INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceeding between

VICTOR PEY CASADO AND FOUNDATION "PRESIDENTE ALLENDE"

Claimants

AND

THE REPUBLIC OF CHILE

Respondent

ICSID Case No. ARB/98/2

DECISION ON THE PROPOSAL TO DISQUALIFY SIR FRANKLIN BERMAN QC AND MR. V.V. VEEDER QC

Chairman of the Administrative Council
Dr. Jim Yong Kim

Secretary of the Tribunal
Mr. Benjamin Garel

Date: 21 February 2017

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I. PROCEDURAL HISTORY

1. On 18 June 2013, Victor Pey Casado and the Foundation Presidente Allende (the "**Claimants**") submitted a Request for Resubmission of their dispute against the Republic of Chile ("**Chile**" or "**Respondent**") to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**").[1]

2. On 8 July 2013, the Secretary-General of ICSID registered the Request for Resubmission pursuant to Article 52(6) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"), and Rule 55(2) of the ICSID Rules of Procedure for Arbitration Proceedings ("**ICSID Arbitration Rules**").

3. On 24 December 2013, the Secretary-General of ICSID notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was deemed to have been constituted on that date, in accordance with ICSID Arbitration Rule 6(1). Mr. Paul Jean Le Cannu, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal. Mr. Benjamin Garel, ICSID Legal Counsel, was subsequently designated to serve as Secretary of the Tribunal in the stead of Mr. Le Cannu.

4. The Tribunal was composed of Sir Franklin Berman QC, a national of the United Kingdom, President, appointed by the Chairman of the Administrative Council pursuant to Article 38 of the ICSID Convention; Professor Philippe Sands QC, a national of France and the United Kingdom, appointed by the Claimants; and Mr. Alexis Mourre, a national of France, appointed by the Respondent.

5. The Tribunal was reconstituted on 31 January 2014, following the resignation of Professor Philippe Sands QC. The Claimants appointed Mr. V.V. Veeder QC to replace Professor Sands QC. The Parties received copies of the *curricula vitae* and declarations of each member of the Tribunal upon acceptance of their appointment. The *curricula vitae* of Sir Franklin Berman QC and Mr. V.V. Veeder QC indicated that they are members of Essex Court Chambers.

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[1] The Request for Resubmission followed the partial annulment, on 18 December 2012, of the initial award rendered in this case on 8 May 2008.

6. On 11 March 2014, the Tribunal held its first session with the Parties. During the first session, the Parties confirmed that the Tribunal was properly constituted and that they had no objection to the appointment of any member of the Tribunal.

7. On 17 March 2016, the Tribunal closed the proceeding and on 13 September 2016, the Tribunal rendered its Award (the "**Award**").

8. By letter dated 20 September 2016 addressed to the Secretary-General of ICSID, the Claimants requested that Sir Franklin Berman QC and Mr. V.V. Veeder QC make a number of disclosures concerning the relationship between their chambers – Essex Court Chambers – and the Republic of Chile.

9. By letter dated 9 October 2016 addressed to the Chairman of the Administrative Council of ICSID and the Secretary-General of ICSID, the Claimants requested that the Secretary-General confirm whether the Republic of Chile had complied with its obligation to disclose its relationship with Essex Court Chambers during the resubmission proceeding. The Claimants requested that the Republic of Chile make full disclosure before 17 October 2016.

10. By letter dated 12 October 2016, the Secretary-General of ICSID advised that Sir Franklin Berman QC and Mr. V.V. Veeder QC had each confirmed that no circumstance had arisen during the resubmission proceeding that required disclosure under ICSID Arbitration Rule 6(2).

11. By a second letter dated 12 October 2016, the Secretary-General of ICSID replied to the Claimants' letter dated 9 October 2016 and confirmed that all correspondence received from the Respondent in the resubmission proceeding had been transmitted to the Claimants and the Tribunal.

12. By letter dated 13 October 2016 addressed to Sir Franklin Berman QC and Mr. V.V. Veeder QC, the Claimants advised that after the issuance of the Award, they had learned of the existence of a professional relationship between members of Essex Court Chambers and the Republic of Chile during the resubmission proceeding. The Claimants requested that Sir Franklin Berman QC and Mr. V.V. Veeder QC inquire into and make disclosures concerning

this relationship so the Claimants could assess whether a legitimate doubt existed as to the impartiality and independence of the arbitrators.

13. By letter dated 17 October 2016, Sir Franklin Berman QC replied to Counsel for the Claimants as follows:

> *Dear Me Garcès,*
>
> *You wrote on 13 October posing a long series of questions to me in my capacity as President of the Resubmission Tribunal in the dispute between Mr Victor Pey Casado and others and the Republic of Chile. With the delivery of its Award last month, the Tribunal completed the task conferred on it. It has not subsequently been called into being for any other purpose under the ICSID Arbitration Rules. I am nevertheless responding to your letter in the same spirit of friendly courtesy as has characterized the conduct of the resubmission proceedings.*
>
> *The Secretary-General of ICSID has, so I understand, already replied to an earlier letter from you, after consultation with me, to convey my confirmation that there was nothing subsequent to my appointment as presiding arbitrator that had called for any supplementary declaration by me under the Arbitration Rules.*
>
> *You are, I am sure, aware that an English barristers' chambers is not a law firm, and that all barristers in chambers operate in strict independence of one another, with the sole exception of the circumstance in which more than one of them is retained by the same client to act in the same matter. I would not therefore in any case be able to answer your questions, as the governing rules impose on each barrister the strictest confidence over the affairs of his clients, so that it would be prohibited for me to make enquiries of fellow members of chambers about the work undertaken by them.*
>
> *I hope that it is not necessary for me to add that at no stage during the resubmission proceedings have I had any discussion of any kind about the case other than with my co-arbitrators, the Secretary to the Resubmission Tribunal, and Dr Gleider Hernandez, the Tribunal's assistant. I would have been deeply distressed had you thought otherwise.*
>
> *With kind and collegial regards,*

14. By letter dated 17 October 2016, Mr. V.V. Veeder QC replied to Counsel for the Claimants as follows:

> *Cher M. Garcès,*
>
> *Je me réfère à : (i) votre lettre du 20 septembre 2016 (adressée à Mme la Secrétaire générale du CIRDI) ; (ii) votre lettre du 13 octobre 2016*

(adressée à Sir Frank Berman et moi-même) ; et (iii) la lettre du 12 octobre 2016 de Mme la Secrétaire Générale (adressée à vous-même).

Je confirme ce que Mme la Secrétaire Générale vous a écrit dans sa lettre : à ma connaissance, aucune circonstance n'est survenue, depuis ma déclaration du 3I janvier 2014 jusqu'à la sentence du 13 septembre 20l6, justifiant d'être notifiée en application de l'article 6(2) du Règlement d'arbitrage du CIRDI.

Je confirme, aussi, que je n'ai eu aucune relation professionnelle d'affaires ou autre avec les parties dans cet arbitrage.

Si je comprends bien les questions que vous m'avez posées dans votre seconde lettre, vous demandez des informations confidentielles concernant d'autres barristers exerçant leurs professions d'avocats au sein de Essex Court Chambers.

Etant donné que tous les barristers de Essex Court Chambers (comme d'autres chambers en Angleterre et au Pays de Galles) exercent à titre individuel et ne constituent donc pas une « law firm », un « partnership » ou une « company », je regrette de ne pas être en mesure de vous répondre. D'après le Code of Conduct du Bar Standards Board, chaque barrister est indépendant et « must keep the affairs of each client confidential » (Core Duty 6). En bref, ces informations confidentielles, quelles qu'elles soient, ne peuvent être ni ne sont connues de moi.

Je vous prie d'agréer, mon cher confrère, l'expression de mes salutations distinguées.

V.V. Veeder QC

15. By letter dated 18 October 2016, the Claimants notified ICSID of two alleged errors in the Award, and asked the Tribunal to make the previously requested disclosures and to hear the Parties regarding the alleged conflict of interest arising from the relationship between the Respondent and Essex Court Chambers.

16. By letter dated 20 October 2016, the Secretary-General of ICSID reminded the Claimants that no proceeding had been initiated under Articles 49, 50 or 51 of the ICSID Convention and therefore the requests addressed to the Tribunal by the Claimants in their letter dated 18 October 2016 could not be transmitted to it.

17. On 27 October 2016, the Claimants submitted a Request for Rectification of the Award pursuant to Article 49 of the ICSID Convention. The Request for Rectification reiterated the request for inquiry and disclosure by Sir Franklin Berman QC and Mr. V.V. Veeder QC. The

Claimants asked them to resign from the rectification tribunal should they not make such inquiry and disclosure.

18. The Request for Rectification further requested that the rectification proceeding be suspended until the tribunal called upon to interpret the initial award of 8 May 2008 had issued its interpretation decision.

19. By email dated 4 November 2016, the Respondent asked the Secretary-General of ICSID for four weeks to file its response regarding the proper procedure to follow in the circumstances presented by the Claimants' submissions.

20. By email dated 5 November 2016, the Claimants opposed the Respondent's request for a four-week time limit.

21. On 8 November 2016, the Acting Secretary-General of ICSID registered the Request for Rectification of the Award. By letter of the same day, the Acting Secretary-General of ICSID invited the Parties to submit their requests regarding the procedure, conduct and timetable of the rectification proceedings to the Tribunal.

22. By letter dated 10 November 2016, the Claimants submitted requests for suspension of the rectification proceeding and for further disclosure by the Tribunal.

23. By letter dated 16 November 2016, the Tribunal invited the Respondent to indicate by 30 November 2016 whether it consented to the requested rectifications.

24. By letter dated 17 November 2016, the Respondent asked the Tribunal to order the Claimants to submit a Spanish translation of the Request for Rectification.

25. By letter dated 21 November 2016, the Tribunal indicated that Sir Franklin Berman QC and Mr. V.V. Veeder QC had nothing further to add to their previous correspondence.

26. By a second letter dated 21 November 2016, the Tribunal denied the Claimants' request to suspend the rectification proceeding, and set the procedural timetable for the rectification proceeding.

27. On 22 November 2016, the Claimants proposed the disqualification of Sir Franklin Berman QC and Mr. V.V. Veeder QC (the "**Challenged Arbitrators**") in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Proposal**").

28. By letter dated 29 November 2016, the Centre informed the Parties that the rectification proceeding was suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural calendar for the Parties' submissions on the Proposal.

29. By letter dated 2 December 2016, the Respondent requested an amendment of the procedural calendar for the Parties' submissions. By letter dated 4 December 2016, the Centre informed the Parties that the procedural calendar had been amended as requested.

30. By letter dated 4 December 2016, Sir Franklin Berman QC submitted his explanations concerning the Proposal. The letter read:

> *Dear Dr Kim,*
>
> *I have been informed by the Secretary-General that a proposal has been lodged for my disqualification as an arbitrator in respect of the ancillary proceedings in relation to the resubmission, following a partial annulment, of the dispute between Mr Victor Pey Casado and the Foundation President Allende and the Republic of Chile (ARB/98/2). As you know, the resubmission tribunal, over which I presided, completed its mandate with the issue of its award on 13 September 2016, but was subsequently called back into being on a request for rectification of that award.*
>
> *In order not to impose any unnecessary delay in your consideration of the matter, I write to say at once that there is nothing I wish to say, or need to say, on the substance of the proposal for my disqualification; I am content for you to decide the matter on the record as it stands, though I naturally stand ready to answer any questions you may wish to put to me.*
>
> *In saying this, I wish merely to draw attention to certain aspects of the record: -*
>
> *1) It is not correct to say that I declined to make disclosure. The request was originally put to me through the Secretary-General, and my reply was promptly conveyed, through the Secretary-General, that disclosure had been made in the standard terms at the time of my appointment, and that nothing had happened since then to call for further disclosure. I drew attention to this in my letter to counsel for the claimants. When counsel subsequently wrote to me direct to convey his personal esteem and*

admiration, I understood this to mean that he recognized that there could be no objection to the impartiality and independence with which I had carried out my functions in the case. Both letters are attached for ease of reference.

2) I note that the disqualification proposal bases itself on a professional engagement said to have been made by the respondent state with a fellow member of my Chambers a short while before the issue of the resubmission award, a matter of which I was entirely unaware (nor could I have been aware of it) until it was raised by counsel some weeks after the resubmission award had issued.

3) I note finally a suggestion in the papers that the resubmission tribunal had pressed ahead with the rectification proceedings in undue haste, and attach therefore, for completeness' sake, a copy of the Centre's letter to the parties which sets out the schedule laid down by the tribunal under Arbitration Rule 49(3).

31. On 5 December 2016, the Claimants submitted a Spanish version of their Proposal.

32. By email dated 11 December 2016, Mr. V.V. Veeder QC submitted his explanations concerning the Proposal. The email read:

Dear Mr Garel (as Secretary to the Tribunal),

I refer to the timetable established by the ICSID Secretariat's second letter dated 29 November 2016 under ICSID Arbitration Rule 9(3), whereby I am invited to respond in writing to the formal challenge made by the Claimants to my independence as a co-arbitrator (nominated by the Claimants in this arbitration), within the meaning of Article 14(1) of the ICSID Convention.

Save for one matter, I think it inappropriate here to add to the written response made by my letter dated 17 October 2016 addressed to the Claimants' counsel (copied to the Parties), the contents of which I here confirm (a copy is attached; it is also Pièce 16 to the Claimants' formal challenge of 22 November 2016).

That matter relates to my voluntary resignation in 2007 as the presiding arbitrator in the ICSID arbitration, Vanessa Ventures v Venezuela (ICSID Case No ARB/05/24). The Claimants' counsel (who was not personally involved) has misunderstood the relevant circumstances in that case, citing it several times in support of the Claimants' challenge (e.g. see paragraph 39 of the Claimants' said challenge and Pièces 1, 4, 10, 12, 13 & 17).

I resigned in that ICSID arbitration because I learnt at the jurisdictional hearing, for the first time, that one of the counsel acting for the claimant (Vanessa Ventures) was an English barrister who was, at that time, also co-counsel with me acting for a different party in a different and unrelated

ICSID Case. I did not resign because he and I were both members of the same barristers' chambers. Before the jurisdictional hearing, I did not know that this counsel was acting for Vanessa Ventures; nor could have I taken any legitimate steps by myself to check for any such conflict owing to the confidential nature of every English barrister's professional practice.

The circumstances in Vanessa Ventures related to an actual conflict caused by counsel within the same arbitration and not to counsel extraneous to the arbitration. To my understanding, the former circumstances are not present in this case (nor so alleged by the Claimants).

Yours Sincerely,

V.V. Veeder QC

33. On 16 December 2016, the Respondent submitted its response to the Proposal (the "**Response**").

34. By letter dated 30 December 2016, the Claimants asked ICSID to transmit to them certain documents relating to the resignation of Mr. V.V. Veeder QC in the *Vannessa Ventures Ltd. v. Venezuela* case (ICSID Case No. ARB(AF)/04/6, to allow the Claimants to assess the validity of the explanations provided by Mr. V.V. Veeder QC.

35. By letter dated 1 January 2017, ICSID informed the Parties that case documents other than those published on the ICSID website are not public and cannot be disclosed by the Centre.

36. By email dated 13 January 2017, the Claimants asked that ICSID seek the approval of the parties in the *Vannessa Ventures Ltd. v. Venezuela* case to disclose the documents referred to in their letter dated 30 December 2016.

37. On 13 January 2017, the Claimants submitted further observations regarding the Proposal (the "**Observations**").

38. By email dated 18 January 2017, ICSID invited the Claimants to contact the parties in the *Vannessa Ventures Ltd. v. Venezuela* case directly.

39. By letter dated 27 January 2017, the Claimants informed ICSID that they invited the parties in the *Vannessa Ventures Ltd. v. Venezuela* case to provide the relevant documents to the Secretary of the Tribunal. The Claimants also requested that the Chairman of the

Administrative Council be allowed to review the documents in question *in camera*, should either party refuse to disclose these documents to the Claimants.

II. PARTIES' ARGUMENTS

A. The Claimants' Position

40. The Claimants' arguments were set forth in their Proposal of 22 November 2016 and their Observations of 13 January 2017. These arguments are summarized below.

1) The Appearance of a Conflict of Interest

41. The Claimants submit that on 18 September 2016, two days after the Award was rendered, the Respondent publicly revealed in the Chilean press that Professor Alan Boyle and Mr. Samuel Wordsworth QC, two barristers member of Essex Court Chambers, were representing Chile in cases before the International Court of Justice ("**ICJ**").[2]

42. According to the Claimants, this fact could create an apparent conflict of interest arising from the relationship between the Respondent, Essex Court Chambers and the Challenged Arbitrators, who are also members of these chambers.

43. The Claimants submit that: (i) the Republic of Chile is one of the most important clients of Essex Court Chambers, which is paid to provide legal advice and representation in relation to matters of strategic importance; (ii) the Respondent has a financial interest in seeing the remedies available to the Claimants under Articles 49, 50 and 51 of the ICSID Convention decided in its favor; (iii) the circumstances establish that Essex Court Chambers has an interest in the success of its client, the Republic of Chile; (iv) the Challenged Arbitrators' explanations did not comply with the standards for conflicts of interest applied by English courts and were designed to maintain the lack of transparency and impropriety of the Chile-Essex Court Chambers relationship; and (v) the refusal to make the requested disclosure breached ICSID Arbitration Rule 6(2).[3]

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[2] Proposal, paras. 8-9.

[3] Observations, paras. 111-118.

44. The Claimants assert that an appearance of conflict was exacerbated by the refusal of the Challenged Arbitrators to make the requested disclosure of the relationship between their chambers and the Respondent. They contend that the Challenged Arbitrators' responses to the request for disclosure demonstrate that they were not transparent about such a relationship.[4]

a) English Law

45. The Claimants assert that the Challenged Arbitrators' refusal to disclose information about the relationship between the Respondent and other barristers in their chambers is not justified under English law.[5]

46. The Claimants rely on a decision from the High Court of England and Wales dated 2 March 2016, which they allege dealt with similar circumstances and where the barrister made disclosures.[6]

47. The Claimants also rely on the Informational Note Regarding Barristers in International Arbitration issued by the Bar Council of England and Wales, which refers to the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 ("**IBA Guidelines**"). For the Claimants, the position of the Bar Council of England and Wales contradicts the position of the Challenged Arbitrators regarding their inability to reveal any links between members of their chambers and the Respondent.[7]

b) IBA Guidelines on Conflicts of Interest

48. The Claimants state that the IBA Guidelines are applicable in this case, and argue that the Respondent has accepted this by previously invoking the Guidelines in these proceedings.[8] They add that the Secretary-General of ICSID previously applied the IBA Guidelines in this case.

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[4] Proposal, paras. 10-15.

[5] Proposal, paras. 8-26.

[6] Proposal, paras. 17-21.

[7] Proposal, para. 22.

[8] Proposal, paras. 56-58

49. According to the Claimants, under the IBA Guidelines, a conflict may arise on the basis of an appearance, rather than actual, partiality and dependence.[9]

50. They cite a passage from the IBA Guidelines, which states that, "*Although barristers' chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers' chambers, disclosure may be warranted in view of the relationships among barristers, parties or counsel.*"[10] In this respect, the Claimants submit that the Challenged Arbitrators' membership in Essex Court Chambers creates a "Non-Waivable Red List" type of conflict, which the IBA Guidelines describe as follows: *"1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom."*[11]

51. The Claimants submit that the Challenged Arbitrators had a duty to investigate possible conflicts of interests under the IBA Guidelines, and to disclose them to the Parties. Yet, the Claimants add, the Challenged Arbitrators exempted themselves from this duty in their letters dated 17 October 2016.[12] This, the Claimants argue, went against the principle of *nemo iudex ese debet in causa sua*.

52. Under the IBA Guidelines, the Challenged Arbitrators should not have accepted their appointment or should have resigned if they could not make a disclosure because of professional secrecy or confidentiality rules.[13]

c) ICSID Convention and Case Law

53. The Claimants assert that failure to disclose the Essex Court Chambers-Chile relationship is incompatible with the ICSID arbitration system, which requires arbitrators to be independent

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[9] Proposal, paras. 43-51.

[10] Proposal, para. 23.

[11] Proposal, paras. 24-25.

[12] Proposal, paras. 60-64

[13] Proposal, paras. 65-68.

and impartial, to judge equitably, and to continuously disclose any relationship or circumstance that would cause their reliability for independent judgement to be questioned.[14]

54. The Claimants cite the decision on disqualification in *Caratube v. Kazakhstan* which held that an arbitrator could not be expected to maintain a Chinese wall in his own mind. The Claimants argue that the Challenged Arbitrators seem to be relying on the existence of a Chinese wall to refuse to make the requested disclosure.[15]

55. The Claimants further rely on the decision on disqualification in *Lemire v. Ukraine* in which an arbitrator disclosed that his firm had received instructions from the respondent regarding an ICJ case and offered to resign. They note that the Challenged Arbitrators have not made any disclosure and refused to resign in this case.[16]

56. According to the Claimants, the response of the Challenged Arbitrators in their letters of 17 October 2016 contradicts the ruling of the tribunal in *Hrvatska v. Slovenia*, which stated that :

> *For an international system like that of ICSID, it seems unacceptable for the solution to reside in the individual national bodies which regulate the work of professional service providers, because that might lead to inconsistent or indeed arbitrary outcomes depending on the attitudes of such bodies, or the content (or lack of relevant content) of their rules. It would moreover be disruptive to interrupt international cases to ascertain the position taken by such bodies. (...).*[17]

57. The Claimants also submit that the conduct of the Challenged Arbitrators in this proceeding contradicts the conduct of Mr. V.V. Veeder QC in the *Vannessa Ventures v. Venezuela* case, where Mr. V.V. Veeder QC resigned as president of a tribunal because a member of his chambers acted as counsel for the claimant in the same case.[18]

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[14] Proposal, paras. 27-33.

[15] Proposal, para. 34, citing *Caratube International Oil Company LLP and Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No ARB/13/13), Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014.

[16] Proposal, para. 35.

[17] Proposal, para. 38.

[18] Proposal, paras. 39-40.

58. The Claimants further submit that the IBA Guidelines apply to all arbitrators in ICSID cases, regardless of their experience and reputation.[19]

59. The Claimants argue that arbitrators have an obligation to disclose facts and circumstances that give rise to doubts as to their impartiality or independence, stating that "*impartiality*" is "*absence of bias, prejudgment and conflict of interest*".[20] The Claimants contend that the Challenged Arbitrators' responses and decisions after 20 September 2016 were not justified,[21] and that their replies to ICSID were evasive, incomplete[22] and biased.[23] The Claimants add that the decisions rendered by the Tribunal since 13 October 2016 are not impartial.[24]

d) Chilean Rules on Ethics

60. The Claimants refer to a statement from the Chilean Bar Association, that when several attorneys are members of the same professional team, disqualifying circumstances for one member constitute disqualifying circumstances for all members, regardless of the form that team takes. The declaration further indicates that such a conflict of interest does not require a formal business tie between individuals as long as they operate their business "*under the same roof.*"[25]

e) Other Sources

61. Finally, the Claimants cite an article by Professor William W. Park stating that conflicts of interest might occur in the absence of shared profits between barristers from the same chambers.[26]

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[19] Proposal, paras. 43-51.

[20] Proposal, para. 42; Observations, paras. 38-40, 89.

[21] Observations, paras. 41-47.

[22] Observations, paras. 41, 48-51, 74-87.

[23] Observations, paras. 41, 52-66, 74-87.

[24] Observations, paras. 67-73.

[25] Proposal, paras. 54-55.

[26] Proposal, para. 26.

2) The Circumstances of This Case

a) The Respondent's Previous Conduct

62. The Claimants submit that the failure to disclose by the Challenged Arbitrators is particularly serious given that the initial award of 8 May 2008 found that the Respondent had committed a denial of justice by concealing the existence of a Chilean court decision which had a major effect on the course of the arbitration.[27] The Claimants also allege that the Respondent has continuously sought to place the Tribunal under its direct or indirect control or to derail the proceeding, which prolonged the case and increased its costs.[28]

b) Admissibility and Promptness

63. The Claimants contend that Article 57 of the ICSID Convention applies to all proceedings provided for in Chapter IV ("Arbitration") of the Convention.[29] They add that ICSID Arbitration Rule 9 does not distinguish between arbitrators acting in proceedings governed by Articles 50, 51 and 52 of the ICSID Convention from arbitrators acting in proceedings under Article 49 of the Convention.[30]

64. The Claimants also submit that the Proposal was submitted one day after the Tribunal formally rejected their requests for full disclosure, and therefore was submitted promptly under Article 57 of the ICSID Convention and ICSID Arbitration Rule 9(1).[31] The Claimants state that they became aware of the Chile-Essex Court Chambers relationship on 20 September 2016, two days after the Respondent mentioned it in the Chilean press, and five days after the Award was rendered. Therefore, they learned about the relationship after the Tribunal became *functus officio*. The Claimants also assert that the Proposal was filed before closing the rectification proceeding, in compliance with ICSID Arbitration Rule 9.[32]

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[27] Proposal, para. 52.

[28] Proposal, paras. 52-53 ; Observations, paras. 98-118.

[29] Observations, paras. 1-2.

[30] Observations, para. 3.

[31] Proposal, paras. 74-84.

[32] Observations, paras. 5-6, 14-16, 88.

c) Waiver

65. For the Claimants, the Respondent's argument that the "*Claimants have waived their right to object on the basis of Essex Court Barristers representing Chile before the ICJ*" has no merit, for the following reasons. First, very little time elapsed between the time the Claimants became aware of the relationship between Chile and Essex Courts Chambers and the Claimants' first requests for further disclosures.[33] Second, under English and French law, an arbitrator must disclose relevant facts even if those are in the public domain.[34] Third, the Respondent had an obligation to disclose the relationship between Chile and Essex Courts Chambers.[35]

66. The Claimants therefore request that the Chairman of the Administrative Council of ICSID uphold the Proposal and that all costs and fees incurred by the Claimants in connection with it be borne by the Respondent.[36]

B. The Respondent's Position

67. The Respondent's arguments opposing the Claimants' Proposal were set forth in its submission of 16 December 2016. These arguments are summarized below.

1) Relevant Background

68. The Respondent lists the background information that it contends is necessary to evaluate this Proposal.[37] In particular, the Respondent describes the process to constitute the resubmission Tribunal.[38] After the Claimants appointed Professor Philippe Sands QC to the Tribunal, the Respondent asked the Centre to inquire with Professor Sands concerning his role in an ICJ case between Chile and Bolivia. Professor Sands advised the Parties that he was not acting

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[33] Observations, para. 89.

[34] Observations, para. 89.

[35] Observations, paras. 89-96.

[36] Observations, para. 118.

[37] Response, paras. 3-25.

[38] Response, paras. 4-12.

as legal counsel for Bolivia in that ICJ case, nor was he involved in any proceeding for or against Chile. [39]

69. The Respondent also recalls that the Secretary-General of ICSID attached Sir Franklin Berman QC's *curriculum vitae* to the letter informing the Parties of ICSID's intention to propose his appointment as President of the Resubmission Tribunal, and that the *curriculum vitae* identified Sir Franklin Berman QC as a member of Essex Court Chambers.[40]

70. The Respondent adds that the Essex Court Chambers website explains that it "*is not a firm, nor are its members partners or employees. Rather, Chambers is comprised of individual barristers, each of whom is a self-employed sole practitioner.*" The Essex Court Chambers website further explains that members of chambers commonly appear on opposing sides in the same dispute, including in arbitration proceedings, or in front of other Essex Court Chambers members acting as arbitrators, with protocols in place to safeguard confidentiality.[41]

71. The Respondent also notes that when Sir Franklin Berman QC was proposed by ICSID, other members of Essex Court Chambers were acting as counsel in ICJ proceedings involving Chile: Mr. Vaughan Lowe QC was representing Bolivia in a case against Chile and Mr. Samuel Wordsworth QC was representing Chile in another case against Peru. The Respondent submits that neither the ICSID Secretariat nor the Claimants raised any concerns when Sir Franklin Berman QC was proposed and then appointed, [42] nor did the Claimants object when Sir Franklin Berman QC accepted his appointment.[43] Rather, the Claimants expressly stated that Sir Franklin Berman QC satisfied the requirements of Article 14 of the ICSID Convention.[44]

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[39] Response, para. 4.

[40] Response, para. 6.

[41] Response, para. 7.

[42] Response, para. 9.

[43] Response, para. 10.

[44] Response, para. 9.

72. The Respondent also notes that the Claimants appointed another barrister member of Essex Court Chambers, Mr. V.V. Veeder QC, to replace Professor Sands QC on the Resubmission Tribunal.[45] The *curriculum vitae* of Mr. V.V. Veeder QC was provided to the Parties when he accepted his appointment. It identified Mr. V.V. Veeder QC as a member of Essex Court Chambers.[46]

73. The Respondent adds that between the first session of the Tribunal on 11 March 2014 and the hearing in London in April 2015, "*various media outlets reported on the progress of the Bolivia v. Chile dispute, and mentioned that Samuel Wordsworth — the Essex Court Chambers barrister who had represented Chile in the Peru v. Chile dispute — had also joined the team representing Chile in Bolivia v. Chile*" and that the "*Claimants never expressed any concern about these developments.*"[47]

74. The Respondent notes that the Claimants complained and began asking for disclosures of information about the relationship between Chile and members of Essex Court Chambers only after the Award was issued to the Parties, on 13 September 2016, and after Chile's Foreign Affairs Minister announced on 18 September 2016 that Professor Alan Boyle of Essex Court Chambers was also representing Chile in the most recent ICJ case against Bolivia.[48]

2) The Claimants' Proposal is Inadmissible

75. The Respondent submits that there has never been an arbitrator challenge in an ICSID rectification proceeding and that Article 49(2) of the ICSID Convention and ICSID Arbitration Rule 49 do not provide for this possibility. It argues that rectification proceedings are incompatible with arbitrator challenges and allowing a challenge would undermine the

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[45] Response, para. 11.

[46] Response, para. 11.

[47] Response, para. 12 (footnotes omitted), referring to several press articles: **Exhibit R-36**, *Wordsworth: 'La frontera marítima entre Chile y Perú es un tema zanjado hace mucho,'* LA NACIÓN, 14 December 2012; **Exhibit R-39**, *Chile cambia estrategia ante La Haya*, LA TERCERA, 12 April 2014; **Exhibit R-40**, *Bolivia llevará 'El mar', un texto de la demanda marítima, al G77*, LA RAZÓN, 24 May 2014; **Exhibit R-41**, *La Haya: Defensa de Chile se reúne con abogados internacionales por demanda de Bolivia*, LA TERCERA, 8 December 2014; **Exhibit R-42**, *La Haya: Estos fueron los argumentos de Chile en el primer día de alegatos ante Bolivia*, LA NACIÓN, 4 May 2015; **Exhibit R-43**, *Los equipos que representan a Chile y Bolivia en la Haya*, EMOL, 4 May 2015; **Exhibit R-44**, *Chile to World Court: No Negotiation on Sea Access for Bolivia*, PAN AM POST, 11 May 2015; **Exhibit R-47**, *Chile defenderá ante La Haya validez y carácter de tratado limítrofe con Peru*, LA TERCERA, 6 December 2012

[48] Response, para. 14.

very nature of the rectification remedy.[49] In support, the Respondent cites the Commentary to the 1968 version of the ICSID Arbitration Rules which explains that "[u]*nlike an interpretation, revision or annulment of an award . . . [,] the rectification of an award can* ***only*** *be made by the Tribunal that rendered the award.*"[50] The Respondent also cites Professeur Schreuer, who submits that if "*for* ***whatever*** *reason, the original tribunal is no longer available,* ***the remedy of Art. 49(2) [i.e., supplementation and rectification] cannot be used.***"[51]

76. The Respondent submits that rectification is a *sui generis* remedy, independent from the other provisions of the ICSID Convention and that ICSID Arbitration Rule 49 expressly provides that only ICSID Arbitration Rules 46 to 48 apply in a rectification proceeding.[52] It notes that the Claimants base their Proposal on Articles 57 and 58 of the ICSID Convention and on ICSID Arbitration Rule 9 but never explain why these provisions should apply.[53]

77. The Respondent therefore concludes that the Proposal is inadmissible because the ICSID Convention and Arbitration Rules preclude arbitrator challenges in a rectification proceeding.[54]

3) The Claimants' Proposal is Unfounded

78. The Respondent submits that the party seeking disqualification under Article 57 of the ICSID Convention must identify a fact that would cause a reasonable person to infer that the challenged arbitrator manifestly cannot be relied upon to exercise independent and impartial judgement. A simple belief or assertion of conflict of interest is insufficient.[55]

79. The Respondent notes that the only facts relied on by the Claimants are that the Challenged Arbitrators: (i) were acting as arbitrators in the resubmission proceeding while other members

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[49] Response, paras. 26, 27, 30.

[50] Response, para. 27, citing ICSID Arbitration Rules (1968), Note D to Arbitration Rule 49 (emphasis added by the Respondent).

[51] Response, para. 27, citing C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, Art. 49, ¶ 36 (2d. ed. 2009) (emphasis added by the Respondent).

[52] Response, paras. 28, 29.

[53] Response, para. 28.

[54] Response, para. 30.

[55] Response, para. 32.

of Essex Court Chambers were counsel in ICJ cases involving Chile; (ii) did not disclose this in their ICSID Arbitration Rule 6(2) declarations; and (iii) did not respond satisfactorily to the Claimants' demands for information.[56]

80. For the Respondent, these facts cannot justify disqualification for the following reasons: (i) barristers' chambers are not treated as equivalent to law firms for conflict purposes;[57] (ii) both Sir Franklin Berman QC and Mr. V. V. Veeder QC complied with their obligation to disclose pertinent information to the Parties and were justified in not acceding to an unreasonable demand for information that they did not and could not have had;[58] (iii) it was public knowledge throughout the entire resubmission proceeding that barristers from Essex Court Chambers were representing the Respondent before the ICJ, and the Claimants waived their right to rely on such a publicly known fact by not submitting their challenge promptly;[59] and (iv) the Claimants' disagreement with the Tribunal's adverse ruling not to suspend the rectification proceeding is not a viable basis for disqualification.[60]

81. The Respondent concludes that the Claimants' Proposal is inadmissible, unfounded and frivolous, and requests that the challenge be summarily rejected with the Claimants paying the Respondent's costs and fees incurred in connection with this Proposal.[61]

III. ANALYSIS

82. Three main issues were addressed by the Parties in relation to the disqualification Proposal:

i. was the Proposal made promptly as required by ICSID Arbitration Rule 9(1);

ii. can a proposal for disqualification be made in a rectification proceeding pursuant to ICSID Arbitration Rule 49; and

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[56] Response, para. 33.

[57] Response, paras. 34-36.

[58] Response, para. 37.

[59] Response, para. 38-39, referring to *Burlington Resources, Inc. v. Ecuador* (ICSID Case No. ARB/08/5), Decision on Proposal for Disqualification (13 December 2013) ("***Burlington***"), para. 67.

[60] Response, para. 40.

[61] Response, para. 42.

iii. if the answers to (i) and (ii) above are affirmative, do the facts described in the Proposal establish that the Challenged Arbitrators manifestly lack reliability to exercise independent judgment, justifying a disqualification under Articles 57 and 14 of the ICSID Convention?

83. With respect to timeliness, ICSID Arbitration Rule 9(1) reads as follows:

> *A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.*

84. The ICSID Convention and Rules do not specify the period of time within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.[62]

85. As stated in *Suez*, "*an orderly and fair arbitration proceeding while permitting challenges to arbitrators on specified grounds also normally requires that such challenges be made in a timely fashion.*"[63] Previous tribunals have found that a proposal was timely when filed within 10 days of learning the underlying facts,[64] but untimely when filed after 53 days,[65] 147 days,[66] or 6 months.[67]

86. In this instance, the Claimants argue that the representation of Chile by Essex Court Chambers barristers was made public for the first time a few days after the Award was issued on 13 September 2016, through a statement made by a Government official in a Chilean newspaper

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[62] *Burlington*, para. 73; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and 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 (May 05, 2014) ("***Conoco***"), para. 39; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 04, 2014) ("***Abaclat***"), para. 68; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and 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 (July 1, 2015) ("***Conoco et al.***"), para. 63.

[63] *Suez*, para. 18.

[64] *Urbaser*, para. 19.

[65] *Suez*, paras. 22-26.

[66] *CDC Group PLC v. Republic of Seychelles* (ICSID Case No.ARB/02/14), Decision on Annulment (June 29, 2005), para. 53.

[67] *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on proposal for Disqualification of an Arbitrator (November 6, 2009), para. 41

article.[68] This is disputed by the Respondent, which claims that the representation of Chile in ICJ proceedings by Essex Court Chambers barristers was public knowledge throughout the resubmission proceedings.

87. It is undisputed that both parties knew that Sir Franklin Berman QC and Mr. V.V. Veeder QC were members of Essex Court Chambers since their respective appointments.

88. The evidence in the record of the case shows that information concerning Chile's representation by Essex Court Chambers barristers in ICJ proceedings had been publicly available since December 2012. In particular, it was reported in the press that Mr. Samuel Wordsworth QC, one of the Essex Court Chambers barristers identified by the Claimants, was acting for Chile in certain ICJ proceedings.[69]

89. The 18 September 2016 article relied on by the Claimants as evidence of a hitherto secret relationship between Essex Court Chambers and Chile does not support this assertion. The article simply notes Chile's representation by another Essex Court Chamber barrister, Professor Alan Boyle, in another ICJ case separate from that involving Mr. Wordsworth QC.[70]

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[68] Exhibits 6 and 7 to the Proposal.

[69] By way of example, the Respondent appended several media articles published between December 2012 and May 2015 that expressly referred to the participation of Essex Court Chambers barristers as counsel for Chile in ICJ cases: **Exhibit R-47**, article published by LA TERCERA on 6 December 2012 regarding Mr. Wordsworth's role in the Peru-Chile maritime border case at the ICJ; **Exhibit R-36**, article published by LA NACIÓN on 14 December 2012 regarding Mr. Wordsworth's first intervention at the hearing in the Peru-Chile maritime border case at the ICJ; **Exhibit, R-39**, article published by LA TERCERA on 12 April 2014 regarding a change of Chile's strategy in the in the Peru-Chile maritime border case at the ICJ and mentioning Mr. Wordsworth as one of Chile's counsel; **Exhibit R-40**, article published by LA RAZÓN on 24 May 2014 regarding the Bolivia-Chile Pacific Ocean access case at the ICJ and mentioning Mr. Wordsworth as one of Chile's counsel; **Exhibit R-41**, article published by LA TERCERA on 8 December 2014 regarding a meeting of Chile's legal team in the Bolivia-Chile Pacific Ocean access case and mentioning Mr. Wordsworth as one of Chile's counsel; **Exhibit R-42**, article published by LA NACIÓN on 4 May 2015 Bolivia's preliminary objections in the Bolivia-Chile Pacific Ocean access case and mentioning Mr. Wordsworth as one of Chile's counsel; **Exhibit R-43**, article published by EMOL on 4 May 2015 presenting the legal teams of both parties in the Bolivia-Chile Pacific Ocean access case and mentioning Mr. Wordsworth as one of Chile's counsel; and **Exhibit R-44**, article published by PAN AM POST on 11 May 2016 regarding the hearing in in the Bolivia-Chile Pacific Ocean access case and mentioning Mr. Wordsworth as one of Chile's counsel.

[70] Exhibits 6 and 7 to the Proposal. The relevant parts of the article read:

> ***Stephen McCaffrey, Laurence Boisson de Chazournes and Alan Boyle, Chile's legal counsel for the Silala***
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> *Chile is currently working on the preparation of its memorial for the claim it has filed against Bolivia for the Silala River, which has to be filed at the Court on July 3rd of next year.*
>
> *[...]*
>
> *The Minister does not hide his enthusiasm when he speaks about the Silala's claim, and the strategy followed in this regard, which included an "advanced" and secretive search for international counsel,*

90. The record further shows that, throughout the arbitration and resubmission proceedings, the Claimants have referred to and cited numerous others press articles.[71]

91. The regular introduction of press articles and statements into the evidentiary record by the Claimants indicates that they have been following the press on a regular basis. The Claimants have used the same or similar sources as those in which information about Essex Court Chambers barristers representing Chile before the ICJ was published.[72]

> *who have been working for months – until now, in absolute secrecy - with the team lead by the agent Ximena Fuentes and the co-agents Juan Ignacio Piña and María Teresa Infante.*
>
> *[...]*
>
> *Today, for the first time, the Minister of Foreign Affairs revealed the names of three of these counsel, whom he does not hesitate to qualify as "eminent figures". They are Stephen McCaffrey, Laurence Boisson des Chazournes and Alan Boyle.*
>
> *[...]*
>
> *The Briton, Alan Boyle, is a professor at the University of Edinburgh, Scotland, and a specialist in the law of the sea and environmental law. Like Samuel Wordsworth – Chile's counsel in the maritime case- he is a member of the prestigious chambers Essex Courts Chambers.* (translated from Spanish)

[71] **Exhibit C-172**, *Declaración del Ministro de Bienes Nacionales*, LA SEGUNDA, 14 May 2002, submitted with the Claimants' supplementary submission on the merits dated 11 September 2002; **Exhibit C-205**, *Declaración del Ministro de Bienes Nacionales*, LA SEGUNDA, 22 August 2002, submitted with the Claimants' supplementary submission on the merits dated 11 September 2002; resubmitted as Exhibit C-M39 with the Claimants' Memorial on resubmission, dated 27 June 2014; **Exhibit C-207**, *Intervención del CDE en caso "Clarin" es intransable*, LA SEGUNDA, 21 August 2002; submitted with the Claimants' supplementary submission on the merits dated 11 September 2002; resubmitted as Exhibit C-M40 with the Claimants' Memorial on resubmission, dated 27 June 2014; **Exhibit C-209**, *Testa reconoce asesoría al Gobierno antes de defender a los indemnizados*, EL MERCURIO, 29 August 2002; submitted with the Claimants' supplementary submission on the merits dated 11 September 2002; resubmitted as Exhibit C-M32 with the Claimants' Memorial on resubmission, dated 27 June 2014; **Exhibit DP041**, *Loan Wolf*, FINANCIAL TIMES, 23 September 2005, submitted with the Claimants' Rejoinder on Annulment dated 28 February 2011; **Footnote 254**, Weiniger and Page, *An ad hoc Committee has granted annulment on unusual grounds. But does the Committee's reasoning add up?* GLOBAL ARBITRATION REVIEW, No. 1, 2007, pp.12-13, submitted in the Claimants' Reply on Annulment dated 15 October 2010; **Exhibit 1**, *Indemnización al PC*, EL MERCURIO, 3 March 2008, submitted with the Claimants' Request for Revision of the Initial Award of 8 May 2008 dated 2 June 2008; **Exhibit C-M44**, *Declaración del representante de Chile*, LA TERCERA, 20 April 2008, submitted with the Claimants' Memorial on resubmission dated 27 June 2014; and **Exhibit ND39bis**, *El Gobierno no ha leido bien la sentencia del CIADI o se esta equivocando en la interpretación*, EL CLARIN DIGITAL, 22 January 2013, submitted with the Claimants' Request for Resubmission dated 18 June 2013.

[72] The Chairman of the Administrative Council notes that this information also was and still is widely reported in a number of other online sources, easily accessible to the public. For instance, another Chilean press article published on 5 May 2015 referred to "*Samuel Wordsworth, another London lawyer, from Essex Street [sic] Chambers*" as counsel for Chile in the Chile-Bolivia case before the ICJ (*See 'Chile mostró sus cartas en La Haya; llega el turno de Bolivia*', LA RAZÓN, 5 May 2015 (translated from Spanish: "*Samuel Wordsworth, otro abogado londinense, de Essex Street [sic] Chambers*"), available at http://la-razon.com/index.php?_url=/nacional/demanda_mar%C3%ADtima/Chile-mostro-cartas-turno-Bolivia_0_2265373488.html. An article published by Global Arbitration Review on 29 January 2014 reporting on the ICJ decision in the Chile-Peru case, and freely available through a Google search, also mentions: "*Chile's advocates included [...] Samuel Wordsworth QC of Essex Court Chambers* (*See ICJ draws Peru-Chile maritime boundary,* GLOBAL ARBITRATION REVIEW, 29 January 2014. Available at http://www.bmaj.cl/pdf/900_icj-draws-peru-ch.pdf) Mr. Wordsworth QC's biography on the Essex Court Chambers' website also mentions expressly "*Notable cases as counsel include: before the ICJ, the Bolivia v Chile case concerning the obligation to negotiate access to the Pacific Ocean (for Chile), [...]the Peru v Chile [...] maritime boundary case (for Chile [...])*" The involvement of Essex Court Chambers barristers as counsel for Chile in ICJ proceedings is also mentioned on the ICJ website: http://www.icj-cij.org/docket/index.php?p1=3&p2=3.

92. It is standard practice for a party to perform a conflict search of arbitrators at the time they are appointed, and, in particular, regarding its own candidate for appointment. The Claimants appointed Mr. V.V. Veeder QC in January 2014, long after several public sources had mentioned Mr. Wordsworth's representation of Chile. If the Claimants were concerned about potential conflicts of interests arising out of the client relationships of other barristers at Essex Court Chambers, they could have raised this point at the time the Challenged Arbitrators were appointed. This would have been prudent in particular since, as is widely known, barristers' chambers take the view that barristers operate in strict independence of one another and chambers are not treated as equivalent to law firms for conflict purposes. There is no indication in the record that the Claimants had any concern of this kind.

93. When the Claimants appointed Mr. V.V. Veeder QC and agreed to the appointment of Sir Franklin. Berman QC, they knew that the Challenged Arbitrators were both members of Essex Court Chambers. At the same time, media regularly reported on Mr. Wordsworth's representing Chile in an unrelated case, and Claimants regularly relied on evidence from these same media outlets during the proceedings. In the specific circumstances of the present case, it appears that sufficient information was publicly available to the Claimants during the resubmission proceeding and they therefore knew or should have known that other barristers from Essex Court Chambers were acting for the Republic of Chile in the ICJ proceedings.

94. For the challenge to have been filed *promptly* in this case, it should have been filed early in the resubmission proceeding, and in any event before the closure of those proceedings. The resubmission tribunal, as reconstituted, commenced proceedings in January 2014, closed the proceedings in March 2016 and rendered the Award dismissing the Claimants' case on 13 September 2016. The Claimants made an inquiry into the representation of Chile by Essex Court Chambers barristers for the first time on 20 September 2016 and their Proposal was submitted on 22 November 2016. The Chairman of the Administrative Council finds that the Proposal cannot be considered as having been filed "*promptly*" for the purposes of ICSID Arbitration Rule 9(1), and must be dismissed.

IV. DECISION

95. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Chairman dismisses the Claimants' Proposal to disqualify Sir Franklin Berman QC and Mr. V.V. Veeder QC.

Chairman of the ICSID Administrative Council
Dr. Jim Yong Kim