Equally, however, there is no absolute rule to opposite effect. The justifiability of an apprehension of partiality depends on all relevant circumstances. Here, those circumstances include, first, the fact that the London Chambers system is wholly foreign to the Claimant; second, the Respondent's conscious decision not to inform the Claimant or the Tribunal of Mr. Mildon's involvement in the case, following his engagement in February of this year, third, the tardiness of the Respondent's announcement of Mr. Mildon's involvement and, finally, the Respondent's subsequent insistent refusal to disclose the scope of Mr. Mildon's involvement, a matter of days before the commencement of the hearing on the merits. The last three matters were errors of judgment on the Respondent's part and have created an atmosphere of apprehension and mistrust which it is important to dispel.[82]

68. Second, even under the Hong Kong rules invoked by Ms. Cheng, assuming *arguendo* that they have the relevance she claims, Ms. Cheng's attempt to minimize her relationship with Freshfields is unacceptable. In this regard, it bears noting that, according to the website cited by Ms. Cheng, "[a]ccess to barristers by the general public is normally through solicitors. The distancing of the barrister from the lay client helps to maintain the barrister's impartiality."[83]

69. Therefore, according to the source cited by Ms. Cheng herself, professional contacts exist between barrister and solicitors, i.e. in this case between Ms. Cheng and Freshfields. But here is another essential point, as according to the rules applicable in common law countries "[a] barrister acts only on the instructions of a **professional client**, and does not carry out any work by way of the management, administration or general conduct of a **lay client's**

[81] *Id.*, ¶ 20.

[82] *Id.*, ¶ 31 (footnotes omitted).

[83] See http://www.hkba.org/the-bar/aboutus/index.html.

affairs."[84]

70. Even though Ms. Cheng, in her explanations of August 18, refers to the concept of "lay client," she carefully omits any reference to the concept that is the other side of the coin: that of the professional client. In the professional relationship of April 2015—to name the most recent one—Freshfields was Ms. Cheng's professional client, a client than any barrister of the world would want to have.[85] On that occasion, Freshfields engaged and instructed Ms. Cheng.

71. The fact that "[t]he interests of the lay client take precedence over those of the instructing solicitors,"[86] as claimed by Ms. Cheng, has no bearing on the existence of a professional relationship between a barrister and his professional client. Again, there is no doubt that such professional relationship should have been disclosed, and it is difficult to understand that Ms. Cheng not only failed to disclose it in a timely manner but also that she keeps insisting that this type of relationship (even if it is contemporaneous with the proceedings in question) does not need to be disclosed. At this point, it should be emphasized that, as provided, for example, by the IBA Rules and contrary to Freshfields' contentions,[87] the duty of disclosure applies to those "facts or circumstances" that "may, **in the eyes of the parties**, give rise to doubts as to the arbitrator's impartiality or independence."[88]

72. In addition, under the applicable Hong Kong rules invoked by Ms. Cheng, it is the solicitor who should advise his client when it is appropriate to instruct a barrister;[89] a solicitor should take care to recommend to his client "a barrister with an appropriate level of competence, suitability and experience," a solicitor "when considering the barrister's advice must ensure it contains no obvious errors," a solicitor must "use his best endeavours to ensure that a barrister carries out his instructions within the time limit specified by the solicitor," and "where appropriate a solicitor must ask for the return of his papers in order to instruct another

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[84] See *Professional Ethics*, by Ros Carne, Oxford University Press, 15th Edition (2010), p. 21 (emphasis added).

[85] Freshfields itself explained in these proceedings that it is one of the "world's largest" law firms. Opposition to the Disqualification Proposal, ¶ 47, fn. 45. This description probably underestimates Freshfields' role in investment arbitration, a field in which Ms. Cheng has begun to work in recent years.

[86] Ms. Cheng's Explanations of 18 August, p. 2.

[87] Opposition to the Disqualification Proposal, ¶ 39.

[88] IBA Guidelines, 3(a) (emphasis added).

[89] See The Law Society of Hong Kong, Guide to Professional Conduct, Vol 1, Rule 5.17, Commentary 3. Available at http://www.hklawsoc.org.hk/pub_e/professionalguide/volume1/default.asp?cap=5.1.17.

barrister."[90]

73. All this clearly proves not only the professional relationship between Freshfields and Ms. Cheng but also goes against Ms. Cheng's attempt to claim that Rule 2.3.2 is not applicable, which Rule refers to the case in which "[t]he arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties."

74. There is no doubt that Ms. Cheng gave advice to Freshfields, which had to ensure that such advice contained no "obvious errors." Moreover, even if a barrister is instructed, a solicitor "should not allow his own skill and judgment to be entirely dominated" [91] by the barrister. As established in the leading case *Davy-Chiesman v Davy-Chiesman* decided by the English Court of Appeal, referred to in the above-mentioned Hong Kong rules, the ordinary rule is that "save in exceptional circumstances a solicitor cannot be criticised when he acts on the advice of properly instructed counsel [i.e. barrister]."[92]

75. In short, even considering the applicable Hong Kong rules, Freshfields was Ms. Cheng's professional client. Ms. Cheng provided Freshfields with advice, with which she basically maintained professional contact.[93] Rule 2.3.2 is then clearly applicable[94] and Ms. Cheng's situation is framed within the (waivable) Red List of the IBA Guidelines, a fact which warrants her disqualification.

76. Third, Ms. Cheng claims: "The professional services I rendered was remunerated, but it is the lay client who pays and not the instructing solicitor or his law firm."[95] This is not true, as

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[90] *Id*., Rule 12.03 (Solicitor Remains Responsible), Commentaries 1-3. Available at http://www.hklawsoc.org.hk/pub_e/professionalguide/volume1/default.asp?cap=12.1.3.

[91] *Id.*, Rule 6.01, Commentary 6. Available at http://www.hklawsoc.org.hk/pub_e/professionalguide/volume1/default.asp?cap=6.1.1.

[92] See Davy-Chiesman v Davy-Chiesman [1984] Fam 48, pp. 63-64.

[93] It cannot be stated with certainty that Ms. Cheng had no contact with the lay client because, as with all other issues on which she was asked to provide clarification, Ms. Cheng did not give details about the parties with which she specifically had contact in connection with the issue of April 2015.

[94] Freshfields denies that this rule is applicable, and also denies the applicability of Rule 3.3.9 as it claims that the fact that Ms. Cheng was engaged and instructed by Freshfields "does not constitute a co-counsel role". Opposition to the Disqualification Proposal, ¶ 47. Freshfields denies all attempts to categorize Ms. Cheng's professional work, never saying how it should be classified. The intention is obvious: it seeks to put the professional relationship in a legal limbo so it cannot be reached by the rules on conflicts of interest and the duty of disclosure. The inconsistency of this argument with the basic rules of ethics is also obvious.

[95] Ms. Cheng's Explanations of 18 August, p. 2.

recognized by Freshfields itself when contending that "the cost of such consultation is passed through as a disbursement to the client."[96]

77. In other words, Ms. Cheng billed Freshfields, even though Freshfields then passed through such fees to its client as a disbursement. In addition, as already explained, the party liable for the payment of Ms. Cheng's fees was not the lay client but Freshfields.

78. Clearly, Ms. Cheng made the conscious decision[97] not to disclose to the parties a professional relationship she had with the law firm representing Total while this annulment proceeding was pending (among other breaches of her duty of disclosure). While the reasons behind this decision are unknown, the existence of the professional relationship and her failure to disclosure it are *objective facts* that warrant Ms. Cheng's disqualification.

79. Aside from the foregoing, it is interesting to note that the arguments presented by Ms. Cheng and Claimant's counsel do not dispel the justifiable doubts about Ms. Cheng's lack of independent judgement. This is so because the grounds for her disqualification exist from the moment when Ms. Cheng decided to receive instructions from Freshfields and failed to disclose this situation in a timely manner. This is why Ms. Cheng manifestly cannot be relied upon to exercise independent judgment and there are sufficient grounds for disqualification.

80. Ms. Cheng, when accepting the appointment, stated as follows:

> I assume a continuing obligation promptly to notify the Secretary-General of the Centre of *any such relationship or circumstance* that subsequently arises during this proceeding.[98]

81. These relationships and circumstances were part of her "past and present professional, business and other relationships (if any) with the parties and … any other circumstance that might cause [her] reliability for independent judgment to be questioned by a party."[99]

82. This declaration and the obligation that Ms. Cheng assumed were in pursuance of Arbitration

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[96] Opposition to the Disqualification Proposal, ¶ 7.

[97] Freshfields acknowledges that Ms. Cheng made the "decision not to disclose" her "non-remunerated" professional relationships with Freshfields. *Id*., ¶ 13. Its attempt to claim, however, that Argentina's assertion that Ms. Cheng also made the decision not to disclose her professional relationship of April 2015 "is likewise speculative" (*id*., ¶ 45), is frankly incomprehensible.

[98] Ms. Cheng's Declaration, 22 May 2014.

[99] *Id*.

Rule 6(b), the purpose of which was—as explained by the Secretary-General—"to expand the scope of disclosures of arbitrators to include *any circumstance likely to give rise to justifiable doubts* as to the arbitrator's reliability for independent judgment."[100] In this regard, as explained by the tribunal in *Tidewater v. Venezuela*, "[t]he standard of 'likely to give rise to justifiable doubts', referred to in the ICSID Secretariat Note on the new text of Arbitration Rule 6(2)(b), is taken from the standard of disclosure required by the UNCITRAL Arbitration Rules, which is also the standard applicable in those Rules to arbitration challenges."[101]

83. Claimant analyzes the *Universal Compression* case, which the Argentine Republic invoked in support of its position on the duty of disclosure. In this regard, Claimant failed to make reference to one of the most important points expressed by the Chairman of the Administrative Council in the sense that:

> The question arises whether justifiable doubts arise about Professor Tawil's independence and impartiality because he did not upon appointment disclose his involvement in *Azurix II*. To ensure that parties have full information relevant to an arbitrator's appointment available to them, and out of abundance of caution, an arbitrator's Arbitration Rule 6(2) declaration should include details of any professional relationship with counsel to a party in the case in which he/she has been appointed.[102]

84. In this regard, the reference above supports the Argentine Republic's position in that, pursuant to Rule 6(2) of the ICSID Arbitration Rules, arbitrators and members of annulment committees have a duty to disclose any circumstance due to which their independence or impartiality may be questioned. This includes, undoubtedly, the duty to disclose any relationship with any of the law firms involved in the dispute in question.

85. It is no minor matter that Ms. Cheng is perfectly aware of the concerns and position of the Argentine Republic on conflicts of interest and the duty to disclose inherent in the role of an arbitrator and member of a committee. She is also a member of the annulment committee in

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[100] Working Paper of the ICSID Secretariat. *See* Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat, 12 May 2005, p. 12, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf.

[101] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, ¶ 39.

[102] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9), Decision on Liability of the Majority of the Arbitral Tribunal, ¶ 103.

the case of *EDF v. Argentina*, in which one of the grounds for annulment invoked by the Argentine Republic is the improper constitution of the tribunal in the original proceeding and the serious departure from fundamental rules of procedure due to the conflicts of interest of two of the arbitrators and their breach of the duties of investigation, disclosure and reporting.

86. This ground for annulment was discussed at length at the hearing on annulment held in June of last year.[103] Ms. Cheng herself asked a number of questions about this ground at the hearing on annulment.[104] That is why it is inadmissible for Ms. Cheng to have made the decision—some months after that hearing—to receive instructions from Freshfields and not disclose it to Argentina.

87. In sum, Ms. Cheng should have disclosed all her past and present links with Claimant's counsel in a timely fashion. With respect to those past links and the statements made by the Argentine Republic regarding what Ms. Cheng included and failed to include in her *curriculum vitae*,[105] Claimant's argument that the preparation of a *curriculum vitae* is

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[103] *See, e.g.*, Corrected Transcript of the Annulment Hearing (English version), 2 June 2014, 75:21-92:16, 100:9-104:12 (opening statement of the Argentine Republic); Corrected Transcript of the Annulment Hearing (English version), 3 June 2014, 251:4-262:11 (closing statement of the Argentine Republic), 350:16-359:22 (questions of the *ad hoc* Committee).

[104] *See, e.g.*, Corrected Transcript of the Annulment Hearing (English version), 2 June 2014, 78:9-11 ("MEMBER CHENG: Question: Just have the date when Professor Kaufmann-Kohler was appointed to the board of the UBS?"), 103:20-104:10 ("MEMBER CHENG: Can I ask the Parties to provide at some stage or if I have it--if it is in the Bundle, then I have missed it--the original disclosure statement by Mr. Remón? I don't think I find it in the evidence that has been filed, if that can be provided to me later. The reason I ask for that is that I remember--I can't remember which side made a comment about some general statements of disclosure made by Mr. Remón that his firm has acted for someone about something related to Argentina. I may have totally misremembered and, therefore, I ask to see the source document."), 142:5-11 ("MEMBER CHENG: Before you move on, can you help me with the--your case on the waive of point? Are they applicable to both Professor Kaufmann-Kohler as well as Professor Remón, and if so, how? Either you, yourself, will deal with it or maybe if Mr. Di Rosa is going to deal with it, I'd like to be clearer on that point."), 145:4-6 ("MEMBER CHENG: So that applies--your waiver applies only to Professor Remón and not Kaufmann-Kohler?"), 197:6-16 ("MEMBER CHENG: Just to let you know what I think I understand--and I may be wrong, and if that's the case, someone will correct me. I thought Argentina was saying that in the letter of the 16th of April, which I believe it's on your next slide, it was when Professor Remón said that the firm has traditionally provided legal advisory services, and, therefore, it must have gone back to those times. That was the implication that they got there about the timing. I believe that that's how they put it in what they have said."); Corrected Transcript of the Annulment Hearing (English version), 3 June 2014, 350:18-351:8 ("MEMBER CHENG: Just one question that I'd like to give primarily to EDF to comment on. Argentina has set out a lot in their written submissions, but I don't think I've heard how you want to deal with it, and this is the question of the duty to disclose. You talked about Professor Remón's duty to disclose and out of abundance of caution, his letter, dated the 18th of April, if I remember correctly, as an indication and et cetera. How would you comment on Professor Kaufmann-Kohler's duty to disclose in the light of what Professor Remón has done comparatively? Is there anything you want to say about that?").

[105] Grounds for the Disqualification Proposal, ¶¶ 47-52.

selective confirms that the information connecting her with Freshfields in the past was deliberately omitted. It was Ms. Cheng who selected the data to be included in her *curriculum vitae* and the data to be left out. She displayed the same behaviour in changing her declaration in relation to the annulment proceedings in which she had participated or was participating at the time of accepting her appointment in this proceeding. In this arbitration, Ms. Cheng has deliberately chosen not to include any information relating to the law firms litigating against Argentina. This is yet another element that fuels Argentina's justifiable doubts about her lack of independent judgment.

88. This regrettable situation in which Ms. Cheng has placed the parties, and even the other members of the Committee, has been brought about by her alone—by failing to disclose (i) her past links at the time of accepting her appointment and (ii) the fact that, during this proceeding, she received a proposal from Freshfields (which involved being given instructions by such firm)—and can be solved through her resignation. Furthermore, the Argentine Republic reserves its right to disclose the details of Ms. Cheng's links with Freshfields to all other States having an interest in the ICSID dispute settlement mechanism.

V. PRAYER FOR RELIEF

89. In light of the foregoing, the Argentine Republic requests:

(a) that Ms. Teresa Cheng resign as a member of the *ad hoc* Committee in this annulment proceeding;

(b) in the alternative, that the majority of the Committee accept this proposal to disqualify Ms. Teresa Cheng; and

(c) that Total be ordered to pay all costs and expenses arising out of the disqualification proposal, on account of Claimant's failure to disclose the relationships between its law firm and one of the members of the *ad hoc* Committee.

Respectfully submitted on 24 August 2015,

[SIGNATURE]
Dra. Angelina M.E. ABBONA
Treasury Attorney-General