CIADI Caso ARB/98/2

CASO VICTOR PEY CASADO Y
FUNDACIÓN ESPAÑOLA «PRESIDENTE ALLENDE»
c. LA REPÚBLICA DE CHILE

PROCEDIMIENTO DE RECTIFICACIÓN DE ERRORES MATERIALES EN EL LAUDO DEL 13 DE SEPTIEMBRE DE 2016

RESPETUOSA PROPUESTA MOTIVADA DE RECUSACIÓN DEL ÁRBITRO SR. V.V. VEEDER QC

Que las partes Demandantes presentan a la Sra. Secretaria General del CIADI en conformidad con los artículos nos. 14(1), 57 y 58 de la Convención y 9(1) del Reglamento de arbitraje del CIADI

Traducción del original en francés

Washington, 23 de febrero de 2017

PROPUESTA MOTIVADA DE RESPETUOSA RECUSACION DEL ÁRBITRO MR. V.V. VEEDER QC

23 de febrero de 2017

Señora Meg Kinnear
Secretaria General del CIADI
Banco Mundial
1818 H Street, N.W.
WASHINGTON D.C. 20433

Ref.: Victor Pey Casado y Fundación Presidente Allende c. República de Chile (Caso No. ARB-98-2. Nueva sumisión- Rectificación)

Señora Secretaria General,

1. El 11 de diciembre de 2016 ha sobrevenido en el presente procedimiento, regido por el artículo 49(2) de la Convención del CIADI, un hecho que plantea dudas razonables en cuanto a la imparcialidad y la neutralidad del Sr. V. V. Veeder exigidas en los artículos 14(1) y 52(1)(d) de la Convención del CIADI.

   Tal hecho consiste en un engaño -en la forma de una omisión deliberada- del Sr. Veeder en su respuesta al Centro en ocasión del tratamiento de un conflicto aparente de intereses en el procedimiento iniciado el 27 octubre 2016 y regido por el artículo 49(2) de la Convención:

   > *"El hecho en el origen de la propuesta de recusación ha sido puesto en conocimiento de la Fundación española el 20 de septiembre de 2016, a saber, la declaración de un miembro del Gobierno de Chile desvelando públicamente relaciones* ***sigilosas*** *con las Essex Court Chambers de las que son miembros esos dos árbitros.*
   >
   > *No se trata en la especie de relaciones con un* barrister *aislado como afirma el Sr. Berman el 4 de diciembre de 2016, sino de que esa Oficina ha devenido durante el presente arbitraje la principal referencia de los intereses estratégicos del Estado chileno en Londres, y de que, por ello, éste tiene una influencia objetiva considerable sobre esa oficina de abogados.*
   >
   > *Las relaciones prolongadas e importantes que existen entre el Estado de Chile y los organismos que de éste dependen, por una parte, y las Essex Court Chambers y miembros de éstas, por otra parte, genera un conflicto aparente de intereses, y pueden influenciar a los árbitros, consciente o inconscientemente, a fin de no perder la confianza de un cliente tan importante, muy verosímilmente en posición de gran influencia sobre las Essex Court Chambers."*[1]

2. Es un hecho conocido que una verdad a medias se convierte en engaño cuando la parte omitida en la respuesta oculta la sustancia de lo que es el objeto de la cuestión planteada. Es de universal notoriedad pública estos días, guardadas sean todas las distancias, que una respuesta oral incompleta a la cuestión planteada ha provocado la

[1] Doc. nº 1, las partes Demandantes al Sr. Presidente del Consejo Administrativo del CIADI, 13 de enero de 2017, §§14, 15, 117

dimisión del Asesor de Seguridad Nacional de los EE.UU.[2] En la especie, la omisión del Sr. Veeder ha tenido lugar por escrito, siendo así que el umbral del deber de no ocultar información cuando se trata de un árbitro que se dirige al Centro no puede ser inferior a ningún otro dada su obligación de ser imparcial y neutral.

I. ADMISIBILIDAD DE LA PROPUESTA DE RECUSACIÓN

3. La parte Demandada ha sostenido ante el CIADI que una propuesta de recusación no puede ser formulada en un procedimiento de rectificación de errores del artículo 49 del Reglamento de arbitraje. Esta objeción no ha sido tomada en consideración en la Decisión del 21 de febrero de 2017 del Sr. Presidente del Consejo administrativo del CIADI porque, antes de considerarla, el Presidente ha estimado que era extemporánea la propuesta del 22 de noviembre de 2016 por un conflicto de intereses entre los Sres. árbitros Berman y Veeder y el Estado de Chile[3] :

> *"For the challenge to have been filed promptly in this case, it should have been filed early in the resubmission proceeding* [en 2013], *and in any event before the closure of those proceedings* [en marzo de 2016]. *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. »*[4] (subrayado añadido).

La propuesta es admisible en el procedimiento del artículo 49 (2) de la Convención del CIADI

4. El respeto de la independencia e imparcialidad de los árbitros son principios generales del derecho a los que reenvía la Convención (artículo 42(1)).

5. No puede haber al respecto una inadmisibilidad de principio en virtud de la especificidad del procedimiento. Ello crearía un precedente grave, en contradicción flagrante con los principios de equidad procesal (*due process).*

6. La Convención no dispone que las partes en el procedimiento regido por el artículo 49(2) deberían imperativamente someterse a árbitros que pudieran hallarse en una situación sobrevenida de sesgo o falta de imparcialidad. Una pretensión en sentido

---

[2] Doc. nº 2, *Key for Michael Flynn resignation was misleading*, The Washington Times del 14 de febrero de 2017, accesible en http://bit.ly/2kQCzcj, igualmente el The Washington Post de 16 de febrero de 2017 : *Trump asked for Flynn's resignation Monday night following reports in The Washington Post that revealed Flynn had misled Vice President Pence in denying the substance of the call* , accesible en http://wapo.st/2lslOpX

[3] Doc. nº 3, Decisión de 21 de febrero de 2017 del Presidente del Consejo Administrativo del CIADI sobre la respetuosa propuesta motivada de recusación de los árbitros Sres. Sir Franklin Berman QC y V.V. Veeder QC por un conflicto aparente de intereses, §§ 75-77, 82

[4] I*bid.*, §94

contrario choca con la fuerza imperativa, sin excepciones, del artículo 57 de la Convención y de las Reglas de arbitraje 9 y 11.

7. El artículo 57 de la Convención del CIADI figura en el Cap. V (*«Sustitución y recusación de conciliadores y árbitros»*), de aplicación general, que dispone:

> *"Cualquiera de las partes podrá proponer a la Comisión o Tribunal correspondiente la recusación de cualquiera de sus miembros por la carencia manifiesta de las cualidades exigidas por el apartado (1) del Artículo 14.»*

La pretensión del Estado Demandado de establecer una discriminación en la aplicación del artículo 57 en alguno de los procedimientos regidos por el Cap. IV de la Convención («El *arbitraje*»), en particular por el artículo 49(2), no tiene fundamento alguno. *Ubi lex non distinguit, nec nos distinguere debemus.*

8. El Cap. I del Reglamento de arbitraje (*«Establecimiento del Tribunal»*), también de aplicación general, dispone en el artículo 11(1) que *«cualquier vacante que se produce por recusación de un árbitro»* será tratada de la misma manera que el fallecimiento de un árbitro, sin discriminar el Tribunal del que forma parte. Dado que el procedimiento del artículo 49(2) de la Convención no hace imposible que un árbitro puede fallecer o ejercitar el derecho de dimitir, de ello se desprende que tanto la recusación como el fallecimiento o la dimisión de un árbitro son compatibles con el procedimiento del art. 49(2) de la Convención y la Regla nº 11(1).

9. El Estado Demandado ha sostenido que *«the ICSID Convention does not contemplate any mechanism for challenging a member of a rectification tribunal (...) arbitrator challenges and rectification proceedings are incompatible*", o que *by their very nature, rectification proceedings are incompatible with arbitrator challenges*, porque, en su parecer, la Nota explicativa «D» de la Regla de arbitraje 49(2) preparada por el Secretariado del Centro y publicada en abril de 1982 afirma:

> *Unlike an interpretation, revision or annulment of an award (. . .) the rectification of an award can* ***only*** *be made by the Tribunal that rendered the award.*[5]

El Estado Demandado al reproducir esta cita la ha truncado, y ha desnaturalizado así su sentido y alcance, pues esa Nota agrega:

> *If, for any reason, the Tribunal cannot be reconvened, the only remedy would be a proceeding under Chapter VII of these Rules* (la frase subrayada ha sido omitida por el Estado Demandado).

10. Sin perjuicio de la interpretación sistemática y contextual que pudiera hacer el Tribunal de arbitraje en el ejercicio de su competencia (art. 41(1) de la Convención), en el supuesto caso de que una vacante en el Tribunal no pudiera ser cubierta la Convención asegura a las partes, según la *Nota* en cuestión, los remedios previstos en el Capítulo VII, a saber, los regidos por los artículos nos. 50, 51 y 52.

[5] Docs. nº 21, página 1, y nº 4, §27, comunicación de Estado de Chile al Centro el 29 de noviembre y 16 de diciembre de 2016, respectivamente

11. Es igualmente inadmisible la pretensión del Estado Demandado de situar el artículo 49(2) -que figura en el Cap. IV, Sección 4 de la Convención, que se corresponde con el Cap. VI del Reglamento («*El Laudo*») – al margen de las Reglas generales de procedimiento so pretexto de la Regla nº 53[6] cuya aplicación se circunscribe a dicho Cap. VII del Reglamento – el que se corresponde con la Sección 5, a saber «*aclaración, revisión y anulación del laudo*» del Cap. IV de la Convención.

Esa pretensión de Chile no respeta el principio de derecho según el cual la *lex specialis* en el marco del Cap. VII del Reglamento -la Regla nº 53- no necesariamente anula los efectos de la *lex generalis* -el artículo nº 57 del Cap. V de la Convención y las Reglas nos. 9 y 11 del Cap. I del Reglamento.

12. Figura igualmente en el Cap. I del Reglamento de arbitraje el artículo 9 *(«Recusación de los árbitros»)*, que no distingue entre les árbitros que integran el Tribunal del procedimiento regido por el art. 49(2) de la Convención o el de alguno de procedimientos regidos por los artículos 50, 51 y 52.

La propuesta se formula sin demora

13. El artículo nº 9(1) del Reglamento prevé que «*La parte que proponga la recusación de un árbitro de conformidad con el Artículo 57 del Convenio presentará su propuesta al Secretario General sin demora y en todo caso antes que se cierre el procedimiento, dando a conocer las causales en que la funde.*"

14. Ni el artículo 57 de la Convención ni el artículo 9(1) del Reglamento de arbitraje establecen el plazo para formular la propuesta de recusación:

> *As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case-by-case basis.*[7]

---

[6] La Regla de arbitraje nº 53 dispone: "***Normas procesales***. *Estas Reglas se aplicarán* mutatis mutandis *a todo procedimiento relacionado con la aclaración, revisión o anulación de un laudo y a la decisión del Tribunal o Comité.*»

[7] Doc. nº 5, *ConocoPhillips Petrozuata B.V. et al., v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 39 (May 5, 2014), accesible en http://bit.ly/2lOciOX ; ver igualmente doc. nº 20, *Abaclat & Others v. Argentina*, ICSID Case No. ARB/07/05, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 68 (Dec. 4, 2014); *Cemex Caracas Investments BV (Netherlands), Cemex Caracas II Investments BV (Netherlands) v. Venezuela*, ICSID Case No. 08/15, Decision on the Proposal to Disqualify a Member of the Tribunal, ¶ 36 (Nov. 6, 2009) ("*Rule 9(1) does not fix a quantifiable deadline for submission of challenges," it is "on a case by case basis that tribunals must decide whether or not a proposal for disqualification has been filed in a timely manner*"), accesible en http://bit.ly/2lgve5n (en ingles) y http://bit.ly/2kTFAvX (en castellano).

15. En los casos *RSM Production Co. v. St. Lucia*[8] y *Abaclat*[9] ha sido considerado razonable un intervalo de 28 y 30 días tras haber tenido conocimiento de las decisiones en que se basa la propuesta de recusación.

16. El presente procedimiento de corrección de errores materiales regido por el artículo 49(2) ha comenzado con la introducción de la demanda el 27 de octubre de 2016, registrada y comunicada el 8 de noviembre siguiente a las partes y al Tribunal de arbitraje[10].

17. El 30 de noviembre de 2016 la Señora Secretaria General del CIADI ha suspendido el procedimiento:

> *« Article 58 of the ICSID Convention provides that the proposal to disqualify Sir Franklin Berman and Mr. Veeder i.e., a majority of the Tribunal, will be decided by the Chairman of the Administrative Council. In accordance with ICSID Arbitration Rule 9(6), the proceeding is suspended until a decision has been taken on the proposal… »*[11]

18. La referida respuesta que el Sr. V.V. Veeder ha dirigido al Centro el 11 de diciembre de 2016 ha sido comunicada a las Demandantes el siguiente 13 de diciembre. Trece días laborables después aquellas la han objetado y han solicitado que el Centro aporte los documentos siguientes

1) **La comunicación del Centro del 27 de abril de 2007 y las declaraciones a la misma unidas de dos miembros del Tribunal de arbitraje** sobre el Sr. Greenwood, miembro de las Essex Court Chambers,

2) **Las observaciones del 3 de mayo de 2007 de la representación de Venezuela,**
parte Demandada, a las mencionadas declaraciones del 27 de abril de 2007,

3) **La carta que el 4 de mayo de 2007 el Tribunal ha dirigido a la parte Demandante,** invitándola a formular observaciones a la del 3 de mayo de la Demandada**,**

4) **La transcripción de la parte de las audiencias del 7 de mayo de 2007** en que las partes expresan sus puntos de vista sobre la participación del Sr. Greenwood en el caso; **la parte en que el Sr. Veeder dimite de la Presidencia del Tribunal de arbitraje** y

5) la decisión de los co-árbitros de aceptar la dimisión del Sr. Veeder.

---

[8] Doc. nº 6, *RSM Production Co. v. St. Lucia*, ICSID Case No. ARM/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith, QC, ¶ 73 (Oct. 23, 2014), accesible en http://bit.ly/2mogXUw

[9] Doc. nº 20, *Abaclat and Others v. Argentine Republic,* ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, ¶ 69, accesible en http://bit.ly/2moGpJt

[10] Carta de 8 de noviembre de 2016 de la Señora Secretaria General *p. i.* del CIADI a las partes con copia a los miembros del Tribunal de arbitraje

[11] Comunicación de la Señora Secretaria General del CIADI el 30 de noviembre de 2016

19. El 27 de enero de 2017 las Demandantes solicitaron igualmente del Centro

> *«que se permita al Sr. Presidente del Consejo administrativo tomar conocimiento **in camera** de dichos documentos a partir del ejemplar que obra en los archivos del CIADI (...) ».*[12]

20. La cuestión relativa a la respuesta del Sr. Veeder del 11 de diciembre de 2016 no ha sido resuelta en la Decisión del 21 de febrero de 2017 del Sr. Presidente del Consejo administrativo del CIADI, que tampoco ha decido sobre la objeción. Lo que concierne a ésta y a aquella no ha sido juzgado pues el referido procedimiento iniciado el 22 de noviembre de 2016 ha sido considerado extemporáneo[13] (sin perjuicio de que la Decisión no tiene el efecto de cosa juzgada),

> *« 92. (...) 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 [2013] the Challenged Arbitrators were appointed... ».*

La respuesta escrita del Sr. Veeder del 11 de diciembre de 2016 ha sido excluida de este modo del período crítico establecido por el Presidente del Consejo administrativo para tenerla en cuenta.

21. El 22 de febrero de 2017 las Demandantes recibieron la comunicación de la Señora Secretaria General, fechada la víspera, en la que indica

> *In accordance with ICSID Arbitration Rule 9(6), the proceeding is resumed today.*

El siguiente día 23 de febrero ha sido formulada la presente propuesta.

22. En consecuencia, la propuesta de recusación de los árbitros es admisible en el marco del procedimiento regido por el artículo 49(2) de la Convención iniciado el 27 de octubre de 2016.

***

II. EL ENGAÑO COMETIDO POR EL SR. VEEDER EL 11 DE DICIEMBRE DE 2016.

23. La cuestión planteada por las Demandantes el 22 de noviembre de 2016[14] fue la siguiente:

---

[12] Doc. nº 3, Decisión del 21 de febrero de 2017 del Sr. Presidente del Consejo Administrativo del CIADI, §§34-39

[13] *Ibid.*, §§ 92-95

[14] Doc. nº 7, respetuosa propuesta de recusación de los Sres. Sir Franklin Berman y V.V. Veeder por un conflicto aparente de intereses, 22 de noviembre de 2016, §§39, 40, 51

"en agosto de 2008, en otro arbitraje CIADI, era el propio Sr. V. V. Veeder quien en su calidad de presidente del Tribunal de arbitraje ha dimitido después de conocerse que otro miembro de las Essex Court Chambers tenía relaciones con una de las partes[15] :

> On May 20, 2005, the Parties informed the Centre that they had jointly appointed Mr. V.V. Veeder, a British national, as the third and presiding arbitrator (…) on May 7, 2007, the hearing on jurisdiction took place in London (…) the following persons appeared as legal counsel and representatives for the Claimant: (…) Prof. Greenwood of Essex Chambers. (…) The following persons appeared on behalf of the Respondent as its legal counsel and representatives: Messrs. (…) Kelby Ballena (…) Mr. Paolo Di Rosa and Ms. Gaela Gehring Flores of Arnold & Porter LLP (…). During the session, after hearing the Parties' positions regarding the participation of Prof. Greenwood in the case, the President of the Tribunal submitted his resignation. His resignation was accepted by his two co-arbitrators, Judge Brower and Mr. Paulsson (…). [Subrayado añadido].[16]

24. La respuesta del Sr. Veeder al Centro el 11 de diciembre de 2016 fue la siguiente:

> *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).*[17]
> *I resigned in that ICSID arbitration* [Vanessa] *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****.* (Subrayado añadido).

25. El Sr. Veeder no ha aportado prueba alguna en respaldo de esta respuesta.

Las pruebas de que la respuesta del Sr. Veeder es incompleta y engañosa

26. El primer indicio de que en su respuesta escrita del 11 de diciembre de 2016 el Sr. Veeder ha faltado a su deber de plena sinceridad y neutralidad hacia el Centro (y las Demandantes) obra, en primer lugar, en el texto de la *Decision on Jurisdiction* del

---

[15] ICSID Case No. ARB(AF)/04/6, *Decision on Jurisdiction*, 22 August 2008, páginas 7-9, accesible en http://www.italaw.com/sites/default/files/case-documents/ita0888.pdf
[16] Docs. nos. 2, 14, 16 y 21 de la propuesta de recusación de 22 de noviembre de 2016, Doc. aquí anexo nº 7
[17] Doc. nº 8, respuesta del Sr. V.V. Veeder al Centro, 11 de diciembre de 2016

Tribunal del caso *Vanessa Ventures v. Venezuela*[18], del 22 de agosto de 2008, donde en base a hechos objetivos queda establecido, negro sobre blanco, que **el Sr. Veeder no se enteró *at the jurisdictional hearing***, que tuvo lugar el 7 de mayo de 2007, de la presencia de un *barrister* miembro de esas mismas Chambers, sino antes :

1) La identidad del abogado de Vanessa, el *barrister* de las Essex Court Chambers Mr. Christopher **Greenwood**, había sido comunicada doce días antes del *hearing*, **el 25 de abril de 2007**, al Tribunal de arbitraje cuyo Presidente desde el 20 de mayo de 2005 era precisamente el Sr. Veeder,

2) La presencia del Sr. **Greenwood** provocó comunicaciones de dos de los árbitros al CIADI;

3) Estas comunicaciones de los dos árbitros fueron transmitidas por el Centro a las partes **el 27 de abril de 2007**, diez días antes del inicio de las audiencias:

   « *On April 27, 2007, the Centre transmitted to the Parties further declarations by two Tribunal members with respect to Prof.* ***Greenwood***»;

4) El **3 de mayo de 2007** los abogados de la Demandada contestaron la carta de los dos árbitros;

5) El **4 de mayo de 2007**, cuatro días antes de las audiencias, el Tribunal

   "*invited the Claimant to provide any observations which it might have with respect to the Respondent's letter in this matter*".

27. La transcripción literal de la referida *Decision on Jurisdiction* del Tribunal de *Vanessa Ventures v. Venezuela,* página 10, desmiente lo que el Sr. Veeder ha hecho saber al Centro el 11 de diciembre de 2016:

> *On* ***April 25, 2007****, the Tribunal was provided with a revised list of participants for the upcoming hearing on jurisdiction. Among the persons listed as representing the Claimant was Prof. Christopher* ***Greenwood****. On April 27, 2007, the Centre transmitted to the Parties further declarations by two Tribunal members with respect to Prof.* ***Greenwood****. On May 3, 2007, the Respondent submitted its observations on the further declarations. On May 4, 2007, the Tribunal invited the Claimant to provide any observations which it might have with respect to the Respondent's letter in this matter. The Claimant provided its observations the same day.*
>
> *As agreed,* ***on May 7, 2007****, the hearing on jurisdiction took place in London. At the hearing, the following persons appeared as legal counsel and representatives for the Claimant: (...) as well as Prof.* ***Greenwood of Essex Chambers****. (...) .*

[18] Doc. nº 25, *Vanessa Ventures v. Venezuela*, ICSID Case N° ARB(AF)/04/6, Decision on Jurisdiction, 22 de agosto de 2008

The following persons appeared on behalf of the Respondent as its legal counsel and representatives: Messrs. (...) Kelby Ballena (....) Mr. Paolo Di Rosa and Ms. Gaela Gehring Flores of Arnold & Porter LLP (...).[19]

***During the session, after hearing the Parties' positions regarding the participation of Prof. Greenwood in the case, the President of the Tribunal submitted his resignation**. His resignation was accepted by his two co-arbitrators, Judge Brower and Mr. Paulsson, in accordance with the Additional Facility Arbitration Rules.*

28. Fueron precisamente los abogados de Venezuela a la sazón - entre ellos los Sres. Paolo di Rosa, Kelby Ballena y la Señora Gehring Flores - quienes formularon una objeción precisa, **objetiva**, acerca del conflicto de intereses que significa el hecho de que el Sr. Veeder - miembro del Tribunal- pertenezca a las mismas Chambers que el otro miembro de éstas que mantiene relaciones profesionales con la parte Demandante -Vanessa- **en este mismo caso contra Venezuela**.

29. Es después de haber escuchado esta precisa objeción de los abogados de la Demandada cuando el Sr. Veeder dimitió del Tribunal de arbitraje.

30. Que esta objeción **objetiva** ha sido planteada efectivamente es un hecho indubitable. Lo que pensaba en su fuero interno el Sr. Veeder no es pertinente en la especie, como tampoco las otras alegaciones hechas por las distintas partes.

31. La comunicación que el Sr. Veeder ha dirigido el 11 de diciembre de 2016 al Centro es, pues, conscientemente incompleta, incluso engañosa, en cuanto que oculta esa precisa objeción, rigurosamente paralela a la planteada por las Demandantes el 22 de noviembre de 2016, y que había sido planteada específicamente en 2007 por quienes son hoy los abogados de la República de Chile en el presente caso.

32. En la comunicación que los abogados Sr. Paolo di Rosa y Sra. Gaela Gehring Flores han dirigido al Centro el 16 de diciembre de 2016 - en nombre de la República de Chile-, guardan silencio sobre el asunto en el que ellos mismos fueron protagonistas personales durante las audiencias de mayo de 2007, dando así cobertura al Sr. Veeder al reproducir las palabras que éste ha escogido a fin de excluir precisamente ese asunto:

> « *Ex-R34. Letter from V. V. Veeder to ICSID, 11 December 2016 (explaining that the reason that he resigned in the Vannessa Ventures arbitration was because there was an "**actual** conflict," and was **not** because he and one of the attorneys acting for the claimant were both members of the same barristers' chambers*) "[20] (subrayado en el original).

[19] Los Sres. Kelby Ballena, Paolo Di Rosa y la Señora Gaela Gehring Flores representan al Estado de Chile en el presente procedimiento de rectificación de errores materiales

[20] Doc. nº 9, *Chile's Response to Claimant's Request for Disqualification*, 16 de diciembre de 2016, nota a pie de página nº 91. La carta del Sr. Veeder al Centro del 11 de diciembre de 2016 figura en el doc. nº 8

33. Es así un hecho objetivo la connivencia entre el árbitro Sr. Veeder y una de las partes en el presente procedimiento de rectificación de errores- la República de Chile-, en perjuicio solamente de los inversores españoles.

34. El segundo elemento de la prueba de omisión engañosa obra en los documentos siguientes:

1) **La comunicación del Centro del 27 de abril de 2007 y las declaraciones a la misma unidas de dos miembros del Tribunal de arbitraje** sobre el Sr. Greenwood, miembro de las Essex Court Chambers,

2) **Las observaciones del 3 de mayo de 2007 de la representación de Venezuela, parte Demandada**, a las mencionadas declaraciones del 27 de abril de 2007,

3) **La carta que el 4 de mayo de 2007 el Tribunal ha dirigido a la parte Demandante,** invitándola a formular observaciones a la del 3 de mayo de la Demandada**,**

4) **La transcripción de la parte de las audiencias del 7 de mayo de 2007** en que las partes expresan sus puntos de vista sobre la participación del Sr. Greenwood en el caso; **la parte en que el Sr. Veeder dimite de la Presidencia del Tribunal de arbitraje** y

5) la decisión de los co-árbitros de aceptar la dimisión del Sr. Veeder.

35. En virtud del principio de igualdad de las partes ante las Reglas de procedimiento, que están en la base de toda jurisdicción arbitral, las Demandantes solicitan que los referidos cinco documentos sean unidos al presente incidente a fin de garantizar su derecho de defensa.

36. En la especie, el artículo 22 del Reglamento financiero y administrativo[21] del CIADI no es oponible a los principios de igualdad y defensa de las partes Demandantes.

En primer lugar porque, como afirma el Tribunal del caso *Helman v Egypt*[22] :

> *that Regulation 22 is non applicable to the present case on the ground that it deals with publication of the Award and other procedural documents -i.e. making them available to the public in general - but do not concern the production of documents to a third party who might have a legitimate interest to have access to these documents to establish its rights.*

Después, porque al invitar al Centro a que aporte esos cinco documentos del caso *Vanessa* el Tribunal de arbitraje puede -lo que las Demandantes le solicitan respetuosamente que haga -

---

[21] « ***Regla 22. Publicaciones.*** *(1) El Secretario General publicará de manera apropiada información sobre las actividades del Centro, incluyendo el registro de todas las solicitudes de conciliación y de arbitraje y, en su debida oportunidad, una indicación de la fecha y manera de terminación de cada procedimiento. (2) Si ambas partes en un procedimiento consienten en la publicación de: (a) los informes de las Comisiones de Conciliación; (b) los laudos; o (c) las actas y demás actuaciones del procedimiento.»*

[22] Doc. nº 10, *Helman International Hotels v Egypt*, Decision on jurisdiction, 17 de octubre de 2005, para. 22, accesible en http://bit.ly/2mofRrY

adoptar simultáneamente las disposiciones necesarias que aseguren la confidencialidad, sea mediante una medida de su propia iniciativa sea mediante una medida similar a la adoptada por el Tribunal del caso *Giovanna A. Beccara and Others v. Argentina* [23] :

> *All such documents (the "Confidential Documents") and all information derived therefrom, but not from any source independent of the Confidential Documents, are to be treated as confidential pursuant to the terms present Order.*
>
> *Confidential Documents and information derived therefrom shall be subject to this Order except if they (i) are already in the public domain at the time of designation; (ii) subsequently become public through means not in violation of this Order; or (iii) are disclosed to the receiving party by a third party who is not bound by any duty of confidentiality and who has the right to make such disclosure.*
>
> *2. All Confidential Documents and any information derived there from shall be used solely in the context of the present arbitration and shall not be used for any other purpose.*
>
> *3. Prior to the receipt of Confidential Documents or any information derived there from, any person authorised under paragraph 4(b), (c) and (d) below, shall execute a declaration substantially in the form of the declaration annexed hereto as Exhibit A.*
>
> *4. Confidential Documents or the information contained therein may be disclosed or described only to the following persons:*
>
> > *a) The Tribunal and its staff, including the staff of the International Centre for Settlement of Investment Disputes ("ICSID");*
> >
> > *b) Attorneys, counsel, paralegals and other staff of counsel for each Party;*
> >
> > *c) Representatives of the Parties (including in the case of Respondent, government officials and employees) who are actively engaged in, or who are responsible for decision making in connection with, the present arbitration; and*
> >
> > *d) Fact witnesses and consulting or testifying experts of the Parties. (...)*
>
> *8. All Confidential Documents and all information derived therefrom shall be securely stored by the persons authorised under paragraph 4 of the present Order when not actively in use, in such manner as to safeguard their confidentiality and to ensure they are accessible only to those persons.*
>
> *9. If the Tribunal makes use of Confidential Documents or information derived therefrom in any decision, including an arbitral award, it shall designate the portions relating to such document or information as confidential, and place them between brackets; the portions so designated shall not be disclosed by either party or any person authorised under paragraph 4 of the present Order.*
>
> *10. Within 30 days after the final conclusion of the dispute (including any appeals or settlement), counsel for each Party shall destroy (and shall certify in writing to counsel of the*

[23] Doc. nº 11, *Giovanna A. Beccara and Others v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order), 27 January 2010, §73, accesible en http://bit.ly/2maV2nK

other Party that it has destroyed) all Confidential Documents and any copies thereof, as well as any information derived therefrom, in whatever form, and that no person authorised under paragraph 4(b), (c) and (d) of the present Order remains in possession of such document or information. The Tribunal and its staff (excluding the staff of ICSID), shall destroy such documents and information within the same period of time, without prejudice to the provisions of paragraph 7.

37. Las Demandantes solicitan, pues, respetuosamente que el Tribunal de arbitraje invite al Centro a aportar esos cinco documentos al presente procedimiento de recusación.

***

III. FUNDAMENTOS DE LA PROPUESTA DE RECUSACIÓN

1. Las circunstancias del caso

38. En la especie, la mencionada respuesta del Sr. Veeder ha tenido lugar

1) en el contexto general descrito en la comunicación de los Demandantes al Centro del 22 de noviembre de 2016, que se adjunta (anexo nº 7, §53),

   y en las circunstancias específicas siguientes:

2) la información omitida el 11 de diciembre de 2016 había sido identificada el 27 de noviembre como un precedente importante para determinar la falta de imparcialidad o de independencia del árbitro;

3) esta omisión-negación, sobre un detalle preciso revelado por él mismo, el Sr. Veeder no la ha hecho inadvertidamente;

4) ha sido intencionada ;

5) no ha sido un efecto de la probidad del árbitro;

6) constituye una tentativa de ocultar una información que en modo alguno tiene relación con cuestiones confidenciales;

7) mientras los cinco documentos identificados anteriormente no estaban disponibles al público,

y, en consecuencia,

(8) no es « *the result of an honest exercise of judgment"*.

39. En derecho inglés el *barrister*/árbitro debe someterse a los mismos tests que el juez. Lord Goff ha afirmado:

> ***I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted, (…) has been whether the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him (…) I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. (…) for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him*** …[24] (subrayado añadido).

40. Como afirma la England and Wales High Court en la sentencia del asunto *Cofely Ltd v Bingham & Anor,* del 17 de febrero de 2016:

> *The tribunal's explanations as to his/her knowledge or appreciation of the relevant circumstances are also a factor which the fair-minded observer may need to consider when reaching a view as to apparent bias.*[25]

2. Violación del artículo nº 14 (deber de imparcialidad) en relación con el artículo nº 57 de la Convención

41. La exigencia de imparcialidad implica la ausencia de sesgo o predisposición hacia una de las partes. Junto con la exigencia de independencia, sirve para proteger a las partes contra los árbitros susceptibles de ser influenciados por factores distintos de los vinculados al fondo del caso[26].

42. La imparcialidad es un concepto abstracto, difícil de medir, pero es un

> *absolutely inalienable and predominant standard' in international arbitration. An arbitrator 'who is impartial but not wholly independent may be qualified, while an arbitrator who is not impartial must be disqualified'*[27].

---

[24] Anexo nº 12, *Regina v. Gough* [1993] House of Lords, AC 646, páginas 669- 670, por Lord Goff of Chieveley
[25] Anexo nº 13, *Cofely Ltd v Bingham & Anor* [2016] EWHC240 (Comm) (17 de febrero de 2016), §§69-73, 75
[26] Anexo nº 14, *Urbaser v. Argentina*, Challenge Decision, 12 de agosto de 2010, §43, accesible en http://bit.lv/2lvvzOf ; anexo nº 15, *Universal Compression v. Venezuela*, Challenge Decision, 20 de mayo de 2011, §70, accesible en http://bit.lv/2maYP4w
[27] Anexo nº 16, página 9, D. Bishop & L. Reed, '*Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration'*, 10 *Arb. Int.* (1998), 399, citando Redfern & Hunter, *The reputation and acceptability of the arbitral process depends on the quality of the arbitrators*, 221

43. La Convención del CIADI considera imperativo que cada árbitro está comprometido: «*juzgaré con equidad*» (artículo 6 del Reglamento de arbitraje).

44. En efecto, es generalmente aceptado que en el sistema CIADI los árbitros deben ser imparciales.[28]

45. Como ha afirmado el Tribunal del caso *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*[29]

> *a question arises with respect to the term "manifest lack of the qualities required" in Article 57 of the Convention. This might be thought to set a lower standard for disqualification than the standard laid down, for example, in Rule 3.2 of the IBA Code of Ethics, which refers to an "appearance of bias". The term "manifest" might imply that there could be circumstances which, though they might appear to a reasonable observer to create an appearance of lack of independence or bias, do not do so manifestly. In such a case, the arbitrator might be heard to say that, while he might be biased, he was not manifestly biased and that he would therefore continue to sit. As will appear,* ***in light of the object and purpose of Article 57 we do not think this would be a correct interpretation****. (….)* (Subrayado añadido).

46. Como ha recordado el Presidente del Consejo Administrativo del CIADI en su Decisión del 28 de diciembre de 2016[30], el término «manifiesto» empleado en el artículo 57 de la Convención del CIADI significa «evidente» («*evident*») o «flagrante» («*obvious*») y hace referencia a la facilidad con la cual el presunto defecto puede ser discernido.

Las tres versiones del artículo 14 de la Convención hacen igualmente fe y, por lo tanto, está admitido que los árbitros deben ser a la vez imparciales e independientes.

La independencia al igual que la imparcialidad « *protègent les parties contre le risque que les arbitres ne soient influencés par des facteurs autres que ceux liés au bien-fondé de l'affaire* ».

---

[28] Anexo nº 17, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decisión de la Propuesta de descalificación del Profesor Francisco Orrego Vicuña, 13 de Diciembre de 2013, §65, accesible en http://bit.ly/2lceJYc ; anexo nº 18, *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decisión de la Propuesta de Descalificación de Francisco Orrego Vicuña y Claus von Wobeser (Español), 13 de diciembre de 2013, §70, accesible en http://bit.ly/2mb8iJ1 ; anexo nº 19, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decisión de la Propuesta de las partes de descalificar a la mayoría del Tribunal, 12 de Noviembre de 2013, §58, accesible en http://bit.ly/2lcceF1 ; anexo nº 20. *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decisión de la Propuesta de Descalificar a la mayoría del Tribunal, 4 de febrero de 2014, §74

[29] Anexo nº 24, *Aguas del Aconquija v. Argentina* (ICSID Case No. ARB/97/3, Decisión del Desafío al Presidente del Comité, 3 de octubre de 2001 (Prof. J. Crawford SC, Prof. J. C. Fernández Rozas), §§20, 25, 26. El Tribunal ha tomado su decision especialmente sobre la base de las premisas siguientes : *"(a) that the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency; (d) that the work concerned does not consist in giving general legal or strategic advice to the Claimants but concerns a specific transaction, in which Ogilvy Renault are not the lead firm; (e) that the legal relationship will soon come to an end with the closure of the transaction concerned"*, estas premisas faltan en el caso de las relaciones entre el Estado de Chile y miembros de Essex Court Chambers; accesible en http://www.italaw.com/sites/default/files/case-documents/ita0208.pdf

[30] Anexo nº 22, *BSG Resources Limited et altri c. Guinée* (Affaire CIRDI ARB/14/22), Decisión sobre la propuesta de recusación de todos los miembros del tribunal de arbitraje, 28 de abril de 2016, accesible en http://bit.ly/2i3kCHZ

Los artículos 57 y 14(1) de la Convención del CIADI no exigen la prueba de una predisposición real; al contrario, es suficiente establecer la apariencia de predisposición.

El criterio jurídico aplicado a una propuesta de recusación de un árbitro es un «*critère objectif fondé sur une appréciation raisonnable des éléments de preuve par un tiers*».

47. Según el Presidente del Consejo Administrativo del CIADI[31],

> *« 59…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.*[32]
>
> *60. The applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party'*[33]*. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.*
>
> *61. Finally, regarding the meaning of the word 'manifest' in Article 57 of the Convention, a number of decisions have concluded that it means 'evident' or 'obvious.'*
>
> (Subrayados añadidos).

48. En su estudio sobre los árbitros internacionales, los trabajos preparatorios de la Convención del CIADI y los artículos de ésta que se refieren al término « *manifiesto* », Karel Daele ha concluido que este término equivale a *easily recognizable*, *clear*, *obvious* y/o *self evident*, y que una definición estricta de este término no concuerda claramente con el hecho de que '*nowhere in the legislative history of the Convention, is there any indication that anything less than the full and complete possession of the [impartiality] would be sufficient*".[34]

49. Una tercera persona imparcial y debidamente informada de las circunstancias específicas del caso sólo puede concluir que el hecho de que un árbitro en el ejercicio de su función haya comunicado al Centro, en el contexto procesal del 11 de diciembre de 2016, une respuesta incompleta y engañosa a una cuestión planteada por los Demandantes constituye una manifestación de falta de imparcialidad y neutralidad.

***

[31] Anexo nº 19, *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decisión de la Propuesta de las partes de descalificar a la mayoría del Tribunal, §§59-62

[32] En el mismo sentido, Anexo nº 23, *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decisión de la propuesta de descalificación de un miembro del Tribunal de arbitraje, 22 de Octubre de 2007, §30 (Suez I), accesible en http://bit.ly/2mfWvpk ; y las Decisiones en los asuntos del CIADI *Burlington Resources, Inc. v. Republic of Ecuador* del 13 de diciembre de 2013, anexo nº 17; *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina,* del 13 de diciembre de 2013, anexo nº 18; anexo nº 20, *Abaclat and Others v. Argentine Republic,* Decisión del 4 de febrero de 2014, citado

[33] En el mismo sentido, anexo nº 24, *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decisión en el desafío al Presidente del Comité, 3 de octubre de 2001, §20: "*In such a case, the arbitrator might be heard to say that, while he might be biased, he was not manifestly biased and that he would therefore continue to sit. As will appear, in light of the object and purpose of Article 57, we do not think this would be a correct interpretation*", accesible en http://bit.ly/2lySInp

[34] Daele (K.), *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer 2012), §§ 5-027, 5-028

PROPUESTA A LA SEÑORA SECRETARIA GENERAL DEL CIADI

50. En consecuencia, habida cuenta del deber de preservar la integridad del procedimiento de arbitraje, en conformidad con los artículos nos. 14(1), 57 y 58 de la Convención y 9(1) del Reglamento de arbitraje del CIADI, los inversores españoles presentan muy respetuosamente la presente proposición motivada de recusación del árbitro Sr. V.V. Veeder QC.

Le saluda muy atentamente

Dr. Juan E. Garcés
Representante de D. Victor Pey Casado, Da. Coral Pey Grebe y de la Fundación española Presidente Allende

TABLA DE DOCUMENTOS ADJUNTOS

NUM.	DOCUMENTO	FECHA
1	Las partes Demandantes al Sr. Presidente del Consejo Administrativo del CIADI	2017-01-13
2	*Key for Michael Flynn resignation was misleading.* Washington Times	2017-02-17
3	Decisión del Presidente del Consejo Administrativo del CIADI sobre la respetuosa propuesta motivada de recusación de los árbitros Sir Franklin Berman QC y Don V.V. Veeder QC por un conflicto aparente de intereses	2017-02-21
4	Comunicación del Estado de Chile al Centro	2016-12-16
5	*ConocoPhillips Petrozuata B.V. et al., v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal	2015-07-01
6	*RSM Production Co. v. St. Lucia*, ICSID Case No. ARM/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith, QC	2014-10-23
7	Respetuosa propuesta de recusación de los Sres. Sir Franklin Berman y V.V. Veeder por un conflicto aparente de intereses	2016-11-22
8	Respuesta del Sr. V.V. Veeder al Centro	2016-12-11
9	Chile's Response to Claimant's Request for Disqualification	2016-12-16
10	*Helman International Hotels v Egypt*, Decision on jurisdiction	2005-10-17
11	*Giovanna A. Beccara and Others v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order)	2010-01-27
12	*Regina v. Gough* [1993] House of Lords, AC 646	1993
13	*Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm)	2016-02-17
14	*Urbaser v. Argentina*, Challenge Decision	2010-08-12
15	*Universal Compression v. Venezuela*, Challenge Decision	2011-05-20
16	D. Bishop & L. Reed, '*Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*', 10 *Arb. Int.* (1998)	1998

17	*Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña	2013-12-13
18	*Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser (Spanish)	2013-12-13
19	*Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal	2013-11-12
20	*Abaclat & Others v. Argentina*, ICSID Case No. ARB/07/05, Decision on the Proposal to Disqualify a Majority of the Tribunal, Dec. 4, 2014	2014-12-04
21	Comunicación del Estado de Chile al Centro	2016-11-29
22	*BSG Resources Limited et altri c. Guinée* (Affaire CIADI ARB/14/22), Decisión sobre la propuesta de recusación de todos los miembros del tribunal de arbitraje	2016-04-28
23	*Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, §30 (Suez I)	2007-10-22
24	*Aguas del Aconquija v. Argentina* (ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee	2001-10-03
25	*Vanessa Ventures v. Venezuela*, ICSID Case No. ARB(AF)/04/6, *Decision on Jurisdiction*	2008-08-22

ANEXO 1

CIADI Caso ARB/98/2

VICTOR PEY CASADO Y FUNDACIÓN ESPAÑOLA «PRESIDENTE ALLENDE» contra LA REPÚBLICA DE CHILE

PROCEDIMIENTO DE CORRECCIÓN DE ERRORES MATERIALES EN EL LAUDO DE 13 DE SEPTIEMBRE DE 2016

OBSERVACIONES A LAS EXPLICACIONES DE LOS ÁRBITROS SIR FRANKLIN BERMAN QC Y MR. V.V. VEEDER QC Y DEL ESTADO DE CHILE

que las partes Demandantes respetuosamente someten al Sr. Presidente del Consejo administrativo del CIADI conforme a los artículos 57 y 58 del Convenio y 9 y 6(2) del Reglamento de arbitraje del CIADI

Traducido del original en francés

Washington, 13 de enero de 2017

INDICE

Juan E. Garcés, Abogado
ZORRILLA, 11 - 1° - DCHA.
TELÉF. 91 360 05 36 - FAX: 91 5311989
E-mail: 100407.1303@compuserve.com
28014 MADRID

[Por correo electrónico]

13 de enero de 2017

Dr. Jim Yong Kim
Presidente del Banco Mundial y del
Consejo Administrativo del CIADI
WASHINGTON D.C.

Ref.: Víctor Pey Casado y Fundación Presidente Allende c. República de Chile (Caso No. ARB-98-2. Nuevo examen- Rectificación)

« *I was furious beyond belief…that was a fraud*!»
Jack Straw, Her Majesty Principal Secretary of State for the Home Department.

Señor Presidente del Consejo Administrativo:

Conforme a la comunicación de la Sra. Secretaria General del 4 de diciembre de 2016, las partes Demandantes tienen el honor de someter observaciones a las comunicaciones de los árbitros Sir Franklin Berman y Mr. V. V. Veeder del 4 y 11 de diciembre de 2016, respectivamente, y a la carta del Estado de Chile del 6 de diciembre de 2016, sobre la respetuosa recusación razonada de los dos árbitros miembros de las Essex Court Chambers formulada el 22 de noviembre de 2016.

Introducción

Muy lamentablemente, en el presente procedimiento de arbitraje sobre la compensación debida a una de las grandes empresas de prensa de Chile, las partes Demandantes han debido desbaratar interminables y recurrentes maniobras fraudulentas encaminadas a privarles, por todos los medios, de la posibilidad de hacer valer sus derechos en el marco de un procedimiento justo y equitativo.

Un importante número de las maniobras ha dejado huellas en el expediente de arbitraje y serán mencionadas más adelante.

Por otra parte, prácticas análogas habían sido aplicadas ya antes en Londres por el Estado de Chile contra una de las partes Demandantes, la Fundación española Presidente Allende. Es imposible no relacionarlas con la situación actual. Por ello se las mencionará en la sección V, a título de antecedente indispensable para comprender el *modus operandi* del Estado Demandado.

El autor de las presentes observaciones tiene la obligación profesional de asegurar que sus representados gocen de un marco arbitral con criterios objetivos de plena independencia y absoluta imparcialidad.

Por ello las informaciones que llegan gradualmente a su conocimiento desde el 20 de septiembre de 2016, y la sucesión de hechos sobrevenidos después, no le han dejado otra opción que la de formular, bien a su pesar, la propuesta razonada de recusación del 22 de noviembre de 2016.

***

I. EL APARENTE CONFLICTO DE INTERESES PUESTO EN CONOCIMIENTO DE LOS DEMANDANTES DESDE EL 20 DE SEPTIEMBRE DE 2016

La propuesta razonada de recusación es admisible en el procedimiento del artículo 49 (2) de la Convención del CIADI

1. El artículo 57 de la Convención del CIADI figura en el capítulo V («*Sustitución y recusación de conciliadores y árbitros*»), es de aplicación general y dispone:

   > *«Cualquiera de las partes podrá proponer a la Comisión o Tribunal correspondiente la recusación de cualquiera de sus miembros por la carencia manifiesta de las cualidades exigidas por el apartado (1) del Artículo 14.»*

   La pretensión del Estado Demandado de que se discrimine en la aplicación del artículo 57 según se trate de uno u otro de los procedimientos regidos por el capítulo IV de la Convención («El *arbitraje*»), en particular el regulado por el artículo 49(2), no tiene fundamento alguno. *Ubi lex non distinguit, nec nos distinguere debemus.*

2. El Cap. I del Reglamento del Arbitraje («*Establecimiento del Tribunal*»), igualmente de aplicación general, dispone en el artículo 11(1) que «cualquier *vacante que se produce por recusación de un árbitro*» será tratada de la misma manera que el fallecimiento de un árbitro, sin distinguir según integra éste uno u otro Tribunal. Habida cuenta que el procedimiento del artículo 49(2) de la Convención no preserva a un árbitro de la posibilidad de renunciar o fallecer, de ello se sigue que tanto la recusación como el fallecimiento de un árbitro son compatibles con el procedimiento del art. 49(2) de la Convención y la Regla nº 11(1).

3. Figura igualmente en el Cap. I del Reglamento de Arbitraje el articulo 9 («Recusación *de los árbitros*»), que no distingue entre los árbitros que integran el Tribunal del procedimiento regido por el art. 49(2) de la Convención o el regido por los artículos 50, 51 y 52.

4. La disposición del artículo 9(1) prevé que "*la parte que proponga la recusación de un árbitro de conformidad con el Artículo 57 del Convenio presentará su propuesta al*

Secretario General sin demora y en todo caso antes que se cierre el procedimiento, dando a conocer las causales en que la funde.»

5. El hecho puesto en conocimiento de las partes Demandantes el 20 de septiembre de 2016, a saber las gestiones *sigilosas* del Estado de Chile en las Essex Court Chambers, fue dado a conocer públicamente por el Gobierno de Chile dos días antes, después de que el Laudo hubiera sido pronunciado y comunicado a todas las partes (artículos 48 y 49(2) de la Convención), después por tanto de que el Tribunal deviniera *functus officio* como la Sra. Secretaria General del CIADI ha indicado el 20 de octubre de 2016[1] en su repuesta al párrafo (II) de la carta de los Demandantes del 18 de octubre[2]:

> *« Nous attirons l'attention de Monsieur Pey Casado et de la Fondation Président Allende sur le fait que le tribunal constitué dans la procédure de resoumission a rendu sa sentence le 13 septembre 2016. Aucune des procédures prévues aux articles 49, 50, et 51 de la Convention CIRDI n'étant actuellement pendante devant ce tribunal, les demandes formulées au paragraphe (II) de la lettre de M. Pey Casado et la Fondation Président Allende ne peuvent lui être soumises. »*

6. El procedimiento regido por el artículo 49(2) habiendo comenzado con el depósito de la Demanda el 27 de octubre de 2016, registrada el 8 de noviembre siguiente, el procedimiento no estaba cerrado cuando el 22 de noviembre de 2016 fue formulada la respetuosa propuesta de recusación.

7. La respuesta del Estado Demandado del 16 de diciembre de 2016 (§27) sostiene que *by their very nature, rectification proceedings are incompatible with arbitrator challenges*, puesto que, según aquél, la Nota explicativa «D» de la Regla de arbitraje 49(2) preparada por la Secretaría del Centro y publicada en abril de 1982 afirma:

> *Unlike an interpretation, revision or annulment of an award (. . .) the rectification of an award can only be made by the Tribunal that rendered the award.*

El Estado Demandado ha truncado esa cita, desnaturalizando su sentido y su alcance, pues esta Nota agrega:

> *«If, for any reason, the Tribunal cannot be reconvened, the only remedy would be a proceeding under Chapter VII of these Rules*" (la frase subrayada ha sido omitida por el Estado Demandado).

Dicho sea esto sin perjuicio de la interpretación sistemática y contextualizada que pudiera hacer, en su caso, el Tribunal de arbitraje en ejercicio de su competencia (art. 41(1) de la Convención), habida cuenta de que la redacción de las Reglas de arbitraje 49 y 53, y otras, han sido modificadas después de la publicación en 1982 de dicha Nota explicativa del Secretariado que, adviertió éste, *«do not constitute part of the Rules and have no legal force.»*

8. En este caso, la Demanda ha sido registrada y comunicada el 8 de noviembre de 2016 a las partes y al Tribunal de arbitraje[3], quien el 16 de noviembre ha invitado a la Demandada *«à*

[1] Doc. nº 68, carta de Sra. Secretaria General del CIADI a las Demandantes el 20 de octubre de 2016
[2] Doc. nº 69, carta a la Sra. Secretaria General del CIADI de los Demandantes el 18 de octubre de 2016
[3] Doc. nº 70, carta de 8 de noviembre de 2016 de la Sra. Secretaria General *p. i.* del CIADI a las partes con copia a los miembros del Tribunal de arbitraje

indiquer si elle accepte les corrections proposées dans la Demande ».[4] Los Demandantes han aportado su provisión de fondos el 13 de diciembre de 2016 y el Centro lo ha comunicado el 22 de diciembre al Tribunal de arbitraje y a la parte Demandada.

9. De ello se sigue que en el caso de que se produjera en el Tribunal del procedimiento del artículo 49(2) una de las vacantes previstas en la Regla nº 10(1) – *«recusación, fallecimiento, incapacidad o renuncia de un árbitro»*-, esa vacante sería cubierta de la forma que disponen las Reglas nos. 10 y 11.
   Si una cuestión de procedimiento fuera planteada en esa ocasión por una u otra de las partes, correspondería al Tribunal de arbitraje reconstituido resolverla según el artículo 44 de la Convención.
   En tercer lugar, sin perjuicio de la interpretación sistemática y contextual que pudiera hacer, en su caso, el Tribunal de arbitraje en el ejercicio de su competencia, en el caso improbable de que una vacante no pudiera ser cubierta la Convención asegura a las partes, según la *Nota* en cuestión, los remedios previstos en el Capítulo VII, a saber, los regulados por los artículos nos. 50, 51 y 52.

10. Lo que la Convención no dispone es que las partes en el procedimiento del artículo 49(2) deberían estar sometidas imperativamente a árbitros que pudieran encontrarse en una situación sobrevenida de conflicto de intereses o parcialidad, de la que se hubiera tenido conocimiento después de pronunciado el Laudo. La afirmación contraria del Estado Demandado (§§27, 28) choca con la fuerza imperativa, sin excepciones, del artículo 57 de la Convención y de las Reglas 9 y 11.

11. Es igualmente inadmisible la pretensión del Estado Demandado de situar el artículo 49(2) – que figura en el Cap. IV, Sección 4 de la Convención, correspondiente al Cap. VI del Reglamento *(«El Laudo»)* – al margen de las Reglas generales de procedimiento so pretexto de la Regla nº 53[5] cuya aplicación está circunscrita a dicho Cap. VII del Reglamento-que corresponde a la Sección 5, a saber *«aclaración, revisión y anulación del laudo»* del Cap. IV de la Convención.
   Esta pretensión de Chile no respeta el principio de derecho según el cual la *lex specialis* en el marco del Cap. VII del Reglamento -la Regla nº 53- no anula necesariamente los efectos de la *lex generalis* –el articulo nº 57 del Cap. V de la Convención y las Reglas nº 9 y 11 del Cap. I del Reglamento.

12. En consecuencia, la propuesta de recusación de los árbitros es admisible en el marco del procedimiento regulado por el artículo 49(2) de la Convención iniciado el 27 de octubre de 2016.
   El respeto de la independencia y la imparcialidad de los árbitros son principios generales del derecho a los que reenvía la Convención (artículo 42(1)).
   No cabe a este respecto una inadmisibilidad de principio por causa de la especificidad del procedimiento. Ello crearía un precedente grave que estaría en contradicción flagrante con los principios del *due process*.

13. La razón específica de la respetuosa propuesta de recusación razonada es la situación de aparente conflicto de intereses del Estado Demandado y de dos de los árbitros del Tribunal

---

[4] Doc. nº 60, carta de 16 de noviembre de 2016 del Secretario del Tribunal de arbitraje a las partes con copia a los miembros del Tribunal

[5] La Regla de arbitraje nº 53 dispone: "***Normas procesales.*** *Estas Reglas se aplicarán* mutatis mutandis *a todo procedimiento relacionado con la aclaración, revisión o anulación de un laudo y a la decisión del Tribunal o Comité*»

de arbitraje al que los artículos 49(2), 50 y 51 de la Convención confieren la competencia

a) de decidir los remedios al Laudo de 13 de septiembre de 2016 en ejecución del Laudo firme y definitivo de 8 de mayo de 2008, que condenó a la República de Chile por incumplimiento de su obligación de trato justo y equitativo, y denegación de justicia, a los inversores españoles propietarios de las empresas periodísticas CPP S.A. y EPC Limitada, cuyo 90% de acciones pertenece a la Fundación española «Presidente Allende»,

y, en particular,

b) de tratar la petición de 27 de octubre de 2016 de suspensión provisional del proceso de corrección de errores materiales en el Laudo del 13 de septiembre de 2016, hasta que el Tribunal de arbitraje previsto en el artículo 50 de la Convención pronuncie su Decisión sobre la demanda formulada el 7 de octubre de 2016 de aclaración del Laudo arbitral de 8 de mayo de 2008.

14. El hecho en el origen de la propuesta de recusación ha sido puesto en conocimiento de la Fundación española el 20 de septiembre de 2016, a saber, la declaración de un miembro del Gobierno de Chile desvelando públicamente relaciones *sigilosas* con las Essex Court Chambers de las que son miembros esos dos árbitros.

15. No se trata en la especie de relaciones con un *barrister* aislado como afirma el Sr. Berman el 4 de diciembre de 2016, sino de que esa Oficina ha devenido durante el presente arbitraje la principal referencia de los intereses estratégicos del Estado chileno en Londres, y de que, por ello, éste tiene una influencia objetiva considerable sobre esa oficina de abogados.

16. Desde el 20 de septiembre de 2016 otros hechos que suponen más graves peligros para la integridad del procedimiento de arbitraje están siendo puestos en conocimiento de la Fundación española; un resumen muy abreviado será hecho en la Sección II.

17. Los dos árbitros y el Estado Demandado convergen objetivamente en su rechazo a aceptar la invitación que les ha sido formulada el 13 de octubre de 2016 – en base al articulo 14(1) de la Convención[6], la Regla de arbitraje 6(2)[7] y los Principios aplicables de la *International Bar Association* (en lo sucesivo "de la IBA") sobre conflictos de intereses en el arbitraje internacional[8] - de que revelen las relaciones que la parte Demandada, o un organismo dependiente de ella, mantiene con miembros de Essex Court Chambers, en particular

---

[6] Artículo 14(1): "*Las personas designadas para figurar en las Listas deberán gozar de amplia consideración moral, tener reconocida competencia en el campo del Derecho, del comercio, de la industria o de las finanzas e inspirar plena confianza en su imparcialidad de juicio. La competencia en el campo del Derecho será circunstancia particularmente relevante para las personas designadas en la Lista de Arbitros.*"

[7] Regla 6(2) : « *"Adjunto una declaración sobre (a) mi experiencia profesional, de negocios y otras relaciones (de haberlas) con las partes, tanto anteriores como actuales y (b) cualquier otra circunstancia por la que una parte pudiera cuestionar la confianza en mi imparcialidad de juicio. Reconozco que al firmar esta declaración asumo una obligación continua de notificar prontamente al Secretario General del Centro cualquier relación o circunstancia de aquéllas mencionadas que surjan posteriormente durante este procedimiento".».*

[8] Accesibles en http://bit.ly/2i2MQCW

1. *si el Estado de Chile o un organismo dependiente de él, es un cliente actual o anterior de miembros de las Essex Court Chambers, y en qué fechas,*
2. *si la República de Chile o un organismo dependiente de ella, es un cliente regular u ocasional de miembros de las Essex Court Chambers, y en qué fechas,*
3. *el número de millones de dólares que la República de Chile o un organismo dependiente de ella habría pagado a miembros y personas relacionadas con las Essex Court Chambers hasta el 13 de septiembre 2016, y las fechas de los pagos correspondientes – en particular a partir de las fechas en que los dos árbitros fueron nombrados en el actual Tribunal arbitral,*
4. *Los montos financieros comprometidos por la República de Chile, o por un organismo dependiente de ella, para un periodo venidero con miembros de estas Oficinas, y las fechas de los acuerdos correspondientes,*
5. *Si los servicios que la República de Chile, o un organismo dependiente de ella, reciben de miembros pertenecientes a las Essex Court Chambers consisten en consejos estratégicos o transacciones específicas,*
6. *Si los trabajos de miembros de las Essex Court Chambers para la República de Chile, o un organismo dependiente de ella, se realizan en lugares donde los dos árbitros en el presente procedimiento están instalados o en otros lugares, y desde qué fechas,*
7. *Si los miembros de las Essex Court Chambers han establecido un* ethical screen *o un* Chinese Wall *como escudo entre dichos dos árbitros y los otros trabajos, y en qué fechas,*
8. *Cuáles son los miembros, asistentes u otras personas de las dichos Chambers que reciben instrucciones, financiamientos o que estarían involucrados, de cualquier manera, que sea, directa o indirectamente, con la República de Chile o con un organismo dependiente de ella,*
9. *Si, en el curso de los tres últimos años miembros de los Essex Court Chambers actuaron para la República de Chile, o un organismo dependiente de ella, en asuntos sin relación con el presente arbitraje sin que los dos árbitros hayan participado personalmente,*
10. *Si una law firm-Chamber o un experto que compartiera honorarios significativos u otros ingresos con miembros de las Essex Court Chambers presta servicios a la República de Chile, o a un organismo dependiente de ella, y desde que fechas,*
11. *Si una law firm-Chamber asociada o en alianza con miembros de las Essex Court Chambers, pero que no compartirían honorarios significativos u otros ingresos de miembros de las Essex Court Chambers, presta servicios a la República de Chile o a un organismo dependiente de ella, y en qué fechas.*

La finalidad de la full disclosure *solicitada es informar a las partes Demandantes (y al Centro) de una situación que pueden desear analizar más en profundidad a fin de determinar si, objetivamente (por lo tanto, desde el punto de vista de un tercero que razonablemente tenga pleno conocimiento de los hechos en la especie), existen dudas legítimas en cuanto a la imparcialidad e independencia de los árbitros. Como afirma la Nota explicativa a la Regla General nº 1 de los Principios de la IBA sobre los conflictos de interés en el arbitraje internacional*[9] *:*

A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator, and must remain so during the entire course of the arbitration proceeding, including the time period for the correction or interpretation of a final award under the relevant rules (...)."

18. Los dos árbitros tampoco han aceptado la petición formulada el 10 de noviembre de 2016 de llevar a cabo una investigación razonable sobre las cuestiones de un aparente conflicto de intereses que plantea la carta de los Demandantes del 13 de octubre de 2016, y de revelar plenamente su resultado al Tribunal, al Centro y a todas las partes.

19. Han rechazado igualmente la invitación a presentar su dimisión voluntaria a la Sra. Secretaria General del CIADI en el caso de que, por razones de confidencialidad u otras, los Sres. árbitros no se consideraran capaces de llevar a cabo esa investigación y/o a la *full disclosure* de la información solicitada.

20. Desde que la Sra. Secretaria General del CIADI les hubo comunicado la propuesta razonada de recusación del 22 de noviembre de 2016, los dos árbitros y el Estado

[9] International Bar Association, accesibles en http://bit.ly/2i2MQCW

Demandado convergen objetivamente en negarse a desvelar las relaciones que la parte Demandada, o un organismo dependiente de ella, mantiene con miembros de las Essex Court Chambers.

21. Sólo después de la comunicación de la demanda de recusación el Estado de Chile ha respondido, el 16 de diciembre de 2016. Pero ha omitido a sabiendas las conexiones entre, de una parte, miembros de las Essex Court Chambers y, de otra parte, altos funcionarios del Estado Chileno como los Señores José Miguel Insulza y Alberto Van Kleveren, o empresas asociadas a la primera empresa exportadora de cobre del mundo, perteneciente al Estado de Chile, como mostraremos más adelante.

***

II. LAS CIRCUNSTANCIAS DE LA ESPECIE Y SU CONTEXTO DE CONJUNTO JUSTIFICAN LA EXIGENCIA DE POSICIONES GARANTES DE IMPARCIALIDAD E INDEPENDENCIA IMPECABLES DE LOS ARBITROS

La subordinación de algunos árbitros por la República de Chile en el presente procedimiento de arbitraje

22. Al mismo tiempo que el Estado de Chile practicaba el fraude contra el Gobierno de Su Majestad y la administración de justicia en un asunto donde la Fundación española Presidente Allende era la Demandante (lo que describiremos en la Sección V), desde la constitución del Tribunal de arbitraje en 1998 el Estado Demandado ha puesto en práctica un sistema para colocarlo bajo su influencia, sabotear y/o prolongar el procedimiento de arbitraje y aumentar su coste. He aquí un breve resumen:

- **El 29 de julio de 1998**, la representación de la República de Chile ha designado árbitro al «*distinguido jurista mexicano Don Jorge Witker Velásquez*», silenciando que éste era chileno *iure soli* y *iure sanguinis*. [10] Obligado a dimitir, es la **primera crisis del procedimiento de arbitraje**.

- **El 18 de noviembre de 1998**, la representación de Chile ha nombrado árbitro al Sr. Galo Leoro-Franco, Gran Cruz de la Orden de Bernardo O'Higgins, la más alta condecoración de la República de Chile. [11]

- **El 30 de noviembre de 1998**, el Ministro chileno de Economía ha dirigido una carta al Sr. Secretario General del CIADI en la que ataca al Centro por haber registrado la **Demanda de arbitraje**. [12]

---

[10] Doc. nº 13, *Brève synthèse raisonnée de la méthode mise en œuvre par la représentation du Chile afin de faire échec à l'arbitrage : placer le Tribunal sous influence, prolonger la procédure et maximiser les coûts*, de 27 de junio de 2014, accesible en http://bit.ly/2hvNqdp , p. 4.13.1.7

[11] Ver la carta del agente de Chile dirigida al Centro el 18 de noviembre de 1998

[12] Doc. nº 14, accesible en http://bit.ly/2hkMpTP, que figura como documento anexo a la Memoria inicial de los Demandantes del 17 de marzo de 1999, §4.13.1.10, aquí anexa como Doc. nº 15, accesible en http://bit.ly/2hkMpTP

- **El 2 de febrero de 1999**, en ocasión del acto de constitución del Tribunal, el representante de Chile ha reconocido que antes del 20 de abril de 1998 (fecha de registro de la Demanda), el Ministro de Economía de Chile se había desplazado en persona al CIADI para insistir en que la Demanda interpuesta el 6 de noviembre de 1997 no fuera registrada. [13]

- **El 2 de febrero de 1999**, igualmente, la representación de la República de Chile ha entregado en mano al Tribunal de arbitraje una copia de la carta del Ministro chileno de Economía del 30 de noviembre de 1998 y dirigida al Sr. Secretario General del CIADI. [14]

- **El 13 de marzo de 2001**, el Presidente del Tribunal de arbitraje nombrado por el Centro, el juez Sr. Rezek, renuncia[15] al día siguiente de que los Demandantes comunicaran al Centro las muy graves infracciones de las reglas de procedimiento que había cometido[16]. Segunda crisis grave del procedimiento de arbitraje.

- **El 2 de abril de 2001**, el representante de Chile solicita al Tribunal de arbitraje que le comunique los detalles de una reunión a puerta cerrada del Tribunal, las opiniones emitidas en la misma, el acta, el registro de ésta, las notas tomadas durante la reunión o, alternativamente, que cada uno de los árbitros comunique a Chile *«una relación precisa y detallada de lo que ha sido discutido y decidido durante esa reunión o esas reuniones, todo ello certificado por el Señor Secretario del Tribunal… »*.[17], a la sazón D. Gonzalo Flores, de nacionalidad chilena, a cuya esposa el Gobierno chileno beneficiaba con una suvención para estudios según supieron después los Demandantes.

- **El 21 de agosto de 2002**[18], la Cámara de Diputados de Chile celebró una sesión especial sobre el presente procedimiento de arbitraje. Los partidos gubernamentales aprueban una moción solicitando que la República de Chile no respete una eventual decisión del Tribunal de arbitraje favorable a los inversores españoles.

- **El 24 de agosto de 2005**, la representación de la República de Chile solicita la recusación de la totalidad del Tribunal de arbitraje después de que éste haya dado a conocer a las partes por intermediación del Centro, el 27 de junio de 2005, que tenía redactado un proyecto de Laudo[19]. Los miembros del Tribunal de arbitraje tenían previsto reunirse a principios de septiembre para finalizar el Laudo.

- **El 26 de agosto de 2005**, el Sr. Leoro Franco, árbitro designado por la República de Chile, dimite alegando que había perdido la confianza de la parte que le había

---

[13] Doc. nº 15, ibid., §4.13.1.11
[14] Doc. nº 14, carta del Ministro chileno de Economía del 30 de noviembre de 1998, figura como documento C-M01f anexo a la Memoria inicial del 17 de marzo de 1998, §4.13.1.10
[15] Doc. nº 16, carta de dimisión del Presidente del Tribunal de arbitraje, D. José Francisco Rezek
[16] Doc. nº 17, carta del 12 de marzo de 2001 de los Demandantes comunicando al Centro el quebrantamiento grave de normas de procedimiento por el Presidente del Tribunal de arbitraje
[17] Carta de Chile de 2 de abril de 2001
[18] Doc. C208 del procedimiento de arbitraje inicial
[19] La recusación del Tribunal por Chile es accesible en http://www.italaw.com/sites/default/files/case-documents/italaw7549.pdf

designado.[20]

- **El 8 de septiembre de 2005**, a petición del Juez Sr. Bedjaoui[21] el Centro informó a los miembros del Tribunal y a las partes Demandantes que una reunión *ex parte* tuvo lugar el 2 de septiembre de 2005[22] en Washington D.C. entre, de una parte, el Secretario General del Centro y, de otra parte, el Ministro de Economía de Chile–en su calidad de enviado personal del Presidente de Chile-, el embajador de Chile en los EE.UU., y otros miembros de una delegación chilena que solicitó derrocar de inmediato al Tribunal de arbitraje legalmente constituido.[23]

  El Sr. Jorge Carey, representante personal del Presidente de Chile en la presente fase del arbitraje, ha participado igualmente en esta reunión *ex parte,* a la que siguió la destitución del Juez Sr. Bedjaoui, ex Presidente del Tribunal International de Justicia, por Mr. Paul Wolfowitz[24], Presidente entonces del Consejo Administrativo del CIADI, sin ninguna motivación (plegándose por tanto a una interferencia política en el procedimiento[25] que es ontológicamente contraria a la razón de ser y a la finalidad de la Convención de despolitizar la solución de las diferencias en materia de inversiones extranjeras). **Tercera crisis grave del procedimiento de arbitraje**

  Estas maniobras de Chile han sido incorporadas en el Laudo arbitral del 8 de mayo de 2008[26] que condena a Chile por incumplimiento de un trato justo y equitativo, incluyendo la denegación de justicia, condena que la Decisión del Comité *ad hoc* del 18 de diciembre de 2012[27] ha confirmado y declarado *res iudicata.*

  Conforme a la Regla de arbitraje 11(2)(a)[28], entre el 26 de marzo de 2006 y 2013 Chile no ha podido nombrar a un árbitro al no ser aceptada la dimisión del Sr. Leoro Franco por el Tribunal de arbitraje el 25 de abril de 2006.[29]

- **El 14 de octubre de 2013** el Estado de Chile nombra árbitro al Sr. Alexis Mourre en el procedimiento de nueva presentación de la demanda, y el **6 de**

---

[20] Documento accesible en http://www.italaw.com/sites/default/files/case-documents/italaw7550.pdf
[21] Doc. nº 18, el Juez Sr. Bedjaoui pide el 7-10-2005 al Sr. Secretario General del CIADI informaciones acerca del contenido de la réunion *ex parte* sostenida con una alta delegación de la República de Chile el 2-09-2005, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw7554.pdf
[22] Doc. nº 19, el Secretario General del CIADI comunica el 8-09-2005 su reunión *ex parte* del 2-09-2005 con la alta delegación de Chile, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw7584.pdf
[23] Doc. nº 20, respuesta del Secretario General del CIADI el 2-12-2005 a la carta del juez Sr. Bedjaoui de 7-10-2005, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw7557.pdf
[24] Doc. 21, el Sr. Paul Wolfowitz acepta el 21-02-2006, sin motivación, la recusación del Juez Bedjaoui por Chile
[25] La décision del Sr. Paul Wolfowitz y algunas de las maniobras del Estado de Chile para derrocar al Tribunal de arbitraje a partir de agosto de 2005 son accesibles en http://www.italaw.com/cases/829
[26] Laudo arbitral del 8 de mayo de 2008 pronunciado por los Sres. Pierre Lalive, Mohammed Chemloul y Emmanuel Gaillard, pp. 729, 34-37, accesible en http://www.italaw.com/sites/default/files/case-documents/ita0638.pdf
[27] Décision del Comité *ad hoc* del 18 de diciembre de 2012 pronunciada por los Sres. L.Y. Fortier QC, P. Bernardini, A. El-Kosheri, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw1178.pdf
[28] Regla de arbitraje 11(2)(a): *«el Presidente del Consejo Administrativo nombrará una persona de entre la Lista de Arbitros: (a) para llenar una vacante producida por la renuncia, sin el consentimiento del Tribunal, de un árbitro nombrado por una de las partes.*"
[29] Doc. 22, Decisión del Tribunal de arbitraje de 25 de abril de 2006 que no acepta la dimisión del árbitro nombrado por Chile

enero de 2014 el Estado de Chile recusa[30] al árbitro nombrado por los Demandantes, el Profesor Philippe Sands, quien dimite voluntariamente « *to allow these proceedings to continue without the distraction posed by my involvement (...) in the interest of the parties and the ICSID system* ».[31] Cuarta crisis grave del procedimiento de arbitraje.

***

Ni los Sres. árbitros ni la parte Demandada han revelado al Centro y a los Demandantes que miembros de las Essex Court Chambers son remunerados por inversores asociados a empresas propiedad del Estado de Chile

23. Informaciones llegadas a los Demandantes a partir de octubre de 2016 han puesto en su conocimiento que las Essex Court Chambers ofrecen igualmente asistencia remunerada a empresas asociadas a organismos del Estado de Chile como la empresa cuprífera CODELCO, asociada a Coromine Ltd., ésta perteneciente a la *« FTSE 10 mining company Anglo American Plc ('Anglo')»*, cuya defensa ha sido confiada por Ince & Co a miembros de las referidas Chambers, los Sres. Simon Bryan y Stephen Houseman QC[32], en relación con el caso *Compañía Minera Doña Inés de Collahuasi*, con sede en Chile[33] y copropiedad de *Anglo-American*, cuyo objeto era un contrato de seguro por un monto de « *$1,180.304 million*».

24. CODELCO, la más grande empresa de producción y exportación de cobre del mundo, es propiedad al 100% del Estado de Chile.

**

Los dos árbitros y la parte Demandada han incumplido su obligación de informar al Centro y a las otras partes que agentes oficiales de la República de Chile, como los **Sres. Kleveren e Insulza**, hacían gestiones ante miembros de las Essex Court Chambers *lite pendente*

25. En las circunstancias del caso, la Regla imperativa de arbitraje nº 6 (2) del CIADI – que no hace distingos con los *barristers' chambers*- al igual que los Principios Generales 6(a) y 7(a) de la IBA, cuyo comentario hace referencia explícita a aquellos- en las circunstancias de especie obligaban a ambos árbitros y al Estado de Chile a revelar las relaciones existentes entre esas Chambers, la Republica de Chile y los organismos que dependen de éste:

(6) Relationships (...) General Standard 6(a) uses the term 'involve' rather than

---

[30] Doc. nº 23, el Estado de Chile recusa al Prof. Philippe Sands
[31] Doc. nº 24, carta de dimisión del Prof. Philippe Sands el 10 de enero de 2014, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw3045.pdf
[32] Doc. 25, intervención de los *barristers* de las Essex Court Chambers Sres. Simon Bryan QC y Stephen Houseman QC en el caso *Coromin Ltd v AXA Re & Ors,* Court of Appeal - Commercial Court, November 30, 2007, [2007] EWHC 2818 (Comm), en el que "*Coromin claims an indemnity arising out of an incident which occurred on 31 March 2005 at a copper mining and processing facility ("the Concentrator Plant") in Northern Chile which forms part of the fourth largest copper mine in the world, and which is owned and operated by the original insured, Compania Minera Dona Inés de Collahuasi ("Collahuasi"). Collahuasi was and remains owned as to 44% by Anglo*", sentencia, §2, accesible en http://bit.ly/2jmArrH
[33] Ver el sitio http://www.collahuasi.cl/es/

'acting for' because the relevant connections with a party may include activities other than representation on a legal matter. 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

(7) Duty of the Parties and the Arbitrator. (a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its own initiative at the earliest opportunity.[34]

26. Entre las informaciones que los Demandantes reciben a partir de octubre de 2016 figura

- que el **Sr. Lawrence Collins**, abogado de Chile en el asunto indicado en la Sección V *infra*, es desde 2012 *arbitrator membre* de las Essex Court Chambers,

- que mientras el presente arbitraje seguía su curso aquellas devenían el apoyo principal en Gran Bretaña de la República de Chile, y de organismos que dependen de ésta,

- quienes remuneran a los miembros de aquellas en asuntos de importancia estratégica,

- como los referidos a la integridad de las fronteras marítimas y terrestres del Norte de Chile, en procesos formalmente iniciados ante la Corte Internacional de Justicia en enero de 2008[35], abril de 2013[36] y junio de 2016[37], y

- que prosiguen hoy:

"Both sides [Chile and Peru] surrounded themselves by legal teams that included former diplomats and ambassadors (Gabriel Gaspar and Alberto Van Klaveren in the Chilean camp (…) ***British lawyer Christopher Greenwood was hired by the Chilean team (…) Essex Court Chambers (…) were consulted by Chile****"* (énfasis añadido), ha escrito Arturo C. Sotomayor en American Crossings. Border Politics in the Western Hemisphere.[38]

27. Según informaciones recientemente recibidas por los Demandantes, resulta

a) que el Sr. Alberto **van Kleveren**, el abogado de Chile en Londres cuando tuvo lugar el fraude contra el Gobierno de Su Majestad y la administración de Justicia en 1999 y 2000 (*infra* Sección V), ha estado a cargo desde 2005 de relaciones con

---

[34] Comentario de la IBA al Principio General nº 6(a), y al Principio nº 7(a), respectivamente
[35] Doc. nº 26, C.I.J., caso *Perú c. Chile*, nota informativa del 16 de enero de 2008, en http://bit.ly/2hQKIyN
[36] Doc. nº 27, C.I.J., caso *Bolivia c. Chile,* nota informativa del 24-04-2013, en http://bit.ly/2i5FOOV
[37] Doc. nº 28, C.I.J, caso *Bolivia c. Chile* (2), nota informativa del 06-06-2013, en http://bit.ly/2hQFuTG
[38] Doc. nº 34 bis American Crossings. Border Politics in the Western Hemisphere, por Maiah Jaskoski, Arturo C. Sotomayor, y Harold A. Trinkunas, John Hopkins Univ. Press, 2015, página 57, citando en la Nota 69 el libro de Durán Pastene (Philipp), La Hora de los Halcones: la trastienda del conflicto Chile-Perú en La Haya. Ed. Planeta, 2013, pp. 115–120

abogados de las Essex Court Chambers sin interrupción, en su calidad de Agente, co-Agente o representante de Chile en esta misión. [39]

b) Que el Sr. José Miguel **Insulza** –el Ministro que ha desempeñado un papel central en el fraude cometido en 1999 y 2000 contra la administración de justicia británica, el Gobierno de Su Majestad y la Demandante Fundación española Presidente Allende, fraude que el Ministro Mr. Jack Straw ha confirmado como se verá a continuación-, ha tenido la misión de completar las gestiones sigilosas reveladas por el Gobierno de Chile el 18 de septiembre de 2016[40]. De hecho, está confirmado que en noviembre de 2015 el Sr. Insulza fue formalmente nombrado Agente oficial de la República de Chile y que en esta calidad ha

«*trabajado previamente en forma individual con cada uno de los abogados nacionales e internacionales que preparan la defensa chilena*" [41],

hasta el pronunciamiento del Laudo arbitral del 13 de septiembre de 2016.

***

Dos Jueces del Tribunal Internacional de Justicia, los Sres. Crawford y Greenwood, dos respuestas diferentes, o la influencia de la República de Chile sobre miembros de las Essex Court Chambers

28. El artículo 17 del Estatuto de la C.I.J. dispone:

"*Los miembros de la Corte (…)2. No podrán tampoco participar en la decisión de ningún asunto en que hayan intervenido anteriormente como agentes, consejeros o abogados de cualquiera de las partes, o como miembros de un tribunal nacional o internacional o de una comisión investigadora, o en cualquier otra calidad. 3. En caso de duda, la Corte decidirá.*"

29. Según el Comentario de Geneviève Guyomar al comparar los Estatutos de la C.I.P.J. y de la C.I.J a este respecto,

«D'après la pratique de la C.I.P.J. (…) il faut tout d'abord que l'intervention du membre de la Cour considérée ait été une intervention active; il faut en outre que cette intervention se soit produite après la naissance du différend soumis à la Cour. (…) Les stipulations adoptées en 1945 apparaissent plus restrictives encore car le mot 'active' a disparu.» [42]

30. Informaciones recibidas a partir de octubre de 2016 llaman la atención de los Demandantes sobre el hecho de que el profesor James Crawford se ha abstenido de integrar la Corte Internacional de Justicia en un asunto en el que la República de Chile es una de las partes [*Bolivia c. Chile*], por haber mantenido relaciones profesionales con

[39] Documentos nos. 29 y 30
[40] Documentos nos. 6 y 7 de la propuesta de recusación del 22 de noviembre de 2016
[41] Doc. nº 31, nota del Ministerio de Relaciones Exteriores de Chile del 25 de enero de 2016, accesible en http://bit.ly/2h6UD1O
[42] Doc. nº 32, Guyomar (G.), Commentaire du Règlement de la Cour Internationale de Justice adopté le 14 de abril de 1978. Interprétation et pratique. Paris, Ed. Padone, 1983, páginas 184-185

aquella cuando era miembro de las Matrix Chambers de Londres[43], mientras que, por el contrario, el profesor Christopher Greenwood ha rehusado en mayo de 2015 a abstenerse en el mismo asunto cuando es de notoriedad pública que siendo miembro de las Essex Court Chambers fue, entre otras funciones, abogado de Chile desde al menos 2008, no solamente en el asunto *Perú c. Chile* sino también en el asunto *Bolivia c. Chile* como lo indican la nota informativa del Ministerio de Relaciones Exteriores de Chile del 14 de marzo de 2008 y otras publicaciones. [44]

31. En efecto, en 2015 el Juez Sr. Greenwood rehusó tener en cuenta las relaciones que podrían afectarle en el marco del artículo 17 del Estatuto del C.I.J, hasta tal punto son prolongados y profundos los lazos entre la República de Chile, y los organismos que dependen de ella, y las Essex Court Chambers. En 2016 los Sres. árbitros Berman y Veeder han rehusado revelar a la Sra. Secretaria General del CIADI y a las partes Demandantes cualquier cosa sobre las abundantes relaciones que existen entre el Estado Demandado y las Essex Court Chambers.

32. En el presente procedimiento de corrección de errores materiales iniciado el 27 de octubre de 2016 los dos árbitros y el Estado Demandado aparecen, así, objetivamente, unidos en su absoluto rechazo a responder a cualquier cuestión sobre las relaciones recíprocas y determinantes que existen entre la República de Chile y las Essex Court Chambers, a pesar de habérselo comunicado el 13 de octubre de 2016.

33. Ello contrasta con el comportamiento de numerosos árbitros del CIADI que, interpelados ante supuestos conflictos aparentes de intereses, cooperan en someter su neutralidad a tests objetivos, como los practicados en el caso *Aguas de Barcelona* (proximidad, intensidad, dependencia e importancia)[45], o en otros casos citados en la proposición de recusación del 22 de noviembre de 2016 (paginas 15-18, 33-34) [46], y también en los principales sistemas de arbitraje internacional.

34. En el sistema de arbitraje francés, por ejemplo, la Corte de Apelaciones de París ha anulado en 2011 un laudo debido a las relaciones existentes entre la oficina de abogados de la que era miembro el Presidente del Tribunal y una de las partes (proximidad) que pagó honorarios superiores a 110.000 euros (importancia) [47] :

« L'arbitre doit révéler aux parties toute circonstance de nature à affecter son

---

[43] Doc. nº 33, nota de *Latin Lawyer*, 1 de octubre 2015, accesible en http://bit.ly/2h6h3QH
[44] Doc. nº 34, nota del Ministerio de Relaciones Exteriores de Chile de 14 de marzo de 2008, accesible en http://bit.ly/2ibhSWl; Doc. nº 34 bis ; Doc. nº 35, comentario de Da. María José Vega publicado el 28 de mayo de 2015 en «24horas.cl", accesible en http://bit.ly/2h2fwIe
[45] Doc. nº 36, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi v. Argentina*, ICSID Case No. ARB/03/19, Decisión del 12 de mayo de 2008, accesible en http://bit.ly/2gY34sT
[46] Ver, por ejemplo, los tests aplicados en los casos CIADI *Fábrica de Vidrios c. Venezuela,* ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify L.Y. Fortier QC, 28 de marzo de de 2016*; Conoco v. Venezuela,* ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L.Y. Fortier QC, del 15 de marzo de de 2016 *; Azurix v Argentina I*, Challenge Decision, 25 February 2005*; Vanessa Ventures Ltd. v. The Bolivar Republic of Venezuela,* ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, 22 August 2008, pages 7-9; *Vivendi v. Argentina I*, Challenge Decision, 3 de octubre de 2001; *Lemire v. Ukraine*, Challenge, Decisión de 23 de diciembre de 2008, §§20-22 ; *Suez v. Argentina II*, Challenge Decision, 12 de mayo de 2008; *Hrvatska v. Slovenia*,Tribunal's Ruling, 6 de mayo de 2008, p. 23; o *Rompetrol Group NV v. Romania*, Challenge Decision of Counsel, 14 January 2010
[47] Doc. nº 37, sentencia en el caso *J&P AVAX SA v. Tecnimont Spa*, (12 de febrero de 2009), Rev. d'Arb. (2009), 186 y ss., confirmada por la Cour d'Appel de Paris en 2011

jugement et à provoquer dans l'esprit des parties un doute raisonnable sur ses qualités d'impartialité et d'indépendance, qui sont l'essence même de la fonction arbitrale.

Le lien de confiance entre l'arbitre et les parties devant être préservé continûment, celles-ci doivent être informées pendant toute la durée de l'arbitrage des relations qui pourraient avoir à leurs yeux une incidence sur le jugement de l'arbitre (...), sans que la société défenderesse (...) puisse opposer la taille mondiale du cabinet d'avocats (...).

La révélation du rôle du cabinet dans lequel travaille le président du tribunal arbitral n'a pas été exhaustive dans la déclaration d'indépendance de celui-ci, et les activités non révélées, prises dans leur ensemble, le montant des honoraires versés à ce cabinet au titre de conseil et de représentant de l'une des parties à l'arbitrage (...) établissent l'existence d'un conflit d'intérêts entre le président du tribunal arbitral et cette partie. Par suite, (...), le tribunal arbitral a été irrégulièrement composé ; le moyen d'annulation étant accueilli, il convient d'annuler la sentence. »

Ahora bien, los pagos del Estado de Chile a miembros de las Essex Court Chambers guardan relación con la envergadura estratégica de los asuntos cuya representación han estado y continúan dirigiendo aquellos, según compromisos contractuales por millones de dólares objetivamente no revelados.

35. La sentencia de la Corte de Casación francesa de 15 de diciembre de 2015 ha confirmado la decisión de la Corte de Apelaciones de 14 de abril de 2014 que anuló un laudo debido a que

« [la partie] *AGI invoque un conflit d'intérêts de l'arbitre unique avec l'une des parties qui n'a pas été révélé lors de la constitution du tribunal arbitral. (...)*

"Il appartient à l'arbitre, avant d'accepter sa mission, de révéler toute circonstance susceptible d'affecter son indépendance ou son impartialité. Il lui est également fait obligation de révéler sans délai toute circonstance de même nature qui pourrait naître après l'acceptation de sa mission ; que la circonstance que le nom de l'arbitre ait été proposé par AGI n'était pas de nature à le dispenser de son obligation d'information à l'égard de cette partie ;

«il ne saurait être raisonnablement exigé, ni que les parties se livrent à un dépouillement systématique des sources susceptibles de mentionner le nom de l'arbitre et des personnes qui lui sont liées, ni qu'elles poursuivent leurs recherches après le début de l'instance arbitrale (...);

« que, d'autre part, à supposer même que le montant des honoraires perçus par le cabinet Fasken Martineau (...) ait été modeste, l'ampleur de la transaction elle-même, le nombre d'avocats mobilisés, ainsi que la publicité que le cabinet a entendu donner à sa contribution manifestaient l'importance qu'il attachait à cette affaire ; qu'il apparaît donc que, contrairement à ce que laissait entendre la déclaration d'indépendance de M. X..., alors que l'instance arbitrale était en cours, trois avocats du cabinet Fasken Martineau prêtaient leur concours à Leucadia dans une opération que le cabinet regardait comme un enjeu de communication ; que de telles circonstances, qui étaient ignorées d'AGI lors de la désignation de M. X..., étaient de nature à faire naître dans l'esprit de cette partie un doute raisonnable quant à l'indépendance et l'impartialité de l'arbitre ; qu'il convient dès lors d'annuler la sentence en raison de l'irrégularité de la

composition du tribunal arbitral ».[48]

Dudas razonables comparables han despertado en el ánimo de las Demandantes la sucesión de informaciones que están recibiendo desde el 20 de septiembre de 2016 sobre las relaciones entre la República de Chile y miembros de las Chambers de las que son miembros los dos árbitros.

36. En el sistema de arbitraje de Suecia, a modo igualmente de ejemplo, en un arbitraje regido por la ley sueca el Tribunal Supremo de Suecia ha tenido en cuenta las reglas de UNCITRAL, las IBA *Guidelines on Conflict of Interest in International Arbitration,* las de la SCC y de la ICC, y ha anulado el laudo porque una de las partes tenía relaciones con la oficina de abogados de la que el Presidente del Tribunal de arbitraje era miembro[49]:

> *A relationship damaging to trust must be deemed to exist even if the arbitrator has not himself had direct client contact with the party, the arbitration activities have been carried out separately from the lawyer activities, or if the arbitration dispute has related to issues other than such as the client assignment normally included, (...) assessment whether circumstances have existed that could shake the trust in J.L.'s impartiality shall, as previously shown, be made on objective grounds and not by concentrating on the risk that J.L. might allow himself to be influenced by the law firm's client relationship with the Ericsson Group in the individual case.*

37. Como se ha indicado en la propuesta de recusación (§§16-26), el tratamiento del conflicto aparente de intereses en derecho inglés no es tan diferente del aplicado en sistema del CIADI, en contra de lo que sostienen los Sres. Berman y Veeder y la República de Chile. Desarrollaremos esta contradicción a continuación.

***

III. LOS ARBITROS SRES. BERMAN Y VEEDER NO HAN SIDO IMPARCIALES DESPUÉS DEL 20 DE SEPTIEMBRE DE 2016

38. La imparcialidad se define generalmente como *«absence de parti pris, de préjugé et de conflit d'intérêt chez un juge, un arbitre, un expert ou une personne en position analogue par rapport aux parties se présentant devant lui ou par rapport à la question qu'il doit trancher»*[50]. En Gran Bretaña el umbral del deber de imparcialidad lo establece el artículo 6(1) de la Convención Europea de Derechos Humanos[51], aplicado de la manera siguiente:

> *30. It is well established in the case-law of the Court that there are two aspects to the*

---

48 Doc. nº 77, Cour de Cassation de Francia, caso *Société Columbus Acquisitions INC y la Société Columbus Holdings France*, sentencia del 16 de diciembre de 2015, accesible en http://bit.ly/2jj3ujr

50 Dictionnaire de Droit International Public, Bruylant/AUF, Bruxelles, 2001, p. 570

51 "*ARTÍCULO 6. Derecho a un proceso equitativo. 1. Toda persona tiene derecho a que su causa sea oída equitativa, públicamente y dentro de un plazo razonable, por un Tribunal independiente e imparcial, establecido por ley, que decidirá los litigios sobre sus derechos y obligaciones de carácter civil (...).*"

requirement of impartiality in Article 6 para. 1 (art. 6-1). First, the tribunal must be subjectively impartial, that is, no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is to be presumed unless there is evidence to the contrary. Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see, for instance, the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, para. 28). [52]

39. «*L'institution arbitrale vit de la confiance*», dijo el delegado de Brasil en la Segunda Conferencia de Paz de La Haya (1907), y han recordado los Presidentes del primer Tribunal de arbitraje en el presente arbitraje, el Profesor Pierre Lalive[53] y el Juez José FranciscoRezek[54].

40. El Principio General 3(a) de las IBA Guidelines dispone que el árbitro debe revelar los hechos y las circunstancias que, '*in the eyes of the parties*', plantean dudas respecto de la imparcialidad o la independencia del árbitro.

41. Las respuestas de los Sres. Berman y Veeder después de la declaración del Gobierno chileno puesta en conocimiento de los Demandantes el 20 de septiembre de 2016 han sido evasivas, incompletas, injustificadas o parciales, así como las decisiones tomadas por el Tribunal de arbitraje a partir del 16 de noviembre de 2016, constituyen pruebas objetivas de falta de imparcialidad respecto del derecho de los inversores españoles a un proceso con todas las garantías propias de un procedimiento de arbitraje.

No se justifican las decisiones de los árbitros Sres. Berman y Veeder posteriores al 20 de septiembre de 2016

42. Según el Tribunal del CIADI en el asunto *Suez v. Argentina*,

> *"generally speaking independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties. Thus Webster's Unabridged Dictionary defines 'impartiality' as "freedom from favoritism, not biased in favor of one party more than another."19 Thus it is possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial".* [55]

43. Los hechos alegados en la respetuosa propuesta de recusación están confirmados en las de pruebas objetivas desarrolladas o unidas a nuestras comunicaciones desde el 22 de octubre de 2016 y en la de hoy. Se cumplen, así, las condiciones que para justificar una propuesta de recusación requiere el artículo 57 de la Convención del CIADI en relación con la Regla de arbitraje nº 6(2) en virtud de la cual los dos árbitros han firmado el 13 y el 31 de enero de 2014 esta declaración

---

[52] Doc. nº 39, CEDH, In the case of *Pullar v. United Kingdom*, Sentencia del 10-06-1996, Reports 1996-III, p. 792, §30, accesible en http://bit.ly/2hPjOqB

[53] Doc. nº 40, Lalive (Pierre), en *Problèmes relatifs à l'arbitrage international commercial*, en Recueil des Cours de l'Académie de Droit International de La Haye, vol. I, t. 120, 1967, p. 578

[54] Doc. nº 16, Carta de dimisión del Presidente del Tribunal de arbitraje, Sr. José Francisco Rezek, el 13 de marzo de 2001, páginas 1-2

[55] Doc. nº 41, *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic*, ICSID Case No ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 de octubre de 2007), §29

« "sobre (a) mi experiencia profesional, de negocios y otras relaciones (de haberlas) con las partes, tanto anteriores como actuales y (b) cualquier otra circunstancia por la que una parte pudiera cuestionar la confianza en mi imparcialidad de juicio. Reconozco que al firmar esta declaración asumo una obligación continua de notificar prontamente al Secretario General del Centro cualquier relación o circunstancia de aquéllas mencionadas que surjan posteriormente durante este procedimiento". »

44. Conforme al artículo nº 31 de la Convención de Viena sobre el derecho de los tratados, ratificado por España, Chile y el Reino Unido, el artículo 14(1) de la Convención del CIADI y la Regla 6(2) deben ser interpretados de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de éstos y teniendo en cuenta su objeto y fin. Y, como afirma la C.I.J., «*chaque fois que possible, les mots doivent être interprétés de manière à avoir un effet utile*»[56].
Las respuestas objetivamente coincidentes de los Sres. árbitros y del Estado Demandado en diciembre de 2016 en el presente caso han privado de efecto útil a la Regla 6(2) en relación con el artículo 14(1).

45. En un estudio publicado en 2016 el profesor James Crawford argumenta que

« The standard of disclosure of potential conflicts of interest in Rule 6(2) appears to be concerned not only with manifest cases of lack of independence—or more strictly, of reliability—but ***also with situations that might give rise to serious, reasonable reservations about an arbitrator's ability to act independently. (…) The disqualification of arbitrators can be compared with how tribunals have dealt with the exclusion of a particular counsel*** [57] (énfasis añadido).

En consecuencia, prosigue el profesor Crawford, los árbitros deben estar sometidos al mismo test que los abogados como ha hecho el Tribunal del CIADI *Hrvatska Elektroprivreda v Slovenia*[58] en un conflicto de intereses aparente entre miembros de las Essex Court Chambers (el Presidente del Tribunal y el abogado de una parte), a fin de

preserve the integrity of the proceedings and, ultimately, its Award. Undoubtedly, one of the 'fundamental rules of procedure' referred to in Article 52(1)(d) of the ICSID Convention is that the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any Tribunal member (…) in the present circumstances.

El profesor Crawford agrega :

The tribunal noted that '[t]he objection in this case is not predicated on any actual lack of independence or impartiality, but on ***apprehensions of the appearance of impropriety****', clarifying that the problem does not stem from a 'manifest' lack of impartiality or independence as such (ibid para 22).*

---

[56] Doc. nº 42, CIJ, *Affaire Relative à l'application de la Convention Internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie),* sentencia de 1 de abril de 2011, §134, accesible en http://www.ici-cij.org/docket/files/140/16398.pdf

[57] Doc. nº 43, Crawford (James*), Challenges to Arbitrators in ICSID Arbitration*, Oxford Scholarship Online, enero de 2016, págs. 7-8

[58] Doc. nº 44, *Hrvatska Elektroprivreda DD v The Republic of Slovenia*, ICSID Case No ARB/05/24, Order Concerning the Participation of a Counsel (6 de mayo de 2008), §30 (David A.R. Williams QC, Charles N. Brower, Jan Paulsson), y en el §32: "*The Tribunal's conclusion about the substantial risk of a justifiable apprehension of partiality leads to a stark choice: either the President's resignation (…) or directions that [the challenged counsel] cease to participate in the proceedings*", accesible en http://www.italaw.com/sites/default/files/case-documents/italaw6289.pdf

Las circunstancias que concurren en el presente caso desde el 20 de septiembre de 2016 aparentan ciertamente *impropriety*, y, además, hacen también dudar a las Demandantes de la imparcialidad de los Sres. árbitros.

46. Recordamos que la conclusión de alcance general del Tribunal *Hrvatska Elektroprivreda v Slovenia* respecto de las Essex Court Chambers parte de la premisa, que el Tribunal aceptó, de que en el sistema CIADI los *barristers' chambers should be treated in the same way as law firms*:

> "*While the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers' chambers should be treated in the same way as law firms:*
>
> *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 (...)*[59] (subrayado añadido).

47. La doctrina del Tribunal del caso *Hrvatska Elektroprivreda v Slovenia* y las consecuencias lógicas que de ella extrae el profesor Crawford son pertinentes y plenamente aplicables al caso de especie, habida cuenta del comportamiento de los árbitros y del Estado Demandado desde que el 20 de septiembre de 2016 los Demandantes hubieran sido alertados sobre el aparente conflicto de intereses, comportamiento que aparece objetivamente concordante con el hecho de

a) negar, silenciar o pretender ignorar que han omitido comunicar al Centro y a los Demandantes las considerables relaciones existentes entre el Estado Demandado y miembros de Essex Court Chambers que reciben instrucciones del Estado chileno o de un organismo que le pertenece, así como la envergadura de las retribuciones financieras que han percibido, y continúan percibiendo, de la República de Chile mientras está en curso el presente arbitraje,

b) tratar de encubrir esta opacidad absoluta con las respuestas dirigidas a la Sra. Secretaria General en diciembre de 2016, sesgadas como se verá más adelante.

Las respuestas a la Sra. Secretaria General del CIADI de los dos árbitros son evasivas

48. A la solicitud de información sobre la envergadura y la profundidad de las relaciones entre el Estado de Chile y las Essex Court Chambers el árbitro Sr. Berman responde el 17 de octubre de 2016:

[59] Ibid., §§19 y 23

an English barristers ' chambers is not a law firm (...) 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[60];

y el árbitro Sr. Veeder de la misma forma:

« Étant 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 independant 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 » [61] ;

y ocho horas después el Estado de Chile coincide una vez más plenamente con los dos árbitros:

> [claimants'] *letter reflects a misunderstanding of the nature of barristers' chambers in the UK.*[62]

49. En conocimiento de que el 16 de diciembre de 2016 era la fecha límite fijada por la Secretaría del CIADI para recibir la respuesta de Chile a la propuesta de recusación, y el 23 de diciembre la fijada para que los árbitros, conociendo las alegaciones de todas las partes, comunicaran al Centro sus propias observaciones, éstos últimos invirtieron el orden establecido y anticiparon sus respuestas al 4 (el Sr. Berman) y 11 de diciembre (el Sr. Veeder) [63], con lo que se crearon a ellos mismos el medio de evitar tener conocimiento y, por lo tanto, no tener que hacer observaciones a cualquier información que el 16 de diciembre[64] pudiera añadir, u omitir, el Estado de Chile a la desvelada por su Gobierno el 18 de septiembre de 2016 sobre sus relaciones con las Essex Court Chambers.

50. En efecto, esta anticipación de los árbitros ha ayudado al Sr. Veeder en su correo electrónico al Centro del 11 de diciembre de 2016 a mantener silencio absoluto sobre lo que el 22 de noviembre de 2016 le ha sido comunicado (de la misma forma que al Sr. Berman) –a saber, la declaración pública del Gobierno de Chile del 18 de septiembre sobre gestiones sigilosas en las Essex Court Chambers incluso cuando los Sres. **Insulza** y **Kleveren** eran agentes de Chile[65]- que Chile no podía sino confirmar el 16 de diciembre; y ha servido también a poner menos de manifiesto que la respuesta del 4 de diciembre del Sr. Berman se abstiene de toda referencia a las consecuencias de esa declaración pública del 18 de septiembre de 2016 sobre el hecho de que ambos árbitros se sientan en el Tribunal que deberá, en el futuro, decidir acerca de los remedios

---

[60] Doc. nº 45, respuesta de Sir Franklin Berman el 4 de diciembre de 2016 a la propuesta de recusación
[61] Doc. nº 46, respuesta del Sr. V. V. Veeder el 11 de diciembre de 2016 a la propuesta de recusación
[62] Doc. nº 47, declaración de un abogado de Chile publicada en *Global Arbitration Review* el 25 de octubre de 2016, página 4_
[63] Documentos nos. 45 y 46, respuestas dirigidas al CIADI por los Sres. Berman y Veeder el 11 y 4 de diciembre de 2016, respectivamente, comunicadas por el Centro a las partes el 13 de diciembre siguiente
[64] Doc. nº 48, comunicación del Estado Demandado al Centro el 16 de diciembre de 2016
[65] Docs. nos. 29, 30, 31 y §27 *supra*

establecidos en los artículos de la Convención del CIADI nos. 49(2) (rectificación de errores), 50 y 51 (interpretación y revisión) respectivamente,del Laudo pronunciado por los Sres. Berman y Veeder el 13 de septiembre de 2016.[66]

51. Habiendo propuesto también los Demandantes el 27 de octubre, 10 y 22 de noviembre de 2016[67] la dimisión en el caso de que los dos árbitros se consideren vinculados por un deber de confidencialidad de sus *chambers*, lo que les evitaba responder a la propuesta de recusación, es evidente y claro que el Estado de Chile daba por descontado el 2 de diciembre que los árbitros no dimitirían sino que responderían[68] Y acertó, lo hicieron el 4 y 11 de diciembre de 2016 de la manera que será expuesta a continuación.

***

La respuesta de los dos árbitros es también sesgada según los standares del derecho inglés

52. Como afirmaba Lord Bingham en la sentencia *Lawal* de la House of Lords del 19 de junio de 2003:

> "*What the public was content to accept many years ago, is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago.*" [69]

53. Ahora bien, levantar como escudo el derecho inglés para rehusar llevar a cabo una investigación razonable sobre las relaciones entre sus *chambers* y el Estado Demandado y revelar el resultado al CIADI y a las partes es, en el presente caso, tratándose de dos abogados tan experimentados como los Sres. Berman y Veeder, de por sí ya notablemente sesgado.

54. Para empezar, es el propio *General Council of the Bar* inglés quien, al reenviar a las reglas específicas que regulan cada arbitraje, afirma la preeminencia de las reglas del CIADI en el caso presente:

> *The principal concern of the Bar Council is with the position of the barrister acting as an advocate (...) The position of the barrister acting as arbitrator will be no different from the position of any other individual acting as an arbitrator, and is likely* ***to be governed by the rules (legal and contractual) which govern the type of arbitration in question***[70]. (Subrayado añadido).

55. No es, en efecto, razonable imaginar que estos dos eminentes *barristers* ignoran que ese escudo no puede ser levantado del modo absoluto que ellos han hecho cuando, como es el caso de especie, se trata de un *barrister*/arbitre, como lo atestigua, entre otras, la sentencia de la High Court of England and Wales del 2 de marzo de 2016 que

---

[66] Doc. nº 45
[67] Ver la propuesta de recusación del 22 de noviembre de 2016, §§1, 65 y ss, doc. nº 49
[68] Doc. nº 48, carta del Estado de Chile al Centro
[69] Doc. nº 50, House of Lords, Appellate Committee, *Lawal (Appellant) V. Northern Spirit Limited on Thursday*, Judgment, 19 June 2003, [2003] UKHL 35, §22, accesible en http://bit.ly/2h0JIZj
[70] *Information Note regarding barristers in international arbitration*, §4(1), del 6 de julio de 2015, doc. nº 22 anexo a la propuesta de recusación del 22-11-2016, consultada el 6 de enero de 2017 en http://bit.ly/1JUpt13

se apoya explícitamente en la explicación al Principio General nº 6 de la IBA:

> *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.***[71] (Subrayado añadido).

56. Evocamos muy sucintamente el derecho inglés en la materia.

El derecho inglés aplica el test del sesgo judicial también al sesgo arbitral

57. En efecto, el *common law test* de parcialidad encuentra su expresión en la sección 24 de la *English Arbitration Act 1996,* que se refiere al poder que tiene un tribunal de Justicia de apartar a un árbitro:

> ***"(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds: (a) that circumstances exist that give rise to justifiable doubts as to his impartiality…"***[72]

58. Los términos *justifiable doubts as to his impartiality* son interpretados y aplicados en caso de sesgo aparente en los términos que describe la más alta magistratura de Inglaterra, como Lord Bingham, Lord Hoppe y Lord Goff:

> ***the expression is not a happy one, since "bias" suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.*** [73]

59. En derecho inglés el test de sesgo arbitral es el mismo que para el sesgo judicial, y en consecuencia la jurisprudencia y la doctrina relativas al sesgo judicial aparente son aplicables al arbitraje. Lord Hoppe :

> ***I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased***[74] (subrayado añadido);

> ***"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious…But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have***

[71] Doc. nº 20 de la propuesta de recusación (§§17-26), sentencia de la High Court of England and Wales del 2 de marzo de 2016
[72] Doc. nº 54, *English Arbitration Act 1996,* Artículo 24, accesible en http://bit.ly/2i2JVuI
[73] Doc. nº 55, *Davidson v Scottish Minister* [2004] UKHL 34, §6, accesible en http://bit.ly/2hz5Upk
[74] Doc. nº 56, *Porter v Magill* [2001] UKHL 67 (13th December, 2001) por Lord Hope, en [103], accesible en http://bit.ly/2iakww8

formed may make it difficult for them to judge the case before them impartially". [75]

"...before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment." [76] (Subrayado añadido).

60. En derecho inglés el *barrister*/árbitro debe por lo tanto someterse a los mismos tests que el juez. Lord Goff :

I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted, (...) has been whether the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him (...) I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. (...) for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him..." [77] (subrayado añadido).

61. La sentencia del 17 noviembre de 1999 en el caso *LOCABAIL (U.K.) LTD* tiene sin duda en cuenta la obligación de *disclosure* en principio diferente de las oficinas de *sollicitors* y de *barristers*, pero el Tribunal formula sin embargo conclusiones de carácter general que son igualmente aplicables a los *barristers*/árbitros.

En primer lugar, porque el Tribunal considera que el deber de *disclosure* de un juez podría aplicarse en el caso de un *barrister/judge* según las circunstancias

16(E): The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias.

20: When in the course of a trial properly embarked upon some such association comes to light as could equally happen with a barrister-judge), the association should be disclosed and addressed, bearing in mind the test laid down in Reg. v. Gough. (...) In any case giving rise to automatic disqualification on the authority of the Dimes case, 3 H.L.Cas. 759 and Ex parte Pinochet (No. 2)[78] *[2000] 1 A.C. 119, the judge should recuse himself from the case before any objection is raised.*52(A): Lord Denning M.R. in Metropolitan Properties Co. (F G. C.) Ltd. v. Lannon [1969] 1

El razonamiento de alcance general de esta Sentencia de la High Court of England and Wales merece ser reproducido:

---

[75] Doc. nº 57, *Helow v Secretary of State for the Home Department* [2008] UKHL 62, por Lord Hope, §2, accesible en http://bit.ly/2i0vlkL

[76] Ibid, §3

[77] Doc. nº 58, *Regina v. Gough* [1993] House of Lords, AC 646, págs. 669- 670, por Lord Goff of Chieveley

[78] Doc. nº 78, Judgment *in re* Pinochet, 15 de enero de 1999

55 (H). If a judge with limited knowledge of some indirect connection between himself and the case does not make any further inquiries, there may be some risk, an outside chance, that inquiries, if made, would reveal some disqualifying pecuniary or proprietary interest

[En la especie, los Sres. Berman y Veeder han rechazado las sucesivas invitaciones a llevar a cabo una investigación razonable sobre las relaciones pecuniarias entre sus *Chambers* y el Estado Demandado]

If there is in fact such an interest, the judge's lack of knowledge of it or forgetfulness about it will not enable the Dimes principle of automatic disqualification to be avoided. But if there is no such interest, (…) the Reg. v. Gough test must be applied and, for that purpose, all that is necessary is to ask whether, in the light of the judge's actual knowledge at the time of the hearing and of any other relevant facts established by the evidence, the real danger of bias test has been satisfied. (Subrayado añadido).

[En la especie, los Sres. Berman y Veeder, en el supuesto caso de que en el curso de los años pasados no hayan jamás oído ni leído que el Estado de Chile era un cliente importante de las Essex Court Chambers, una vez tuvieron conocimiento de las comunicaciones de los Demandantes sobre relaciones entre miembros de sus chambers y el Estado Demandado ya no podían pretender que no lo sabían. Sin embargo, han asumido estas relaciones sin reserva alguna y han rehusado iniciar una investigación razonable al respecto en el marco del procedimiento del art. 49(2) de la Convención. De conformidad con el razonamiento de esta sentencia inglesa, les sería aplicable el principio *Dimes* más bien que el test *Reg. v. Gough*]

58: If a serious conflict of interest becomes apparent (…), it seems plain to us the judge should not sit on the case. This is so whether the judge is a full-time judge or a solicitor deputy or a barrister deputy.[79] (Subrayado añadido).

[En la especie, los Sres. Berman y Veeder han sido informados a través del Centro del aparente conflicto de intereses con el Estado de Chile y, sin embargo, al tiempo que rehúsan llevar a cabo una encuesta razonable se sientan, desde el 8 de noviembre de 2016, en el Tribunal de arbitraje que tiene la misión de decidir la demanda de 27 de octubre de 2016 de rectificación de errores materiales en el Laudo de 13 de septiembre de 2016 y, llegado el caso, los recursos formulados en conformidad con los artículos 50 y 51 de la Convención]

59(C) In a case in which before or during the trial the facts relating to the alleged bias have been disclosed to the parties, it seems to us right that attention should be paid to the wishes of the parties. They are the principals.

[En la especie, ni el Estado Demandado ni los dos árbitros miembros de las Essex Court Chambers han revelado absolutamente nada sobre sus relaciones recíprocas ni al Centro ni a los Demandantes. Cuando esas relaciones han sido puestas en conocimiento de los Demandantes a partir del 20 de septiembre de 2016, los dos árbitros han rehusado llevar a cabo la investigación razonable que les ha sido solicitada.]

[79] Doc. nº 51, *Locabail (UK) Ltd v Bayfield* [2000] EWCA Civ 3004 en The Supreme Court of Judicature Court of Appeal (Civil Division), 17 de noviembre de 2000, §§20, 19, 52, 58

62. La sentencia más reciente de **17 de febrero de 2016** de la High Court of England and Wales en el asunto *Cofely Ltd.* [80] estudia un caso de «apparent bias, *not actual bias*» en un procedimiento de arbitraje regido por el derecho inglés de un *«qualified barrister [that] has practised from 3, Paper Buildings since 1991-2"*, y formula una consideración de carácter general:

> ***106. It is to be noted, moreover, that the CIArb[81] acceptance of nomination form calls for disclosure of "any involvement, however remote," with either party over the last five years.***

63. La más reciente versión de los Principios de la IBA ha modificado el párrafo 1.4 de la Lista roja no-renunciable con el fin de incluir la situación en la que el grupo del que es miembro el árbitro asesora regularmente a una parte o a una sociedad afiliada a una parte, aunque el árbitro no lo haga:

> *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*

64. La mayor parte de los casos de arbitraje son sustanciados en la *Admiralty and Commercial Court*, una sección de la *High Court*. La mayoría de los jueces nombrados por la *Admiralty and Commercial Court* son *barristers* y *sollicitors* experimentados, con una buena experiencia de arbitraje internacional. En consecuencia, las partes convocadas a los arbitrajes ante un Tribunal inglés pueden esperar razonablemente que los jueces conozcan bien los Principios de la IBA y otros estándares generalmente aplicados en el arbitraje internacional.

65. Por lo tanto, la respuesta de los árbitros a la Sra. Secretaria General del CIADI es injustificada porque no está justificada su premisa, a saber, que cualesquiera que sean las circunstancias cuando se trata de un conflicto aparente de intereses no tenido en cuenta los *barristers*/árbitros tendrían en derecho inglés un tratamiento diferente al de los abogados en el sistema del CIADI.

66. En el caso presente, los Sres. Berman y Veeder

a) el 16 noviembre 2016 han hecho todo lo que estaba en sus manos para cerrar este procedimiento de rectificación de errores, sin acceder a que previamente pudiera responder el Estado de Chile a las preguntas formuladas por los Demandantes sobre el aparente conflicto de intereses (ver §§8, 41, 67-73);

b) sus respuestas al Centro no reconocen que se les ha pedido revelar información que no es confidencial ni para Chile ni para los árbitros puesto que los Demandantes habían puesto en su conocimiento la declaración del Gobierno de

---

[80] Doc. nº 52, England and Wales High Court (Commercial Court), between *COFELY LIMITED, Claimant, and ANTHONY BINGHAM and KNOWLES LIMITED* 1st Defendant, Decision 17/02/2016, [2016] EWHC 240 (Comm), Case No: 2015-000555, accesible en http://bit.ly/2io4kXm; ver en particular los §§69-73, 75 (*The tribunal's explanations as to his/her knowledge or appreciation of the relevant circumstances are also a factor which the fair minded observer may need to consider when reaching a view as to apparent bias – see, for example, In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 and Woods Hardwick Ltd v Chiltern Air Conditioning Ltd [2001] BLR 23)*

[81] UK Chartered Institute of Arbitrators, *"an international centre of excellence for the practice and profession of alternative dispute resolution (ADR)*", accesible en http://www.ciarb.org/

Chile desvelando sus gestiones *sigilosas* en las Essex Court Chambers;

c) no consideran que haya sido inapropiado su comportamiento en el Tribunal de arbitraje durante el presente procedimiento iniciado el 8 de noviembre de 2016 (ver *infra* §§67 a 73).

Esto demuestra una ausencia de objetividad que acrecienta un riesgo de sesgo, consciente o inconsciente, que justifica que sean apartados del Tribunal de arbitraje que deberá decidir el procedimiento del artículo 49(2) y, en su caso, el de los artículos 50 y 51 de la Convención.

Las decisiones tomadas por los árbitros desde el 20 de septiembre de 2016 no son imparciales

67. En efecto, el 20 de septiembre y 13 de octubre de 2016 los Demandantes han dado a conocer al Centro, a los Sres. árbitros y al Estado Demandado[82] el conflicto aparente de intereses puesto en conocimiento de los primeros el 20 de septiembre, solicitando información a fin de confirmarlo o descartarlo y, el 27 de octubre de 2016, plantearon respetuosamente al Tribunal de arbitraje reconstituido la cuestión previa siguiente:

> *"1. Que acceda a la solicitud dirigida a la República de Chile el 13 de octubre de 2016 de full disclosure al Tribunal de arbitraje, al Centro y a todas las partes, de las relaciones durante los tres años anteriores al comienzo, el 16 de junio de 2013, de la presente fase del procedimiento, y las que existen actualmente, entre la República de Chile y miembros de las Essex Court Chambers;*
>
> *2.Que acceda a que los Sres. árbitros miembros de las Essex Court Chambers lleven a cabo una investigación razonable sobre las cuestiones con apariencia de conflicto de intereses planteadas en la carta de los Demandantes del 13 de octubre de 2016, y que revelen plenamente el resultado al Tribunal, al Centro y a todas las partes;*
>
> *3.Que en caso de que, por razones de confidencialidad u otras, los Sres. Árbitros miembros de las Essex Court Chambers no procedieran a realizar esa investigación y/o a la* full disclosure *de la información solicitada, que sometan a la Secretaría General del CIADI su dimisión voluntaria (artículos 8(2) del Reglamento de arbitraje y 14 de la Convención) como árbitros del Tribunal de arbitraje que deberá decidir sobre la presente demanda de corrección de errores materiales en el Laudo del 13 de septiembre de 2016."* [83]

68. El 10 de noviembre de 2016 los Demandantes reiteraban que:

> *«vistos los hechos y fundamentos que obran en la Demanda de 27 de octubre de 2016 (pp. 28 a 91), las Demandantes solicitan respetuosamente al Tribunal de arbitraje que en el marco de la Regla de arbitraje nº 49(3), con carácter previo a cualquier determinación acerca del procedimiento a seguir en el examen de la demanda de suspensión provisional del curso procesal del presente procedimiento,*

[82] Pièces nos. 64 et 65
[83] Pièce nº 72

1. Que admita la demanda que las partes demandantes han dirigido a la República de Chile el 13 de octubre de 2016 para que proceda a la full disclosure *ante el Tribunal de arbitraje, el Centro y todas las partes, de las relaciones mantenidas entre la República de Chile y miembros de las Essex Court Chambers durante los tres años anteriores al inicio, el 16 de junio de 2013, de la presente fase del procedimiento, y de las que existen actualmente;*

2. Que admita que los Señores árbitros que forman parte del Tribunal y también son miembros de las Essex Court Chambers lleven a cabo una investigación razonable sobre las cuestiones de aparente conflicto de intereses enumeradas en la carta de las Demandantes de 13 de octubre de 2016, y revelen todo el resultado al Tribunal, al Centro y a todas las partes."

69. Ahora bien, en lugar de tomar en consideración esta cuestión previa, de invitar al Estado Demandado a ser oído y tomar después una decisión al respecto, el 16 de noviembre de 2016 el Tribunal de arbitraje ha ignorado pura y simplemente pronunciarse sobre la cuestión previa y ha dirigido a la República de Chile la decisión siguiente[84] :

*The Respondent is invited to indicate as soon as possible, and in any event not later tan **30 November 2016**, whether it accepts the rectifications put forward in the Request. In the light of the Respondent's response the Tribunal will then proceed to determine the future procedure in accordance with Arbitration Rule 49(3).* (Énfasis en el original).

70. En claro, el Tribunal arbitral ha ofrecido al Estado de Chile concluir sin examen el procedimiento de rectificación de errores materiales eliminando, en consecuencia, *ipso facto* cualquier posibilidad de tratamiento de la cuestión previa relativa al aparente conflicto de intereses, privando así a éste totalmente de espacio procesal o incluso de objeto, creando un completo *porte-à-faux* artificial respecto de la acción de los Demandantes. En efecto, en cuanto que el Estado Defensor hubiera comunicado su consentimiento a la demanda introducida el 27 de noviembre de 2016 por los Demandantes, al Tribunal arbitral sólo le quedaba tomar nota y cerrar el procedimiento, con lo que los Demandantes, en la práctica, ya no podían ser tomados en serio sobre un posible conflicto de intereses dado que su demanda de corrección de errores habría sido plenamente aceptada.

71. La tentativa de los árbitros de eludir pura y simplemente la cuestión previa ha quedado muy a la vista.

72. Resulta evidente que esta respuesta de los Sres. Berman y Veeder del 16 de noviembre de 2016 recuerda el caso estudiado en la sentencia del **17 de febrero de 2016** de la High Court of England and Wales (asunto *Cofely Ltd.*, *supra* §62) sobre el aparente conflicto de intereses del *barrister*/árbitro Sr. Bingham,

Mr Bingham's essential response, however, involved avoiding addressing the requests and instead giving the appearance of seeking to foreclose further inquiry by demonstrating their irrelevance.

Mr Bingham gave the impression that he was seeking to pre-empt that process by pressurising Cofely into acknowledging that there was no issue to be explored.

[84] Doc. nº 60, el Tribunal de arbitraje pregunta el 16 de noviembre de 2016 si Chile consiente la demanda

73. En resumen, los dos árbitros no han accedido a la solicitud, perfectamente legítima y motivada, de permitir que el Estado demandado y ellos mismos sean oídos sobre el aparente conflicto de intereses y han maniobrado de manera manifiesta con el fin de eludir la cuestión.

La respuesta del Sr. Berman del 4 de diciembre de 2016 es incompleta, inexacta y sesgada

74. Sir Franklin Berman no responde en su carta al Sr. Presidente del Consejo Administrativo del CIADI[85] a ninguno de los motivos y hechos sobre los cuales se fundamenta la demanda de recusación formulada el 22 de noviembre de 2016, a saber:

> *"I. EL APARENTE CONFLICTO DE INTERESES ENTRE LOS DOS ARBITROS MIEMBROS DE ESSEX COURT CHAMBERS Y LA PARTE DEMANDADA, LA REPUBLICA DE CHILE*
> *1. La negativa de Sir Franklin Berman y el Sr. V.V. Veeder de revelar al Centro y a los inversores las relaciones entre miembros de su Oficina y el Estado Demandado*
> *2. La obligación de* disclosure *en derecho inglés no justifica la negativa que los Sres. Berman y Veeder oponen a la solicitud de los Demandantes*
> *II. LA CONVENCIÓN DEL CIADI*
> *1. La obligación de* disclosure *en el sistema CIADI contradice a los Sres. Berman y Veeder*
> *2. La doctrina de los Tribunales del CIADI en dos casos de conflicto de interés aparente entre miembros de las Essex Court Chambers y árbitros igualmente miembros de esas Chambers*
> *3. Los Principios de la International Bar Association (IBA) sobre los conflictos de interés en el arbitraje internacional son aplicados en el sistema CIADI*
> *III. LAS CIRCUNSTANCIAS ESPECÍFICAS EN LA ESPECIE*
> *1.Las continuadas maniobras de la República de Chile para intervenir el Tribunal de arbitraje y/o sabotear el arbitraje*
> *2. El Código ético del Colegio de Abogados de Chile califica de conflicto de interés objetivo una situación como la creada en el presente procedimiento entre el Estado de Chile y los árbitros miembros de las Essex Court Chambers*
> *3. Sin embargo, la República de Chile, el Tribunal de arbitraje y el Centro han aplicado a las partes Demandantes los Principios de la IBA sobre conflictos de intereses*
> *4.* Nemo iudex esse debet in causa sua
> *5. Revelar o dimitir en caso de deber mantener la confidencialidad."*

75. Sir Franklin Berman afirma en su carta, sin precisar ninguna fecha que pudiera orientar al destinatario de su carta y evitar la confusión en la articulación de peticiones diferentes:

> *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.*

Fue sobre la base y en relación con lo que había sido puesto en conocimiento de los Demandantes el 20 de septiembre de 2016 que las solicitudes de una investigación razonable y de *disclosure* fueron dirigidas a Sir Franklin a través de la Sra. Secretaria General del CIADI, mientras que la fecha de su nombramiento había sido el 13 de enero de 2014[86].

Que el Sr. Berman no ha aceptado llevar a cabo una investigación razonable sobre las relaciones existentes entre el Estado de Chile y los miembros de las Essex Court Chambers lo atestigua el archivo adjunto nº 45, en detrimento únicamente de los Demandantes.

Y mientras estos últimos, totalmente exteriores a los contactos accesibles al Sr. Berman,

[85] Doc. nº 45
[86] Doc. nº 61, declaración de Sir Franklin Berman ante el CIADI el 13 de enero de 2014

recibían informaciones que les permitían gradualmente poner de relieve la considerable profundidad de los lazos de intereses, de una envergadura manifiestamente prohibitiva, al nivel de la apariencia objetiva de incompatibilidad, el Sr. Berman, sin embargo, desplazaba el asunto hacia una suposición de coincidencia puntual que, según él, cerraba el paso a cualquier pregunta pues estaba protegida por las reglas de confidencialidad interna propias de su asociación profesional.

> *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.*

Invitado desde el 20 de septiembre de 2016 a llevar a cabo una investigación razonable sobre esas relaciones, Sir Franklin debió, según el artículo 14(1) de la Convención y la Regla de arbitraje nº 6(2) del CIADI del CIADI, acceder a la solicitud de los Demandantes. No lo ha hecho, en detrimento únicamente de los Demandantes.

> *3) I note finally a suggestion in the papers that the resubmission tribunal had pressed ahead with the rectification proceedings in undue baste, 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).*

Las fechas por sí mismas desvirtúan esta afirmación de Sir Franklin : la decisión del Tribunal comunicando el calendario del procedimiento está fechada el 21 de noviembre de 2016[87], cinco días después de la decisión del 16 de noviembre[88] que, ignorando la cuestión previa planteada por los Demandantes, había dejado a la discreción del Estado de Chile la oportunidad de consentir de forma inmediata la demanda de rectificación de errores y, en consecuencia, de cerrar este procedimiento en la práctica, precluir la posibilidad de una propuesta de recusación en virtud de la Regla 9(1)[89] e impedir, de este modo, el tratamiento de la cuestión del aparente conflicto de intereses (que concierne también, recordémoslo, a los procedimientos que los artículos 51 y 50 de la Convención confían a estos mismos árbitros en revisión y/o interpretación del Laudo de 2016).

76. A esto se añade el hecho de que, habiendo solicitado los Demandantes el 10 de noviembre de 2016 que el Tribunal accediera a la petición de *disclosure* por los árbitros y el Estado de Chile con carácter previo a cualquier determinación sobre la suspensión provisional del procedimiento de rectificación de errores, hasta conocer la decisión del Tribunal de interpretación de la Sentencia de 2008 (*ex* art. 50 de la Convención), sin embargo el 21 de noviembre los dos árbitros, de manera incongruente, ignoran la demanda de *disclosure* que les concierne e, invirtiendo el orden natural de las solicitudes formuladas, pasan directamente a pronunciarse sobre la suspensión provisional del procedimiento como se lo solicitó Chile el 17 de noviembre de 2016[90].

---

[87] Doc. nº 45, páginas 3 y 4

[88] Doc. nº 60

[89] La Regla de arbitraje nº 9(1) dispone: « *La parte que proponga la recusación de un árbitro de conformidad con el Artículo 57 del Convenio presentará su propuesta (...) en todo caso antes que se cierre el procedimiento.*"

[90] Doc. nº 62, carta de 17 de noviembre de 2016 del Estado Demandado al Tribunal de arbitraje

77. Estas decisiones procesales por parte de árbitros tan experimentados han confirmado las dudas sobre su imparcialidad y el riesgo de sesgo.

***

La respuesta del Sr. Veeder del 11 de diciembre de 2016 es igualmente incompleta, inexacta, sesgada y conscientemente engañosa, en connivencia manifiesta con la República de Chile

78. En el correo electrónico que dirige al Secretario del Tribunal arbitral[91] el Sr. Veeder tampoco responde a las cuestiones formuladas en la propuesta de recusación.

79. Mientras que uno de los fundamentos de la respetuosa propuesta de recusación del 22 de noviembre de 2016 lo resume su §42 : "*Estos hechos, discriminatorios y parciales respecto de las partes Demandantes, plantean dudas razonables en cuanto a* ***la imparcialidad y neutralidad*** *de los dos árbitros que exigen los arts. 14(1) y 52(1)(d) de la Convención y* ***el art. 6(2) del Reglamento de arbitraje***", la respuesta del Sr. Veeder[92] ha modificado la razón de ser y la finalidad de la recusación por la vía de ignorar pura y simplemente el primer fundamento de la *causa petendi – « imparcialidad y neutralidad »*, es decir el artículo 6(2) del Reglamento y el segundo componente del artículo 14(1) de la Convención (ausencia de sesgo, ver *supra* §17, 44). Como afirma el profesor Crawford:

> *The standard of disclosure of potential conflicts of interest in Rule 6(2) appears to be concerned not only with manifest cases of lack of independence—or more strictly, of reliability—but also with situations that might give rise to serious, reasonable reservations about an arbitrator's ability to act independently*[93] (subrayado en el original).

80. El Sr. Veeder ignora en su carta, en efecto, que se le ha recordado su obligación *ex* artículo 6(2) del Reglamento de arbitraje cuya redacción reproduce la nota a pie de página n° 7 *supra*.

81. Esta modificación de la *causa petendi*, la supresión correlativa de la referencia al artículo 6(2) del Reglamento y, en consecuencia, la privación de cualquier efecto útil asociada al mismo, son manifiestas en la respuesta del Sr. Veeder:

> *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.*

82. El Sr. Veeder termina así su respuesta:

> *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*

[91] Doc. n° 46
[92] Doc. n° 46
[93] Doc. n° 43, Crawford (James), *Challenges to Arbitrators in ICSID Arbitration*, Oxford Scholarship Online, enero de 2016, pág.7

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.* (Soulignement ajouté).

83. Ahora bien, la prueba presentada por los Demandantes, la *Decision on Jurisdiction* del Tribunal del caso *Vanessa Ventures v. Venezuela*[94], de 22 de agosto de 2008, hace inverosímil la respuesta del Sr. V.V. Veeder QC del 11 de diciembre de 2016 y, **en este contexto, corresponde al Sr. Veeder la ímproba tarea de explicar por qué ha asegurado al Centro haberse enterado *at the jurisdictional hearing*, que tuvo lugar el 7 de mayo de 2007,**

> "*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*",

cuando

1) la identidad del consejero de Vanessa, el *barrister* de Essex Court Chambers Mr. Christopher **Greenwood**, había sido comunicada doce días antes del *hearing*, **el 25 de abril de 2007**, al Tribunal arbitral cuyo presidente era precisamente el Sr. Veeder desde el 20 de mayo de 2005,

2) la presencia del Sr. **Greenwood** había provocado que dos árbitros, los Sres. Veeder y Brower, tomaran la iniciativa de dirigirse por escrito al CIADI;

3) las comunicaciones de los dos árbitros transmitidas al Centro han sido comunicadas a las partes **el 27 de abril de 2007** (con el conocimiento del Presidente del Tribunal Sr. Veeder), diez días antes de la apertura de las audiencias: «On *April 27, 2007, the Centre transmitted to the Parties further declarations by two Tribunal members with respect to Prof. **Greenwood**»;*

4) el **3 de mayo de 2007** los abogados de la Demandada respondieron a la carta de los dos árbitros;

5) el **4 de mayo de 2007**, cuatro días antes de las audiencias, el Tribunal (en el que se sentaba el Sr. Veeder) "*invited the Claimant to provide any observations which it might have with respect to the Respondent's letter in this matter*".

---

[94] Doc. nº 63, *Vanessa Ventures v. Venezuela*, ICSID Case N° ARB(AF)/04/6, Decision on Jurisdiction, 22 de agosto de 2008

84. La mencionada *Decision on Jurisdiction* del Tribunal de *Vanessa Ventures v. Venezuela,* en su página 10, no confirma lo que el Sr. Veeder ha escrito al Centro el 11 de diciembre de 2016:

> *On **April 25, 2007**, the Tribunal was provided with a revised list of participants for the upcoming hearing on jurisdiction. Among the persons listed as representing the Claimant was Prof. Christopher **Greenwood**. On April 27, 2007, the Centre transmitted to the Parties further declarations by two Tribunal members with respect to Prof. **Greenwood**. On May 3, 2007, the Respondent submitted its observations on the further declarations. On May 4, 2007, the Tribunal invited the Claimant to provide any observations which it might have with respect to the Respondent's letter in this matter. The Claimant provided its observations the same day.*
> *As agreed, **on May 7, 2007**, the hearing on jurisdiction took place in London. At the hearing, the following persons appeared as legal counsel and representatives for the Claimant: (...) as well as Prof. **Greenwood of Essex Chambers**. (...) .*
>
> *The following persons appeared on behalf of the Respondent as its legal counsel and representatives: Messrs. (...) Kelby Ballena (....) Mr. Paolo Di Rosa and Ms. Gaela Gehring Flores of Arnold & Porter LLP (...).*[95]
>
> ***During the session, after hearing the Parties' positions regarding the participation of Prof. Greenwood in the case, the President of the Tribunal submitted his resignation**. His resignation was accepted by his two co-arbitrators, Judge Brower and Mr. Paulsson, in accordance with the Additional Facility Arbitration Rules.*

85. Se recordará que los dos co-árbitros en el asunto *Vanessa* –los Sres. Jan Paulsson y Charles Brower- no aceptaron ese mismo mes de mayo de 2008 el conflicto aparente de intereses surgido entre dos miembros de las Essex Court Chambers en el asunto *Hrvatska Elektroprivreda DD v The Republic of Slovenia*[96], es decir el Presidente del Tribunal arbitral y el abogado de una de las partes. Después de haber considerado apartar a uno o al otro, el Tribunal apartó al abogado, declarando que es inaceptable en el sistema del CIADI el conflicto aparente de intereses que plantean las relaciones no consentidas entre miembros de las Essex Court Chambers (ver *supra* §§48-49), como en el asunto *Vanessa*.

86. El Sr. Veeder no ha aportado ninguna prueba de que la sóla objeción determinante a su continuidad en el Tribunal debatida durante los doce días siguientes versaba sobre la participación del Sr. Veeder en otro caso sin relación con Vanessa, como éste deja entender el 11 de diciembre de 2016.

87. El 30 de diciembre de 2016 los Demandantes han solicitado al Centro que les sea entregada la información citada en las páginas 9 y 10 de la mencionada Decisión del Tribunal de *Vanessa Ventures v. Venezuela*[97]. El Centro ha respondido el 1 de enero de 2017 que no estaba autorizado a hacerlo[98]. El Estado de Chile y sus abogados, que recibieron copia de este intercambio y podían levantar este obstáculo a la transparencia, guardaron silencio.

Ahora bien, ha sido puesto en conocimiento de las Demandantes que en el caso Vanessa fueron precisamente los abogados de Venezuela – a la sazón los Sres. Paolo di Rosa, Kelby

---

[95] Los Sres. Kelby Ballena, Paolo Di Rosa y Da. Gaela Gehring representan al Estado de Chile en el presente procedimiento de arbitraje

[96] Doc. nº 44, *Hrvatska Elektroprivreda DD v The Republic of Slovenia*, ICSID Case No ARB/05/24, Order Concerning the Participation of a Counsel (6 May 2008), §30

[97] Doc. nº 74

[98] Doc. nº 75

Ballena y la Da. Gaela Gehring[99]- quienes formularon una objeción al conflicto de intereses consistente en que Mr. Veeder -miembro del Tribunal- pertenecía a las mismas Chambers que otro miembro de éstas que tenía relaciones profesionales con una de las partes -Vanessa- en el propio caso contra Venezuela.

Es después de haber oído las objeciones de esos abogados cuando Mr. Veeder dimitió del Tribunal de arbitraje.

La comunicación que Mr. Veeder ha dirigido el 11 de diciembre de 2016 al Secretario del Tribunal de arbitraje es por lo tanto deliberadamente sesgada, incluso engañosa, en cuanto que oculta la objeción rigurosamente paralela a la específicamente planteada a la sazón por quienes hoy son los abogados de la República de Chile en el presente caso.

Es inconcebible que una personalidad con la reputación internacional de Mr. V. V. Veeder QC (el Gobierno de Su Majestad había nombrado expertos eminentes, independientes e imparciales, de reputación internacional sin tacha, voir §102 *supra*), haya ocultado que ese muy preciso motivo de oposición de los referidos abogados había sido uno de las cuestiones contrarias a su continuidad en el Tribunal debatidas durante las audiencias, si no hubiera estado cierto que, quienes sabían, se callarían so pretexto de deber de confidencialidad.

En efecto, en la comunicación que D. Paolo di Rosa y la Da. Gaela Gehring han firmado el 16 de diciembre de 2016 -en nombre de la República de Chile- guardan silencio acerca de esta precisa cuestión de la que ellos mismos han sido los protagonistas personales durante las audiencias de mayo de 2007, cuidándose de cubrir a Mr. Veeder mediante la reproducción de las palabras escogidas por éte a fin de excluir esta cuestión:

> « *Ex-R34. Letter from V. V. Veeder to ICSID, 11 December 2016 (explaining that the reason that he resigned in the Vannessa Ventures arbitration was because there was an "**actual** conflict," and was **not** because he and one of the attorneys acting for the claimant were both members of the same barristers' chambers*)" [100] (subrayado en el original).

La desviación de la confidencialidad a fin de encubrir la connivencia entre los árbitros y la República de Chile está aquí, una vez más, comprobada de manera manifiesta, en perjuicio de los inversores españoles. Otro paralelismo con el fraude, cofirmado por el Ministro Jack Straw, cometido contra la Fundación española Demandante (ver *supra* §§ 98-105).

***

[99] Doc. nº 65, page 10: "*The following persons appeared on behalf of the Respondent as its legal counsel and representatives: (…)* ***Kelby Ballena*** *(…);* ***Mr. Paolo Di Rosa and Ms. Gaela Gehring Flores of Arnold & Porter LLP*** (…)" (subrayado añadido).

[100] *Chile's Response to Claimant's Request for Disqualification*, nota a pie de página nº 91. La carta de Mr. Veeder al Centre de 16 de diciembre de 2016 figura en el doc. nº 46

IV. EVALUACIÓN DE LA COMUNICACION DE LA REPÚBLICA DE CHILE DEL 16 DE DICIEMBRE DE 2016

88. El 20 de septiembre de 2016, en cuanto fue puesto en conocimiento de los Demandantes que el Gobierno de Chile publicitó dos días antes que llevaba a cabo gestiones ***sigilosas*** en las Essex Court Chambers, los Demandantes se dirigieron a la Sra. Secretaria General del CIADI a fin de identificar los hechos[101] :

> *«Dans les toutes prochaines semaines Messieurs les arbitres du Tribunal arbitral pourraient avoir à exercer, à l'initiative des parties, les pouvoirs de décision que leur confère l'article 50 de la Convention CIRDI dans la procédure d'interpréter et/ou réviser la Sentence arbitrale communiquée le 13 septembre 2016.*
>
> *Dans l'intérêt du Centre, du système d'arbitrage international et conformément à une application effective de l'article 14 de la Convention CIRDI (offrir toute garantie d'indépendance et d'impartialité dans l'exercice des fonctions arbitrales), les Demanderesses sont amenées à solliciter respectueusement que les très distingués arbitres dans la présente procédure, Sir Frank Berman, QC et M. V.V. Veeder, QC, membres des Essex Court Chambers, révèlent pleinement sans tarder (*full disclosure*)... »*[102]

De conformidad con la Regla de arbitraje del CIADI n° 6(2) y la nota explicativa al Principio General n° 3(e) de la IBA sobre conflictos de interés en el arbitraje internacional:

> *When considering whether facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration is at the beginning or at a later stage.*

La carga de desvelar en 2016 las relaciones entre la parte Demandada y las Essex Courts Chambers no incumbe a los Demandantes habida cuenta de la declaración inicial de los Sres. Berman y Veeder *ex* Regla n° 6(2)

89. La pretensión del Estado de Chile (§§38,39) según la cual « *Claimants have waived their right to object on the basis of Essex Court Barristers representing Chile before the ICJ* »[103] no tiene fundamento alguno en lo que se refiere al tiempo transcurrido entre el conocimiento del hecho que plantea un conflicto aparente de intereses, el 20 de septiembre de 2016, y la reacción a este hecho, ni con respecto a la razón de ser y la finalidad de la propuesta de recusación, que se refieren al aparente conflicto de intereses de dos de los árbitros que tendrán que decidir el procedimiento iniciado el **27 de octubre de 2016** *ex* artículo 49(2) de la Convención y, en su caso, los procedimientos previstos en los artículos 50 y 51 que las partes pudieran iniciar en el futuro.

El documento R47 anexo a la respuesta de Chile desvela al CIADI y a los Demandantes, por primera vez, que un miembro de Essex Court Chambers era abogado de Chile en 2012 y que habría publicaciones que hablaban de ello. Chile reprocha a los Demandantes no conocerlas. Al respecto cabe responder en los términos de la *sentencia de la Corte de Casación* de

---

[101] Ver el doc. n° 64, carta de los Demandantes solicitando el 20 de septiembre de 2016 la *full disclosure* por los Sres. Berman y Veeder de las relaciones entre Chile y las Essex Court Chambers, y los §§2, 10, 76 de la propuesta de recusación de 22 de noviembre de 2016

[102] Doc. n° 64, carta de los Demandantes a la Sra. Secretaria General del CIADI el 20 de septiembre de 2016

[103] Respuesta del Estado Demandado de 16 de diciembre de 2016, §39

Francia de 16 de diciembre de 2016 a una objeción semejante:

> *«que le fait n'était pas notoire pour la société AGI avant le début de l'arbitrage, qu'en cours d'instance arbitrale,* ***l'obligation de se livrer à des investigations sur l'indépendance de*** **[l'arbitre]** ***M. X... ne pesait pas sur [la société AGI], compte tenu des garanties qu'il*** **[l'arbitre]** ***avait fournies lors de sa déclaration*** **[d'indépendance]**».

En efecto, el Tribunal de Casación ha desestimado el motivo del recurso según el cual

> *« la recherche concrète de l'existence d'une incidence raisonnable sur l'impartialité de l'arbitre s'impose d'autant que les liens d'intérêts allégués ne mettent en relation directe ni l'arbitre, ni l'une des parties, mais la structure dans laquelle le premier exerce (...) appartenant au bureau de Toronto du cabinet international Fasken Martineau sur les 770 avocats répartis au Canada, en Europe et en Afrique du Sud que comprend ce cabinet, (...) sans expliquer en quoi et de quelle manière ces éléments pouvaient concrètement affecter le jugement de l'arbitre pour faire naître une tel doute, la cour d'appel n'a pas légalement justifié sa décision au regard de l'article 1520-2° du code de procédure civile (...) ; que* ***son jugement [*** **de l'arbitre*** ***]ne pouvait se trouver affecté par une circonstance qu'il ignorait*** *»*[104] (énfasis añadido).

A su vez, en derecho inglés la obligación de confidencialidad de los *barristers*/árbitros termina cuando se trata de información que es de dominio público:

> *34.(...) barristers who are asked to act as arbitrators should consider what steps should be taken to ensure early disclosure at the time of appointment, bearing in mind all relevant obligations of confidentiality,*

afirma el *Information Note regarding barristers in international arbitration* del *General Council of the Bar*.[105]

Los árbitros tenían pues el deber de presentar la situación a los Demandantes, poniéndolos en la situación de ejercer la opción adecuada, un deber permanente que en el sistema del CIADI impone la Regla de arbitraje n° 6(2).

En el caso *Locabail*, la High Court of England and Wales (*supra* §61) no ha aceptado la recusación del juez/árbitro porque éste había comunicado a las partes lo que había leído en un recorte de prensa y las partes no habían reaccionado:

> *During the hearing E. produced material relating to her matrimonial proceedings which included a press cutting from which the judge learnt that his firm was acting for clients in litigation for the enforcement of financial claims and of bankruptcy against E.'s former husband.* ***The judge immediately disclosed that connection, stating that*** *he knew no more of that litigation than had appeared from the cutting. Neither party sought an adjournment, no objection was raised and the hearing continued. (...)* ***If a serious conflict of interest becomes apparent (…), it seems plain to us the judge should not sit on the case. This is so whether the judge is a full-time judge or a solicitor deputy or a barrister deputy***.[106] (Subrayado añadido).

---

[104] Doc. n° 77, Cour de Cassation de Francia, caso *Société Columbus acquisitions INC et la société Columbus Holdings France,* Sentencia de 16 de diciembre de 2015

[105] Doc. n° 22 anexo a la propuesta de recusación del 22 de noviembre de 2016, citado

[106] Doc. n° 51, *Locabail (UK) Ltd v Bayfield* [2000] EWCA Civ 3004, pág. 451 (1) y §58

Ocurre, sin embargo, que a partir del 17 de octubre de 2016[107] los dos árbitros han leído el recorte de prensa del 18 de septiembre de 2016 que publica la declaración del Gobierno de Chile desvelando gestiones sigilosas en las Essex Court Chambers, y no pueden aquellos continuar sosteniendo que ignoran su existencia ni pretender su «confidencialidad» ni en el derecho del CIADI ni tampoco en el inglés, desde el momento en que han sido personal y formalmente alertados por los Demandantes.

En el sistema del CIADI este deber de *disclosure* es de aplicación en las circunstancias específicas del presente caso (que no son *de minimis*), como lo atestiguan las resoluciones de los Tribunales y del Presidente del Consejo Administrativo del CIADI citadas en la proposición de recusación del 22 de noviembre de 2016 (§§29, 32, 35, 38, 39, 44, 45, 46, 47, 51, 56, 68), y la conclusión del Tribunal del asunto *Alpha v. Ukraine* después de estudiar la relación entre la Regla del artículo 6(2) y los Principios de la IBA:

> *Certain facts or circumstances are of such a magnitude that failure to disclose them either (1) would thereby in and of itself indicate a manifest lack of reliability of a person to exercise independent and impartial judgment or (2) would be sufficient in conjunction with the non-disclosed facts or circumstances to tip the balance in the direction of disqualification.*[108]

En el mismo sentido, la sentencia citada del Tribunal de Casación francés del 16 de diciembre de 2016 ha confirmado el sesgo de un árbitro porque «*n'avait pas fait état dans sa déclaration d'indépendance* » de las relaciones profesionales entre abogados de su Oficina y una de las partes (la sociedad AGI) que eran del dominio público pero que AGI desconocía,

> *« (…) au regard de l'ample publicité donnée par ce dernier* [le Cabinet], *la cour d'appel en a exactement déduit que, ces circonstances ignorées de la société AGI étant de nature à faire raisonnablement douter de l'indépendance et l'impartialité de l'arbitre, le tribunal arbitral était irrégulièrement constitué. »*[109]

El Estado de Chile tiene la obligación de revelar al Centro y a las partes que mantiene relaciones con las Chambers de las que son miembros los árbitros Sres. Berman y Veeder

90. Como hemos visto *supra* (§§52-66) y en el caso *Hrvatska Elektroprivreda DD v Slovenia*[110], los Principios Generales de la IBA en materia de conflictos de interés en el arbitraje internacional son tenidos en cuenta tanto en el sistema del CIADI como por los Tribunales ingleses en el caso de los *barristers*/árbitros.[111] El Principio General nº 7(a) dispone:

> *A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of* ***any relationship, direct or indirect,***

[107] El 17 de octubre de 2016 los Demandantes comunicaron a Sir Franklin Berman por intermedio de la Sra. Secretaria General del CIADI el recorte de prensa con la declaración del Gobierno chileno de 18 de septiembre de 2016, doc. 15 anexo a la propuesta de recusación formulada el 22 de noviembre de 2016
[108] Doc. 76, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, §64, 19 mars de 2010, accesible en http://www.italaw.com/sites/default/files/case-documents/ita0025.pdf
[109] Doc. nº 77, Cour de Cassation de Francia, vaso *Société Columbus acquisitions INC et la société Columbus Holdings France,* Sentencia de 16 de diciembre de 2015, página 2
[110] Doc. nº 74, *Hrvatska Elektroprivreda DD v Slovenia,* ICSID Case No. ARBl05124, Order of 6 May 2008, §§4, 7 a 10
[111] Ver igualmente los §§16-24, 43-51, 56-59 de la propuesta de recusación de 22 de noviembre de 2016

> ***between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration)**, or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. **The party shall do so on its own initiative at the earliest opportunity**.* (Subrayado añadido).

La explicación que hace la IBA de este Principio General es que

> *(a) **The parties are required to disclose any relationship with the arbitrator**. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment.* (Subrayado añadido).

El Estado Defensor ha incumplido siempre, categóricamente, esta obligación, también en su comunicación del 16 de diciembre de 2016[112].

91. Conforme a la explicación de la IBA al Principio General n° 7(c):

> ***any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of** the proceedings, (...) to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence.*
>
> ***The focus is on any relevant information available to a party – i.e. whether publicly or privately accessible. Thus, the range of information which needs to be searched would also cover information that the party may only know of internally at its organization, for example.*** (Subrayado añadido).

El Estado de Chile ha ocultado en forma absoluta al Centro y a las Demandantes la información de que dispone sobre sus relaciones con las Essex Court Chambers y sus miembros. Y a pesar de conocerlo **todo** sobre esas relaciones no tenidas en cuenta, el Estado Demandado no ha respondido a ninguna de las preguntas que se le han planteado al respecto desde el 13 de octubre de 2016[113].

92. *Res ipsa loquitur*, la prueba ha sido aportada, la mala fe del Estado Demandado respecto del CIADI, de la integridad del procedimiento de arbitraje y de las partes Demandantes, es manifiesta e indiscutible.

93. Esa mala fe aumenta cuando el Estado Demandado desnaturaliza en su comunicación del 16 de diciembre de 2016 la razón de ser y la finalidad de las preguntas planteadas en la carta de los Demandantes del 13 de octubre de 2016 y en la respetuosa propuesta de recusación del 22 de noviembre siguiente,

a) Pues siendo la premisa de esas preguntas la aplicación efectiva de la articulación entre la Regla de arbitraje n° 6(2) y el artículo n° 14 de la Convención en relación con el Tribunal que debe decidir en el futuro la demanda del 27 de noviembre de 2016, la comunicación del Estado de Chile ignora magníficamente la fuerza vinculante de esas normas para los árbitros y todas las partes;

---

[112] Doc. n° 48
[113] Doc. n° 65

b) Dado que la respetuosa proposición de recusación tiene por objeto asegurar la imparcialidad del Tribunal al que la Convención encomienda decidir los remedios que prevén el artículo nº 49(2) –rectificación de errores materiales en el Laudo de 13 de septiembre de 2016-, el artículo nº 51 –recurso de revisión del mismo -, y el artículo nº 51-recurso de aclaración del Laudo-, la comunicación del Estado de Chile no hace la menor referencia a esas normas y modificando la *causa petendi* la desvía hacia un asunto diferente, a saber *the Tribunal decision* [del 16 de noviembre de 2016[114]] *not to suspend the Rectification Proceeding* (§40). El argumento de la Demandada no tiene ningún fundamento. La prueba de lo contrario figura en el procedimiento (ver en la propuesta de recusación los §§2-7, 8-15, 60-68 y las Conclusiones; y en la presente comunicación los §§50, 75, 93, 113*)*;

c) Siendo así que las revelaciones que se le han solicitado al Estado Demandado y a los Sres. árbitros de las Essex Court Chambers tienen su fundamento en el deber que, **hoy**, les impone la Regla de arbitraje nº 6(2) en relación con sus funciones en los procedimientos regidos por los artículos nos. 49(2), 50 y 51 de la Convención, a saber "*la **obligación continua** de notificar prontamente al Secretario General del Centro cualquier relación o circunstancia de aquéllas mencionadas que surjan **posteriormente durante este procedimiento**»*, la comunicación del Estado Demandado coincide objetivamente con la de los árbitros del 17 de octubre de 2016 en mirar hacia atrás, hacia los años 2013-2014 (§§2 a 12, 16, 17, 33, 37, 38, 39),

d) Cuando el hecho puesto en conocimiento de los Demandantes lleva por fecha el 20 de septiembre de 2016 y se centra en el procedimiento en curso *ex* art. 49(2) y los procedimientos por venir de los artículos 51 y 50 de la Convención;

la comunicación del Estado Demandado no aporta ninguna de las informaciones que le han sido específicamente solicitadas y que conoce perfectamente (§17 *supra*).

94. Ese propósito de asegurar ante el Centro y las partes Demandantes la opacidad de las relaciones no tomadas en cuenta es hasta tal punto fuerte que lleva al Estado Demandado a contradecirse o al absurdo.

Por un lado, intenta justificar la opacidad de los dos árbitros bajo el pretexto de *constraints that bound the other Essex Court Chambers barristers* (§37) –que no existen en el sistema del CIADI -ni en la jurisprudencia inglesa, que aplica a los *barristers*/árbitros los Principios Generales de la IBA, entre ellos el nº 6(a)

> *The arbitrator is in principle considered to bear the identity of his or her law firm. (...) 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.** [115]*

El *Working Group* detrás de los Principios de la IBA afirma a este respecto que

> *w]hile the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar,*

[114] Doc. nº 60

[115] Explicacón de la IBA al Principio General de la IBA 6(a)

> *particularly in light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers' chambers should be treated in the same way as law firms. It is because of this perception that the Working Group decided to keep an Orange List, and thus subject to disclosure, the situation in which the arbitrator and another arbitrator or counsel for one of the parties are members of the same barristers' chambers.*[116] (Subrayado añadido).

Ahora bien, mientras que el Estado de Chile se pliega a la coartada de los Sres. Berman y Veeder (§37):

> *The only thing that they did not do was accede to an unreasonable demand for information that they did not have, and could not properly obtain (in light of ethical constraints that bound the other Essex Court Chambers barristers),*

por otro lado, el Estado Demandado afirma que

> *it was public knowledge throughout the entirety of the Resubmission Proceeding that Essex Court Chambers barristers were representing Chile before the ICJ* (§38).

¿Por qué, entonces, los dos árbitros no han dicho nada al respecto cuando los Demandantes les han planteado en varias ocasiones la cuestión a través del Centro desde el 20 de septiembre de 2016? Porque son los dos árbitros quienes deben saberlo y revelarlo o dimitir:

> *(a) The arbitrator's duty to disclose under General Standard 3(a) rests on* ***the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view. (…) The duty of disclosure under General Standard 3(a) is ongoing in nature.(…)***
> ***If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign.*** [117]

¿Por qué entonces el Estado Demandado ha recusado al Profesor Philippe Sands el 18 de diciembre de 2013 invocando los Principios de la IBA[118], atribuyéndole un papel que ni él ni su *Chambers* tenía en un caso ante la C.I.J. totalmente ajeno a los inversores españoles y, el 16 de diciembre de 2016, el Estado Demandado reprocha (sección IV) a los Demandantes el dudar de la imparcialidad de árbitros que desde el 20 de septiembre de 2016 silencian y rechazan llevar a cabo cualquier investigación razonable, siendo así que trabajan en las mismas *Chambers* cuyos miembros son remunerados por la República de Chile y organismos que dependen de ésta, y continúan siéndolo hoy en día?

95. Como ha afirmado el Tribunal CIADI del caso *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*[119]

---

[116] Doc. nº 66, Otto de Witt Wijnen, Nathalie Voser, Neoni Rao, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration,* página 455

[117] Explicación de la IBA a los Principios Generales de la IBA nos. 3(a) y 3(d)

[118] Doc. nº 23

[119] Doc. nº 67 ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee 3 oct. 2001 (Prof. J. Crawford SC, Prof. J. C. Fernández Rozas), §§20, 25, 26. El Tribunal ha tomado su decision en particular en base a las premisas siguientes: *"(a) that the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency; (d) that the work concerned does not consist in giving general legal or strategic advice to the Claimants but concerns a specific transaction, in which Ogilvy Renault are not the lead firm; (e) that the legal relationship will soon come to an end with the closure of the transaction concerned"*, premisas que faltan en el caso de las relaciones entre el Estado de Chile y miembros de las Essex Court Chambers. Accesible en

a question arises with respect to the term "manifest lack of the qualities required" in Article 57 of the Convention. This might be thought to set a lower standard for disqualification than the standard laid down, for example, in Rule 3.2 of the IBA Code of Ethics, which refers to an "appearance of bias". The term "manifest" might imply that there could be circumstances which, though they might appear to a reasonable observer to create an appearance of lack of independence or bias, do not do so manifestly. In such a case, the arbitrator might be heard to say that, while he might be biased, he was not manifestly biased and that he would therefore continue to sit. As will appear, ***in light of the object and purpose of Article 57 we do not think this would be a correct interpretation****. (….)*

The term cannot preclude consideration of facts previously undisclosed or unknown, provided that these are duly established at the time the decision is made. (Subrayado añadido).

96. La respuesta del Estado Demandado también formula sofismas fuera de lugar, como este en el §36:

> *if the World Bank were to disqualify Messrs. Berman et Veeder (…) this will effectively would prevent members of chambers from serving in the future as arbitrators in ICSID cases (…) thereby removing from the market many of the world's best arbitrators…".*

Al contrario, son los buenos *barristers* como Sir David A.R. Williams QC (de las Essex Court Chambers), Mr. James Crawford y Mr. Philippe Sands (de las Matrix Chambers), el primero en el caso del CIADI *Hrvatska Elektroprivreda DD v The Republic of Slovenia* (*supra* §§ 46)[120], el segundo en el artículo citado de 2016[121] (*supra* §45-47) y el tercero dimitiendo en el presente arbitraje a petición de Chile (*supra* §§22, 94)[122], quienes sostienen y aplican los principios que se les ha solicitado en vano respetar a los Sres. Berman y Veeder, y la jurisprudencia inglesa citada demuestra que los buenos *barristers*/árbitros están sometidos en derecho inglés a los mismos test que los buenos jueces ingleses. Chile les agravia atribuyéndoles pretendidos corporatismos y privilegios inexistentes, en todo caso, en el sistema del CIADI.

97. Las objeciones del Estado Demandado a la admisibilidad de la propuesta de recusación (Sección III de su comunicación del 16 de diciembre de 2016) las hemos considerado en la sección I *supra*.

***

V. LOS PELIGROS DEL PRECEDENTE: EL *MODUS OPERANDI* DEL GOBIERNO CHILENO EN LONDRES SE REPITE EN EL SENO DEL CIADI, ¿ES ACEPTADO?

El Ministro Jack Straw confirma el fraude montado por el Gobierno de Chile so pretexto de « confidencialidad » contra una acción judicial de la Demandante Fundación española Presidente Allende

98. El inversor español codemandante – la Fundación Presidente Allende – se ha enfrentado ya a otras maquinaciones del Gobierno de Chile llevadas a cabo en Londres al amparo de la

---

http://www.italaw.com/sites/default/files/case-documents/ita0208.pdf

[120] Doc. nº 44

[121] Doc. nº 43

[122] Doc. nº 24

obligación de confidencialidad. Entre los protagonistas figuraban el Sr. José Miguel **Insulza**, Ministro chileno de Asuntos Exteriores, y los abogados de Chili en Londres, entre ellos el Sr. Alberto Van Kleveren, intentando rematar de forma expeditiva (*reipublicae interest ut finis sit litium)* el *caso Pinochet* que seguía su curso normal ante los Tribunales de Justicia del Reino Unido.

99. La obligación de confidencialidad fue utilizada y aplicada por el Gobierno de Chile y sus abogados en Londres a una operación encubierta cuya diana era el Gobierno del Reino Unido y su objetivo poner un fin definitivo a la continuación del procedimiento judicial en que la Fundación española era la parte actora ante la Audiencia Nacional de España, por delitos impunes contra la comunidad internacional cometidos por las más altas autoridades del Estado de Chile[123].

100. Une instrumentalización de la confidencialidad, esta vez del sistema de las *barristers' chambers*, es puesta en práctica hoy en el sistema CIADI por el Gobierno de Chile, con una finalidad similar y en detrimento de la misma Fundación Demandante, en su calidad, en esta ocasión, de inversor español en las empresas de prensa CPP S.A. y EPC Ltée.

Ni los árbitros ni la parte Demandada han revelado al Centro que **Mr. Lawrence Collins**, el abogado de Chile durante el proceso en Londres iniciado por la Fundación española Presidente Allende, se ha convertido en 2012 en *arbitrator membre* de las Essex Court Chambers[124]

101. En efecto, siguiendo las instrucciones del Ministro de Asuntos Exteriores de Chile D. José Miguel Insulza, Mr. Lawrence Collins pleiteó desestimar por falta de jurisdicción y competencia la demanda de extradición de Augusto Pinochet solicitada por la Fundación española ante los Tribunales de Justicia. La sentencia de la House of Lords del 24 de marzo de 1999 rechazó las tesis defendidas por Mr. Lawrence Collins en nombre de Chile[125] y el 8 de octubre de 1998 la Bow Street Magistrates' Court acordó la extradición a España solicitada por la Fundación española.[126]

Donde la « confidencialidad » esconde un fraude contra la administración de Justicia

102. Es entonces cuando los abogados de Chile en Londres montaron la estratagema de la operación que, so pretexto del deber de respetar la confidencialidad, tenía como finalidad frustrar la ejecución de la sentencia del 8 de octubre de 1999 favorable a la Fundación española. El Ministro de *Home Office* M. Jack Straw testifica que a petición del Gobierno de

[123] Doc. nº 1, Demanda de la *Fundación española Presidente Allende c. Augusto Pinochet y otros*, 4 de julio de 1996, Juzgado Central de Instrucción nº 6, Audiencia Nacional de España, accesible en http://bit.ly/2hX1iNJ en inglés y en castellano en http://bit.ly/2h020rM

[124] Doc. nº 2, *Curriculum Vitae* de Mr. Lawrence Collins (Lord Collins of Mapesbury), extracto

[125] Doc. nº 3, intervención de Mr. Lawrence Collins en nombre del Gobierno de Chile pidiendo la puesta en libertad inmediata del *extraditurus*, sentencia de la House of Lords de 24 de marzo de 1999, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3)* accesible igualmente en http://www.uniset.ca/other/cs5/2000AC147.html

[126] Doc. nº 4, Bow Street Magistrates' Court: The Kingdom of Spain v. Augusto Pinochet Ugarte, Sentencia, 8 de octubre de 1999, accesible en http://bit.ly/1JGDiAs

Chile nombró[127] cuatro eminentes expertos, independientes e imparciales, que gozaban de una reputación mundial sin tacha.[128]

103. El Informe de esas eminencias inglesas e internacionales ha engañado, por unanimidad, a la institución que las había nombrado, el Gobierno de Su Majestad británica.

104. En el presente procedimiento arbitral se repite el mismo *modus operandi* en el seno del CIADI cuando el Estado de Chile y los eminentes árbitros invocan una obligación de confidencialidad que trata de inducir a error a aquellos que les nombraron árbitros, a saber, el Presidente del Consejo Administrativo del CIADI en el caso de Sir Franklin Berman, y la Fundación española en el caso del Sr. V.V. Veeder.

105. Los documentos adjuntos aportan la prueba

a) De la demanda de la República de Chile de imponer en Londres la confidencialidad profesional[129] como coartada para su maquinación;

b) De la exigencia de que la confidencialidad sea mantenida en todas las circunstancias: la sentencia de la *Supreme Court of Judicature*, Queen's Bench Division, del 15 de febrero de 2000, informa de los intercambios que a este fin tuvieron lugar entre el Ministro del Home Office, Mr. Jack Straw, y los abogados de Chile en Londres[130] ;

c) De la sentencia del 15 de febrero de 2000 de la *Supreme Court of Judicature*[131] rechazando la alegada confidencialidad y ordenando revelar las informaciones a los Demandantes, y una de las resoluciones judiciales que siguieron al levantamiento de la confidencialidad[132] ;

d) Del fraude bajo el pretexto de la « confidencialidad » propugnado por el Estado de Chile, en particular el Sr. Insulza y sus abogados en Londres, para evitar la ejecución de la mencionada Sentencia del 8 de octubre de 1999, a saber:

   1) la emisión por *BBC Radio4* del 6 de mayo de 2016 del coloquio en el cual el autor de las presentes observaciones ha participado junto con el Sr. Jack Straw, quien expresa su *fury* por haber sido engañado por la maquinación urdida bajo el pretexto de la confidencialidad[133];

---

[127] Doc. nº 4 bis, el Gobierno de Su Majestad nombra expertos eminentes obligados a confidencialidad profesional
[128] Doc. nº 6, Kingdom of Belgium, R (on the application of) v Secretary of State for Home Department, Court of Appeal - Administrative Court, February 15, 2000, [2000] EWHCAdmin 293, página 5
[129] Doc. nº 5, Straw (Jacques), Memoirs, Londres, Pan Books, 2012, página 261
[130] Doc. nº 6, ibid., páginas 4-5, 10-13
[131] Ibid, página 15 y siguientes
[132] Doc. nº 7, The New York Times, *Chilean Judge Says Pinochet Is Fit for Trial*, 2004-12-14, accesible en http://nyti.ms/1YqtwdB
[133] Doc. nº 8, Jack Straw, coloquio retransmitido por BBC Radio 4 el 6 de mayo de 2016, minutos 40:35 à 41:12 ; 33 :37 a 35 :19 ; 36 :25 a 36.50, accesible igualmente en http://bbc.in/2hv3UAO

2) el documental difundido por la Televisión Nacional de Chile el 27 de noviembre de 2016 donde el Ministro Jack Straw declara que estaba por ello « *furious beyond belief…that was a fraud* !»[134], y

3) el documental difundido el 1 de diciembre de 2016 por la Televisión Nacional de Chile exponiendo la preparación del fraude y la intervención en él del Ministro Sr. Insulza y sus abogados en Londres[135] ;

e) De las interferencias extra-judiciales puestas en marcha en Londres por el Estado chileno a fin de impedir la ejecución de la referida sentencia obtenida por la Fundación española. El Ministre Jack Straw hace un resumen: menciona el Vaticano, un antiguo Presidente de los Estados Unidos, une antigua Primera Ministra del Reino Unido, «*a large group of wealthy and influential supporters* ».[136]

El recurso por el Estado de Chile a inversores extranjeros y a la corrupción contra el procedimiento judicial dirigido en Londres por la Fundación española Demandante

106. En 1998 la empresa eléctrica ENDESA era el mayor inversor español en Chile, el 35% de un total de US$ 3.674.472.000 acumulados entre 1974 y 1998 según el Comité de las Inversiones Extranjeras de Chile[137]. Inmediatamente después de que la sentencia del 25 de noviembre de 1998 de la House of Lords hubiera aceptado la apelación formulada por el Reino de España a petición de la Fundación española Demandante[138], el Estado de Chile movilizó al invasor español ENDESA, de tal manera que uno de los hermanos del entonces Presidente del Consejo de Administración hizo llegar al abogado de la Fundación española que firma esta comunicación el mensaje siguiente : *está en Madrid una alta autoridad chilena que me pide transmitirte este mensaje: que esto se arregla con dinero, pon la cifra que quieras …*
En el anexo nº 10 figura el documental difundido por la TV Nacional de Chile informando de esta tentativa de soborno, donde se añade que es poco probable que ésta haya sido la única oferta de dinero tendente a interferir en la administración de Justicia en el procedimiento que dirigía en Londres la Fundación española Demandante (minutos 11 :12 a 11 :35).

---

[134] Doc. nº 9, capítulo 2 del documental de la TV Nacional de Chile transmitido el 1 de diciembre de 2016, **Mr. Jack Straw** condena el fraude montado por el Gobierno chileno del que ha sido víctima el Gobierno británico (minutos 01:50 a 01 :54 ; 04 :45 a 05 :00 ; 05 :34 a 05 :46) ; **el Ministro Sr. Insulza** defiende el fraude (min. 05 :01 à 05 :10) ; **Juan E. Garcés** (min. 01 :46 a 01 :50 ; 06 :04 a 06 :27 ; 21 :07-21 :15), accesible igualmente en http://bit.ly/2hJxktN o en el sitio de la TV Nacional de Chile http://bit.ly/2fUsBDu

[135] Doc. nº 10, cap. 1 del documental de la TV Nacional de Chile transmistido el 25 de octubre de 2016 : ver las manifestaciones de **Mr. Straw** (03 :40 a 03 :57 ; 07 :27 a 07 :40 ; 24 :44 a 25 :34 ; 41 :22 a 41 :39 y, en particular, 54 :14 a 54 :58 ; 55 :14 a 55 :28 ; 56 :12 a 56 :22 ; 58 :00 a 58 :12), las del **Ministro Sr. Insulza** (09 :16 a 09 :33 ; 10 :09 a 10 :41 ; 14 :47 a 14 :50 ; 26 :02 a 26 :14 ; 45 :10 a 45 :25) , y las **Juan E. Garcés** (02 :07 a 02 :21 ; 03 :14 a 03 :28 ; 11 :12 a 11 :35 ; 15 :12 a 15 :18 ; 25 :35 a 26 :01; 53 :20 a 53 :25, y, en particular, 56 :22 a 56 :39), accesible igualmente en http://bit.ly/2hJJXHo

[136] Doc. 5, Straw (Jacques), Memoirs, Londres, Pan Books, 2012, página 258 y ss.

[137] Ver el informe publicado en http://www.americaeconomica.com/inversion/chile/texto.htm, sección 2.7

[138] Doc. nº 12, House of Lords, *Regina v. Bartle and the Commissioner of Police* (Pinochet 1), sentencia de 25 de noviembre de 1998, accesible igualmente en http://bit.ly/2iaRIUT

107. Tales antecedentes, tales riesgos, acentúan, si es posible, el deber de exigencia legítima concerniente al respeto de los criterios objetivos reconocidos en materia de independencia, neutralidad, conflictos aparentes de intereses y sesgo de los árbitros.

***

VI. CONCLUSIONES

108. Como ha recordado el Presidente del Consejo Administrativo del CIADI en su reciente Decisión del 28 de diciembre de 2016[139], el término «manifiesto» empleado en el artículo 57 de la Convención CIADI significa «evidente» («*evident*») o «flagrante » («*obvious* ») y hace referencia a la facilidad con la cual puede ser discernido el defecto alegado.

Las tres versiones del artículo 14 de la Convención hacen igualmente fe, y está admitido que los árbitros deben ser tanto imparciales como independientes.

La independencia al igual que la imparcialidad « *protègent les parties contre le risque que les arbitres ne soient influencés par des facteurs autres que ceux liés au bien-fondé de l'affaire* ».

Los artículos 57 y 14(1) de la Convención CIADI no exigen la prueba de la falta de independencia o de imparcialidad efectivas; al contrario, basta establecer la apariencia de falta de independencia o de parcialidad.

El criterio jurídico aplicado a la propuesta de recusación de un árbitro es un «*critère objectif fondé sur une appréciation raisonnable des éléments de preuve par un tiers*».

109. El 20 de septiembre de 2016, al ser informados de que el Estado de Chile dirigía gestiones *sigilosas* en las Essex Court Chambers, los inversores españoles revivieron las maniobras fraudulentas del Estado Defensor de las que fueron víctimas los Tribunales de Justicia del Reino Unido, el Gobierno de Su Majestad y la Fundación española -parte Demandante en este arbitraje- con el fin de evitar la ejecución de la mencionada sentencia del 8 de octubre de 1999 de la Bow Street Magistrates' Court que aceptó una demanda de la Fundación española (*supra* §§98-105), propietaria igualmente del 90% de las empresas de prensa CPP S.A. y EPC Ltda. que son hoy el objeto del presente arbitraje

110. Está comprobado un *modus operandi* comparable del Estado de Chile en el presente procedimiento de recusación, a saber:

a) Que en la fecha de registro, el 8 de noviembre de 2016, de la demanda de rectificación de errores materiales en el laudo del 13 de septiembre de 2016, los Demandantes habían recibido información (*supra* §§5, 14, 23, 26, 27) de que la República de Chile es uno de los clientes más importantes de las Essex Court Chambers. Los Sres. **Lawrence Collins, Christopher Greenwood, Simon Bryan, Stephen Houseman**[140], **Samuel Wordsworth,**

---

[139] *BSG Resources Limited et altri c. Guinée* (Affaire CIRDI ARB/14/22), Décision sur la proposition de récusation de tous les membres du tribunal arbitral, 28 de abril de 2016, accesible en http://bit.ly/2i3kCHZ

[140] Ver *supra* §§23, 26, 30, 31, 101. Los Sres. Lawrence Collins, Christopher Greenwood, Simon Bryan, Stephen Houseman no son mencionados en las respuestas a la Sra. Secretaria General del CIADI del Estado Demandado y los Sres. Berman y Veeder

Alan Boyle[141], entre otros, han sido y son remunerados por aconsejar regularmente a la República, y a organismos que dependen de éste, en asuntos de envergadura estratégica, entre otros los que se refieren a la integridad de sus fronteras marítimas y terrestres del Norte y a empresas que están asociadas, directa o indirectamente, a empresas propiedad del Estado chileno, siendo las Essex Court Chambers la referencia, un punto de apoyo principal en Inglaterra en materias de importancia estratégica para la República de Chile (*supra* §§23, 24, 28-33) ;

b) Que el Estado de Chile tiene un interés financiero cierto en que no prosperen los remedios que la Convención del CIADI (arts. 49(2), 50 y 51) ofrece a los inversores Demandantes en relación con el Laudo del 13 de septiembre de 2016, tres remedios cuya solución es precisamente de la competencia del Tribunal donde se sientan los Sres. Berman y Veeder (*supra* §§50, 75, 93);

c) Que esas circunstancias configuran una situación donde convergen intereses presentes y futuros de miembros de las Essex Court Chambers en dar satisfacción a las necesidades de un cliente tan importante como es el Estado de Chile y los organismos que de éste dependen, en detrimento únicamente de las partes Demandantes (*supra* §§23-27 74-87; 88-96);

d) Que los Tribunales de Justicia ingleses aplican los tests propios de la imparcialidad de los jueces a los *barristers*/árbitros (§§25, 37, 52-66, 78, 89, 94), a diferencia de lo que Sir Franklin Berman y el Sr. V. V. Veeder parecen dar a entender en sus comunicaciones al CIADI del 4 y 11 de diciembre y 17 de octubre de 2016, al servicio objetivo de mantener la opacidad absoluta en las relaciones entre el Estado Demandado y las Essex Court Chambers, incluso después que ambos árbitros hubieran sido informados de ello por los Demandantes[142];

e) Que los dos árbitros han rehusado reaccionar cuando los Demandantes les hicieron partícipes el 13 y 27 octubre y el 18 de noviembre de 2016[143] de que las relaciones *sigilosas* del Estado Demandado con sus Chambers **ya no eran confidenciales, sino del dominio público**;

f) Que cuando les fue transmitida la demanda de corrección de errores del 27 de octubre de 2016[144] ni el Estado de Chile ni los árbitros han revelado al Centro ni a los Demandantes las importantes relaciones recíprocas entre el Estado y miembros de las Essex Court Chambers, infringiendo de este modo su obligación de aplicar de manera efectiva y útil la Regla de arbitraje nº 6(2) en relación con el artículo 14(1) de la Convención, con la práctica de los Tribunales del CIADI sobre conflictos de interés e, igualmente, con los Principios de la IBA, señalados en la propuesta de recusación (§§29, 32, 35, 38, 39, 44, 45, 46, 47, 51, 56, 68) y aquí *supra* §§25, 42-48, 63, 85, 90, 91, 95).

[141] Los nombres de los Sres. Samuel Wordsworth y Alan Boyle fueron dados a conocer a las partes Demandantes el 20 de septiembre de 2016, quienes los comunicaron al Centro el 17 de octubre siguiente (Docs. 6 y 7 anexos a la propuesta de recusación de 22 de noviembre de 2016)
[142] Docs. nos. 45, 46 y 71, y Doc. nº 13 anexos a la propuesta de recusación
[143] Docs. nos. 64, 65, 72 y 73
[144] Doc. nº 72

111. Ambos árbitros han faltado a su deber incluso bajo el derecho inglés, pues hubieran debido adoptar con anticipación medidas preventivas en conformidad con el *General Council of the Bar*, entre otras las siguientes:

> *a. As far as clerking is concerned, separate clerks should be designated to deal with the matter on behalf of the arbitrator member and on behalf of the member retained to act as advocate/adviser.*
> *b. There should be state of the art arrangements to ensure that communications destined for one member cannot be seen by, or come into the hands of, the other member.*
> *c. There should be arrangements for the secure storage of papers in cases in which this is necessary, with those arrangements being kept up to date to reflect best practice.*[145]

112. Además, en el marco del procedimiento iniciado el 27 de octubre regulado por el art. 49(2) de la Convención, los árbitros han resuelto inadmitir *a limine* que el Estado Demandado revele el contenido y el alcance de las relaciones que mantiene con las Essex Court Chambers, en las circunstancias descritas en los §§67-73 *supra* y en los §§2-5, 21, 51, 77-84 de la propuesta de recusación.

113. Por otra parte, los hechos sobrevenidos a partir del 20 de septiembre de 2016, las respuestas de Sir Franklin Berman y el Sr. M. V.V. Veeder al Centro desde el 20 de septiembre de 2016, incluidas las del 4 y 11 de diciembre de 2016, han incrementado las dudas en cuanto a

a) que en el proceso de arbitraje iniciado el 22 de noviembre de 2016 su parcialidad es más que probable, sus respuestas incompletas, inexactas, sesgadas, no pueden ser consideradas -habida cuenta de las respuestas de que disponen o pueden razonablemente disponer a las preguntas que les han sido planteadas - ni imparciales ni neutras, en detrimento sólo de los Demandantes,

b) que en el procedimiento de rectificación de errores materiales han tomado partido infringiendo normas fundamentales de procedimiento, en detrimento de los solos Demandantes (*supra* §§49-51, 76, 77),

c) que la situación en su conjunto puede objetivamente encerrar riesgos reales de parcialidad en los futuros procedimientos, en su caso, de revisión y/o aclaración del Laudo del 13 de septiembre de 2016.

114. Los dos árbitros y el Estado de Chile presentan sus explicaciones en un contexto de aparente connivencia objetiva en cuanto a la opacidad del contenido y alcance de las relaciones entre el Estado Demandado y miembros de las Essex Court Chambers e, igualmente, de interacción a fin de evitar que los Sres. Berman y Veeder se sometan a los tests generalmente practicados en el sistema del CIADI para calificar los conflictos aparentes de interés planteados[146].
Como afirma la England and Wales High Court en la mencionada sentencia del caso *Cofely Ltd v Bingham & Anor* de 17 de febrero de 2016

> *The tribunal's explanations as to his/her knowledge or appreciation of the relevant circumstances are also a factor which the fair minded observer may need to consider when*

[145] Doc. nº 22 anexo a la propuesta de recusación de 22 de noviembre de 2016, *Information Note regarding barristers in international arbitration du General Council of the Bar,* §22
[146] Este asunto es desarrollado en la propuesta de recusación de 22 de noviembre de 2016, §§60-68

reaching a view as to apparent bias[147]

115. La confidencialidad del sistema de las *chambers* inglesas aparece, así, objetivamente, como habiendo sido desviada para encubrir la connivencia aparente entre los árbitros y el Estado Demandado, de la misma manera que el Estado de Chile desvió la confidencialidad para encubrir el fraude a la administración de Justicia de los Tribunales británicos, al Gobierno de Su Majestad y a la Fundación española cometido entre 1998 y 2000 (*supra* §§98-107).

116. En el sistema de derecho civil vigente en Chile la presente situación entre los dos árbitros y el Estado Demandado daría igualmente lugar a un conflicto objetivo de intereses, como ha sido demostrado en la propuesta de recusación del 22 de noviembre de 2016 (§54).

117. Un tercero imparcial y debidamente informado de las circunstancias específicas en la especie no puede sino concluir que las relaciones prolongadas e importantes que existen entre el Estado de Chile y los organismos que de éste dependen, por una parte, y las Essex Court Chambers y miembros de éstas, por otra parte, genera un conflicto aparente de intereses, y pueden influenciar a los árbitros, consciente o inconscientemente, a fin de no perder la confianza de un cliente tan importante, muy verosímilmente en posición de gran influencia sobre las Essex Court Chambers.

118. Por estos motivos, formulan la presente

PETICION AL SEÑOR PRESIDENTE DEL CONSEJO ADMINISTRATIVO

1) Constatar que en los conflictos aparentes de interés que han afectado precisamente a miembros de las Essex Court Chambers, el Tribunal de arbitraje ha decidido -en el caso *Hrvatska Elektroprivreda v Slovenia*, al igual que los árbitros Sres. Jan Paulsson y Charles Brower en el caso *Vanessa c. Venezuela*-, que en el Sistema del CIADI las ***barristers' chambers should be treated in the same way as law firms***:

> *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 (...)* [§§19, 23];

2) Constatar que el Ministro del Reino Unido, Mr. Jack Straw, ha confirmado el fraude cometido por el Estado de Chile -parte Demandada en el presente arbitraje – contra la administración de Justicia británica, el Gobierno de Su Majestad y **una de las partes Demandantes en el presente arbitraje** -el inversor español Fundación Presidente Allende-, so pretexto del deber de «*confidencialidad*» invocado por las eminentes personalidades inglesas, de reputación mundial, que posibilitaron dicho fraude;

3) Considerar que este precedente es tanto más directo cuanto que el mismo Estado, los mismos individuos que participaron en ese fraude confirmado en Londres, tales como los Sres. Insulza, Kleveren y otros, son quienes mantienen las relaciones con las Essex Court Chambers mientras se desarrolla el presente procedimiento, planteando la aprensión, los temores y peligros objetivos expuestos en la proposición de recusación;

[147] Doc. nº 52, §§69-73, 75

4) Constatar el conflicto aparente de intereses objetivo que existe entre el Estado de Chile, parte Demandada, las Essex Court Chambers y los miembros del Tribunal de arbitraje Sir Franklin Berman y Mr. V.V. Veeder, igualmente miembros de las Essex Court Chambers,

5) Aceptar la respetuosa propuesta de recusación de los dos árbitros;

6) Que el Estado de Chile pague todos los costos y gastos causados a las Demandantes que dimanan del incidente de recusación por no haber informado al Centro y a las partes Demandantes sobre las relaciones y vínculos que existen entre las Essex Court Chambers, miembros de éstas, y la República de Chili y organismos dependientes de ella.

Respetuosamente

Dr. Juan E. Garcés
Representante de D. Víctor Pey Casado, Da. Coral Pey Grebe y la
Fundación española Presidente Allende

	DOCUMENTOS ANEXOS	
Nº	**Documento**	Pág.
1	*Fundación española Presidente Allende c. Augusto Pinochet y otros*, demanda de 4 de julio de 1996, Juzgado Central de Instrucción num. 6, Audiencia Nacional de España	2
2	*Curriculum Vitae* de Lord Collins of Mapesbury, Ll.D., F.B.A. (Lawrence Collins), extracto	35
3	Intervención del Sr. Lawrence Collins en representación del Gobierno de Chile, sentencia, House of Lords, 24 de marzo de 1999, *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte* (No. 3)	37
4	Bow Street Magistrates' Court: *The Kingdom of Spain v. Augusto Pinochet Ugarte*, sentencia, 1999-10-8	44
4 bis	Eminentes expertos recomendados al Home Office Secretary el 26 de octubre de 1999	53
5	Straw (Jacques), Memoirs, Londres, Pan Books, 2012, extracto	55
6	*Kingdom of Belgium, R (On The Application of) v Secretary of State for Home Department*, Court of Appeal - Administrative Court, February 15, 2000, [2000] EWHCAdmin 293	76
7	The New York Times, *Chilean Judge Says Pinochet Is Fit for Trial*, 2004-12-14	106
8	Jack Straw, coloquio con Juan E. Garcés y otros, transmitido por BBC Radio 4, 2016-05-06	Video
9	Jack Straw, Ministro Insulza y Juan E. Garcés, Documental de la TV Nacional de Chile, cap. 2, transmitido el 1-12-2016	Video
10	Jack Straw, Ministro Insulza y Juan E. Garcés, Documental de la TV Nacional de Chile, cap. 2, transmitido el 25-11-2016	Video
11	Comunicación confidencial de D. Francisco Orrego Vicuña al Tribunal de la House of Lords, 1998-11-21	111
12	House of Lords, *Regina v. Bartle and the Commissioner of Police (Pinochet 1)*, sentencia, 25 novembre 1998, acepta la apelación interpuesta por el Reino de España a petición de la Fundación española Demandante	121
13	Breve síntesis razonada del *modus operandi* de la representación de Chile a fin de frustrar el arbitraje, influenciar al Tribunal, prolongar el procedimiento y aumentar el costo, 27 de junio de 2014	151
14	Carta del 30 de noviembre de 1998 del Ministro chileno de Economía al Señor Secretario General del CIADI atacando al Centro por haber registrado la Demanda de arbitraje	162
15	Memoria inicial de las Demandantes del 17 de marzo de 1999	173

53	*Eurocom v. Siemens*, High Court of Justice of England and Wales, [2014] EWHC 3710 (TCC), 7 November 2014	868
54	*English Arbitration Act* 1996, article 24	887
55	*Davidson v Scottish Minister* [2004] UKHL 34	890
56	*Magill v. Porter* [2001] UKHL 67 (13th December, 2001) par Lord Hope	896
57	*Helow v Secretary of State for the Home Department* [2008] UKHL 62	937
58	*Regina v. Gough* [1993] House of Lords AC 646	944
59	High Court of Justice, [2015] EWHC 140 (Comm)	973
60	El Tribunal de arbitraje invita el 16 de noviembre de 2016 a Chile a consentir la demanda de rectificación de errores materiales interpuesta el 27 de octubre de 2016	988
61	Sir Franklin Berman al CIADI el 13 de enero de 2014	990
62	Chile al Tribunal de arbitraje el 17 de noviembre de 2016	993
63	*Vanessa Ventures v. Venezuela*, Decision on Jurisdiction, 22 de agosto de 2008	998
64	Los Demandantes a los Sres. Berman y Veeder el 20-09-2016	1032
65	Los Demandantes solicitan el 13-10-2016 que Chile revele sus relaciones con miembros de las Essex Court Chambers	1036
66	Witt Wijnen (Otto de)-Voser (N.)- Rao (N.), *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*	1044
67	*Aguas del Aconquija v. Argentina*, Decision on Challenge to arbitrator, 3-10-2001	1071
68	La Sra. Secretaria General del CIADI a los Demandantes el 20 de octubre de 2016	1086
69	Los Demandantes a la Sra. Secretaria General del CIADI el 18 de octubre de 2016	1089
70	La Sra. Secretaria General del CIADI a las partes el 8 de noviembre de 2016	1108
71	M. V.V. Veeder al abogado de las Demandantes el 17 de octubre de 2016	1111
72	Demanda de 27-10-2016 de rectificación de errores en la Sentencia del 13 de septiembre de 2016 y de revelar las relaciones entre Chile y las Essex Court Chambers	1115
73	Los Demandantes al Tribunal de arbitraje el 18 de noviembre de 2016	1163
74	Los Demandantes solicitan el 30 de diciembre de 2016 conocer el contenido de los documentos y del debate entre las partes en el caso *Vanessa c. Venezuela* sobre el conflicto de intereses aprente los Sres. Veeder y Greenwood, miembros de las Essex Court Chambers	1166
75	El CIADI comunica el 1 de enero de 2016 que no son públicos los documentos del	1169

	debate entre las partes en el caso *Vanessa c. Venezuela* sobre el conflicto de intereses entre los Sres. Veeder y Greenwood	
76	*Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 mars 2010	1171
77	Cour de Cassation, Arrêt du 16 décembre 2015, N° de pourvoi: 14-26279, caso *Société Columbus acquisitions INC et la société Columbus Holdings France*	1204
78	House of Lords, *Judgment in re Pinochet* (2), 15 de enero de 1999	1208

ANEXO 2

Kellyanne Conway: Key for Michael Flynn's resignation was misleading vice president, others

Counselor to the President Kellyanne Conway answers questions during a network television interview in the James Brady Press Briefing Room of the White House in Washington, Monday, Feb. 13, 2017. (AP Photo/Pablo Martinez Monsivais) more >

By David Sherfinski - *The Washington Times - Tuesday, February 14, 2017*

White House counselor Kellyanne Conway said Tuesday that the key factor behind the resignation of National Security Adviser Michael Flynn was that he misled Vice President Mike Pence and others about the nature of his talks with the Russian ambassador to the U.S. last year.

"The key here is the misleading of the vice president and others — the incomplete information or the inability to completely recall what did or did not happen as reflected in his debriefing of particular phone calls," Ms. Conway said on NBC's "Today" program.

Mr. Flynn resigned Monday after increasing questions surrounding his conversations with Russian Ambassador Sergey Kislyak during the transition period between the November election and President Trump's inauguration.

SEE ALSO: How the first major shakeup of Trump's presidency unfolded around Michael Flynn

Mr. Flynn said in his resignation letter that he "inadvertently briefed the Vice President Elect and others with incomplete information" on what was discussed. Mr. Flynn had denied he talked about U.S. sanctions against Russia and later said he couldn't recall for certain they hadn't been discussed.

Mr. Pence said in a CBS interview last month that sanctions did not come up in the talks, only to have staff clarify last week that those statements were based on what Mr. Flynn had told him.

Mr. Trump has named retired Lt. Gen. Joseph Keith Kellogg Jr. as acting national security adviser to replace Mr. Flynn for the time being.

Ms. Conway was asked about reports that the Justice Department had warned the White House last month that Mr. Flynn could have been vulnerable to Russian blackmail as a result.

"I'm telling you what the president has said, which is that he's accepted General Flynn's resignation and he wishes him well and that we're moving on," she said.

Ms. Conway said it would be a "mistake" to conclude that Mr. Flynn was not "freelancing" with the calls and was acting on behalf of the incoming administration.

"Remember, in the end, it was misleading the vice president that made the situation unsustainable," she said.

"In this case, it is the misleading to the vice president and also the inability to remember, as General Flynn started to clarify his remarks and say, 'I can't remember. I can't recall,' " she said.

Mr. Flynn denied to The Washington Post last week that sanctions were discussed, but a spokesman later said he couldn't be sure.

Ms. Conway had said Monday afternoon that Mr. Flynn had the full confidence of the

president, but press secretary Sean Spicer said later that they were evaluating the situation.

She said Tuesday the two sentiments were not incompatible.

"The president is very loyal. He's a very loyal person, and by night's end Mike Flynn had decided it was best to resign," she said.

"He knew he'd become a lightning rod, and he made that decision," she said.

ANEXO 3

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

TABLE OF CONTENTS

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.

---

[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]

---

[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.

---

[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

---

[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]

---

[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]

---

[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]

---

[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

---

[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]

---

[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

---

[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

---

[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

---

[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

---

[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]

---

[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***
>
> *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 "Clarín" 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

ANEXO 4

Juan E. Garcés, Abogado
ZORRILLA, 11 - 1° - DCHA.
TELÉF. 91 360 05 36 - FAX: 91 5311989
E-mail: 100407.1303@compuserve.com
28014 MADRID

[Par courriel]

Le 30 décembre 2016

M. Benjamin Garel
Secrétaire du Tribunal arbitral
CIRDI. Banque Mondiale
1818 H Street, N.W.
WASHINGTON D.C. 20433

Réf.: Victor Pey Casado et Fondation Président Allende c. République du Chili (Affaire No. ARB-98-2. Nouvel examen- Rectification)

Monsieur le Secrétaire du Tribunal arbitral,

Dans leurs communications antérieures les Demanderesses ont appuyé certains de leurs arguments en faisant référence à la démission de M. V. V. Veeder QC des fonctions d'arbitre présidant l'affaire *Vanessa c. Venezuela* (ICSID Case N° ARB(AF)/04/6).

Ces remarques ont donné lieu à un correctif de M. Veeder, indiquant que les Demanderesses auraient mal interprété la signification de son geste, correctif mentionné dans la réponse de la Défenderesse (nbg n° 91).

Or aussi bien M. Veeder que MM. Paolo Di Rosa et Ballena et Me Gaela Gehring, qui conseillent la Défenderesse dans la présente procédure en rectification, étaient présents et pleinement informés de l'ensemble des données précisant de cerner avec précision l'enchainement des faits.

Afin que les Demanderesses puissent, de leur côté, prendre une position définitive sur ce point, il est indispensable qu'elles disposent des mêmes informations de base que celles à la disposition des autres intervenants et qui permettent de suivre l'exacte succession des événements.

Les Demanderesses sont amenées à solliciter du Centre qu'il leur soit communiqué les pièces pertinentes, à savoir :

1) **La communication du Centre du 27 avril 2007 et les déclarations y jointes de deux membres du Tribunal arbitral relatives à M.** Greenwood, membre des Essex Court Chambers,

2) **Les observations du 3 mai 2007 de la représentation du Venezuela, partie Défenderesse,** auxdites déclarations du 27 avril de 2007,

3) **La lettre que le 4 mai 2007 le Tribunal a adressée à la partie Demanderesse,** l'invitant à faire des observations à celles du 3 mai de la Défenderesse**,**

4) **La transcription de la partie des audiences tenues le 7 mai 2007** où les parties expriment leur point de vue relatif à la participation de M. Greenwood dans l'affaire ; la partie où M. Veeder démissionne de la Présidence du Tribunal arbitral et

5) La décision des co-arbitres d'accepter la démission de M. Veeder.

Nous vous prions d'agréer, Monsieur le Secrétaire du Tribunal arbitral, l'expression de notre considération distinguée.

Dr. Juan E. Garcés
Représentant de M. Victor Pey-Casado, Mme. Coral Pey-Grebe et de la Fondation espagnole Président Allende

ANEXO 5

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE ARBITRATION PROCEEDING BETWEEN

CONOCOPHILLIPS PETROZUATA B.V.
CONOCOPHILLIPS HAMACA B.V.
CONOCOPHILLIPS GULF OF PARIA B.V.
CLAIMANTS

and

BOLIVARIAN REPUBLIC OF VENEZUELA
RESPONDENT

ICSID Case No. ARB/07/30

DECISION ON THE PROPOSAL TO DISQUALIFY A MAJORITY OF THE TRIBUNAL

CHAIRMAN OF THE ADMINISTRATIVE COUNCIL
DR. JIM YONG KIM

Secretary of the Tribunal
Mr. Gonzalo Flores

Date: May 5, 2014

THE PARTIES' REPRESENTATIVES

REPRESENTING THE CLAIMANTS:

MR. JAN PAULSSON
BAHRAIN WORLD TRADE CENTRE
EAST TOWER, 37TH FLOOR
PO BOX 20184
MANAMA
BAHRAIN
AND
MR. NIGEL BLACKABY
FRESHFIELDS BRUCKHAUS DERINGER LLP
701 PENNSYLVANIA AVE. NW, SUITE 600
WASHINGTON, DC 20004
UNITED STATES OF AMERICA
AND
MR. D. BRIAN KING
MR. ELLIOT FRIEDMAN
MR. VIREN MASCARENHAS
FRESHFIELDS BRUCKHAUS DERINGER LLP
601 LEXINGTON AVENUE, 31ST FLOOR
NEW YORK, NY 10022
UNITED STATES OF AMERICA
AND
MS. LUCY F. REED
FRESHFIELDS BRUCKHAUS DERINGER LLP
11TH FLOOR TWO EXCHANGE SQUARE
HONG KONG
AND
PROFESSOR JAMES CRAWFORD, SC
WHEWELL PROFESSOR OF INTERNATIONAL LAW
MATRIX CHAMBERS
GRIFFIN BUILDING, GRAY'S INN
LONDON WC1R 5LN
UNITED KINGDOM

REPRESENTING THE RESPONDENT:

DR. MANUEL ENRIQUE GALINDO
PROCURADOR GENERAL (E) DE LA REPÚBLICA
PROCURADURÍA GENERAL DE LA REPÚBLICA
PASEO LOS ILUSTRES C/C AV. LAZO MARTÍ
ED. SEDE PROCURADURÍA GENERAL DE LA REPÚBLICA, PISO 8
URB. SANTA MÓNICA
CARACAS 1040
VENEZUELA
AND
MR. GEORGE KAHALE, III
MS. MIRIAM K. HARWOOD
MR. MARK H. O'DONOGHUE
MR. BENARD V. PREZIOSI, JR.
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 PARK AVENUE
NEW YORK, NY 10178
UNITED STATES OF AMERICA
AND
MS. GABRIELA ÁLVAREZ-ÁVILA
CURTIS, MALLET-PREVOST, COLT & MOSLE, S.C.
RUBÉN DARÍO 281, PISOS 8 & 9
COL. BOSQUE DE CHAPULTEPEC
11580 MEXICO, D.F.
MEXICO

CONTENTS

A. THE PARTIES

1. The Claimants are ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V., three companies incorporated under the laws of The Netherlands (jointly, "**ConocoPhillips**" or "**the Claimants**").

2. The Respondent is the Bolivarian Republic of Venezuela ("**Venezuela**" or the "**Respondent**").

B. PROCEDURAL HISTORY

3. On November 2, 2007, the Claimants submitted a Request for Arbitration against Venezuela to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") pursuant to Article 36 of the ICSID Convention. On December 13, 2007, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention.

4. The Tribunal was constituted on July 23, 2008. Its members were Judge Kenneth Keith, a national of New Zealand, appointed as president pursuant to Article 38 of the ICSID Convention; Mr L. Yves Fortier, CC, QC, a national of Canada appointed by the Claimants; and Sir Ian Brownlie, CBE, QC, a national of the United Kingdom, appointed by the Respondent. On February 1, 2010, the Tribunal was reconstituted, with Professor Georges Abi-Saab, an Egyptian national, being appointed by the Respondent, following Sir Ian Brownlie's passing.

5. On September 3, 2013, the Tribunal issued a Decision on Jurisdiction and Merits ("**Decision on Jurisdiction and Merits**"). It found the Respondent in breach of its international obligation to negotiate compensation in good faith for its taking of ConocoPhillips' assets in three oil projects in Venezuela, and rejected all other claims submitted by the Claimants. Professor Abi-Saab dissented from this Decision, but he has not yet provided the text of his dissent.

6. On September 8, 2013, the Respondent requested a clarification and further explanations from the Tribunal regarding certain findings in the Decision on Jurisdiction and Merits ("**the**

September 8 letter"). In its letter, the Respondent also requested "a limited and focused hearing" to address the issues raised.

7. By letter of September 10, 2013, the Claimants opposed the Respondent's requests and instead proposed a briefing schedule for submissions on *quantum*. The parties exchanged further correspondence on the matter on September 11, 12, 16 and 23, 2013.

8. On October 1, 2013, the Tribunal fixed a schedule for the parties to file written submissions on: (i) the Tribunal's power to reconsider the Decision on Jurisdiction and Merits; and (ii) a possible schedule for quantum briefs. In accordance with the schedule, the parties simultaneously filed briefs on October 28 and November 25, 2013.

9. On March 10, 2014, the Tribunal issued a majority decision rejecting Respondent's Request for Reconsideration (the "**Decision on Reconsideration**"). Professor Abi-Saab appended a Dissenting Opinion.

10. On March 11, 2014, Venezuela proposed the disqualification (the "**Proposal**") of Judge Keith and Mr. Fortier (the "**Challenged Arbitrators**") "on grounds of lack of the requisite impartiality under Article 14 of the ICSID Convention."

11. On March 13, 2014, the Centre informed the parties that the 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.

12. In accordance with the procedural calendar, the Respondent submitted a brief with its arguments on the disqualification proposal on March 21, 2014. The Claimants submitted a Reply to the Respondent's disqualification proposal on March 28, 2014.

13. On March 30, 2014, the Respondent submitted a letter commenting on the Claimants' Reply to the Respondent's disqualification proposal and asking several questions to the challenged arbitrators. On March 31, 2014, the Claimants replied to Respondent's March 30 letter.

14. On April 4, 2014, Mr. Fortier furnished explanations pursuant to ICSID Arbitration Rule 9(3). On that same date, Judge Keith declined to furnish explanations, also in accordance with ICSID Arbitration Rule 9(3).

15. As scheduled, both parties submitted additional comments on the Proposal on April 14, 2014.

C. PARTIES' ARGUMENTS REGARDING THE PROPOSAL TO DISQUALIFY JUDGE KEITH AND MR. FORTIER AND THE ARBITRATORS' EXPLANATIONS

1. Venezuela's Proposal for Disqualification

16. Venezuela's arguments on the proposal to disqualify Judge Keith and Mr. Fortier were set forth in its submissions of March 21 and April 14, 2014 and supplemented by its communication of March 30, 2014. These arguments are summarized below.

17. Venezuela bases the challenge to Judge Keith and Mr. Fortier on "their steadfast refusal to entertain an application for reconsideration of the [Decision on Jurisdiction and Merits] on an important issue that they decided based on what has been proven beyond doubt to be false premises and their negative 'general attitude vis-à-vis the Respondent,' their propensity to decide by 'sheer fiat,' their adoption of 'a presumption . . . of a constant pattern of conduct attributable to the Respondent, of not hesitating to violate its obligations whenever it suited its purposes,' and their 'relying almost exclusively and uncritically on the affirmations and representations of the Claimants throughout the proceedings [which] have evinced a lack of the requisite impartiality under Article 14(1) of the ICSID Convention."[1]

18. Venezuela claims that the finding in the Decision on Jurisdiction and Merits that the Respondent failed to negotiate compensation for the 2007 oil nationalization in good faith was based on improper inferences drawn from false factual premises, and it was manufactured by the Challenged Arbitrators as the Claimants never accused Respondent of bad faith negotiation.[2]

[1] Memorial in Support of Proposal to Disqualify Arbitrators of March 21, 2014 ¶3.
[2] Memorial in Support of Proposal to Disqualify Arbitrators ¶5. Respondent's Second Submission of April 14, 2014 ("**Respondent's Second Submission**") page 5.

19. Venezuela argues that the Challenged Arbitrators inferred that the Claimants' allegations concerning the compensation negotiations were true because the Respondent did not present evidence of what had occurred during the critical negotiating period. Venezuela further claims that the Challenged Arbitrators ignored the Confidentiality Agreement between the parties to the compensation negotiations, because Respondent had commented on earlier negotiations. Therefore, the Challenged Arbitrators assumed that Venezuela did not feel bound by the Confidentiality Agreement and should have provided additional evidence. Venezuela states that "while as a matter of law it is never appropriate to infer bad faith negotiation on the part of the State, as a matter of logic the Challenged Arbitrators were obviously wrong in drawing an inference from the purported lack of evidence in this case."[3]

20. Venezuela also refers to U.S. Embassy cables - part of the WikiLeaks released after the hearing on the merits held in 2010 - submitted by the Respondent with the September 8 letter, to demonstrate that the Claimants made misrepresentations of fact at the hearing that proved decisive to the Challenged Arbitrators.[4] Venezuela claims that these cables prove that the Claimants made false representations to the Tribunal, upon which the decision of the Challenged Arbitrators on the lack of good faith negotiation was based.[5]

21. Venezuela asserts that a decision based on misrepresentations would not comport with basic principles concerning the administration of justice and could not be made by arbitrators having the requisite impartiality under the ICSID Convention.[6] Venezuela adds that "no legal system can endorse the position that an arbitrator has no power in a case still pending before him to rectify an obvious mistake, irrespective of whether its original opinion was based on misrepresentation, fraud, forged documents, false testimony or any other egregious misconduct" and that "this is the effect of the Challenged Arbitrator's blanket refusal to even consider the facts on Respondent's Application for Reconsideration."[7]

22. Venezuela maintains that the Challenged Arbitrators did not seriously entertain Respondent's application for reconsideration, refused to engage in any analysis of the facts,

[3] Memorial in Support of Proposal to Disqualify Arbitrators ¶9.
[4] Memorial in Support of Proposal to Disqualify Arbitrators ¶10.
[5] Memorial in Support of Proposal to Disqualify Arbitrators ¶11.
[6] Memorial in Support of Proposal to Disqualify Arbitrators ¶16.
[7] Respondent's Second Submission page 5.

reached their conclusions in the Reconsideration Decision without addressing the arguments made or authorities cited by the Respondent, and refused to hold the hearing requested by the Respondent. It submits that this conduct evidences "an unwavering determination by the Challenged Arbitrators to maintain their finding no matter what the circumstances and no matter how erroneous the finding may be.[8]

23. Venezuela maintains that this challenge involves more than the "mere existence of an adverse ruling," and that "although mere mistakes of procedure or law normally do not constitute sufficient proof of an arbitrator's bias, there is a widely-recognized exception for 'particularly serious or recurring errors, which would constitute a blatant breach of his obligations." In Venezuela's submission "this case involves a decision of the Challenged Arbitrators on a fundamental issue that directly and dispositively affects liability, coupled with a steadfast refusal by the Challenged Arbitrators to even consider the facts establishing that their decision was based upon false factual premises and misrepresentations of a party, an untenable position for any arbitrator to take. To the best of Respondent's knowledge, no proposal of this kind has ever been presented to ICSID." [9]

24. Venezuela also maintains that an impartial arbitrator cannot ignore the facts and circumstances of a case and that a tribunal cannot refuse to review its own decision where it is demonstrated to be based on patently false factual premises and misrepresentations. It submits this is particularly evident where the case is still pending before the tribunal with an entire phase left to unfold, "a phase that will be based on and infected by the very decision that was founded upon those patently false premises and misrepresentations." [10] Venezuela adds that the issue here is whether the manner in which the Challenged Arbitrators approached Venezuela's Application for Reconsideration creates the appearance of a lack of the requisite impartiality.[11]

[8] Memorial in Support of Proposal to Disqualify Arbitrators ¶35-36. Respondent's Second Submission page 5.
[9] Memorial in Support of Proposal to Disqualify Arbitrators ¶47 and footnote 73.
[10] Memorial in Support of Proposal to Disqualify Arbitrators ¶50. Respondent's Second Submission page 4.
[11] Respondent's Second Submission page 3.

25. Venezuela maintains that it is not asking the Chairman to determine the merits of the case, but only the merits of the challenge and it requests an oral hearing on this matter before the Chairman of the ICSID Administrative Council.[12]

26. Finally, Venezuela submits that Judge Keith's and Mr. Fortier's communications of April 4, 2014 do not address the issues raised in its submissions or in its March 30 letter.[13]

2. Claimants' Observations

27. The Claimants' arguments on the proposal to disqualify Judge Keith and Mr. Fortier were set forth in their submissions of March 28 and April 14, 2014, supplemented by their communication of March 31, 2014. These arguments are summarized below.

28. The Claimants allege that the Proposal is patently frivolous and that it is part of a series of meritless and desperate delaying tactics by Venezuela.[14] The Claimants maintain that Venezuela, while disagreeing with some of the factual and legal conclusions reached by the Challenged Arbitrators, has failed to show bias or misconduct on their part.[15] The Claimants add that the Proposal is "founded on nothing more than the Respondent's unhappiness with the Procedural Decision."[16]

29. The Claimants note that Venezuela is not challenging the independence of the Challenged Arbitrators but their impartiality, claiming that Venezuela's allegations fall far short of satisfying that ground for disqualification.[17]

30. The Claimants argue that this challenge is precluded by well-established principles and the fact that the Majority ruled against Venezuela in a reasoned decision, after deliberation, cannot give rise to a successful challenge.[18] The Claimants allege that "it is unquestionable that [in the Reconsideration Decision] the Majority considered the parties' arguments and reached a

[12] Memorial in Support of Proposal to Disqualify Arbitrators ¶52; Respondent's Second Submission pages 2 and 7.
[13] Respondent's Second Submission page 1.
[14] Claimants Reply to Respondent's Proposal to disqualify Judge Kenneth Keith and Maître L. Yves Fortier of March 28, 2014 ("**Claimant's Reply**") ¶1.
[15] Claimant's Reply ¶2.
[16] Claimant's Reply ¶10.
[17] Claimant's Reply ¶16.
[18] Claimant's Reply ¶¶16, 22.

reasoned decision on the basis of those arguments. There is no evidence to support the accusation that the resulting decision evinced any degree of partiality. A fortiori, an objective third party could not conclude in these circumstances that the Majority's finding demonstrated a 'manifest lack' of impartiality towards the Respondent."[19]

31. The Claimants also submit that the failure to hold the oral hearing requested by Venezuela does not establish manifest lack of impartiality by the Challenged Arbitrators.[20]

32. The Claimants argue that the Respondent is postulating a "non-existent challenge standard of 'particularly serious or recurring errors' of procedure or law" as the basis to uphold this challenge.[21]

33. The Claimants state that the Chairman of the Administrative Council is "neither in a position to, nor mandated to, scour the factual record to determine, for example, what the WikiLeaks cables should be understood to mean, or whether the Majority relied more heavily on the witness testimony offered by one party. And that is precisely why evidence of arbitrator bias must be 'obvious' and 'discerned with little effort and without deeper analysis.' Were it otherwise, arbitrator challenges would turn into full blown legal and evidential appeals – a result antithetical to the ICSID system, but precisely what the Respondent is attempting to manufacture here."[22]

34. The Claimants refute Venezuela's contention that the majority had reached its Decision on Jurisdiction and Merits as a result of certain misapprehensions. The Claimants state that they have consistently disputed the allegation that the Tribunal's finding of an illegal expropriation was based on a misapprehension and have refuted Venezuela's contention that the facts not contested by the Claimants were undisputed. The Claimants argue that the Respondent is now seeking to transform their explicit and principled stance "into a form of unspoken acquiescence, referring wishfully to the supposedly undisputed fact that the arbitrators erred." [23]

[19] Claimant's Reply ¶28.
[20] Claimant's Reply ¶29.
[21] Claimant's Reply ¶19.
[22] Claimant's Reply ¶21.
[23] Claimant's Reply ¶32.

35. The Claimants argue that they placed the issues of illegality of the expropriation and good-faith negotiations before the Tribunal and that these points were argued in multiple rounds.[24]

36. Finally, the Claimants maintain that Venezuela's assertions concerning the Confidentiality Agreement and the WikiLeaks cables are legally irrelevant, as they pertain to the period after the Claimants filed their Request for Arbitration.[25]

3. Arbitrators' Explanations

37. By communications of April 4, 2014, Judge Keith advised that he did not wish to furnish any explanations on the Proposal and Mr. Fortier declared the following:

> *Having read carefully the parties' submissions of 21 March and 28 March respectively, I believe that you have been well and sufficiently briefed. Accordingly, today, I only offer the following comments.*
>
> *For more than 10 years now, I have been practicing law exclusively as an arbitrator. I consider arbitration a very noble profession and I am extremely proud to be a member of that profession.*
>
> *When I ceased, after many years at the Bar, to act as counsel, I no longer represented clients. I became an adjudicator who, whether as party appointed or chairman of arbitral tribunals, had no case to win or lose. I pledged to myself that I would always be independent and impartial and decide all cases submitted to tribunals on which I sat strictly on the basis of the factual evidence and the applicable law. I am convinced that I have always honored my pledge. The present case is no exception.*

D. DECISION BY THE CHAIRMAN

1. Timeliness

38. 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*

[24] Claimant's Reply ¶34.
[25] Claimant's Reply ¶36.

> *is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.*

39. As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case-by-case basis.[26]

40. In this case, Venezuela filed the Proposal on March 11, 2014. It arose from a March 10, 2014 Tribunal ruling on Venezuela's request for reconsideration of the September 2013 Decision on Jurisdiction and Merits. This disqualification proposal was filed promptly for the purposes of ICSID Arbitration Rule 9(1).

2. Request for Oral Hearing before the Chairman

41. Article 58 of the ICSID Convention states that the decision on any proposal to disqualify the majority of arbitrators shall be taken by the Chairman of the ICSID Administrative Council.

42. The Respondent requested that the Chairman of the Administrative Council hold a hearing on the Proposal.[27] The Claimants have not advanced a position in this regard.

43. Under the ICSID Convention and the ICSID Arbitration Rules, the Chairman has discretion to determine the procedure that will be followed in deciding a disqualification proposal before him. The sole procedural guidance in the Rules is that the Chairman shall use his best efforts to take the decision within thirty days after he has received the proposal.

44. The Chairman notes that the parties have been given a full opportunity to argue their positions with respect to the Proposal. The parties have comprehensively briefed the Chairman on the relevant facts and law and an oral hearing is not necessary in these circumstances.

45. Accordingly, the Chairman has decided the Proposal on the basis of the written submissions presented by the parties and the explanations provided by the Challenged

---

[26] See *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) ¶73 ("**Burlington**"); *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 4, 2014) ¶68 ("**Abaclat**").

[27] Memorial in Support of Proposal to Disqualify Arbitrators ¶52; Respondent's Second Submission page 7.

Arbitrators, as required by Articles 57 and 58 of the ICSID Convention and the Arbitration Rules.

3. Merits

46. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads in relevant part as follows:

> *A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.*

47. A number of decisions have concluded that the word "manifest" in Article 57 of the Convention means "evident" or "obvious,"[28] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[29]

48. The disqualification proposed in this case alleges that Judge Keith and Mr. Fortier manifestly lack the impartiality required by Article 14(1).

49. Article 14(1) of the ICSID Convention provides:

> *Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.*

50. While the English version of Article 14 of the ICSID Convention refers to "*independent judgment*," and the French version to "*toute garantie d'indépendance dans l'exercice de leurs fonctions*" (guaranteed independence in exercising their functions), the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that all three versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.[30]

---

[28] *Burlington supra* note 26 ¶68, footnote 83; *Abaclat* supra note 26 ¶71, footnote 25; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal (November 12, 2013) ¶61, footnote 43 ("**Blue Bank**"); *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal to Disqualify a Majority of the Tribunal (December 13, 2013) ¶73, footnote 58 ("**Repsol**").

[29] C. Schreuer, The ICSID Convention, Second Edition (2009), page 1202 ¶¶134-154.

[30] The parties agree on this point: Memorial in Support of Proposal to Disqualify Arbitrators ¶44. Claimants' Reply ¶12. So does ICSID jurisprudence: *Burlington*, supra note 26 ¶65; *Abaclat supra* note 26 ¶74; *Blue Bank supra* note

51. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both "protect parties against arbitrators being influenced by factors other than those related to the merits of the case." [31]

52. 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.[32]

53. The legal standard applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party." As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[33]

54. The Respondent is dissatisfied with the majority's Decision on Reconsideration and with the procedure that led to it, in particular, the Tribunal's failure to convene an oral hearing on the request for reconsideration.

55. However, the Tribunal adopted a reasonable procedure that was within its discretion to regulate the conduct of the proceeding. Similarly, there is nothing in the reasoning or conclusions of the Decision on Reconsideration that suggests an absence of impartiality.

---

28 ¶58, *Repsol supra* note 28 ¶70; *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) and *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007) (together "***Suez***"), ¶ 28; *OPIC Karimum Corporation v. Bolivarian Republic Venezuela* (ICSID Case No ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Decision on the Proposal for Disqualification of Mr. Bernardo M. Cremades, Arbitrator (June 28, 2012) ¶ 59; *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012) ¶54; *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (March 19, 2010) ¶36; *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, Arbitrator (December 23, 2010) ¶37; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimants' Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013) ¶55.

[31] *Burlington supra* note 26 ¶66; *Abaclat supra* note 26 ¶75; *Blue Bank supra* note 28 ¶59; *Repsol supra* note 28 ¶71.

[32] *Burlington supra* note 26 ¶66; *Abaclat supra* note 26 ¶76; *Blue Bank supra* note 28 ¶59; *Repsol supra* note 28 ¶71.

[33] *Burlington supra* note 26 ¶67, *Abaclat supra* note 26 ¶77; *Blue Bank supra* note 28 ¶60, *Repsol supra* note 28 ¶72.

56. In the Chairman's view, a third party undertaking a reasonable evaluation of the facts in this case, would not conclude that they indicate a manifest lack of the qualities required under Articles 57 and 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

E. DECISION

Having considered all of the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chairman rejects the Bolivarian Republic of Venezuela's Proposal to Disqualify Judge Kenneth Keith and Mr. L. Yves Fortier.

[Signed]

Chairman of the ICSID Administrative Council

Dr. Jim Yong Kim

ANEXO 7

CIADI Caso ARB/98/2

CASO VICTOR PEY CASADO Y FUNDACION ESPAÑOLA «PRESIDENTE ALLENDE» c. LA REPUBLICA DE CHILE

PROCEDIMIENTO DE CORRECCION DE ERRORES MATERIALES EN EL LAUDO DE 13 DE SEPTIEMBRE DE 2016

RESPETUOSA PROPUESTA RAZONADA DE RECUSACION DE LOS ARBITROS SIR FRANKLIN BERMAN QC Y V.V. VEEDER QC

que las partes Demandantes someten a la Sra. Secretaria General del CIADI conforme a los artículos 57 y 58 de la Convención y 9 del Reglamento de Arbitraje del CIADI

Washington, 22 de noviembre de 2016

[Traducción del original en francés]

RESPETUOSA PROPUESTA RAZONADA DE RECUSACION DE LOS ARBITROS DEL TRIBUNAL ARBITRAL SIR FRANKLIN BERMAN Y V.V. VEEDER

22 de noviembre de 2016

Señora Meg Kinnear
Secretaria General del CIADI
Banco Mundial
1818 H Street, N.W.
WASHINGTON D.C. 20433

Ref.: Víctor Pey Casado y Fundación Presidente Allende c. República de Chile (Caso No. ARB-98-2. Nuevo examen- Rectificación)

Señora Secretaria General,

1. El 10 de noviembre de 2016, dos días después de enterarse de la reconstitución del Tribunal de arbitraje en el procedimiento de rectificación de errores materiales en el Laudo del 13 de septiembre de 2016, las partes Demandantes han dirigido al Tribunal una demanda razonada solicitándole que

> *«vistos los hechos y fundamentos que obran en la Demanda de 27 de octubre de 2016 (pp. 28 a 91), las Demandantes solicitan respetuosamente al Tribunal de arbitraje que en el marco de la Regla de arbitraje nº 49(3), con carácter previo a cualquier determinación acerca del procedimiento a seguir en el examen de la demanda de suspensión provisional del curso procesal del presente procedimiento,*
>
> 1. *Que admita la demanda que las partes demandantes han dirigido a la República de Chile el 13 de octubre de 2016 para que proceda a la* full disclosure *ante el Tribunal de arbitraje, el Centro y todas las partes, de las relaciones mantenidas entre la República de Chile y miembros de las Essex Court Chambers durante los tres años anteriores al inicio, el 16 de junio de 2013, de la presente fase del procedimiento, y de las que existen actualmente;*
> 2. *Que admita que los Señores árbitros que forman parte del Tribunal y también son miembros de las Essex Court Chambers lleven a cabo una investigación razonable sobre las cuestiones de aparente conflicto de intereses enumeradas en la carta de las Demandantes de 13 de octubre de 2016, y revelen todo el resultado al Tribunal, al Centro y a todas las partes;*
> 3. *Que en el supuesto caso de que, por motivos de confidencialidad u otros, los Señores árbitros que forman parte del Tribunal de arbitraje e igualmente de las Essex Court Chambers no se consideren en condiciones de llevar a cabo esta investigación y/o la* full disclosure *de la información solicitada, que presenten su dimisión voluntaria ante la Sra. Secretaria General del CIADI (artículos 8(2) del Reglamento de arbitraje y 14 del Convenio) como árbitros del Tribunal que deberá decidir la solicitud del 27 de octubre de 2016 de suspender de modo provisional la continuación procesal de la demanda de corrección de errores materiales en el Laudo del 13 de septiembre de2016.»*[1]

2. El aparente conflicto de intereses entre el Estado Demandado y los dos árbitros también miembros de las Essex Court Chambers del que los Demandantes han tenido conocimiento el 20 de septiembre de 2016, se ha agravado cuando, el 16 de noviembre de 2016, el Tribunal arbitral ha rechazado pura y simplemente considerar

[1] Anexo nº 2, petición de los inversores dirigida el 10 de noviembre de 2016 al Tribunal arbitral

la solicitud de ordenar la *disclosure* que se le hizo el 10 de noviembre de 2016[2], lo que no se puede analizar sino como su rechazo.

3. Al día siguiente, el jueves 17 de noviembre, la respuesta del Estado de Chile al Tribunal de arbitraje ignoraba igualmente la solicitud de *full disclosure* de las relaciones entre la República de Chile y miembros de las Essex Court Chambers dirigida a su atención por los Demandantes el 13 de octubre de 2016 [3]: una nueva coincidencia objetiva, después de la del 17 de octubre anterior, entre los dos árbitros miembros de Essex Court Chambers y la parte Demandada en rechazar la *full disclosure* solicitada.

4. El viernes 18 de noviembre de 2016 los Demandantes han invocado la Regla de arbitraje nº 27[4] al comunicar al Tribunal su objeción por no tomar en consideración la solicitud de *disclosure* formulada el 10 de noviembre, la que respetuosamente reiteraron[5].

5. El lunes 21 de noviembre de 2016 el Tribunal arbitral ha adoptado la Decisión[6] de no aceptar la solicitud a la República de Chile de *full disclosure* ante el Tribunal de arbitraje, el Centro y todas las partes, de las relaciones existentes entre la República de Chile y miembros de las Essex Court Chambers, así como la de rechazar la solicitud de que acepte que los Sres. árbitros miembros del Tribunal e igualmente de las Essex Court Chambers lleven a cabo una investigación razonable sobre las cuestiones con apariencia de conflicto de intereses y revelen plenamente su resultado al Tribunal, al Centro y a todas las partes.

6. Los artículos 49(2) y 51 del Convenio confieren al presente Tribunal de arbitraje competencia para decidir dos recursos importantes, a saber, los recursos de rectificación de errores materiales y el de revisión del Laudo del 13 de septiembre de 2016.

7. Conforme a los artículos 58 de la Convención del CIADI y 9 del Reglamento de arbitraje, los inversores españoles someten sin demora la respetuosa propuesta de recusación de los árbitros Sres. Sir Franklin Berman QC y V.V. Veeder QC, por los motivos y antecedentes que siguen.

***

[2] Anexo nº 3
[3] Anexo nº 4, comunicación de las partes Demandantes al Estado Demandado el 13 de octubre de 2016
[4] Regla de arbitraje nº 27: "*una parte que sabiendo, o debiendo haber sabido, que no se ha observado alguna disposición del Reglamento Administrativo y Financiero, de estas Reglas o de cualquier otra regla o algún acuerdo aplicable al procedimiento, o alguna resolución del Tribunal, y no objeta con prontitud dicho incumplimiento, se considerará (...) que ha renunciado a su derecho a objetar.*»
[5] Anexo nº 5, los Demandantes solicitan al Tribunal proveer su demanda del 10-10-2016
[6] Anexo nº 28
[6] Anexo nº 28

I. EL APARENTE CONFLICTO DE INTERESES ENTRE LOS DOS ARBITROS MIEMBROS DE ESSEX COURT CHAMBERS Y LA PARTE DEMANDADA, LA REPUBLICA DE CHILE

1. La negativa de Sir Franklin Berman y el Sr. V.V. Veeder de revelar al Centro y a los inversores las relaciones entre miembros de su Oficina y el Estado Demandado

8. El 18 de septiembre de 2016 las autoridades de Chile han hecho público un hecho susceptible de constituir un conflicto de intereses aparente, a saber, la existencia

> *"una sigilosa y* 'adelantada' *búsqueda de asesores internacionales, quienes ya llevan meses trabajando -hasta ahora, bajo absoluta reserva- (...) hoy por primera vez [*el Gobierno*] revela los nombres (...) Se trata de (...) Alan Boyle (...) [que] al igual que Samuel Wordsworth -abogado de Chile (...) es miembro de la prestigiosa oficina Essex Court Chambers"* (subrayado añadido)[7].

9. Esta información ha sido ulteriormente confirmada a los inversores por otras fuentes dignas de crédito.

10. El 20 de septiembre de 2016, los inversores españoles han solicitado a la Sra. Secretaria General del CIADI[8] que los árbitros Sir Frank Berman y M. V.V. Veeder revelen plenamente (*full disclosure*) sin tardanza

> *«1. si en las Essex Court Chambers habría miembros, ayudantes u otras personas que recibirían instrucciones, financiamiento o que estarían implicados, de cualquier manera que fuere, directa o indirectamente, con la República de Chile,*
>
> *2. si la República de Chile ha desvelado al Tribunal la naturaleza y envergadura de las eventuales relaciones financieras o de otra naturaleza que haya podido tener con miembros de las Essex Court Chambers -las partes Demandantes están en condiciones de afirmar que no las han tenido de absolutamente ninguna manera antes del nombramiento de los árbitros en el Tribunal del presente procedimiento arbitral, ni después-,*
>
> *3. si uno u otro de los dos árbitros ha hecho, y en qué fecha, una investigación razonable -en virtud de su deber de* due diligence*- para identificar conflictos de intereses, hechos o circunstancias razonablemente susceptibles de plantear dudas legítimas sobre su imparcialidad en el presente procedimiento de arbitraje en el que la República de Chile ha sido condenada por incumplir la obligación de trato justo y equitativo, incluida la denegación de justicia, en el Laudo arbitral del 8 de mayo de 2008 (Pierre Lalive, M. Chemloul, E. Gaillard), condena confirmada en la Decisión*

---

[7] Anexo 6, declaración del Ministro de Asuntos Exteriores de Chile, publicada en la prensa chilena el domingo 18 septiembre 2016: "*una sigilosa y* 'adelantada' *búsqueda de asesores internacionales, quienes ya llevan meses trabajando -hasta ahora, bajo absoluta reserva- (...) hoy por primera vez [*el Gobierno*] revela los nombres (...) Se trata de (...) Alan Boyle (...) [que] al igual que Samuel Wordsworth -abogado de Chile (...) es miembro de la prestigiosa oficina Essex Court Chambers",* anexos números 6 y 7

[8] Anexo nº 8, carta de 20 de septiembre de 2016 de los inversores españoles a la Sra. Secretaria General del CIADI

del Comité ad hoc *de 18 de diciembre de 2012 (L.Y. Fortier QC, P. Bernardini, A. El-Kosheri),*

4. en su caso, en qué fecha uno u otro de los árbitros habría tenido conocimiento, en su caso, de eventuales relaciones de la República de Chile con miembros, ayudantes u otras personas de las Essex Court Chambers,

5. si miembros o asociados de las Essex Court Chambers representan a Chile de manera regular,

6. si en los últimos tres años miembros de las Essex Court Chambers han comparecido por cuenta de la República de Chile, o de un organismo dependiente de ésta, en asuntos no relacionados con el presente arbitraje sin que hayan tomado parte personalmente en ellos los dos árbitros,

7. si una law firm-Chamber o un experto que compartiera honorarios significativos u otros ingresos con miembros de las Essex Court Chambers presta servicios a la República de Chile, o a un organismo perteneciente a ésta,

8. si una law firm-Chamber asociada o en alianza con miembros de las Essex Court Chambers pero que no compartiría honorarios significativos u otros ingresos de miembros de las Essex Court Chambers, presta servicios a la República de Chile, o a un organismo perteneciente a ésta.

11. La respuesta a la Sra. Secretaria General de los dos árbitros ha sido:

«Sir Franklin y el Sr. Veeder ha confirmado cada uno que no ha sobrevenido ninguna circunstancia posterior que justifique ser notificada al Secretario general en los términos del artículo 6(2) del Reglamento de arbitraje del CIADI ».[9]

9. En efecto, a pesar de lo dispuesto en la Regla de arbitraje n° 6(2)[10] los Sir Franklin Berman y el Sr. V. V. Veeder, miembros de las Essex Court Chambers (Londres) y del Tribunal de arbitraje, no han revelado en ningún momento al Centro ni a los Demandantes que miembros de las Essex Court Chambers recibían instrucciones y financiación del Estado de Chile, o de organismos e instituciones que del mismo dependen.

10. El 10 de octubre de 2016 los Demandantes han solicitado del Sr. Presidente del Consejo administrativo del CIADI confirmar si, sucesivamente,

«la República de Chile habría cumplido con su obligación de revelar al CIADI haber mantenido cualquier relación, directa o indirecta, con las Chambers de las que son miembros dos de los tres árbitros del presente Tribunal, antes y durante el desarrollo

[9] Anexo n° 9, carta de la Sra. Secretaria General del CIADI, el 12 de octubre de 2016, a los inversores españoles
[10] Regla de arbitraje n° 6(2), *" « (...) Reconozco que al firmar esta declaración asumo una obligación continua de notificar prontamente al Secretario General del Centro cualquier relación o circunstancia de aquéllas mencionadas que surjan posteriormente durante este procedimiento"».*

de la nueva presentación del diferendo entre el Estado de Chile y las Demandantes, iniciada el 16 de junio de 2013 ».[11]

11. El 12 de octubre de 2016 la Sra. Secretaria General ha respondido a los inversores:

«El CIADI confirma que, en conformidad con los artículos 13.1 y 13.2 de la Orden procesal no. 1, toda la correspondencia recibida de la Demandada en este caso ha sido transmitida a las Demandantes así como al Tribunal. (...) Hemos tomado nota de la solicitud dirigida por el Sr. Pey Casado y la Fundación Presidente Allende a la República de Chile. Significamos que copia a esta última no figuraba en su correo. Corresponde al Sr. Pey Casado y a la Fundación Presidente Allende, si lo desean, contactar directamente a la República de Chili a fin de hacerles partícipes de esta solicitud ».[12]

12. Al día siguiente 13 de octubre de 2016 los inversores han solicitado por intermedio del Secretario del Tribunal de arbitraje a la República de Chile y a los Sres. Árbitros miembros de las Essex Court Chambers hacerles saber, al igual que al Centro, como muy tarde el 17 de octubre

1. *si el Estado de Chile o un organismo dependiente de él, es un cliente actual o anterior de miembros de las Essex Court Chambers, y en qué fechas,*
2. *si la República de Chile o un organismo dependiente de ella, es un cliente regular u ocasional de miembros de las Essex Court Chambers, y en qué fechas,*
3. *el número de millones de dólares que la República de Chile o un organismo dependiente de ella habría pagado a miembros y personas relacionadas con las Essex Court Chambers hasta el 13 de septiembre 2016, y las fechas de los pagos correspondientes – en particular a partir de las fechas en que los dos árbitros fueron nombrados en el actual Tribunal arbitral,*
4. *Los montos financieros comprometidos por la República de Chile, o por un organismo dependiente de ella, para un periodo venidero con miembros de estas Oficinas, y las fechas de los acuerdos correspondientes,*
5. *Si los servicios que la República de Chile, o un organismo dependiente de ella, reciben de miembros pertenecientes a las Essex Court Chambers consisten en consejos estratégicos o transacciones específicas,*
6. *Si los trabajos de miembros de las Essex Court Chambers para la República de Chile, o un organismo dependiente de ella, se realizan en lugares donde los dos árbitros en el presente procedimiento están instalados o en otros lugares, y desde qué fechas,*
7. *Si los miembros de las Essex Court Chambers han establecido un* ethical screen *o un* Chinese Wall *como escudo entre dichos dos árbitros y los otros trabajos, y en qué fechas,*
8. *Cuáles son los miembros, asistentes u otras personas de las dichos Chambers que reciben instrucciones, financiamientos o que estarían involucrados, de cualquier manera que sea, directa o indirectamente, con la República de Chile o con un organismo dependiente de ella,*
9. *Si, en el curso de los tres últimos años miembros de los Essex Court Chambers actuaron para la República de Chile, o un organismo dependiente de ella, en asuntos sin relación con el presente arbitraje sin que los dos árbitros hayan participado personalmente,*
10. *Si una law firm-Chamber o un experto que compartiera honorarios significativos u otros ingresos con miembros de las Essex Court Chambers presta servicios a la República de Chile, o a un organismo dependiente de ella, y desde que fechas,*
11. *Si una law firm-Chamber asociada o en alianza con miembros de las Essex Court Chanbers, pero que no compartirían honorarios significativos u otros ingresos de miembros de las*

[11] Anexo nº 10, carta de los inversores españoles del 10 de octubre de 2016 al Sr. Presidente del Consejo Administrativo del CIADI por intermedio de la Secretaria General del CIADI

[12] Anexo nº 11, respuesta de la Secretaria General del CIADI el 12 de octubre de 2016 a los inversores españoles

Essex Court Chambers, presta servicios a la República de Chile o a un organismo dependiente de ella, y en qué fechas.[13]

13. El 17 de octubre los dos árbitros han respondido al abogado de las Demandantes, en síntesis,

Sir Franklin Berman:

> *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.*[14]

El Sr. V. V. Veeder:

> *«(...) 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 independant 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.* »[15]

[El fundamento de estas dos respuestas es contrario al sentido y alcance de la más reciente práctica en materia de conflictos de intereses en el sistema CIADI y el arbitraje internacional en general, como será desarrollado más adelante en este texto]

14. El 18 de octubre de 2016 por intermedio de la Sra. Secretaria General del Centro los inversores han reiterado sus preguntas a la Republica du Chile[16], que no ha respondido. Un abogado de la República de Chile sin embargo ha hecho público el 25 de octubre de 2016 que ésta no estaría dispuesta a revelar voluntariamente sus relaciones con las Essex Court Chambers «*unless it is requested to do so by ICSID*»[17].

---

[13] Anexos nos. 12 y 13, cartas de los inversores españoles, por intermedio del Secretario del Tribunal de arbitraje, a la atención de la República de Chile y los Señores árbitros, respectivamente

[14] Anexo nº 14, carta de Sir Franklin Berman QC al abogado de los inversores españoles el 17 de octubre de 2016, respondida al día siguiente, anexo nº 15

[15] Anexo nº 16, carta del Sr. V. V. Veeder QC al abogado de los inversores españoles el 17 de octubre de 2016

[16] Anexos nº 17 y 18, carta de los inversores españoles del 18 de octubre a la Sra. Secretaria General del CIADI y respuesta de ésta del 20 de octubre de 2016, respectivamente

[17] Declaración de un abogado del Estado de Chile publicada el 25 de octubre de 2016 en *Global Arbitración Review*, anexo nº 19, página 4, accesible en http://bit.ly/2dLayCK

15. Resulta así manifiesto que las relacione existentes entre miembros de las Essex Court Chambers y la República de Chile son objetivamente mantenidas tanto por ésta como por los dos árbitros en la más absoluta opacidad respecto del Centro y de los inversores españoles, y que las respuestas están objetivamente coordinadas (los dos árbitros dicen el 17 de octubre que no van a revelar esas relaciones y ocho días después la República de Chile se apoya en los árbitros para declarar en la *Global Arbitration Review*[18] que tampoco las revelará).

2. La obligación de *disclosure* en derecho inglés no justifica la negativa que los Sres. Berman y Veeder oponen a la solicitud de los Demandantes

16. Ahora bien, en contra de lo que, como acabamos de ver, han sostenido los Sres. Berman y Veeder ante de la Sra. Secretaria General del CIADI el 17 de octubre de 2016, no es exacto que el derecho inglés, tal cual es aplicado hoy en día, les prohibiría revelar completamente (*full disclosure*) las relaciones con la parte Demandada que han solicitado los inversores.

17. En efecto, la reciente Sentencia de la High Court of England and Wales del 2 de marzo de 2016[19] se refiere a una situación cuyas circunstancias son básicamente similares al caso que nos ocupa, a saber si el árbitro Mr David Haigh QC se encontraba en un

> *apparent bias based on alleged conflict of interest that fell squarely within paragraph 1.4 of the Non-Waivable Red List within the 2014 IBA Guidelines*[20] *(...)*
> *The arbitrator's firm (but not the arbitrator) does regularly advise an affiliate of the Defendant (but not the Defendant) and the arbitrator's firm (but not the arbitrator) derives substantial financial income from advising the affiliate.*

18. Sin embargo el árbitro Sr. David Haigh QC ha informado a la High Court of England and Wales que ejercía su profesión de abogado en un aislamiento aparentemente mayor que el de los *barristers* de Essex Court Chambers:

> *a sole practitioner carrying on my international practice with support systems in the way of secretarial and administrative assistance provided by [the Law Firm]. I am treated for the purposes of compensation as a separate department within the firm and, other than [one other] I am the only member of the ... Alternative Dispute Resolution department.*

19. Ahora bien - a diferencia de Sir Franklin Berman y el Sr. V.V. Veeder – Mr. David Haigh QC ha declarado que

> *On accepting the appointment as arbitrator, Mr Haigh QC made some, in the event immaterial, disclosures to the parties revealed by his firm's conflict check systems. He made a later, in the event immaterial, disclosure in September. Those conflict check*

---

[18] Ibid.
[19] Anexo nº 20, Sentencia de la High Court of England and Wales del 2 de marzo de 2016
[20] Para 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.*"

systems did not however alert him to the fact that the firm had Q as a client (...) he would have wished to make a disclosure had he known".

20. A la vista de esta declaración del árbitro, el Tribunal inglés ha aplicado el «*test at common law for apparent bias*»:

> "*the test at common law for apparent bias is whether 'a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased' (...) no attention will be paid to any statement by the [arbitrator] as to the impact of any knowledge on his or her mind*",

el Tribunal ha tenido en cuenta el hecho de que

> *"the arbitrator, although a partner, operates effectively as a sole practitioner using the firm for secretarial and administrative assistance for his work as an arbitrator. The arbitrator makes other disclosures where, after checking, he has knowledge of his firm's involvement with the parties, and would have made a disclosure here if he had been alerted to the situation,*
> *(...)*
> *where, as here, the arbitrator made checks, and made disclosures where the checks drew matters to his attention, and the problem was that the facts in relation to Q were not drawn to his attention, the fair minded and informed observer would say that this was an arbitrator who did not know rather than that this was an arbitrator whose credibility is to be doubted, who 'must have known', and who was choosing not to make a disclosure in this one important instance.*
> *24. The fact that the arbitrator would have made a disclosure if he had been alerted to the situation shows a commitment to transparency that would be relevant in the mind of the fair minded and informed observer,*

antes de fallar que

> *On considering the facts the fair minded and informed observer would not, in my view, conclude that there was a real possibility that the tribunal was biased, or lacked independence or impartiality".*(Subrayado añadido).

21. En la especie, en su comunicación del 17 de octubre de 2016 Sir Franklin Berman y el Sr. V.V. Veder no han hecho *disclosure to the parties*, ni indicado haber hecho ningún *checking,* muy al contrario. Y cuando el 10 de noviembre de 2016 –en el marco del procedimiento que se acababa de abrir tres días antes – los inversores les han solicitado proveer, en su calidad de árbitros sentados en el Tribunal arbitral, como cuestión previa llevar a cabo una investigación razonable de las relaciones entre el Estado Demandado y miembros de las Essex Court Chambers, y revelar su resultado, los dos árbitros han rehusado tácitamente al comunicar a las partes, el 16 de noviembre siguiente, que el Tribunal entraba a conocer sobre el fondo del procedimiento de rectificación[21], despreciando las solicitudes de previa *full disclosure*.

[21] Anexo nº 3

22. Por su parte, el 6 de julio de 2015 el *Bar Council of England and Wales* había emitido una *Information Note Regarding Barristers in International Arbitration*[22] que remitía, precisamente, a aplicar los Principios aprobados por la IBA[23] invocados por los inversores españoles, desmientiendo así la *splendid isolation* de los *barristers* respecto de los principios relativos a la *disclosure* aplicados en el sistema CIADI que los Sres. Berman y Veeder oponen a desvelar las relaciones entre miembros de su Oficina y el Estado de Chile (ver §13 *supra*):

> *4(1). The position of the barrister acting as arbitrator will be no different from the position of any other individual acting as an arbitrator, and is likely to be governed by the rules (legal and contractual) which govern the type of arbitration in question. Part II of this document addresses the position of barristers who act as arbitrators. 1.In preparing this document, we have consulted many arbitral institutions worldwide and have taken their comments into account (…)*
>
> *30. (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator, if he or she has any doubt as to his or her ability to be impartial or independent.*
>
> *(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, which, **from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances**, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).*
>
> *(c) **Doubt is justifiable if a reasonable and informed third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.***
>
> ***(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence in any of the situations described in the Non-Waivable Red List.*** (Subrayado añadido).

23. Antes de ello, en 2014, los dichos Principios orientadores de la IBA sobre los conflictos de interés en el arbitraje internacional habían indicado en el comentario al Principio general 6 citado en el §49 *infra* que:

> *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* (subrayado añadido).

---

[22] Anexo nº 22, *Bar Council of England and Wales: Information Note Regarding Barristers in International Arbitration,* 6 de julio de 2015, accesible en http://bit.ly/1JUpt13 , paras. 4(1), 29-34

[23] I*BA Guidelines on Conflicts of Interest in International Arbitration*, 23 de octubre de 2014, accesibles en http://bit.ly/1UgAOml

24. Ahora bien, en las circunstancias del presente caso, como vemos en los §§8, 10-23 *supra* y §68 *infra*, la situación de los dos árbitros miembros de las Essex Court Chambers concurren condiciones que la sitúan en el marco de la *Non-Wailable Red List* :

> *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.*

25. Sin embargo, ni la República de Chile ni los referidos dos árbitros han respondido a las solicitudes del 13 de septiembre y 10 de noviembre de 2016 de desvelar las sumas satisfechas por el Estado de Chile, u organismos e instituciones que dependen de él, ni los compromisos suscritos con miembros de las Essex Court Chambers.

26. En todo caso, al evaluar el comportamiento en este procedimiento de los meritados dos árbitros es procedente tener en cuenta que, como afirma el prof. William W. Park, Presidente de la London Court of International Arbitration:

> *Shared profits are not the only type of professional relationships that can create potential conflicts. Senior barristers often have significant influence on the progress of junior colleagues' careers. Moreover, London chambers increasingly brand themselves as specialists in particular fields, with senior 'clerks' taking on marketing roles for the chambers, sometimes travelling to stimulate collective business.*
>
> *Moreover, a barrister's success means an enhanced reputation, which in turn reflects on the chambers as a whole. (note 203: Sceptics also note that salaried legal associates in the United States and other countries assume the conflicts of their firm affiliation even without sharing in profits.)*
>
> *In response to doubts about the ethics of their practice, some barristers suggest that outsiders just do not understand the system, characterising the critiques as naïve. Like a Paris waiter impugning a tourist's ability to speak French in order to distract him from insisting on the correct change, the critique aims to camouflage what is at stake. Often, however, outsiders do understand the mechanics of chambers. They simply evaluate the dangers differently.*[24]

***

II. LA CONVENCIÓN DEL CIADI

1. La obligación de *disclosure* en el sistema CIADI contradice a los Sres. Berman y Veeder

[24] William W. Park, Rectitude in International Arbitration, in William W. Park (ed.), *Arbitration International Special Edition on Arbitrator Challenges*, (© LCIA; Kluwer Law International 2011, página 516

27. Aún en el supuesto caso de que el derecho inglés protegiera la opacidad alegada por Sir Franklin Berman y el Sr. V.V. Veeder respecto de las relaciones entre el Estado Demandado y miembros de las Essex Court Chambers, *quod non*, semejante falta de transparencia no sería aceptable en el sistema de arbitraje del CIADI en las concretas circunstancias del presente arbitraje, y menos aún servir de excusa al incumplimiento de la obligación correlativa.

28. En la Convención del CIADI es imperativo que los árbitros se comprometan «*a juzgar con equidad*», "*inspirar plena confianza en su imparcialidad de juicio" y tienen la «obligación continua de notificar prontamente al Secretario General del Centro cualquier relación o circunstancia de aquéllas mencionadas que surjan posteriormente durante este procedimiento*» (artículos 14 de la Convención y 6 del Reglamento de arbitraje).

29. Está, en efecto, generalmente aceptado que el sistema CIADI los árbitros deben ser imparciales.[25]

30. La obligación de revelar completamente las circunstancias de un posible conflicto de intereses es permanente en el sistema CIADI,

> *"The prohibition against a conflict of interest and the disclosure obligation continue after the appointment. If the facts that could cast doubt on the arbitrator's independence and impartiality arise during the course of the proceeding, the arbitrator is expected to reveal them promptly [Shihata, I. F.I.: The experience of ICSID in the Selection of Arbitrators, News from ICSID, Vol. 6/1, pp 5, 6 (1989)]. In Holiday Inns v. Morocc, the arbitrator appointed by the Claimants disclosed that four years after the registration of the request he had become a director of one of the Claimants. He had to resign in accordance with art. 56(3) (see Art. 56, para 38)"*[26]

31. Esto es aún más imperativo después que en 2006 se introdujera en el Reglamento de arbitraje la disposición que regula la primera sesión del Tribunal y obliga a cada árbitro a firmar la siguiente declaración:

> *«Reconozco que al firmar esta declaración asumo una obligación continua de notificar prontamente al Secretario General del Centro cualquier relación o circunstancia de aquéllas mencionadas que surjan posteriormente durante este procedimiento»* (Regla de arbitraje 6(2), subrayado añadido).

32. Según el Presidente del Consejo administrativo del CIADI[27],

---

[25] *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; *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Proposal for Disqualification of Francisco Orrego Vicuña and Claus von Wobeser (Spanish), 13 December 2013, §70; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, 12 November 2013, §58, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw3009.pdf ; *Abaclat and Others v. Argentine Republic* , ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, §74, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw3057.pdf

[26] SCHREUER (Ch.): The ICSID Convention. A Commentary (2001), páginas 516-517, Art. 41, §23

[27] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposal to Disqualify a Majority of the Tribunal, citado, §§59-62

« 59… 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.[28]

60. The applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party'[29]*. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.*

61. Finally, regarding the meaning of the word 'manifest' in Article 57 of the Convention, a number of decisions have concluded that it means 'evident' or 'obvious.'

62. The Chairman notes that the Parties have referred to other sets of rules or guidelines in their arguments such as the IBA Guidelines. While these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention.[30]

(Subrayados añadidos).

33. En su estudio sobre los árbitros internacionales, los trabajos preparatorios de la Convención del CIADI y los artículos de ésta que contienen el término « *manifeste* », Karel Daele ha concluido que este término equivale a *easily recognizable*, *clear*, *obvious* y/o *self evident*, y que una definición estricta de este término no concuerda de manera clara con el hecho de que '*nowhere in the legislative history of the Convention, is there any indication that anything less than the full and complete possession of the [independence and impartiality] would be sufficient*".[31]

34. En el caso *Caratube*, los árbitros Sres. Levy y Aynès afirmaban que no podia esperarse que el árbitro Sr. Boesch pudiera «*maintain a 'Chinese wall' in his own mind*"" y que "*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*".[32]

---

[28] En el mismo sentido, *Suez, Sociedad General de Aguas de Barcelona SA and Interagua Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, §30 (Suez I), accesible en http://www.italaw.com/sites/default/files/case-documents/ita0811_0.pdf ; y las Decisiones en los casos CIADI *Burlington Resources, Inc. v. Republic of Ecuador* del 13 de diciembre de 2013, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw3028.pdf ; *Repsol S.A. and Repsol Butano S.A. v. Republic of Argentina* del 13 de diciembre de 2013, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw3033.pdf *; Abaclat and Others v. Argentine Republic,* Decisión del 4 de febrero de 2014, citado

[29] En el mismo sentido, *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee, 3 October 2001, §20: "*In such a case, the arbitrator might be heard to say that, while he might be biased, he was not manifestly biased and that he would therefore continue to sit. As will appear, in light of the object and purpose of Article 57, we do not think this would be a correct interpretation.*"

[30] Ver en el mismo sentido *Urbaser SA 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, 12 August 2010, §43, accesible en http://www.italaw.com/sites/default/files/case-documents/ita0887.pdf

[31] Daele (K.), *Challenge and Disqualification of Arbitrators in International Arbitration* (Kluwer 2012), §§ 5-027, 5-028

[32] *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, §24, 75, 91

[Sin embargo, pareciera ser que una '*Chinese wall' in his own mind* es lo que cada uno de los dos árbitros, los Sres. Sir Franklin Berman y V.V. Veeder, oponen a la solicitud de *disclosure* que las Demandantes les han dirigido].

35. En el caso CIADI *Lemire v. Ukraine* el árbitro nombrado por el inversor, el Sr Jan Paulson, reveló espontáneamente que su *law firm* acababa de recibir instrucciones de parte del Estado demandado en un arbitraje diferente ante la Corte Internacional de Justicia. Y aunque el Sr. Paulson no se hallaba personalmente involucrado en el otro arbitraje y era de la opinión que el mandato a su *law firm* no afectaba a su imparcialidad, ofreció su dimisión voluntaria a las partes y les pidió que se expresaran al respecto[33].

[A diferencia del Sr. Jan Paulson, los dos árbitros miembros de las Essex Court Chambers no han revelado a los inversores españoles, ni al Centro, que miembros de sus *Chambers* tenían relaciones con la República de Chile en un caso ante la Corte Internacional de Justicia, ni tampoco han ofrecido dimitir del Tribunal de arbitraje]

36. Ahora bien, en el sistema del CIADI el "*requirement of impartiality and independence (...) [also] applies in investor-State disputes, where the need for independence is at least as great.*"[34]

2. La doctrina de los Tribunales del CIADI en dos casos de conflicto de interés aparente entre miembros de las Essex Court Chambers y árbitros igualmente miembros de esas Chambers

37. Es sabido que sin el consentimiento de las partes algunas de las especificidades propios del sistema de los *barristers* ingleses que practican el arbitraje no se aplican en el sistema CIADI.

38. Es un Tribunal de arbitraje del CIADI presidido precisamente por un miembro de las Essex Court Chambers, el Sr. M. D.A.R. Williams QC, quien en mayo de 2008 ha aplicado el §4.5 de la *Background Information on the IBA Guidelines on Conflicts of Interest in International arbitration* relativa a los *barristers* que practican el arbitraje, según la cual:

> *"While the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the*

[33] Challenge, Decision of 23 December 2008, §§20-22

[34] *OPIC Karimum Corp. v. Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, ¶ 49 (May 5, 2011), accesible en http://www.italaw.com/sites/default/files/case-documents/ita0588.pdf

> *promotional material which many chambers now disseminate, there is an understandable perception that barristers' chambers should be treated in the same way as law firms*"[35]

y ha formulado la doctrina de alcance general relativa a los *barristers*/arbitros miembros de las Chambers inglesas que los inversores españoles invocan en el presente procedimiento:

> *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. (...).*[36]

[La respuesta del 17 de octubre de 2016 de Sir Franklin Berman y el Sr. V. V. Veeder va en sentido contrario a este Laudo, aquellos han opuesto las reglas internas de sus Chambers a las que se aplican en el sistema internacional del CIADI invocadas por las Demandantes el 13 de octubre de 2016]

39. Poco después, en agosto de 2008, en otro arbitraje CIADI, era el propio Sr. V. V. Veeder quien en su calidad de presidente del Tribunal de arbitraje ha dimitido después de conocerse que otro miembro de las Essex Court Chambers tenía relaciones con una de las partes[37] :

> *On May 20, 2005, the Parties informed the Centre that they had jointly appointed Mr. V.V. Veeder, a British national, as the third and presiding arbitrator (...) on May 7, 2007, the hearing on jurisdiction took place in London (...) the following persons appeared as legal counsel and representatives for the Claimant: (...) Prof. Greenwood of Essex Chambers. (...) The following persons appeared on behalf of the Respondent as its legal counsel and representatives: Messrs. (...) Kelby Ballena (...) Mr. Paolo Di Rosa and Ms. Gaela Gehring Flores of Arnold & Porter LLP (...). During the session, after hearing the Parties' positions regarding the participation of Prof. Greenwood in the case, the President of the Tribunal submitted his resignation. His resignation was accepted by his two co-arbitrators, Judge Brower and Mr. Paulsson (...).* [Soulignement ajouté].

40. Ahora bien, en el presente procedimiento los representantes de la República de Chile –precisamente los Sres. Kelby Ballena, Paolo Di Rosa, Gaela Gehring Flores, Arnold & Porter LLP- han pleiteado durante más de dos años ante el Sr. V.V.Veeder en persona y Sir Franklin Berman y todos–el Estado de Chile, sus abogados, los dos árbitros- han silenciado las relaciones que existen entre la República de Chile y

---

[35] Publicado en (2004) 5 *Business Law International, 433*

[36] *Hrvatska c. Slovenia*, ICSID Case Nº ARB/05/24, Tribunal's Ruling, 6 Mai 2008, p. 23, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw6289.pdf

[37] ICSID Case No. ARB(AF)/04/6, *Decision on Jurisdiction*, 22 August 2008, páginas 7-9, accesible en http://www.italaw.com/sites/default/files/case-documents/ita0888.pdf

miembros de las Essex Court Chambers, y desean mantenerlas también ocultas en el procedimiento iniciado el 7 de noviembre de 2016.

41. *Omnes sapiebant, omnes tacebant* …

42. Estos hechos, discriminatorios y parciales respecto de las partes Demandantes, plantean dudas razonables en cuanto a la imparcialidad y neutralidad de los dos árbitros que exigen los arts. 14(1) y 52(1)(d) de la Convención y el art. 6(2) del Reglamento de arbitraje.

3. Los Principios de la International Bar Association (IBA) sobre los conflictos de interés en el arbitraje internacional son aplicados en el sistema CIADI

43. La Corte Permanente de Arbitraje ha considerado que esos principios "*reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator's impartiality and independence.*"[38]

44. Esos Principios no son obligatorios, cierto, pero *may serve as useful references,* afirma el CIADI[39], y son generalmente aplicados por el Centro y los Tribunales del CIADI en numerosas ocasiones[40].

45. En *Blue Bank* y *Burlington* el Presidente del Consejo administrativo del CIADI ha considerado esos Principios "*useful references*"[41]. En el caso *Alpha Projekt* los dos co-árbitros los han calificado de «*instructive*»[42] y en el caso *Urbaser* "*a most valuable source of inspiration*"[43].

46. En resúmen, según la Corte Permanente de Arbitraje los Principios del IBA se aplican en el sistema CIADI

i. en cualquier fase del procedimiento[44] :

---

[38] *ICS Inspection & Control Services Ltd. v. Republic of Argentina*, Decision on Challenge to Arbitrator, PCA Case No. 2010-9, 1, 4 (Dec. 18, 2009), accesibles en http://www.italaw.com/sites/default/files/case-documents/ita0415.pdf

[39] Ver el sitio internet del CIADI en http://bit.ly/2e5wWVF

[40] Ver *Compañia de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001) (Vivendi I); SGS *Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (19 December 2002); *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12, Decision on Respondent's Proposal to Disqualify the President (25 February 2005); *EDF International SA, SAUR International SA and Leon Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Decision on Respondent's Proposal to Disqualify an Arbitrator (25 June 2008)

[41] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, cité, §62; *Burlington Resources, Inc. v. Republic of Ecuador*, citado, §69.

[42] *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 March 2010, §56.

[43] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Cambell McLachlan, 12 August 2010, §37

[44] Comentario a la Regla general 3(e) de los principios del IBA: *"(e)* ***Disclosure*** *or disqualification (as set out in General Standards 2 and 3)* ***should not depend on the particular stage of the arbitration****. In order to determine*

« The first General Standard, entitled "General Principle," provides as follows: Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.

The second General Standard, entitled "Conflict of Interest" provides as follows: (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent
(b)The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).
(c)Doubts are justifiable if a reasonable person and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision. [. . .]

As Judge Brower points out, the stage of proceedings (which are neither at a very early, or a very late stage) is "wholly irrelevant" to this challenge.
Applying the IBA Guidelines, I have not taken the stage of proceedings into account in determining this challenge.[45]

[En el caso presente, un hecho constitutivo de conflicto de interés aparente ha sido puesto en conocimiento de los inversores españoles el 20 septiembre 2016]

ii. cualquier que sea la experiencia y reputación de los árbitros:

«Claimant argues that Judge Brower's "experience and standing are relevant when evaluating his independence and impartiality." The justifiable doubts test is objective and applies universally to all arbitrators, irrespective of whether they are chairs, sole arbitrators or party-appointed arbitrators (see General Standard 5). There is nothing in the IBA Guidelines that supports a special deference to the subjective positions of arbitrators based on their level of experience or standing in the international community. Judge Brower no doubt has extensive experience in international arbitration and is highly regarded in the field, but this fact is irrelevant in applying the IBA.

---

whether the arbitrator should disclose, decline the appointment or refuse to continue to act, the facts and circumstances alone are relevant, not the current stage of the proceedings, or the consequences of the withdrawal. (...) no distinction is made by these Guidelines depending on the stage of the arbitral proceedings. While there are practical concerns, if an arbitrator must withdraw after the arbitration has commenced, a distinction based on the stage of the arbitration would be inconsistent with the General Standards." (Subrayado añadido)

[45] Corte Permanente de arbitraje, *Perenco v. Ecuador, I*CSID CASE No. ARB/08/6, *Décision du 8 décembre 2009 concernant le Juge Charles Brower,* PCA Case No. IR-2009/1, §§39, 40, 65, 66, subrayado en el original, accesible en http://www.italaw.com/sites/default/files/case-documents/ita0625.pdf

Indeed, given Judge Brower's experience and reputation, it can be assumed that he must have been aware of the risks his interview could entail as far as raising justifiable doubts regarding his impartiality or independence.[46]

[Sir Franklin Berman QC y el Sr. V. V. Veeder QC tienen gran experiencia y reputación]

iii. <u>en base a la apariencia de parcialidad o dependencia y no de parcialidad o dependencia efectivas</u>:

in all of the jurisdictions considered by the Working Group in formulating the Guidelines, there was agreement "that a challenge to the impartiality and independence of an arbitrator depends on the appearance of bias and not actual bias." The Background Information proceeds to explain that: Based on the virtual consensus of the national reports and the discussions of national law, the Working Group decided that the proper standard for a challenge is an "objective" appearance of bias, so that an arbitrator shall decline appointment or refuse to continue to act as an arbitrator if facts or circumstances exist that form a reasonable third person's point of view having knowledge of the relevant facts give rise to justifiable doubts as to the arbitrator's impartiality or independence. If an arbitrator chooses to accept or continue with an appointment once such bias has been brought to light, disqualification is appropriate and a challenge to the appointment should succeed. Accordingly, a finding that Judge Brower is actually biased against Ecuador or has actually prejudged the merits of the dispute is not necessary in order for the challenge to be sustained under the IBA Guidelines. [47]

[En el caso presente, la apariencia de conflicto de intereses es tanto más significativa habida cuenta de la absoluta falta de *disclosure* por parte de Sir Franklin Berman QC y el Sr. V. V. Veeder QC cuando en enero de 2014 aceptaron ser árbitros, o antes de cerrar el procedimiento el 17 de marzo de 2016, o después de la solicitud que, en su calidad de miembros del presente Tribunal de arbitraje, les ha sido dirigida el 10 de noviembre y el 13 de octubre de 2016 por las partes Demandantes]

47. El Comité *ad hoc* en el caso CIADI *Vivendi c. Argentine* (II) al estudiar la pertenencia de un árbitro a una institución que tenía una relación directa con una de las partes ha tenido en cuenta los Principios de la IBA, y ha afirmado que

having properly and adequately investigated and established any relationship between [l'institution] *and any of the parties to the arbitrations, it is for the arbitrator personally first to consider such a connection in terms of* ***a voluntary resignation as arbitrator. Such connection must otherwise be properly disclosed to the parties through an adequate amendment of earlier declarations under Rule 6.***

The Respondent has raised the important point that, if this is the decisive element, failure to adequately investigate, disclose and inform is encouraged in this manner, and that as a consequence a nonsense is being made of all duties in this respect, thus undermining the credibility of the entire ICSID process, which the Committee has

[46] *Perenco v. Ecuador,* ibid. §§62, 63
[47] *Perenco v. Ecuador,* ibid. §§43,44

already stated to underly all of Article 52. The Respondent cites the revision of the Pinochet case in the House of Lords as powerful support.[48]

[En el caso presente, la relación actual entre la República de Chile y miembros de las Essex Court Chambers es directa. Algún tiempo antes, la apariencia de un conflicto de intereses entre un juez del Tribunal de la House of Lords y una de las partes -en el caso de la extradición de Pinochet para ser juzgado en España por crímenes contra la Humanidad- fue conocida después de pronunciada la Sentencia del 25 de noviembre de 1998[49], la que fue anulada el 17 de diciembre de 1998 por un segundo tribunal de la House of Lords[50]].

48. En el sistema CIADI, los árbitros tienen la obligación de comunicar al Centro, al Tribunal de arbitraje y a las otras partes un eventual conflicto de intereses lo más pronto posible, según la Regla de arbitraje nº 6(2) y según el Principio General nº 7 de la IBA:

> ***Deberes de los árbitros y de las partes***
> *(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of* ***any*** *relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and* ***any person or entity*** *with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.*
> ***The party shall do so on its own initiative at the earliest opportunity****.*
> *(c) In order to comply with General Standard 7(a), a party shall perform reasonable enquiries and provide* ***any*** *relevant information available to it.*
> *(d) An arbitrator is under a duty to make reasonable enquiries to identify* ***any*** *conflict of interest, as well as* ***any*** *facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence.*
> *Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries.* (Soulignement ajouté).

> [En la especie, los dos árbitros de las Essex Court Chambers no han llevado a cabo la investigación, ni informado al Centro ni a las partes Demandantes acerca de las relaciones que existen entre el Estado Demandado y miembros de las Essex Court Chambers, ni han aceptado la solicitud de *disclosure* del 10 de noviembre de 2016].

49. Las relaciones entre el árbitro y una parte son el objeto del Principio General nº 6:

> ***(6) Relationships***
> *(a)* ***The arbitrator is in principle considered to bear the identity of his or her law firm****, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made,*

---

[48] *Compañía de Aguas del Aconquija S.A., Vivendi Universal v Republic of Argentina*, Decision on the Argentine Republic's Request for Annulment of the Award, ICSID Case No. ARB/97/3, 10 August 2010, §§226, 230, 236, 237, accesible en http://www.italaw.com/documents/VivendiSecondAnnulmentDecision.pdf

[49] Accesible en http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd981125/pino01.htm

[50] Accesible en http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm

the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, ***should be considered in each individual case****.*
The fact that the activities of the arbitrator's firm involve one of the parties shall not necessarily constitute a source of such conflict, or a reason for disclosure. Similarly, if one of the parties is a member of a group with which the arbitrator's firm has a relationship, ***such fact should be considered in each individual case****, but shall not necessarily constitute by itself a source of a conflict of interest, or a reason for disclosure.*
(b) ***If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in,*** *or a duty to indemnify a party for,* ***the award to be rendered in the arbitration, may be considered to bear the identity of such party****.* (Soulignement ajouté).

[En la especie, los dos árbitros miembros de las Essex Court Chambers no han revelado las relaciones de la República de Chile con miembros de esas Chambers, han rechazado explícitamente hacerlo en sus comunicaciones del 17 de octubre de 2016[51], y tácitamente -esta vez en el marco del procedimiento en calidad de árbitros – al no aceptar la solicitud del 10 de noviembre de 2016[52]].

50. Los Principios del IBA sitúan en la *Non-Waivable Red List* el hecho de que

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****.* (Soulignement ajouté).

[El 18 de septiembre de 2016 el Gobierno de Chile ha hecho público que miembros de las Essex Court Chambers aconsejaban a la República de Chile de manera regular[53]]

La *Part II: Practical Application of the General Standards* de esos Principios de la IBA indica que

2. (...) The Non-Waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, acceptance of such a situation cannot cure the conflict.

[En su respuesta del 17 de octubre de 2016 los dos árbitros miembros de las Essex Court Chambers se han atribuido a ellos mismos ser *iudices in causa sua*[54]]

51. En el caso CIADI *Azurix c. Argentina* el Presidente del Tribunal de arbitraje, el Sr. Yves Fortier, PC CC OQ QC, reveló al comienzo del procedimiento que una de las partes mantenía relaciones con su *law firm* y de inmediato dimitió de esta última, con efecto inmediato, '*so that [he would] serve as president in a capacity of*

[51] Anexos nos. 14 y 16
[52] Anexo nº 3
[53] Anexos nos. 6 y 7
[54] Anexos nos. 14 y 16

unquestionable independence unaffected by events of which [he had] no knowledge or information and over which [he had] no control'[55].

[En su respuesta del 17 de octubre de 2016 los dos árbitros miembros de las Essex Court Chambers no han revelado las relaciones entre la República de Chile y miembros de sus *Chambers*, y ni han dimitido de éstas ni han aceptado el 16 de noviembre de 2016, en el marco de sus funciones en el Tribunal, la solicitud de las Demandantes del 10 de noviembre[56]].

***

III. LAS CIRCUNSTANCIAS ESPECÍFICAS EN LA ESPECIE

1.Las continuadas maniobras de la República de Chile para intervenir el Tribunal de arbitraje y/o sabotear el arbitraje

52. Esta opacidad es aún menos aceptable en el sistema del CIADI habida cuenta de que el Laudo de 2008 condenó a la República Demandada por infringir el trato justo y equitativo y denegación de justicia a los inversores españoles, consistente en haber ocultado las principales consecuencias sobre la orientación del arbitraje de una resolución judicial.

53. Una de las circunstancias específicas y únicas del presente arbitraje desde su inicio el 6 de noviembre de1997 son las continuadas maniobras del Estado de Chile para poner al Tribunal de arbitraje bajo su control directo o indirecto, o, alternativamente, sabotear el procedimiento de arbitraje, lo que ha tenido como consecuencia prolongar el procedimiento y aumentar los costos.[57] No son éstas «acusaciones» sino hechos patentes y comprobados. En resumen, muy abreviado, ante el actual Tribunal de arbitraje ha sido demostrado[58] que

- **El 5 de mayo de 1998** la representación de la República de Chile ha exigido al Secretario General del CIADI anular el registro de la Demanda, y anunció que pediría anular el Laudo que se dictara si le era desfavorable.[59]

[55] Challenge, Decision of 25 February 2005
[56] Anexos nos. 2, 14, 16 y 21
[57] Ver el anexo CRM89, 2005-09-19 Memorándum de la mala fe de Chile, accesible en http://www.elclarin.cl/fpa/pdf/051005_fr.pdf
[58] Ver la *Breve síntesis razonada del método seguido por la representación de Chile para hacer fracasar el arbitraje, controlar o prolongar el arbitraje y aumentar el costo*, del 27 de junio de 2014, anexo CM-00, accesible en http://www.italaw.com/sites/default/documents/italaw3245.pdf
[59] Ibid, p. 4.13.1.2

- **El 29 de julio de 1998** la representación de la República de Chile ha nombrado en calidad de árbitro al «*distinguido jurista mexicano Don Jorge Witker Velásquez*», silenciando que era chileno *iure soli* y *iure sanguinis*.[60]

- **El 18 de noviembre de 1998** la representación de Chile ha nombrado árbitro a D. Galo Leoro-Franco, Gran-Cruz de la Orden Bernardo O'Higgins, la más alta condecoración de la República de Chile.[61]

- **El 30 de noviembre de 1998** el Ministro chileno de Economía ha dirigido una carta al Señor Secretario General del CIADI atacando al Centro por haber registrado la **Demanda de arbitraje.**[62]

- **El 2 de febrero de 1999**, durante el acto de constitución del Tribunal la representación de Chile ha reconocido que **antes del 20 de abril de 1998** (fecha del registro de la Demanda), el Ministro de Economía de Chile se desplazó en persona al CIADI a fin de insistir personalmente en que no fuera registrada la **Demanda** interpuesta el 6 de noviembre de 1997.[63]

- **El 2 de febrero de 1999,** igualmente, la representación de la República de Chile ha entregado al Tribunal de arbitraje una copia de la carta del Ministro chileno de Economía[64], fechada el 30 de noviembre de 1998 y dirigida al Señor Secretario General del CIADI, en la que tras atacar al Centro por haber registrado la **Demanda** el autor afirmaba : *manifestamos formalmente nuestra objeción a la constitución del Tribunal*, y amenazaba con ***pedir (...) la nulidad de todo lo que habrá sido hecho (...)*** en el supuesto caso de que el Secretario General del CIADI no anulara el registro de la Demanda.

- **El 21 de agosto de 2002**[65] la Cámara de Diputados de Chile celebra una sesión especial sobre el presente procedimiento de arbitraje. Los partidos gubernamentales aprueban una moción pidiendo que la República de Chile no respete una eventual decisión del Tribunal de arbitraje favorable a los inversores españoles.

- **El 24 de agosto de 2005** la representación de la República de Chile pide recusar al entero Tribunal de arbitraje después que, el 27 de junio de 2005, éste haya dado a conocer a las Partes, por intermedio del Centro, que tenía redactado un proyecto de

---

[60] *Ibid*, p. 4.13.1.7
[61] Ver la carta que el agente de Chile dirige al Centro el 18 de noviembre de 1998
[62] Anexo aquí adjunto nº 25, accesible en http://www.elclarin.cl/images/pdf/memoire17031999.pdf, correspondiente al anexo C-M01 adjunto a la Memoria inicial de las Demandantes del 17 de marzo de 1999, §4.13.1.10
[63] Anexo C-M01, ibid, §4.13.1.1.1
[64] Carta del Ministro chileno de Economía del 20 de noviembre de 1998, aquí anexo con el nº 12; documento C-M01f, Memoria del 17 de marzo de 1998, §4.13.1.10
[65] Anexo C208, procedimiento de arbitraje inicial

Laudo y, el 12 de agosto de 2005 que los miembros du Tribunal de arbitraje iban a reunirse a comienzos de septiembre a finalizar el Laudo.[66]

- **El 26 de agosto de 2005** D. Leoro Franco, el árbitro nombrado por la República de Chile, dimite alegando que habría perdido la confianza de la parte que le había nombrado.[67]

- **El 8 de septiembre de 2005**, a petición del Juez Sr. Bedjaoui el Centro informaba a los miembros del Tribunal y a las partes Demandantes que había tenido lugar una reunión *ex parte* el 2 de septiembre de 2005 en Washington D.C. entre, por una parte, el Secretario General del Centro y, de otra parte, el Ministro de Economía de Chile – en su calidad de enviado personal del Presidente de Chile-, el Embajador de Chile en EE.UU. y otros miembros de una delegación chilena que pidió derrocar de inmediato al Tribunal de arbitraje legalmente constituido.[68]

- **D. Jorge Carey, representante personal del Presidente de Chile en la presente fase del procedimiento de arbitraje, ha participado también en esa reunión *ex parte* de 2005 dirigida a derrocar al Tribunal de arbitraje, a la que ha seguido la destitución del Juez Sr. Bedjaoui, ex Presidente de la Corte Internacional de Justicia, por el Sr. Paul Wolfowitz, Presidente a la sazón del Consejo administrativo del CIADI, sin motivación alguna (plegándose por lo tanto a una interferencia en el procedimiento de arbitraje[69] ontológicamente contraria a la razón de ser y a la finalidad de la Convención de despolitizar la solución de los diferendos relativos a inversiones extranjeras).**

- **El 2 de abril de 2006** el representante de Chile pide al Tribunal de arbitraje que le comunique el detalle de una reunión a puerta cerrada del Tribunal, las opiniones que en la misma han sido hechas, el acta, la grabación, las notas tomadas durante la reunión o, alternativamente, que cada uno de los árbitros comunique a Chile *une versión precisa y detallada de lo que ha sido discutido y decidido durante esa reunión o esas reuniones, todo ello certificado por el Señor Secretario del Tribunal*….

- Estas maniobras están incluidas en el Laudo arbitral del 8 de mayo de 2008 (Pierre Lalive, M. Chemloul, E. Gaillard, pp. 729, 34-37)[70] que ha condenado a Chile por incumplir la obligación de trato justo y equitativo y por denegación de justicia, condena que la Decisión del Comité *ad hoc* de 18 de diciembre de 2012[71] (L.Y. Fortier QC, P. Bernardini, A. El-Kosheri), p. 353, ha declarado *res iudicata.*

---

[66] La recusación del Tribunal por Chile es accesible en http://www.italaw.com/sites/default/files/case-documents/italaw7549.pdf
[67] Documento accesible en http://www.italaw.com/sites/default/files/case-documents/italaw7550.pdf
[68] Documentos accesibles en http://www.italaw.com/sites/default/files/case-documents/italaw7557.pdf y http://www.italaw.com/sites/default/files/case-documents/italaw7552.pdf
[69] La decisión del Sr. Paul Wolfowitz de 21 de febrero de 2006 y algunas de las maniobras del Estado de inversión para derrocar al Tribunal de arbitraje a partir de agosto de 2005 son accesibles en http://www.italaw.com/cases/829
[70] Accesible en http://www.italaw.com/sites/default/files/case-documents/ita0638.pdf
[71] Accesible en http://www.italaw.com/sites/default/files/case-documents/italaw1178.pdf

- **El 6 de enero de 2014** la representación del Estado de Chile ha recusado al árbitro nombrado por las Demandantes, el Prof. Philippe Sands, quien el 10 de enero de 2014 ha dimitido voluntariamente del Tribunal *«to allow these proceedings to continue without the distraction posed by my involvement (...) in the interest of the parties and the ICSID system ».*[72]

2. El Código ético del Colegio de Abogados de Chile califica de conflicto de interés objetivo una situación como la creada en el presente procedimiento entre el Estado de Chile y los árbitros miembros de las Essex Court Chambers

54. La declaración pública del Colegio de Abogados de Chile del 24 de octubre de 2016 ha recordado las normas del Código Ético que se aplica a los abogados chilenos desde el 1 de agosto de 2011[73] :

> *«3o) Por su parte, el art. 88 del Código de Ética Profesional dispone que, por regla general: 'Cuando varios abogados integran un mismo estudio profesional, cualquiera sea la forma asociativa utilizada, las reglas que inhabilitan a uno de ellos para actuar en un asunto por razones de conflicto de funciones o de intereses también inhabilitarán a los restantes'.*
>
> *4o) De esta manera, la extensión de las inhabilidades derivadas de conflictos de funciones e intereses reguladas por el Código de Ética Profesional a otros abogados con quienes se comparte un estudio profesional, no requiere la existencia de una sociedad profesional entre ellos.*
>
> *5o) La 'comunidad de techo' constituye indudablemente una forma asociativa suficiente para extender la inhabilidad de un abogado a los demás profesionales del estudio cuando esa vinculación profesional supone compartir gastos, utilizar un nombre común, publicitar al estudio profesional como una entidad a través de su página web y copatrocinar, aunque sea ocasionalmente, la defensa jurídica de ciertos clientes.»*

55. La República de Chile no respeta estas normas éticas en el presente procedimiento de arbitraje ni en sus relaciones con los miembros de las Essex Court Chambers[74].

3. Sin embargo, la República de Chile, el Tribunal de arbitraje y el Centro han aplicado a las partes Demandantes los Principios de la IBA sobre conflictos de intereses

---

[72] Ver en el anexo nº 23 la carta de dimisión del Prof. Philippe Sands de 10 de enero de 2014, accesible en http://www.italaw.com/sites/default/files/case-documents/italaw3045.pdf

[73] Anexo nº 24, declaración pública del Colegio de abogados de Chile, el 24 de octubre de 2016, accesible en https://goo.gl/P9kX8x

[74] Ver la declaración de un abogado de Chile publicada en *Global Arbitration Review* el 25 de octubre de 2016 : « *the letter* [de los Demandantes del 13 de octobre de 2013, anexo nº 12] *reflects a misunderstanding of the nature of barristers' chambers in the UK (...)* », anexo nº 19, página 4, citado

56. El 18 de diciembre de 2013 la República de Chile ha comunicado al Tribunal de arbitraje sus exigencias al respecto en el presente arbitraje[75] :

> *46. Article 14(1) of the Convention mandates that arbitrators "*be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, **who may be relied upon to exercise independent judgment**.*"[76] As Professor Schreuer has noted, of the three qualities listed in Article 14(1), "*only the requirement of reliability to exercise independent judgment has played a role in practice.*"[77]*
>
> *47. Although the English version of the Convention states that an arbitrator must be a person "*who may be relied upon to exercise independent judgment*,"[78] ICSID tribunals —as well as the Centre itself— repeatedly have recognized that an arbitrator must also be relied upon to be impartial.[79] The requirement of independence and impartiality not only is an approach that "*accords with that found in many arbitration rules,*"[80] but is also one that is mandated by the terms of the ICSID Convention. As many tribunals have acknowledged, the Spanish version of Article 14(1) refers to an arbitrator's "*impartiality*"[81] rather than independence. "*Since the [ICSID Convention] by its terms makes both language versions equally authentic, [both] the standards of independence and impartiality [apply] in making our decisions."[82] (...)*
>
> *48. While "*the precise nature of the distinction [between independence and impartiality] is not always easy to grasp[,] [g]enerally speaking independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.*"[83]*
>
> *49. As the Chairman of the Administrative Council recently emphasized in his decisions to disqualify arbitrators in the Blue Bank v. Venezuela and Burlington Resources v. Ecuador arbitrations, to prove that an arbitrator lacks independence or impartiality, the party requesting disqualification need not demonstrate actual bias. In both cases, the Chairman of the Administrative Council made the following (identical) statement: "*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**.*"[84] The Urbaser v. Argentina tribunal, which the Chairman of the Administrative Council cited in support of his rulings in Blue Bank and Burlington Resources,[85] explained: "*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.*"[86] Instead, "*[a]n

---

[75] Ver la carta de la parte Demandada del 18 de diciembre de 2013

[76] 88 ICSID Convention, Art. 14(1) (énfasis añadido).

[77] RA-10, Christoph Schreuer et Al., *The ICSID Convention: A Commentary*, Art. 57 ¶ 18 (2d. ed. 2009) ("Schreuer, *Commentary*, Art. 57"), subrayado en el original

[78] ICSID Convention, Art. 14(1) (énfasis añadido).

[79] RA-7, *Suez, Sociedad General de Aguas de Barcelona and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007), ¶ 28 (Salacuse, Nikken) ("*Suez (Challenge)*"); *see also* RA-4, *ConocoPhillips Company et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30 (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator, 27 February 2012), ¶ 54 (Keith, Abi-Saab) ("*ConocoPhillips (Challenge)*"); RA-8, *Urbaser (Challenge)*, ¶ 36.

[80] RA-7, *Suez (Challenge)*, ¶ 28.

[81] ICSID Convention, Art. 14(1) (Spanish) (afirmando que los árbitros "*deberán . . . inspirar plena confianza en su imparcialidad de juicio*").

[82] RA-7, *Suez (Challenge)*, ¶ 28; *see also* RA-4, *ConocoPhillips (Challenge)*, ¶ 54; RA-8, *Urbaser (Challenge)*, ¶36.

[83] RA-7, Suez (Challenge), ¶ 29.

[84] RA-2 Blue Bank (Challenge), ¶ 59 (emphasis added); RA-3, Burlington Resources (Challenge), ¶ 66 (ICSID Administrative Council Chairman Kim), subrayado en el original

[85] RA-2, Blue Bank (Challenge), ¶ 59; RA-3, Burlington Resources (Challenge), ¶ 66 (citing RA-8, Urbaser (Challenge), ¶ 43).

[86] RA-8, Urbaser (Challenge), ¶ 43.

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."[87] *As Professor Sands himself noted in the context of challenges based on arbitrators who serve simultaneously as counsel,* "the test is not what we think, but what a reasonable observer would think.*"*[88]

*50. Although many claims of partiality have been based on relationships between arbitrators and the parties (or arbitrators and counsel), other circumstances may be "*sufficient to justify doubts about an arbitrator's independence or impartiality.*"*[89] *As the Conoco Phillips tribunal recently held, justifiable doubts can arise out of any circumstances leading a reasonable person to conclude that an arbitrator might be* "influenced by factors other than those related to the merits of the case.*"*[90] *(…).*

*53. (…) as the recent decisions by the Chairman of the Administrative Council in the Blue Bank and Burlington Resources cases confirm, there is little practical difference between the standard derived from the IBA Guidelines applied in Perenco and the one set forth in Article 57 of the ICSID Convention. As the PCA stated in Perenco, under the IBA Guidelines, "*Judge Brower would be disqualified if 'circumstances . . . have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts' as to Judge Brower's impartiality or independence.*"*[91] *Under the General Standard of the IBA Guidelines, justifiable doubts exist "*if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.*"*[92] *This is an "*appearance test.*"*[93] *Accordingly, a finding that the arbitrator "*is actually biased . . . or has actually prejudged the merits of the dispute is not necessary in order for the challenge to be sustained . . . .*"*[94]

*54. The standard for impartiality is evaluated the same way in the Article 57 context. As the Chairman of the Administrative Council held in the recent Blue Bank and Burlington Resources decisions: "*Independence and impartiality both 'protect parties against arbitrators being influenced by factors other than those related to the merits of the case.*'"*[95]
For disqualification due to the lack of one of these qualities, "[t]he applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party.'"[96] Proof of actual dependence or bias is not required; "rather it is sufficient to establish the appearance of dependence or bias.*"*[97] *(…).*

*55. The "*appearance*" standard is employed in numerous jurisdictions. As the Working Group that drafted the IBA Guidelines explained, in preparing the Guidelines,* "[t]he members of the Working Group submitted 13 National Reports from the following jurisdictions: Australia, Belgium, Canada, England, France, Germany, Mexico, the Netherlands, New Zealand,

---

[87] Id.
[88] RA-8, Urbaser (Challenge), ¶ 43.
[89] RA-8, Urbaser (Challenge), ¶ 43
[90] RA-4, ConocoPhillips (Challenge), ¶ 55. As Professor Schreuer has noted, one example of issue conflict "arises in investment arbitrations when an arbitrator is also involved as counsel in another pending case. Challenging parties in those types of situations argue that if an arbitrator also acts as counsel in another investment case, involving similar legal issues, an unbiased approach cannot be maintained." RA-10, Schreuer, Commentary, Art. 57, ¶ 34.
[91] RA-6, *Perenco (Challenge)*, ¶ 44 (quoting RA-11, IBA Guidelines, General Standard 2(b)).
[92] RA-11, IBA Guidelines, General Standard 2(c). This interpretation also has been accepted in the Article 57 context.
[93] RA-11, IBA Guidelines, Explanation to General Standard 2(b); *see also* RA-6, *Perenco (Challenge)*, ¶¶ 42–44.
[94] RA-6, *Perenco (Challenge)*, ¶ 44 (emphasis in original).
[95] RA-2, *Blue Bank (Challenge)*, ¶ 59; RA-3, *Burlington Resources (Challenge)*, ¶ 66.
[96] RA-2, *Blue Bank (Challenge)*, ¶ 60; RA-3, *Burlington Resources (Challenge)*, ¶ 67 (quoting RA-7, *Suez (Challenge)*, ¶¶ 39–40).
[97] RA-2, *Blue Bank (Challenge)*, ¶ 59; RA-3, *Burlington Resources (Challenge)*, ¶ 66.

> Singapore, Sweden, Switzerland, and the United States."[98] *These reports covered a wide range of issues, including whether "an 'appearance' test or something similar is applied . . . ."*[99] *Out of the 13 surveyed,* "[a]ll of the jurisdictions agree that a challenge to the impartiality and independence of an arbitrator depends on the appearance of bias and not actual bias."[100]

57. El 5 de julio de 2014 la República de Chile ha pedido asimismo la recusación del Sr. Secretario del Tribunal de arbitraje por el siguiente motivo:

> *Chile took note of the disclosures made at the First Session by Claimants' counsel and by the Secretary of the Tribunal, Mr. Paul-Jean LeCannu, concerning (a) the ongoing status of Mr. LeCannu's father as a consultant to one of Claimants' counsel's law firms, Gide Loyrette Nouel, and (b) Mr. LeCannu's own role as an intern at Gide Loyrette Nouel years ago.*

58. Al desvelar esa relación el Cabinet Gide, las Demandantes aplicaban lealmente, sin reserva ni restricción alguna, el Principio General n° 7 de la IBA sobre conflictos de interés en el arbitraje internacional:

> *A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) (...) any relationship, including membership of the same barristers' chambers, between its counsel and the arbitrator. The party shall do so on its own initiative at the earliest opportunity, and upon any change in its counsel team.*

59. Al aceptar la recusación del Secretario del Tribunal instada por el Estado de Chile, el Centro ha hecho una aplicación extensiva en el sistema del CIADI de las incompatibilidades establecidas en los referidos Principios de la IBA sobre conflictos de interés. Las Demandantes formulan aquí una propuesta que reposa en hechos que plantean incompatibilidades más objetivas aún. A no ser que los inversores debieran estar subordinados a criterios de escrutinio distintos a los aplicables a la Demandada, la propuesta de aquellos debiera ser aceptada.

4. ***Nemo iudex esse debet in causa sua***

60. Las dos circunstancias previstas en el punto n° 4 de la *Non-Waivable Red List* sobrevienen, recordémoslo, cuando

> *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.* (Soulignement ajouté).

61. Este principio no admite excepción y, en consecuencia, los árbitros tienen el deber de investigar, con la *due diligence* a la que están obligados, la existencia de posibles

---

[98] RA-12, *Background Information on the IBA Guidelines*, pp. 436–437
[99] *Id.* p. 437.
[100] *Id.*, p. 441.

conflictos de interés, de revelarlos sin demora al Centro y a las partes, permitiéndoles así evaluar su eventual incidencia sobre la integridad del procedimiento.

62. Las dos premisas del Principio 1.4 *Non-Waivable Red List* de la IBA están comprobadas en el presente procedimiento de arbitraje. La primera ha sido explícitamente desvelada el 18 de septiembre de 2016 por las autoridades de Chile[101], la segunda configuración lo ha sido tácitamente, es una de las preguntas formuladas en las cartas de los Demandantes del 13 de octubre de 2016[102] que no ha sido respondida, y en las solicitudes formuladas al presente Tribunal de arbitraje el 10 y 18 de noviembre 2016, después de su reconstitución.

63. La Regla General n° 7(2) de los principios de la IBA dispone:

> "*[a]n arbitrator is under a duty to make reasonable enquiries to identify* ***any conflict of interest****, as well as* ***any facts or circumstances*** *that may reasonably give rise to doubts as to his or her impartiality or independence.* ***Failure to disclose a conflict is not excused by lack of knowledge, if the arbitrator does not perform such reasonable enquiries***" (soulignement ajouté),

y la Regla General 3(a):

> *"(a) If facts or circumstances exist that may,* ***in the eyes of the parties****, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them.* (Soulignement ajouté).

64. Ahora bien, en la especie, los hechos y circunstancias sobre las relaciones, directas e indirectas, que existen entre la República de Chile y miembros y personas vinculadas a las Essex Court Chambers no han sido desveladas al Centro, ni a los inversores españoles. En su respuesta de 17 de octubre de 2016 los dos árbitros se eximieron a ellos mismos del deber de *disclosure* al tiempo que proclamaban ignorar los hechos, una respuesta que la sentencia de la High Court of England and Wales de 2 de marzo de 2016 considera inaceptable cuando se aplica el «*test at common law for apparent bias*» (§20 *supra*):

> *No attention will be paid to any statement by the [arbitrator] as to the impact of any knowledge on his or her mind".*

5. Revelar o dimitir en caso de deber mantener la confidencialidad

65. El General Standard n° 3 de los Principios de la IBA dispone

[101] Anexos 6 y 7
[102] Anexos 12 y 13

(d) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

66. La explicación de la IBA a este standard es la siguiente:

(d) In determining which facts should be disclosed, an arbitrator should take into account all circumstances known to him or her. If the arbitrator finds that he or she should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, he or she should not accept the appointment, or should resign. (Soulignement ajouté).

67. Este principio ha sido aplicado por el prof. Philip Sands, el árbitro nombrado por los inversores españoles, al dimitir voluntariamente del presente Tribunal de arbitraje el 14 de enero de 2014, después que Chili le haya hecho una pregunta sobre eventuales relaciones profesionales con terceros que ni siquiera son parte en el presente procedimiento:

These proceedings involve only a very limited phase (quantum, following the findings on jurisdiction and liability). They can and should be addressed expeditiously and without undue distraction, as I expected to be the case when I accepted appointment. It hardly seems appropriate to expend undue effort in taking the matter raised by the Claimant to decision. This is all the more so where ***the Respondent has raised issues that would require correction and/or response by reference to information that is subject to professional confidentiality (and could not be provided without permission obtained from third parties, which in certain respects would certainly not be granted).***[103] (Subrayado añadido).

68. Siendo así que, como hemos visto, el comentario a la Regla General 4(b) de los principios de la IBA afirma que los ***facts and circumstances arising in the course of the arbitration should be disclosed to the parties by virtue of the arbitrator's ongoing duty of disclosure***,

y que las Reglas 3.1.4, 3.2.1 y 3.2.3 de los principios de la IBA obligan a revelar los hechos relativos a lo que

the arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator,

The arbitrator's law firm is currently rendering services to one of the parties, or to an affiliate of one of the parties, without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator

en el presente procedimiento de corrección de errores materiales del Laudo arbitral de 16 septembre 2016

[103] Ver la carta de dimisión del profesor Philippe Sands en el anexo nº 23

a) la falta de *disclosure* de los hechos solicitados por los inversores españoles tanto a la República de Chile como a los árbitros que también son miembros de las Essex Court Chambers;
b) el continuado silencio de la República de Chile y de los dichos árbitros, desde la fecha de su designación en enero de 2014, respecto de las relaciones entre el Estado de Chile y miembros de sus *chambers*;
c) el hecho de que los trabajos de miembros de las Essex Court Chambers para la República de Chile no hayan sido interrumpidod después de enero de 2014 a fin de asegurar la completa neutralidad de los dos árbitros;
d) el hecho de que estos últimos no hayan dimitido de sus *chambers,* ni ofrecido a las partes dimitir del presente Tribunal;
e) la aparente ausencia de una «pantalla *ética*» o de una «*muralla china*»[104] con los miembros de dichas *chambers* remunerados por el Estado de Chile y que reciben instrucciones de éste, o de organismos que dependen de él,
f) el hecho de que los dos árbitros no hayan accedido a la solicitud dirigida, esta vez, al Tribunal de arbitraje el 10 de noviembre de 2016,

parecen converger en la finalidad aparente de impedir la aplicación, en la especie, de tests como los que se aplican en el sistema CIADI para evaluar eventuales conflictos de interés y parcialidad[105], u otros tests adaptados a las circunstancias de la especie,

y han creado la apariencia objetiva

1. de ausencia de transparencia de los árbitros miembros de las Essex Court Chambers y de la República de Chile;
2. de posible proximidad, intensidad, dependencia y significación de las relaciones, directas o indirectas, entre el Estado de Chile y las Essex Court Chambers;
3. de que los servicios que la República de Chile, o un organismo dependiente de ésta, reciben de miembros pertenecientes a las Essex Court Chambers podrían consistir en consejos de carácter estratégico,
4. que esos servicios podrían tener relación, directa o indirecta, con el presente arbitraje,

[104] En lo referente a los '*ethical screens*', ver C. Nakajima & E. Sheffield, Conflicts of Interest and Chinese Walls (London, Butterworths Lexis Nexis, 2002); C. Hollander & S. Salzedo, Conflicts of Interest & Chinese Walls (London, Sweet & Maxwell, 2000)

[105] Ver, por ejemplo, los tests aplicados en los casos CIADI *Fábrica de Vidrios c. Venezuela,* ICSID Case No. ARB/12/21, Decision on the Proposal to Disqualify L.Y. Fortier QC, 28 de marzo de 2016;*Conoco v. Venezuela,* ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L.Y. Fortier QC, de 15 de marzo de 2016 *; Azurix v Argentina I*, Challenge Decision, 25 February 2005*; Vanessa Ventures Ltd. v. The Bolivar Republic of Venezuela,* ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, 22 August 2008, pages 7-9; *Vivendi v. Argentina I*, Challenge Decision, 3 October 2001; *Lemire v. Ukraine*, citado ; *Suez v. Argentina II*, Challenge Decision, 12 May 2008; *Hrvatska v. Slovenia,* citado, o *Rompetrol Group NV v. Romania*, Challenge Decision of Counsel, 14 January 2010, citado

5. que las sumas en concepto de retribuciones entregadas por la República de Chile a miembros de dichas *Chambers* y su fecha podrían ser inconfesables ante el Tribunal de arbitraje, el Centro y los inversores españoles.

***

IV. LA SORPRENDENTE CONTRADICCIÓN DEL ÁRBITRO D. ALEXIS MOURRE

69. Al denegar el 21 de noviembre de 2016 las solicitudes de *disclosure* formuladas por las Demandantes, referidas a los Sres. Berman y Veeder, D. Alexis Mourre, en tanto que miembro del Tribunal, ha favorecido la opacidad de las relaciones entre el Estado Demandado y miembros de las Essex Court Chambers de la que son miembros los otros dos árbitros.

70. Al actuar de este modo el Sr. Mourre ha mostrado que discrimina en perjuicio de los Demandantes y no aplica en el marco del sistema CIADI las normas de transparencia de las que es campeón en el arbitraje internacional. En efecto, como subraya él mismo:

> *It is of course not satisfactory to leave the fate of an award in which the parties have invested tens of millions of dollars and years of work to the hazards of subjectivity. The* Tecnimont *tale is in this respect cautionary. Because certain professional links between a party and one of the arbitrators' law firms had not been disclosed, a partial award was quashed by the Court of Appeal in Paris in February 2009*[(19)106] *and the parties have since then been litigating before the French judiciary.*[(20)107]
>
> *All these questions come down to one single fundamental question: is the arbitrator required to disclose any link with the parties and their counsel, or is he or she allowed to exercise judgment as to what is or is not relevant? And why is that question so important? Because, at the end of the day, the arbitrator is not the judge of the ultimate relevance of the facts that he or she will disclose. He or she is not the judge of whether they should be disqualified. That judgment will be made by the parties and, in case of a disagreement, by a judge, an institution or sometimes the remaining arbitrators. What is required from the arbitrator is only to provide the information that is needed in order to enable the parties to exercise their right to bring forward a challenge*[108].

---

[106] [19 Paris *Cour d'Appel,* 1ère Chambre, Section C, 12 February 2009, no. 07.22164]
[107] [20 French *Cour de Cassation,* Civ. 1ère, 4 November 2010, no. 02-12716; Reims *Cour d Appel, 2* November 2011, no. 10.02888; French *Cour de Cassation,* Civ. 1 re, 25 June 2014, no. 11-26259]
[108] Anexo nº 26, Mourre (Alexis), Chapter 23: *Conflicts Disclosures: The IBA Guidelines and Beyond*, en Stavros L. Brekoulakis, Julian D. M. Lew , et al.(eds), The Evolution and Future of International Arbitration, International Arbitration Law Library, Volume 37 (© Kluwer Law International; KluwerLaw International 2016), ver en particular los §§23.11, 23.21

71. Y en su calidad de Presidente de la Cámara de Comercio Internacional (CCI, o ICC en inglés), basada en París, el Sr. Mourre ha puesto en práctica principios de transparencia[109] cuya aplicación niega cuando se trata de revelar las relaciones entre la República de Chile y miembros de las Essex Court Chambers de las que son miembros sus dos co-árbitros.

72. En efecto, el 24 de febrero de 2016 el Sr. Mourre hizo comunicar una *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules for Arbitration intended to provide parties and arbitral tribunals with practical guidance concerning the conduct of arbitrations*, en la que figura lo que sigue:

> *17. The parties have a legitimate interest in being fully informed of all facts or circumstances that may be relevant in their view in order to be satisfied that an arbitrator (…) is and remains independent and impartial or, if they so wish, to explore the matter further and/or take the initiatives contemplated by the Rules.*
>
> *18. An arbitrator (…) must therefore disclose (…) as the arbitration is ongoing, any circumstance that might be of such a nature as to call into question his or her independence in the eyes of any of the parties or give rise to reasonable doubts as to his or her impartiality. **Any doubt must be resolved in favour of disclosure**.*
>
> *20. Each arbitrator (…) must assess what circumstances, if any, are such as to call into question his or her independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality. In making such assessment, an arbitrator should in particular, **but not limited to**, pay attention to the following circumstances:*
>
> *☐(…) his or her law firm represents or advises, or has represented or advised, one of the parties or one of its affiliates. (…)*
>
> *☐(…) or his or her law firm has a business relationship with one of the parties or one of its affiliates, or a personal interest of any nature in the outcome of the dispute.(…)*
>
> *21. The duty to disclose is of an ongoing nature and it therefore applies throughout the duration of the arbitration.*
>
> *22. Although an advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future may or may not in certain circumstances be taken into account by the Court, it does not discharge an arbitrator from his or her ongoing duty to disclose.*
>
> *23. When completing his or her Statement and identifying whether he or she should make a disclosure, both at the outset of the arbitration and subsequently, an arbitrator (…) should make reasonable enquiries in his or her records, those of his or her law firm and, as the case may be, in other readily available materials.*

[109] Ver *ICC clarifies when arbitrators should disclose potential conflicts of interest* en Outlaw.com, 24 feb. 2016, accessible en http://www.out-law.com/en/articles/2016/february/icc-clarifies-when-arbitrators-should-disclose-potential-conflicts-of-interest-/

> *24. For the scope of disclosures, an arbitrator will be considered as bearing the identity of his or her law firm, and a legal entity will include its affiliates. In addressing possible (…) challenges, the Court will consider the activities of the arbitrator's law firm and the relationship of the law firm with the arbitrator in each individual case. **Arbitrators should in each case consider disclosing relationships with another arbitrator or counsel who is a member of the same barristers' chambers**. Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case.*
> (Soulignement ajouté)
>
> [Estos principios son generalmente aplicados en las decisiones del Sr. Presidente del Consejo administrativo y de los tribunales del sistema CIADI citadas *supra*.]

73. En su calidad de miembro del Tribunal de arbitraje que ha adoptado la decisión del 21 de noviembre de 2016[110], el Sr. Mourre ha negado a los Demandantes su derecho a que se apliquen todos esos principios, propios del arbitraje internacional, a las relaciones entre el Estado Demandado y miembros de las Chambers de las que son miembros los árbitros Sres. Sir Franklin Bernan y V.V. Veeder.

***

V. La propuesta de recusación se formula sin demora

74. Ni el artículo 57 del Convenio ni el artículo 9(1) del Reglamento de arbitraje establecen plazo para formular la propuesta de recusación:

> *As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case-by-case basis*[111]

[110] Anexo nº 28

[111] *ConocoPhillips Petrozuata B.V. et al., v. Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 39 (May 5, 2014); ver igualmente *Abaclat & Others v. Argentina*, ICSID Case No. ARB/07/05, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 68 (Dec. 4, 2014). *Cemex Caracas Investments BV (Netherlands), Cemex Caracas II Investments BV (Netherlands) v. Venezuela*, ICSID Case No. 08/15, Decision on the Proposal to Disqualify a Member of the Tribunal, ¶ 36 (Nov. 6, 2009) ("*Rule 9(1) does not fix a quantifiable deadline for submission of challenges," it is "on a case by case basis that tribunals must decide whether or not a proposal for disqualification has been filed in a timely manner*").

75. En los casos *RSM Production Co. v. St. Lucia*[112] y *Abaclat*[113] se ha considerado razonable 28 y 30 días después de haber tenido conocimiento de las decisiones en las que se basa la propuesta de recusación.

76. En la especie, los hechos que han planteado las dudas en cuanto a una apariencia de conflicto de intereses han sido conocidos el 20 de septiembre de 2016, y ese mismo día los Demandantes han dirigido a la Sra. Secretaria General la primera pregunta a fin de delimitar los antecedentes[114]. El 13 de octubre siguiente han dirigido las preguntas pertinentes al Estado Demandado y a los dos árbitros miembros de las Essex Court Chambers que obran en los documentos nos. 12 y 13 aquí anexos. Cuando el 18 de octubre de 2016 los Demandantes han dirigido a la Sra. Secretaria General una propuesta formal de conflicto de interés entre la República de Chile y los dos árbitros miembros de las *Essex Court Chambers,* la respuesta del Centre ha llamado la atención de los Demandantes sobre el hecho de

> *«que le tribunal constitué dans la procédure de resoumission a rendu sa sentence le 13 septembre 2016. Aucune des procédures prévues aux articles 49, 50, et 51 de la Convention CIRDI n'étant actuellement pendante devant ce tribunal, les demandes formulées au paragraphe (II) de la lettre de M. Pey Casado et la Fondation Président Allende ne peuvent lui être soumises.»*

77. Registrada el 7 de noviembre de 2016 la demanda del 27 de octubre de corrección de errores materiales y reconstituido el Tribunal de arbitraje, los Demandantes han solicitado de inmediato a éste, el 10 noviembre[115], que admita su solicitud de *full disclosure* por parte del Estado Demandado y los dichos dos árbitros.

78. El siguiente16 de noviembre el Tribunal de arbitraje ha invitado a la República de Chile

> *«à indiquer le plus tôt possible et au plus tard le **30 novembre 2016**, si elle accepte les corrections proposées dans la Demande. A la lumière de la réponse de la Défenderesse, le Tribunal s'attachera à déterminer la procédure ultérieure, conformément à l'article 49(3) du Règlement d'arbitrage du CIRDI.*"[116]

79. El día siguiente, 17 de noviembre, la República de Chile ha respondido que no se hallaba

> "*in a position to meet the Tribunal's proposed deadline. (...) the bulk of the Request was devoted to the (unfounded) allegation that there was a "conflit d'intérêts*

---

[112] *RSM Production Co. v. St. Lucia*, ICSID Case No. ARM/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith, QC, ¶ 73 (Oct. 23, 2014), accesible en http://www.italaw.com/sites/default/files/case-documents/italaw4062.pdf

[113] *Abaclat*, ICSID Case No. ARB/07/05, ¶ 69, citado

[114] Anexo nº 8

[115] Anexo nº 1

[116] Anexo nº 3

apparent entre la République de Chile et les deux membres du Tribunal arbitral également membres des Essex Court Chambers."[117]

80. El día siguiente, viernes 18 de noviembre, los Demandantes han comunicado al Tribunal de arbitraje

> «*leur respectueux désaccord quant au fait que le Tribunal n'ait pas donné suite à la demande formulée le 10 novembre 2016. Conformément à la Règle d'arbitrage nº 27, les Demandantes entendent par la présente remplir promptement leur obligation de soulever leur objection à ce sujet et réitèrent respectueusement la demande du 10 novembre dernier.* »[118]

81. De este modo, los Demandantes han dado a todos los intervinientes una amplia oportunidad de tratar las cuestiones lealmente y con total transparencia.

82. El lunes 21 de noviembre de 2016 el Tribunal de arbitraje ha acordado la decisión de denegar la solicitud dirigida a la República de Chile de *full disclosure* al Tribunal de arbitraje, al Centro y a todas las partes, de las relaciones que existen entre la República de Chile y miembros de las Essex Court Chambers, y también ha denegado la solicitud de permitir que los Señores árbitros miembros del Tribunal e igualmente de las Essex Court Chambers lleven a cabo una investigación razonable sobre las cuestiones con apariencia de conflicto de intereses planteadas en la carta de los Demandantes del 13 de octubre 2016, y de que revelen completamente el resultado al Tribunal, al Centro y a todas las partes.

83. La decisión del 21 de noviembre de 2016 constituye une nueva coincidencia del Tribunal de arbitraje con la República de Chile en no revelar las relaciones que existen entre ésta y miembros de las Essex Court Chambers.

84. El resultado ha sido que el martes 22 de noviembre de 2016, seis días después de haber tenido conocimiento de la comunicación de 16 de noviembre del Tribunal de arbitraje que rechaza tácitamente considerar la cuestión previa formulada el 10 de noviembre, cuatro días después de haber reiterado la solicitud del 10 de noviembre, un día después de la decisión del 21 de noviembre de 2016 del Tribunal de arbitraje, los Demandantes formulan la propuesta razonada de respetuosa recusación de los dichos dos árbitros.

***

[117] Anexo nº 27, respuesta de Chile el 17 de noviembre de 2016 a la invitación del Tribunal de arbitraje de la víspera
[118] Anexo nº 5

CONCLUSIONES

1. El 20 de septiembre de 2016 ha sido puesta en conocimiento de los Demandantes una declaración pública de las autoridades de Chile desvelando relaciones *sigilosas* mantenidas durante meses entre la República de Chile y miembros de las Essex Court Chambers.

2. El Centro, los árbitros Sres. Sir Franklin Berman y V.V. Veeder, miembros de las Essex Court Chambers, y el Estado Demandado ha sido informados sin demora de un aparente conflicto de intereses con la República de Chile.

3. Los dos árbitros y el Estado Defensor habiendo sido invitados a revelar completamente al Centro y a las Demandantes la naturaleza y el alcance de esas relaciones, el fundamento de la decisión del Tribunal de 21 de noviembre de 2016 (las normas que rigen a los *barristers* de su *Chambers*) parece como una suerte de coartada para proteger la opacidad absoluta de los dos árbitros y de cobertura ofrecida a la República de Chile a fin de no revelar al Centro y a las partes Demandantes sus relaciones con miembros de las Essex Court Chambers.

4. Esta coincidencia en el rechazo a la *full disclosure* por los Señores árbitros y la parte Demandada viene a confirmar un conflicto de intereses aparente, y plantea dudas razonables en cuanto a la neutralidad de los Señores árbitros respecto de los inversores Demandantes y en detrimento de éstos.

5. En vista de la experiencia, de las competencias y de la familiaridad de los Señores árbitros y de los abogados de la República de Chile en su conocimiento del presente caso, así como de los argumentos inequívocos y reiterados de los Demandantes sobre el deber de *full disclosure* de las relaciones entre el Estado Demandado y miembros de las Essex Court Chambers, esta coincidencia no puede considerarse involuntaria. Como proponía otrora el Sr. Veeder:

> *"there is a lack of transparency in international arbitration. (...) The whole activity takes place in a cloud of privacy without the same public scrutiny directed at state Court. (...) like State litigation, the system must work because it is essentially self-policing - but self-policing by lawyers and arbitrators depends on practitioners having a clear idea of where the line is drawn between good and bad arbitration practices. (...) In the field of international arbitration, like State litigation, there are many fish competing in the same sea. Clear rules and self-policing are an essential part of any solution. (...) the rules need to be practical; and it is useless to maintain any rule at the level of supreme generality"*[119]

6. En consecuencia, teniendo en cuenta la fundamentación indicada en los §§1 a 68 *supra*, el derecho de legítima defensa de las partes Demandantes y el deber de preservar la integridad del procedimiento de arbitraje, en conformidad con los artículos 57 y 58 de la Convención y 9 del Reglamento de arbitraje del CIADI los inversores españoles muy respetuosamente formulan la presente propuesta razonada de recusación de los Señores árbitros Sir Franklin Berman QC y V.V. Veeder QC.

---

[119] Anexo nº 21, Veeder (V.V.), The 2001 Goff Lecture – "*The Lawyer's Duty to Arbitrate in Good Faith*" (2002) Arbitration International 431, páginas 439-440

Le expresan, Señora Secretaria General del CIADI, su consideración distinguida

Dr. Juan E. Garcés
Representante de D. Víctor Pey-Casado, Da. Coral Pey-Greba y la
Fundación española Presidente Allende

ANEXOS

Número

1. Demanda de 27 de octubre de 2016 de corrección de errores materiales contenidos en el Laudo arbitral de 13 de septiembre de 2016

2. Solicitud que los inversores dirigen el 10 de noviembre de 2016 al Tribunal de arbitraje

3. Comunicación del Tribunal de arbitraje el 16 de noviembre de 2016 que no toma en consideración la solicitud del 10 de noviembre de 2016

4. Comunicación que las partes Demandantes dirigen al Estado Demandado el 13 de octubre de 2016

5. Los Demandantes reiteran el 18 de noviembre de 2016 al Tribunal de arbitraje que considere su solicitud del 10 de noviembre de 2016

6. Declaración del Ministro de Asuntos Exteriores de Chile publicada el domingo 18 de septiembre de 2016

7. Id. id.

8. Carta de 20 de septiembre de 2016 de los inversores españoles a la Sra. Secretaria General del CIADI

9. Carta de la Sra. Secretaria General del CIADI, el 12 de octubre de 2016, a los inversores españoles

10. Carta de los inversores españoles, el 10 de octubre de 2016, al Sr. Presidente del Consejo administrativo del CIADI por intermedio de la Sra. Secretaria General del CIADI

11. Respuesta de la Sra. Secretaria General del CIADI, el 12 de octubre de 2016, a los inversores españoles

12. Carta del 13 de octubre de 2016 de los inversores españoles, por intermedio del Secretario del Tribunal de arbitraje, a la atención de la República de Chile

13. Carta del 13 de octubre de 2016 de los inversores españoles, por intermedio del Secretario del Tribunal de arbitraje, a la atención de los Sres. árbitros Sir Franklin Berman y V.V. Veeder

14. Carta de Sir Franklin Berman al abogado de los inversores españoles el 17 de octubre de 2016

15. Respuesta del abogado de los Demandantes a Sir Franklin Berman, el 18 de octubre de 2016

16. Carta del Sr. V. V. Veeder QC al abogado de los inversores españoles el 17 de octubre de 2016

17. Carta del 18 de octubre de 2016 que los inversores dirigen, por intermedio de la Sra. Secretaria General del CIADI, a la República de Chile

18. Respuesta de la Sra. Secretaria General del CIADI a los inversores españoles, el 20 de octubre de 2016

19. Declaración del abogado de la República de Chile a *Global Arbitration Review* (GAR, Londres) publicada el 25 de octubre de 2016

20. Sentencia de la High Court of England and Wales de 2 de marzo de 2016

21. Veeder (V.V.), The 2001 Goff Lecture – "*The Lawyer's Duty to Arbitrate in Good Faith*" (2002) Arbitration International 431, página 439

22. *Bar Council of England and Wales: Information Note Regarding Barristers in International Arbitration,* 6 de julio de 2015

23. Carta de dimisión del Prof. Philippe Sands QC de 10 de enero de 2014

24. Declaración pública del Colegio de abogados de Chile, 24 de octubre de 2016

25. Carta del 30 de noviembre de 1998 del Ministro chileno de Economía de Chile al Señor Secretario General del CIADI atacando al Centro por haber registrado la Demanda de arbitraje de los inversores españoles

26. Mourre (Alexis), *Conflicts Disclosures: The IBA Guidelines and Beyond,* capítulo en en Stavros L. Brekoulakis, Julian D. M. Lew, et al.(eds), The Evolution and Future of International Arbitration, International Arbitration Law Library, Volume 37 (© Kluwer Law International; KluwerLaw International 2016)

27. Respuesta de Chile el 17 de noviembre de 2016 a la invitación formulada la víspera por el Tribunal de arbitraje

28. Decisión del 21 de noviembre de 2016 del Tribunal de arbitraje que inadmite 1) aceptar la solicitud dirigida a la República de Chile de *full disclosure* al Tribunal de arbitraje, al Centro y a todas las partes, de las relaciones entre la República de Chile y miembros de las Essex Court Chambers, así como 2) la solicitud de aceptar que los Señores árbitros miembros del Tribunal e igualmente de las Essex Court Chambers lleven a cabo una investigación razonable sobre las cuestiones con apariencia de un conflicto de intereses planteadas en la carta de las Demandantes del

13 de octubre de 2016, y de revelar completamente el resultado al Tribunal, al Centro y a todas las partes

ANEXO 8

ANEXO 8

ANEXO 9

Before the

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

VÍCTOR PEY CASADO AND PRESIDENT ALLENDE FOUNDATION,
Claimants,

v.

REPUBLIC OF CHILE,
Respondent.

ICSID CASE NO. ARB/98/2

CHILE'S RESPONSE TO CLAIMANTS' REQUEST FOR DISQUALIFICATION

---

16 DECEMBER 2016

TABLE OF CONTENTS

Page

I. Introduction

1. Pursuant to the Centre's invitation of 29 November 2016,[1] the Republic of Chile ("**Chile**") hereby responds to the unprecedented request by Claimants Víctor Pey Casado and the President Allende Foundation ("**Claimants**") for the disqualification of two of the arbitrators in this Rectification Proceeding, Sir Franklin Berman and Mr. V.V. Veeder. As Chile explains below, this request ("**Disqualification Request**") is both inadmissible and unfounded.

2. For the Centre's convenience, Chile begins by summarizing in **Section I** the background information necessary to evaluate the Disqualification Request in its proper context. Chile then demonstrates in **Section II** that the Disqualification Request is inadmissible, given that the ICSID Convention and Arbitration Rules — for good reason — preclude arbitrator challenges in the context of a rectification proceeding. In **Section III**, Chile shows that, in any event, the Disqualification Request is unfounded, as Claimants have not provided any basis on which to conclude that either of the challenged arbitrators manifestly lacks any of the qualities required for service as arbitrator. In **Section IV**, Chile sets forth its request for relief.

II. Relevant Background

3. On 18 June 2013, following the partial annulment of the Award rendered on 8 May 2008 by Messrs. Lalive, Chemloul, and Gaillard ("**2008 Award**"), Claimants requested that, in accordance with Article 52(6) of the ICSID Convention,[2] a new tribunal be constituted to conduct a resubmission proceeding, the purpose of which would be to decide the issue of the "la réparation due par la République du Chili en vertu de sa condamnation pour violation de son obligation de faire bénéficier les Demanderesses d'un traitement juste et équitable, en ce compris

[1] *See* **Ex. R-45**, Letter from B. Garel to the Parties, 29 November 2016.

[2] Article 52(6) states as follows: "If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter."

celle de s'abstenir de tout déni de justice."[3] This "Request for Resubmission" was registered on 8 July 2013.[4] In accordance with Rule 6 of the Institution Rules, the "Resubmission Proceeding" was deemed to have been instituted on that date.[5]

4. The parties thereafter proceeded to constitute the Resubmission Tribunal. Claimants appointed Philippe Sands QC, a UK barrister who, at the time, was rumored to be advising the Republic of Bolivia on a claim that it recently had brought against Chile at the International Court of Justice ("**ICJ**").[6] On 22 July 2013, Chile requested that the Centre ask Professor Sands to "provide information to the parties . . . regarding his role in the above-referenced Bolivia matter, as well as with respect to any other issue that might be cause for concern to either of the Parties."[7] Professor Sands responded on 5 August 2013 by accepting his appointment, submitting the declaration contemplated in Arbitration Rule 6(2), and submitting a separate letter in which he stated, *inter alia*, that "(1) [he was] not acting as counsel for the Republic of Bolivia in the proceedings against the Republic of Chile at the ICJ, and (2) [he was] not involved in any proceedings for or against the Republic of Chile."[8]

5. On 10 October 2013, Chile appointed French national Alexis Mourre to serve on the Resubmission Tribunal. Mr. Mourre accepted his appointment the next day.[9]

---

[3] **Ex. R-46**, Request for Resubmission, 18 June 2013, p. 1.
[4] *See* Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRD.
[5] *See* Institution Rule 6(2) ("A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request").
[6] *See* **Ex. R-7**, Letter from Chile to ICSID, 22 July 2013.
[7] **Ex. R-7**, Letter from Chile to ICSID, 22 July 2013, p. 2.
[8] **Ex. R-8**, Letter from P. Sands to ICSID, 5 August 2013.
[9] *See* Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRD.

6. The parties were not able to agree on the identity of the Tribunal President. Claimants therefore sought a default appointment pursuant to Article 38 of the Convention.[10] On 17 December 2013, the Secretary-General sent a letter to the parties, stating that "[i]t is our intention to propose to the Chairman of the ICSID Administrative Council the appointment of Sir Franklin Berman, a national of the United Kingdom, as the presiding arbitrator. . . . Sir Berman's *curriculum vitae* is attached."[11] The CV that she appended identified Sir Franklin Berman as a member of "Essex Court Chambers."[12]

7. As the Essex Court Chambers website states — and apparently stated as far back as May 2008[13] — "Essex Court Chambers is a leading set of barristers' chambers, specialising in commercial and financial litigation, arbitration, public law and public international law."[14] The website further explains that, as a set of barristers' chambers, Essex Court Chambers "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."[15] Thus, as is both permitted and

---

[10] Article 38 of the Convention states as follows: "If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute."

[11] **Ex. R-9**, Letter from M. Kinnear to the Parties, 17 December 2013.

[12] *See* **Ex. R-9**, Letter from M. Kinnear to the Parties, 17 December 2013, Attachment, p. 1.

[13] The May 2008 decision in *Hrvatska v. Slovenia*, which Claimants rely upon in their Disqualification Request (*see* ¶ 38), quotes from the Essex Court Chambers website at length. *See* **RLA-10**, *Hrvatstka Elektroprivreda, d.d. v. Slovenia*, ICSID Case No. ARB/05/24 (Decision on Participation of Counsel, 6 May 2008), ¶ 17 (Williams, Brower, Paulsson) ["*Hrvatska*"].

[14] **Ex. R-2**, Essex Court Chambers Website, "About" page, *last visited* 15 December 2016. This information appeared on the Essex Court Chambers website as far back as May 2008. *See* **RLA-10**, *Hrvatska*, ¶ 17 ("Essex Court Chambers is a leading set of Barristers Chambers specialising in commercial, international, and European law").

[15] **Ex. R-2**, Essex Court Chambers Website, "About" page, *last visited* 15 December 2016; *see also* **Ex. R-3**, Essex Court Chambers Website, "Disclaimer" page, *last visited* 15 December 2016 ("Essex Court Chambers is a set of barristers' chambers. It has no collective or distinct legal identity of any kind. All

[FOOTNOTE CONTINUED ON NEXT PAGE]

common in England and Wales,[16] "[m]embers of Chambers are commonly retained by opposing sides in the same dispute, both in litigation and arbitration, with protocols in place to safeguard confidentiality."[17] And in addition to "acting on opposing sides, individuals appear in front of other members acting impartially as Deputy Judges or Arbitrators."[18]

8. For purposes of the Resubmission Proceeding, neither party was being represented by a barrister from Essex Court Chambers. Claimants were being represented by the Spanish law firm Garcés y Prada and the French law firm Gide Loyrette Nouel.[19] Chile, for its

---

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
barristers practising from these chambers are self-employed individuals who provide their professional services as sole practitioners in their own name"). This information, too, appeared on the Essex Court Chambers website as far back as May 2008. *See* **RLA-10**, *Hrvatska*, ¶ 17 (quoting from the Essex Court Chambers website as follows: "Chambers is not a firm, nor are its members partners or employees. Rather, Chambers contains the separate, self-contained offices of individual barristers, each self-employed and working separately").

[16] *See* **Annex 22 to Claimants' Disqualification Request**, *Barristers in International Arbitration* (2015), ¶ 8 ("The English and Welsh Courts have confirmed on a number of occasions that, because of the fact that self-employed barristers are not in partnership and do not share one another's income, there is no objection to barristers appearing against one another in the same case"), ¶ 12 ("[I]t is clear that as a matter of English and Welsh law, there is no objection to a barrister acting as an arbitrator in an arbitration simply because one of the parties is represented by a barrister from the same chambers"), ¶ 15 ("As a matter of English and Welsh law, there is no prohibition against an advocate appearing before an arbitration tribunal which includes a member of his or her chambers"); **RLA-10**, *Hrvatska*, ¶ 17 ("Barristers are sole practitioners. Their Chambers are not law firms. Over the years it has often been accepted that members of the same Chambers, acting as counsel, appear before other fellow members acting as arbitrators").

[17] **Ex. R-2**, Essex Court Chambers Website, "About" page, *last visited* 15 December 2016. Once again, this information appeared on the Essex Court Chambers website as far back as May 2008. *See* **RLA-10**, *Hrvatska*, ¶ 17 (quoting from the Essex Court Chambers website as follows: "[I]ndividual Barristers within Chambers are commonly retained by opposing sides in the same dispute, both in litigation and arbitration").

[18] **Ex. R-2**, Essex Court Chambers Website, "About" page, *last visited* 15 December 2016. This information also appeared on the Essex Court Chambers website as far back as May 2008. *See* **RLA-10**, *Hrvatska*, ¶ 17 (quoting from the Essex Court Chambers website as follows: "As well as acting on opposing sides, individuals regularly appear in front of other members acting as Deputy Judges or Arbitrators").

[19] *See* Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRO.

part, was being represented by the State's Agencia de Promoción de la Inversión Extranjera, by the U.S. law firm Arnold & Porter, and by the Chilean law firm Carey.[20]

9. As it happens, at the time, there were some Essex Court Chambers barristers acting as counsel in certain ICJ proceedings involving Chile. Specifically, Vaughan Lowe QC was representing Bolivia in the *Bolivia v. Chile* matter (referenced above) about which Chile had asked Professor Sands.[21] In parallel, Samuel Wordsworth QC was representing Chile in another ICJ case, *Peru v. Chile*.[22] Yet the Secretariat, which vets arbitrator candidates for conflicts of interest before it proposes them,[23] did not discern any problem with appointing an Essex Court Chambers barrister to chair the Resubmission Tribunal. Nor did Claimants, who, as the case file demonstrates, routinely objected to various other aspects of the Tribunal constitution process.[24]

---

[20] *See* Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRO.

[21] *See* **Ex. R-37**, *Bolivia demandará a Chile ante el tribunal de La Haya para recuperar su salida al mar*, EL MUNDO, 22 April 2013; **Ex. R-38**, *Bolivia contacta al abogado que defendió a Perú para su demanda marítima hacia Chile en La Haya*, CAMBIO 21, 22 April 2013. Both of these articles were cited and hyperlinked in Chile's 22 July 2013 letter to ICSID regarding Professor Sands. *See* **Ex. R-7**, Letter from Chile to ICSID, 22 July 2013, note 3. It appears that Amy Sander also represented Bolivia in this matter. *See* **Ex. R-4**, Essex Court Chambers Website: Amy Sander ("examples of notable cases"), *last visited* 15 December 2016.

[22] *See* **Ex. R-47**, *Chile defenderá ante La Haya validez y carácter de tratado limítrofe con Peru*, LA TERCERA, 6 December 2012; **Ex. R-36**, *Wordsworth: 'La frontera marítima entre Chile y Perú es un tema zanjado hace mucho*,' LA NACIÓN, 14 December 2012. Both of these articles identify Professor Wordsworth as counsel for Chile in the *Peru v. Chile* dispute before the ICJ. As the ICJ website indicates, the judgment in this case was not rendered until 27 January 2014. *See* **Ex. R-1**, ICJ Case Registry, *Chile v. Peru*, last visited 15 December 2016. Professor Wordsworth has exercised professional duties out of Essex Court Chambers since 1998. *See* **Ex. R-5**, Samuel Wordsworth CV, December 2016, p. 6.

[23] *See* **RLA-13**, M. Kinnear and F. Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, in CHALLENGES AND RECUSALS OF JUDGES AND ARBITRATORS IN INTERNATIONAL COURTS AND TRIBUNALS 35, 39 (Giorgetti, ed. 2015) ["Kinnear and Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*"].

[24] For example, Claimants objected on ten separate occasions to Chile appointing an arbitrator in the Rectification Proceeding. *See* **Ex. R-12**, Claimants' Letters dated 18 June 2013, 10 July 2013, 26 July 2013, 27 July 2013, 23 August 2013, 25 September 2013, and 9 October 2013, 23 December 2013, 26 December 2013; **Ex. R-6**, Procedural Order No. 1, Annex 2 ("Summary of Items Discussed at the First Session"), § 2.

Thus, for example, when invited by the Secretary-General to comment on the proposal of appointing Sir Franklin Berman,[25] Claimants responded as follows:

> Dans la communication du 17 décembre 2013 vous envisagez de proposer au Président du Conseil administratif du CIRDI la nomination de Monsieur Franklin Berman, et les parties ont été invitées à soumettre des observations concernant cette proposition au plus tard le lundi 23 décembre 2013.
>
> ***Les Demanderesses considèrent que ces deux arbitres réunissent les conditions prévues dans l'article 14 de la Convention***.[26]

10. On 24 December 2013, the parties were informed that the Chairman of the Administrative Council had appointed Sir Franklin Berman as President of the Resubmission Tribunal, and that he had accepted this appointment.[27] Sir Franklin Berman submitted his Rule 6(2) declaration on 13 January 2014.[28] His declaration did not indicate that there were Essex Court Chambers barristers acting as counsel in active ICJ proceedings involving Chile.[29] However, neither party objected.

11. On the same day that Sir Franklin Berman's declaration was transmitted to the parties, the arbitrator whom Claimants had appointed to the Resubmission Tribunal — Philippe Sands — resigned.[30] ICSID invited Claimants to name a new arbitrator,[31] and on 30 January

---

[25] *See* **Ex. R-9**, Letter from M. Kinnear to the Parties, 17 December 2013 ("If either party wishes to submit any observations related to this proposal, these should be received by Monday, December 23, 2013").

[26] **Ex. R-10**, Letter from Claimants to M. Kinnear, 23 December 2013 (emphasis added).

[27] **Ex. R-11**, Letter from M. Kinnear to the Parties, 24 December 2013.

[28] *See* **Ex. R-13**, F. Berman Declaration, 13 January 2014.

[29] *See* **Ex. R-13**, F. Berman Declaration, 13 January 2014.

[30] *See* **Ex. R-14**, Letter from ICSID to the Parties, 13 January 2014. Chile had challenged Professor Sands based on his past professional activities, and longstanding and publicly-manifested views, concerning former Chilean President and Senator Augusto Pinochet, and the actions of the dictatorial regime led by Pinochet that ruled Chile from 1973 to 1989. Chile argued that such activities and views rendered Professor Sands uniquely unsuited to sit in judgment of a case that was prompted precisely by actions of the Pinochet regime, and that involved a reparations program later established by the Chilean

[FOOTNOTE CONTINUED ON NEXT PAGE]

2014, Claimants appointed another Essex Court Chambers barrister, Mr. V.V. Veeder QC.[32] Like Sir Franklin Berman, Mr. Veeder did not indicate that there were Essex Court Chambers barristers appearing in the *Bolivia v. Chile* and *Peru v. Chile* proceedings before the ICJ. Again, however, neither party objected.

12. With the Tribunal thus constituted, the Resubmission Proceeding got underway. The Tribunal held its first session on 11 March 2014, and Claimants filed their Memorial shortly thereafter.[33] The Counter-Memorial, Reply, and Rejoinder were submitted in October 2014, January 2015, and March 2015, respectively,[34] and a hearing was held in London in April 2015.[35] Cost submissions were filed at the end of May 2015,[36] and the hearing transcript was finalized the next month.[37] Throughout this time period, 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*.[38] Claimants never expressed any concern about these developments.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

Government to compensate the victims of the Pinochet regime, as well as claims and requests for relief (including the Resubmission Proceeding) that related directly to the Pinochet regime's measures.

[31] *See* **Ex. R-14**, Letter from ICSID to the Parties, 13 January 2014.

[32] *See* **Ex. R-15**, Letter from ICSID to the Parties, 30 January 2014 (enclosing both Claimants' letter appointing Mr. Veeder and a copy of Mr. Veeder's CV taken from the Essex Court Chambers website).

[33] Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRD.

[34] Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRD.

[35] Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRD.

[36] *See* **Ex. R-17,** Chile's Cost Submission, 29 May 2015; **Ex. R-18**, Claimants' Cost Submission, 29 May 2015.

[37] *See* **Ex. R-19**, Letter from ICSID to the Parties, 9 June 2015.

[38] *See, e.g.*, **Ex. R-39**, *Chile cambia estrategia ante La Haya*, LA TERCERA, 12 April 2014; **Ex. R-40**, *Bolivia llevará 'El mar', un texto de la demanda marítima, al G77*, LA RAZÓN, 24 May 2014; **Ex. R-41**, *La Haya: Defensa de Chile se reúne con abogados internacionales por demanda de Bolivia*, LA

[FOOTNOTE CONTINUED ON NEXT PAGE]

13. The Rectification Proceeding was declared closed on 17 March 2016,[39] and the Tribunal issued its Award on 13 September 2016 ("**2016 Award**"). The 2016 Award rejected Claimants' damages claims in their entirety.

14. Five days later, on 18 September 2016, Chile's Foreign Affairs Minister announced that another Essex Court Chambers barrister — Professor Alan Boyle — was representing Chile in a new ICJ dispute between Chile and Bolivia.[40] Unlike before, however, this time Claimants complained, likely influenced by the adverse result in the 2016 Award. They began by writing a letter to ICSID's Secretary-General on 20 September 2016, asking that she solicit information from Messrs. Berman and Veeder regarding any relationships that other Essex Court Chambers barristers may have with Chile,[41] so that "les parties Demanderesses (et le Centre) . . . peuvent souhaiter analyser plus en profondeur afin de determiner si, objectivement . . . , il existe un doute légitime quant à l'impartialité et à l'indépendance des arbitres."[42] On 12 October 2016, the Secretary-General informed Claimants that "Sir Franklin and M. Veeder ont chacun confirmé qu'aucune circonstance n'est survenue depuis justifiant d'être notifiée au Secrétaire général aux termes de l'article 6(2) du Règlement d'arbitrage du CIRDI."[43]

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
TERCERA, 8 December 2014; **Ex. R-42**, *La Haya: Estos fueron los argumentos de Chile en el primer dia de alegatos ante Bolivia*, LA NACIÓN, 4 May 2015; **Ex. R-43**, *Los equipos que representan a Chile y Bolivia en la Haya*, EMOL, 4 May 2015; **Ex. R-44**, *Chile to World Court: No Negotiation on Sea Access for Bolivia*, PAN AM POST, 11 May 2015.

[39] Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRD.

[40] *See* Claimants' Disqualification Request, Annex 6, *Canciller Heraldo Muñoz: "Desde hace tiempo que hemos estado diciéndole 'no podia seguir indefinidamente,'"* EL MERCURIO, 18 September 2016.

[41] *See* **Ex. R-20**, Letter from Claimants to M. Kinnear, 20 September 2016.

[42] *See* **Ex. R-20**, Letter from Claimants to M. Kinnear, 20 September 2016, p. 3.

[43] **Ex. R-48**, Letter from M. Kinnear to Claimants, 12 October 2016.

15. Dissatisfied with this response, Claimants then directed their requests specifically to Messrs. Berman and Veeder, asking them on 13 October 2016 for answers to the following 11 questions (which are quoted in full, as they are relevant to Claimants' Disqualification Request):

> 1. si l'Etat du Chili, ou un organisme dépendant de celui-ci, est un client actuel ou antérieur de membres des Essex Court Chambers, et à quelles dates,
>
> 2. si la République du Chili, ou un organisme dépendant de celle-ci, est un client régulier ou occasionnel de membres des Essex Court Chambers, et à quelles dates,
>
> 3. le nombre de millions de dollars que la République du [Chili], ou un organisme dépendant de celle-ci, aurait versé à des membres et des personnes en rapport avec les Essex Court Chambers jusqu'au 13 septembre 2016, et les dates des paiements correspondants — notamment à partir des dates où les deux arbitres ont été nommés dans le présent Tribunal arbitral,
>
> 4. les montants financiers engagés par la République du Chili, ou par un organisme dépendant de celle-ci, pour une période à venir avec des membres de ces Chambers, et les dates des accords correspondants,
>
> 5. si les services que la République du Chili, ou un organisme dépendant de celle-ci, reçoivent de membres appartenant aux Essex Court Chambers portent sur des conseils stratégiques ou des transactions spécifiques,
>
> 6. si les travaux de membres des Essex Court Chambers pour la République du Chili, ou un organisme dépendant de celle-ci, sont effectués dans les lieux où les deux arbitres dans la présente procédure sont installés ou ailleurs, et depuis quelles dates,
>
> 7. si les membres des Essex Court Chambers au service de la République du Chili ont mis en place un *ethical screen* ou un *Chinese Wall* comme bouclier desdits deux arbitres à l'égard des autres travaux, et à quelles dates,
>
> 8. quels sont les membres, les assistants ou autres personnes desdites Chambers qui reçoivent des instructions, des financements ou qui seraient impliqués, de quelque manière que ce soit, directement ou

> indirectement, avec la République du Chili ou un organisme dépendant de celle-ci,
>
> 9. si dans les trois dernières années des membres des Essex Court Chambers ont agi pour la République du Chili, ou un organisme dépendant de celle-ci, dans des affaires sans rapport avec le présent arbitrage sans que les deux arbitres y aient pris part personnellement,
>
> 10. si une law firm-Chamber ou un expert qui partagerait des honoraires significatifs ou d'autres revenus avec des membres des Essex Court Chambers rend des services à la République du Chili, ou à un organisme appartenant à celle-ci, et depuis quelles dates,
>
> 11. si une law firm-Chamber associée ou formant alliance avec des membres des Essex Court Chambers, mais qui ne partagerait pas des honoraires significatifs ou d'autres revenus de membres des Essex Court Chambers, prête des services à la République du Chili, ou à un organisme appartenant à celle-ci et à quelles dates.[44]

16. Sir Franklin Berman and Mr. V.V. Veeder each sent a response to Claimants' inquiry on 17 October 2016. In his response, Sir Franklin Berman noted that the Tribunal had become *functus officio* after it rendered the 2016 Award.[45] He then stated as follows:

> 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

[44] Disqualification Request, ¶ 12 (quoting Claimants' 13 October 2016 letter).

[45] *See* **Ex. R-21**, Letter from F. Berman to Claimants, 17 October 2016 ("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").

> would be prohibited for me to make enquiries of fellow members of chambers about the work undertaken by them.[46]

17. Mr. Veeder, for his part, confirmed in his own letter that "à ma connaissance, aucune circonstance n'est survenue, depuis ma declaration du 31 janvier 2014 jusqu'à la sentence du 13 septembre 2013, 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."[47] He also stated:

> 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 . . . exercent à titre individual et ne constituent donc pas une 'law firm', un 'partnership' o une 'company', je regrette de ne pas être en mesure de vous répondre. . . . En bref, ces informations confidentielles, quelles qu'elles soient, ne peuvent être ni ne sone connues de moi.[48]

18. Claimants were still not satisfied. On 18 October 2016, they wrote to ICSID, demanding more fulsome responses to their inquiries,[49] and asking that the Tribunal (which, as noted, was already *functus officio*) suspend Claimants' deadlines for seeking post-award relief "jusqu'à ce que soit resolu ce qui concerne le conflit d'intérêts."[50] On 20 October 2016, the Secretariat reminded Claimants that "le tribunal constitué dans la procédure de resoumission a rendu sa sentence le 13 septembre 2016. Aucune des procédures prévues aux articles 49, 50, et 51 de la Convention CIRDI n'étant actuellement pendante devant ce tribunal, les demandes

[46] **Ex. R-21**, Letter from F. Berman to Claimants, 17 October 2016.
[47] **Ex. R-22**, Letter from V.V. Veeder to Claimants, 17 October 2016.
[48] **Ex. R-22**, Letter from V.V. Veeder to Claimants, 17 October 2016.
[49] **Ex. R-23**, Letter from Claimants to ICSID, 18 October 2016.
[50] **Ex. R-23**, Letter from Claimants to ICSID, 18 October 2016, p. 17.

formulées au paragraphe (II) de la lettre de M. Pey Casado et la Fondation Président Allende ne peuvent lui être soumises."[51]

19. In light of the foregoing, on 27 October 2016, Claimants initiated a rectification proceeding pursuant to Article 49(2) of the ICSID Convention.[52] It was clear from the face of their Request for Rectification that Claimants were not interested in the prompt correction of the purported errors that they had identified in the 2016 Award. The Request was devoted primarily to the issue of the alleged "conflit d'interets apparent entre la Republique du Chili et les deux membres du Tribunal Arbitral egalement membres des Essex Court Chambers,"[53] and touched only briefly on the supposed "erreurs materielles"[54] for which Claimants ostensibly sought rectification. The Request concluded by seeking an indefinite suspension of the Rectification Proceeding.[55]

20. ICSID registered Claimants' Request for Rectification on 8 November 2016,[56] and forwarded the Request to the members of the Tribunal (*i.e.*, Messrs. Berman, Veeder, and Mourre). On 10 November 2016, Claimants wrote to the Tribunal, reiterating their request for suspension of the Rectification Proceeding,[57] but asking that the Tribunal withhold any decision on suspension so that Claimants could determine whether the Tribunal was even competent to

---

[51] **Ex. R-24**, Letter from ICSID to Claimants, 20 October 2016.

[52] Article 49(2) of the Convention states as follows: "The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered."

[53] *See* Request for Rectification, § II (pp. 12 to 36).

[54] *See* Request for Rectification, § I (pp. 3 to 11).

[55] Request for Rectification, ¶ 116.

[56] Case Details, ICSID Case No. ARB/98/2, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/98/2&tab=PRD.

[57] *See* **Ex. R-25**, Letter from Claimants to ICSID, 10 November 2016, ¶ 10.

decide the issue of suspension.[58] Specifically, Claimants asked that, "préalablement à toute détermination sur la procédure à suivre pour examen de la demande de suspension provisoire de la suite processuelle de la présente procedure,"[59] the Tribunal order "full disclosure" by Chile, Sir Franklin Berman, and Mr. V.V. Veeder of the information that Claimants had requested on 13 October 2016.[60]

21. On 16 November 2016, the Tribunal invited Chile "to indicate as soon as possible, and in any event not later than 30 November 2016, whether it accepts the rectifications put forward in the Request,"[61] explaining that, "[i]n the light of the Respondent's response the Tribunal will then proceed to determine the future procedure in accordance with Arbitration Rule 49(3)."[62] On 17 November 2016, Chile informed the Tribunal that it would not be in a position to meet the Tribunal's proposed deadline because Claimants had not yet provided a translation of the Request for Rectification (and, in order to determine whether it accepted the rectifications that Claimants had put forward, Chile needed to be certain that it understood such rectifications).[63] The next day, 18 November 2016, Claimants wrote to the Tribunal to "manifeste[r] leur respectueux désaccord quant au fait que le Tribunal n'ait pas donné suite à la demande formulée le 10 novembre 2016."[64]

22. On 21 November 2016, the Tribunal Secretary transmitted to the parties "the Tribunal's decision on the procedure for the consideration of the Claimants' Request for

[58] *See* **Ex. R-25**, Letter from Claimants to ICSID, 10 November 2016, ¶ 12.
[59] **Ex. R-25**, Letter from Claimants to ICSID, 10 November 2016, ¶ 12.
[60] **Ex. R-25**, Letter from Claimants to ICSID, 10 November 2016, ¶ 12.
[61] **Ex. R-26**, Letter from ICSID to the Parties, 16 November 2016.
[62] **Ex. R-26**, Letter from ICSID to the Parties, 16 November 2016.
[63] **Ex. R-27**, Letter from Chile to the Tribunal, 17 November 2016.
[64] **Ex. R-28**, Letter from Claimants to ICSID, 18 November 2016, p. 1.

Rectification."[65] In his cover message, the Tribunal Secretary stated that the Tribunal had instructed him to convey to the parties that "[t]he Tribunal notes also the references in the Request to further declarations touching the independence and impartiality of two of its members. The Tribunal has been informed by Sir Franklin Berman and by Mr. Veeder that the same request had already been addressed to them at an earlier stage via the ICSID Secretary-General and had been answered, and that neither of them has anything further to add on the subject."[66] The decision itself stated that "[t]he Tribunal has taken note of the application enunciated in the Request [for Rectification] for the suspension of the present proceedings until an undetermined future date. Having given this matter its careful consideration, the Tribunal can find no grounds for such a suspension which appear to it, in any event, to be contrary to the spirit and intention of Article 49(2) of the ICSID Convention and Arbitration Rule 49."[67]

23. The very next day (22 November 2016), Claimants requested disqualification of Messrs. Berman and Veeder on three grounds: (1) that Essex Court Chambers barristers reportedly were representing Chile in an ICJ proceeding;[68] (2) that Messrs. Berman and Veeder did not respond to Claimants' satisfaction to Claimants' demands for information;[69] and (3) that once the Rectification Proceeding began, the Tribunal did not grant Claimants' request for "full disclosure" of the information they had requested.[70]

24. When the Disqualification Request was transmitted to Chile on 28 November 2016, Chile objected that the Disqualification Request was inadmissible, because arbitrator

[65] **Ex. R-29**, Letter from ICSID to the Parties, 21 November 2016, p. 1.
[66] **Ex. R-29**, Letter from ICSID to the Parties, 21 November 2016, p. 1.
[67] **Ex. R-30**, Decision on Procedure for the Rectification Proceeding, 21 November 2016, p. 1.
[68] *See* Disqualification Request, ¶ 24.
[69] *See* Disqualification Request, § I.1.
[70] *See* Disqualification Request, ¶ 2.

challenges are not permitted in the context of a rectification proceeding.[71] The Secretariat invited Chile to address this issue in its submissions to the Chairman of the Administrative Council.[72]

25. On 4 December 2016, Sir Franklin Berman provided his comments on the Disqualification Request,[73] and Mr. V.V. Veeder did the same on 11 December 2016.[74] These comments were transmitted to the parties on 13 December 2016.[75]

III. The Disqualification Request is Inadmissible

26. To Chile's knowledge, there has never before been an arbitrator challenge in an ICSID rectification proceeding.[76] There is no reason to admit one now.

27. Rectification proceedings are governed by Article 49(2) of the ICSID Convention and by Arbitration Rule 49. Neither of those norms mentions the possibility of arbitrator challenges. This likely is due to the fact that, by their very nature, rectification proceedings are incompatible with arbitrator challenges. As the Commentary to the original (1968) version of the ICSID Arbitration Rules explains, "Unlike an interpretation, revision or annulment of an

---

[71] *See* **Ex. R-31**, Letter from Chile to ICSID, 29 November 2016.
[72] *See* **Ex. R-32**, Letter from ICSID to the Parties, 30 November 2016, p. 2.
[73] **Ex. R-33**, Letter from F. Berman to ICSID, 4 December 2016.
[74] **Ex. R-34**, Letter from V.V. Veeder to ICSID, 11 December 2016.
[75] **Ex. R-35**, Letter from ICSID to the Parties, 13 December 2016.
[76] As Meg Kinnear and Frauke Nitschke explained in their recent article *Disqualification of Arbitrators under the ICSID Convention and Rules*, as of 1 September 2014, there had only been 84 requests for disqualification in ICSID history. **RLA-13**, M. Kinnear and F. Nitschke, *Disqualification of Arbitrators under the ICSID Convention and Rules*, p. 35. "The vast majority of proposals to disqualify in ICSID cases have been filed in original arbitrations (seventy-seven), with two challenges in interpretation proceedings, one challenge in a resubmitted case, and four challenges in annulment proceedings." *Id.*, p. 44. The ICSID website indicates that, out of the five rectification proceedings conducted since 1 September 2014, the present proceeding is the only one to involve an arbitrator challenge. *See* ICSID Website, Case Details: *Tenaris S.A. and Talta v. Venezuela*, ICSID Case No. ARB/11/26; *Içkale Inşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24; *Philip Morris Brand Sàrl and others v. Uruguay*, ICSID Case No. ARB/10/7; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17.

award . . . [,] the rectification of an award can ***only*** be made by the Tribunal that rendered the award."[77] This is also the interpretation of Professor Schreuer in his *Commentary*: "Supplementation and rectification can only be made by the tribunal that rendered the award. This is in contrast to interpretation and revision which are to be made 'if possible' by the original tribunal."[78] Professor Schreuer adds 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***."[79] The 1968 Arbitration Rules contain words to similar effect.[80]

28. In their Disqualification Request, Claimants cite Articles 57 and 58 of the Convention and Arbitration Rule 9 as the basis for their challenge.[81] However, Claimants do not explain why those norms should apply. It is clear from Article 49(2) of the Convention and from Arbitration Rule 49 that rectification is a *sui generis* remedy, independent from the other Convention provisions and from most of the Arbitration Rules. Unlike all of the other Articles

---

[77] **RLA-12**, ICSID Arbitration Rules (1968), Note D to Arbitration Rule 49 (emphasis added).

[78] **RLA-5**, C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, Art. 49, ¶ 36 (2d. ed. 2009).

[79] **RLA-5**, C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, Art. 49, ¶ 36 (2d. ed. 2009) (emphasis added).

[80] **RLA-12**, ICSID Arbitration Rules (1968), Note D to Arbitration Rule 49 ("If, for any reason, that Tribunal cannot be reconvened, the only remedy would be a proceeding under Chapter VII of these Rules [*i.e.*, interpretation, revision, or annulment]")

[81] *See* Disqualification Request, p. 1. Article 57 of the Convention states that "[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV." Article 58 states that "[t]he decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV." In relevant part, Arbitration Rule 9 states that "[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."

of the Convention that establish post-award remedies,[82] Article 49(2) does not incorporate by reference any other Convention provision; rather, it simply states:

> The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

29. Arbitration Rule 49, for its part, states that it is only "Rules 46-48 [that] shall apply, *mutatis mutandis*,"[83] in a rectification proceeding. It follows *a fortiori* that the other Arbitration Rules do *not* apply in a rectification proceeding. Applying other Arbitration Rules in the context of a rectification proceeding would thus violate the principle *expressio unius est exclusio alterius*.

30. Accordingly, there is no basis for entertaining Claimants' Disqualification Request. The Convention provision and Arbitration Rule that govern this Rectification Proceeding do not — either explicitly or implicitly — contemplate the possibility of arbitrator challenges, and enabling challenges would undermine the very nature of the rectification remedy.

---

[82] Article 50 of the Convention (on interpretation), incorporates by reference "Section 2" of Chapter IV. *See* ICSID Convention, Art. 50(2). Article 51 of the Convention (on revision of an award) likewise incorporates by reference Section 2 of Chapter IV. *See* ICSID Convention, Art. 51(3). Article 52 of the Convention (on annulment) states that "[t]he 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." ICSID Convention Art. 52(4).

[83] Arbitration Rule 49(4).

IV. The Disqualification Request is Unfounded

31. Even assuming *arguendo* that the Disqualification Request could be entertained, it still should be rejected.

32. As noted above, Claimants advance their challenge to Messrs. Berman and Veeder on the basis of Article 57 of the Convention. Article 57 allows a party to request "the disqualification of any of [the tribunal] members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14,"[84] which include — in the different language versions of the Convention — references to "impartiality" and "independence."[85] To unseat an arbitrator under Article 57, the party seeking disqualification must identify a "fact"[86] — as opposed to a simple belief or assertion[87] — that would cause a reasonable person to infer that the challenged arbitrator "manifestly" cannot be relied upon to exercise independent and impartial judgment.[88] As the *Suez* tribunal put it, the moving party must "establish facts that make it obvious and highly probable, *not just possible* that [the challenged arbitrators] may not

---

[84] ICSID Convention, Art. 57.

[85] ICSID Convention, Art. 14(1) (English) ("Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise ***independent judgment***") (emphasis added); ICSID Convention Art. 14(1) (Spanish) ("Las personas designadas para figurar en las Listas deberán gozar de amplia consideración moral, tener reconocida competencia en el campo del Derecho, del comercio, de la industria o de las finanzas e inspirar plena confianza en su ***imparcialidad de juicio***") (emphasis added); **RLA-3**, *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 (ICSID Administrative Council Chairman Kim) ("Given that both versions [of the Convention] are equally authentic, it is accepted that arbitrators must be both impartial and independent").

[86] ICSID Convention, Art. 57.

[87] *See, e.g.*, **RLA-15**, *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13 (Decision on Proposal for Disqualification, 19 December 2002), ¶ 20 (Feliciano, Faurès) ["*SGS v. Pakistan (Challenge)*"]; **RLA-16**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 (Decision on First Proposal for Disqualification, 22 October 2007), ¶ 40 (Salacuse, Nikken) ["*Suez (First Challenge)*"]; **RLA-4**, *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5 (Decision on Proposal for Disqualification, 13 December 2013), ¶ 67 (ICSID Administrative Council Chairman Kim) ["*Burlington (Challenge)*"].

[88] **RLA-15**, *SGS v. Pakistan (Challenge)*, ¶ 21.

be relied upon to exercise independent and impartial judgment."[89] Claimants have not met their burden in this regard.

33. The only "facts" that Claimants have identified are the following: (1) that Messrs. Berman and Veeder were acting as arbitrators in the Resubmission Proceeding while other Essex Court Chambers barristers were acting as counsel in ICJ disputes involving Chile; (2) that Messrs. Berman and Veeder did not indicate the foregoing in their Rule 6(2) declarations; and (3) that the response that Messrs. Berman and Veeder gave to Claimants' demands for information were not to Claimants' liking. These facts cannot justify disqualification, for the following four reasons.

34. ***First***, the fact that Essex Court Chambers barristers represent Chile in ICJ proceedings does not "make it obvious and highly probable [that Messrs. Berman and Veeder] may not be relied upon to exercise independent and impartial judgment."[90] As Claimants' own authority indicates, "the mere fact that advocate and arbitrator come from the same chambers does not give rise to . . . justifiable doubts."[91] If justifiable doubts do not arise about the arbitrators' independence and impartiality even when barristers from the same chambers are

---

[89] **RLA-17**, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19 (Decision on Second Proposal for Disqualification, 12 May 2008), ¶ 29.2 (Salacuse, Nikken) (emphasis in original) ["*Suez (Second Challenge)*"]; *see also* **RLA-19**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01 (Decision on Proposal for Disqualification), ¶ 105 (Castellanos, Zuleta) ["*Total (Challenge)*"]; **RLA-1**, *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5 (PCA Recommendation on Proposal for Disqualification, 19 December 2011), ¶ 50 (PCA Secretary-General Kröner) ["*Abaclat (PCA Challenge Recommendation)*"]; **RLA-15**, *SGS v. Pakistan (Challenge)*, ¶¶ 20–21.

[90] **RLA-17**, *Suez (Second Challenge)*, ¶ 29.2; *see also* **RLA-19**, *Total Challenge*, ¶ 105; **RLA-1**, *Abaclat (PCA Challenge Recommendation)*, ¶ 50; **RLA-15**, *SGS v. Pakistan (Challenge)*, ¶¶ 20–21.

[91] *See* **Annex 22 to Claimants' Disqualification Request**, *Barristers in International Arbitration* (2015), note 2; **Ex. R-34**, Letter from V. V. Veeder to ICSID, 11 December 2016 (explaining that the reason that he resigned in the *Vannessa Ventures* arbitration was because there was an "***actual*** conflict," and was ***not*** because he and one of the attorneys acting for the claimant were both members of the same barristers' chambers).

advocate and arbitrator *in the same case*, there certainly can be no such doubts here, where the challenge relates to barristers who are "extraneous to the arbitration."[92]

35. In their Disqualification Request, Claimants substitute an analysis of the impact on independence and impartiality with a citation to Item 1.4 on the so-called "non-Waivable Red List" contained in the IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**").[93] Even assuming *arguendo* that a citation to the IBA Guidelines were a proper substitute for careful analysis, Item 1.4 describes a situation in which "***[t]he 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."[94] However, it does not apply to the present situation, in which a different member of the arbitrator's chambers has a connection to one of the parties. The IBA Guidelines are quite clear that "barristers' chambers should ***not*** be equated with law firms for the purposes of conflicts . . . ."[95]

36. If the World Bank were to disqualify Messrs. Berman and Veeder, that would set a precedent in ICSID cases that — contrary to the views of the UK courts and the IBA — barristers' chambers need to be treated as equivalent to law firms for conflicts purposes. Given the number of UK barristers who appear as counsel in investor-State arbitrations and represent States before the ICJ, this effectively would prevent members of chambers from serving in the future as arbitrators in ICSID cases (and likely other types of investment arbitration as well), thereby removing from the market many of the world's best arbitrators, and further limiting the Centre's already limited pool of arbitrator candidates.

---

[92] **Ex. R-34**, Letter from V. V. Veeder to ICSID, 11 December 2016.
[93] Disqualification Request, ¶ 24.
[94] **RLA-11**, IBA Guidelines, Part II, § 1.4. The fact that other Items on the IBA Guidelines Lists refer specifically to "barristers' chambers" (*see, e.g.*, Item 3.3.2) further indicates that the terms "firm" and "chambers" are not interchangeable.
[95] **RLA-11**, IBA Guidelines, Part I, Explanation A to General Standard 6 (emphasis added).

37. ***Second***, Messrs. Berman and Veeder were not under any obligation to provide the detailed information that Claimants sought from them on 13 October 2016. Although an arbitrator should undertake a reasonable investigation into circumstances that may create an appearance of a conflict of interest, and disclose pertinent information to the parties, both Sir Franklin Berman and Mr. V.V. Veeder in fact complied with this obligation.[96] The only thing that they did *not* do was accede to an unreasonable demand for information that they did not have, and could not properly obtain (in light of ethical constraints that bound the other Essex Court Chambers barristers). As noted above in Section II, each of the barristers at Essex Court Chambers operates as "a self-employed sole practitioner,"[97] and there are "protocols in place to safeguard confidentiality."[98] It "would be prohibited for [one barrister] to make enquiries of fellow members of chambers about the work being undertaken by them."[99] An arbitrator cannot be expected to violate applicable ethics rules (or invite others to violate such rules) in order to satisfy a party's demands for information. Yet, by soliciting information like the names of any barristers representing Chile, the nature of their work, the amount of money that "la République du [Chili], ou un organisme dépendant de celle-ci, aurait versé à des membres et des personnes

[96] **Ex. R-33**, *See* Letter from F. Berman to ICSID, 4 December 2016 (stating, in response to Claimants' Disqualification Request, that "[i]t 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"); **Ex. R-22**, Letter from V.V. Veeder to the Parties, 17 October 2016 (confirming that "à ma connaissance, aucune circonstance n'est survenue, depuis ma declaration du 31 janvier 2014 jusqu'à la sentence du 13 septembre 2013, 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").

[97] **Ex. R-2**, Essex Court Chambers Website, "About" page, *last visited* 15 December 2016.

[98] **Ex. R-2**, Essex Court Chambers Website, "About" page, *last visited* 15 December 2016; *see also* **Ex. R-21**, Letter from F. Berman to Claimants, 17 October 2016 ("[A]ll 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 manner").

[99] **Ex. R-21**, Letter from F. Berman to Claimants, 17 October 2016.

en rapport avec les Essex Court Chambers jusqu'au 13 septembre 2016, et les dates des paiements correspondants,"[100] that is precisely what Claimants asked Messrs. Berman and Veeder to do.

38. ***Third***, even assuming *arguendo* that Claimants had identified a viable basis for challenge, as explained above in Section II, it was public knowledge throughout the entirety of the Resubmission Proceeding that Essex Court Chambers barristers were representing Chile before the ICJ. Yet Claimants expressly stated that they had no objection to the appointment of Sir Franklin Berman, and even appointed Mr. V.V. Veeder themselves. Nor did Claimants object on the basis of the Essex Court Chambers issue at any point before the 2016 Award was rendered — not when the arbitrators submitted Rule 6(2) declarations without appending statements,[101] not when the Tribunal asked the parties at the March 2014 First Session whether they had any objections regarding the constitution of the Tribunal,[102] and not at the April 2015 hearing. Instead, Claimants waited until after the outcome of the Resubmission Proceeding was known — and the Tribunal had become *functus officio* — to object.

39. By waiting this long, Claimants have waived their right to object on the basis of Essex Court Chambers barristers representing Chile before the ICJ.[103] As Claimants themselves

---

[100] Disqualification Request, ¶ 12 (quoting Claimants' 13 October 2016 letter).

[101] *See* **Ex. R-13**, F. Berman Declaration, 13 January 2014; **Ex. R-16**, V.V. Veeder Declaration, 31 January 2014.

[102] **Ex. R-6**, Procedural Order No. 1, 18 May 2014, Annex 2 (Summary of Items Discussed at the First Session), § 2 (explaining that Claimants' only complaint was that Chile had been allowed to appoint an arbitrator, despite Claimants' belief that the Chairman of the Administrative Council should have made that appointment rather than Chile).

[103] Claimants also have waived their right to object on the basis that Messrs. Berman and Veeder did not inform the parties that Essex Court Chambers barristers were representing Chile before the ICJ. *See* **RLA-4**, *Burlington (Challenge)*, ¶ 70 ("Three grounds are invoked to disqualify Professor Orrego Vicuña: i. His repeat appointments as arbitrator by Freshfields; ii. His non-disclosure of these appointments in this case; . . . ."), ¶ 74 ("[T]he appointment of Professor Orrego Vicuña by Freshfields became public in October 2012 in the *Ampal* case, in January 2013 in the *Rusoro* case, and in February

[FOOTNOTE CONTINUED ON NEXT PAGE]

acknowledge in their Disqualification Request,[104] Arbitration Rule 27 states that "[a] party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed — subject to Article 45 of the Convention — to have waived its right to object."[105] In *Burlington v. Ecuador*, the Chairman of the Administrative Council concluded that the claimant had waived an objection by waiting four *months* after the relevant information entered the public domain.[106] Here, Claimants have waited almost three years.

40. ***Finally***, although it is clear that Claimants disagree with the Tribunal's decision not to suspend the Rectification Proceeding in order to address the "Essex Court Chambers" issue, that in itself is not a viable basis for disqualification. Because, as discussed above, the ICSID Convention does not contemplate arbitrator challenges in a rectification proceeding, there is nothing inherently improper in the Tribunal's conclusion that there were "no grounds for such

---

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]
2013 in the *Repsol* case. There is no doubt that all relevant information concerning the *Repsol, Ampal* and *Rusoro* cases was publicly available on the ICSID website before, or by, March 7, 2013"), ¶ 75 ("Taking all of these facts into consideration, the Chairman finds that the Respondent had sufficient information to file its Proposal for Disqualification of Professor Orrego Vicuña on the basis of repeat appointments ***and non-disclosure of such appointments*** well before it did so on July 24, 2013. . . . ***As a result, the Proposal is dismissed to the extent that it relies on these grounds of challenge***") (emphasis added). In any event, as the *Tidewater v. Venezuela* tribunal noted, "the non-disclosure at the time of the [arbitrator's] first declaration of [information] in the public domain is not sufficient to sustain a finding that [the arbitrator] manifestly lacks the qualities required under Article 14(1) of the ICSID Convention." **RLA-18**, *Tidewater Inc* et al. *v. Venezuela*, ICSID Case No. ARB/10/5 (Decision on Proposal for Disqualification, 12 December 2010), ¶ 57 (McLachlan, Rigo Sureda); *see also* **RLA-9**, *Getma International* et al. *v. Guinea*, ICSID Case No. ARB/11/29 (Decision on Proposal for Disqualification), ¶ 80 (ICSID Administrative Council Chairman Kim) ("[L]'absence d'une déclaration ne peut en elle-même prouver le manque d'indépendance; seuls les faits et les circonstances qui n'ont pas été révélés peuvent mettre en cause la garantie d'indépendance d'un arbitre, non le manque de déclaration à cet effet").

[104] *See* Disqualification Request, note 4.

[105] Arbitration Rule 27.

[106] *See* **RLA-4**, *Burlington (Challenge)*, ¶¶ 70, 74–75.

a suspension."[107] In any event, arbitrators cannot be disqualified simply because they rule against one of the parties.[108] As the Secretary-General of the Permanent Court of Arbitration explained in his recommendation to the Chairman of ICSID's Administrative Council on the request for disqualification in *Abaclat*, "if the existence of an adverse ruling were sufficient to establish a lack of independence and impartiality, no ruling by an adjudicator would ever be possible. It is not the function of an arbitrator to reach conclusions which are mutually acceptable to the parties or which are neutral in their effects. It follows from the foregoing that the mere fact of an adverse ruling against the party proposing disqualification does not establish, let alone suggest, a lack of independence or impartiality."[109]

41. Thus, Claimants' Disqualification Request is entirely without merit.

V. Conclusion and Request for Relief

42. For the reasons articulated above, Claimants' Disqualification Request is inadmissible, unfounded, and utterly frivolous. It therefore should be summarily rejected, and — particularly in light of their history of abusive litigation and tactics — Claimants should be

[107] **Ex. R-30**, Decision on Procedure for the Rectification Proceeding, 21 November 2016, p. 1.

[108] *See* **RLA-2**, *Abaclat and others v. Argentina*, ICSID Case No. ARB/07/5 (Decision on Second Challenge, 4 February 2014), ¶ 80 (ICSID Administrative Council Chairman Kim) ("The mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention. If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process"); **RLA-6**, *ConocoPhillips Petrozuata B.V.* et al. *v. Venezuela*, ICSID Case No. ARB/07/30 (Decision on Proposal for Disqualification, 1 July 2015), ¶ 90 (ICSID Administrative Council Chairman Kim) ("It is evident that the Respondent and the challenged arbitrators differ on the appropriate procedure and the circumstances that would warrant a refusal to consent to Prof. Abi-Saab's resignation under Article 56(3) of the ICSID Convention and ICSID Arbitration Rule 8(2). However, this difference of views does not demonstrate apparent or actual bias on the part of Judge Keith or Mr. Fortier"); **RLA-14**, *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10 (Decision on Proposal for Disqualification), ¶ 80 (Elsing, Nottingham) ("An adverse ruling itself is no permissible ground for a disqualification").

[109] **RLA-1**, *Abaclat (PCA Challenge Recommendation)*, ¶ 64.

ordered to reimburse Chile for the totality of the costs and fees, including attorney fees, that it has incurred in connection with the Disqualification Request.[110]

Respectfully submitted,

Paolo Di Rosa
Gaela K. Gehring Flores

[110] Costs awards have been made in the past for disqualification requests that were "wholly without merit." *See* **RLA-7**, *Fábrica de Vidrios los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/12/21 (Second Challenge Decision, 28 March 2016), ¶ 58 (Douglas, Shin); **RLA-8**, *Fábrica de Vidrios los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/12/21 (Third Challenge Decision, 12 September 2016), ¶ 62 (Douglas, Shin). In the event that the Chairman of the Administrative Council concludes that only the Tribunal can award costs, Chile requests that the Chairman expressly recommend that the Tribunal make such an award. It does not seem appropriate to place arbitrators who have been challenged in the position of deciding a request for reimbursement of the costs and fees associated with a frivolous request for their own disqualification.

ANEXO 10

INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

HELNAN INTERNATIONAL HOTELS A/S,

(Claimant)

AND

THE ARAB REPUBLIC OF EGYPT

(Respondent)

CASE n° ARB 05/19

DECISION OF THE TRIBUNAL ON OBJECTION TO JURISDICTION

Members of the Tribunal

Me. Yves DERAINS (Chairman)
Professor Rudolf DOLZER (Arbitrator)
Mr. Michael LEE (Arbitrator)

Secretary of the Tribunal:
Mrs. Gabriela Alvarez-Avila

Representing the Claimant

Mr. Peter R. GRIFFIN,
Mrs. Ania FARREN
Mr. Devashish Krisham

Representing the Respondent

Dr. Ahmed EL KOSHERI
Dr. Mohamed Abdel RAOUF
Dr. Karim HAHEZ

Date of Decision: October 17, 2006

I- LEGAL AND FACTUAL BACKGROUND:

1. The Scandinavian Management Company A/S (Hereinafter " Scandinavian") and the Egyptian Hotels Company (Hereinafter " EHC"), entered into a contract for the management and the operation of the Shepheard Hotel (Hereinafter " the Contract") on September 8, 1986 (Hereinafter "the Contract") whereby Scandinavian was entrusted with the management of the Shepheard Hotel in Cairo, owned by EHC.

2. Two annexes and a protocol to the Contract were signed by the parties on December 31, 1986, May 11, 1989 and July 23, 1987 respectively.

3. On June 24, 1999, a Bilateral Investment Treaty (Hereinafter "the Treaty") was concluded between the Government of the Arab Republic of Egypt (Hereinafter " EGYPT") and the Kingdom of Denmark (Hereinafter Denmark) as to the promotion and reciprocal protection of investments. Article 9 of the Treaty provides that "*any dispute which may arise between an investor of one Contracting Party and the Other Contracting Party in connection with an investment in the territory of that other Contracting Party shall, as far as possible, be settled amicably*". However, Article 9 adds that the investor is entitled to submit the case to arbitration and *inter alia* to the International Centre for Settlement of Investment Disputes (Hereinafter "the Centre") in the hypothesise where the dispute continues to exist after a period of six months.

4. On March 7, 2000, the Egyptian Company for Tourism and Hotels (Hereinafter " EGOTH") succeeded to EHC's rights and obligations as the result of a merger.

5. The Contract was originally to remain in force for a period of 26 years. On October 15, 2002, a further Annex to this Contract (Hereinafter " the Annex ") was signed between EGOTH and HELNAN INTERNATIONAL HOTELS A/S (Hereinafter " HELNAN"), the latter being described as the successor in interest of Scandinavian. The Annex indicated that, as part of the privatisation program of the State of Egypt, the Shepheard Hotel could be sold by EGOTH, under terms that respect HELNAN's rights under the Contract or its rights to receive appropriate compensation.

6. On September 7, 2003, pursuant to a notification to HELNAN on July 30, 2003 of an inspection of the Hotel and pursuant to a report of September 4, 2003 of a second inspection, the Shepheard Hotel was downgraded by the Minister of Tourism from 5 stars to 4 stars. On October 2nd, 2003 EGOTH initiated an arbitration procedure against HELNAN pursuant to the arbitration clause included in the Contract providing for arbitration under the *aegis* of the Cairo

Regional Center for International Commercial Arbitration. An Award was issued on December 4, 2004 which, *inter alia*, decided to terminate the Contract, ordered the Claimant to hand over to EGOTH the Shepheard Hotel and condemned EGOTH to pay HELNAN the amount of EGP 12,5 Million.
HELNAN's request to set aside this Award was dismissed by the Cairo Court of Appeal on June 7, 2005. On July 12, 2005, the Cour de Cassation also refused to order enforcement stayed. On July 19, 2005, the Cairo Court of Appeal granted exequatur. Finally, the juge des référés dismissed two objections to enforcement brought by HELNAN.

7. On March 23, 2006, EGOTH took over the Shepheard Hotel.

II- THE PROCEDURE

8. On March 8, 2005, on the basis of the 1965 Convention on the Settlement of Investment Disputes between States and nationals of other States (Hereinafter "the Convention") and the Treaty, HELNAN filed a Request for Arbitration against EGYPT before the Centre asserting that Egypt had violated Article 2, Article 3 and Article 5 of the Treaty which provide investments in another contracting party with "*full protection and security*", "*fair and equitable treatment*" and prohibit expropriation "*except for expropriations made in the public interest (...) against prompt, adequate and effective compensation*".

In its Request for Arbitration, HELNAN requested the following:

> *"A. Provisional Measures*
>
> *71. Claimant, Helnan, respectfully requests that, upon constitution, the Arbitral Tribunal provide urgent interim relief:*
>
> *(i) recommending that Egypt refrain from taking any action (through EGOTH or any other instrumentalities) to evict Helnan from the Shepheard Hotel on or after 30 March 2005; and*
>
> *(ii) recommending that Egypt (through EGOTH or any instrumentalities) ceases immediately all procedures to sell the Shepheard Hotel to any third party, on terms that directly or indirectly interfere with Helnan's management and operation of the Shepheard Hotel, until the issuance of the final award in this arbitration.*
>
> *B. Final Award*
>
> *72. In the event that the urgent interim relief requested above is granted, and the Shepheard Hotel is not confiscated, Claimant shall seek an award on the merits:*

(i) declaring that Helnan should be free to continue to enjoy its management rights to the Shepheard Hotel under the Management Contract until its expiry in December 2012 with similar co-operation and investment from EGOTH as accorded to other foreign hotel chains;

(ii) ordering the Respondent to pay to Helnan damages, in an amount to be determined, as compensation for its share of the profits lost as a result of the downgrade of the Shepheard Hotel;

(iii) ordering the Respondent to pay damages, in an amount to be determined, in compensation for reputional damages suffered by Helnan; and

(iv) ordering the Respondent to pay interest on the amounts awarded in (ii) and (iii) above at an appropriate rate.

73. In the alternative, in the event that the Shepheard Hotel is confiscated from Helnan prior to the outcome of this arbitration, Helnan respectfully requests that the Arbitral Tribunal enter an award:

(i) ordering the Respondent to pay (a) damages in the amount of €10 million, subject to further revision, to indemnify Helnan for loss of its share in the total operating profits of the Shepheard Hotel during the remaining period of the Management Contract; or, in the alternative (b) damages in an amount to be quantified in respect of Helnan's lost investment in the Shepheard Hotel;

(ii) ordering the Respondent to pay damages in the amount of €15 million, subject to further revision, in compensation for reputional damages suffered by Helnan;

(iii) ordering Respondent to pay €15 million, subject to further revision, representing the balance in the accounts owing to Helnan for servicing the head office and financing the development and renovation works and the debt written off by Helnan on 15 October 2002;

(iv) ordering the Respondent to pay all of Helnan's costs associated with the defence of the arbitration proceedings taken against it by EGOTH in Egypt, in the amount of approximately €150 thousand;

(v) ordering the Respondent to pay all of Helnan's costs associated with this arbitration, including the arbitrator's fees and administrative costs fixed by ICSID, the expenses of the arbitration, any expert's fees and expenses, and the legal costs (including attorney's fees) incurred by the parties, in an amount to be quantified;

(vi) ordering the Respondent to pay interest on the amounts awarded in (i) to (v) above at an appropriate rate; and

(vii) granting Helnan any other relief that the Arbitrator sees fit."

9. On February 10, 2006, an Arbitral Tribunal composed of Professor Rudolf DOLZER, appointed by the Respondent, of Mr. Michael LEE, appointed by the

Claimant and Me. Yves DERAINS, Chairman, appointed by the two above mentioned arbitrators was constituted in accordance with article 6 (1) of the ICSID Arbitration Rules (Hereinafter "the Arbitration Rules").

10. On April 6, 2006, the ICSID Secretariat transmitted a letter from Respondent indicating its position regarding the jurisdiction of the Centre to which it had expressed objections.

11. On April 14, 2006, the First Session was held in the World Bank's offices in Paris. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules and that they did not have any objections in this respect. The parties also agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. In particular it was agreed that the Respondent's objections on jurisdiction would be dealt with as follows:

" (...) *the Tribunal, after deliberation, informed the parties that, on the basis of the Arbitration Rule 41 (3), the proceeding on the merits was suspended and that a time limit for the parties to file a Memorial on jurisdiction and a Counter-Memorial on jurisdiction will be fixed. The President also informed the parties that the Tribunal could then decide, pursuant to Arbitration Rule 41 (4) whether to have a hearing on jurisdiction or to join the objections to the merits".*

12. During the first session, the parties presented their respective oral arguments as to the Request for Provisional Measures. Such presentation was followed by rebuttals from both parties as well as by questions from the Arbitral Tribunal.

13. On April 26, 2006, Claimant transmitted to Respondent its First Request for Production of Documents.

14. On May 17, 2006, the ICSID Secretariat transmitted an electronic version of the Arbitral Tribunal's Decision on Provisional Measures whereby the Arbitral Tribunal decided to:

"*1) Dismisses Claimant's Request for Provisional Measures;*
2) Declares that the costs of this phase of the proceedings will be allocated in its Final Award".

15. On the same day, the ICSID Secretariat transmitted a letter from Respondent regarding its objection to Claimant's First Request for Production of Documents.

On May 22, 2006, the ICSID Secretariat transmitted certified copies of the minutes of the First Session held on April 14, 2006 as well as certified copies of the Arbitral Tribunal's decision on Provisional Measures.

16. On May 31, 2006, Respondent transmitted an electronic copy of its Memorial on Jurisdiction to the Arbitral Tribunal and to Claimant.

17. On May 31, 2006, the ICSID Secretariat acknowledged receipt of Respondent's Memorial on Jurisdiction and reminded that every communication among the parties needed to pass through the Centre.

18. On June 6, 2006, the ICSID Secretariat transmitted hard copies of the Respondent's Memorial on Jurisdiction. In this Memorial, the Respondent requests that:

"The Tribunal declare that Claimant's Request for Arbitration does not fall within the jurisdiction of the Centre and the competence of the Tribunal and order Claimant to reimburse to Respondent all costs reasonably incurred by it in connection with this proceeding."

19. On June 12, 2006, the ICSID Secretariat transmitted a letter from Claimant providing its observations on Respondent's objections to its First Request for Production of Documents.

20. On June 15, 2006, the ICSID Secretariat transmitted to the parties a letter from the Arbitral Tribunal whereby it invited Respondent to indicate by June 20, 2006 whether it maintained its objections to the Production of Documents.

21. On June 20, 2006, the ICSID Secretariat transmitted an e-mail from Respondent indicating that it reiterated its objections to the Production of Documents.

22. On June 23, 2006, the ICSID Secretariat transmitted, on behalf of the Arbitral Tribunal, an electronic version of Procedural Order No. 1 stating the following:

"WHEREAS, on April 26, 2006, Claimant sent Respondent a Request for Production of Documents;

WHEREAS, on May 17, 2006, Respondent objected to the foregoing production of documents and refused to comply with this Request;

WHEREAS, on June 12, 2006, Claimant requested that the Arbitral Tribunal order the production of documents if Egypt maintained its objections to this production;

WHEREAS, under Article 43 of the ICSID Convention and Rule 34 of the ICSID, the Arbitral Tribunal is empowered, absent contrary agreement and if it deem it necessary, at any stage of the proceeding, to request from the parties that they produce documents; it may also do it further to a request by one of the parties;

WHEREAS, "the IBA Rules on the Taking of Evidence in International Commercial Arbitration" (and particularly Articles 3 and 9), even though not directly applicable in this proceeding, can be considered as a guidance as to what documents may be requested and produced;

WHEREAS, the Arbitral Tribunal examined the first category of documents tied to the ICSID Case No. ARB/98/4 Wena Hotels Ltd. v. Egypt;

WHEREAS, in order to reject the production of these documents, Respondent referred to Regulation 22 of the Administrative and Financial Regulations stating the following:

> *"(1) The Secretary-General shall appropriately publish information about the operation of the Centre (...)*
>
> *(2) If both parties to a proceeding consent to the publication of:*
>
> *(a) reports of Conciliation Commissions;*
> *(b) arbitral awards; or*
> *(c) the minutes and other records of proceeding."*

WHEREAS, in the light of these provisions, Respondent considered that "a party to arbitration can not solely decide to disclose any information relating to such arbitration unless the consent of the other party is expressly reached";

WHEREAS, the Arbitral Tribunal considers that Regulation 22 is not applicable to the present case on the ground that it deals with publication of Awards and other procedural documents -i.e. making them available to the public in general - but do not concern the production of documents to a third party who might have a legitimate interest to have access to these documents to establish its rights;

WHEREAS, additionally, the Arbitral Tribunal notes the fact that the documents in the ICSID Case No. ARB/98/4 Wena Hotels Ltd. v. Egypt have already been subject to generous publications, even though partial ones which have already been submitted in the instant case;

WHEREAS, pursuant to Article 3 of the "IBA Rules on the Taking of Evidence in International Commercial Arbitration", the documents to be produced need to be relevant and material to the outcome of the case and need to be precisely identified;

WHEREAS, the Arbitral Tribunal finds that it is the case of the first category of requested documents provided they deal with the Arbitral Tribunal jurisdictional issues that need to be examined by it at this stage of the proceedings and will order their production;

WHEREAS, however, the Arbitral Tribunal considers that this Production of Documents should be subject to the execution of a confidentiality undertaking by Claimant;

WHEREAS, the second category of documents requested generally refer to the Egyptian's policy to privatize enterprises in the Tourism Sector;

WHEREAS, they are not precisely identified and no precise explanation is given as to their relevancy to the problem of jurisdiction that the Arbitral Tribunal has to solve;

WHEREAS, pursuant to Article 9 of the "IBA Rules on the Taking of Evidence in International Commercial Arbitration", the Arbitral Tribunal will not order their production;

THE ARBITRAL TRIBUNAL HAS DECIDED THE FOLLOWING:

1) The foregoing documents:

- Transcript of Tribunal's session held on 25 May 1999;

- Transcript of Tribunal's session held on 25-29 April 2000;

- Transcript of Tribunal's session held on 22-23 October 2001;

- Transcript of Tribunal's session held on 14 June 2005;

- All expert reports/opinions (in relation to the Egyptian Tourism industry) and any accompanying document thereof,

in the ICSID Case No. ARB/98/4 Wena Hotels Ltd shall be produced by Respondent, in their part or in totality, provided they are relevant for issues of jurisdiction that the Arbitral Tribunal needs to examine at this stage of the procedure and upon execution by Claimant of the text of an undertaking of confidentiality worded on the basis of the model attached to this decision.

2) The request for production of all documents and written communications relating to efforts to privatize enterprises within the Egyptian Tourism Sector pursuant to the United States Agency for International Development (USAID) Egypt Privatization Implementation Project is denied. "

23. On July 7, 2006, the ICSID Secretariat transmitted a letter from Respondent dated July 6, 2006 whereby it indicated that it complied with Procedural Order No. 1 concerning the requested production of documents.

24. On July 14, 2006, the ICSID Secretariat transmitted an electronic version of Claimant's Counter-Memorial on Jurisdiction.

25. On July 18, 2006, the ICSID Secretariat transmitted a hard copy of Claimant's Counter-Memorial on Jurisdiction, which was received on July 24, 2006. In this Counter-Memorial, the Claimant requests that the Arbitral Tribunal decides:

- *"That the Tribunal has jurisdiction over the claims presented in [Claimant's] Request for Arbitration, and that they are admissible: and correspondingly*

- *That Egypt's objections to jurisdiction be rejected in their entirety.*

  Since each of Egypt's objections fail (and indeed some, if not all, are manifestly contrived) [Claimant] respectfully requests that Egypt pay [Claimant's] costs associated with these proceedings, to be determined by the Tribunal in the final award."

In order to save time in the proceedings, Claimant also requested that EGYPT's jurisdictional objections be addressed in the Final Award on the Merits.

26. On July 20, 2006, the ICSID Secretariat transmitted a letter from Claimant correcting a typographical error as to the number of Exhibits submitted.

27. On July 25, 2006, the ICSID Secretariat transmitted a letter from the President of the Arbitral Tribunal whereby he indicated the involvement of its law firm in a case with the Ministry of Water Resources and Irrigation of the Republic of Egypt.
On July 26, 2006, Counsel for Respondent indicated that the foregoing case did not have any impact on the Chairman's independence and impartiality in the present case. On July 28, 2006, Counsel for the Claimant indicated the same.

28. On August 1, 2006, the ICSID Secretariat transmitted, on behalf of the Arbitral Tribunal, a letter indicating to the parties that in the absence of witnesses or experts to testify, the scheduled hearing on jurisdiction would be held solely on August 17, 2006 instead of August 17, 2006 and August 18, 2006. It also transmitted a provisional agenda of the session and requested that Claimant clarify its position on whether the Tribunal should join the objections to the jurisdiction to the merits of the case.

29. On August 2, 2006, Claimant indicated that it accepted the provisional agenda transmitted by the ICSID Secretariat and indicated that it requested that the Arbitral Tribunal joined the issue on the jurisdiction with the merits.

30. On August 17, 2006, a session on the issues of jurisdiction was held at the World Bank's offices in Paris.

III- DISCUSSION

31. The Respondent objects to the jurisdiction of the Centre and of the Arbitral Tribunal on the following grounds:

- *ratione temporis*: the Claimant's claims would fall beyond the temporal scope of the Treaty;
- *ratione materiae*: there would be no dispute directly arising out of an investment and involving EGYPT;
- *ratione personae*: EGOTH would not be an emanation of the Egyptian State.

32. Pursuant to Article 41 of the Arbitration Rules, the Arbitral Tribunal is authorized to take a decision regarding the jurisdiction of the Centre and its own jurisdiction. Due to the fact that the objections raised by the Respondent are not frivolous and that there is no need to enter into the merits of the case to deal with them, the Arbitral Tribunal decides not to join them to the merits of the dispute and to resolve them as a preliminary issue in this Decision.
Consequently, the Arbitral Tribunal will deal successively with each of the Respondent's objections to its jurisdiction.

A. Do the Claimant's claims fall beyond the temporal scope of the Treaty?

***a) The Respondent's position*:**

33. The Respondent relies on Article 12 of the Treaty which reads:

> "*The provisions of this Agreement shall apply to all investments made by investors of one contracting party in the territory of the other contracting party prior to or after the entry into force of the Agreement by investors of the other contracting party. It shall, however, not be applicable to divergences or disputes, which have arisen prior to its entry into force.*"

It points out that the Treaty entered into force on January 29, 2000, thirty days after Egypt had notified to Denmark that it had fulfilled the constitutional requirements.

Indeed, Article 15 of the Treaty states that:

"[t]he Contracting Parties shall notify each other when the constitutional requirements for the entry into force of this Agreement [are] fulfilled. The agreement shall enter into force thirty days after the date of that last notification."

34. The Respondent underscores that the parties have determined precisely the scope of the Treaty and that, while they agreed that it would apply to any investment made by the parties notwithstanding the moment at which it occurred, it is clear that the Treaty does not apply to "*divergences or disputes, which have arisen prior to its entry into force*", thereby exempting the State from liability for past conduct. According to Respondent, "*existing and new investments would be afforded full Treaty protection, but that as at 29 January 2000, the slate was utterly and completely clean*[1]."

35. The Respondent emphasizes that Egypt and Denmark deliberately excluded from the application of the Treaty not only "*disputes*" that were prior to its entry into force but also mere "*divergences*". Referring to Prof. Ch. Shreuer, it contends that a "*dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim*[2]." "*Divergence*" is, in its mind, a very significantly broader concept, which need not go beyond general grievances and may very well not be susceptible of being stated in terms of a concrete claim[3]. Respondent added at the hearing of August 17, 2006 that facts and situations qualified as divergences shall also be excluded from the application of the treaty provided they occurred before January 29, 2000.
To support its argumentation, the Respondent also referred, at the hearing, to the following canons of interpretation:

- the rule of no retrospective effect;

- the rule of literal meaning;

- the rule against redundancy.

36. Moreover, the Respondent relies on Article 28 of the Vienna Convention stating that the provisions of a treaty "*do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty*".

---

[1] Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.5, paragraph 28.
[2] Prof. Christoph H. Shreuer, Commentary on the ICSID Convention, Article 25, 11 ICSID Rev.- FILJ 318 (1996), at 337.
[3] Respondent's Memorial on its objections to jurisdiction, May 31, 2006, page 6, paragraph 30.

37. The Respondent is convinced that the Claimant's claims are based on divergences which pre-dated January 29, 2000.
Indeed, it considers that the divergences started in 1993, at the time of the state's privatisation which allowed the Shepheard Hotel to be sold to a third party. This is not denied by Claimant which stated in its Request for Arbitration that: "*after 1993 EGOTH refused to invest further in the Shepheard Hotel and offered property for sale*" and added that "*any initial efforts made by EGOTH to contribute to the upkeep of the Shepheard Hotel were abandoned after 1993 (...)*".

The Claimant also admitted in a letter to the Centre dated September 28, 2005 that "*the origins of this dispute date as far back as 1993, at which point Egypt-in a coordinated effort with EGOTH-embarked on a coordinated strategy to terminate prematurely the Management and Operation Contract of 8 September 1986 (....) These efforts to evict Helnan culminate, however, in the improper downgrade of the Shepheard from five-to four stars establishment by the Ministry of tourism in September 2003 (....) As a result of such downgrade, EGOTH initiated arbitration proceedings against Claimant in October 2003. As already explained above, Claimant put Egypt on notice of its grievances in July 2004.*"

38. In the light of the above arguments, it seems obvious, from the Respondent's point of view, that the divergences pre-dated the Treaty's entry into force of January 29, 2000 and that the claims are outside the scope of the Treaty. Consequently, in the instant case the Tribunal cannot have jurisdiction under the ICSID Convention.

***b) The Claimant's position*:**

39. First, Claimant rejects Egypt's allegation that divergences giving rise to the claims arose prior to the entry into force of the BIT i.e. prior to January 29, 2000. The Claimant explains that:

"The real source of Claimant's dispute with Egypt is:

> *the State-orchestrated downgrade of the Shepheard Hotel from five to four stars on 7 September, 2003; and*
>
> *the threatened eviction of Claimant from the Shepeard Hotel following that orchestrated downgrade; and*
> *the final eviction of Claimant on 23 March 2006*[4] " .

[4] Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.5, paragraph 8.

40. The Claimant considers that even though the dispute between the parties arose in 2003-2004 and at the latest on July 29, 2004 -i.e. when the President of HELNAN first raised its grievances against EGYPT (see letter to ICSID dated September 28, 2005),- it may rely on relevant events or conduct of EGYPT prior to the entry into force of the Treaty in order to explain the background of the dispute.

41. The Claimant agrees that the Treaty, pursuant to Article 12, applies to divergences or disputes that arose after its entry into force, i.e. after January 29, 2000. However, Article 12 does not exclude relying on facts that occurred prior to January 29, 2000.

Indeed, clauses restraining jurisdiction *ratione temporis* may be divided into two main groups:

- in the first group, the clauses relate to the date on which a dispute arises,
- in the second group, the clauses relate to the date on which events took place or facts at the origin of the dispute arose.

Article 12 solely requires the dispute to have arisen after the critical date (January 29, 2000). There are no consequences if the dispute relates in part to certain facts or situations prior to that date.
Moreover, when States want to exclude from the scope of a treaty facts and situations occurring prior to its entry into force, they say so expressly. Article 27(a) of the European Convention for the Peaceful Settlement of Disputes is an example of such express exclusion. The so-called " Belgian type reservation" to the jurisdiction of the International Court of Justice is another example. The Treaty does not include any wording of that kind.

42. Additionally, the Treaty "*applies to all investments, including those made prior to its entry into force*". Consequently, Claimant is of the view that *"since the express terms of the Treaty contemplate coverage of investments made before January 2000, then the factual matrix of disputes relating to such investments will-unavoidably-also date back to before January 2000* [5] ".

The Claimant finds support in the Decision in the *Tecmed S.A. v. Mexico's* case where the Tribunal declared that:

"... conducts, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent

[5] Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.8, paragraph 19.

factor or aggravating or mitigating elements of conducts or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction[6].

43. In this respect, the Claimant contends that even though EGOTH has not, since 1993, respected its obligation to invest money for the upkeep of the Shepheard Hotel which led Claimant to base its claims on factual behaviours prior to 2000, other facts or events have led Claimant to file this arbitration against EGYPT and further actions to interrupt the Management Contract that continued long after January 2000 were taken by EGYPT.

44. Further, the Claimant objects to EGYPT's interpretation of the term *"divergence"* which would be a very significantly broader concept than *"dispute"*. First, in the Claimant's view, the term "*divergence*" cannot cover facts or situations pre dating the dispute since the term *"divergence*" necessarily requires the existence of a disagreement whereas facts and situations do not. Therefore, it is necessary to distinguish facts and situations, on one hand, and divergence and dispute, on the other hand. Second, the term "*dispute"* relies on 3 determining elements that are the following:

"(i) *a disagreement on a point of law or fact, conflict of legal views or of interests between the parties, which (ii) manifests itself in claims of the parties positively opposing each other; these claims in turn (iii) serving as the point of departure for the Tribunal itself to determine on an objective basis the existence of a dispute between the parties*[7]."

45. The Claimant does not give a different meaning to the term "*divergence"* which would be "*ejusdem generis", i.e.* are of a like nature. By definition, the term "*divergence*" also requires an "opposition" or "a conflict of view" between the parties. As the Claimant s' first grievances were solely communicated in 2004 to Egyptian ministers, the divergence cannot have arisen before the year 2000.

46. The Claimant also argues that, in the hypothesise where the Tribunal would accept that the term "*divergence"* is broader than the term "*dispute"*, which opinion Claimant does not share, a restrictive view is adopted under case law as to the scope of a temporal limitation to jurisdiction. Further, the relevancy of the facts to the outburst of the dispute is to be taken into account when interpreting and applying the *ratione temporis* limitation.

---

[6] 43 I. L. M. 133, at para. 66.

[7] Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.10, paragraph 27.

As stated by the Permanent Court of International Justice in 1939 in Electricity Company of Sofia and Bulgaria, *(...)" it is true that a dispute may presuppose the existence of some prior situation or fact, but it does not follow that the dispute arises in regard to that situation or fact. A situation or fact in regard to which a dispute is said to have arisen must be the real cause of the dispute (...)*[8]*."*

Therefore, "*to summarise, in applying ratione temporis limitations to facts or situations (if it is accepted that "divergence" covers facts or situation), an international tribunal looks at the facts or situations directly associated with the outbreak of the dispute itself. There must be a direct and proximate link between the facts or situations and the dispute: it is not enough that earlier facts or situations may have in a sense predisposed the parties in respect of a dispute*[9]*"*

47. In any case, in the present dispute, the triggering event was the downgrade of the Shepheard Hotel which started on September 7, 2003 and the two other critical dates were the official notification by Claimant to Respondent of a dispute (February 14, 2005) and the submission of the Request for Arbitration (March 8, 2005). The dispute thus cannot have arisen before 2003.

c) The Arbitral Tribunal's decision:

48. The parties both agreed in their submissions as well as during the hearing of August 17, 2006 that the Treaty entered into force on January 29, 2000.

49. They however have opposite views on the interpretation of Article 12 which deals with the temporal scope of the Treaty.

Indeed, this Article states that:

"*The provisions of this Agreement shall apply to all investments made by investors of one contracting party in the territory of the other contracting party prior to or after the entry into force of the Agreement by investors of the other contracting party. It shall, however, not be applicable to divergences or disputes, which have arisen prior to its entry into force.*"

50. It results from this wording that whereas any investment falls within the scope of the Treaty irrespective of the date it was made, the Treaty applies only

[8] Electricity Company of Sofia and Bulgaria, 1939 PCIJ., Ser. A/B, n°77, at p. 81
[9] Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.13, paragraph 35.

to those divergences or disputes which have arisen subsequently to its entry into force.

51. The parties mainly disagree on the meaning to be given to the two key terms in the second sentence of Article 12 i-e *"divergence"* and "*dispute*". The Respondent makes a clear distinction between both. The Claimant considers that the terms divergence and dispute are *ejusdem generis,* of a "like nature".

52. The Arbitral Tribunal cannot follow the Claimant's interpretation in that regard and agree with the Respondent that, whenever possible, terms must be interpreted literally and given practical effect, which excludes redundancy. As the parties to the Treaty referred both to *"divergence"* and "*dispute*", it must be assumed that they were not giving the same meaning to these two distinct terms.

The Tribunal is satisfied that such an assumption is correct. Although, the terms "*divergence*" and "*dispute*" both require the existence of a disagreement between the parties on specific points and their respective knowledge of such disagreement, there is an important distinction to make between them as they do not imply the same degree of animosity. Indeed, in the case of a divergence, the parties hold different views but without necessarily pursuing the difference in an active manner. On the other hand, in case of a dispute, the difference of views forms the subject of an active exchange between the parties under circumstances which indicate that the parties wish to resolve the difference, be it before a third party or otherwise. Consequently, different views of parties in respect of certain facts and situations become a " *divergence*" when they are mutually aware of their disagreement. It crystallises as a "*dispute*" as soon as one of the parties decides to have it solved, whether or not by a third party.

53. On this basis, the Arbitral Tribunal considers that three hypothesises must be distinguished in order to determine whether or not the Claimant's claims fall within or beyond the temporal scope of the Treaty:

- First, if the dispute has crystallised after January 29, 2000 on the sole basis of divergences prior to that date, the Claimant's claims cannot be submitted to the Centre under the Treaty since divergences prior to 2000 are clearly excluded by Article 12.

- Second, if the dispute has crystallised after January 29, 2000 but on the sole basis of divergences that occurred after that date, it falls within the temporal scope of the Treaty as the divergences, source of the dispute, occurred after the entry into force of the Treaty.

- Third, if the dispute has crystallised after January 29, 2000 as a continuation of divergences that occurred prior to that date but evolved and changed of nature after that date, it falls within the temporal scope of the Treaty as the divergences which are its source are not any longer the divergences which were existing before January 29, 2000.

54. The instant dispute is based on Helnan's allegations that Egypt has violated its obligations under the Treaty i.e. an obligation of full protection and security and fair treatment as set forth in Article 2 and 3 of the Treaty as well as an obligation not to expropriate Helnan's investments without providing prompt, adequate and effective compensation, as set forth in Article 5. These alleged violations are made in the context of the privatisation of the Shepheard Hotel.
It cannot be disputed that the Claimant refers to facts and situations prior to January 29, 2000- as far as 1993- which may be seen as having been the objects of divergences. However, they are not and could not be at the origin of the dispute which gave rise to the Claimant's claims.

55. Indeed, on October 15, 2002, the parties agreed to modify the terms of their Contract by signing an Annex to the Management Contract which put them in a completely different contractual situation than the one prevailing before, as the Annex, *inter alia*, referred to the State's privatisation program.
Consequently, the divergences that occurred before the agreement on the Annex of October 15, 2002, even if they originated from disagreement prior to January 29, 2000, could not be of the same nature as the divergences which crystallised into the instant dispute which occurred under the Management Contract as modified by the Annex. This situation corresponds to the third hypothesis contemplated above.

56. On October 15, 2002, HELNAN acknowledged in the Annex that the Shepheard Hotel formed part of EGYPT's privatisation project. The divergences which may have existed before, in particular before January 29, 2000, could not focus on this issue. As the Arbitral Tribunal is satisfied that the instant dispute is grounded on alleged violations of the Treaty within the process of the Shepheard Hotel privatisation, it is as well satisfied that the crystallisation of the relevant divergence did not occur prior to the entry into force of the Treaty.

57. For these reasons, the Arbitral Tribunal dismiss the Respondent's objection to jurisdiction based on Article 12 of the Treaty.

B. The alleged absence of a dispute arising directly out of an investment and involving EGYPT

a) *The Respondent's position*:

58. The Respondent alleges that the Claimant made no investment in Egypt. It underscores that pursuant to Article 25 (1) of the ICSID Convention, the dispute must arise " *directly out of an investment*". Even though the ICSID Convention does not contain any definition of the term "*investment*", its guiding principle relies on "*a desire to strengthen the partnership between countries in the cause of the economic development.*[10]"

59. Moreover, referring to recent ICSID arbitral decisions (in particular the Decision on jurisdiction in the Salini v. Kingdom of Morocco case) and to the Commentary by Prof. Ch. Schreuer[11], the Respondent suggests that for being defined as an investment *"a qualifying project must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development*[12]".

60. The Respondent points out that the transaction object of the dispute does not fulfil these criteria since:

"*The Management Contract underlying the present proceedings is a standard commercial agreement featuring ordinary commercial terms, regulating the management of an unremarkable property of no particular consequence to the host state's development. The duration of the Contract is well within industry standards. The nature of Claimant's remuneration it envisages is typical of its kind. The transaction involves no more than the ordinary degree of commercial risk inherent in everyday transactions (...)* and *managing a hotel on behalf of its owner can hardly be said to contribute to the host state's development*[13]. "

61. Moreover, the Respondent relies on the Award on Jurisdiction in the Joy Mining v. A.R.E. case where the Tribunal held that "*The parties to a dispute cannot by contract or by treaty define an investment, for the purpose of ICSID jurisdiction, which does not satisfy the objective requirements of Article 25 of the Convention.*[14]"

---

[10] Report of Executive Directors of the ICSID Convention., I ICSID Reports, at page 25.
[11] Christoph H. Shreuer, The ICSID Convention: a Commentary (2001), at 140.
[12] Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.9, paragraph 51.
[13] Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.9, paragraph 52.
[14] Joy Mining Machinery Ltd v. the Arab Republic of Egypt. ICSID case n° ARB/03/11, Award on Jurisdiction of August 6, 2004, para. 50, p.11.

62. In view of the foregoing contentions and on the ground that Claimant has failed to demonstrate the existence of an investment, the Respondent asserts that the transaction cannot be qualified as an investment and simply constitutes a commercial transaction.

63. The Respondent further argues that the Claimant also failed to prove the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT, although this is the first necessary step in order to determine the jurisdiction of the Centre and the competence of the Arbitral Tribunal. Indeed, the Claimant has solely indicated in its Request for Arbitration that EGYPT had violated its obligations towards HELNAN under the Treaty but did not provide any additional evidence as to this allegation preventing therefore the Arbitral Tribunal of determining whether or not the alleged violations felt within the provisions of the Treaty.

64. The Respondent invokes several ICSID cases[15] in order to contend that failing to establish *prima facie* violations of the Treaty by EGYPT, the Claimant cannot resort to arbitration under the Treaty. It refers also, in the same spirit to the approach adopted by the International Court of Justice[16].

65. Moreover, to the extent that the refusal of EGOTH to finance the renovation of the Shepheard Hotel, its negligence in the maintenance of the hotel and the downgrading of the Hotel are the causes of the dispute, Claimant has no valid cause of action in front of this Tribunal.
Indeed, the essential basis of the claim concerns a contractual dispute with another party that has already been resolved by the Award rendered under the *aegis* of the Cairo Regional Centre for International Commercial Arbitration. The Claimant is attempting to dress up contractual grievances as Treaty claims. The Claimant thus failed to determine the cause of action capable of founding the Tribunal's jurisdiction under article 25 of the ICSID Convention. It concludes, quoting the above-mentioned Award in the Joy Mining v. A.R.E. case, that " *In the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction.*[17]

---

[15] SGS v. Pakistan, ICSID Case n° ARB/01/13, Decision of the Arbitral Tribunal on objections to jurisdiction of August 6, 2003; SGS v. Republic of the Philippines, ICSID Case n° ARB/02/6, Decision of the Arbitral Tribunal on objections to jurisdiction of January 29, 2004; Salini Costruttori S.P.A. and Italstrade, S.P.A. v Hashemite Kingdom of Jordan, ICSID Case n° ARB/02/13, Decision on jurisdiction of November 29, 2004.
[16] Yugoslavia v. Italy, ICJ Reports 1999-I, p. 490.
[17] See note 14, para. 82 of the Award.

b) *The Claimant's position:*

66. The Claimant rejects EGYPT's allegation that no "*investment*" was made by HELNAN in Egypt. It denies that the Contract is "*a standard commercial agreement*". On the contrary, it meets the criteria adopted by the Respondent to define an " *investment*", in spite of their excessive narrowness. Indeed, it shows certain duration, a regularity of profit and return, an element of risk, a substantial commitment and a significant contribution to EGYPT's development.

- duration: the Management Contract was concluded for a period of 26 years.

- a regularity of profit and return: it results from article 1.7 of the Contract which defines Total Operating Revenue as follows: "*Means the sum of revenues realized (directly or indirectly) during any given fiscal year, by operating the hotel and its facilities, including the revenue realized through resident or transit hotel guests, or through other activities or leases or privileges approved by the manager.*"

- element of risk: the Claimant covered the initial expenditure required to regenerate the Shepheard Hotel and undertook the operational risk, deductible from the hotel's revenues.

- substantial commitment: the aim of the contract was to transform the Shepheard Hotel into a five-star establishment and HELNAN invested considerably to reach this goal and invest further amounts for maintenance and repair.

- contribution to development: the Contract has contributed to EGYPT's tourism industry. Moreover, HELNAN was the first company investing in the popular areas of Egypt such as Sharm El Sheikh, Ras Sudr, Nuweiba, Port Said and Fayed and that, by its marketing, it induced other companies to invest. In this respect it has largely contributed to the development of the country.

67. Consequently, the Contract qualifies as an "*investment*", even though the above mentioned criteria "*should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention*", as pointed out by Prof. Ch. Schreuer[18].

[18] Christoph H. Schreuer, The ICSID Convention: a Commentary (2001), at 140.

68. The Claimant also relies on decisions of ICSID Tribunals which, according to it gave a broad interpretation to the term "*investment*" in article 25 of the ICSID Convention[19].

69. The Claimant asserts that its contractual rights under the Contract fall within the definition of the term "*investment*" provided in Article 1 of the Treaty i.e. "*every kind of asset*". This precludes Egypt from rejecting that definition on the basis of the principle *alegans contraria non est audientur*. The Respondent reliance on the Award issued in Joy Mining v. A.R.E[20] is misplaced as in this case, the jurisdictional issue was that of " *whether or not bank guarantees are to be considered as an investment*". Furthermore, in this Award, it was found that the bank guarantee did not meet the definition of an "*investment*" contained in both the relevant bilateral investment treaty and the ICSID Convention.

70. Therefore, the Claimant concludes that the Respondent's objection to jurisdiction grounded on the notion of investment should be dismissed.

71. The Claimant analyses the Respondent's argument that the Claimant failed to prove the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT as an assertion that HELNAN has not sufficiently substantiated its claims. According to it, this matter pertains to the merits of the case rather than to the jurisdictional phase and to bring such evidence and such substantiation at this stage of the proceedings is neither required by the ICSID Convention nor by the Arbitration Rules.

72. The Claimant contends that its Request for Arbitration meets all the requirements pursuant to Article 36 (2) of the ICSID Convention and Rule 2 (e) of the Arbitration Institution Rules. Indeed, the Claimant's Request for Arbitration (i) contains information concerning the issues in dispute (ii) indicates the existence of a legal dispute between Claimant and Egypt pertaining to an investment (iii) provides an overview of the factual and legal issues. Therefore, Egypt can not object to Claimant's lack of substance within the Request for Arbitration.

73. In any case, for the *prima facie* standard to be satisfied, it is sufficient that the facts alleged by the Claimant's, provided they are ultimately proven true, be capable of constituting a breach of the Treaty. The Claimant relies in this respect on the Decisions on Jurisdiction made in the ICSID cases Bayindir Insaat

---

[19] Fedax v. Venezuela, ICSID Case n° ARB/96/4, Decision on jurisdiction of July 11, 1997; COSB v. Slovak , ICSID Case n° ARB/97/4 , Decision on Objections to Jurisdiction of May 24, 1999.

[20] See note 14.

Turizm Ticaret Ve Sanayi A.S.v. Islamic Republic of Pakistan[21] and Jan de Nul N.V. and Dredging International N.V. v. A.R.E.[22].

c) *The Arbitral Tribunal Decision*:

74. It is common ground that the Arbitral Tribunal has jurisdiction only if the requirements of Article 25 of the Convention are met. This Article reads as follow:

"*The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (...) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.*"

75. The Arbitral Tribunal has already found that this dispute falls within the temporal scope of the Treaty which includes the consent of the parties to the jurisdiction of the Centre. It must now decide whether this dispute is a legal dispute and arise directly out of an investment between a Contracting State and a national of another Contracting State.

76. It is not disputed that the dispute is a legal dispute. It is not disputed either that the Claimant is a national of a Contracting State, Denmark, but the Respondent denies that it arises from an investment and that it involves a Contracting State, EGYPT.

77. The Arbitral Tribunal is satisfied that the dispute arises directly out of an investment. It disagrees with the Respondent's view that the Contract can solely be "*a standard commercial agreement featuring ordinary commercial terms, regulating the management of an unremarkable property of no particular consequence on the Host State's development*". The Arbitral Tribunal accepts the Respondent's suggestion, based on ICSID precedents, as summarized in the unchallenged statement by Prof. Ch. Schreuer, that to be characterized as an investment a project " *must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State's development*[23]." But the Arbitral Tribunal also agrees with the Claimant that the Contract meets these requirements. Twenty six years is definitely a " *certain duration*", the Claimant's activity was supposed to provide it with a regular remuneration, refurbishing the Shepheard Hotel to

[21] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.v. Islamic republic of Pakistan, , ICSID Case n° ARB/03/29, Decision on jurisdiction of March 14, 2005.

[22] Jan de Nul N.V. & Dredging International N.V. v. A.R.E., ICSID Case n° ARB/04/13, Decision on Jurisdiction of June 16, 2006. .

[23] see note n°12

transform it into a five-stars hotel implied the risk of no commercial success and the amount of money necessary to achieve that goal and keep such classification for years qualifies as a substantial commitment. As for the contribution to the development of the EGYPT's development, the importance of the tourism industry in the Egyptian economy makes it obvious.

78. Moreover, Article 1 of the Treaty reads as follow:

" The term "investment" means every kind of asset and shall include in particular, but not exclusively:

(i) tangible and intangible, moveable and immoveable property, as well as any other rights such as leases, mortgages, liens, pledges, privileges, guarantees and any other similar rights,

(ii) a company or business enterprise, or shares, stock or other forms of participation in a company or business enterprise [...],

(iii) returns reinvested, claims to money and claims to performance pursuant to contract having an economic value [...]

(iv) industrial and intellectual property rights [...]

(v) concessions or other rights conferred by law or under contract [...]."

79. The Contract falls without any doubt within this broad definition and, in particular, under Article 1(v). Most significantly also, words as "assets", "any other rights", "any other similar rights", "pursuant to contract having an economic value", "under contract" shows that Article 1 encompass wide concepts that include undoubtfully the contractual obligations contained in the Contract.

80. In this case, both the requirements of ICSID precedents, as referred to by the Respondent and the definition of Article 1 of the Treaty are satisfied. Consequently, the Arbitral Tribunal concludes that the dispute arises out of an investment. There was no contention by the Respondent that the relation between the Claimant's claims and the Contract would not be direct. Thus the Arbitral Tribunal is satisfied that the dispute directly arises out of an investment.

81. Has the Claimant made a *prima facie* case that its case is against EGYPT? The Arbitral tribunal has no doubt in this regard. The Claimant alleges that through a conspiracy, various emanations of the Egyptian State planned the downgrading of the Shepheard Hotel from five-stars to four-stars and the

termination of the Contract in order to facilitate the privatisation of the Hotel. If it was true, and it remains to be proved, HELNAN would have a case against EGYPT. The Tribunal here follows the approach adopted by others ICSID Tribunals[24]. To ascertain the reality of the situation would require entering further into the merits of the case. This is what the Claimant suggested as it requested that the Respondent's objections to jurisdiction be dealt with the merits of the case. The Respondent took the contrary view and this view was accepted by the Tribunal. The consequence is that it must remain at a *prima facie* level and, at this level, it is satisfied that the Claimant has established the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT.

Thus, the Respondent's objection to jurisdiction on the ground that the Claimant has failed to prove such a *prima facie* case is dismissed.

C. The status of EGOTH

a) ***The Respondent's position:***

82. In order to further help the Tribunal to decide whether Claimant provided or not *prima facie* evidence as to the violation of the Treaty, the Respondent contends that it needs to clarify the legal situation of EGOTH which is considered by Claimant as an emanation of the Egyptian State.

The Respondent refers to the dispute that opposed SPP and Southern properties ltd to the Arab Republic of Egypt and EGOTH, known as the "*Pyramids Plateau*" *case*. In this case, an Arbitral Tribunal under the *aegis* of the International Court of Arbitration of the International Chamber of Commerce decided that " (....) *bearing in mind EGOTH's separate legal entity, we find it impossible to say that the breach committed by the Government was also ipso facto a breach of a joint obligation by EGOTH or that the Act of Government in cancelling the Project was an act that may be attributed also to EGOTH. (...). We accordingly hold that EGOTH was not liable for the cancellation*".

The Court of Appeal of Paris, which set aside the Award, agreed on that particular subject and held that EGOTH had:

"*indiscutablement une personnalité morale et un statut juridique distincts de l'Etat, qu'il pouvait, en conséquence, agir en son nom et avoir un patrimoine*

[24] Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.v. Islamic republic of Pakistan and Jan de Nul N.V. and Dredging International N.V. v. A.R.E., see notes n° 21 and 22.

propre avant que sa transformation en société anonyme, courant 1976, mette encore en évidence son caractère autonome[25]".

83. The Respondent further asserted at the hearing of August 17, 2006 that even though EGOTH is within the ownership of the Egyptian government, its administration remains independent. Accordingly, none of its contracts or acts is attributable to the government.
Nevertheless, Claimant's claims are addressed to EGOTH, which is not an entity of the Egyptian State, and thus cannot justify the jurisdiction of the Centre.

b) ***The Claimant's position*:**

84. The Claimant rejects EGYPT's objections to jurisdiction on the basis of EGOTH's status. Indeed, the claims it brings against Egypt do not solely involve EGOTH but also, *inter alia*, the Egyptian government, the Ministry of Tourism, the Department of Health, the Civil Defence Department, the Tourist Police, the Ministry of Justice, the Judicial Authority Police and the Ministry of Investment that have all contributed to the termination of Contract. The objection to jurisdiction should therefore be rejected.

85. In any case, however, the Claimant contends that EGOTH 's actions or omissions are attributable to Egypt. The Claimant refers to Article 4 to 11 of the ILC Rules applicable in all international obligations of States in order to determinate whether a State is responsible for the action or omission of an entity.

Claimant explains that:

"Article 4 addresses conducts of organs of a State [and] *(...) stipulates that the conduct of any State organ, whether exercising legislative, executive, judicial or any other function shall be considered an act of that State under international law, irrespective of the position the organ in question holds in the organisation of the State and whatever its character as an organ of the central government, or of a territorial unit of the State.*

Article 5 regulates the conduct of persons or entities which are not an organ of the State, but which are empowered by municipal legislation to exercise elements of governmental authority. These acts are considered acts of the State-

[25] Quotation in French in the Respondent's Memorial on its objections to jurisdiction, May 31, 2006, p.15, paragraph 91.

and thus attributable to it- under international law, provided the person or entity is acting in such capacity in the particular situation[26]".

86. In this light, Claimant contends that EGOTH was *de jure* and *de facto* an emanation of the Egyptian State and that consequently EGYPT should be held responsible for EGOTH's acts.

87. As asserted during the First Session of April 14, 2006, HELNAN recalls that EGOTH's predecessor - EHC- was a public sector company, wholly owned by the Egyptian Government, pursuant to Law No. 97 of 1983 that governed Public Sector Companies and organisation.

88. A new law named the Public Sector Companies Law was enacted in 1991 (hereinafter "the Law") which pooled the public sector companies into twelve State owned holding companies supervised by the Minister for the Public Sector. Claimant emphasizes that the Holding Company, that is 100% owned by EGYPT, also owns 100% of the share capital of EGOTH.

Even though the 1991 law purportedly aimed to separate legal entities from the State, Claimant underscores that the Holding Company is still 100% owned by the State since it appears from the statute that its role is to "*contribute to the development of national economy in its field of activity and through its subsidiary companies [i.e. EGOTH] within the framework of the public policy of the state*[27]".

89. Further, the Claimant insists on the role of the ministers and their impact on the Holding Company.

90. The Claimant also contends that pursuant to provisions from the 1991 law it is also entirely controlled by the Egyptian State via the Holding Company. EGOTH is then naturally, as the Holding Company, not an independent entity in view of the controls made by Egypt on any action the Holding Company and EGOTH attempt to do on their own.

Therefore, EGOTH is an emanation of the Egyptian State, acting under its entire control.

---

[26] Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.29, paragraph 76.
[27] Helnan's counter- Memorial on jurisdiction of July 14, 2006, p.31, paragraph 84.

The Claimant also underlines that, as a matter of fact, after the taking over by EGOTH, the Shepheard Hotel was immediately listed on the Egyptian Ministry of Investment's website, showing, once more, the role of EGYPT.

c) ***The Arbitral Tribunal's decision***:

91. The Arbitral Tribunal does not need to decide on the status of EGOTH in order to assess its jurisdiction in this case. It has already found that the Claimant has established the existence of a *prima facie* dispute directly arising out of an investment and involving EGYPT and that the dispute falls within the temporal scope of the Treaty. However, since the parties have thoroughly discussed this point, it considers *ex abundanti cautela* that it is its duty to solve this disputed issue in this Decision.

92. The Arbitral Tribunal is of the opinion that Claimant has convincingly demonstrated that EGOTH, through the Holding Company (which owns EGOTH at 100%), is under the close control of the State. Indeed, the following points must be underscored:

- The purpose of EGOTH is "*to contribute to the development of national economy in its field of activity and through its subsidiaries companies [i.e EGOTH] within the framework of the public policy of the State*" (article 2.2 of the Law);

- EGOTH's memorandum and articles of association are reviewed by the State Council (article 11);

- EGOTH's general assembly is headed by the Chairman of the Holding company's board of directors. Moreover, the Minister exercises administrative and executive powers on the Holding Company;

- Funds of EGOTH are public funds;

- The Manager and Director of EGOTH may be imprisoned if he/she does not distribute State's share of profits (Article 49.3).

However, all these gathered clues are not sufficient to conclude that EGOTH's conduct is attributable to EGYPT. Indeed, as pointed out by M. Crawford[28] "*the fact than an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in*

[28] James Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries, Cambridge University Press, 2002, page 100.

its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control- these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specific elements of governmental authority".

93. More significantly in this case, EGOTH was an active operator in the privatisation of the tourism industry on behalf of the Egyptian Government. Egypt's privatisation program was scheduled since 2001 and always included EGOTH's assets. The different announcements proposing to invest in Egypt, on the Ministry of Investment website, all refers to Egypt, the Holding Company and EGOTH. In this respect, it must be pointed out that according to Article 5 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts "*the conduct of a person or entity which is not a organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance*". Even if EGOTH has not been officially empowered by law to exercise elements of the governmental authority, its actions within the privatisation process are attributable to the Egyptian State.

94. Thus, the Respondent's characterization of EGOTH's status cannot be sustained. On the contrary, the Arbitral tribunal findings in this respect confirm, *ex abundanti cautela*, that the Claimant has established the existence of a *prima facie* dispute involving EGYPT.

95. In consideration of all the above, the Arbitral Tribunal retains jurisdiction.

D. <u>The allocation of costs:</u>

96. Each party requests that the other one be condemned to bear the costs in connection to these proceedings.

97. The Arbitral Tribunal will examine this question in its Award.

ON THE BASIS OF THE ABOVE

THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

1. The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.

2. The Arbitral Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.

3. The Arbitral Tribunal will take a decision regarding the costs in connection to this part of the proceedings in its Award.

Made on October 17, 2006

Mr. Yves DERAINS, Chairman of the Arbitral Tribunal

Prof. Rudolf DOLZER, Arbitrator

Mr. Michael LEE, Arbitrator

ANEXO 11

ICSID Case No. ARB/07/5

GIOVANNA A BECCARA AND OTHERS
(CLAIMANTS)

and

THE ARGENTINE REPUBLIC
(RESPONDENT)

PROCEDURAL ORDER NO. 3

(CONFIDENTIALITY ORDER)

---

27 JANUARY 2010

Table of Contents

PRELIMINARY REMARKS

1. In this Order, the Tribunal adopts the following method of citation:

- "R-MJ" refers to Respondent's First Memorial on Jurisdiction and Admissibility filed on 8 August 2008.
- "C-MJ" refers to Claimants' Counter-Memorial on Jurisdiction filed on 7 November 2008.
- "R-R-MJ" refers to Respondent's Reply Memorial on Jurisdiction and Admissibility filed on 23 February 2009.
- "C-R-MJ" refers to Claimants' Rejoinder Memorial on Jurisdiction filed on 6 May 2009.
- "RSP 20.10.06" refers to Respondent's letter of 20 October 2006.
- "RSP 18.12.06" refers to Respondent's letter of 18 December 2006.
- "RSP 24.01.07" refers to Respondent's letter of 24 January 2007.
- "CL 12.03.08" refers to Claimants' letter of 12 March 2008.
- "RSP 19.03.08" refers to Respondent's letter of 19 March 2008.
- "CL 27.03.08" refers to Claimants' letter of 27 March 2008.
- "CL 03.04.08" refers to Claimants' letter of 3 April 2008.
- "RSP 05.02.09" refers to Respondent's letter of 5 February 2009.
- "CL 07.06.09" refers to Claimants' letter of 7 June 2009.
- "CL 06.07.09" refers to Claimants' letter of 6 July 2009.
- "CL 30.01.09" refers to Claimants' letter of 30 January 2009.
- "RSP 24.06.09" refers to Respondent's letter of 24 June 2009.
- "CL 16.09.09" refers to Claimants' letter of 16 September 2009.
- "RSP 16.09.09" refers to Respondent's letter of 16 September 2009.
- "First Session Tr." refers to the transcript made of the First Session of 10 April 2008 (Tr. p. 1/l. 1 means Transcript on page 1 on line 1).
- "First Session Minutes" refers to the Minutes of the First Session of 10 April 2008.
- "Exh. C-[N°]" refers to Claimants' exhibits.
- "Exh. R[letter]-[N°]" refers to Respondent's exhibits.

I. GENERAL CONTEXT OF THE DISPUTE[1]

2. This Order is issued within the context of a dispute relating to Claimants' claim for compensatory damages due to Respondent's alleged breach of its obligations under the *Agreement between the Republic of Argentina and the Republic of Italy on the Promotion and Protection of Investments*, signed in Buenos Aires on 22 May 1990, in two original copies, in the Italian and the Spanish language, both texts being equally authentic (hereinafter "Argentina-Italy BIT") in relation to alleged bonds issued by Respondent, allegedly held by Claimants, on which payment Respondent defaulted.

3. After Argentina defaulted on 24 December 2001 on over US$ 100 billion of external bond debt owed to both non-Argentine and Argentine creditors,[2] it proceeded with a restructuring of its debt culminating in the launching on 14 January 2005 of an Exchange Offer, pursuant to which bondholders could exchange existing series of bonds, on which Argentina had suspended payment, for new debt that Argentina would issue. On 25 February 2005, the period for submitting tenders pursuant to the Exchange Offer expired with the participation of 76.15% of all holdings.[3]

4. The Claimants did not participate to the Exchange Offer. It is disputed between the Parties whether and, if so, to what extent Claimants are entitled to claim for compensatory damages concerning the bonds purchased by Claimants and not submitted to the Exchange Offer. This dispute brought Claimants to file their Request for Arbitration with ICSID on 14 September 2006.

5. In the light of the object of the present order focusing on particular procedural issues, namely on confidentiality issues, it is at this stage not necessary to enter into more details on the facts and circumstances of this

---

[1] The following summary of the factual background is not meant to be exhaustive, and simply aims at laying down the general context of the dispute at stake.

[2] R-R-MJ § 66.

[3] R-MJ § 40; C-R-MJ § 205

dispute, which will further be dealt with when dealing with the jurisdictional phase of the case.

II. PROCEDURAL HISTORY

6. On 14 September 2006, Claimants filed their Request for Arbitration, accompanied by Annexes A through E, which contain information relating to individual Claimants, such as name, address, Database file number, ISIN Code(s) of bondholding, nominal amount, purchase price and purchase date, as well as supporting documentation with respect to such data.

7. Between 14 September 2006 and 7 February 2007, the date of registration of the Request for Arbitration, Claimants submitted supplemental annexes as well as "substituted versions" of annexes previously submitted reflecting: (i) the addition of certain Claimants, (ii) the withdrawal of certain Claimants, (iii) certain corrections and substitutions to the documentation for other Claimants, and (iv) the revision of certain aggregate amounts based on the foregoing adjustments and the addition of one new bond series.

In summary, the Annexes to the Request for Arbitration that contain data relating to individual Claimants are organized as follows:

> "Lists of Claimants
>
> | | |
> |---|---|
> | Annex A | List of Claimants who are natural persons; |
> | Annex B | List of Claimants who are natural persons and who co-own bonds with (non-claiming) non-Italian nationals (and therefore claim compensation only for their pro-rata share); |
> | Annex C | List of Claimants that are juridical entities |
>
> Supporting Documentation
>
> | | |
> |---|---|
> | Annex D | Supporting documentation for Claimants listed in Annexes A or B; |

Annex E Supporting documentation for Claimants listed in Annex C.

Supplemental Lists

Annex K List of Claimants that were added to Annexes A, B or C prior to registration of the Request for Arbitration;

Annex L List of Claimants that have withdrawn their consent to arbitrate and have been removed from Annexes A, B or C, and D or E, as applicable."[4]

In addition, Annexes I and J contain documents relating to the revision of the aggregate amounts (Annex I) and the addition of one new bond series (Annex J).

8. Respondent opposed the changes made to the identity and number of Claimants as reflected in the substitute annexes and repeatedly argued that the concerned Annexes should not be admitted and that the Request for Arbitration should be rejected.[5]

9. On 7 February 2007, based on the finding that the dispute is not manifestly outside the jurisdiction of ICSID, the Secretary-General of ICSID registered Claimants' Request for Arbitration with accompanying Annexes A through L and issued the Notice of Registration.

10. On 16 May 2007 and 5 February 2008, Claimants submitted again "substituted versions" of Annexes A through E and I through L, reflecting the withdrawal of certain Claimants as well as limited corrections to the documentation for certain Claimants.

11. On 4 March 2008, Respondent requested the Tribunal to order Claimants to submit the Excel files of Annexes A, B and C to the Request for

[4] CL 12.03.08 p. 4.

[5] RSP 20.10.06, pp.1,fol.; RSP 18.12.06, pp. 6 fol.; RSP 24.01.07, pp. 1 fol.

Arbitration and its further substitutions, as well as of Annexes K and L in order to facilitate Respondent's exercise of its rights of defence.

12. On 12 March 2008, Claimants responded to Respondent's letter of 4 March 2008 requesting the Tribunal to reject Respondent's request alleging that Claimants have no Excel files of the concerned data and that such data is kept on a Microsoft SQL Database. After giving further explanations on the content of the various Annexes, Claimants stressed that it had already submitted to Respondent computer-readable disks with searchable ".pdf" versions of the concerned Annexes containing individual information on each Claimant. According to Claimants, this information and support provided to Respondent already went beyond the minimal requirements set out in ICSID Institution Rules. Nevertheless, Claimants were further willing to give direct access to Respondent to its online Database, provided that Respondent agrees to sign a confidentiality agreement, a draft of which was attached to Claimants' letter.

13. On 19 March 2008, Respondent responded to Claimants' letter of 12 March 2008 and requested a safety copy of the SQL server for internal use. According to Respondent the format of the information provided by Claimants so far did not allow Respondent to properly exercise its defence rights since it did not constitute "a well organized database of Claimant data and documentation . . .in a format easily accessible for Respondent". Respondent further rejected Claimants' proposed confidentiality agreement arguing that it went beyond confidentiality duties contemplated in the various ICSID Rules and Regulations, which would already and sufficiently ensure confidentiality.

14. On 27 March 2008, Claimants responded to Respondent's letter of 19 March 2008 insisting that ICSID Convention and Rules did not sufficiently protect confidentiality of Claimants' personal data under the applicable Italian law and that they already submitted to Respondent all relevant information in a form complying, and even going beyond the requirements of Rules 1 and 2 of ICSID Institution Rules. Therefore, Claimants asked the Tribunal to reject Respondent's request to order Claimants to provide the

SQL server in back up format, and to order Respondent to execute the proposed confidentiality agreement, so as to allow Claimants to provide Respondent with Annexes A, B, C, K and L in Microsoft Access format.

15. On 31 March 2008, ICSID informed the Parties that the Tribunal had taken note of the Parties' correspondences of 4, 12, 19 and 27 March 2008 and had decided to defer its ruling on the matter until the First Session of 10 April 2008.

16. On 10 April 2008, the First Session was held at the seat of the Centre in Washington, D.C. at which a procedural calendar for the further conduct of the proceedings was established. During the First Session it was agreed that the arbitration would be bifurcated in a jurisdictional and a merits phase. With regard to the confidentiality issue, the President of the Tribunal (Dr. Robert Briner) stated that this issue concerned information relating to individual Claimants and was therefore not relevant for this jurisdictional phase.[6] Thus, the issue of confidentiality would be dealt with at that time when the individual situation of individual Claimants would have to be looked at, stressing however that "it is inherent to arbitration, to ICSID arbitration, even if in ICSID most of the awards and decisions become public, that the individual circumstances of individual Claimants remain confidential".[7]

17. On 9 May 2008, ICSID sent out a letter on behalf of the Tribunal in which it amended the procedural calendar announced during the First Session. According to this new calendar, the Parties were to consult regarding the exchange of documents requested by each of them and, in case no agreement could be reached, to submit on 5 December 2008 their respective "Redfern Schedules" together with optional explanatory letters.

18. On 5 December 2008, the Parties submitted their respective "Redfern Schedules" listing their specific requests for document production by the other Party and their objections to the other Party's requests.

---

[6] First Session Tr. p. 140/l. 17; p. 141/l. 3-9.

[7] First Session Tr. p. 141/l. 18-22; p. 142/l. 1-9.

19. On 12 December 2008, the Tribunal issued Procedural Order No. 1 ruling on the Parties' production for document requests and ordering the Parties to submit such documents on or before 22 December 2008.

20. On 22 December 2008, the Parties exchanged documents in accordance with Annex A of the Tribunal's Procedural Order No. 1.

As of this date Claimants contend having provided Respondent access to:[8]

- Annexes A, B, C, K and L on DVDs in a ".pdf" searchable format, as well as in Microsoft Access format;
- Annexes D and E in form of compilations of the scanned documentation (Annexes A, B and C each contain an index cross-referencing the names of each Claimant with the file number allocated to the supporting documentation found in Annexes D and E concerning the Claimant).

21. In contrast, Respondent submitted only part of the documents mentioned in the Tribunal's Procedural Order No. 1 (see above § 19).

22. On 30 January 2009, Claimants sent a letter complaining about Respondent's alleged failure to timely comply with the document production as ordered by the Tribunal in its Procedural Order No. 1 and Respondent's alleged refusal to conclude a confidentiality agreement in order to protect Claimants' personal information. Claimants therefore requested that the Tribunal order Respondent to conclude the production of all documents in accordance with the Tribunal's Procedural Order No. 1 and to treat as confidential any data or documentation relating to individual Claimants (see below § 43).

23. On 5 February 2009, Respondent reacted to Claimants' letter of 30 January 2009 requesting further time to respond. In the meantime, it stressed again that it did not consider a Confidentiality Agreement as necessary, or mandated by Italian law or urgent. Respondent nevertheless indicated that it had agreed to negotiate the matter with Claimants and enclosed a copy of a confidentiality agreement it would be willing to enter into.

---

[8] CL 12.03.08 p. 3, p. 5; CL 30.01.09, p. 5; C-MJ § 292; C-R-MJ § 241.

24. On 9 February 2009, Respondent completed its document production pursuant to the Tribunal's directions (see above § 20) and Claimants' request (see above § 22).

25. On 12 February 2009, the Tribunal invited the Parties to continue their discussions in order to arrive at a Confidentiality Agreement and stated that "if the Parties cannot come to such an agreement and if so requested by a Party, the Tribunal will hear the Parties on this matter at the occasion of the June 2009 Hearing and then take the necessary measures".

26. On 21 May 2009, the Tribunal set forth certain principles for conduct of the forthcoming Hearing on Jurisdiction confirming among others that the hearing would last 5.5 days, defining the scope of direct examination of witnesses and experts and setting new deadlines for the designation of witnesses and experts and submission of documents for direct and cross-examination. According to this letter, the Parties were to exchange the lists of witnesses to be cross-examined and those presented for direct examination by 28 May 2009, and any documents not already in the record to be used for the purpose of cross-examination were to be exchanged by 3 June 2009 and documents not already in the record to be used for the purpose of re-direct examination by 9 June 2009.

27. On 28 May 2009, the Parties submitted their designation of witnesses and experts relevant to the jurisdictional phase. Claimants did not directly designate witnesses or experts from Respondent for cross-examination, but reserved the right to do so in case Respondent would designate any such witnesses or experts for direct examination and to expand the scope of redirect examination of Claimants' witnesses or experts accordingly.

28. On 3 June 2009, Respondent submitted its documents for direct and cross-examination accompanied by an index, and requested disclosure of documents regarding the direct testimony by Prof. Briguglio and Prof. Nagareda. This submission included the so-called "Supplemental Exhibits" binders. Claimants did not submit any documents relating to its

cross- or re-direct examination of witnesses and experts designated by Respondent.

29. On 7 June 2009, Claimants responded to Respondent's submission of 3 June 2009. With regard to the submission by Respondent of its "Supplemental Exhibits", Claimants deemed it as untimely and abusive. In addition, Claimants brought forward that these exhibits contained 21 expert opinions and transcripts from other treaty arbitrations involving Argentina, ignoring any confidentiality protections in such proceedings. According to Claimants, besides the disregard for confidentiality duties, such submission would be contrary to the principle of equality of the Parties, since Claimants would not have access to those proceedings and Respondent's selective and out of context use of such evidence would be seriously unbalanced. Consequently, Claimants requested the Tribunal to "strike all confidential material Respondent has submitted from other arbitrations, including in particular Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528".

30. On 9 June 2009, ICSID informed the Parties that in the light of unfortunate circumstances affecting the President of the Tribunal (Dr. Briner), the Hearing on Jurisdiction could not take place as foreseen.

31. On 9 June 2009, Claimants acknowledged that the Hearing was postponed and understood that related deadlines were suspended, including deadlines relating to the submission of examination documents.

32. On 17 June 2009, the President of the Tribunal (Dr. Briner) sent out a letter to the Parties providing as follows: (i) with respect to the issues raised by the Parties in relation to the Hearing, in particular to the testimony of fact and expert witness, the Tribunal reserved its decision for a later stage during the proceedings, once the new dates for the Hearing have been established; (ii) with respect to Claimants' request for the production of documents as contained in their letter of 20 May 2009, it is denied; (iii) with regard to Claimants' objection of 7 June 2009 regarding Respondent's submission of 3

June 2009, the Tribunal invited Respondent to state its position, especially with regard to Claimants' objection relating to confidential material, before 24 June 2009.

33. On 24 June 2009, Respondent responded to the President's letter of 17 June 2009 and to Claimants' letters of 7 and 9 June 2009. With regard to the confidentiality issue, Respondent stressed that (i) it had not submitted any document filed in sealed proceedings, (ii) that there was no general rule of confidentiality governing ICSID arbitration proceedings and (iii) that it had never been deprived of making use of such documents in any ICSID arbitral proceedings. Respondent therefore requested that Claimants' objections to the admissibility of the relevant parts of the Supplemental Exhibits be rejected.

34. On 26 June 2009, the Tribunal invited Claimants to respond to Respondent's letter of 24 June 2009.

35. On 6 July 2009, Claimants responded to Respondent's letter of 24 June 2009. With regard to confidentiality, Claimants' position can be summarized as follows: (i) Respondent's selectively-produced confidential documents should be excluded to preserve fairness and equality of the Parties, (ii) Respondent's position and action demonstrates that it feels at liberty to disclose and make use of confidential information. Claimants referred, among others, to an article published in Italy containing allegedly erroneous information regarding the current status of the arbitration proceeding with numerous statements that mimic those in Respondent's written pleadings and correspondence (Isabella Bufacchi, *Tango-Bond, tempi lunghi all'Icsid*, Il Sole, 19 June 2009). Respondent's position and actions would constitute an abuse by Respondent of confidentiality, which would make a confidentiality order necessary in order to protect Claimants' personal information. Consequently, with regard to the confidentiality issue, Claimants requested the Tribunal to issue and order ruling as follows:

"

- The following confidential material Respondent has submitted from other treaty arbitration shall be excluded from the record, including Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-

462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528.

[…]

- The record of this proceeding ("Confidential Information") shall be used solely for purposes of conducting this arbitration and may be disclosed only to each party and its duly appointed representatives, agents and employees directly working on the arbitration proceedings; the Tribunal and persons employed by the Tribunal; ICSID and persons employed by ICSID; or such other entity that may be designated by Claimants or Respondent to maintain Claimant data and documentation; and persons serving as witnesses, experts, advisors or consultants retained by the parties in connection with the arbitration, to the extent the Claimant data or documentation is relevant to any such person's testimony or work. This Order shall be without prejudice to the Parties' ability to publish general updates on the status of the case, including for the information of Claimants, provided that such updates do not contain or reflect any data or documentation relating to individual Claimants. The Tribunal should direct Counsel to agree to a Confidentiality order to be provided for the Tribunal accordingly. In the absence of an agreed order within two weeks from the date of this order, Counsel should then submit their proposed orders for the Tribunal to consider."

36. In their respective letters of 16 September 2009, addressing several hearing issues, Claimants repeated their request to strike from the record of these proceedings confidential material submitted by Respondent, in particular the "21 expert opinions and transcripts from other treaty arbitrations involving Argentina, ignoring any confidentiality protections in such proceedings", while Respondent insisted that all documents submitted by it on 3 June 2009 be admitted.[9] Further, Claimants reiterated their request "– first made in March 2008 – that the Tribunal enter a confidentiality order to govern these proceedings".

37. Following the resignation of Dr. Briner as President of the Tribunal, Prof. Pierre Tercier was appointed on 2 September 2009 as his successor and new President of the Tribunal. The procedure, which had been on hold since June 2009, was actively resumed on 14 October 2009 through a joint telephone conference between the Tribunal, the Secretary and the Parties. During this telephone conference, both Parties confirmed their previous positions

[9] CL 16.09.09, p. 3, item 3.b; RSP 16.09.09, pp. 6 and 10.

concerning the confidentiality issue and the Tribunal announced that it would make a decision.

III. SUMMARY OF THE PARTIES' POSITIONS

A. Claimants' Position

38. According to Claimants, in early 2006, Task Force Argentina collected data and documentation from each Italian national bondholder with a claim who wished to consent to Respondent's offer of ICSID arbitration. Those data and evidence included a declaration of consent to ICSID arbitration, delegation of authority, and power of attorney, as well as information and documentation relating to each bondholder's identity, Italian nationality and domicile, and ownership of bonds. This information was then compiled in coordination with Cedacri. S.p.A. ("Cedacri"), a leading provider of informational technology services in Italy, into an online Database.

39. When submitting their Request for Arbitration, and on various occasions thereafter, Claimants submitted part of the information compiled in the Database in the form of Annexes A to E, K and L to its Request for Arbitration (see above §§ 7 and 10) and in various other formats (see above § 20). The only information contained in the Database and having not yet been submitted to Respondent would be additional information and documents relating to the nationality of the Claimants.[10]

40. On several occasions Claimants stressed that they were willing to give Respondent access to all Claimants' data, including direct access to the Database itself, provided that Respondent executes an appropriate Confidentiality Agreement in order to protect the confidentiality of Claimants' personal data.[11]

41. Claimants' motivated the need to protect their personal information with the following main arguments:

---

[10] C-R-MJ § 242.

[11] CL 12.03.08, p. 1 and pp. 5-6 (see also Annex B); CL 27.03.08 p. 4; CL 03.04.08, p. 10 n. 20.

(i) The Database is kept in Italy and is therefore subject to the Italian Legislative Decree of 30 June 2003 n. 196 (hereinafter, the "Italian Privacy Code"), which mandates strict compliance with a set of rules therein established and regulating, under articles 31 to 36, the electronic management of personal data. The Italian Privacy Code "requires, in particular, that in the case of access to, and use of, private information through electronic means (such as stand-alone personal computers, networked systems, online electronic access systems), the holder of the data adopts specific technological protection measures illustrated under an ad hoc Annex to the Italian Privacy Code, as amended from time to time".[12] "Moreover, in the case of transmission of private information to third parties or in the case of transfer of the same towards non-EU Countries, the Italian Privacy Code requires that the transmitting entity takes steps to ensure that the data are thereafter used only for the purposes for which they were originally collected".[13]

(ii) ICSID's legal framework (in particular Article 48(5) of the ICISD Convention and Rules 15 and 32(2) of the ICSID Arbitration Rules) would "not provide for the requisite confidentiality for Claimants' data", and it would be "common practice for parties to an ICSID arbitration to conclude a confidentiality agreement to secure protection of private or business confidential information, and for ICSID Tribunals to order the parties to do so where a party fails to agree to do so".[14]

(iii) Such protection of Claimants' personal information would not cause any prejudice to Respondent, as "Respondent will be free to use the data as necessary for the arbitration and would only be limited as to disclosure". [15]

42. Owing to insurmountable differences in the Parties' respective positions, they were unable to agree on the content and scope of a Confidentiality Agreement.[16]

---

[12] CL 12.03.08, p. 5.

[13] CL 12.03.08, pp. 5-6.

[14] CL 27.03.08, pp. 2, 3.

[15] CL 27.03.08, p. 3.

43. Consequently, Claimants subsequently modified their request that the Tribunal order Respondent to execute the proposed Confidentiality Agreement into a request that the Tribunal issue an order providing as follows:

> "The Tribunal orders the parties to treat as confidential any data or documentation submitted by the other party in this proceeding and relating to individual Claimants. Such data or documentation shall be used solely for purposes of conducting this arbitration and may be disclosed only to each party and its duly appointed representatives, agents and employees directly working on the arbitration proceedings; the Tribunal and persons employed by the Tribunal; ICSID and persons employed by ICSID; Cedacri S.p.A. or such other entity that may be relied upon to maintain Claimant data and documentation; and persons serving as witnesses, experts, advisors or consultants retained by the parties in connection with the arbitration, to the extent the Claimant data or documentation is relevant ot any such person's testimony or work." [17]

44. Following the submission by Respondent on 3 June 2009 of its "Supplemental Exhibits", Claimants raised various objections regarding such submission (see above § 28 fol.), including the objection that among the documents submitted by Respondent would be "21 expert opinions and transcripts from other treaty arbitrations involving Argentina, ignoring any confidentiality protections in such proceedings". [18] Because the "selective" and "out of context" use by Respondent of these documents would be "seriously unbalanced" and allow Respondent an "unfair advantage over Claimants, contrary to the principle of equality of the parties", [19] Claimants further requested the Tribunal to issue an order that:

> "Respondent shall not use at the hearing confidential material it has submitted from other arbitrations, including Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528" [20]

---

[16] CL 30.01.09, p. 1, see also pp. 4, 6 -7.

[17] CL 30.01.09, p. 8.

[18] CL 07.06.09, p. 3; see also CL 06.07.09 p. 7.

[19] CL 07.06.09, p. 3.

[20] CL 07.06.09, p. 7.

45. In its submission of 6 July 2009, confirmed by its submission of 16 September 2009, Claimants modified and generalized their previous requests regarding confidentiality as follows:

> "The following confidential material Respondent has submitted from other treaty arbitrations shall be excluded from the record, including Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528.
>
> [...]
>
> The record of this proceeding ("Confidential Information") shall be used solely for purposes of conducting this arbitration and may be disclosed only to each party and its duly appointed representatives, agents and employees directly working on the arbitration proceedings; the Tribunal and persons employed by the Tribunal; ICSID and persons employed by ICSID; or such other entity that may be designated by Claimants or Respondent to maintain Claimant data and documentation; and persons serving as witnesses, experts, advisors or consultants retained by the parties in connection with the arbitration, to the extent the Claimant data or documentation is relevant to any such person's testimony or work. This Order shall be without prejudice to the Parties' ability to publish general updates on the status of the case, including for the information of Claimants, provided that such updates do not contain or reflect any data or documentation relating to individual Claimants. The Tribunal should direct Counsel to agree to Confidentiality order to be provided for the Tribunal accordingly. In the absence of an agreed order within two weeks from the date of this order, Counsel should then submit their proposed orders for the Tribunal to consider."[21]

46. Besides arguments previously raised (see above § 42 and 44), Claimants base their request on the following supplemental arguments:

(i) The Parties have been unable to agree on a Confidentiality Agreement.[22]

(ii) Respondent has adopted an approach in which it "picks and chooses" when to respect confidentiality according to its convenience, feeling free to use confidential information and records from other arbitrations and court proceedings.[23]

---

[21] CL 06.07.09, p. 12; see also CL 16.09.09 p. 3.

[22] CL 06.07.09, p. 6.

[23] CL 06.07.09, p. 2, pp. 5-7.

(iii) Respondent's position that "[t]here is no provision in the ICSID Convention or in the ICSID Arbitration Rules establishing a general principle of confidentiality" indicates that a confidentiality order is necessary in order for Respondent to respect confidentiality.[24]

(iv) Claimants suspect that Respondent may have been leaking information about the present arbitration to the press, whilst misstating some of the information.[25]

(v) Respondent's criminal allegations against Claimants and professional ethics allegations against counsel as contained in Respondent's letter of 24 June 2009 are abusive because they are "unproven and inapposite to the eleven jurisdictional issues".

B. Respondent's Position

47. Respondent rejects all of Claimants' requests for confidentiality protection, based mainly on the following arguments:

48. *Claimants Personal Data.* With regard to the issue of personal information relating to individual Claimants, Respondent contends that Claimants has a duty to provide Respondent with a "well-organized database of Claimant data and documentation", "in a format easily accessible for Respondent".[26] According to Respondent, Claimants cannot condition this duty upon "inappropriate exigencies" such as a Confidentiality Agreement, which would constitute "a wholly unprecedented and in any even inadmissible requirement".[27]

49. Further, Respondent contends that a confidentiality ruling is not necessary in this arbitration and is not and could not be mandated by Italian law.[28]

---

[24] CL 06.07.09, p. 6.

[25] CL 06.07.09, pp. 6-7.

[26] RSP 19.03.08, p. 6.

[27] RSP 19.03.08, p. 8.

[28] RSP 05.02.09, p. 2.

50. Although Respondent nevertheless agreed to enter into negotiation concerning a confidentiality agreement and submitted a draft of what it thought was an admissible agreement, it rejected Claimants' concrete proposals of a draft Confidentiality Agreement as going "well beyond what is required" and "not fairly balanced".[29] Respondent asserts that Claimants are not entitled to require Respondent "to assume, under a 'Confidentiality Agreement', confidentiality obligations other than those already provided for in the ICSID Convention and ICSID Arbitration Rules", i.e., in Article 48(5) of the ICSID Convention and Rules 15 and 32(2) of ICSID Arbitration Rules.[30]

51. *Confidentiality of the Proceedings and Evidentiary Material*. With regard to Claimants' allegations that Respondent submitted confidential material relating to other arbitrations and to Claimants' corresponding request to strike such material from the record, Respondent asks the Tribunal to deny Claimants' request and to admit all the documents submitted by Respondent on 3 June 2009.[31] Respondent brings forward the following main arguments:

(i) The concerned material, relating to testimonies given by some of Claimants' experts in other arbitral proceedings, is "relevant and wholly appropriate for impeachment purposes"[32] and was "timely filed".[33]

(ii) Respondent has never been deprived of making use of such documents in any ICSID arbitral proceedings it was involved in, since such material would be "essential to ascertain the credibility and consistency of the witnesses and experts the opposing party presents".[34] Restricting the use of

---

[29] RSP 05.02.09, p. 2.

[30] RSP 19.03.08, p. 8.

[31] RSP 24.06.09, p. 8; RSP 16.09.09, p. 10.

[32] RSP 24.06.09, p. 6.

[33] RSP 16.09.09, p. 6.

[34] RSP 24.06.09, p. 8.

such documents for impeachment purposes would entail a "serious departure from principles of due process and the established procedure".[35]

(iii) The fact that Respondent possesses such material is only the consequence of the fact that such witnesses and experts have been repeatedly presented by different claimants in cases brought against Argentina, and such "de facto experience that Argentina acquired in previous cases does not mean in a juridical sense that the principle of equality of arms might have been breached".[36]

(iv) Respondent has not submitted any document filed in a sealed proceeding. With regard to the documents submitted and relating to the court case *BG Group PLC v. Argentina*, they have become public.[37]

(v) All documents filed by Respondent on 3 June 2009 that were also filed or produced in other proceeding were presented in full, and not "selectively" and "out of context".[38]

(vi) There is "no general rule of confidentiality governing ICSID arbitration proceedings", and in particular there is "no provision in the ICSID Convention or in the ICSID Arbitration Rules establishing a general principle of confidentiality or a confidentiality rule applicable to the kind of documents submitted by Argentina".[39]

IV. TRIBUNAL'S POWER TO DECIDE AND GENERAL LEGAL CONTEXT

A. Preliminary Remarks

52. Having first asked the Tribunal to direct Respondent to enter into an appropriate Confidentiality Agreement protecting Claimants' personal information (see above § 12), Claimants currently request an order for

---

[35] RSP 24.06.09, p. 8.

[36] RSP 24.06.09, p. 6, referring to „CIT Group Inc. v. Argentine Republic" (ICSID Case No. ARB/04/9).

[37] RSP 24.06.09, p. 6 and p. 7.

[38] RSP 24.06.09, p. 7.

[39] RSP 24.06.09, p. 7.

confidentiality aiming at protecting the entire "record of these proceedings" and to exclude allegedly confidential material submitted by Respondent (see above § 45). Respondent insists on rejecting Claimants' requests with regard to confidentiality (see above §§ 47-51).

53. In its letter of 12 February 2009 (see above § 25), the Tribunal had announced that – lacking an agreement between the Parties – the issue of confidentiality would be dealt with during the Hearing on Jurisdiction scheduled in June 2009. Unfortunately, this Hearing could not take place as planned in June 2009 due to resignation of the former President of the Tribunal (Dr. Briner) and has been postponed to April 2010. Further, the Parties have been unable to settle this issue and continue to express diverging opinions as to the role and scope of confidentiality in investment arbitration proceedings. This divergence is creating doubts as to the standard of confidentiality to be applied to the present procedure thereby preventing Claimants from submitting further documents and information.

54. Basing itself thereon, the Tribunal is of the opinion that in order to ensure the proper continuation of the procedure as well as the orderly conduct of the up-coming Hearing, it is appropriate and necessary to decide on the confidentiality issue now and by the way of a written decision.

55. Both Parties have had sufficient opportunity to express their positions, which have duly been taken into account by the Tribunal in designing the below order.

56. In this respect, it should be noted that although initiated by Claimants' request, the present order is also based on the Tribunal's own power to rule on the conduct of these proceedings (see below §§ 59-66). The Tribunal is of the opinion that the present circumstances as described above (see §§ 6-37) clearly indicate that Parties will not be able to find an agreement, and the Tribunal is therefore of the opinion that it shall decide on the confidentiality issue right away.

57. After establishing its power to issue such an order, the Tribunal shall firstly describe, in a general manner, the confidentiality standard in ICSID arbitration, before applying this standard to the present dispute.

58. At this stage, the Tribunal wishes to recall that, according to common practice, the Tribunal is not bound by previous decisions of other international tribunals. However, the Tribunal is also of the opinion that, subject to the specific provisions of a treaty in question and of the circumstances of the actual case, it should attempt to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[40] The Tribunal may therefore pay due consideration to earlier decisions of international tribunals, where it deems that such consideration is appropriate in the light of the specific factual and legal context of the case and the persuasiveness of the legal reasoning of these earlier decisions.

B. Power of the Tribunal to Order Confidentiality

59. In their various correspondences requesting the Tribunal to issue an order for confidentiality, Claimants have not indicated the legal basis for issuing such a decision.

60. Respondent has not contested the Tribunal's power to issue such an order, and even suggested the option of a confidentiality order as a substitute to a Confidentiality Agreement between the Parties during the First Session.[41] Respondent merely objects that confidentiality, as requested by Claimants, is not necessary and not mandated by the applicable legal framework (see above §§ 23 and 49).

61. Neither Party thus contests the Tribunal's power to rule on confidentiality issues. Nevertheless, for the sake of comprehensiveness and transparency, the

[40] On the precedential value of ICSID decisions, *see* Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse? Freshfields lecture 2006, Arbitration International 2007, pp. 368 *et seq*.

[41] First Session, Tr. p. 141/l. 10-16.

Tribunal shall expressly indicate the legal provisions on which such power is based.

62. In this respect, two sets of provisions enter into consideration:

(i) Provisions on Provisional Measures:

Article 47 of the ICSID Convention provides:

"Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party".

Rule 39 (1) of the ICSID Arbitration Rules provides:

"At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures".

(ii) Provisions on Procedural Orders:

Rule 19 of the ICSID Arbitration Rules provides:

"The Tribunal shall make the orders required for the conduct of the proceeding".

63. The Tribunal notes that there is as of today no uniform practice concerning the use of "orders" or "provisional measures" with regard to confidentiality issues in international investment arbitration. While in some cases, parties and/or tribunals have addressed confidentiality issues in the form of provisional measures,[42] others used the form of an order or even a combination of both.[43]

64. In this respect, the members of the Tribunal hold somewhat different views. However, the members of the Tribunal all agree that this question is of

---

[42] See e.g., *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1 (hereafter "*Amco Case*"), Decision on Request for Provisional Measures of December 9, 1983, 24 *ILM* 365 (1985), and *Biwater Case*, Procedural Order No. 3 of September 29, 2006, §§ 109-111.

[43] See e.g. *Metalclad Corporation v. United Mexican States,* ICSID Case No. ARB(AF)/97/1 (hereafter "*Metalclad Case*"), Award of 30 August 2000, § 13, in which the Party requested a combination of provisional measures and procedural order.

mainly technical nature and does not carry any substantial practical relevance for the present case.

65. In the present case, the nature of Claimants' requests aim to determine the standard of confidentiality that applies to information and documents submitted, issued or otherwise accessed during these proceedings and thereby to determine the scope of the use each Party may make of such information and documents. These questions relate to the rules applicable to the conduct of the proceedings and can therefore appropriately be addressed by an order under the terms of Rule 19 of the ICSID Arbitration Rules.

66. **Consequently**, the present confidentiality order is based on the Tribunal's power to determine the conduct of the proceedings as deriving from Rule 19 of the ICSID Arbitration Rules combined.

C. In General: Confidentiality Standard in ICSID Arbitration

67. Within the context of the generally acknowledged trend towards transparency in investment arbitration, the Tribunal shares the opinion expressed by the tribunal in the *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (hereafter "*Biwater Case*"), according to which:

> "In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources. [44]

68. As analysed by various international tribunals and authors,[45] the ICSID Convention, the Administrative and Financial Regulations and the Arbitration

---

[44] ICSID Case No. ARB/05/22, Procedural Order No. 3 of September 29, 2006, § 121.

[45] Margrete Stevens, Confidentiality Revisited, in News from ICSID Vol. 17 No. 1 (Spring 2000), pp. 1, 8-10; Christina Knahr / August Reinisch, Transparency versus Confidentiality in International Investment Arbitration — The Biwater Gauff Compromise, The Law and Practice of International Courts and Tribunals Vol. 6 (2007), pp. 97 fol.; Benjamin H. Tahyar, Confidentiality in ICSID Arbitration after Amco Asia Corp. v. Indonesia: Watchword or White Elephant? Fordham International Law Journal Vol. 10 (1986), pp. 93 fol., 109 fol.

Rules only contain limitations on specific aspects of confidentiality and privacy, as follows:

(i) Article 48(5) of the ICSID Convention provides that "[t]he Centre shall not publish the award without the consent of the parties."

(ii) Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of (1) arbitral awards or (2) the minutes and other records of proceedings, if both parties to a proceeding so consent.

(iii) Rule 6(2) of the ICSID Arbitration Rules provides that each arbitrator must sign a declaration according to which the arbitrator "[..] shall keep confidential all information coming to [his/her] knowledge as a result of [his/her] participation in this proceeding, as well as the contents of any award made by the Tribunal".

(iv) Rule 15 of the ICSID Arbitration Rules provides that "[t]he deliberations of the Tribunal shall take place in private and remain secret".

(iv) Rule 32(2) of the ICSID Arbitration Rules provides that the hearing may be opened by the Tribunal to other persons besides the disputing parties, their agents, counsel and advocates, witnesses and experts and officers of the Tribunal - provided that no party objects (in which case, the hearing is to be held in private). In such case, the Tribunal shall establish "procedures for the protection of proprietary or privileged information".

69. The foregoing provisions deal with specific confidentiality duties of the tribunal and ICSID. However, they do not prevent the publication of general information about the operation of ICSID and the cases at hand (see Regulation 22(1) of the ICSID Administrative and Financial Regulations). Further, they do not expressly address the actions of the parties themselves.

70. This silence of ICSID's legal framework has led various authors and tribunals to take the stand that the ICSID Convention and Rules do not prevent the parties from revealing their case, including even from releasing

awards and other pertinent decisions.[46] However, whereby it is widely acknowledged that parties may engage in general discussion about the case in public, some tribunals have deemed it appropriate to set express limits to such freedom requiring that the parties limit public discussion of the case "to what is considered necessary"[47], "to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound"[48], or "to what is necessary, and is not used as an instrument to antagonize the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult [...]".[49]

71. This approach appears also to be in line with the spirit expressed in the official annotations accompanying the original version of the ICSID Arbitration Rules (which are not binding, and do not form part of the Rules) stating the following: "The parties are not prohibited from publishing their pleadings. They may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute [...]".[50]

72. In the light of the above considerations, whilst the Tribunal shares the view that transparency in investment arbitration shall be encouraged as a means to promote good governance of States, the development of a well grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration, it also believes that transparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings. Further, transparency considerations may not

---

[46] Christoph Schreuer, The ICSID Convention: A Commentary, Cambridge 2005, §§ 100 fol. *ad* Article 48; Benjamin H. Tahyar, Confidentiality in ICSID Arbitration after Amco Asia Corp. v. Indonesia: Watchword or White Elephant? Fordham International Law Journal Vol. 10 (1986), p 110; *Amco Case,* Decision on Provisional Measures of 9 December 1983, 1 ICSID Reports 410 fol., 412.; *Metalclad Case* and *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3 (hereafter "*Loewen Case*"), Decision on hearing of Respondent's objection on competence and jurisdiction of January 5, 2001, 7 *ICSID Rep.* 421 (2005), §§ 25-26.

[47] *Loewen Case*, Decision on hearing of Respondent's objection on competence and jurisdiction of January 5, 2001, § 26.

[48] *Metalclad Case*, Award of 30 August 2000, § 10.

[49] *Biwater Case*, Procedural Order No. 3, § 163 lit. b

[50] Corresponding to Rule 31 of the ICSID Arbitration Rules 2006.

prevail over the protection of information which is privileged and/or otherwise protected from disclosure under a Party's domestic law.[51]

73. **In conclusion**, the Tribunal deems that the ICSID Convention and Arbitration Rules do not comprehensively cover the question of the confidentiality/transparency of the proceedings. Thus, in accordance with Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules, unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.

V. TRIBUNAL'S ANALYSIS OF THE SPECIFIC ISSUES

74. The confidentiality issue as arising in the present disputes relates to three different aspects of the proceedings: (a) to the "record of this proceeding", i.e., to the arbitration proceedings in general, (b) to the protection of Claimants' personal information contained in the Database, and (c) to the admissibility as evidence of allegedly confidential documents relating to other arbitration proceedings, i.e., of Respondent's Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528.

75. Except as for the Parties' agreement to publish the award,[52] there has been no general or specific agreement with regard to confidentiality between the Parties, and there is further no relevant provision on confidentiality in the Argentina-Italy BIT pursuant to which these proceedings have been brought.

---

[51] This is also reflected in Rule 32(2) in fine of the ICSID Arbitration Rules, and in the NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions, par. 2(b). See also Knahr at al., p. 102.

[52] First Session Minutes, § 18.

76. **Consequently**, the Tribunal shall decide on the three different aspects of Claimants' request for a confidentiality order according to the principles set forth above (§§ 67-73).

a) With Regard to the Present Arbitration Proceedings

77. In their latest request for a confidentiality order, Claimants request that disclosure of the "record of these proceedings" be limited to the sole "purposes of conducting this arbitration" and restricted to key persons involved in it, without prejudice however of the Parties' "ability to publish general updates on the status of the case" (see above § 45). As such, Claimants request that the entire proceedings be covered by a general duty of confidentiality allowing only the disclosure by the Parties of "general updates on the status of the case".

78. Without commenting on the specific wording and scope of Claimants' request, Respondent have made it sufficiently clear that they consider that there is "no general rule of confidentiality governing ICSID arbitration proceedings" (see above § 51 (v)). Further, the submission by Respondent in this proceeding of various documents produced in other investment arbitrations involving Argentina and the fact that Respondent seems to have done so in the past in other proceedings shows that Respondent does not consider any such documents to be subject to any restriction, unless they relate to sealed proceedings (see above § 51 (ii)-(iv)). As such, Respondents seems to take the position that unless specifically restricted, information and documents issued and/or submitted in this proceeding may be disclosed by either Party.

79. In the light of the principles set forth above (§§ 67-73), the Tribunal disagrees with both of the Parties' positions. As mentioned above (§ 67), if it is true that there is no general duty of confidentiality, this is not to be understood as a "carte blanche" entitling a Party to disclose as it deems fit any kind of information or documents issued or produced in this proceeding.

80. Depending on the information and documents at stake, different considerations of confidentiality, transparency, public information, equality of the Parties' rights, orderly conduct of the proceedings and other procedural rights and principles may apply, requiring a differentiated treatment.

81. Due consideration must also be paid to the stage of the proceedings, i.e., to whether disclosure happens while proceedings are still ongoing or after their closure. While proceedings are still ongoing, considerations such as ensuring the orderly unfolding of the arbitration and the respect of the Parties' equality of rights, avoiding the exacerbation of the dispute, etc. carry more weight and therefore require more caution than once the procedure has been completed and an award has already been rendered.

82. Therefore the Tribunal rejects Claimants' request to restrict disclosure of the entire "record of these proceedings [...] without prejudice to the Parties' ability to publish general updates on the status of the case". Rather, the Tribunal deems that a distinction must be drawn between different kinds of documents and information while giving due consideration to the fact that proceedings are at an early stage, and that "restrictions must be carefully and narrowly delimited".[53]

83. Having considered both Parties' arguments as well as the various documents and information at stake, and having weighted the diverging interests at stake, the Tribunal decides to allow or restrict disclosure of documents and information as follows:

(i) General Discussion about the Case

84. In the *Biwater Case*, the Tribunal decided that, except where specific restrictions apply, "the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary (for example, pursuant to Respondent's duty to provide the public with information concerning governmental and public affairs), and is not used as an instrument to further antagonise the parties, exacerbate their differences,

[53] *Biwater Case*, Procedural Order No. 3, § 147.

unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order".[54]

85. The present Tribunal shares this view. Neither Party shall be prevented from engaging in general discussion about the case in public, whereby such discussion shall in particular not be limited to general updates on the mere status of the case and may include wider aspects of the case such as a summary of the Parties' position, provided however that such discussion remains within the above mentioned boundaries.

86. **Consequently,** ***subject to further specific restrictions on disclosure of specific documents and information as set out herein, the Parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonise the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3.***

(ii) Awards

87. The Parties have agreed to publish the award according to Article 48(4) of the ICSID Convention (see above § 75).

88. **Consequently,** ***no confidentiality restriction shall apply to the publication of the award and its content.***

89. Whether certain Annexes submitted by Claimants, in particular Annexes relating to the identity of the Claimants, should constitute an integral part of the award and be thereby jointly published is a different question, which will need to be determined at a later stage of the proceedings.

[54] *Biwater Case*, Procedural Order No. 3, § 149.

(iii) Decisions, Orders and Directions of the Tribunal (other than Awards)

90. In the *Biwater Case*, the tribunal reasoned that "the presumption should be in favour of allowing the publication of the Tribunal's Decisions, Orders and Directions". It justified this position based on "the treatment of awards, and the treatment of such materials in investment arbitration generally" as well as on the fact that "[p]ublication of the Tribunal's decisions also, as a general matter, will be less likely to aggravate or exacerbate a dispute, or to exert undue pressure on one party, than publication of parties' pleading or release of other documentary materials". So far, the present Tribunal shares this view.

91. However, instead of giving full effect to this presumption, the tribunal in the *Biwater Case* preferred to exercise supplementary caution and to decide on the publication of a decision "on a case-by-case basis", given that "the nature and subject matter of Decisions, Orders and Directions varies enormously, and for some it may still be inappropriate to allow wider distribution".[55]

92. The present Tribunal is of the opinion that such supplementary caution is not necessary in the case at hand, in the light of various factors and further supporting the presumption in favour of the publication of the Tribunal's decisions, orders and directions:

(i) The Parties agreed that the final award be made public, which shows that the Parties give due consideration to transparency and public information issues.

(ii) Respondent's liberal attitude towards disclosure of documents seems to indicate that it would not have a problem with the disclosure of other decisions of the Tribunal.

(iii) It derives from Claimants' position and request, that it is not opposed to the publication by the Parties of "general updates on the status of the case" and that its main concerns relates to the uneven use by

[55] *Biwater Case*, Procedural Order No. 3, §§ 152-154.

Respondent of documents produced and information submitted during the arbitration by the Parties, especially with regard to Claimants' personal information. Thus it appears that Claimants' request aims primarily to limit the risk of exacerbating the dispute, disadvantaging a Party and abusing of personal information, and not to limit the disclosure of information which carries public interest.

(iv) It cannot be ignored that in the present case there are over 180,000 Claimants having in principle all access to the records of the proceedings. This circumstance has a certain diluting effect on the potential need for protection of confidentiality.

93. In the light of the above considerations, the Tribunal is of the opinion that in the case at hand, the presumption in favour of the publication of decisions, orders or directions of the Tribunal should be given full effect, meaning that – unless otherwise expressly provided in the decision, order or direction, and justified by specific considerations against disclosure – decisions, orders and directions of the Tribunal may be published by either Party.

94. **Consequently,** ***in the absence of any specific contrary ground, no confidentiality restriction shall be imposed on orders or directions of the Tribunal, including this Procedural Order No. 3.***

(iv) Minutes and Records of Hearing

95. With regard to the minutes and/or records of oral hearing, ICSID Administrative and Financial Regulations as well as ICSID Arbitration Rules contain specific provisions:

- Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of the minutes and other records of proceedings if both parties to a proceeding so consent.
- Rule 32(2) of the ICSID Arbitration Rules provides that participation in the hearing is restricted to the parties, their agents, counsel and advocates, and witnesses and experts, and that the tribunal may not allow

other persons to attend or observe all or part of the hearings if a party objects.

96. Thus, the above mentioned provisions establish the principle that the content of hearings, as well as minutes and other records of such hearings should not be disclosed to third parties unless the Parties so agree.

97. The question arises whether the Parties may through their attitude and positions be deemed to have implicitly consented to such disclosure and/or be precluded from their right to object thereto. This question may remain open, since in the case at hand, there are not sufficient elements to deduce such implied consent or preclusion of rights.

98. Whilst decisions, orders and directions of the Tribunal in principle present the facts of the dispute in a summary and neutral manner and take into account each Party's allegations and positions before deciding thereon, the same is not true for minutes of hearings and similar records. Minutes of hearings and records of expert and witness examinations mirror faithfully what happened in a specific hearing, meeting or examination. As such, their publication, and especially a partial and out of context publication of such minutes and records carries the risk of antagonizing the Parties and exacerbating their differences. Also, the prospect of the publication of such minutes and records may further exercise unnecessary pressure on and thereby inappropriately influence the attitude of the various participants during the relevant hearing or meeting. All these elements are likely to endanger the proper unfolding of the arbitration and the efficiency of the hearing itself, and thereby render the resolution of the dispute more difficult.

99. Therefore, the Parties' conduct, and in particular Claimants' position as summarized above (§ 92 (iii)) and its objection to the inclusion in this proceedings of transcripts relating to other arbitration proceedings because of their allegedly confidential character (see above § 44) could not be interpreted as an implicit consent to disclose minutes of hearing or other similar records.

100. **Consequently,** ***minutes and records of hearings of the present proceedings shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs***.

(v) Pleadings, Written Memorials, other Written Submissions

101. Pleadings and written memorials are likely to contain references to and details of documents produced pursuant to a disclosure exercise, and their uneven publication or distribution carry the risk of giving a misleading impression about these proceedings".[56]

102. Indeed, based on their function and aim, pleadings and memorials of a Party often present a one-sided story of the dispute. Their publication therefore carries the inherent risk to give an incorrect impression about the proceedings. This would not only thwart public information purposes, but would further antagonise the Parties and aggravate their differences. In the present proceedings, this risk is further accentuated by the fierce tone of some of the Parties' submissions.

103. Under these circumstances, the Tribunal concludes that – at this stage of the proceedings – the need to preserve a constructive atmosphere allowing the proper unfolding of the arbitration requires restricting publication of the Parties' pleadings, written memorials and other written submissions, including correspondence between the Parties and the Tribunal on substantive issues (see further below § 114-116).

104. The same restriction applies to witness and expert statements attached to pleadings and written memorials, the publication of which would carry the same risk of giving a misleading impression about the proceedings.

105. **Consequently,** ***pleadings, written memorials and other written submissions of the Parties (including correspondence between the Parties and the Tribunal on substantive issues), as well as witness and experts statements attached thereto shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs***.

---

[56] See *Biwater Case*, see Procedural Order No. 3, § 158.

(vi) Documents and Exhibits relating to Pleadings, Written Memorials or other Written Submissions

106. In the *Biwater Case*, the Tribunal decided that no restriction was in principle appropriate upon the publication by one party of its own documents, except where separate contractual or other confidentiality restrictions on such publication exist. In contrast, it considered appropriate to restrict publication or distribution of documents that had been produced in the arbitration by the opposing party in the interests of procedural integrity. [57]

107. While in principle sharing this view, the Tribunal is of the opinion that the above principles need to be further tailored to the specificities of the present case.

108. Thus, with regard to other documents and exhibits submitted in support of the Parties' pleadings, written memorials and submissions as well as expert and witness statements, the following principles shall apply:

109. Where such documents themselves or their content are under separate contractual or other confidentiality obligations restricting disclosure, their disclosure and the formalities thereof shall be decided according to the law or rules imposing such confidentiality obligation.

110. Where no such contractual or other confidentiality obligations apply:

- A Party shall be free to decide if and how to publish its own documents. Nevertheless, their publication shall not be used as an instrument to further antagonise the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult or circumvent the terms of this Procedural Order No. 3;
- A Party shall not publish or otherwise disclose to third parties the documents produced by the opposing Party and shall use them only for the purpose of participating in the arbitration, except where these documents are already in the public domain or the opposing Party has expressed its consent to their disclosure.

[57] Procedural Order No. 3, §§ 156-157.

111. Although the above stated principles constitute useful guidelines, it cannot be ignored that the nature, type, content and purpose of such documents vary enormously and that it is therefore impossible to anticipate the specific interests at stake in a particular case. The door for diverging case-by-case decisions must therefore remain open.

112. In the present proceedings, the Parties have submitted numerous binders with exhibits, of varying nature, type and content. Except as for Claimants' request concerning the protection of personal information relating to individual Claimants which is dealt with below (§§ 121 fol.), the Parties have not raised any other contractual or other confidentiality obligation affecting specific documents, nor have they otherwise identified specific documents or categories of documents that would require special treatment. Based thereon, and on the preliminary review by the Tribunal of the documents submitted in this case, the above mentioned principles seem appropriate to establish the basic rule with regard to publication of documents.

113. **Consequently,** ***documents and exhibits submitted with pleadings, written memorials and/or other written submissions of the Parties shall be subject to the restrictions contemplated in §§ 109-110 unless the Parties otherwise agree, or the Tribunal otherwise directs***.

(vii) Correspondence between the Parties and/or the Tribunal Exchanged in respect of the Arbitral Proceedings

114. In the *Biwater case*, the Tribunal concluded that in the light of the nature of the correspondence between the parties and/or the tribunal which mainly relates to the conduct of the process itself rather than to substantive issues, "the needs of transparency (if any) are outweighed by the requirements of procedural integrity". Consequently it considered correspondence between the parties and/or the tribunal as an appropriate category for restriction.

115. The present Tribunal agrees with this position. Indeed, information relating to the conduct of the proceedings, such as the number of written submissions and their order, the time and place of hearings, the hearing agendas, the number and order of expert and witness examinations, etc. are in

principle not of public interest. Further, when deciding upon the modalities of the procedure, it is important to have the full cooperation of all actors in order to ensure smooth and rapid unfolding of the proceedings. Restricting the correspondence relating to the conduct of the arbitration proceedings helps ensure a cooperative atmosphere by avoiding external influences and limiting unnecessary publicity. Such restriction therefore seems appropriate.

116. **Consequently,** ***correspondence between the Parties and the Tribunal which does relate to the mere conduct of the case shall be restricted.***

117. With regard to correspondence between the Parties and the Tribunal which do not relate to the mere conduct of the case, but address substantive issues, they have been dealt with above together with pleadings, written memorials and/or other written submissions of the Parties (see § 105).

(viii) Duration of the Restrictions

118. Insofar as the Tribunal has imposed as set forth above specific restrictions on the present proceedings, and in particular on certain categories of information and documents, these restrictions shall apply until conclusion of the proceedings, unless otherwise agreed between the Parties or ordered by the Tribunal upon its own initiative or upon request of a Party.

119. All parties are at liberty to apply to the Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis.

120. The question will arise whether the Tribunal has the power and authority to decide, either on its own initiative or upon request of a Party, on the continuation of some or all of these restrictions beyond the conclusion of the present proceedings. This question will be dealt with when concluding the present proceedings.

b) With Regard to Information Contained in the Database

121. As mentioned above (§ 72), transparency considerations may not prevail over the protection of information which is privileged and/or otherwise protected from disclosure under a Party's domestic law.

122. In the present case, Claimants bring forward that personal information relating to individual Claimants as compiled in the online Database and as partly disclosed to Respondent in the form of hard and soft copies of Annexes A to E are subject to confidentiality obligations under Italian and European law (see above § 41). Consequently, as Respondent accesses this information, it should be ordered to comply with certain confidentiality standards according to the relevant legal provisions. Claimants request for enforcement of this confidentiality obligation aims primarily to protect personal identification, financial information and nationality information.[58] Although Respondent has denied that such confidentiality obligations would be mandated under Italian and European law (see above §§ 23 and 49), it has failed to explain to what extent the legal references invoked by Claimants were not applicable or did otherwise not provide for the alleged confidentiality obligations.

123. Considering that it is to be presumed for the present stage of the proceedings that the Claimants have the Italian nationality and that the online Database is established under Italian law, this issue is to be examined under Italian law.

124. The Italian Privacy Code implements on national level the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[59]

125. Article 5(1) of the Italian Privacy Code provides as follows:

---

[58] First Session, Tr. p. 88/l. 15-20.

[59] Italian Privacy Code Section 184(1).

> "This Code shall apply to the processing of personal data, including data held abroad, where the processing is performed by any entity established either in the State's territory or in a place that is under the State's sovereignty."

126. In the case at hand, the processing of personal data, meaning its collection, recording, organization, keeping etc. with the help of electronic means,[60] is done by Cedacri S.p.A., a company registered under the laws of Italy. As such, the Italian Privacy Code applies to the processing of Claimants' personal data.

127. According to the relevant provisions of the Italian Privacy Code, the process of personal data is subject – among others - to the following two relevant principles:

(i) The controller of the database must take specific security measures preventing certain risks, such as unauthorized access to the data base or processing operations that are either unlawful or inconsistent with the purposes for which the data have been collected.[61]

(ii) The transfer of personal data to non-EU countries is restricted to countries which ensure adequate protection of such personal data, unless such transfer is expressly agreed by the subject data or justified by specific circumstances, such as the performance of a contract or the establishment, exercise or defence of legal claims.[62]

128. Although Claimants have brought forward that ICSID legal framework does not sufficiently address and protect the confidentiality of personal data, Claimants have not alleged or demonstrated that Argentinean law does not offer an adequate level of protection in the sense of the relevant provisions of the Italian Privacy Code or EU Directives.

129. Actually, according to the European Commission's Decision of 30/06/2003 pursuant to Directive 95/46/EC of the European Parliament and

---

[60] Italian Privacy Code Section 4(1) lit. a.

[61] Italian Privacy Code Sections 31 and 34.

[62] Italian Privacy Code Sections 43-45; EU Directive 95/46/EC Articles 25 and 26.

of the Council on the adequate protection of personal data in Argentina, Argentina is regarded as providing an adequate level of protection for personal data transferred from the Community for the purposes of Article 25(2) of Directive 95/46/EC.[63] This decision was based, among others on the Argentine Constitution which provides for a special judicial remedy for the protection of personal data, known as "habeas data" and the Personal Data Protection Act No 25.326 of 4 October 2000 which develops and widens the Constitutional provisions.

130. Based on this decision of the European Commission, the transfer of Claimants' personal data to Respondent must be seen as a permitted transfer under Section 44(1) lit. b of the Italian Privacy Code, which provides that:

> "The transfer of processed personal data to a non-EU Member State shall also be permitted if it is authorised by the Garante on the basis of adequate safeguards for data subjects' rights
>
> a) […]
>
> b) as determined via the decisions referred to in Articles 25(6) and 26(4) of Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, through which the European Commission may find that a non-EU Member State affords an adequate level of protection, or else that certain contractual clauses afford sufficient safeguards."

131. However, in the interest of the continued protection of Claimants' personal data, such transfer must still be done in a way to allow the controller of the Database to comply with its own safeguard obligations under the Italian Privacy Code and the EU Directive 95/46/EC, in particular to prevent unauthorized access and processing of information inconsistent with the purposes for which the data has been collected. As such, even though the transfer is permitted and there is no indication that Respondent will not comply with Argentinean data protection laws and regulations, there is still a legitimate interest of Claimants to establish specific rules concerning the use of such information, especially if Respondent is to be given direct access to Claimants' entire online Database.

[63] Decision available on http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/decision-c2003-1731/decision-argentine_en.pdf.

132. Based on the above considerations, taking into account Claimants' basic willingness to provide Respondent with direct access to the online Database (see above § 12), and after balancing Claimants' for continued protection of its personal data and Respondent's right in accessing all information necessary to defend its case, the Tribunal orders that Respondent be given direct access to Claimants' online Database subject to the following restrictions:

(i) Access shall be given only to those persons who are directly involved in the present arbitration on behalf of Respondent ("Authorised Persons"). Respondent shall provide Claimants with a list of such Authorised Persons, and shall update this list whenever necessary. Each person or category of Authorised Persons shall be given distinct access codes, so as to monitor the access to the Database.

(ii) Access shall allow Respondent to consult the Database, but not to make any changes or alteration thereto.

(iii) Respondent shall use the information contained in the Database ("Confidential Information") solely for purposes of conducting this arbitration. Further, except for the part of the Confidential Information which is subject to publication in ICSID's registers and website according to Regulations 22 and 23 of the Administrative and Financial Regulations and therefore constitutes public knowledge, Respondent shall not disclose to any unauthorized person or entity any of the Confidential Information, without obtaining prior consent from Claimants' Counsel.

(iv) Respondent shall keep the Confidential Information secure, and take appropriate measures to ensure that the Authorised Persons understand the confidential nature of the Confidential Information and comply with the same obligations as set forth in lit. (iii) above.

(v) Any breach or suspected breach of the present restriction shall be reported immediately to Claimants' counsel.

133. The Confidential Information which has already been provided to Respondent by other means than direct access to the Database (i.e., through the submission of hard and soft copies of the relevant Annexes) shall be subject to the same restrictions as described in § 132 lit. (iii) – (v).

134. **Consequently,** ***Respondent shall be given access to the information contained in Claimants' Database under the terms and conditions set forth in §§ 132-133 above.***

135. The above terms and conditions of Respondent's access to the information contained in Claimants' Database apply until conclusion of the proceedings, unless otherwise agreed between the Parties or ordered by the Tribunal upon its own initiative or upon request of a Party. All parties are at liberty to apply to the Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis. The question will arise whether the Tribunal has the power and authority to decide, either on its own initiative or upon a corresponding request of a Party, on the continuation of this right and some or all of its restrictions beyond the conclusion of the present proceedings. This question will be dealt with when concluding the present proceedings.

c) With Regard to Exhibits relating to other Arbitration Proceedings, in particular Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528

136. As mentioned above (§§ 44-45), Claimants request the Tribunal to strike from the record certain exhibits submitted by Respondent and relating to other arbitration or court proceedings. Claimants' request is based on the following two main arguments: (i) these documents would be subject to confidentiality and (ii) their allegedly selective and out of context use by Respondent would entail the principle of equality of the Parties by disadvantaging Claimants and hindering them from duly exercising their right of defence.

137. In contrast, Respondent requests that these exhibits be admitted (see above § 51). Respondent brings forward that these documents were not issued in sealed proceedings, that they are necessary for impeachment purposes and that, given the lack of general confidentiality duty in ICSID arbitration, Respondent should not be prevented from making use thereof.

138. According to Rule 34(1) of the ICSID Arbitration Rules "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value". The Tribunal thus has the power to decide on the admissibility of the Exhibits at stake.

139. According to the principles established with regard to the present arbitration proceedings (see above §§ 95-100 and 101-105), the category of exhibits at stake would be restricted. However, lacking further knowledge on these other arbitration proceedings, and in particular on potential agreements between the parties or specific orders from the relevant tribunal on confidentiality of the proceedings, the present Tribunal considers that it cannot simply apply its own standard to other arbitration proceedings and assume confidentiality.

140. With regard to Exhibit RE-495 relating to an arbitration (*BG Group PLC v. Republic of Argentina*) in which the award was later subject to setting aside proceedings before the Federal Court of the District of Columbia, confidentiality of the arbitration proceedings was expressly ordered by the tribunal.[64] Even if, as contended by Respondent, the court may have lifted the seal concerning the court proceedings, such lifting of the seal may only apply to the records of the court proceedings, and not render to the whole record of the arbitration proceeding public. Thus, failing proof that Exhibit RE-495 (transcript of the expert examination of Prof. Héctor Mairal held on 5 July 2006 in the arbitration *BG Group PLC v. Republic of Argentina*) was submitted during the court proceedings and is concerned by the lifting of the court's seal, it shall not be admitted into the present proceedings. In addition, even if the lifting of the seal also applied to Exhibit RE-495, the same

[64] CL 07.06.09, p. 3; RSP 24.06.09, p. 7.

considerations as set forth below (§§ 141-150) would apply and hinder the admission of such Exhibit.

141. With regard to the other 20 Exhibits (RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528), they do not seem to have been subject to specific confidentiality orders.

142. However, with regard to the Exhibits relating to transcripts of expert examinations (i.e., Exhibits RE-428, RE-495, RE-452, RE-491, RE-494, RE-495, RE-497, RE-498, RE-504, RE-528), the publication of such documents require in principle the agreement of the parties (see above § 95). Whether such confidentiality considerations may suffice to refuse the admissibility of the concerned Exhibits can remain open. Indeed, besides considerations of confidentiality, further considerations, such as the principle of equality of the Parties, must be taken into account when deciding on the admissibility of evidence.

143. Thus, in order to decide on the admissibility of these documents, it is necessary to balance Respondent's right of defence, including its right to challenge the credibility of any expert or witness, with (i) Claimants' right to equality of arms and (ii) the general interest of ensuring the integrity of the procedure and in particular the finding of the truth.

144. Under due consideration of these diverging interests, it is the Tribunal's opinion that it would not be appropriate to allow these documents as Exhibits in the present proceedings based on the following reasoning:

145. The 20 Exhibits at stake all relate to either expert reports rendered by Prof. Christoph Schreuer, Prof. Rudolf Dolzer, Prof. Michael W. Reisman and Prof. Hector Mairal or transcripts of the examination of these experts in relation to their expert reports. These 20 reports and expert examination transcripts were issued in arbitration proceedings (i) involving different claimants than the ones at stake, (ii) relating to disputes arising from circumstances different than the circumstances of the present case,

(iii) concerning claims raised under BITs signed with countries like the USA, France and Germany and not with Italy as in the case at hand, (iv) concerning claims partly relating to substantial violations of the applicable BITs, and partly relating to jurisdictional issues, sometimes similar to the issues raised in the present case, and (v) based on the stand of laws and jurisprudence in effect at the time of issuance of these reports and conduct of examination, i.e., in the years 2002-2009.

146. Thus, whereas the same experts have rendered expert reports in the present proceedings and partly specifically relating to the issues arising in the present proceedings, the 20 Exhibits at stake have been rendered in different proceedings, relating to different disputes and subject to different laws. As such, except as for very general opinions and opinions of principle, specific considerations expressed in the relevant expert reports or examination transcripts could not be transposed one to one to the present proceedings, but would require to firstly establish the differences and commonalities between the different cases in order to evaluate to what extent and under what conditions these considerations may be transposed. For example:

(i) Part of the expert reports or examinations at stake relate to specific arguments raised by other actors, such as for example specific jurisdictional objections raised by Respondent in the concerned arbitration or to specific arguments set forth in Respondent's memorials.[65] Thus the relevant expert opinions relate to information which is not available. How could the credibility and conviction force of such expert opinions be evaluated without knowledge of such information?

(ii) Some of the expert opinions focus on material violations of the relevant BITs,[66] whilst the current proceedings focus at this stage only on jurisdictional issues.

(iii) Some of the expert opinions focus on specific legal provisions of other BITs signed between Argentina and other countries.[67] Even where such

[65] See, e.g., RE-440, RE-492 and RE-493.

[66] See, e.g., RE-427, RE-428, RE-429, RE-448, RE-490 and RE-496,

provisions are identical to some of the relevant provisions of the Argentina-Italy BIT, opinions relating to one BIT could not be directly transposed to another BIT, but would further require taking into consideration the general circumstances and time under which both BITs were concluded.

147. The exercise of putting the relevant expert opinions back into their original context would not only be a very time consuming exercise, but also a very delicate and difficult one, since the full records of these proceedings are not freely accessible to the Claimants and the Tribunal. The unilateral use of the concerned 20 Exhibits by Respondent would therefore carry an unavoidable risk of "out of context" use of the concerned expert opinions, against which Claimants would have no equal means of defence.

148. The 20 Exhibits at stake are only a small part of a series of binders containing Respondent's so-called "Supplementary Exhibits", primarily intended for the purposes of expert examination. It appears that Respondent's main aim is to use the 20 Exhibits, and other similar Exhibits, in order "to ascertain the credibility and consistency of the witnesses and experts the opposing party presents".[68] It thus seems that these Exhibits would be used in the first place for "impeachment purposes" (see above § 51), and not to shed more light on the legal issues at stake.

149. The four experts concerned by the 20 Exhibits are all Professors of law having published a variety of books and articles, in which their general position on certain relevant issues are laid down. In addition, they have rendered written expert opinions concerning specific issues raised in the present proceedings, and have further been allowed by the Tribunal for cross-examination by Respondent. These circumstances should be sufficient to allow Respondent to challenge the experts' credibility where deemed appropriate. It does not seem necessary to further refer to specific documents issued in other arbitration proceedings, being however understood that

[67] See, e.g., RE-499.

[68] RSP 24.06.09, p. 8.

Respondent may when preparing its cross-examination, make use of the experience it accumulated in other proceedings.

150. In summary, the submission of the concerned 20 Exhibits, as well as of any other Exhibit consisting of expert reports or transcripts of expert examination issued in other arbitration proceedings, seems excessive in the light of Respondent intended use of such Exhibits. The public knowledge concerning the concerned experts' general legal opinions, their specific expert reports rendered in the present case and Respondent's accumulated experience in previous arbitration proceedings involving such experts should suffice to allow Respondent to efficiently defend its rights and in particular to challenge the experts' credibility without referring to documents issued within the course of other arbitration proceedings.

151. **Consequently,** ***Respondent's Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528, as well as any other Exhibit relating to an expert report or transcript of expert examination issued in another arbitration shall not be admitted as evidence in the present proceedings and, hence, shall not be used as examination documents.***

152. The above mentioned Exhibits are part of the so-called "Supplemental Exhibits" submitted by Respondent on 3 June 2009 (see § 28). The admissibility of the remaining part of these "Supplemental Exhibits" will be addressed in the Tribunal's upcoming decision on "the admissibility of all documents submitted by both Parties with regard to expert and witness examinations" according to par. 3 of the Tribunal's letter of 28 December 2009.

VI. ORDER

153. For the reasons set forth above, the Tribunal issues the following decision:

(a) With regard to the present arbitration proceedings, the Tribunal orders that:

(i) ***S*ubject to further specific restrictions on disclosure of specific documents and information as set out herein, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3.**

(ii) **No confidentiality restriction shall apply to the publication of the award and its content.**

(iii) **In the absence of any specific contrary ground, no confidentiality restriction shall be imposed on orders or directions of the Tribunal, including this Procedural Order No. 3.**

(iv) **Minutes and records of hearings of the present proceedings shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs.**

(v) **Pleadings, written memorials and other written submissions of the Parties (including correspondence between the Parties and the Tribunal on substantive issues), as well as witness and experts statements attached thereto shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs.**

(vi) **Documents and exhibits submitted with pleadings, written memorials and/or other written submissions of the Parties shall be subject to the restrictions contemplated in §§ 109-110 above unless the Parties otherwise agree, or the Tribunal otherwise directs.**

(vii) **Correspondence between the Parties and the Tribunal which does relate to the mere conduct of the case shall be restricted.**

(b) With regard to Information Contained in the Database, the Tribunal orders that:

Respondent shall be given access to the information contained in Claimants' Database under the terms and conditions set forth in §§ 132-133 above.

(c) **With regard to Exhibits relating to other Arbitration Proceedings, the Tribunal orders that:**

> **Respondent's Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528, as well as any other Exhibit relating to an expert report or to a transcript of expert examination issued in another arbitration shall not be admitted as evidence in the present proceedings *and, hence, shall not be used as examination documents*.**

(d) **The orders set forth in this Procedural Order No. 3 shall remain in force until conclusion of the proceedings, unless otherwise agreed between the Parties or ordered by the Tribunal upon its own initiative or upon request of a Party.**

On behalf of the Tribunal,

[signed]

_____

Pierre Tercier,
Chairman

ANEXO 12

to determine whether or not there was an infringment of any privilege found to exist. In fact, neither the letter from the Clerk of the Commons nor the Attorney-General have identified or specified the nature of any privilege extending beyond that protected by the Bill of Rights. In the absence of a claim to a defined privilege as to the validity of which your Lordships could make a determination, it would not in my view be right to withhold from the taxpayers a decision to which, in law, they are entitled. I would therefore allow the appeal.

I trust when the House of Commons comes to consider the decision in this case, it will be appreciated that there is no desire to impeach its privileges in any way. Your Lordships are motivated by a desire to carry out the intentions of Parliament in enacting legislation and have no intention or desire to question the processes by which such legislation was enacted or of criticising anything said by anyone in Parliament in the course of enacting it. The purpose is to give effect to, not thwart, the intentions of Parliament.

Appeal allowed with costs.

Solicitors: Kenwright & Cox for Jagger Son & Tilley, Birmingham; Solicitor of Inland Revenue.

J. A. G.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT

AND

GOUGH . . . . . APPELLANT

1992 May 14, 15; 22 — Farquharson L.J., Alliott and Cazalet JJ.

1993 Jan. 27, 28; May 20 — Lord Goff of Chieveley, Lord Ackner, Lord Mustill, Lord Slynn of Hadley and Lord Woolf

Crime—Jury—Bias—Juror next door neighbour of defendant's brother—Juror unaware of connection until after trial—Whether real danger of bias—Whether irregularity affecting trial

The appellant was indicted on a single count of conspiring with his brother to commit robbery. At the trial the brother, who had been discharged on the application of the prosecution at the committal hearing, was referred to by name and a photograph of him and the appellant was shown to the jury and

A a statement containing the brother's address was read to the jury. After the appellant had been convicted and sentenced the brother, who was in the court, started shouting. One of the jurors then recognised him as her next door neighbour. He then informed the defence that a member of the jury was his next door neighbour. Those facts were placed before the trial judge but he held that he was functus officio. The juror was later interviewed by the police and swore an affidavit in which B she stated that she was unaware of the connection until after the jury had delivered its verdict. On appeal by the appellant on the ground that the presence of the brother's next door neighbour on the jury was a serious irregularity, the Court of Appeal (Criminal Division) held that the correct test was whether there was a real danger that the appellant might not have had a fair trial and dismissed the appeal.

C On appeal by the appellant:—

Held, dismissing the appeal, that the test to be applied in all cases of apparent bias was the same, whether concerning justices, members of inferior tribunals, arbitrators or jurors, and, in cases involving jurors, whether being applied by the judge during the trial or by the Court of Appeal when considering the matter on appeal, namely, whether, in all the circumstances of the case, there appeared to be a real danger of bias, concerning the D member of the tribunal in question so that justice required that the decision should not stand; that, accordingly, the Court of Appeal, in dismissing the appeal, applied the correct test (post, pp. 660D–E, 670C–F, H–671B, 673G).

Reg. v. Spencer [1987] A.C. 128, H.L.(E.) applied.

Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.; *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167, C.A. E and *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, C.A. considered.

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) and *Reg. v. Box* [1964] 1 Q.B. 430, C.C.A. distinguished.

Per curiam. (i) That in the case of alleged bias on the part of a justices' clerk, the court, having considered whether there was F a real danger of bias, should go on to consider whether the clerk had been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant (post, pp. 670F–G, H–671B).

(ii) There is only one established special category where the law assumes bias and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the G proceedings. The courts should hesitate long before creating any other special category (post, pp. 664E–F, 670H–671B, 673F).

Decision of the Court of Appeal (Criminal Division), post, pp. 649 et seq.; [1992] 4 All E.R. 481 affirmed.

The following cases are referred to in their Lordships' opinions in the House H of Lords:

Ardahalian v. Unifert International S.A. (The Elissar) [1984] 2 Lloyd's Rep. 84, C.A.

Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie. [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199, C.A.

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.)
Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, H.L.(E.); sub nom. *Rex v. Bath Compensation Authority* [1925] 1 K.B. 685, C.A.
Hannam v. Bradford Corporation [1970] 1 W.L.R. 937; [1970] 2 All E.R. 690, C.A.
Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577; [1968] 3 W.L.R. 694; [1968] 3 All E.R. 304, C.A.
Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C.
Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1959] 2 Q.B. 276; [1959] 3 W.L.R. 96; [1959] 2 All E.R. 635, D.C.; [1960] 2 Q.B. 167; [1960] 3 W.L.R. 305; [1960] 2 All E.R. 703, C.A.
Reg. v. Box [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240, C.C.A.
Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.
Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 W.L.R. 119; [1983] 1 All E.R. 490, D.C.
Reg. v. McLean, Ex parte Aikens (1974) 139 J.P. 261, D.C.
Reg. v. Morris (orse. Williams) (1990) 93 Cr.App.R. 102, C.A.
Reg. v. Pennington (1985) 81 Cr.App.R. 217, C.A.
Reg. v. Putnam (1991) 93 Cr.App.R. 281, C.A.
Reg. v. Rand (1866) L.R. 1 Q.B. 230
Reg. v. Sawyer (1980) 71 Cr.App.R. 283, C.A.
Reg. v. Spencer [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 3 All E.R. 928, H.L.(E.)
Reg. v. Uxbridge Justices, Ex parte Burbridge, The Times, 21 June 1972, D.C.
Rex v. Sunderland Justices [1901] 2 K.B. 357, C.A.
Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.

The following additional cases were cited in argument in the House of Lords:

Reg. v. Chapman (William) (1976) 63 Cr.App.R. 75, C.A.
Reg. v. Weaver [1968] 1 Q.B. 353; [1967] 2 W.L.R. 1244; [1967] 1 All E.R. 277, C.A.
Rex v. Twiss (1918) 13 Cr.App.R. 177, C.C.A.

The following cases are referred to in the judgment of the Court of Appeal (Criminal Division):

Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C.
Reg. v. Bliss (1986) 84 Cr.App.R. 1, C.A.
Reg. v. Box [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240, C.C.A.
Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 W.L.R. 119; [1983] 1 All E.R. 490, D.C.
Reg. v. Longman (1980) 72 Cr.App.R. 121, C.A.
Reg. v. Morris (orse. Williams) (1990) 93 Cr.App.R. 102, C.A.
Reg. v. Mulvihill [1990] 1 W.L.R. 438; [1990] 1 All E.R. 436, C.A.
Reg. v. Sawyer (1980) 71 Cr.App.R. 283, C.A.
Reg. v. Spencer [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 3 All E.R. 928, H.L.(E.)

No additional cases were cited in argument in the Court of Appeal.

APPEAL against conviction.

The appellant, Robert Brian Gough, was convicted in the Crown Court at Liverpool, before Judge Lynch and a jury, of conspiracy to rob. He was sentenced to 15 years' imprisonment. He appealed against conviction on the ground, inter alia, that there was a material irregularity in the conduct of the trial in that one of the jurors was the next-door neighbour of his brother, David Gough.

The facts are stated in the judgment.

Benet Hytner Q.C. and *David Boulton* (assigned by the Registrar of Criminal Appeals) for the appellant.

Andrew Moran and *Andrew Downie* for the Crown.

Cur. adv. vult.

22 May. FARQUHARSON L.J. read the following judgment of the court. On 25 April 1991 at Liverpool Crown Court the appellant was convicted on an indictment containing a single count of conspiracy to rob and was sentenced to a term of 15 years' imprisonment. The indictment was based on the commission of eight robberies which had taken place in Liverpool between 13 April 1989 and 6 March 1990. The first seven robberies bore features of striking similarity such that the prosecution contended they had all been committed by the same two men.

On each occasion the two men were masked, generally with a full face balaclava or a stocking. The premises which were being attacked were betting shops. The robberies were committed at a time, at the beginning or end of the day, when a large amount of money would be in the till. Besides being masked the two robbers were also armed, one with a sawn-off shotgun and the other with a large knife. The technique was usually for the former to vault over the counter and security screen, threaten the staff and demand money while the latter stood by the door keeping guard against anyone coming in or a customer going out. Sometimes the guard carried the shotgun.

The first, second and sixth robberies were committed at the same premises, the robbers using the same escape route along a railway embankment on each occasion. One member of the staff of the betting shop, a Mr. Mooney, was sure that it was the same two men on each occasion by reason of their movements, build and general behaviour. Similarly another witness, Mr. Forman, who worked at a betting shop which was the subject of the fourth and fifth robberies concluded that the same men were responsible on both occasions. A Mrs. Hunter was confident that the same two men were responsible for the fourth and seventh robberies of another betting shop. There was also evidence linking the offenders who committed robberies three and four by the garments one of them was wearing. In short the prosecution were able to present a strong case that each of the first seven robberies were committed by the same two men. It was the case for the Crown that the two responsible were the appellant and his brother, David Stephen Gough.

After the sixth robbery the two robbers were seen to conceal something in the undergrowth of the railway embankment. The witness who observed this reported what he had seen to the police. There were found a sawn-off double barrelled shotgun, with a cartridge in both barrels, a bag containing gloves and masks and two pairs of blue jeans. The shotgun, which was of a somewhat antique design, was identified by witnesses as having been used in the third, fourth and sixth robberies, while others described a similar weapon being used on some of the other robberies. A significant piece of evidence was a set of four keys which were discovered in the pocket of one of the pairs of jeans. It was found that these keys fitted the main door of the block of flats where the appellant's father lived, as well as the flat itself. Another key fitted the front door lock of the house of the appellant's sister.

The eighth robbery followed a different pattern from the first seven; although two masked men were involved, they were not armed, and the premises concerned was an off-licence rather than a betting shop. There was no evidence from the scene of the robbery which implicated the appellant. However, some 10 minutes after the robbery took place, a Mrs. Maher was walking along a road about a quarter of a mile from the off-licence when she saw an old Ford Capri motor car with a beige vinyl roof pull up in the middle of the road. As she watched she saw a man running from the direction of the road where the off-licence was situated and get into the front passenger seat of the vehicle. The car was driven away. After the appellant's arrest Mrs. Maher picked him out on an identification parade as the man she had seen running to the car. Furthermore she was taken by the police to a car park where there were a large number of vehicles and identified a Capri as being the vehicle she had seen. It transpired that the Capri belonged to David Gough's wife, Elaine, and up to the preceding January had been owned by the appellant.

Both the appellant and David Gough were arrested on 22 March 1990. They had been kept under observation by the police and were seen to arrive at the block of flats, where their father lived, in the same Ford Capri with David Gough driving. The appellant went into the flats and was later joined by his brother. When they emerged the appellant was carrying two jackets, one a light grey tweed and the other dark grey. They were arrested when they got back into the car. The appellant had in his pocket a set of keys, two of which again operated the main door to the block of flats and his father's flat respectively. Witnesses who were present at the robberies later identified the tweed jacket as being worn by one of the robbers in the third and fourth robberies, and the dark grey jacket in the fifth.

The father's flat was searched by the police, who found a suitcase containing some of the appellant's clothing and correspondence, together with his cheque-book and cheque card. Hidden at the back of a cupboard in the kitchen the police discovered four shotgun cartridges. Microscopic examination subsequently revealed that one of these cartridges had at some time been loaded into the shotgun found on the railway embankment after the sixth robbery.

Both the appellant and David Gough were charged with the robberies. At the committal proceedings the prosecution applied for David Gough

A to be discharged on the grounds that there was insufficient evidence against him. We have not been concerned with the merits of this decision.

At the trial the appellant was indicted on a single count that between the relevant dates he conspired with David Gough to commit robberies. By his notice of appeal the appellant claims that the judge of his own motion should have required the prosecution to proceed on an indictment containing eight substantive counts of robbery and not on the conspiracy B count. Mr. Hytner, for the appellant, has argued that on principle a defendant should not be tried on a conspiracy count when substantive counts are available. Apart from the artificiality of a situation like the present where the alleged co-conspirator has been discharged, it is unfair for a defendant to have to meet a global charge of this nature instead of counts which he can meet or attempt to meet individually.

C Furthermore if a jury convicts on a conspiracy count based on eight overt acts, that is the individual robberies, it is not possible to say which overt acts have been proved to the jury's satisfaction. In this case the evidence was very weak on some counts.

The prosecution have contended that the facts of the present case are an exception to the general principle in that the criminality of the enterprise is not sufficiently contained in an allegation of eight individual D robberies. The range and number of these crimes are such that a conspiracy count is more appropriate.

At the trial counsel for the appellant indicated at the outset to the judge that he would be challenging the conspiracy count in the indictment. However, for whatever reason, he did not in the result do so. We are clearly of the opinion that in such a situation it is not for the judge to E order an amendment of the indictment. It is for counsel to say whether it is in his client's best interest to seek such an amendment. Mr. Hytner recognises that he cannot really sustain this ground of appeal before this court in the absence of an application to amend in the court below.

Although David Gough was not tried with the appellant, he was referred to by name with some frequency during the proceedings. The court does not know how often David Gough attended his brother's trial F but on an occasion when he was present he recognised one of the jurors as his next door neighbour. He did not draw this to the attention of those representing the appellant during the trial. After the appellant had been sentenced David Gough started shouting and it was at this point that the juror, Mrs. Smith, recognised him. The facts were placed before the judge who decided, correctly in our view, that he had no jurisdiction G to take any action, the appellant having been convicted.

However, a statement was taken from Mrs. Smith which was verified by affidavit. In this statement Mrs. Smith said (1) when she began her service on the jury she did not recognise the name "Gough" as she knew her neighbour as "Steve." Similarly she knew David's wife as Elaine during the two years that they had been her next door neighbours. (2) The name David Gough was mentioned on a number of occasions H during the course of the trial. (3) She had no recollection of ever seeing the appellant before the trial; and had no idea he was the brother of her next door neighbour. (4) On 24 April 1991 during the trial, prosecution counsel read out a statement which contained the address, 3, Buckley

Way—Mrs. Smith lives at no. 2—and concerned the Capri motor car. She wondered whether Steve was David Gough but thought it could not be him as he was called Steve. She was confused. (5) The photographs of the appellant and David Gough respectively were shown to the jury during the trial of the appellant. They were police photographs colloquially known as "mug shots." Mrs. Smith did not recognise David. (6) The fact that David Gough was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury.

Another matter raised by Mrs. Smith in her statement was that her son-in-law's brother was married to the sister of the Goughs. Although she knew the sister by her Christian name, Valerie, she was unaware of the connection.

Before us Mr. Hytner argues that the presence of Mrs. Smith on the jury constituted a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. He has demonstrated that there are two conflicting lines of authority on the question of bias, or the appearance of bias, in criminal proceedings.

The test, according to the first line of authorities, when considering whether a conviction should be quashed on the grounds of bias is posed in the following question: was there a real danger that the accused may not have had a fair trial? If this be the correct question Mr. Hytner concedes that he cannot disturb this verdict, because the circumstances of the case are such that there was not such a danger. He contends however that the proper test is: would a reasonable and fair-minded person sitting in the court and knowing all the relevant facts have a reasonable suspicion that a fair trial of the defendant was not possible?

Mr. Hytner submits, applying that test, that the fair-minded observer would suspect in the present case that a fair trial was not possible. In this case Mrs. Smith in her affidavit evidence has stated that she was unaware of the relevant facts connecting her to the appellant until after the jury had delivered its verdict. This evidence was unchallenged. Accordingly this can be distinguished from the various authorities which have been cited to us in that in these latter cases the relevant "connecting" facts giving rise to the alleged bias have already been known to the particular member of the tribunal, against whom bias has been raised, throughout the trial in question. This did not apply in the present case. If the fact that Mrs. Smith was not aware of the relevant facts connecting her to the appellant had been known to the fair-minded observer, then surely the observer would, in those circumstances, have regarded the trial as having been a fair one. Should we impute knowledge of Mrs. Smith's particular state of mind to the fair-minded observer? Mr. Hytner submits that such an observer would be bound to conclude that Mrs. Smith must have realised who the case concerned when she heard the address referred to in the statement and also when she saw David Gough's photograph. Her claim of ignorance would be unacceptable to a fair-minded observer. We think there is force in this contention. Accordingly we do not seek to distinguish the instant case by imputing to the fair-minded observer *actual* knowledge of Mrs. Smith's unawareness of the relevant facts until after the verdict had been delivered.

Mr. Moran contends that the first of the two tests referred to above is the correct one to apply, at all events when one is dealing with a juror. If that be right the appeal fails ex concessis, but Mr. Moran claims that even if one applies the second test the question must be decided against the appellant. There was no prejudice real or apparent to the appellant by the presence of Mrs. Smith on the jury and no risk of an unfair trial. Furthermore, if there was any bias on the part of Mrs. Smith it was likely to have been exercised in favour of the appellant rather than against him, since, according to her statement, her relations with David Gough were friendly.

We have been referred to a considerable number of authorities by counsel on both sides. In *Reg. v. Box* [1964] 1 Q.B. 430 a five-judge division of the Court of Criminal Appeal declined to disturb a conviction where the foreman of the jury knew that the appellants were villains, that they were ex-burglars and were associates of prostitutes. Counsel had argued that even if a fair trial had been possible justice had not manifestly been seen to be done, but the court took the view that there was no proof that the foreman was unable to do what he had sworn to do by his oath. Plainly the Court of Criminal Appeal were applying the "real danger test" rather than that of the independent observer, as on those facts it could hardly be said that the latter would not have had a suspicion that a fair trial was not possible.

The same approach was taken by this court in *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283. During the trial the chief prosecution witness and another witness spoke to three jurors in the court canteen. The judge investigated the matter and found that the witnesses had done little more than pass the time of day. In rejecting the appeal Lord Lane C.J., giving the judgment of the court, said, at p. 285:

> "Upon those facts the judge had to decide whether or not there was a real danger that the appellant's position had been compromised by what had happened. Was there a real danger that she was or might have been prejudiced by what had gone on? The discretion which he undoubtedly had to stop the trial had of course to be exercised judicially and had to be exercised upon the facts as he knew them. It seems to us that what he principally had to decide was whether there was any danger from anything done or said that the jury might have been prejudiced against the appellant. In our judgment there was no such danger."

In *Reg. v. Bliss* (1986) 84 Cr.App.R. 1 this court followed *Reg. v. Box* as well as *Reg. v. Sawyer*, 71 Cr.App.R. 283, Garland J. saying, at p. 6:

> "It appears to us that the principle which emerges from these cases is that this court will not interfere with the verdict of a jury unless there is either evidence pointing directly to the fact or evidence from which a proper inference may be drawn that the defendant may have been prejudiced or may not . . . have received a fair trial."

Reg. v. Sawyer was approved by the House of Lords in *Reg. v. Spencer* [1987] A.C. 128. The facts need not be repeated here but in his speech Lord Ackner said, at p. 144:

> "The correct test is the one stated in *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283, 285 namely, whether there was a 'real danger' that the appellants' position had been prejudiced in the circumstances . . ."

From the other line of cases we turn first to *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549. In a case where a greengrocer was being prosecuted under the weights and measures legislation for giving short weight, the purchaser of the vegetables being a county council school, it was revealed that the chairman of the bench was on the education committee. Lord Widgery C.J. said, at p. 552:

> "There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned. When an application is made to set aside a decision on the ground of bias, it is of course not necessary to prove that the judicial officer in question was biased. It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment to which I have referred."

In *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119 the applicant was charged with criminal damage. The justices who were to try the case had been given sheets from the court register produced through a computer. These revealed that there were seven further charges pending against the applicant. Despite protests from the defending solicitors the bench decided to hear the charge. On an application for judicial review the Divisional Court held, at p. 123:

> "the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery C.J. in a test which he laid down in *Reg. v. Uxbridge Justices, Ex parte Burbridge*, The Times, 20 June 1972 . . . Would 'a reasonable and fair-minded person sitting in court and' knowing all the relevant facts have a 'reasonable suspicion that a fair trial for' the applicant 'was not possible'?"

The application was granted on those facts.

That test was applied in *Reg. v. Mulvihill* [1990] 1 W.L.R. 438 when a judge tried a robbery case where the loser was a bank in which he held shares, the court distinguishing between the role of the judge and the jury. The *Topping* test, if one can use that abbreviation, was also applied in *Reg. v. Morris (orse. Williams)* (1990) 93 Cr.App.R. 102 by this court. During a trial on indictment for theft from Marks and Spencer Plc. it emerged that one of the jurors was an employee of that organisation though working at a different branch. In quashing the conviction the court held that the judge when asked to discharge the juror had not gone into the question of "the appearance of bias."

It is difficult to discover any basis on which these two lines of authority can live together. Mr. Moran has submitted that a distinction

A can be drawn between the test to be applied in jury cases and that which is appropriate for magistrates' courts or other inferior tribunals entrusted with fact finding responsibilities. We feel we must accept this distinction because there is no other way of reconciling most of the authorities, though it is difficult to understand why the test of bias should be any different in considering the position of a magistrate compared with that of a juror. The only case which cannot be fitted into this dichotomy is B the one last cited, namely *Reg. v. Morris (orse. Williams)*, in which giving the judgment of the court I applied the *Topping* test [1983] 1 W.L.R. 119 to the position of a juror. The decision in *Reg. v. Morris (orse. Williams)*, 93 Cr.App.R. 102 cannot stand with that of the five-judge court in *Reg. v. Box* [1964] 1 Q.B. 430; and, having regard to the decision of the House of Lords in *Reg. v. Spencer* [1987] A.C. 128, *Reg.* C *v. Morris (orse. Williams)* should not be followed to the extent that it applies the *Topping* test to trials on indictment.

Accordingly, the appeal fails on this point because of the application of the "real danger" test to jury trials in cases of bias. It is therefore not necessary to decide whether (a) the application of the *Topping* test would have caused a different result, or (b) whether there was in fact any bias.

A further ground of appeal alleging inconsistency of verdicts based D on *Reg. v. Longman* (1981) 72 Cr.App.R. 121 was not pursued and could not in our view have assisted the appellant.

The appeal against conviction is dismissed.

Appeal dismissed.

Certificate under section 33(2) of the E *Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision, namely, "Where a complaint is made after the conclusion of a trial that a juror may have been biased against the defendant* F *what is the proper test for the Court of Appeal to apply in deciding whether or not to order a retrial?"*

Leave to appeal refused.

Solicitors: Crown Prosecution Service, Merseyside.

G

[Reported by MRS. CLARE BARSBY, Barrister]

The defendant appealed by leave of the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Browne-Wilkinson and Lord Mustill) granted on 20 July 1992.

H *Benet Hytner Q.C.* and *David Boulton* for the appellant. Two tests have been applied when considering whether a conviction should be quashed on the ground of bias: (a) was there a real danger that the defendant may not have had a fair trial ("the real danger test") and

(b) would a reasonable and fair minded person sitting in the court and knowing all the relevant facts have had a reasonable suspicion that a fair trial of the defendant was not possible ("the reasonable observer test")?

The real danger test has its genesis in *Reg. v. Box* [1964] 1 Q.B. 430 and is supported by *Rex v. Twiss* (1918) 13 Cr.App.R. 177. The other authorities on that test include *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283; *Reg. v. Spencer* [1987] A.C. 128; *Reg. v. Pennington* (1985) 81 Cr.App.R. 217 and *Reg. v. Putnam* (1991) 93 Cr.App.R. 281.

The reasonable observer test is based on the old and well established principle that justice should not only be done but should manifestly and undoubtedly be seen to be done: *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259. [Reference was also made to *Reg. v. Uxbridge Justices, Ex parte Burbridge*, The Times, 21 June 1972; *Reg. v. McLean, Ex parte Aikens* (1974) 139 J.P. 261; *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119 and *Reg. v. Morris (orse. Williams)* (1990) 93 Cr.App.R. 102.] The reasonable observer test has its genesis in a line of authorities stating two apparently conflicting tests: was there a real likelihood of danger of bias (see *Reg. v. Rand* (1986) L.R. 1 Q.B. 230; *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586 and *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41) and was there a reasonable suspicion of bias? The apparent conflict was reconciled in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, 599. [Reference was also made to *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167.]

The real danger test was developed in isolation from the reasonable observer test. In none of the real danger cases was any of the reasonable observer cases ever cited in argument. The reasonable observer test is to be preferred because it is more soundly based in jurisprudence. There is no justification for applying a different test to magistrates, members of inferior tribunals or arbitrators: see *Ardahalian v. Unifert International S.A. (The Elissar)* [1984] 2 Lloyd's Rep. 84 and *Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie.* [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199.

Brian Leveson Q.C. and *Andrew Moran* for the Crown. The concept of bias covers a wide range of activity, so the first task of the court is to establish the facts. If there is no underlying substance to the allegation, that is the end of the matter: *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 258.

The test in relation to bias, other than in respect of pecuniary or proprietary interest, has been propounded in two different ways: (a) is there a real likelihood of bias (see *Reg. v. Rand*, L.R. 1 Q.B. 230; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *Ardahalian v. Unifert International S.A. (The Elissar)* [1984] 2 Lloyd's Rep. 84 and *Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie.* [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199) and (b) is there a reasonable suspicion of bias? Recently the distinction has become less evident: see *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577 and *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937, but the

correct interpretation of the predominant principle is that the test should be whether the court should conclude objectively from all the facts that there was a real likelihood that the relevant tribunal was in fact prejudiced in some operative way. The test is objective: *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg. v. Uxbridge Justices, Ex parte Burbridge*, The Times, 21 June 1972 and *Reg. v. McLean, Ex parte Aikens*, 139 J.P. 261.

In relation to the knowledge and conduct of a juror in a criminal trial the test of "real danger of prejudice" has been consistently applied. That is the equivalent of the objective real likelihood test (see *Rex v. Twiss*, 13 Cr.App.R. 177; *Reg. v. Box* [1964] 1 Q.B. 430; *Reg v. Spencer* [1987] A.C. 128 and *Reg. v. Putnam*, 93 Cr.App.R. 281) and is in keeping with the exercise of parallel jurisdiction in other areas of criminal procedure. [Reference was made to *Reg. v. Weaver* [1986] 1 Q.B. 353 and *Reg. v. Chapman (William)* (1976) 63 Cr.App.R. 75.]

Hytner Q.C. replied.

Their Lordships took time for consideration.

20 May. LORD GOFF OF CHIEVELEY. On 25 April 1991, at Liverpool Crown Court, the appellant Robert Brian Gough was convicted on an indictment containing a single count of conspiracy to rob, and was sentenced to a term of 15 years' imprisonment.

The indictment was based upon the commission of eight robberies in Liverpool between 13 April 1989 and 6 March 1990. The first seven robberies bore features of striking similarity. In all seven cases the premises concerned were a betting shop; the robbery was committed by two masked men, either at the beginning or at the end of the day; the men were armed, one with a shotgun and the other with a knife; and the modus operandi was similar. The prosecution contended that the first seven robberies had been committed by the same two men, the appellant and his brother David Stephen Gough. There was however insufficient evidence to link this brother with the eighth robbery, and the evidence against him on the other seven was weak. In the result, at the committal proceedings the prosecution applied for David Stephen Gough to be discharged on the ground that there was insufficient evidence against him; and at the trial the appellant was indicted on a single count that between the relevant dates he conspired with David Stephen Gough to commit the robberies.

On appeal, the appellant claimed that the judge should on his own motion have required the prosecution to proceed on an indictment containing eight substantive counts of robbery and not on the conspiracy count. That submission was rejected by the Court of Appeal. There was however another ground of appeal, which is the subject of the present appeal to your Lordships' House. This was that, by reason of the presence on the jury of a lady who was David Stephen Gough's next door neighbour, there was a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. That submission was also dismissed by the Court of Appeal, and the appellant now appeals to your Lordships' House from that part

of the decision of the Court of Appeal, with the leave of your Lordships' House.

It was not until after the trial that it emerged that a member of the jury was David Stephen Gough's next door neighbour. In opening and in the indictment, he was referred to as David Gough; but in closing speeches he was referred to as David Stephen Gough. The defence case was based on the premise that David Stephen Gough was one of the robbers. He had a record of previous convictions, as had the appellant. During the trial, photographs of both brothers had been produced to the jury, and retained by them. Furthermore the vehicle alleged to have been used in the eighth robbery was owned by Elaine Gough, the wife of David Stephen Gough, and her statement including her address was read to the jury. The car must have been parked outside the juror's house for a number of months, and at the time at least of the eighth robbery.

After sentence was passed, David Stephen Gough, who was then present in court for the first time, started shouting; and it was at this point that the juror, Mrs. Smith, recognised him. He in his turn informed the defence that one member of the jury was his next door neighbour. This was drawn to the attention of the judge, but he rightly decided that he was by then functus officio. However the juror was later interviewed by the police, and subsequently swore an affidavit. The effect of the affidavit was summarised by the Court of Appeal, ante, pp. 651–652:

> "(1) when she began her service on the jury she did not recognise the name 'Gough' as she knew her neighbour as 'Steve.' Similarly she knew David's wife as Elaine during the two years that they had been her next door neighbours. (2) The name David Gough was mentioned on a number of occasions during the course of the trial. (3) She had no recollection of ever seeing the appellant before the trial; and she had no idea that he was the brother of her next door neighbour. (4) On 24 April 1991 during the trial, prosecution counsel read out a statement which contained the address, 3, Buckley Way—Mrs. Smith lives at no. 2—and concerned the Capri motor car. She wondered whether Steve was David Gough but thought it could not be him as he was called Steve. She was confused. (5) The photographs of the appellant and David Gough respectively were shown to the jury during the trial of the appellant. They were police photographs colloquially known as 'mug shots.' Mrs. Smith did not recognise David. (6) The fact that David Gough was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury."

The affidavit was and remains unchallenged.

It was on these facts that the question arose whether the courts should conclude that, by reason of the presence of Mrs. Smith on the jury, there was such a possibility of bias on her part against the appellant that his conviction should be quashed. As I have already recorded, that question was answered by the Court of Appeal in the negative. The Court of Appeal however identified in the cases two strands of authority, revealing

A that differing criteria have been applied in the past when considering the question of bias. The two tests have, as will appear, themselves been variously described. The Court of Appeal identified them as being (1) whether there was a real danger of bias on the part of the person concerned, or (2) whether a reasonable person might reasonably suspect bias on his part. In the end, the court concluded that the former test was to be applied in cases concerned with jurors, and the latter in those B concerned with magistrates or other inferior tribunals. The court therefore applied the real danger test in the present case and, on that basis, held that the appeal must fail, as indeed had been accepted by counsel for the appellant.

In considering the subject of the present appeal, your Lordships have been faced with a series of authorities which are not only large in C number, but bewildering in their effect. It is only too clear how great a difficulty courts of first instance, and indeed Divisional Courts and the Court of Appeal, must face in cases which come before them; and there is a compelling need for your Lordships' House to subject the authorities to examination and analysis in the hope of being able to extract from them some readily understandable and easily applicable principles, thus D obviating the necessity of conducting on each occasion a trawl through authorities which are by no means easy to reconcile. It is on that exercise that I now propose to embark.

A layman might well wonder why the function of a court in cases such as these should not simply be to conduct an inquiry into the question whether the tribunal was in fact biased. After all it is alleged that, for example, a justice or a juryman was biased, i.e. that he was motivated E by a desire unfairly to favour one side or to disfavour the other. Why does the court not simply decide whether that was in fact the case? The answer, as always, is that it is more complicated than that. First of all, there are difficulties about exploring the actual state of mind of a justice or juryman. In the case of both, such an inquiry has been thought to be undesirable; and in the case of the juryman in particular, there has long F been an inhibition against, so to speak, entering the jury room and finding out what any particular juryman actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias—a point stressed by Devlin L.J. in *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. G 167, 187. In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259, that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." I shall return H to that case in a moment, for one of my tasks is to place the actual decision in that case in its proper context. At all events, the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether

there is such a degree of possibility of bias that the decision in question should not be allowed to stand.

My initial reaction to the conclusion of the Court of Appeal in the present case was one of surprise that it should be necessary to draw a distinction between cases concerned with justices and those concerned with jurymen, and to conclude that different criteria fell to be applied in investigating allegations of bias in the two categories of case. Evidently, the Court of Appeal was itself unhappy in having to reach this conclusion, which it felt bound to reach on the authorities. Of course, there are some distinctions between the two groups of cases. For example, in the case of jurymen there is the inhibition, to which I have already referred, against investigating the state of mind of a juryman when reaching his decision in the privacy of the jury room. There is also the fact that the possibility of bias may come to light in the course of a jury trial—for example, a juryman may have unwisely indulged in conversation with a witness, or previous convictions of the accused may have accidentally been revealed to the jury. Situations such as these have to be dealt with by the judge when they arise; and he may be able to deal with the situation on the spot, for example by issuing a warning to the jury, or by discharging the particular juryman involved. And, if a verdict is challenged before the Court of Appeal on the ground of bias, the ultimate principles to be applied are to be found in section 2 of the Criminal Appeal Act 1968. But, even taking these matters into account, I am left with the feeling that there should be no reason, in principle, why the test of bias should be different in the two groups of cases—those concerned with justices and those concerned with juries. I shall however, as a matter of convenience, submit the authorities concerning these two categories of case to separate consideration, before reaching any final conclusion on this point.

The argument before the Appellate Committee was presented on the basis that there were two rival, alternative tests for bias to be found in the authorities, and that the result in the present case depended on the choice made by your Lordships' House between them. The first test, favoured by Mr. Hytner for the appellant, was whether a reasonable and fair minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial by the defendant was not possible. The second test, favoured by Mr. Leveson for the Crown, was whether there was a real likelihood of bias. I shall for convenience refer to these two tests respectively as the reasonable suspicion test, and the real likelihood test. It was recognised by Mr. Hytner before the Appellate Committee, as before the Court of Appeal, that if the real likelihood test is to be preferred, the appeal must fail.

In fact, examination of the authorities reveals that selection of the appropriate test does not simply involve a choice between the two tests formulated by counsel in the present case. Thus, when the appropriate test in cases concerned with juries fell to be considered by your Lordships' House in *Reg. v. Spencer* [1987] A.C. 128, a variant of the real likelihood test, viz. whether there was a real danger of bias, was adopted, as it was by the Court of Appeal in the present case. There are also to be found in the authorities variants of the reasonable suspicion

test; and sometimes the two tests seem to have been combined. At the heart of the present inquiry lies the need to identify the precise nature of these tests, and to consider what, if any, are the differences between them. For that purpose, I propose to consider first the cases concerned with justices and other inferior tribunals, where the principal problems appear to have arisen; and then to turn to the cases concerned with juries, of which *Reg. v. Spencer* is of great importance.

Before I do so, however, I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter." The principle is expressed in the maxim that nobody may be judge in his own cause (nemo judex in sua causa). Perhaps the most famous case in which the principle was applied is *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."

In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

I turn next to the broader question of bias on the part of a member of the relevant tribunal. Here it is necessary first to put on one side the very rare case where actual bias is shown to exist. Of course, if actual bias is proved, that is an end of the case; the person concerned must be disqualified. But it is not necessary that actual bias should be proved; and in practice the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include, but are by no means limited to, cases in which a member of the tribunal has an interest in the outcome of the proceedings, which falls short of a direct pecuniary interest. Such interests may vary widely in their nature, in their effect,

and in their relevance to the subject matter of the proceedings; and there is no rule, as there is in the case of a pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts.

I turn first to the authorities concerned with justices, with whom I bracket members of other inferior tribunals. Of the authorities cited to the Appellate Committee in the course of argument, the first in point of time was *Reg. v. Rand*, L.R. 1 Q.B. 230, to which I have already referred, in which Blackburn J. stated the law in terms of the real likelihood test. He referred, at p. 233, to cases in which there was "a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties" in which event "it would be very wrong in him to act." That test was later approved by three members of the Appellate Committee of this House in *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586 (a case concerned with licensing justices): see p. 591, *per* Viscount Cave L.C., p. 607, *per* Lord Atkinson (citing *Rex v. Sunderland Justices* [1901] 2 K.B. 357), and p. 610, *per* Lord Sumner (quoting from the dissenting judgment of Atkin L.J., sub nom. *Rex v. Bath Compensation Authority* [1925] 1 K.B. 685, 712). Furthermore Lord Shaw of Dunfermline agreed with Viscount Cave L.C.; and, although the other member of the Appellate Committee, Lord Carson, spoke simply of "a likelihood of bias" (see p. 617), there is no reason to suppose that he intended any different test.

At this stage, however, I must turn to the well known case of *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256. There the applicant came before justices charged with the offence of dangerous driving, which had involved a collision between his vehicle and another vehicle. The solicitor acting as magistrates' clerk on this occasion was also acting as solicitor for the other driver in civil proceedings against the applicant arising out of the collision. At the conclusion of the evidence before the magistrates, the acting clerk retired with them in case his help should be needed on a point of law; but in fact the magistrates did not consult him, and he himself abstained from referring to the case. The magistrates convicted the applicant, but his conviction was quashed by a Divisional Court. This is of course the case in which Lord Hewart C.J. let fall his much-quoted dictum, to which I have already referred. I think it helpful, however, to quote from his judgment in extenso, see pp. 258–259:

> "It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was

A so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that B the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In C those circumstances I am satisfied that this conviction must be quashed . . . "

The case was therefore concerned with the possibility that the acting magistrates' clerk, who plainly had such an interest in the outcome of the civil proceedings that he might well be biased against the applicant in the proceedings before the magistrates, might influence the decision of D the magistrates adversely to the applicant. Lord Hewart C.J. clearly thought that the acting magistrates' clerk's involvement in the civil proceedings was such that he should never have participated in the hearing before the magistrates, and went so far as to indicate that "even a suspicion that there had been an improper interference with the course of justice" is enough to vitiate the proceedings, an observation which has been invoked as the origin of the reasonable suspicion test. Indeed, E following the *Sussex Justices* case, there developed a tendency for courts to invoke a test requiring no more than a suspicion of bias.

However in a later case, also concerned with alleged bias on the part of a magistrates' clerk, *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, a Divisional Court, having received the assistance of the Solicitor-General as amicus curiae, approached the question on the basis F that a real likelihood of bias must be established. In that case, the applicant was convicted of an offence under the Food and Drugs Act 1938. The information alleging the offence had been laid by a sampling officer, for the Cornwall County Council. The justices' clerk, who in the course of the hearing was invited into the justices' private room in order to advise them, was a member of the county council (though not of the relevant committee of the council, the Public Health and Housing G Committee). For this reason, the applicant alleged that a reasonable suspicion of bias might arise, and that his conviction should be quashed. The court dismissed the application, holding that in the circumstances there was no real likelihood of bias on the part of the justices' clerk. Moreover the court was at pains to reject any suggestion that mere suspicion of bias was sufficient; and, while endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart C.J. H in the *Sussex Justices* case, nevertheless deplored the principle

> "being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias:" see pp. 51–52, *per curiam.*

In the *Sussex Justices* case [1924] 1 K.B. 256 it must have been plain that there was a real likelihood of bias on the part of the acting magistrates' clerk; and the court went on to hold that, despite the fact that there had been no discussion about the case between the magistrates and the clerk, nevertheless the decision of the magistrates must be quashed, because nothing may be done which creates even a suspicion that there has been a wrongful interference with the course of justice. It appears that this decision was later used to suggest that a mere suspicion of bias on the part of a person involved in the process of adjudication is enough to require that the decision should be quashed. That approach was rejected in the *Camborne Justices* case [1955] 1 Q.B. 41, in which it was held that, since there was no real likelihood of bias on the part of the justices' clerk, there was no ground for quashing the justices' decision. The cases can therefore be distinguished on the facts. But the question remains whether, in a case involving a justices' clerk, it is enough to show that there was a real likelihood of bias on the part of the clerk, or whether it must also be shown that, by reason of his participating in the decision-making process, there was a real likelihood that he "would impose his influence on the justices or give them wrong legal advice:" see p. 46, *per* Sir Reginald Manningham-Buller Q.C., S.-G., arguendo as amicus curiae. In my opinion, the latter view is to be preferred. Of course, nowadays a justices' clerk will not withdraw with the justices, but will only join them if invited to advise them on a question of law. If the clerk is not so invited, any bias on his part will ordinarily have no influence on the outcome of the proceedings; though if he has any interest in the outcome, it is obviously undesirable that he should be acting at all in the capacity of clerk in relation to those proceedings, in case his advice is called for. If however he is invited to give the justices advice, it is open to the court to infer that, having regard to the insidious nature of bias, there is a real likelihood of the clerk's bias infecting the views of the justices adversely to the applicant.

I have had the opportunity of reading in draft the speech of my noble and learned friend, Lord Woolf, and it follows from what I have said that I am in agreement with his conclusions both about the effect of the *Sussex Justices* and *Camborne Justices* cases, and that the only special category of case, in which it is unnecesary to inquire whether there was any real likelihood of bias, relates to circumstances where a person acting in a judicial capacity has a direct pecuniary interest in the outcome of the proceedings.

In *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167, 187, Devlin L.J. also preferred the real likelihood test, considering that the term "real likelihood of bias" is not used to import the principle in *Rex v. Sussex Justices, Ex parte McCarthy*, which had been invoked by Salmon J. at first instance [1959] 2 Q.B. 276, 286. It is, I think, desirable that I should quote the relevant passage from the judgment of Devlin L.J. in full, at pp. 186–187:

> "Here is an application by the co-operative society and there is sitting to decide it a bench which is wholly composed of members of the society and one woman whose husband was a member of the

society, presided over by a chairman who had interested himself actively in the conduct of the affairs of the society or was desirous of doing so. Is there, in those circumstances, a real likelihood of bias? I am not quite sure what test Salmon J. applied. If he applied the test based on the principle that justice must not only be done but manifestly be seen to be done, I think he came to the right conclusion on that test. I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a bench which was so composed, and, indeed, it is conceded that steps will have to be taken to rectify the position. But, in my judgment, it is not the test. We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias—not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. The term 'real likelihood of bias' is not used, in my opinion, to import the principle in *Rex v. Sussex Justices* to which Salmon J. referred. It is used to show that it is not necessary that actual bias should be proved. It is unnecessary, and, indeed, might be most undesirable, to investigate the state of mind of each individual justice. 'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit."

It is plain from this passage that Devlin L.J. was concerned to get away from any test founded simply upon suspicion—"the sort of impression that might reasonably get abroad"—and to focus upon the actual circumstances of the case in order to decide whether there was in those circumstances a real likelihood of bias. His question—do the circumstances give rise to a real, likelihood that the justices might be biased?—suggests that he was thinking of likelihood as meaning not probability, but possibility; the noun probability is not aptly qualified by the adjective "real," and the verb "might" connotes possibility rather than probability. Such a reading makes the real likelihood test very similar to a test requiring a real danger of bias. It is true that, at the conclusion of the passage which I have quoted, Devlin L.J. stated that the matter must be determined "upon the probabilities." I do not however think that he meant "on the balance of probabilities," but rather that he was emphasising that the question was to be answered by reference to the relevant circumstances.

However nine years later, in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, the law took a different turn. The

case was concerned with a decision by a rent assessment committee, when determining fair rents for a block of flats in London. The rent so determined was substantially below the rent suggested even by the expert called by the tenants. The landlord sought to quash the decision on the ground that the chairman of the committee was a solicitor who had been concerned with advising tenants of flats in another comparable block of flats. The Court of Appeal, allowing the appeal from a Divisional Court, held that the facts were such as to give rise to an appearance of bias on the part of the chairman, and on that ground they quashed the decision of the committee, even though there was no actual bias on his part. In so holding, the court rejected the argument of counsel for the committee, who invited the court to proceed on the basis of the real likelihood test. Lord Denning M.R. and Edmund Davies L.J. both invoked the much quoted dictum of Lord Hewart C.J. in *Rex v. Sussex Justices*, and declined to follow Devlin L.J.'s approach in *Reg. v. Barnsley Licensing Justices*. Lord Denning M.R. stated the law as follows, at p. 599:

> "In *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association*, Devlin L.J. appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg. v. Huggins* [1895] 1 Q.B. 563 and *Rex v. Sunderland Justices, per* Vaughan Williams L.J. [1901] 2 K.B. 357, 373. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, 48–51 and *Reg. v. Nailsworth Licensing Justices, Ex parte Bird* [1953] 1 W.L.R. 1046. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

Edmund Davies L.J. said, at p. 606, that it was enough if "there is *reasonable* suspicion of bias on the part of one or more members of the adjudicating body;" and the third member of the court, Danckwerts L.J., appears to have, proceeded, despite some doubt, upon a similar basis, at pp. 601–602.

I shall return to this case in a moment, but I have to say that it left a legacy of some confusion behind it. In two cases, *Reg. v. Uxbridge Justices, Ex parte Burbridge*, The Times, 21 June 1972, and *Reg. v. McLean, Ex parte Aikens* (1974) 139 J.P. 261, Lord Widgery C.J. was prepared to proceed on the basis of the reasonable suspicion test, though in neither case was the choice of test decisive. However, in *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549, Lord Widgery C.J. did not feel able to decide whether the real likelihood test or the reasonable suspicion test was appropriate. In that case the appellants were convicted of offences of having sold vegetables by weight and having delivered a lesser weight to two county schools. The presiding justice at the trial was a member of the education committee, and was a governor of two schools, though not of those in question. A Divisional Court quashed the convictions on the ground that the presiding justice should have disqualified herself from hearing a case where she had an active interest in the schools which were the victims of the offence. In so holding, Lord Widgery C.J. referred to both the real likelihood test and the reasonable suspicion test. However it was not clear to him from *Lannon* which of those tests fell to be applied. Furthermore, in *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119, in which justices became aware of other unrelated charges against the defendant whose case they were about to consider, the Divisional Court applied a form of the reasonable suspicion test derived from the judgment of Lord Widgery C.J. in *Ex parte Burbridge*; but they prefaced their choice of this test with the observation that, in agreement with a view expressed by Cross L.J. in *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937, 949, there was little if any difference between the real likelihood test and the reasonable suspicion test, because if a reasonable person with the relevant knowledge thinks that there might well be bias, then there is in his opinion a real likelihood of bias—a view which appears to assume that real likelihood of bias means no more than a real possibility of bias.

I have already quoted passages from the judgments of Lord Denning M.R. and Edmund Davies L.J. in *Metropolitan Properties (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, 599, 606, which show that they did not in fact state the same test, Lord Denning's test being really no more than an adaptation of the real likelihood test, and only Edmund Davies L.J. enunciating a test founded upon reasonable suspicion of bias. Furthermore Lord Denning M.R., while purporting to differ from Devlin L.J. in the *Barnsley Licensing Justices* case [1960] 2 Q.B. 167, in fact differed very little from him. Thus, both considered that it was not necessary that actual bias should be proved, the court having therefore to proceed upon an impression derived from the circumstances; and that the question is whether such an impression reveals a real likelihood of bias. The only difference between them seems to have been that, whereas Devlin L.J. spoke of the impression which the court gets from the circumstances, Lord Denning M.R. looked at the circumstances from the point of view of a reasonable man, stating that there must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, was biased. Since however the court investigates the actual circumstances, knowledge of such

circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man. It is true that Lord Denning M.R. expressed the test as being whether a reasonable man would think it "likely or probable" that the justice or chairman was biased. If it is a correct reading of his judgment (and it is by no means clear on the point) that it is necessary to establish bias on a balance of probabilities, I for my part would regard him as having laid down too rigorous a test. In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose. Finally there is, so far as I can see, no practical distinction between the test as I have stated it, and a test which requires a real danger of bias, as stated in *Reg. v. Spencer* [1987] A.C. 128. In this way, therefore, it may be possible to achieve a reconciliation between the test to be applied in cases concerned with justices and other members of inferior tribunals, and cases concerned with jurors.

I turn therefore to the cases concerned with jurors; and here the relevant authorities support the view which I have just expressed. It is true that, after the *Lannon* case, there were cases in which the reasonable suspicion test was adopted: see, e.g., *Reg. v. Pennington* (1985) 81 Cr.App.R. 217. However, it is appropriate to turn straight to the leading authority, which is the decision of your Lordships' House in *Reg. v. Spencer* [1987] A.C. 128. In that case the defendants, who were members of the nursing staff at a secure hospital, were convicted in two separate trials of ill treating patients at the hospital, contrary to section 126 of the Mental Health Act 1959. On appeal, the principal issue was one of corroboration. But in addition a question arose with regard to one of the jurors at the first trial. He had clearly demonstrated in the course of the trial that he was biased against the defendants. At first the judge, having consulted counsel, decided to take no action. However, it then transpired that the juror's wife worked at another mental hospital which figured in the evidence at the trial. The judge, fearing that the juror might have heard things from his wife which it would be better if he had not heard, decided to discharge him; but, discovering that the juror was in the habit of giving three other members of the jury a lift home, warned the members of the jury that they should not discuss the case further with him. On the following morning, however, defence counsel submitted that the remainder of the jury should be discharged; but the judge decided, in the exercise of his

discretion, not to do so. Counsel for the prosecution had submitted that the test which the judge should apply was that the jury should not be discharged unless it could be shown that there was a very high risk that the apparently biased jury had influenced any of his fellow jurors. Lord Ackner (with whom Lord Brandon of Oakbrook and Lord Mackay of Clashfern agreed) however held that the correct test was that stated by the Court of Appeal in *Reg. v. Sawyer* (1980) 71 Cr.App.R. 283, 285, viz., whether there was a real danger that the appellant's position had been prejudiced in the circumstances. This was the test which had in fact been applied by the Court of Appeal, but they had concluded that there was no realistic chance that the three jurors who had travelled in the car had been prejudiced or biased by what they had heard. On this point, however, Lord Ackner found himself unable totally to dismiss that possibility, and he concluded, with the remainder of the Appellate Committee, that the verdict was unsafe and the appeal must be allowed [1987] A.C. 128, 146. Subsequently, the test so established in *Reg. v. Spencer* was applied by the Court of Appeal in *Reg. v. Putnam* (1991) 93 Cr.App.R. 281. I should add that in *Reg. v. Morris (orse. Williams)* (1990) 93 Cr.App.R. 102, in which the reasonable suspicion test was applied, it appears that *Reg. v. Spencer* was not cited to the court. In the light of the conclusion which I have reached, I do not think that it is necessary for me to consider any more of the earlier cases concerned with allegation of bias on the part of jurors. I only wish to say that *Reg. v. Box* [1964] 1 Q.B. 430, to which some criticism was directed in the course of argument, appears to have been concerned primarily with an allegation of actual bias, and to have reasserted the principle that knowledge by a juror of a defendant's character or previous convictions is not an automatic disqualification.

There are however two features of jury cases to which I will briefly draw attention. The first is that the possibility of bias on the part of a juror may, as in *Reg. v. Spencer* itself, come to the attention of the judge in the course of the trial. In such circumstances the judge, in deciding whether to exercise his discretion to discharge one or more members of the jury, should apply the same test as falls to be applied on appeal by the Court of Appeal, viz., whether there is a real danger of bias affecting the mind of the relevant juror or jurors. Even if the judge decides that it is unnecessary to do more than issue a warning to the jury or to a particular juror, and thereby isolate and neutralise any bias that might otherwise occur, the effect of his warning is not merely to ensure that the jurors do not allow any possible bias to affect their minds, but also to prevent any lack of public confidence in the integrity of the jury. It is unnecessary for me to say any more on this subject, to which no argument was addressed in the present case. Second, if any question of bias on the part of a juror arises on appeal, the Court of Appeal, having applied the real danger test, will then proceed in the light of its conclusion on that test to exercise its powers under section 2 of the Criminal Appeal Act 1968, in the normal way, as was done by your Lordships' House in *Spencer*.

I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted, derived from *Ex parte Topping*

[1983] 1 W.L.R. 119, has been whether the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him: see *Ardahalian v. Unifert International S.A. (The Elissar)* [1984] 2 Lloyd's Rep. 84, and *Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie.* [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199. Such a test is, subject to the introduction of the reasonable man, consistent with the conclusion which I have reached, provided that the expression "real likelihood" is understood in the sense I have described, i.e. as meaning that there is a real possibility or, as I would prefer to put it, a real danger of bias. It would appear to have been so understood by Mustill J. in the *Bremer* case [1985] 1 Lloyd's Rep. 160, 164, where he referred to "an evident risk" of bias.

In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant.

It follows from what I have said that the Court of Appeal applied the correct test in the present case. On that test, it was accepted by Mr. Hytner that there was no ground for disturbing the jury's verdict. I would therefore dismiss the appeal.

LORD ACKNER. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

LORD MUSTILL. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

LORD SLYNN OF HADLEY. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

LORD WOOLF. My Lords, I have had the advantage of reading in draft the speech of Lord Goff of Chieveley and I agree that this appeal should be dismissed for the reasons which he gives. In particular, I agree that the correct test to adopt in deciding whether a decision should be set aside on the grounds of alleged bias is that given by Lord Goff, namely, whether there is a real danger of injustice having occurred as a result of the alleged bias.

The test to be applied in each case has as its source the maxim that nobody may be a judge in his own cause. No distinction arises in the application of the test because it is the clerk to the justices rather than the justices themselves who are alleged to be biased. A clerk to the justices is part of the judicial process in the magistrates' court. This is accepted by Lord Hewart C.J., when he said in his judgment in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259, that the clerk's position "was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction." (The other position, being a member of the firm of solicitors acting for the other driver who was involved in the accident which gave rise to the prosecution.)

This is also made clear in the judgment in *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, where the facts were very similar to those in the *Sussex Justices* case. The *Camborne Justices* case also involved a justices' clerk. The proceedings before the justices were the result of an information under the Food and Drugs Act 1938 laid on behalf of the county council. The clerk to the justices was at the time a member of the council, but not a member of the council's health committee responsible for laying the information. At the hearing he was sent for to advise the justices on a point of law, but according to the evidence put before the Divisional Court he did not discuss the facts of the case and having given his advice returned to the court. Unlike the *Sussex Justices* case, where the argument appears to have been limited (the applicant was not called upon to address the court) and the judgment was not reserved, in the *Camborne Justices* case the matter was fully argued, Sir Reginald Manningham-Buller Q.C., S.-G. and J. P. Ashworth appearing as amici curiae and a reserve judgment of the court was given by Slade J. on behalf of a Divisional Court which was presided over by Lord Goddard C.J. That judgment described the question which the court had to decide, at p. 47, as being:

> "What interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it upon the ground of bias or appearance of bias?"

To that question the court gave the answer, at p. 51:

> "that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown."

As the court concluded on the facts that there was no real likelihood of bias the application was dismissed. However, for present purposes the importance of the case is that the court did not consider they were dealing with a special category of case and applied a test which I regard as being the equivalent of the real danger test.

The problem created by the *Sussex Justices* case [1924] 1 K.B. 256 arises because Lord Hewart C.J. preceded his celebrated remark, at p. 259: "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done," with the comment, at pp. 258–259:

> "It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way."

and later added: "speaking for myself, I accept the statements contained in the justices' affidavit." If these passages in his judgment are taken at face value, then they are consistent with the court in the *Sussex Justices* case coming to the conclusion that there was no risk of actual bias and the court was therefore applying some different test from the real danger test when deciding that the decision had to be quashed. A similar situation arises in relation to the comment of Lord Campbell in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759, 793, when he, alone among the members of the House of Lords, said:

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."

It could well be that too much attention should not be attached to the remarks made as to the bona fides of Lord Cottenham L.C. in the *Dimes* case and the justices' clerk in the *Sussex Justices* case, although, no doubt the Lord Chancellor and the clerk respectively found them comforting. It must be remembered that except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established. Whether it is a judge, a member of the jury, justices or their clerk, who is alleged to be biased, the courts do not regard it as being desirable or useful to inquire into the individual's state of mind. It is not desirable because of the confidential nature of the judicial decision making, process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.

A It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but seen to be done applies. When considering whether there is a real danger of injustice, the court gives effect to the maxim, but does so by examining all the material available and giving its conclusion on that material. If the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash B the decision should be dismissed. This, therefore, should have been the result in the *Sussex Justices* case if Lord Hewart C.J.'s remarks are to be taken at face value and are to be treated as a finding, and not merely an assumption, that there was no danger of the justices' decision being contaminated by the possible bias of the clerk.

The *Dimes* case, 3 H.L.Cas. 759, is different because it involved C direct pecuniary or proprietary interest on the part of Lord Cottenham L.C. in the subject matter of the proceedings and this creates a special situation, as was pointed out at the beginning of the judgment in the *Camborne Justices* case [1955] 1 Q.B. 41, 47:

> "any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias."

D

It was because Lord Hewart C.J.'s judgment in the *Sussex Justices* case [1924] 1 K.B. 256, 258–259, has created difficulties that in the *Camborne Justices* case [1955] 1 Q.B. 41, where exactly the same issue was involved, the court warned against the misuse of Lord Hewart's judgment since it was being "urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in E some cases upon the flimsiest pretexts of bias:" see pp. 51–52. As the court pointed out the continued citation of Lord Hewart's maxim may lead to the erroneous impression that "it is more important that justice should appear to be done than that it should, in fact, be done."

I therefore suggest that the *Sussex Justices* case [1924] 1 K.B. 256 neither creates, nor should it be placed in, a separate category. The F proper test which Lord Goff has identified should have been applied in that case as it was in the *Camborne Justices* case [1955] 1 Q.B. 41. There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to G what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist.

Appeal dismissed.

H

Solicitors: E. Rex Makin & Co., Liverpool; Crown Prosecution Service, Headquarters.

A. R.

ANEXO 13

England and Wales High Court (Commercial Court) Decisions

Neutral Citation Number: [2016] EWHC 240 (Comm)
Case No: 2015-000555

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
17/02/2016

B e f o r e :

MR JUSTICE HAMBLEN

Between:

COFELY LIMITED	**Claimant**
- and -	
ANTHONY BINGHAM	
and –	
KNOWLES LIMITED	**1st Defendant**

Vincent Moran QC (instructed by Stephenson Harwood) for the Claimant
Karen Gough (instructed by Browne Jacobson) for the 1st Defendant
Jonathan Acton Davis QC (instructed by Wheelers) for the 2nd Defendant
Hearing dates: 8 February 2016

HTML VERSION OF JUDGMENT

Mr Justice Hamblen :

Introduction

1. The Claimant ("Cofely") seeks an order that the First Defendant ("Mr Bingham") be removed as arbitrator from an ongoing arbitration between the Claimant and the Second Defendant ("Knowles") pursuant to section 24(1)(a) of the Arbitration Act 1996 ("the Act"), on the grounds that circumstances exist that give rise to justifiable doubts as to his impartiality. Those doubts about his impartiality are alleged to involve apparent bias, not actual bias.

2. The Defendants dispute the existence of such circumstances and question whether Cofely has lost the right to raise this objection under section 73 of the Act.

The background facts

3. Cofely is a major construction company.

4. Knowles is a well known firm of claims consultants in the construction field.

5. Mr Bingham is a very experienced arbitrator and adjudicator in construction disputes. He worked in the construction business for a number of years before selling his business in 1988 so as to concentrate on his arbitration career. He is a qualified barrister and has practised from 3, Paper Buildings since 1991-2.

6. Cofely East London Energy Limited (a company related to Cofely) entered into a contract with Stratford City Developments Limited and the Olympic Delivery Authority (the "Employers") to design, build, maintain and operate district energy services to the Olympic Park and Westfield Shopping Centre in Stratford, London (the "Concession Agreement").

7. Various disputes arose between the parties under the Concession Agreement and Cofely appointed Knowles to advise upon and then progress its claims arising under it for an extension of the time (the "Time Claim") and associated additional costs caused by the delay in completion of the works (the "Money Claim").

8. Knowles was initially appointed by Cofely pursuant to a written agreement dated 19 August 2010 ("the Appointment") and Knowles was subsequently paid £1,187,082 by Cofely on a time basis pursuant to the Appointment to prepare the Time Claim and Money Claim on Cofely's behalf.

9. Cofely, however, became concerned about the escalating costs and delay in Knowles pursuing the Time Claim and Money Claim and new terms of remuneration were therefore discussed between the parties.

10. This culminated in the conclusion of a success fee agreement dated 26 October 2011 (the "Success Fee Agreement"), pursuant to which Knowles was entitled to payment of certain sums and, potentially, a success fee on the occurrence of certain events (set out at sub-headings entitled "AGREEMENT" Nos 1-6).

11. An adjudication was thereafter commenced by Knowles on behalf of Cofely against the Employers in relation to the Time Claim ("the Adjudication") but, prior to the conclusion of the Adjudication, Cofely says that it became concerned about the advice being provided by Knowles and the approach being taken in the Adjudication. It therefore entered into direct settlement negotiations with the Employers and reached a settlement of the Time Claim, the Money Claim and other issues that had arisen under the Concession Agreement.

12. Knowles then alleged that in settling their claims without the involvement of Knowles, Cofely had acted in breach of various provisions of the Success Fee Agreement and claimed at least £3.5 million was payable as fees by Cofely.

The Arbitration proceedings

13. The arbitration agreement in the Success Fee Agreement provided that:

> "The Success Fee Agreement and any dispute or claim of whatever nature arising out of or under or relating to this Success Fee Agreement shall be governed by English law and is to be and hereby is referred to arbitration pursuant to the Arbitration Act 1996. Such arbitration shall commence on the giving of notice and on the application by either of the parties to the Chartered Institute of Arbitrators or the Royal Institution of Chartered Surveyors for the appointment of an arbitrator".

14. On 21 January 2013, Knowles gave notice of arbitration to Cofely and applied to the Chartered Institute of Arbitrators ("CIArb") for the appointment of an arbitrator. It was stated that it was preferable that the arbitrator had both quantity surveying ("QS") and delay analysis experience and the appointment of Mr Bingham was sought.

15. On 30 January 2013, Cofely's solicitors, Stephenson Harwood ("SH"), wrote to the CIArb stating that it did not agree to the appointment of Mr Bingham, explaining that whilst it was agreed that the arbitrator should have legal experience it was not considered that experience in QS or construction delay was needed. It was proposed that Ms Krista Lee, a barrister at Keating Chambers, be appointed.

16. On 4 February 2013, the CIArb confirmed the appointment of Mr Bingham as arbitrator.

17. Knowles served its Particulars of Claim on 2 April 2013 and at the same time made an application for a Partial Award in relation to the Time claim and Money Claim pursuant to section 47(2) (a) (b) of the Act.

18. Knowles requested that the Arbitration should proceed in two parts: the first dealing with claims made by Knowles which related to defined sums payable under the Success Fee Agreement and the second dealing with Knowles's alleged entitlement to a success fee based on the outcome of the settlement negotiated between Cofely and the Employers.

19. This application was acknowledged by Mr Bingham the next day and on 17 April 2013 Mr Bingham requested that Cofely indicate its position in relation to Knowles' application.

20. Cofely served its Defence on 23 April 2013 and a hearing was held on 19 July 2013.

21. On 21 August 2013, Mr Bingham made a Partial Award entitled "Arbitrator's Decision No 1", finding in favour of Knowles on its claims in relation to defined sums and directing Cofely to pay Knowles £1,000,000 plus interest. No challenge was made to the Partial Award and the sum awarded was duly paid by Cofely.

22. The parties then tried to agree how the referral would proceed but were unable to do so because of a difference of opinion as to how any entitlement under AGREEMENT SIX of the Appointment (in relation to a success fee) should be approached.

23. On 11 November 2013, Cofely made its own application for Partial Awards under section 47 of the Act regarding the approach to be taken in connection with AGREEMENT SIX. The application sought a decision on the following issue:

> "Whether, on a proper construction of Agreement Six, the sum which is due to the Claimant (if any) is:
>
> (a) The actual value of the Knowles Money Claim within the Deed of Settlement; or
>
> (b) Some other sum and, if so, what."

24. It is said that the purpose of this application was to avoid the need for an extensive (hypothetical) factual analysis of the likely outcome of the Time Claim and the Money Claim in the adjudication against the Employers as part of a consideration of whether the settlement with the Employers was reasonable.

25. Mr Bingham acknowledged receipt of this application by email dated 9 November 2013 in which he stated he would "read in and revert".

26. Thereafter there was a period of inactivity. Mr Bingham did not revert, nor did Cofely chase him to do so.

27. On 9 April 2014, Mr Bingham responded to the proposed application by issuing "Arbitrator's Memo No. 1 About AGREEMENT SIX" containing his "observations" on the correct approach to be taken to the outstanding claims of Knowles and concluding that "the Arbitrator in short ought to investigate the £23 million claim", but stating that "This is not a Direction or Decision" and "Comment invited".

28. On 6 June 2014, SH wrote to Mr Bingham regarding the memorandum, stating that Mr Bingham had not addressed Cofely's section 47 application and providing various comments on Mr Bingham's memorandum.

29. On 4 July 2014, Mr Bingham acknowledged receipt of SH's letter and asked for comments from Knowles.

30. Thereafter there was a further period of inactivity in the arbitration.

31. On 24 December 2014, Knowles made an application to Mr Bingham for Cofely to disclose certain documents referred to in the Settlement Deed between the Employers and Cofely. Mr Bingham responded by email almost immediately.

32. On 22 January 2015, Cofely enquired of Knowles as to when it would be responding to its section 47 application.

33. On 18 February 2015, Cofely wrote to Knowles requesting information in relation to its dealings with Mr Bingham in light of the decision of Mr Justice Ramsey in *Eurocom Ltd v Siemens Plc* [2014] EWHC 3710 (TCC) [2015] BLR in which judgment had been delivered on 7 November 2014. The *Eurocom* case concerned a summary judgment application made by Eurocom against Siemens in respect of an adjudication decision made by Mr Bingham. The application failed on the grounds that Siemens had real prospects of successfully defending the claim on the basis that the adjudicator had no jurisdiction because of a fraudulent misrepresentation allegedly made by Mr Giles of Knowles in applying for the appointment of an adjudicator on Eurocom's behalf.

34. The outline facts were that Mr Giles made an application to the Royal Institution of Chartered Surveyors ("RICS") for the appointment of an adjudicator and requesting that one of three nominees be appointed, one of whom was Mr Bingham. In the application form Mr Giles stated that numerous other named candidates had a conflict of interest and were therefore unable to act. Mr Justice

Ramsey held at [63] that there was a "very strong *prima facie* case that Mr Giles deliberately or recklessly answered the question as to whether there were conflicts of interest so as to exclude adjudicators who he did not want to be appointed".

35. The judgment records at [40] the evidence of Mr Giles as being that he had a general practice of excluding candidates in this manner:

> "On the same page of the application form there is a box headed 'Are there any adjudicators who would have a conflict of interest in this case?'. I largely use this box as a means of stating to which adjudicators, based on past experience, I would not send a referral document: in effect a pre-emptive rejection list. This saves time and money that would otherwise be expended in allowing notices of adjudication to lapse and replying for alternative adjudicators. In the instances where there is a conflict I obviously say why."

36. In its letter of 18 February 2015 Cofely explained that it had concerns arising out of the *Eurocom* case and Mr Bingham's conduct of the referral to that time, and asked six questions seeking further information concerning the nature and extent of the professional relationship between Knowles and Mr Bingham. This was the first time that Cofely had raised any concern about the prior conduct of the reference.

37. On 27 February 2015, Knowles wrote to SH answering five of the questions contained in SH's letter dated 18 February 2015.

38. On 11 March 2015, SH replied to this response and posed further questions in light of the responses provided by Knowles in that letter.

39. On the same day SH also wrote to Mr Bingham for the first time requesting related information. The letter enclosed SH's letter dated 18 February 2015 to Knowles and included the following specific requests:

> 1 "How many times in the last 3 years have you acted as adjudicator or arbitrator in disputes where Knowles represented, or was itself, the claimant/referring party?
>
> 2 Please would you break your answer in 1 down so as to clarify how many of the above relate to:
>
> 2.1 appointments first made in the last 3 years; and
>
> 2.2 appointments made more than 3 years ago in respect of matters which are ongoing or have been decided in the last 3 years.
>
> 3 How many times have you made an award or decision in favour of the claimant/referring party (either in whole or in part) in the adjudications and arbitrations referred to above?
>
> 4 What proportion of your professional income as a barrister/adjudicator/arbitrator was accounted for from the referrals covered by requests 1 and 2 above for each of the 3 years in question?
>
> 5 What proportion of your professional income as a barrister/adjudicator/arbitrator was accounted for from the referrals covered by request 3 above for each of the 3 years in question?

> 6 What, if anything, have you done during this Arbitration to satisfy yourself that there is no information that you should disclose to Cofely which could reasonably be interpreted (on an objective basis) as undermining your apparent impartiality?"

40. On 12 March 2015, Mr Bingham emailed Knowles and SH acknowledging SH's letter and making observations on the *Eurocom* case, but failing to answer any of the questions or to indicate whether or not he would do so in due course.

41. On 17 March 2015, Mr Thwaite of SH sent an email commenting on Mr Bingham's observations on the *Eurocom* case, explaining why it appeared significant in the current case and asking Mr Bingham to answer the questions previously asked of him "so that Cofely may be reassured about the position".

42. In an email dated 19 March 2015 Mr Bingham replied to Mr Thwaite stating that in the last three years he had been appointed as adjudicator/arbitrator a total of 137 times and asking what "you say is wrong" in light of this and Knowles' answers in its 27 February 2015 letter.

43. On 23 March 2015, Mr Thwaite emailed Mr Bingham asking him to confirm that (i) the number of Knowles related appointments suggested by Knowles in the past three years (25) was correct, and (ii) he was prepared to answer the question as to what proportion of his income had come from these appointments.

44. Mr Bingham did not respond directly to these specific queries or the original 6 questions.

45. On 30 March 2015, Mr Bingham sent the parties an email dated 30 March 2015 stating that "the clip of correspondence beginning 18th February Cofely-Knowles raises an issue of whether the tribunal is properly constituted" and directing that there be a meeting in relation to this matter.

46. Mr Bingham then sent an email dated 31 March 2015 to Mr Thwaite asking "I ponder what are you driving at. Is it anything in particular" in relation to question 6 from the 11 March 2015 letter (regarding what Mr Bingham had done to satisfy himself that there was no relevant information to disclose).

47. Mr Bingham chased an answer to the above question in a further email dated 2 April 2015 stating "what are you driving at please; or (forgive the vernacular) so what?"

48. In an email dated 2 April 2015 Mr Thwaite sought to explain the purpose of the questions posed in the letter dated 11 March 2015 and, in particular, the relevance of the question regarding the proportion of Mr Bingham's income derived from the 25 apparent Knowles appointments in the past three years. The email stated as follows:

> "The purpose of the questions raised in our letter of 11 March was to reassure Cofely that there are no previously undisclosed circumstances that might give rise to justifiable doubts as to your independence and impartiality.
>
> As a matter of general law an arbitrator has a duty prior to appointment and throughout the duration of the appointment to consider whether there are any relevant circumstances about the arbitrator's relationship with the parties that should be disclosed.
>
> ....
>
> We are told that you have been appointed 25 times in 3 years in matters involving Knowles either as referring party or acting for the referring party. Based on the

> information you have given us, this amounts to almost one fifth of your total appointments during the same period. We have asked what proportion of your income as barrister/adjudicator/arbitrator relates to these appointments. The relevance of this information is that, were a significant proportion of your income to derive from appointments by (or at the request of) Knowles, it could raise justifiable doubts about your independence and impartiality in a matter where Knowles is itself the claimant party. Certainly, given the number of appointments, it is information which we believe you should have considered whether to disclose prior to, or during, your appointment in this arbitration. "

49. On 17 April 2015, the hearing called for by Mr Bingham took place at the offices of Knowles.

50. The night before the hearing Knowles served a skeleton argument and Mr Bingham indicated that this would be a hearing at which a ruling would be made. I shall address that hearing in more detail later in the judgment.

51. It is Cofely's case that the approach and the tone of the interventions by Mr Bingham were aggressive and pointed and that they indicated, at the very least, an impatience at the questioning of facts potentially relevant to his apparent impartiality and hostility toward Cofely for raising the matter.

52. After the meeting SH wrote to Knowles on 21 April 2015 requesting that answers be provided to the outstanding questions canvassed at the hearing.

53. In response, on 24 April 2015 Knowles provided SH with answers to the outstanding questions raised in the letter dated 11 March 2015.

54. On 30 April 2015, Mr Bingham issued his "Arbitrator's Ruling" as to whether the tribunal was 'properly constituted' – concluding that it was and that he had no conflict of interest.

55. Cofely stresses that (i) neither of the parties had requested a ruling on either of these issues, and (ii) as part of his reasoning Mr Bingham appeared to adopt Knowles's figure for the number of relevant appointments (25) (and all of the other relevant information provided by Knowles) without undertaking his own independent investigation.

56. In a letter dated 15 May 2015 SH wrote to Knowles seeking an answer to question 5 of its earlier letter dated 18 February 2015. It was explained that without it being answered Cofely would not know the extent to which 'the *Eurocom* case practice' of deliberately excluding certain potential individuals as tribunal had been deployed so as to make the chance of Mr Bingham's appointment increase.

57. By email dated 26 May 2015 Knowles copied in Mr Bingham to the requests for further information. On 28 May 2015 Knowles emailed Mr Bingham to ask him to answer certain parts of the questions put to Knowles in the SH letter dated 15 May 2015.

58. In an email on 5 June 2015 to Mr Bingham, Knowles then revised the questions put to Mr Bingham regarding his income from the 25 'Knowles' appointments and the total 137 appointments in the previous three years. Knowles asked Mr Bingham to provide specific total figures as to his income over the past three years and the amount of fees he had earned from appointments involving Knowles. This request went beyond the level of information requested by Cofely. On the same day Mr Bingham responded by email to both parties providing the information sought, namely £1,146,939 and £284,593.75 respectively.

59. On 3 July 2015, Knowles wrote to SH to provide some further outstanding information relating to when they had excluded other candidates in requests for appointments where Mr Bingham had ended up being appointed. Knowles stated that this had occurred 16 out of the 25 times he had been appointed without being named specifically.

60. On 8 July 2015, SH wrote to Mr Bingham asking him to recuse himself – to which there has been no response from Mr Bingham.

61. On 22 July 2015, the present application was issued.

The hearing of 17 April 2015

62. The tone of the hearing is reflected in the full transcript but it can be illustrated by citing some excerpts from it.

63. At the hearing Mr Bingham aggressively questioned Cofely's counsel, Mr Moran QC, as to why Cofely had asked particular questions, for example, in relation to Cofely's question as to what proportion of Mr Bingham's income over the past three years related to appointments concerning Knowles. As the transcript records:

"MR BINGHAM It seems at the heart of this that I ought to ask, really, Mr Moran: if these 25 of 137 is a significant portion of your income, to what effect?

MR MORAN Well, I think today, as far as we are concerned, is just really an information gathering exercise.

MR BINGHAM For me To what effect, please?

MR MORAN Well, we have just asked some questions.

MR BINGHAM No, please tell me. Please answer my question.

What is the effect of these 25 of 137 being a, as you say, significant portion of your income. What is the effect?

MR MORAN What do you mean the effect?

MR BINGHAM Tell me what you are getting at.

MR MORAN We're not getting at.

MR MORAN We're not getting at anything.

MR BINGHAM I mean, I put it to you like this.

MR MORAN We are not making any applications. We haven't decided on any course of action. We just want to understand what the position is".

64. Instead of dealing with Cofely's queries, Mr Bingham kept asking why Cofely had asked the questions it had raised. For example:

"MR BINGHAM I want to understand --- and I think Knowles wants to understand, I suspect --- what is it you are getting at.

MR MORAN What we're getting at, if you would, is we want an answer to the questions we have

posed to you.

MR BINGHAM No, no. I want you to answer that question: why is it that this is troubling you?

MR MORAN Well, it's been explained, I think, in both the letter that we sent to you of 11 March.

MR BINGHAM No, it's not.

MR MORAN All right... Can I just --

MR BINGHAM I'm sorry, it's not enough. Can I put it in the vernacular? I want to put it like I did in the memo ---forgive the vernacular –so what?

MR MORAN I think you are perhaps jumping the gun because we're not, as far as we are concerned, here to decide, as it were, the consequences or whether or not it is a matter of fact the information we know amounts to a case of apparent bias or not. That's not where we are.Where we are is we just want, because of the reasons explained in the letters and the email, in particular, of 2 April, our client wants to know more about –

MR BINGHAM I want to know – please stop. I want to know why. I asked again. Would you please answer my question: so what?"

65. In relation to the question as to how many times Mr Bingham had acted as arbitrator or adjudicator in cases involving Knowles over the past three years, having asked Mr Moran QC to take the information provided by Knowles as a fact, Mr Bingham then asked Mr Moran QC what the implication of that fact is, despite refusing to verify if that information was correct.

66. Mr Moran QC attempted to explain to Mr Bingham that it is not possible to answer this question in isolation and that Cofely needed answers to all of its questions in order to be able to fully consider the position. However Mr Bingham would not accept this and continued to proceed as if he were cross-examining Mr Moran QC:

"MR BINGHAM Let's take it that it means, say – it's not unreasonable – we have 18.25 per cent of the income from 137 appointments.

MR MORAN Yes.

MR BINGHAM So what?

MR MORAN Well, if that were the answer, we would reflect on and consider then our position

MR BINGHAM Well, please reflect now. So what?

MR MORAN I'm not in a position to reflect.

MR BINGHAM Well, adjourn then. Shall we adjourn?

MR MORAN We need to have the information.

MR BINGHAM No, no, I'm narrowing it down here. Mr Moran, I want to know what the implications are. I'm asking you again. Will you please tell me? It is ever so straightforward, Assume, please, for the purposes of exploring this 18.25 per cent of those were overall appointments is the income. Assume that.

So?

MR MORAN Well—

MR BINGHAM If it was 25 per cent, so?

MR MORAN Well, the answer to the question "So what?" will be the right answer will depend upon where we get to in terms of the answers to all of the question – you can't—

MR BINGHAM No, answer that one.

MR MORAN You can't answer it. You can't pick –

MR BINGHAM Help me, then: why?

MR MORAN You can't pick one issue in isolation and give a view on –

MR BINGHAM Yes, you are, sir. I want to know what this is all about. You are here, I have called the meeting, the hearing. I want to hear you on it.

MR MORAN Yes.

MR BINGHAM You have had ample time. Tell me: what it is all about?

MR MORAN What it's all about is we have asked the questions in the letter and we either want answers or an indication you won't answer.

MR BINGHAM I have given you a proposition. Base it on this: 18.25 per cent of income out of 137 appointments are these 25. Proceed on that basis. I ask you again: so what?

MR MORAN Well, that would – so what, if that were your answer, that would be one of the factors that would go into a consideration of whether – and there's no – at the moment there's no conclusion or view on this – whether or not we ought to take this further or not.

MR BINGHAM Okay. So you can't answer, or you're not willing to at the moment.

MR MORAN You can't just hypothesise on the basis of on piece of information as to what – and I haven't got instructions to give an answer. This is not what we are here for."

67. This line of questioning continued in such a manner that eventually Mr Acton Davis QC, acting for Knowles, stepped in and asked if he could "mediate". Further discussion followed about Mr Bingham's approach of adopting answers given by Knowles as fact and refusing to verify them. Mr Bingham again confirmed that he would not answer the questions himself. Mr Acton Davis QC on behalf of Knowles once again stated that Knowles had answered the questions and that Knowles therefore had no issue with Mr Bingham confirming whether or not the answers given were correct, however Mr Bingham still refused to do so:

"MR MORAN … but I take it that you're adopting Knowles' answer on the number of appointments that you've been involved in over the years.

MR BINGHAM It's information which is their information, and I'm willing to – it is a matter for them to reveal information about their business and not a matter for me to reveal it in this arbitration

MR MORAN Well, if that means that you're not answering that question, then we will –

MR BINGHAM It means I can't reveal information about Knowles' affairs that don't concern Cofely and Knowles, and nor would I reveal it about Cofely and other matters that Cofely has been

involved in, as I have already said.

MR MORAN But Knowles have given this information.

MR BINGHAM That's it then.

MR MORAN Yes, but if you're not going to, as it were agree to that –

MR ACTON DAVIS We have already answered that question. We have, therefore, already waived any confidentiality there is, and we therefore have no objection to you confirming that we are right, if we are right, or saying that we are wrong.

MR BINGHAM All right. Fine. I've got no comment at this stage".

68. Similarly, in relation to Cofely's query that Mr Bingham confirm how many of those 25 appointments commenced in the past three years, Mr Bingham was dismissive and simply stated that Cofely had been given enough information and he was not prepared to go into that "level of detail":

"MR BINGHAM Take it that the 137 … appointments made more than three years ago in respect of matters which are ongoing. Take it that it's 137. That's not a question I'm willing to delve into at all. You can take that as the answer.

MR MORAN Sorry, take what as an answer?

MR BINGHAM That you have enough information as far as 2.1 and 2.2 is concerned. I don't intend to go into that sort of detail.

MR MORAN That question is referring to Knowles-related appointments.

MR BINGHAM Yes, I know, but the point we've driven it down to is: how much have you earned out of Knowles?

MR MORAN That's not what we're asking.

MR BINGHAM Yes, but I'm not willing to answer. Mr Acton Davis, this particular matter, I don't intend to answer that.

MR ACTON DAVIS I understand you to say that, sir. It's a matter for you.

MR BINGHAM Fine."

The law

69. Section 24(1)(a) of the Act provides as follows:

> "(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—
>
> (a) that circumstances exist that give rise to justifiable doubts as to his impartiality;"

70. Section 33 of the Act provides:

> "(1) the tribunal shall—

> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

71. Section 73 of the Act provides:

> "(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,
>
> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection"

72. The law as set out in the main authorities relating to section 24 of the Act may be summarised as follows:

> (1) The common law test for apparent bias is reflected in section 24 – see, for example, *Laker Airways v FLS Aerospace* [1999] 2 Lloyds Rep 45, per Rix J at [48]; *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at [21]-[29]; *Sierra Fishing Co & Others v Farran & Others* [2015] EWHC 140 (Comm), [2015] Lloyds Law Reports per Popplewell J at [51];
>
> (2) The common law test under section 24 is whether "the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" - see *Porter v Magill* [2002] AC 357 per Lord Hope at [103]; *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416, per Lord Hope at [1]-[3];
>
> (3) Such a fair minded and informed observer, although not a lawyer, is assumed to be in possession of all the facts which bear on the question and expected to be aware of the way in which the legal profession operates in practice - see *Rustal v Gill & Dufus* [2001] 1 Lloyd's Law

> Reports 14; *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528; *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at [21]-[29].
>
> (4) A "fair-minded" observer reserves judgment until he/she has seen and fully understood both sides of the argument: his/her approach must not be confused with that of the person who has brought the complaint, the assumptions made by the complainer are not to be attributed to the observer unless they can be justified objectively: *A v B* at [26] and *Helow* at [1]-[3];
>
> (5) An "informed" observer takes a balanced approached and appreciates that context forms an important part of the material to be considered: *A v B* at [26] and *Helow* per Lord Hope at [3].

73. In the context of alleged apparent bias on the part of a Court, Lord Bingham explained the common law test as follows in *Davidson v Scottish Ministers* [2004] UKHL 34 at [6]:

> "What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."

74. The fact that an arbitrator is regularly appointed or nominated by the same party/legal representative may be relevant to the issue of apparent bias, particularly if it raises questions of material financial dependence – see *A v B* [2011] 2 Lloyds Rep 591 per Flaux J at [62]; *Fileturn Ltd v Royal Garden Hotel* [2010] TCC 1736, [2010] BLR per Edwards-Stuart J at [20(7)].

75. The tribunal's explanations as to his/her knowledge or appreciation of the relevant circumstances are also a factor which the fair minded observer may need to consider when reaching a view as to apparent bias – see, for example, *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 and *Woods Hardwick Ltd v Chiltern Air Conditioning Ltd* [2001] BLR 23. In this regard Cofely relies in particular on *Paice v Harding* [2015] EWHC 661, [2015] BLR 345, per Coulson J at [46]-[51] in which it was held that the explanations given by the adjudicator made apparent bias more rather than less likely having regard in particular to the "aggressive" and "unapologetic" terms in which they were expressed which suggested that he had concluded that something had gone wrong and that "attack was the best form of defence".

Institutional Rules and Guidelines

76. Cofely relies upon a number of Rules and Guidelines as providing relevant guidance.

77. Rule 3 of the CIArb Code of Professional and Ethical Conduct for Members (October 2000) states:

> "Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so."

78. Cofely contends that the disclosure obligation should be followed where there is any doubt as to the relevance of the information and the manner in which an arbitrator discharges this obligation can be relevant to the issue of apparent bias.

79. Cofely further contends that the IBA Guidelines on Conflicts of Interest in International Arbitration provide relevant guidance showing what is considered to be accepted good arbitral practice generally. Cofely draws particular attention to General Standard 2 – Conflicts of Interest; General Standard 3 – Disclosure by the Arbitrator; 'Orange list' definition; Orange list 3.1.3; and Orange list 3.1.5.

80. The explanations for General Standard 3 state at 3 (a) that "the arbitrator's duty to disclose … rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view " and at 3 (c) "it is the purpose of disclosure to allow the parties to judge whether they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further …".

81. The Orange List is "a non-exhaustive list of specific situation that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence … with the consequence that the arbitrator has a duty to disclose such situations …" and contains the following provisions:

> 3.1.3 – "the arbitrator has, within the past three years, been appointed as an arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties";
>
> 3.1.5 – "the arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration involving one of the parties, or an affiliate of one of the parties".

82. Cofely places particular reliance upon the CIArb form signed by Mr Bingham on his acceptance of his nomination. This included the statement that:

> "To the best of my knowledge I am not aware of any involvements, interests, relationships or other matters which are likely to affect my independence or impartiality or which might reasonably be perceived as likely to do so. If I become aware, at any future stage of the dispute resolution process, of any interests, relationships or other matters which are likely to affect my independence or impartiality, or might reasonably be perceived as likely to do so, I will disclose those to the parties.."

83. Mr Bingham also left blank the answer to the following question:

> "If you are aware of any involvement, however remote, but in particular an involvement you or your firm has (or has had in the last five years) with either party to the dispute please disclose."

The evidence

84. In support of its application Cofely relies on two witness statements of Mr Thwaite of SH and the extensive exhibits thereto. In response to the application there is a witness statement from Mr Bingham and from Mr Rainsberry of Knowles together with exhibits. Both state that they adopt a neutral stance to the application since it is a matter for the Court and their concern is simply to ensure that the Court is fully informed. That position has been restated by their counsel in their submissions to the Court. Cofely disputes that either the evidence or the submissions are as neutral as claimed.

85. Mr Bingham's witness statement includes the following explanations:

> "56. Cofely replied to my Memo No.2 in their letter of 27 March 2015, expressing

> concern that I had not disclosed the information which they had obtained on enquiry at the time of my appointment in 2013. My reason was and remains that, at the time and even after further enquiry and debate with the parties, I could not see its relevance or that such information ought ever to have been the subject of disclosure by me before accepting the appointment upon nomination by the CIArb in February 2013.
>
> ....
>
> 58. When there is assertive/challenging/perhaps even bullying behaviour aimed at the arbitrator or something that could fall within a Section 73 objection, my approach is to take the initiative where I can and immediately get the complainant and the other party to the table so that we can identify the issue, deal with the bullying and make a ruling which resolves the issue one way or the other. Section 73 of the Act calls for "forthwith" action by the objecting party…so too by the arbitrator.
>
> ....
>
> 63. Although I could see no relevance to Cofely's requests for details of the number of times I had been appointed as arbitrator or adjudicator in cases where Knowles was either the party or a representative of a third party (substantially the latter), I set out below the relevant information and particulars….."

The grounds of the application under section 24(1)(a)

86. Cofely relies upon seven grounds which are relied upon cumulatively as giving rise to the real possibility of bias. In addition it is submitted that grounds (3)(4)(5) and (6) are sufficient to question Mr Bingham's impartiality by themselves.

Ground (1) - The Eurocom case

87. Cofely submits that an objective and fair minded observer would note the following as a result of this decision:

> (1) Mr Bingham was clearly someone Knowles was keen to see appointed (even at the expense of making fraudulent misrepresentations to manipulate the appointment process);
>
> (2) Knowles was also very keen to exclude (for inappropriate reasons) many other potential adjudicators from acting;
>
> (3) Knowles indicated that this was its usual approach when seeking appointments via appointing bodies such as the RICS;
>
> (4) One possible explanation for this approach was that Knowles (and its clients) were treated favourably by Mr Bingham on prior occasions and that it expected that he would do so again in the future. A possible reason for this was that Mr Bingham was predisposed to favour Knowles or its clients (perhaps by virtue of his familiarity with Knowles or the regularity in which he was appointed in relation to claims involving them as a party or client representative);
>
> (5) Mr Bingham would have been aware from copies of the appointment forms that Knowles were in the habit of both (i)

nominating individuals that it liked and (ii) excluding those that it did not;

Ground (2) - Response to Cofely's requests for information

88. Having been put on notice of a possible inappropriate relationship between Mr Bingham and Knowles, Cofely submits that it quite reasonably sought further information as to the nature and extent of their professional relationship.

89. Cofely contends, however, that the way that Mr Bingham responded to this justified questioning would lead the fair minded observer to have increased concern regarding the possibility that he was biased. In particular:

> (1) Mr Bingham's response between February and April 2015 to SH's numerous requests for details relating to his previous work as tribunal in Knowles related cases was evasive, defensive and unjustified.
>
> (2) The information requested in the letter 11 March 2015 (especially as to the number of referrals/appointments made involving Knowles and the proportion of his income derived from the same) was or might be considered as relevant to the independent objective observer considering the question of apparent bias, but at no stage did Mr Bingham indicate a serious attempt to consider, by reference to the appropriate guidance, whether this information should be volunteered or not.
>
> (3) His willingness to volunteer or corroborate relevant information appeared to be led by the attitude of Knowles to these matters – most seriously in the timing of his decision to disclose information relating to his earnings (which appears to have been triggered by a request from Knowles).

Ground (3) - The hearing

90. Cofely submits that Mr Bingham's defensive approach to providing the requested information and, in particular, the hostile stance taken to Cofely's position also demonstrates, by itself, reasonable grounds to suspect a real possibility of bias. In particular:

> (1) The objective perception of a real risk of bias was exacerbated by (i) the calling of a hearing to ostensibly consider whether the tribunal had been properly appointed, (ii) the way the hearing was conducted and (iii) the way in which a 'ruling' was handed down purporting to deal with apparent bias.
>
> (2) The fact that a 'hearing' was called in the first place and an (unrequested) 'ruling' provided demonstrates that Mr Bingham has descended into the arena on this topic in a wholly inappropriate way by seeking to press the parties into a conclusion that would justify his remaining as arbitrator, rather than providing the requested information to enable Cofely to

then decide on the appropriate course of action.

(3) Mr Bingham's aggressive and dismissive demeanour and questioning of Cofely's counsel also demonstrated a lack of understanding of the need to be seen to be impartial and concerned to disclose potentially relevant information.

Ground (4) - The relevant relationship information

91. Cofely submits that it is against this background that the information now available as to the nature and extent of Mr Bingham's professional relationship with Knowles has to be considered. It identifies the most relevant information to be as follows.

(1) In the past three years Mr Bingham has acted as arbitrator or adjudicator 25 times in cases involving Knowles as a party or the representative of a party;

(2) Of these 25 appointments, 22 related to cases where Knowles acted for the claimant / referring party and Knowles itself was the claimant / referring party in 3 cases.

(3) Mr Bingham has been appointed as arbitrator or adjudicator a total of 137 times in the past 3 years and therefore 18% of Mr Bingham's appointments involve Knowles either as claimant/referring party or acting for the claimant/referring party.

(4) According to Knowles, of those 25 appointments: in one, Mr Bingham was already the Tribunal in a case arising out of the same contract and Knowles told the relevant nominating body that this was the case; in three Knowles suggested a list of three names including Mr Bingham, which includes the *Eurocom* Case; in two Knowles specifically requested that Mr Bingham be appointed (including the arbitration which is the subject of these proceedings); in the remaining 19 cases, Mr Bingham was nominated by the relevant nominating body.

(5) In all 25 of the cases where Mr Bingham was appointed by a nominating body, Knowles has admitted that it requested that the candidate be both a "QS and barrister" and in most cases a QS and practising barrister.

(6) This approach significantly reduces the pool of possible candidates and increases the likelihood of Mr Bingham being appointed. By way of example, in the case of the RICS, which has 109 possible candidates, only 5 are both practising barristers and quantity surveyors and so this qualification reduces the pool to just 4% of the total number of candidates.

(7) On 16 out of the 25 occasions when Mr Bingham has been nominated the exclusion of others has been sought and so all of these may have been the subject of behaviour of the kind undertaken in the *Eurocom* case.

(8) In 18 of those 25 cases Mr Bingham found in favour of Knowles or Knowles' client (72%).

(9) 25% of Mr Bingham's total income as adjudicator/arbitrator in the past three years has come from the 25 appointments involving Knowles.

92. Cofely submits that taken by itself or in combination with the other matters referred to above, a fair minded observer would conclude that Mr Bingham has or has an appearance of a significant financial dependence and/or interest in continuing to be appointed in cases involving Knowles and that therefore he may be unconsciously influenced to find in favour of Knowles as a result and/or not to fall out of favour with them.

Ground (5) - Mr Bingham's witness statement

93. Cofely submits that Mr Bingham's statement in these proceedings makes the possibility of apparent bias more, rather than less, likely. In particular:

(1) Rather than stay neutral, Mr Bingham has seen fit to make positive statements in opposition to Cofely's application (regarding the relevance of the information that was sought/provided, the behaviour aimed at him and possible application of section 73 of the Act).

(2) Mr Bingham has wholly inappropriately suggested that Cofely's requests for information amounted to aggressive and/or bullying behaviour.

(3) This response illustrates a complete failure (even now) of Mr Bingham to appreciate (at the very least) the *possible* relevance of the information that was sought and his obligation to err on the side of caution in relation to the disclosure of such matters. It also shows that Mr Bingham has descended inappropriately into the arena of the dispute. In essence, his statement is aggressive and unapologetic.

(4) Mr Bingham appears to have interpreted a process whereby Cofely reasonably sought information regarding, in particular, the proportion of his earnings derived from Knowles related referrals, as an unwarranted attack on him – rather than a justified attempt to obtain a full picture of the extent to his recent professional relationship with Knowles.

(5) On any view Mr Bingham has taken sides in this application.

Ground (6) - Unilateral communications with Knowles

94. Cofely submits that Mr Bingham appears to have been engaging in inappropriate unilateral communications with Knowles. For example, his statement suggests that he received the letter sent by SH to Knowles on 22 February 2015 in spite of the fact that it was not sent to him by SH at that time.

Ground (7) - General conduct of the Referral.

95. Cofely submits that in the period prior to February 2015 it is notable that:

> (1) Mr Bingham responded in strikingly different ways to the parties' respective section 47 applications; and
>
> (2) Mr Bingham made no effort to progress Cofely's section 47 application at all – contrary to his obligations under section 33 of the Act – or even respond to Cofely's requests to progress it.

96. Knowles' stated position was one of neutrality but it draws attention to the following points in particular:

> (1) The world of construction professionals is relatively small and it is inevitable that Mr Bingham will have had exposure to Knowles and vice versa
>
> (2) Cofely has itself been involved in adjudications by Mr Bingham.
>
> (3) Mr Bingham has never advised or acted as counsel for Knowles.
>
> (4) Knowles completes its applications on a case by case basis and it sets out the qualifications it considers appropriate to the case in hand.
>
> (5) Whilst disclosure was called for under the Acceptance of Nomination and the guidance provided by the Orange List, non-disclosure does not in itself give rise to justifiable doubts as to impartiality.
>
> (6) The *Eurocom* case was factually very different.
>
> (7) Whilst it might be fair to say that there was an element of aggression in Mr Bingham's exchanges with Cofely and its counsel this can be seen as being no more than professional pride being hurt by what were perceived to be unwarranted allegations.

97. Mr Bingham's position was also one of neutrality. He draws attention to the following points in particular:

> (1) Some of the facts relating to the relationship between Mr Bingham and Knowles is knowledge only recently acquired.
>
> (2) Mr Bingham was not accusing Cofely of bullying tactics. His reference to bullying referred to a general concern to the ADR community rather than this case.
>
> (3) Mr Bingham is known to be forthright and decisive.
>
> (4) Whilst legitimate and reasonable enquiries and concerns of

a concerned party should be addressed, there is a line beyond which such inquiries are unnecessary and intrusive.

(5) Knowles is a substantial organisation which regularly appoints arbitrators and adjudicators. None of the appointments identified over the last three years involve Knowles appointing Mr Bingham directly.

(6) Cofely has sought his appointment by specific reference to his name in the past.

Findings

98. The following findings are made viewing the facts as a fair minded and informed observer having regard to the guidance provided by the authorities referred to above and the evidence and submissions of Mr Bingham and Knowles.

99. I do not consider that find that Grounds (6) and (7) provide any basis for concluding that there was a real possibility of bias, whether considered individually or together with the other grounds relied upon.

100. In relation to Ground (6), on further investigation by Mr Bingham and Knowles' solicitors it has been established that SH's letter was not in fact received by Mr Bingham until it was sent to him by SH as an attachment to their 11 March 2015 letter. Even if it had been, I would not regard the forwarding of that (single) communication as any indication of apparent bias.

101. In relation to Ground (7), I do not consider that there was anything untoward in Mr Bingham's conduct of the section 47 applications. Knowles' application was an application for an immediate money award for sums which it said were indisputably due. Whether or not that was so turned on a short point of construction. One would expect such an application to be progressed reasonably promptly, as it was.

102. Cofely's own application was not for any monetary award but for directions as to the issues to be tried, which is more of a case management matter. Having made the application Cofely did nothing to pursue it for many months. The next step was Mr Bingham himself taking the initiative and issuing his Memo no. 1 on 9 April 2014. This invited the parties to comment. Nothing was heard from either party until SH's letter of 6 June 2014. There was then a further period of inactivity until early the following year when Cofely began its requests for further information. No complaint was made about any failure to progress the section 47 application until that time. Whilst Mr Bingham could have been more pro-active in dealing with the application, if Cofely had any concern about this it could and should have taken action itself and/or raised that concern. It did neither.

103. I do, however, consider that Grounds (1) to (5) raise concerns of apparent bias.

104. The starting point is the relationship between Mr Bingham and Knowles as now disclosed by the evidence. This is set out in detail in paragraph 91 above, but of most significance it that it shows that over the last three years 18% of Mr Bingham's appointments and 25% of his income as arbitrator/adjudicator derives from cases involving Knowles.

105. Mr Bingham's attitude to this, as made clear at the hearing and as maintained in his statement, is that this is irrelevant as all these appointments were made by an appointing body rather than Knowles directly. On this logic even if all his income derived from cases involving Knowles there would still be no cause for concern.

106. It is to be noted, moreover, that the CIArb acceptance of nomination form calls for disclosure of "any involvement, however remote," with either party over the last five years. Acting as arbitrator/adjudicator in cases in which Knowles is a party or a representative of a party is a form of involvement.

107. Further, the evidence shows that even though Knowles does not appoint an arbitrator/adjudicator directly, it is able to influence and does influence such appointments, both positively and negatively. It does so positively by putting forward the name of its chosen appointee either on his/her own or with others. It also does so more indirectly by identifying required characteristics that will only be shared by a small pool of people. It does so negatively by putting forward a list of those potential appointees that it does not wish to be appointed and who are said to be inappropriate. These practices would be apparent from the appointment forms which, as was common ground, would have been forwarded to Mr Bingham. Their significance is highlighted by the *Eurocom* case which provides a striking example of Knowles steering the appointment process towards its desired appointees, and doing so as a matter of general practice.

108. The existence of Knowles' appointment "blacklist" is itself a matter of significance. It means that the arbitrator/adjudicator's conduct of the reference may lead to him/her falling out of favour and being placed on that list and thereby effectively excluded from further appointments involving Knowles. That is going to be important for anyone whose appointments and income are dependent on Knowles related cases to a material extent, as is the case for Mr Bingham.

109. It is right to observe that only 3 of the 25 cases (including the present case) involve Knowles as a party. However, that would be sufficient to trigger disclosure under both the acceptance of nomination form and under the Orange List guidance. In any event, it is self-evident that, in many cases in which Knowles acts as claims consultant for the referring party, it is likely to have a significant say both in who should be put forward as arbitrator/adjudicator, either expressly or impliedly by reference to narrow qualification requirements, and also in who should be sought to be excluded.

110. The concerns raised by the relationship evidence are heightened by Mr Bingham's response to Cofely's inquiries and application. In the light of the *Eurocom* case it was reasonable for Cofely to inquire into the nature of the relationship between Mr Bingham and Knowles. They did so in courteous terms and sought answers to questions which Knowles considered it appropriate to answer. Mr Bingham's essential response, however, involved avoiding addressing the requests and instead giving the appearance of seeking to foreclose further inquiry by demonstrating their irrelevance and, moreover, doing so in an aggressive manner.

111. Whilst it was reasonable for Mr Bingham to call for a meeting to seek to address the concerns raised by Cofely, the meeting instead became a means by which Mr Bingham would arrive at a "ruling" on apparent bias. Neither party, however, was seeking such a "ruling", nor was it an appropriate matter for him to be making a "ruling" upon. As was made clear, all Cofely was seeking was further information in order to decide what position to adopt in relation to the concerns it had raised. There was as yet no question of Mr Bingham being asked to recuse himself and inquiries were still at the information gathering stage. Mr Bingham gave the impression that he was seeking to pre-empt that process by pressurising Cofely into acknowledging that there was no issue to be explored.

112. Of further concern is the manner in which this was done at the hearing. Excerpts of the transcript have been set out above. They illustrate how Mr Bingham was effectively cross examining Cofely's counsel and doing so aggressively and in a hostile manner. Although counsel had explained that all that was being sought at this stage was information and that Cofely was not yet in a position to state what it ultimate stance was to be, Mr Bingham continually pressed him to state its position and

sought to demonstrate at the hearing and through his "ruling" that there were no grounds for concern. I agree with Cofely that Mr Bingham was thereby descending into the arena in an inappropriate manner.

113. These concerns are further heightened by Mr Bingham's witness statement. This shows that even now Mr Bingham does not recognise the relevance of the relationship information or the need for any disclosure. There is also no hint that Mr Bingham regards his conduct of the April 2015 hearing as in any way inappropriate. This lack of awareness demonstrates a lack of objectivity and an increased risk of unconscious bias.

114. In addition the statement does suggest that Mr Bingham regarded and regards Cofely's requests for information as "assertive, challenging, perhaps even bullying behaviour". This is consistent with his own assertive response at the time. However, the reality is that in general Cofely's inquiries were reasonably made and expressed, particularly in so far as they sought a general statement as to the proportion of appointments and income derived from Knowles related cases over the last three years. Mr Bingham appears, however, to have considered Cofely's inquiries to amount to an unwarranted attack on him and in turn to have seen attack as the best form of defence – this involved descending into the arena.

115. For all these reasons I consider that there is force in Grounds (1) to (5) relied upon by Cofely and that considered cumulatively they do raise the real possibility of apparent bias.

116. Where there is actual or apparent bias there is also substantial injustice and there is no need for this to be additionally proved – see, for example, *Lesotho Highlands v Impreglio* [2006] 1 AC 221 at [35]; *ASM Shipping Ltd of India v TTMI Ltd of England* [2006] 1 CLC 656 (Comm).

Section 73

117. This was raised as a potential issue by both Mr Bingham and Knowles, although neither advanced a positive case as to its application. On my findings the issue of apparent bias does not arise out of the earlier conduct of the arbitration reference but only out of events from March 2015 onwards. From March until July 2015 Cofely was involved in an information gathering exercise which continued until the important information provided by Knowles in its 3 July letter. It was not in a position to decide whether there were grounds for objection until that information gathering was as complete as it was likely to be. Bias is not an issue to be raised lightly. Moreover, the only part it was playing in the proceedings during this period was in pursuing its information requests. In all the circumstances I am satisfied that section 73 has no application in this case.

Conclusion

118. For the reasons outlined above I find that Cofely has established the requisite grounds for removal of Mr Bingham as arbitrator under section 24(1)(a) of the Act. If Mr Bingham does not resign an order for removal will accordingly be made. I will hear counsel further as to what further orders may be appropriate in the light of that determination. Although I have found that the case of apparent bias is made out, I have also found that there is nothing untoward about the Partial Award or the conduct of the arbitration up until March 2015.

ANEXO 14

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding between

URBASER S.A.
AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAIA UR PARTZUERGOA

(Claimants)

and

THE ARGENTINE REPUBLIC

(Respondent)

ICSID Case No. ARB/07/26

Decision
On Claimants' Proposal to Disqualify
Professor Campbell McLachlan, Arbitrator

Rendered by

Professor Andreas Bucher, President
Mr. Pedro J. Martinez-Fraga, Arbitrator

Secretary of the Tribunal: Mr. Marco Tulio Montañés-Rumayor

Representing Claimants:

Dra. Mercedes Fernández Fernández
Dr. Juan Ignacio Santabaya González
Jones Day
Madrid, Spain

Representing Respondent:

Dr. Joaquín Pedro da Rocha
Procurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Buenos Aires, Argentina

Date: August 12, 2010

I. Background

1. On July 20, 2007, the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received a Request for Arbitration dated July 6, 2007, presented in the Spanish language ("Solicitud de Arbitraje") and submitted by URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAIA UR PARTZUERGOA ("Claimants", respectively "URBASER" and "CABB") against the ARGENTINE REPUBLIC ("Argentina" or "Respondent"). The Claimants submitted the Request pursuant to Article X of the Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain signed on October 3, 1991[1] ("Argentina-Spain BIT" or "the BIT").

2. On October 1, 2007, the Acting Secretary–General of ICSID registered the Request and notified the Parties of its registration.

3. Claimants and Respondent (the "Parties") agreed to waive the nationality requirement as provided in Article 39 of the ICSID Convention (the "Convention"). Respondent selected the formula provided for in Article 37(2)(b) of the Convention regarding the constitution of the Tribunal. Claimants agreed to this choice, subject to the provisions of Article 38 of the Convention.

4. On December 18, 2007, Claimants appointed a national of Spain as arbitrator and proposed the designation of another arbitrator as president of the Tribunal. Respondent rejected the latter proposal on December 28, 2007, and suggested another candidate to become president. Claimant objected to this new proposal on January 3, 2008. On February 15, 2008, Respondent appointed an arbitrator of Argentine nationality and asserted a new proposal for president of the Tribunal. Because both arbitrators appointed by the Parties share the nationality of Claimants and Respondent, respectively, pursuant to Article 39 of the Convention the agreement of all parties was required to confirm these appointments. On June 18, 2008, Claimants rejected both proposals that Respondent had raised.

5. On September 29, 2008, Claimants withdrew their initial appointment of an arbitrator and instead appointed Mr. Pedro J. Martinez-Fraga, a national of the United States of America, as Arbitrator. The Parties were informed on October 30, 2008 that Mr. Martinez-Fraga had accepted his appointment.

6. Respondent stated on December 18, 2008 that an agreement had been reached between the Parties to accept the appointment of a national of a party pursuant to Ar-

[1] Acuerdo para la promoción y protección recíprocas de inversiones firmado por la República Argentina y el Reino de España el 3 de octubre de 1991.

ticle 39 of the Convention. On January 20, 2009, Claimants requested that the two remaining arbitrators be appointed by the Chairman of the Administrative Council, one of them to serve as the Tribunal's president. By letter dated February 13, 2009, the Centre confirmed that in the absence of an agreement between the Parties, no party could designate an arbitrator having the nationality of either Party.

7. On February 23, 2009, Respondent appointed Sir Ian Brownlie, a national of the United Kingdom, as arbitrator. On February 26, 2009, the Centre confirmed that Sir Ian Brownlie had accepted his appointment.

8. On May 26, 2009, Respondent rejected and Claimants accepted a proposal by the Centre for the appointment of a president of the Tribunal. A new proposal by the Centre on June 9, 2009 was accepted by Claimants on June 16, 2009 and rejected by Respondent on the same day. A further proposal submitted by the Centre on July 10, 2009 was refused by both Parties on July 17, 2009.

9. The Centre then considered Claimants' earlier request to have the third presiding arbitrator appointed by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules. By letter dated July 30, 2009, the Centre informed the Parties that it intended to propose the appointment of Professor Andreas Bucher, a national of Switzerland and a member of the ICSID Panel of Arbitrators, as the third arbitrator and President of the Tribunal. In an additional letter dated August 21, 2009, the Secretary-General of ICSID responded to Respondent's objections to the proposed appointment by concluding that these objections were not compelling.

10. On August 25, 2009, Respondent agreed to the appointment of another Swiss national that the Centre earlier had suggested and to which Claimants had agreed on May 26, 2009. When the Centre stated that it was going to seek this appointee's acceptance, on September 1, 2009, Claimants stated that their earlier acceptance was no longer in effect and that they were opposed to Respondent's attempt to have Professor Bucher's designation replaced upon its unilateral initiative.

11. On October 13, 2009, the Parties were informed that the Chairman of the ICSID Administrative Council had appointed Professor Andreas Bucher as the President of the Tribunal. On October 16, 2009, the Parties were further informed that Professor Bucher as well as Sir Ian Brownlie and Mr. Pedro J. Martinez-Fraga had accepted their respective appointments and that accordingly, the Tribunal was deemed to be constituted and the proceedings to have begun on that date.

12. In view of the first session of the Tribunal that was envisaged to be held in Paris on December 16, 2009, the Parties submitted an agreement on multiple issues

listed on that meeting's provisional agenda. By letter dated December 10, 2009, the Tribunal offered additional suggestions for the Parties' consideration. As the Parties were making progress in resolving outstanding issues, the meeting in Paris was cancelled, based on the expectation that agreement would be reached on the outstanding issues listed on the provisional agenda within a few days between the Tribunal and the Parties.

13. On January 3, 2010, Arbitrator Sir Ian passed away. Pursuant to Arbitration Rule 10(2), the proceeding was thus suspended and the Argentine Republic was invited to appoint an arbitrator.

14. On February 26, 2010, the Argentine Republic appointed Professor Campbell McLachlan, a national of New Zealand as arbitrator. On March 8, 2010, the Centre informed the Parties that Professor McLachlan had accepted his appointment and that therefore, in accordance with Arbitration Rule 12, the proceeding resumed the same day from the point it had reached at the time the vacancy occurred.

15. On March 18, 2009, Claimants filed with the Centre a Proposal to disqualify ("Propuesta de Recusación") Professor McLachlan as Arbitrator pursuant to Article 57 of the ICSID Convention. The same day, the Centre confirmed receipt of the Proposal and declared that in accordance with Arbitration Rule 9(6) the proceeding was suspended until a decision on the Proposal for disqualification was taken.

16. On April 16, 2010, Respondent filed a submission in response to the disqualification proposal.

17. Invited thereupon to make his own statement on the matter, if any, Professor McLachlan submitted such statement by letter dated May 5, 2010. The Parties all filed a further response to this statement on May 14, 2010.

18. In a case like the present one, where one of the members of the Tribunal is challenged, Arbitration Rule 9(4) provides that "the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned." Mr. Pedro J. Martinez-Fraga, Arbitrator, and Professor Andreas Bucher, President (both also designated hereinafter as the "Two Members") have thus considered the Proposal and agreed upon the reasons and conclusions stated below.

19. Because Claimants filed their Proposal within ten days after they were informed of Professor McLachlan's acceptance, it is certain that Claimants have acted promptly as required by Arbitration Rule 9(1).

II. The circumstances relevant to the Proposal for disqualification and the Parties' position

20. Claimants' proposal for the disqualification of Prof. McLachlan as an arbitrator and member of this Tribunal is based on views expressed by Prof. McLachlan in his publications as a legal scholar on two questions that Claimants consider crucial to this arbitration.

21. In connection with the Most Favored Nation (MFN) Clause, Claimants refer to the statement made by Prof. McLachlan in the book "International Investment Arbitration, Substantive Principles", published in 2007 by Oxford University Press. This book has been written by Prof. McLachlan together with Laurence Shore and Matthew Weiniger, assuming joint responsibility for the entirety of the work. It is, however, stated therein that Chapter 7 was written by Prof. McLachlan. Claimants base their claim and analysis on Chapter 7. Their concerns are focused on an extract that reads as follows:

> *"Like national treatment, most favored nation (MFN) treatment has an impressive lineage in both investment and trade treaties. The general approach to the interpretation of such clauses has received considerable attention from international courts* [recte: *tribunals] and from the International Law Commission.*
> ....
> *However, it is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. It is submitted that this is precisely the effect of the heretical decision of the Tribunal on objections to jurisdiction in Maffezini v Spain. In this case, the Tribunal held that the specific provisions of the dispute resolution clause in the Argentine-Spain BIT did not constitute a bar to its jurisdiction in view of the more liberal provisions of the Chile-Spain BIT, which could be applied as a result of the MFN provision...*
>
> *In Maffezini, the Argentine-Spain BIT contained a dispute settlement clause which permitted the submission of the dispute to international arbitration only if it had first been submitted to the courts of the host State and no decision had been rendered within eighteen months. The Chile-Spain BIT merely contained a cooling off period of six months, with no requirement to resort to the host State courts...*
>
> *On that question, the Tribunal found that the protection of the rights of traders by means of dispute resolution clauses was a matter which fell within the protections afforded by treaties of commerce and navigation or investment treaties.... Accordingly, Maffezini could take the benefit of the Chile-Spain BIT, and was not required to resort to the Spanish courts before invoking the jurisdiction of the arbitral tribunal...*
>
> *The correctness of this analysis was convincingly questioned in Plama.... States could provide expressly that they intended the MFN clause to apply to dispute settlement (as was the case, for example, in the UK model form BIT). But the fact that the*

> *MFN clause was expressed to apply 'with respect to all matters' dealt with by the basic treaty was not sufficient to alleviate the doubt as to whether the parties had really intended it to apply to the dispute settlement clause.*
>
> ...
>
> *It is submitted that the reasoning of the Tribunal in Plama is to be strongly preferred over that in Maffezini... Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration. In those circumstances, it is particularly important to construe the ambit of the State's consent strictly....It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State parties and in other circumstances. Moreover, it is in any event not possible to imply a hierarchy of favour to dispute settlement provisions. The clauses themselves do not do this, and it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration....*
>
> *The result, if as is suggested, the approach in Plama is preferred, will be that the MFN clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide. Its domain of application will be as to the substantive rights vouchsafed to investors from third States to which special preferences have been granted."*[2]
>
> *"The application of MFN protection will not be justified where it subverts the balance of rights and obligations which the parties have carefully negotiated in their investment treaty. In particular, it will not apply to the dispute settlement provisions, unless the parties expressly so provide."*[3]

22. In summary, the key points on which Claimants' proposal is based in this respect are that (i) Prof. McLachlan described as "heretical" the jurisdictional decision handed down in the *Maffezini* case, (ii) he found the criticism of this decision by the Tribunal in the *Plama* case convincing, (iii) the reasoning of this Tribunal was to be preferred, he sustains that the MFN Clause does not apply to the dispute settlement provisions of a BIT unless the parties expressly have so agreed and (iv) that doubts are to be raised in this respect in those cases where the clause provides to be applied "with respect to all matters" as stated in Article 4.2 of the Spain-Argentina BIT.

23. On this basis Claimants draw the conclusion that Prof. McLachlan "has already prejudged an essential element of the conflict that is the object of this arbitration". It is Claimants' submission that the claim presented before this Tribunal is under the auspices of the Spain-Argentina BIT in the same way as the claim presented by Mr. Maffezini against the Kingdom of Spain. When describing the *Maffezini* decision as "heretical", Claimants sustain that Prof. McLachlan has prejudged the jurisdiction of this

---

[2] See "International Investment Arbitration, Substantive Principles, Oxford University Press, 2007, pages 254 to 257. Emphasis added by Claimants. Footnotes omitted.

[3] McLachlan *et al.*, *op. cit.*, page 263. Emphasis added by Claimants.

Tribunal. This would appear all the more so as Prof. McLachlan's position has been taken as support in one recent decision where the jurisdictional objection raised by the Argentine Republic in respect of the MFN Clause has been admitted.[4]

24. The other matter on which, according to Claimants' Proposal, Prof. McLachlan has clearly given his views is the defence posed by the Argentine Republic on the state of necessity, in relation to the decisions handed down in the *CMS*, *Enron*, *Sempra*, and *LG&E* cases. Prof. McLachlan's statement, on which the proposal for disqualification is based in this respect reads:

> *"Unfortunately, however, the tribunals which have so far considered the matter have come to very different conclusions on the application of the defence. In CMS, Enron, and Sempra the tribunals (which all had the same President) considered that the defence was not available....*
>
> *The award in CMS was the subject of annulment proceedings. On 25 September 2007, the Annulment Committee delivered its decision. It found manifest errors of law in the tribunal's treatment of necessity, but it declined to annul on this ground, holding that the errors did not amount to a manifest excess of powers or lack of reasoning, as would have been required for annulment.*
>
> ...
>
> *The Committee concluded: Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.*
>
> *This led to a second error of law, namely the failure to consider whether each such rule was a primary or a secondary rule of international law. The Committee's views was that Article XI was a primary rule, in that, if it applied, there would have been no breach of the BIT.*
>
> ...
>
> *These two errors made by the Court could have had a decisive impact on the operative part of the Award.*
>
> ...
>
> *The answer to that question is clear enough: Article XI, of and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.*
>
> *In formal terms, the decision of an annulment committee has no greater precedential effect than an award. Nevertheless, the very opportunity of a second tier of review; the narrowly circumscribed limits of the review; and the eminent experience in public international law of the Committee, suggest that great weight should be given to the Committee's categorical views on the central issues confronted in these cases...*

[4] *Wintershall v. Argentine Republic*, ICSID No. ARB/04/14, Award of 8 December 2008, §§ 167 and 188.

> *... It was taking the customary doctrine first, and then conflating its test with that of the Treaty, without close consideration of the differences, which contributed to the errors of the CMS Tribunal, and those which followed it."*[5]

25. While Claimants admit that they are conscious that a clear difference exists between the BIT applied in the *CMS* case and the Spain-Argentina BIT, they nevertheless deem that Prof. McLachlan has prejudged the defense of necessity because the case submitted to this Tribunal involves the emergency measures adopted in Argentina in 2002, which were the subject of the *CMS* case and of many other cases where they were invoked as a defense by the Argentine Republic, thus making it highly probable that they will be referred to again in the case pending before this Tribunal. Claimants submit that Prof. McLachlan has prejudged the defense of necessity because he declared that more weight should be given to the decision of the Annulment Committee than to the Award handed down in the *CMS* case, as the latter did contain a "manifest error of law" in the Committee's view, which is shared by Prof. McLachlan, thus prejudging yet another crucial question relevant to the case before this Tribunal.

26. Claimants' position, as will be considered below, is that an arbitrator appointed to an ICSID Tribunal must fulfill the two requirements of impartiality and independence. In Claimants' view, the first requirement has a strong subjective content. Partiality exists not only in relation to one of the parties, but it also exists when the arbitrator shows a preference towards the position adopted by one of the litigants or has in some other way prejudged the matter or a certain aspect thereof. In this respect, Claimants submit that Prof. McLachlan does not meet the requisite of impartiality. He lacks the freedom to give his opinion and to make a decision with respect to the facts and circumstances of this case because he already had prejudged those facts and circumstances, issued his opinion, and made it known. Claimants further note that the requirement of impartiality is a question of appearance and trust, an approach that attempts to "make objective" a condition that is clearly subjective in Claimants' view. In the instant case, however, Prof. McLachlan's prejudice towards fundamental elements of this arbitration stems from circumstances that have been verified and not from mere appearance, no element showing furthermore that he might have changed his opinion in the meantime. Claimants do not formulate any reproach against Prof. McLachlan for not having made any disclosure when he accepted his appointment as arbitrator, as they do not know whether he had, at that time, knowledge of the elements that gave rise to Claimants' disqualification proposal.

---

[5] See Campbell McLachlan, "Investment treaties and general international law", International & Comparative Law Quarterly, 2008, pages 361-401, quoted from pages 385, 386, 389 and 390. Emphasis added by Claimants.

27. Respondent rejects all arguments the Claimants put forth as groundless and lacking legal basis. Respondent notes that the opinions previously expressed by Prof. McLachlan and on which the Proposal for his disqualification is based make no reference whatsoever to the instant case. Respondent's position, as will be further considered below, is that opinions previously published by an arbitrator do not raise an issue of lack of impartiality or independence when issued outside the framework of the ongoing arbitration. In another ICSID case, the objection to the appointment of an arbitrator based on an opinion given by him in another case was rejected.[6] Respondent highlights that Prof. McLachlan has given opinions on a large number of concepts of international investment law and they were rendered in consideration of neither the Argentine Republic, URBASER, nor concerning the dispute in question. Only two general comments included in two different publications constitute the factual basis of Claimants' Disqualification Proposal. Prof. McLachlan has never given a legal opinion in which he expressed a preference for the Argentine Republic, nor did he ever refer to the strategy of the Argentine Republic in its international arbitration proceedings.

28. In relation to Prof. McLachlan's comments regarding the defense of necessity, Respondent notes that they are about two international law concepts based on the idea that importance must be given to the comparative analysis made by the Annulment Committee in the *CMS* case. Prof. McLachlan only intended to transcribe what this Committee stated. The Committee never asserted that the facts in question met the necessary requirements of the state of necessity in order to justify its invocation by Argentina. Prof. McLachlan's "preference" for the Committee's arguments in no way means that he is in favour of and in agreement with the merits of the arguments of the Argentine Republic. In any event, Claimants' objection is not applicable to this case, as the Argentina-Spain BIT does not contain any non-preclusive measures clause.

29. Respondent also notes that based on the appointment made by the Chairman of the ICSID Administrative Council in the *Alemanni* case, an institutional position of ICSID has been issued that prior opinions expressed on the MFN clause by the president of a Tribunal do not constitute an obstacle for its appointment and performance in said position, reason for which, *a fortiori*, it could not constitute a ground for the disqualification of an arbitrator. The substance of the decision made by ICSID in that case is perfectly applicable in the instant case with respect to opinions previously entered on the scope and application of the MFN clause.

30. Claimants stated expressly and the Argentine Republic acknowledged that the Proposal to disqualify Prof. McLachlan as arbitrator in no way questions the latter's moral consideration and competence. The motive of disqualification is exclusively

---

[6] *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8.

based on the opinions expressed by Prof. McLachlan in his writings as a scholar, which in Claimants' view constitute a source for a lack of confidence in the impartiality of his judgment concerning two essential issues to be debated in the course of this proceeding. For Respondent, no doubt about Prof. McLachlan's independence and impartiality is permitted. Moreover, there has been no showing by Claimants that their alleged lack of full confidence is "manifest" as required by Article 57 of the ICSID Convention.

31. Prof. McLachlan's statement dated May 5, 2010, made in regards to the Proposal for disqualification, in relevant part, reads:

> *"I have evaluated my own position in the light of the fundamental requirements of Article 14 of the ICSID Convention. On accepting my appointment on 7 March 2010, I signed an unqualified Declaration. After consideration of the matters raised in the Claimant's Proposal, I see no reason to qualify that Declaration, nor any reason why I may not be relied upon to exercise independent judgment in this arbitration.*
>
> *It is important to distinguish the task of the legal scholar from that of the arbitrator. When writing a book or article, the scholar must express views on numerous general issues of law, based on the legal authorities and other material then available to him. A scholar of any standing should always be prepared to reconsider his views in the light of subsequent developments in the law or further arguments.*
>
> *However, and in any event, the task of the arbitrator is completely different. It is to judge the case before him fairly as between the parties and according to the applicable law. This can only be done in the light of the specific evidence, the specific applicable law and the submissions of counsel for both parties.*
>
> *I wish to assure both parties that I would approach such a task in this, as in any, arbitration, unconstrained by my prior publications and without having prejudged any of the issues. This is the essence of the role of the arbitrator."*

32. Claimants argue that their presentation of Prof. McLachlan's writings is not challenged and thus, they have not committed an error in interpretation. Claimants accept that there is a difference between the task of a scholar and that of an arbitrator, but in the case of the opinions expressed by Prof. McLachlan, Claimants assert that circumstances that would clearly permit distinguishing between the two duties are not present. They note that the opinions expressed by Prof. McLachlan on the state of necessity specifically refer to the Argentine Republic. Additionally, Claimants argue that in regard to the MFN clause, Prof. McLachlan expressed a degree of conviction and took a stance much greater than a mere doctrinal opinion by describing the decision rendered in the *Maffezini* case as "heretical".

33. Respondent affirms that it expects each of the members of the Tribunal to judge this case exclusively based upon the evidence, applicable law, and submissions

presented by the parties, wholly independent from any views expressed by them in any scholarly writing.

III. The legal basis for the consideration of the disqualification proposal

34. The Parties do not dispute that provisions for dealing with the disqualification proposal are contained in Article 57 (first sentence) of the ICSID Convention, including the reference made to Article 14(1). These provisions read:

> "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14." (Art. 57, first sentence)
>
> "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators." (Art. 14[1])

When reading both provisions together, Article 57 has the effect of extending the qualities required by Article 14(1) to all members of the Tribunal, whether or not they are designated to a Panel, and of allowing any party to propose the disqualification of any member on account of any fact indicating a lack of such qualities, under the condition that it must be "manifest". Because Article 57 of the Convention refers to "any of its members" it leaves no doubt that the applicable rules and requirements are the same for all arbitrators of a three member Tribunal.

35. When considering Claimants' disqualification proposal in light of the provisions quoted above, the Two Members of this Tribunal are called to decide whether the opinions expressed by Prof. McLachlan on the two matters Claimants qualify as crucial to the outcome of this proceeding, this Arbitrator is deemed to indicate a manifest lack of the required quality to be relied upon to exercise independent judgment.

36. Both Parties have rightly pointed to the fact that the Spanish version of the ICSID Convention introduces a variant to the extent that the final words of the first sentence of Article 14 refer to an arbitrator's quality to "inspirar plena confianza en su imparcialidad de juicio", thus referring to the notion of impartiality instead of independence as in the English and French version, as well. The Convention states in its last final clause that the texts in all these three languages are "equally authentic". It does not contain a rule giving preference to one version over the other. Therefore, the Two Members agree that in case of a divergence of wording the respective versions are to be construed as equivalent. Accordingly, both notions of independence and impartiality are to be considered as equally pertinent for the examination of the Proposal

to disqualify Prof. McLachlan. As Respondent rightly pointed out, the ICSID Convention says nothing, however, about specific factual circumstances that would justify a challenge.

37. The Two Members are fully aware of a large body of case law, proposals and guidelines rendered or issued with the aim of providing definitions for such fundamental notions as the independence and impartiality of arbitrators. In particular, they have taken a close look to definitions quoted and explained in Claimants' Proposal and in Respondent's Reply, some of which are rightly considered, as Claimants put it, of "general acceptance" in international arbitration, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. However, while these texts certainly constitute a most valuable source of inspiration, they are not part of the legal basis on which the decision rendered in respect of Claimants' Proposal is based. This Decision is based on the provisions of the ICSID Convention, as quoted above, which are to be construed and interpreted in the broader context of the objectives and the operation of the arbitral proceedings governed by this instrument.

IV. The content and scope of the notions of independence and impartiality

38. As stated above, both concepts of independence and impartiality are deemed to be of equivalent content and pertinence in the framework of Articles 14(1) and 57 of the ICSID Convention. Therefore, a debate on the question of whether the concepts may have, at least in part, different meanings, becomes moot. In any event, many efforts to discover a manner to divide these notions cannot overcome their inherent redundancy. Indeed, an arbitrator's lack of independence of judgment results in favor shown to one of the parties and thus demonstrates the arbitrator's lack of impartiality, while an arbitrator's lack of impartiality is a sign of the arbitrator's lack of independent judgment.

39. Claimants, however, focus on the notion of impartiality, which, in their opinion, has a "strong subjective content" and therefore, is different from the concept of independence. Claimants consider independence as an objective circumstance, implying the nonexistence of a relationship with the parties. Based on these definitions, Claimants reach the conclusion that no doubt exists regarding Prof. McLachlan's independence, however, in their view, the circumstances relating to his publications demonstrate that he "does not meet the requisite of impartiality since he has prejudged certain fundamental aspects of this arbitration".

40. According to Articles 57 and 14(1) of the ICSID Convention, the crux of the analysis is whether the opinions expressed by Prof. McLachlan qualify as indicating a manifest lack of the qualities required to provide independent and impartial judgment. This principle, however, requires that an inherent qualification is expressed. No arbi-

trator and, more generally, no human being of a certain age is, in absolute terms, independent and impartial. Simply put, every individual is conveying ideas and opinions based on its moral, cultural, and professional education and experience. What is required, when it comes to rendering judgment in a legal dispute, is the ability to consider and evaluate the merits of each case without relying on factors having no relation to such merits.

41. Claimants' definition of the requirement of independence and more particularly, the concept of impartiality, is broader. Claimants admit that the opinions expressed by Prof. McLachlan do not raise an issue of partiality shown towards a party or related to the outcome of the claims as to their merits. They contend that there is a showing of preference and partiality in favor of the position that the Respondent will undoubtedly assert in this arbitration with respect to the two crucial issues described above. Claimants assert that Prof. McLachlan lacks the freedom to give his opinion and to make a decision solely based on the facts and the circumstances of the case because he has allegedly already prejudged those facts and circumstances, and issued his opinion on these matters. Claimants argue that Prof. McLachlan cannot issue an opinion contrary to that which he published and thus face criticism that he was inconsistent or possibly "heretical" himself.

42. In support of this latter point, Claimants refer to the IBA Rules of Ethics, which state:

> "3.1 The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute.
> 3.2 Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it."[7]

When arguing that a position taken on a matter of legal interpretation, as is the case with the excerpts published by Prof. McLachlan, constitutes a prejudice "in relation to the subject-matter of the dispute" and that it reflects "a position in relation to it [*i.e.* the 'outcome of the dispute']", Claimants go far beyond the reasonable understanding of these provisions. The "subject-matter of the dispute" and the "outcome of the dispute" are the core concepts that these provisions refer to; their content is thus identical or at least very close to the outcome of the proceedings. These provisions are far from clearly supporting the purported interpretation that any position taken on a particular issue to be raised in arbitration shall be considered as an element of bias showing a lack of impartiality and independence. The provisions are even more unclear or totally

[7] Emphasis added by Claimants.

ambiguous when the issue to be considered is, like in the instant case, the interpretation of legal concepts in isolation from the facts and circumstances of a particular case.

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. Claimants refer to the decision made on December 8, 2009, by the Secretary General of the Permanent Court of Arbitration (PCA)[8] upon the challenge of Judge Charles N. Brower. This decision states that a point of view expressed in an interview gave rise to an appearance that this arbitrator prejudged the issue of an arbitration proceeding although he had not given a specific opinion on the outcome of the pending arbitral proceedings. The issue in the instant case, however, is that the appearance of doubt in regards to the independence and impartiality of Prof. McLachlan is directly linked to the statements quoted by Claimants as grounds for their challenge.

44. What matters is whether the opinions expressed by Prof. McLachlan on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceeding. Claimants' view is, as stated, broader. They do not include in their position the latter qualification and they contend that the opinions expressed by Prof. McLachlan are to be taken as such and that it appears "unquestionable" that he shares the same opinion today, absent any evidence that he has changed his opinion in the meantime (such change not being noticed in Prof. McLachlan's statement of May 5, 2010).

45. The Two Members seized with the challenge submitted by Claimants are of the view that the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator.

---

[8] Decision on Challenge to Arbitrator by the Secretary General of the Permanent Court of Arbitration (PCA) in ICSID Case No. ARB/08/6, *Perenco Ecuador Ltd v. Republic of Ecuador and Petroecuador.*

46. Indeed if one would prefer to extend such requirement of independence or impartiality beyond this framework, as supported by Claimants, the mere fact of having made known an opinion on an issue relevant in an arbitration would have the effect of allowing a challenge for lack of independence or impartiality. Such a position, however, would have effects reaching far beyond what Claimants seem to sustain, and incompatible with the proper functioning of the arbitral system under the ICSID Convention.

47. The opinions expressed by Prof. McLachlan are those of an academic. They represent, even when taken together with numerous other opinions expressed by scholars, a small part of all opinions contained in publications relating to arbitrations governed by the ICSID Convention. These opinions include, in particular, the full set of opinions expressed in the awards and decisions rendered under the ICSID system, most of which are published or available through the Internet. The appointment of the President of the Tribunal in the *Alemanni* case, as reported by Respondent, seems to indicate that an opinion previously expressed in an arbitral decision does not constitute an obstacle for an arbitrator to be appointed in another case raising similar issues. In the Decision on the proposal for the disqualification of a member of the Arbitral Tribunal rendered in the *Suez/Vivendi v. Argentine Republic* cases on October 22, 2007[9], the Two Members stated that the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case does not mean that such judge or arbitrator cannot decide the law and the facts impartially in another case. They further observed that:

> "A finding of an arbitrator's or a judge's lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system." (§ 36)

48. If Claimants' view were to prevail and any opinion previously expressed on certain aspects of the ICSID Convention be considered as elements of prejudgment in a particular case because they might become relevant or are merely argued by one party, the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter, whether it may be procedural, jurisdictional, or touching upon the substantive rights deriving from BITs. The wide spreading of ICSID awards through publication and appearance on the Centre's website has greatly contributed to dense exchanges of views throughout the world on matters of international investment law. This is very largely considered as a positive contribution to the development of the law and policies in this segment of the world's economy. It goes without saying that such a debate would be fruitless if it did not include an ex-

[9] ICSID No. ARB 03/17 and 03/19.

change of opinions given by those who are actually involved in the ICSID arbitration process, whether they are writing and speaking as scholars, arbitrators, or counsel. Such activity is part of the "system" and well known to all concerned. Therefore, it seems extremely strange to the Two Members to accept Claimants' position that a view previously expressed on an item relevant in an arbitral proceeding should be qualified as a prejudgment that demonstrates a lack of independence or impartiality.

49. The above analysis is not intended to suggest that Claimants' views are not a matter for debate. It is true, indeed, that each arbitrator's personal opinion is of greater weight in a system like ICSID arbitration than in most other systems of judicial adjudication world-wide. In other judicial systems, decisions are based on precedent that all members of the judicial body have to respect or, at least, observe within a usually small margin for possible overruling, under the control of the appellate body. In such a system, the opinion of an individual judge counts for little to the extent that previous precedents have to be followed. This is not how ICSID arbitration operates. Despite many statements made in ICSID awards affirming the necessity or the duty to achieve consistency through ICSID case law, the principle remains that each Tribunal is sovereign in its decision making. This autonomy also applies to decisions rendered by Annulment Committees, which do not have precedential value and are not in practice considered as having such value. This necessarily implies that weight is given to the opinion of each member of an ICSID Tribunal. However, this is not without limits. The requirement of independent and impartial judgment means that an arbitrator's previously adopted opinion, whether published or not, shall not be of such force as to prevent the arbitrator from taking full account of the facts, circumstances, and arguments presented by the parties in the particular case.

V. Professor McLachlan's statements

50. The Two Members have examined whether the opinions expressed by Prof. McLachlan should be viewed as being so strongly argued that their author will not, in the view of a reasonable third party, give due consideration to the position taken by a party in this proceeding.

51. The Two Members wish to emphasize at the outset that Prof. McLachlan has provided the Parties with a clear statement in which he acknowledges the Claimants' concern and ensures both Parties that he will approach his task as an arbitrator unconstrained by his prior publications and without having prejudged any of the issues. The Two Members have no reason whatsoever not to trust this statement. They also note that the opinions referred to by Claimants have been expressed by Prof. McLachlan in his capacity as a scholar and not in a decision that could have some kind of a binding effect upon him. One of the main qualities of an academic is the ability to change his/her opinion as required in light of the current state of academic knowledge. The

Two Members have no doubt that Prof. McLachlan reaches such high standard of science and conscience.

52. When looking more closely at the opinions that form the basis for the Proposal for disqualification, the Two Members observe that the opinions appear to be of different significance in view of the influence one might derive for the resolution of the dispute before this Tribunal. For the purpose of such examination, the Two Members are not convinced that distinctions like the one based on the notion of "general opinion" as it is used to define the attitudes to be put on the "green list" according to the IBA Guidelines make much sense. Such a distinction between "general" and "specific" views is of little value when it comes to characterizing academic work. The hypothesis of research done by a scholar on a merely "general" level is a description more caricatured than that of actual academic work. As well, it is not much more convincing to draw a strict dividing line between opinions expressed as a scholar and those to be formed as an arbitrator. While it is correct to say that a scholar's opinion might change and is unrelated to the pattern of facts and arguments related to a particular case, Claimants are right to the extent that they argue that such opinion may nevertheless be a factor of influence when it comes to considering the same or similar issues in a particular dispute. In other words, a legal scholar who becomes an ICSID arbitrator does not lose his/her capacity of being a scholar that conveys academic opinions, which might become relevant to the legal analysis undertaken in the resolution of a particular dispute. Irrespective of such more artificial distinctions, the focus has to be put on statements made by Prof. McLachlan as they stand in order to determine whether they prevent him from taking an independent and impartial judgment in the instant case.

53. In respect to the issue relating to the defense that may be posed by the Argentine Republic on the state of necessity, the Two Members observe that Prof. McLachlan's statement made in the International and Comparative Law Quarterly, 2008, p. 361-401 (385-391), reproduced in relevant parts above, is in very large part devoted to a description and comparison of the decisions handed down in the *CMS*, *Enron*, *Sempra*, and *LG&E* cases. Elements of personal opinion are contained in the statement that "great weight should be given to the Committee's [seized with the CMS case] categorical views on the central issues confronted in these cases" and that the errors it identified in the decision under its scrutiny was that it "was taking the customary doctrine first, and then conflating its test with that of the Treaty, without close consideration of the differences, which contributed to the errors of the CMS Tribunal, and those which followed it" (page 390).

54. The Two Members are not able to identify anything more in these statements than an analysis of international law, the relationship between general and customary international law, and the law of the BITs involved in the cases under examination.

Even at this level, it is not clear whether the statements made by Prof. McLachlan are relevant in the instant case, especially given that Claimants' acknowledge that there is a clear difference between the BIT applied in the *CMS* case and the Spain-Argentina BIT relevant to the matter before this Tribunal. The statements made by Prof. McLachlan do not contain any element indicating, from the point of view of a reasonable third party, that he will not be capable of giving his full attention and consideration to the positions developed by each Party involved in the instant case as they relate to the legal items he previously examined. If Claimants' challenge would be upheld on the basis of the challenged statements made by Prof. McLachlan, nearly all arbitrators who have ever expressed an opinion on an item specific to ICSID arbitration would be at risk of a challenge. Such an approach would lead to the disqualification of as many arbitrators, including in particular those who have acquired the greatest experience, thus leading to the paralysis of the ICSID arbitral process. Such a perspective cannot be even an implicit outcome of the decision to be taken by the Two Members of this Tribunal.

55. Compared to his explanations on the defense of necessity, Prof. McLachlan's analysis of the "Most Favoured Nation Treatment" in his book on International Investment Arbitration (pages 254-257, 263) appears to be of a more case driven density. While several decisions rendered under the ICSID Convention are quoted, Prof. McLachlan's statement on this matter concentrates on a comparison between the decisions on jurisdiction made in the cases *Maffezini v. Spain*[10] and *Plama Consortium Ltd v. Republic of Bulgaria*[11]. In the author's view, the *Maffezini* decision had "the effect of fundamentally subverting the carefully negotiated balance of the BIT in question" (*i.e.* the Argentina-Spain BIT), a statement which allows the author to qualify this decision as "heretical" (p. 254). Turning to the *Plama* decision, Prof. McLachlan observes that it "convincingly questioned" the correctness of the analysis in *Maffezini* (p. 256). In his view, *Plama* admitted that the agreement on international arbitration "must be clear and unambiguous, even where reached by incorporation by reference" (p. 256). For such a purpose, a MFN clause expressed to apply "with respect to all matters" was not sufficient (p. 256). The *Plama* tribunal therefore decided that a MFN provision would not apply to dispute settlement provisions unless the parties expressly so provided. On this point, Prof. McLachlan submits his view "that the reasoning of the Tribunal in Plama is to be strongly preferred over that in Maffezini" (p. 257). The result of his analysis is therefore that "the MFN clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide" (p. 257, and in similar terms p. 263).

[10] ICSID No. ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000.
[11] ICSID No. ARB/03/24, Decision on Jurisdiction of February 8, 2005.

56. The *Plama* decision referred to another MFN clause, contained in the Bulgaria-Cyprus BIT. The comparison between this decision and the *Maffezini* decision therefore remains on a more general level of legal interpretation of the scope of MFN clauses in respect of dispute settlement provisions contained in a BIT. The preference goes to the *Plama* "approach" (p. 257), which seems to leave open a more in-depth analysis of each MFN clause at issue in a particular arbitral dispute.

57. The Two Members further observe that Prof. McLachlan's scholarly works are far from providing a complete picture of the potential role of how MFN clauses relate to dispute settlement clauses, by virtue of the mere fact that they do not consider all or most decisions rendered in this respect and the many academic and other contributions published in recent years. It may also be observed that the only conclusion beyond the preference given to the *Plama* approach is the statement that the MFN clause should apply to dispute settlement only if this has been "expressed" therein. On this point as well, the analysis leaves open the possibility of adding other elements of interpretation in support of a conclusion which accepts the pertinence of a MFN clause in relation to dispute settlement, not based exclusively on the formal requirement of will having been "expressed", but also the history of the negotiation, the intentions of the parties having ratified the BIT, the objective of the MFN clause within the overall context of the BIT, and others.

58. In light of the elements contained in Prof. McLachlan's statement on the role of MFN clauses in matters of dispute settlement provided for in a BIT and based on the trust the Two Members have in Prof. McLachlan's ability to examine the matter from a more broad perspective, and in taking full account of the facts, circumstances and arguments presented by the Parties in the present proceeding, the Two Members conclude that Prof. McLachlan's scholarly opinions do not meet the threshold of presenting an appearance that he is not prepared to hear and consider each Parties' position with full independence and impartiality.

59. This conclusion necessarily implies that Prof. McLachlan's statements on which the Proposal for his disqualification is based do not indicate a "manifest" lack of independence or impartiality as required by Article 57 of the ICSID Convention.

VI. Conclusion

Based on the reasons given above, the Two Members decide –

1. Claimants Proposal to disqualify Professor Campbell McLachlan as Arbitrator and member of this Tribunal is dismissed.

2. The determination and attribution of costs in connection with this Decision is reserved for a decision made by this Tribunal at a later stage of this proceeding.

3. As from the date hereof, the state of suspension of the proceeding according to Arbitration Rule 9(6) is hereby terminated.

Professor Andreas Bucher
President

Mr. Pedro J. Martinez-Fraga
Arbitrator

ANEXO 15

ICSID Case No. ARB/10/9

Universal Compression International Holdings, S.L.U.

Claimant

v.

The Bolivarian Republic of Venezuela

Respondent

DECISION ON THE PROPOSAL TO DISQUALIFY PROF. BRIGITTE STERN AND PROF. GUIDO SANTIAGO TAWIL, ARBITRATORS

Issued by

Chairman of the Administrative Council
Mr. Robert B. Zoellick

Secretary of the Tribunal
Ms. Janet M. Whittaker

Representing Claimant
Mr. Craig S. Miles, Mr. R. Doak Bishop,
Ms. Isabel Fernández de la Cuesta,
Mr. Alberto Ravell and Ms. Silvia Marchili
King & Spalding LLP
1100 Louisiana Street, Suite 4000
Houston, Texas 77002
UNITED STATES OF AMERICA

Dra. Elisabeth Eljuri and Dr. Victorino Tejera
Despacho de Abogados Macleod Dixon, S.C.
Centro San Ignacio
Torre Copérnico Piso 8
Ave. Blandín, La Castellana
Caracas 1060
VENEZUELA

Representing Respondent
Dra. Margarita L. Mendola Sánchez
Procuradora General de la República
Av. Los Ilustres, cruce con calle Francisco lazo Martí
Edificio Procuraduría General de la República
Piso 8., Urb. Santa Mónica
Caracas 1040
VENEZUELA

Mr. George Kahale III, Mr. Eloy Barbará de Parres, Ms. Gabriela Álvarez Ávila,
and Ms. Claudia Frutos-Peterson
Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York, NY 10178
UNITED STATES OF AMERICA

Date: **May 20, 2011**

I. INTRODUCTION

A. REQUEST FOR ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

1. On March 23, 2010, Universal Compression International Holdings, SLU ("Claimant") filed a Request for Arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention") against the Bolivarian Republic of Venezuela ("Respondent").

2. On April 12, 2010, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention.

3. Absent an agreement between the Parties with respect to a method of appointment, Claimant, by letter of August 4, 2010, informed the Centre that, under Arbitration Rule 2(3), it elected the formula provided for in Article 37(2)(b) of the Convention. In its letter, Claimant appointed Professor Guido Santiago Tawil, an Argentine national, as arbitrator.

4. On August 9, 2010, the Secretariat informed the Parties that Professor Tawil had accepted his appointment and circulated a copy of his signed Arbitration Rule 6(2) declaration and attached statement. On August 12, 2010, Respondent appointed Professor Brigitte Stern, a national of France, as arbitrator. On August 18, 2010, the Secretariat informed the Parties that Professor Stern had accepted her appointment and circulated a copy of her signed Arbitration Rule 6(2) declaration.

5. By email of August 18, 2010, Claimant informed the Secretariat that the Parties had agreed to attempt to reach agreement upon a candidate for president of the tribunal by September 5, 2010. By further email of September 7, 2010, Claimant informed the Secretariat that the Parties were unable to agree upon a candidate for president of the tribunal. Claimant also requested that the Chairman of the Administrative Council ("Chairman") appoint the president of the tribunal in accordance with Article 38 of the Convention.

6. On October 13, 2010, the Secretary-General informed the Parties that she intended to propose to the Chairman that he appoint Mr. J. William Rowley, QC, a national of Canada and a member of the ICSID Panel of Arbitrators designated by Mongolia, as the president of the tribunal. Claimant and Respondent confirmed that they had no

compelling objection to the appointment of Mr. Rowley on October 20, 2010, and October 25, 2010, respectively. On October 25, 2010, the Secretary-General confirmed that the Chairman would proceed with his appointment.

7. The Parties were informed on November 3, 2010, that the three arbitrators had accepted their appointments and that, therefore, pursuant to Arbitration Rule 6, the Tribunal was deemed to have been constituted and the proceeding to have begun as of that date. A copy of Mr. Rowley's Arbitration Rule 6(2) declaration was circulated to the Parties.

B. PROFESSOR TAWIL'S ARBITRATION RULE 6(2) DECLARATION

8. Professor Tawil attached a statement to his Arbitration Rule 6(2) declaration signed on August 6, 2010, confirming that he had "no relationship with any of the parties." In that statement, Professor Tawil disclosed facts and relationships with counsel for Claimant, as follows:

> "1. I have acted as co-counsel of Claimant's counsel in two ICSID arbitrations (Azurix Corp. v. Argentine Republic [ICSID Case No. ARB/01/12)] and Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic [ICSID Case No. ARB/01/3)]. Both arbitrations have concluded.
>
> 2. One of King & Spalding's associates, Ms. Silvia Marchili worked as a junior associate in the legal team that I lead in M. & M. Bomchil between 3/24/2003 and 7/31/2006.
>
> 3. Together with other authors, I have contributed to the first and second editions of the book 'The Art of Advocacy in International Arbitration', in which Mr. Bishop is one of the editors."

Professor Tawil also confirmed that he does "not consider that such circumstances affect in any way my ability to serve in this Tribunal or the reliance on my independent judgment."

C. PROFESSOR STERN'S ARBITRATION RULE 6(2) DECLARATION

9. In her Arbitration Rule 6(2) declaration of August 20, 2010, Professor Stern crossed out the first sentence of the fourth paragraph, which stated as follows:

> Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party.

10. On October 1, 2010, Professor Stern submitted a letter to the Centre, stating the following:

> "I was faced recently with a situation from which it appears that some parties to ICSID arbitration want not only that private information be disclosed, but also that public information be released by an arbitrator at the time of making the declaration of independance.
>
> I therefore, for the avoidance of doubt, would like to release the following information, which is available on the ICSID website, as a precision of my declaration of independence and impartiality sent to ICSID on August 17, 2010.
>
> I have been nominated by Venezuela in the following three cases, respectively in the years 2007, 2008 and 2010:
>
> Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/04/6), in the year 2007.
>
> Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, in the year 2008.
>
> Tidewater, Inc. et al. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5).
>
> I reconfirm here that I see no reason why I should not serve on the Arbitral Tribunal to be constituted with respect of the dispute between Universal and Venezuela."

D. REQUEST TO DISQUALIFY PROFESSOR STERN AND PROFESSOR TAWIL

11. By letter of September 9, 2010, Respondent indicated its intention to propose the disqualification of Professor Tawil as arbitrator in this case following the constitution of the tribunal. Respondent stated that its intention to seek Professor Tawil's disqualification was based on the relationship between Professor Tawil and counsel for Claimant—King & Spalding LLP—purportedly resulting from their having acted as co-counsel in proceedings that allegedly had recently concluded or were pending.

12. By letter of September 15, 2010, Claimant reserved its right to seek the recusal of Professor Stern as arbitrator once the tribunal had been constituted. Claimant's reservation was based on an allegation of repeated appointments of Professor Stern by Venezuela and Venezuela's counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP, and her alleged non-disclosure of this fact.

13. On November 4, 2010, Claimant proposed the disqualification of Professor Stern upon the basis that her multiple appointments by Venezuela and Respondent's counsel, not disclosed in her original declaration, conflict with three situations on the "Orange List" of the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") and give rise to justifiable doubts in Claimant's mind as to Professor Stern's ability to exercise independent and impartial judgment in this proceeding.

14. On November 5, 2010, the President of the Tribunal, having consulted with Professor Tawil, set a timetable for the Parties to submit observations and Professor Stern to furnish an explanation as provided for under Arbitration Rule 9, as follows:

- November 22, 2010—Respondent to submit a reply to Claimant's disqualification proposals;
- December 6, 2010—Professor Stern to furnish any explanation; and
- December 13, 2010—The Parties to submit any further observations, including comments arising from Professor Stern's explanation.

15. In its submission dated November 8, 2010 (received on November 12, 2010), Respondent proposed the disqualification of Professor Tawil on the grounds that: (i) Professor Tawil allegedly served as co-counsel with King & Spalding LLP to claimants in specified ICSID cases that purportedly had recently concluded or were pending; and (ii)

one of Claimant's counsel, Ms. Silvia M. Marchili, allegedly was an associate of and worked with Professor Tawil for four years in the law firm M. & M. Bomchil of which Professor Tawil is a partner.

16. Each of the Parties filed submissions and Professor Stern furnished an explanation regarding the proposal to disqualify her within the time limits established in the letter of November 5, 2010.

17. Claimant's submission of November 4, 2010 and Respondent's submission dated November 8, 2010 were deemed by the Parties to be a proposal relating to the majority of the members of the Tribunal and thus was required to be decided by the Chairman of the Administrative Council in accordance with Article 58 of the Convention and Arbitration Rule 9.

18. By letter of January 12, 2011, the Centre invited the Parties to submit their final observations on the proposed disqualification of Professor Stern by Wednesday, January 26, 2011, and Professor Stern was invited to submit any further explanation that she wished to make by the same date. The Centre also set a timetable for the Parties to submit observations on the proposal to disqualify Professor Tawil, and for Professor Tawil to furnish an explanation as provided for under Arbitration Rule 9, as follows:

- January 28, 2011—Claimant to submit observations;
- February 11, 2011—Professor Tawil to furnish any explanation; and
- February 18, 2011—The Parties to submit any further observations, including comments arising from Professor Tawil's explanation.

19. On January 26, 2011, the Parties submitted final observations on the proposal to disqualify Professor Stern. Claimant, having requested an extension of time, filed observations on the proposal to disqualify Professor Tawil on February 7, 2011. On February 18, 2011, having requested an extension of time for filing, Professor Tawil furnished an explanation. On February 25, 2011, Claimant confirmed that it did not intend to submit any further observations on the proposal to disqualify Professor Tawil, and Respondent submitted its final observations in this respect.

II. THE PARTIES' SUBMISSIONS AND PROFESSOR STERN'S EXPLANATION REGARDING THE PROPOSAL TO DISQUALIFY PROFESSOR STERN

A. CLAIMANT'S SUBMISSIONS

20. Claimant asserts that the standards under Articles 14 and 57 of the Convention require that arbitrators be both impartial and independent. In Claimant's view, the requirement of impartiality implies the absence of actual or apparent bias towards a party and must be judged from the perspective of a reasonable and informed observer.[1]

21. Claimant references the requirement in Article 57 of the Convention that disqualification of an arbitrator requires a manifest lack of the qualities in Article 14(1) of the Convention. Claimant submits that the "'manifest' criterion merely means that an arbitrator's lack of Article 14(1) qualities is clear; it does not mean that a claimant must show that the arbitrator manifestly lacks these qualities."[2]

22. Claimant references several standards in the IBA Guidelines, and acknowledges that the IBA Guidelines are not binding, although in its submission they expressly apply to investment arbitrations.[3] Claimant asserts that conflicts arising with respect to standards on the IBA Guidelines' Orange List can give rise to justifiable doubts as to an arbitrator's impartiality and that "[t]he test to be applied to determine whether Claimant's doubts are in fact justifiable is an 'appearance test,' which is to be applied objectively."[4] Claimant asserts that "a single situation included on the Orange List may necessitate an arbitrator's disqualification. The three situations existing with respect to Professor Stern make her disqualification all the more necessary."[5] Claimant submits that an arbitrator may be disqualified in this situation, even if the arbitrator intends to act independently and impartially.

---

1 Claimant's Additional Observations Regarding Its Challenge to Professor Brigitte Stern as Arbitrator dated Dec. 13, 2010 ("Claimant's Additional Observations PTD Stern") ¶ 2.

2 Claimant's Challenge to Professor Brigitte Stern as Arbitrator dated November 4, 2010 ("PTD Stern") ¶ 9; Claimant's Additional Observations PTD Stern ¶ 3.

3 PTD Stern ¶ 5, fn. 4; Claimant's Additional Observations PTD Stern ¶¶ 5–9.

4 PTD Stern ¶ 9.

5 *Id.* ¶ 6.

23. Claimant asserts that Professor Stern's appointment as arbitrator in this case is inconsistent with the IBA Guidelines "because it constitutes at least three situations giving rise to potential conflict found on the IBA 'Orange List'."[6]

1. Multiple Appointments by the Same Party

24. First, Claimant expresses doubt about Professor Stern's "ability to inspire full confidence and offer every guarantee to exercise impartial and independent judgment while participating in this proceeding,"[7] on the basis that Professor Stern is acting as the party-appointed arbitrator for Venezuela in at least three additional pending ICSID proceedings, namely: (i) *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6) ("*Vannessa Ventures*"); (ii) *Brandes Investment Partners, L.P. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) ("*Brandes*"); and (iii) *Tidewater Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No.l ARB/10/5) ("*Tidewater*").[8] Claimant submits that these multiple appointments conflict with Section 3.1.3 of the IBA Guidelines' Orange List.[9] Claimant argues that multiple appointments by the same party give rise to a potential for, or appearance of, undue influence.[10] Claimant also argues that Professor Stern's multiple appointments could place her "on unequal footing in her understanding of the proceeding," as she may have heard Venezuela's position several times previously while the other arbitrators and Claimant will not.[11] Claimant disputes Respondent's assertion that *Vannessa Ventures* should be excluded from the count because the appointment of Professor Stern in this case was not precisely within the past three years.[12] Claimant submits that the relevant date is not the date of appointment but the date of constitution of the tribunal, which was within the relevant three-year period.[13] Claimant contends that, in any event, application of a

---

6 *Id.* ¶ 5.

7 *Id.* ¶¶ 4, 7.

8 *Id.* ¶¶ 4, 8; Claimant's Additional Observations PTD Stern ¶ 12.

9 PTD Stern ¶¶ 11–15 (citing Section 3.1.3 ("[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.")).

10 *Id.* ¶ 13.

11 *Id.* ¶ 13.

12 Claimant's Additional Observations PTD Stern ¶¶ 13–19.

13 *Id.* ¶ 14.

strict three-year bright line cut-off would give parties an incentive to avoid the application of Section 3.1.3 through dilatory tactics.[14]

2. Multiple Arbitrations Having Related Issues

25. Claimant also submits that a conflict arises with respect to Section 3.1.5 of the IBA Guidelines' Orange List.[15] In particular, Claimant asserts that "all four of these cases involve similar issues—the claimants in all four cases are foreign investors in service industries in Venezuela, who are alleging that Venezuela has seized property through expropriatory measures."[16] Claimant notes alleged overlap between the factual and legal issues arising in the *Vannessa Ventures*, *Brandes*, and *Tidewater* cases and the case at hand. Claimant contends that "[t]he fact that she will not be learning of Venezuela's actions and its defenses afresh in the present case—because she has already been exposed to them in the first two cases and will likely soon hear them in the *Tidewater* case—increases the probability that she is unable to judge the present case impartially and independently."[17]

3. Multiple Appointments by the Same Counsel

26. Claimant notes that in two of these cases, Respondent is represented by its counsel in this case, Curtis, Mallet-Prevost, Colt & Mosle LLP, and is represented in all four cases by Venezuela's Attorney General.[18] Claimant submits that this conflicts with Section 3.3.7 of the IBA Guidelines' Orange List and gives rise to doubts as to Professor Stern's independence and impartiality.[19] Claimant also disputes the determination in the Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator dated Dec. 23,

---

14 *Id.* ¶¶ 15–17.

15 PTD Stern ¶¶ 16–22 (citing Section 3.1.5 ("[t]he arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.")).

16 *Id.* ¶¶ 5, 16. *See also* Claimant's Additional Observations PTD Stern ¶¶ 25–26; Claimant's Final Observations Regarding Its Challenge to Professor Brigitte Stern as Arbitrator dated Jan. 26, 2011 ("Claimant's Final Observations PTD Stern") ¶ 23.

17 PTD Stern ¶ 21.

18 *Id.* ¶¶ 4–5, 23; Claimant's Additional Observations PTD Stern ¶¶ 20–21.

19 PTD Stern ¶ 23 (citing Section 3.3.7 ("[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.")).

2010 ("*Tidewater* Decision") that the Attorney General of Venezuela is not "counsel" within the meaning of Section 3.3.7 of the IBA Guidelines.[20]

4. Non-Disclosure of Other ICSID Appointments by Venezuela

27. Claimant submits that the IBA Guidelines explicitly require arbitrators to disclose situations appearing on the Orange List.[21] Accordingly, Claimant asserts that Professor Stern "was under an obligation to disclose her involvement in at least three other cases involving Venezuela when she was appointed."[22] Claimant argues that the justifiable doubts as to Professor Stern's independence and impartiality are increased by her "failure to immediately disclose these matters."[23] Claimant states that "it is no defense to argue ... that no disclosure obligation exists whenever a party can 'discover' the arbitrator's prior appointments on its own by searching through 'public' sources." Claimant notes that Professor Stern's appointment in *Tidewater* was not made public on the ICSID website at the time that Professor Stern made her declaration because the tribunal in that case was not yet constituted.[24]

28. Finally, Claimant notes that in the *Tidewater* Decision, submitted by Respondent, similar arguments to those advanced by Claimant here were rejected by the members authoring that decision. In Claimant's Final Observations Regarding Its Challenge to Professor Brigitte Stern as Arbitrator dated January 26, 2011, Claimant outlines in detail its disagreement "with the reasoning and conclusions of the two members of the *Tidewater* Tribunal with regard to the substantive arguments raised."[25]

---

20 Claimant's Final Observations PTD Stern ¶¶ 12–15.

21 PTD Stern ¶ 6; Claimant's Additional Observations PTD Stern ¶ 10.

22 PTD Stern ¶ 24.

23 *Id. See also* Claimant's Final Observations PTD Stern ¶ 10 ("there is no apparent justification for Professor Stern's non-disclosure, except for her own, subjective belief that Universal or its counsel would discover the conflicts on their own, and/or that the conflicts were immaterial since Professor Stern herself did not believe her appointments would affect her impartiality and independence.").

24 PTD Stern ¶ 25.

25 Claimant's Final Observations PTD Stern ¶¶ 1–2.

B. RESPONDENT'S SUBMISSIONS

29. Respondent asserts that under Articles 14 and 57 of the Convention, the applicable standard is the "manifest" lack of independence or impartiality. A challenge must be based on objective facts that, from the point of view of a reasonable and informed third person, evidently and clearly constitute a manifest lack of the qualities indicated above.[26]

30. Respondent contends that the IBA Guidelines "fundamentally deal with international commercial arbitrations,"[27] and "are only a guide, and are not mandatory in ICSID proceedings."[28] Respondent also argues that, even if a situation falls within the Orange List, disqualification is not automatic,[29] but that it is also necessary to demonstrate the existence of objective elements "which, in the eyes of a reasonable and informed third party, evidently show that the arbitrator in question lacks independence or impartiality."[30]

1. Multiple Appointments by the Same Party

31. Respondent asserts that the mere existence of a situation within Section 3.1.3 of the IBA Guidelines' Orange List—in light of the appointment of Professor Stern in *Vannessa Ventures*, *Brandes*, and *Tidewater*—is not sufficient for an independent and informed third party objectively to conclude that it is obvious and clear that Professor Stern cannot be relied upon to exercise independent and impartial judgment in this case.[31] Specifically, there is no other objective fact or element that "might lead a reasonable and informed third party to conclude that it is clear, obvious and evident that as a result of Respondent's appointment of Professor Stern, Professor Stern's impartiality and independence to act in this case should be doubted."[32]

---

26 Respondent's Observations on the Proposal to Disqualify Professor Stern dated Nov. 22, 2010 ("Respondent's Observations PTD Stern"), p. 2.

27 *Id.*, p. 4.

28 *Id.*, p. 3. *See also* Respondent's Observations PTD, p. 9 fn. 20; Respondent's Additional Observations on the Proposal to Disqualify Professor Stern dated Dec. 13, 2010 ("Respondent's Additional Observations PTD Stern"), p. 2.

29 Respondent's Additional Observations PTD Stern, p. 2.

30 *Id.*, p. 3. *See also* Respondent's Additional Observations PTD Stern, p. 1; Respondent's Final Observations on the Proposal to Disqualify Professor Stern dated Jan. 26, 2011 ("Respondent's Final Observations PTD Stern"), p. 2.

31 Respondent's Observations PTD Stern, p. 7.

32 *Id.*, p. 5. *See also* Respondent's Final Observations PTD Stern, p. 2.

32. Respondent dismisses, as speculative and without foundation, the assertion made by Claimant that a conflict might arise because (i) Professor Stern's decision in an earlier case may affect her later decisions, (ii) Professor Stern might be exposed to materials in an earlier case that are unknown to the arbitrators or parties in a later case, (iii) Professor Stern may have become dependent upon the repeated appointment by Venezuela and, therefore, be unlikely to reach a decision finding against Venezuela,[33] and (iv) Professor Stern's three previous appointments could make her economically dependent upon appointments by Venezuela.[34]

33. Respondent also disputes Claimant's argument that Respondent's appointment of Professor Stern in other cases places her on an unequal footing in understanding this proceeding on the basis that she would already have heard relevant argument and seen evidence in those other cases, such that she would be unable to judge this case impartially and independently.[35]

34. Respondent observes that, in any event, Section 3.1.3 is not at issue because Professor Stern was appointed in *Vannessa Ventures* before the relevant three-year period began.

2. Multiple Arbitrations Having Related Issues

35. Respondent observes that, if Claimant's interpretation of Section 3.1.5 of the IBA Guidelines' Orange List was accepted "it would mean that no party to a proceeding under an investment treaty could appoint in more than one occasion, within a three year period, an arbitrator it has already designated in another proceeding under an investment treaty."[36]

36. Respondent observes that all ICSID cases deal with essentially the same issues—for example, fair and equitable treatment and expropriation—but that Claimant does not

---

[33] Respondent's Observations PTD Stern, p. 6.

[34] *Id.*, p. 6, fn. 13.

[35] *Id.*, pp. 6–7.

[36] *Id.*, p. 8. *See also* Respondent's Final Observations PTD Stern, p. 4, fn. 9.

identify measures or arguments in common between *Vannessa Ventures*, *Brandes*, *Tidewater*, and *Universal*, but merely speculates that they exist.[37]

37. Respondent notes that there were repeat appointments of arbitrators in certain cases involving Argentina—concerning the same measures in the same sector and similar issues—but that it was not considered by King & Spalding LLP (or claimants or Argentina) in those cases that there was any objective reason to disqualify the relevant arbitrators.[38]

3. Multiple Appointments by the Same Counsel

38. Respondent asserts that Section 3.3.7 of the IBA Guidelines' Orange List is not applicable because Curtis, Mallet-Prevost, Colt & Mosle LLP does not act as counsel in more than three cases in which Professor Stern serves as an arbitrator, namely, *Brandes*, *Tidewater*, and *Universal.* Further, that provision is not applicable to appointments made by the Attorney General of the Republic, which is part of the Republic as an internal organ of the State. [39]

4. Non-Disclosure of Other ICSID Appointments by Venezuela

39. Respondent asserts that the non-disclosure by an arbitrator of the existence of an IBA Guidelines' Orange List situation does not lead to the arbitrator's automatic disqualification.[40] In any event, Respondent notes that, pursuant to Arbitration Rule 6, Professor Stern disclosed her appointment in *Vannessa Ventures*, *Brandes*, and *Tidewater* to the Parties prior to the constitution of the Tribunal. Further, this information was already publicly available via the ICSID website.[41]

C. PROFESSOR STERN'S EXPLANATION

40. In her explanation of December 1, 2010, Professor Stern states that, when acting as arbitrator, she has always complied with her duty to be both independent and impartial,

---

37 Respondent's Additional Observations PTD Stern, p. 3; Respondent's Final Observations PTD Stern, p. 4.

38 Respondent's Observations PTD Stern, pp. 8–9.

39 Respondent's Additional Observations PTD Stern, p. 4.

40 Respondent's Observations PTD Stern, p. 4 (citing the IBA Guidelines, Part II).

41 *Id.*, pp. 4–5, fn. 9.

and will continue to act independently and impartially in all of the arbitral tribunals in which she will be called to sit.[42]

1. Multiple Appointments by the Same Party

41. Professor Stern explains that she does not consider a nomination as arbitrator to create a professional relationship with the party making the nomination.[43]

42. As concerns the argument that multiple appointments by the same party might result in her being unduly influenced by repeatedly hearing the same arguments, Professor Stern explains that she is influenced by the intrinsic value of an argument and not the number of times that she hears it. She states that she knows nothing about this case or *Tidewater*, or whether similar arguments will be espoused. Additionally, in *Vannessa Ventures* and *Brandes*, in which she has participated in preliminary decisions, the issues raised were quite different.[44]

43. Professor Stern also references Claimant's assertion that there is a general need to minimize the relationships that a party-appointed arbitrator has with the appointing party. She states that the case on which Claimant relies on in support of this assertion—where an arbitrator was challenged in a NAFTA case because he was giving advice to a NAFTA State—is inapposite. She sits exclusively as an arbitrator and does not act as counsel to parties or as an expert.[45]

44. She remarks that the number of States and experienced arbitrators is limited and that if a State cannot nominate the same arbitrator in several cases, the freedom of States to choose an arbitrator would be undermined.[46]

2. Multiple Arbitrations Having Related Issues

45. In response to the argument that each of the cases in which she has been appointed by Venezuela as an arbitrator involve similar issues, Professor Stern notes that she has

---

42 Stern Explanation of Dec. 1, 2010, p. 1.

43 *Id.*

44 *Id.*, p. 2.

45 *Id.*

46 *Id.*

difficulty understanding how cases involving different claimants in different industries are related.[47] To the extent that each case involves similar types of claims—for example, for expropriation, violation of the fair and equitable treatment standard, and violation of the full protection and security standard—all investment arbitrations involve such claims.

3. Multiple Appointments by the Same Counsel

46. As concerns multiple appointments by the same counsel, Professor Stern indicates that she has been appointed three or more times by various law firms, but that such appointments do not create a professional business relationship that could endanger her independence.[48]

4. Non-Disclosure of Other ICSID Appointments by Venezuela

47. Professor Stern explains that it has always been her "understanding that only facts that are undisclosed or unknown must be disclosed: the participation in an ICSID arbitral tribunal is public knowledge available on ICSID web pages ...."[49] She notes that this has been her practice and that of her co-arbitrators in cases where there were multiple appointments by the same party. Furthermore, the parties' counsel in those cases did not consider that those appointments raised reasonable doubts regarding her independence or impartiality.[50] Professor Stern notes that she provided information about her publicly known appointments on October 1, 2010, for the avoidance of doubt only in light of concerns raised in *Tidewater*. She objects to the suggestion that the trigger to provide this information was Claimant's letter notifying the Centre that it had learned of Professor Stern's other appointments by Venezuela.[51]

---

47 *See*, *id.*, p. 3.

48 Stern Explanation of Dec. 1, 2010, p. 3.

49 *Id.*, p. 4.

50 *Id.*

51 *Id.*

III. THE PARTIES' SUBMISSIONS AND PROFESSOR TAWIL'S EXPLANATION REGARDING THE PROPOSAL TO DISQUALIFY PROFESSOR TAWIL

A. RESPONDENT'S SUBMISSIONS

48. Respondent submits that the standards applicable to the proposal to disqualify an arbitrator are as follows:

> a) "With respect to Article 14 of the Convention, ICSID tribunals have recognized that both impartiality and independence are fundamental requirements in arbitration proceedings under the Convention ....
>
> b) An appearance of bias in the eyes of a reasonable and informed third person is enough to sustain a challenge to an arbitrator.
>
> c) A challenge to an arbitrator should succeed when there is a reasonable doubt as to the arbitrator's impartiality ....
>
> d) Objective facts that give rise to a reasonable inference that the arbitrator may not be relied upon to exercise independent and impartial judgment are also enough to sustain a challenge.
>
> e) The appearance of impropriety is basis enough for a proposal to disqualify an arbitrator to succeed."[52]

49. Respondent contends that the IBA Guidelines cannot be more than a guide or reference for investor-State proceedings.[53] Additionally, Respondent submits that "although some of the scenarios included in the Guidelines are considered not to create a conflict in the context of international commercial arbitration, they do create a conflict in ICSID proceedings."[54]

---

52 Proposal for Disqualification of Dr. Guido Santiago Tawil Pursuant to Article 57 of the ICSID Convention dated Nov. 8, 2010 ("PTD Tawil") ¶ 10.

53 Respondent's Final Observations to Respondent's Proposal for the Disqualification of Professor Guido Santiago Tawil dated Feb. 25, 2011 ("Respondent's Final Observations PTD Tawil") ¶ 5.

54 *Id.* ¶ 5.

50. Respondent asserts that there is "a long professional relationship between Dr. Tawil and several members of the firm King & Spalding, counsel to the Claimant, which has lasted for at least ten years and which has basically consisted in joint representations in investor-state arbitrations, always arguing in favor of investors."[55] The alleged facts underlying this relationship are as follows: (i) Professor Tawil served, along with Claimant's counsel, as counsel to the claimants in *Enron Creditors Recovery Corporation and Ponderosa Assts, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 until at least July 30, 2010; (ii) Professor Tawil served, along with Claimant's counsel, as counsel to the claimant in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 until at least September 1, 2009; (iii) Professor Tawil served, along with Claimant's counsel, as counsel to the claimant in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30 ("Azurix II"); and (iv) Ms. Silvia M. Marchili of Claimant's counsel worked with Professor Tawil for four years in the law firm of M. & M. Bomchil, where Professor Tawil is currently a partner.[56]

51. Respondent alleges that "all circumstances, including the nature, scope, length and recentness of the relationship lead to the conclusion that a very significant relationship exists between Dr. Tawil and Claimant's counsel,"[57] and that "this relationship is more recent, protracted, and close than that indicated by Dr. Tawil in his declaration."[58] In particular, Respondent asserts that "Professor Tawil's declaration did not include his joint participation with King & Spalding in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30, however small that participation may have been."[59]

52. Respondent submits that, by virtue of this relationship, Claimant's counsel is in a privileged position to know Dr. Tawil's stance on several relevant legal issues and that this

---

55 PTD Tawil ¶ 10. *See also* Respondent's Final Observations PTD Tawil ¶¶ 2, 7.

56 PTD Tawil ¶ 4.

57 *Id.* ¶ 12.

58 *Id.* ¶ 10; Respondent's Final Observations PTD Tawil ¶¶ 4(iii)(b), 6(2)(b) (stating that the moment at which the relationship ends is relevant to whether there is a conflict of interest and an appearance of partiality and impropriety).

59 Respondent's Final Observations PTD Tawil ¶ 4(iii)(b).

creates "a clear disadvantage for Respondent and in favor of Claimant, in clear violation of procedural fairness."[60]

53. In Respondent's view "the importance of this relationship ... shows that Dr. Tawil's participation as an arbitrator in this case creates an appearance of bias in the eyes of a reasonable and informed third person and gives rise to justifiable doubts with respect to his capacity to reach a free and independent decision – since he could be influenced by other factors unrelated to the merits of the case –, threatening the Respondent's legal security."[61] Additionally, Respondent alleges that it is "evident that a close relationship between an arbitrator and the lawyers of the party who appointed him to serve in such capacity creates an appearance of impropriety,"[62] and that there is an actual appearance of impropriety in relation to Professor Tawil's appointment.[63]

B. CLAIMANT'S SUBMISSIONS

54. Claimant asserts that the standards under Article 14 and 57 of the Convention require that arbitrators be impartial and independent.[64] In Claimant's view, the requirements of impartiality and independence serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case.[65]

55. Claimant contends that the IBA Guidelines constitute a very valuable source to determine what most of the legal community understands are the best practices in terms of conflicts of interest, and that they have been relied upon by ICSID tribunals since their inception.[66]

56. Claimant submits that "Professor Tawil's connections to Claimant's legal team involve a normal and unobjectionable degree of overlap among participants in the

---

60 PTD Tawil ¶ 11.

61 PTD Tawil ¶ 13.

62 PTD Tawil ¶ 14; Respondent's Further Observations on PTD Tawil ¶¶ 2, 5(vi).

63 Respondent's Further Observations on PTD Tawil ¶¶ 5(vii), 7.

64 Claimant's Observations Regarding Respondent's Challenge to Professor Guido S. Tawil as Arbitrator dated Feb. 7, 2011 ("Claimant's Observations PTD Tawil") ¶ 20.

65 *Id.* ¶ 20.

66 *Id.* ¶ 25.

relatively small world of investment arbitration."[67] Claimant contends that Respondent is incorrect regarding the facts allegedly proving that a recent, protracted, and close relationship with Claimant's counsel exists. Claimant asserts that: (i) in *Azurix I* and *Enron*, Professor Tawil acted primarily as local counsel and King & Spalding LLP handled the international law issues; (ii) Professor Tawil last participated in *Azurix I* in September 2008 and in *Enron* in October 2009; (iii) Professor Tawil and his law firm had no substantial participation in *Azurix II*, that he had no participation in the drafting of the Memorial on the Merits or any subsequent submission and that, since June 2008, King & Spalding LLP has been the only firm representing Azurix Corp.;[68] and (iv) Ms. Marchili was a junior associate in Professor Tawil's firm and left five years ago, no exchange program exists between that firm and King & Spalding LLP, and "at least two current associates of Respondent's outside counsel (Curtis, Mallet-Prevost, Colt & Mosle) practiced at M. & M. Bomchil, and one of them worked on Professor Tawil's team for at least two years."[69]

57. Claimant notes that the IBA Guidelines' "Green List" includes the situation described in the proposal to dismiss Professor Tawil; specifically, Section 4.4 includes the scenario where "[t]he arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel."[70] Claimant asserts that because the relationship between King & Spalding LLP and Professor Tawil falls within Section 4.4.2, no conflict arises and Professor Tawil was not required to disclose the facts on the basis of which he was challenged, notwithstanding that he did so at the time of accepting his appointment.[71]

58. Claimant asserts that "the fact that King & Spalding may be knowledgeable of Professor Tawil's arguments (on Argentine law) as an advocate in two unrelated cases has no impact on Professor Tawil's impartiality as an arbitrator and could never meet the standard under Article 57 of the ICSID Convention."[72] Further, Claimant states that,

---

67 *Id.* ¶ 1.

68 *Id.* ¶ 5.

69 *Id.* ¶ 7.

70 *Id.* ¶ 22 (citing IBA Guidelines, Green List, section 4.4.2).

71 *Id.* ¶¶ 4, 22.

72 *Id.* ¶ 20.

because the role of Professor Tawil's firm in *Azurix I* and *Enron* was to focus on arguments relating to Argentine law, Claimant's counsel does not have a special insight into, and is not in a "privileged position to anticipate[,] Professor Tawil's views and mindset on general international law and investment arbitration."[73]

59. Claimant submits that "it is Venezuela's counsel who stands in this privileged position,"[74] because members of Respondent's legal team have had access to Professor Tawil's arguments and presentations in their role as ICSID Secretaries in *Azurix I* and *Enron*, as well as in cases in which Professor Tawil acted as sole lead counsel.[75] Members of Respondent's legal team have also acted as Secretaries to ICSID Tribunals in which both Professors Tawil and Stern acted as arbitrator.[76]

C. PROFESSOR TAWIL'S EXPLANATION

60. In his explanation of February 18, 2011, Professor Tawil states that throughout his career he has acted as counsel both for claimants and respondents, and for States, companies, and individuals. He has acted as chair and co-arbitrator in arbitrations under different rules and in none of those cases has his independence and impartiality been seriously doubted.[77]

1. Service as Co-Counsel with Claimant's Counsel in Other ICSID Cases

61. As concerns the argument that he served with Claimant's counsel as co-counsel to a party in other matters, Professor Tawil states generally that "[h]aving served with one party's counsel previously either as co-counsel or as co-arbitrator is not and has never seriously been considered as a valid argument for disqualification of an arbitrator. If that would have been the case, most of the prominent arbitrators that frequently act in international arbitration would be barred from being part of ICSID tribunals."[78] Professor Tawil notes that "a relationship of this kind is considered to be part of the IBA Guidelines' Green List, that is, those '*specific situations where no appearance of, and no actual,*

---

73 *Id.* ¶ 17.

74 *Id.* ¶ 18.

75 *Id.* ¶¶ 12–13.

76 *Id.* ¶¶ 13–16.

77 Tawil Explanation of Feb. 18, 2011, p. 5.

78 *Id.*, p. 3.

conflict of interest exists from the relevant objective point of view' and, '*thus, the arbitrator has no duty to disclose*'."[79]

a. Service as Co-Counsel with Claimant's Counsel in Enron and Azurix I

62. Professor Tawil explains that "[a]s mentioned in my August 6, 2010 declaration, both the Azurix I and Enron cases concluded before my appointment in the present case." Further, his "professional activity in those cases ended during 2008 and 2009 ...."[80]

b. Service as Co-Counsel with Claimant's Counsel in Azurix II

63. As concerns his involvement in *Azurix II*, Professor Tawil explains that it "was limited to participating in the first session of the Arbitral Tribunal, held (by conference call) on June 1, 2008 and limited – as usual – to procedural matters."[81] He explains that he joined the first session as a matter of courtesy as his firm and Azurix were discussing the terms of his firm's possible engagement in the case; no such terms were agreed; accordingly, the firm did not represent Azurix further in the case. Professor Tawil states that neither he nor his firm participated in drafting the request for arbitration or other submissions in that arbitration.[82]

2. Employment of Silvia M. Marchili at M. & M. Bomchil

64. Professor Tawil explains that Ms. Marchili resigned from his firm and joined Claimant's counsel almost five years prior. He states that it is normal for lawyers to move from one firm to another and from one country to another during their careers. Professor Tawil notes that "no special relationship or exchange programs exist between M. & M. Bomchil and King & Spalding or between M. & M. Bomchil and Curtis, Mallet-Prevost, Colt & Mosle."[83] However, he does not believe that those contacts or those that he has had with members of other firms during his professional or academic career pose a conflict or affect in any way his independence or impartiality.

---

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*, p. 4.

65. Finally, as concerns the disclosures of facts in his statement attached to his Arbitration Rule 6(2) declaration, Professor Tawil states that he finds some difficulty in understanding how his disclosure of the relevant situations could give rise to a proposal of disqualification.[84] He explains that "while disclosure requires a subjective test for reflecting the possible perspective of the parties – i.e. the standard of '*likely giving rise of justifiable doubts*' – , disqualification must meet an objective stricter test which '*imposes a relatively heavy burden of proof on the party making the proposal*' to disqualify an arbitrator."[85]

IV. THE CHAIRMAN'S DECISION ON THE PROPOSAL TO DISQUALIFY

A. APPLICABLE LEGAL STANDARDS

66. Articles 14(1) and 57 of the Convention and Arbitration Rule 6(2) set forth the applicable legal standards.

67. Article 14(1) of the Convention provides:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

68. Article 57 states:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.

---

84 *Id.*

85 *Id.* (citing Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge, 2nd. Ed. 2009) at 1202 and *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, Oct. 22, 2007 ("*Suez*") ¶ 29).

69. Arbitration Rule 6(2) provides the form of the declaration that each arbitrator must sign. The declaration states, in particular, that an arbitrator "shall judge fairly as between the parties," and envisages that an arbitrator shall provide a statement of "(a) [his/her] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party."

70. The Parties agree that the concept of "independence" in Article 14(1) encompasses a duty to act with both independence and impartiality,[86] and that impartiality concerns the absence of a bias or predisposition towards one party.[87] These requirements of independence and impartiality "serve the purpose of protecting parties against arbitrators being influenced by factors other than those related to the merits of the case."[88] The Parties further agree that the notion of impartiality is viewed objectively.

71. Article 57 of the Convention requires that there be a "manifest lack of the qualities required" of an arbitrator. It is generally acknowledged that the term "manifest" means "obvious" or "evident," and that it imposes a "relatively heavy burden of proof on the party making the proposal."[89] A manifest lack of the required qualities must be proved by objective evidence.[90] A simple belief that an arbitrator lacks independence or impartiality is not sufficient to disqualify an arbitrator.[91]

---

86 *See also Suez* ¶ 28; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify an Arbitrator, Aug. 12, 2010 ("*Urbaser*") ¶ 38.

87 *Suez* ¶ 29.

88 *Urbaser* ¶ 43.

89 *See Suez* ¶ 34; Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge, 2nd. Ed. 2009) at 1202.

90 *Suez* ¶ 40. *See also SGS Société Générale de Surveillance v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator, Dec. 19, 2001, p. 398 at p. 402 ("The standard of appraisal of a challenge set forth in Article 57 of the Convention may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such a nature or character as to 'indicat[e] a manifest lack of the qualities required by' Article 14(1). The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case in which the challenge is made.").

91 *Suez* ¶ 40 ("Implicit in Article 57 and its requirement for a challenger to allege a fact indicating a *manifest* lack of the qualities required of an arbitrator by Article 14, is the requirement that such lack be proven by objective evidence and that the mere belief by the

72. Accordingly, in order to succeed, a proposal to disqualify an arbitrator must (1) establish the facts underlying the proposal, and (2) demonstrate that these facts give rise to a manifest lack of the required qualities.

73. Both Parties have addressed the IBA Guidelines in their submissions. Claimant asserts that the IBA Guidelines are applicable to investment arbitrations, while Respondent contends that they are intended to apply to international commercial arbitrations and, in any event, at most provide guidance, not rules.

74. It is important to note that this decision is taken within the framework of the Convention and is made in light of the standards that it sets forth. The IBA Guidelines are widely recognized in international arbitration as the preeminent set of guidelines for assessing arbitrator conflicts. It is also universally recognized that the IBA Guidelines are indicative only—this is the case both in the context of international commercial and international investment arbitration.[92]

B. DECISION ON THE PROPOSAL TO DISQUALIFY PROFESSOR STERN

1. Multiple Appointments by the Same Party

75. As disclosed in her letter of October 1, 2010, Professor Stern has been appointed by Venezuela in three cases in addition to the case at hand, namely, *Vannessa Ventures*, *Brandes*, and *Tidewater*. The question arises whether such multiple appointments demonstrate that Professor Stern manifestly lacks independence or impartiality.

76. Claimant asserts that these multiple appointments conflict with Section 3.1.3 of the IBA Guidelines' Orange List, which covers a situation in which "[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties ... ." As set forth above, the IBA Guidelines are indicative and not mandatory.

77. In this case, no objective fact has been presented that would suggest that Professor Stern's independence or impartiality would be manifestly impacted by the multiple

---

challenge of the contest arbitrator's lack of independence or impartiality is not sufficient to disqualify the contested arbitrator.").

92 *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17 ¶ 24.

appointments by Respondent. Professor Stern has been appointed in more than twenty ICSID cases, evidencing that she is not dependent—economically or otherwise—upon Respondent for her appointments in these cases.[93]

78. Claimant also claims that Professor Stern "will not be learning of Venezuela's actions and its defenses afresh in the present case—because she has already been exposed to them"[94] in the other three cases. Claimant's assertions, however, are speculative and do not identify what evidence or arguments, if any, may be presented in those other arbitrations that would in Claimant's view "unjustifiably influence Professor Stern, negating her ability to judge the present case independently and impartially."[95]

79. In conclusion, the Chairman finds that the appointment of Professor Stern on three prior occasions by Venezuela does not indicate a manifest lack of the required qualities.

2. Multiple Arbitrations Having Related Issues

80. The question has also been raised whether Professor Stern's independence or impartiality may be affected by her appointment by Venezuela in four cases, which according to Claimant involve similar issues because they allegedly stem from allegations by claimants "each of whom operates in service industries and three of whom operate in the extractive services industry, that Venezuela's expropriatory measures caused harm to their respective investments."[96] Claimant contends that this situation falls under Section 3.1.5 of the IBA Guidelines' Orange List as Professor Stern currently serves "as arbitrator in another arbitration on a related issue involving one of the parties ... ."

81. According to Claimant, overlap exists because three of the cases involve allegations of a direct and forceful takeover of assets and the fourth involves a taking due to alleged coercion, and Professor Stern will be required to decide whether the various measures Venezuela is asserted to have taken amount to unlawful expropriation of assets.

---

93 Professor Stern has stressed that she "do[es] not consider that a nomination creates a 'professional relationship' with the Party that effectuates this nomination. To the contrary, once nominated, I do not have the slightest relation with the Party that has nominated me." *See* Stern Explanation of Dec. 1, 2010, p. 2.

94 PTD Stern ¶ 21.

95 *Id.* ¶ 13.

96 *Id.* ¶ 16.

In Claimant's view, this purported overlap "increases the probability that she is unable to judge the present case impartially and independently."[97] In its Additional Observations, Claimant also asserts that "[i]t is simply impractical to believe that the jurisdictional issues raised in each of these cases will not be at all related."[98] Claimant, however, acknowledges that these cases involve claimants from different industries and that the facts in them may differ.[99]

82. As an initial matter, because no pleadings other than the Request for Arbitration have been submitted, it is not possible to say with any precision what similarities in law or in fact may exist between this case and the three other matters. It appears, however, that the claimants in each case are distinct and also operate in different industries.

83. The international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations. As was stated in *Suez Sociedad General de Aguas de Barcelona S.A. et al., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case Nos. ARB/03/17 and ARB/03/18 ("*Suez*"), the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially in another case.[100] It is evident that neither Professor Stern nor her co-arbitrators will be bound in this case by any factual or legal decision reached in any of the three other cases.

84. Moreover, to the extent to which similarities among the arguments may exist, Professor Stern's statement that "the fact of whether I am convinced or not convinced by a pleading depends on the intrinsic value of the legal arguments and not on the number of times I hear the pleading"[101] has not been put in question.

---

97 *Id.* ¶ 21. *See also* Claimant's Additional Observations PTD Stern ¶¶ 22–24; Claimant's Final Observations PTD Stern ¶ 23.

98 *See also* Claimant's Additional Observations PTD Stern ¶ 25.

99 PTD Stern ¶ 22.

100 *Suez* ¶ 36. *See also Urbaser* ¶ 47.

101 Stern Explanation of Dec. 1, 2010, p. 2.

85. In conclusion, the Chairman finds that Claimant's assertion that the cases may involve similar issues such that Professor Stern would not be able to judge impartially and independently lacks basis.

3. Multiple Appointments by the Same Counsel

86. Professor Stern has been appointed in two other cases in which Venezuela is represented by Curtis, Mallet-Prevost, Colt & Mosle LLP, namely, *Brandes* and *Tidewater*. As an initial matter, Section 3.3.7 of the IBA Guidelines' Orange List is not implicated because it envisages that "[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm."

87. It has not been shown that facts exist that could call into question Professor Stern's independence or impartiality as a result of the three appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP. Professor Stern indicates that she has been appointed multiple times by various law firms, but that a relationship of dependence, which could endanger her independence or impartiality, does not exist here or elsewhere.[102]

88. In conclusion, the Chairman finds that the appointment of Professor Stern on two prior occasions by counsel does not indicate a manifest lack of the qualities required of her.

4. Non-Disclosure of Other ICSID Appointments by Venezuela

89. On October 1, 2010, prior to the constitution of the Tribunal, Professor Stern submitted a letter by way of clarification of her Arbitration Rule 6(2) declaration of August 20, 2010, in which she provided information about the three other ICSID cases in which she had been appointed as arbitrator by Respondent. Professor Stern states that she provided this supplementary information—publicly available on the ICSID website—for the avoidance of doubt.[103]

90. As a general matter, parties to investment arbitrations have an interest in knowing any facts or circumstances that may exist that may give rise to doubts about an arbitrator's

---

102 *Id.*, p. 3.

103 Stern Statement of Oct. 1, 2010. *See also* Stern Explanation of Dec. 1, 2010, p. 4 ("It has always been my understanding that only facts that are undisclosed or unknown must be disclosed: the participation in an ICSID tribunal is public knowledge available on ICSID web pages and all over the Internet.").

independence and impartiality. Indeed, as is reflected in Arbitration Rule 6(2), disclosure by arbitrators of any such facts or circumstances is required.

91. The question is whether justifiable doubts arise about Professor Stern's independence and impartiality because she did not at the time of accepting her appointment disclose those appointments in circumstances where this information was publicly available. In this respect, pursuant to ICSID Administrative and Financial Regulations 22 and 23, information about all appointments to an ICSID tribunal is published on the ICSID website upon constitution of that tribunal. Claimant notes that Professor Stern's appointment in *Tidewater* was not made public on the ICSID website at the time of her appointment in this case as the tribunal in *Tidewater* had not been constituted; however, this information was published on the ICSID website shortly thereafter on August 31, 2010.

92. In order to ensure that parties have complete information available to them, an arbitrator's Arbitration Rule 6(2) declaration should include details of prior appointments by an appointing party, including, out of an abundance of caution, information about publicly available cases.[104] However, in assessing whether an arbitrator's non-disclosure of such appointments results in a manifest lack of independence or impartiality, the public nature of that information must be taken into account.[105]

93. Professor Stern explains that she did not disclose information in her declaration about the relevant prior appointments because it was her understanding at that time that only facts that are undisclosed or unknown, and not publicly available information, must be disclosed. Professor Stern confirms that, in this respect, she followed her previous practice of not disclosing publicly available information about ICSID appointments when accepting a nomination; in those cases neither her independence nor impartiality was challenged.[106]

94. It is apparent that her initial omission of publicly available information about appointments in her Arbitration Rule 6(2) declaration was the product of "an honest

---

104 *Tidewater* Decision ¶ 54.

105 *Id.*

106 Stern Explanation of Dec. 1, 2010, p. 4.

exercise of discretion" by Professor Stern.[107] When Professor Stern was made aware that "some parties to ICSID arbitration want not only that private information be disclosed, but also that public information be released by an arbitrator at the time of making the declaration,"[108] she submitted a letter providing information about all other appointments by Venezuela.

95. In this light, Professor Stern's non-disclosure in her Arbitration Rule 6(2) declaration of publicly available information about her previous appointments by Venezuela does not evidence a manifest lack on her part of independence or impartiality.

96. Having examined carefully the allegations underlying the proposal to disqualify Professor Stern, the Chairman finds no basis to indicate that there is a manifest lack of independence or impartiality on the part of Professor Stern in this case. Accordingly, the proposal to disqualify Professor Stern is rejected.

C. DECISION ON THE PROPOSAL TO DISQUALIFY PROFESSOR TAWIL

1. Prior Joint Representations With Counsel for Claimant

97. Respondent alleges that there is a long professional relationship between Professor Tawil and counsel for Claimant, King & Spalding LLP, that has "basically consisted in joint representations in investor-State arbitrations, always arguing in favour of investors."[109] Respondent asserts that "this relationship is more recent, protracted, and close than that indicated by Professor Tawil in his declaration,"[110] which "did not include

---

107 *Tidewater* Decision ¶ 55 (citing *Suez , Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic; Suez , Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Cases ARB/03/19 and ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal ¶ 44 ("Whether the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed raised obvious questions about impartiality and independence, and whether the non-disclosure is an aberration on the part of the conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality. The balancing is for the deciding authority … in each case.")).

108 Stern Letter dated Oct. 1, 2010. *See also* Stern Explanation of Dec. 1, 2010, p. 4.

109 PTD Tawil ¶ 10.

110 *Id.*

his joint participation with King & Spalding in [*Azurix II*], however small that participation may have been."[111]

98. Respondent asserts that this relationship puts Claimant's counsel in a privileged position to know Professor Tawil's stance on relevant legal issues, thereby creating a disadvantage for Respondent in violation of procedural fairness.[112] Respondent also argues that "a close relationship between an arbitrator and the lawyers of the party who appointed him to serve in such capacity creates an appearance of impropriety,"[113] and "gives rise to justifiable doubts with respect to his capacity to reach a free and independent decision."[114]

99. The three cases referenced by Respondent in which Professor Tawil served as counsel jointly with King & Spalding LLP are *Azurix I*, *Enron*, and *Azurix II*. In his Arbitration Rule 6(2) declaration, Professor Tawil disclosed that he had acted as co-counsel with King & Spalding LLP in *Azurix I* and *Enron*.[115] In that declaration and in his explanation of February 18, 2011, Professor Tawil noted that *Azurix I* and *Enron* concluded before his appointment in this case.[116] Professor Tawil specifies that "[t]he last material professional work that [he] performed in Azurix I took place in September 2008 when I participated in the hearing on the merits on annulment. My last material work as counsel in Enron was in October 2009 upon filing the post-annulment-hearing brief."[117]

100. Professor Tawil did not disclose his involvement in *Azurix II* in his Arbitration Rule 6(2) declaration. In his explanation of February 18, 2011, Professor Tawil states that his involvement in *Azurix II* was limited to participating in the first session of the Tribunal held by conference call on June 1, 2008; at the time his firm was discussing possible terms

---

111 Respondent's Final Observations PTD Tawil ¶ 4(iii)(b).

112 PTD Tawil ¶ 11.

113 *Id.* ¶ 14. *See also* Respondent's Final Observations PTD Tawil ¶¶ 2, 5(vi).

114 PTD Tawil ¶ 13.

115 *See* Statement attached to Tawil Arbitration Rule 6(2) declaration of August 6, 2010.

116 *Id.* and Tawil Explanation of Feb. 18, 2011 ¶ 15 (Professor Tawil specifies that: "[i]n fact, as both cases where subject to annulment petitions, my professional activity in those cases ended during 2008 and 2009, pending in both cases only the annulment decisions.").

117 Tawil Explanation of Feb. 18, 2011 ¶ 15, fn. 7.

of engagement with Azurix, but no such agreement was reached and the firm did not represent Azurix further.[118]

101. In considering whether the relationship between Professor Tawil and King & Spalding LLP gives rise to a manifest lack of independence or impartiality on Professor Tawil's part, it is noted that there is no ongoing relationship between Professor Tawil and that firm. It appears that Professor Tawil and King & Spalding LLP do not currently act, and have not acted since October 2009, as co-counsel in an investor-state arbitration.[119] In this respect, it is acknowledged, as advanced by Professor Tawil and Claimant's counsel, that Section 4.4.2 of the IBA Guidelines' Green List includes the scenario in which "[t]he arbitrator and counsel for one of the parties ... have previously served together as arbitrators or as co-counsel."

102. It is undisputed between the parties that the previous relationship between counsel for Claimant and Professor Tawil was as joint representatives of different parties to those involved in this case and in cases involving different fact patterns. Additionally, it has not been demonstrated to what extent this case will involve similar legal issues to those arising in cases in which they were co-counsel. Therefore, it is not evident that Claimant will be in a privileged position to anticipate Professor Tawil's views on issues arising in this case.

103. 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 an abundance of caution, an arbitrator's Arbitration Rule 6(2) declaration should include details of any professional relationships with counsel to a party in the case in which he/she has been appointed.

104. Professor Tawil indicates that he did not disclose his involvement in *Azurix II*, both because that involvement was incidental and because it "should, at the most, be considered

---

118 *Id.* ¶¶ 16–17 ("my involvement in Azurix II was circumscribed to an isolated participation in a formal event at the early stage of the arbitration."). Ex. R-1 (Case Register *Azurix Corp. v. Argentine Republic*), ICSID Case No. ARB/03/30) reflects that M&M Bomchil has not acted as counsel to the claimant in *Azurix II* since January 2009.

119 Accordingly, Respondent's assertion that "the joint collaboration between Claimant's counsel and Professor Tawil formally continued up until the filing of the Request for Arbitration in these proceedings" appears to be incorrect. *See* Respondent's Final Explanations PTD Tawil ¶ 6(ii)(c).

as a Green List situation,"[120] such that it did not require disclosure. It is clear that Professor Tawil's decision not to include information about his involvement in *Azurix II* was the result of his "honest exercise of discretion."[121] In this light, Professor Tawil's non-disclosure does not evidence a manifest lack on his part of independence or impartiality.

2. Employment of Ms. Silvia M. Marchili at M. & M. Bomchil

105. In the statement attached to his Arbitration Rule 6(2) Declaration, Professor Tawil disclosed that "[o]ne of King & Spalding's associates, Ms. Silvia Marchili worked as a junior associate in the legal team that he lead in M. & M. Bomchil between 3/24/2003 and 7/31/2006." Respondent suggests that this relationship between Professor Tawil and Ms. Marchili, who is part of the team appointing Professor Tawil, increases the proximity of the relationship between Professor Tawil and Claimant's counsel.[122]

106. Professor Tawil explains that "Ms. Marchili resigned to M. & M. Bomchil and joined Claimant's law firm almost five years ago."[123] Ms. Marchili was a junior associate and one of several lawyers in Professor Tawil's team at that time. In these circumstances, it is difficult to envisage that Professor Tawil's independence or impartiality might be affected by his prior relationship as Ms. Marchili's employer.

---

120 Tawil Explanation of Feb. 18, 2011 ¶ 17.

121 *See supra* footnote 107.

122 Respondent also suggests Ms. Marchili is taking part in an exchange program between M. & M. Bomchil and King & Spalding LLP. *See* PTD Tawil ¶ 4(d) fn. 4. Professor Tawil indicates that no such exchange program exists. *See* Tawil Explanation of Feb. 18, 2011 ¶ 19.

123 Tawil Explanation of Feb. 18, 2011 ¶ 19.

107. Having examined carefully the allegations underlying the proposal to disqualify Professor Tawil, the Chairman finds no basis to indicate that there is a manifest lack of independence or impartiality on the part of Professor Tawil in this case. Accordingly, the proposal to disqualify Professor Tawil is rejected.

per: Mr. Robert B. Zoellick
Chairman of the Administrative Council

ANEXO 16

PRACTICAL GUIDELINES FOR INTERVIEWING, SELECTING AND CHALLENGING PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION©

By Doak Bishop*
Lucy Reed**

I. INTRODUCTION

It is a truism of arbitration that the process is only as good as the quality of the arbitrators conducting it.[1] In the common international arbitration scenario of a tripartite panel, with each party appointing one arbitrator and the party-appointed arbitrators then selecting the presiding arbitrator, each side's selection of "its" arbitrator is perhaps the single most determinative step in the arbitration. The ability to appoint one of the decisionmakers is a defining aspect of the arbitral system and provides a powerful instrument when used wisely by a party.

It is also a truism that a party will strive to select an arbitrator who has some inclination or predisposition to favor that party's side of the case such as by sharing the appointing party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a

---

* Partner at King & Spalding, in Houston, Texas; Vice-Chairman of the Institute for Transnational Arbitration; Fellow of the Chartered Institute of Arbitrators; Editor of the International Litigation Quarterly; Chairman, Southwest Arbitration Committee of the ICC; Alternate, U.S. Delegation to the NAFTA Advisory Committee on Private Commercial Disputes.

** Counsel to Freshfields in New York City, and formerly the U.S. Agent to the Iran-U.S. Claims Tribunal at The Hague; Member of the Advisory Board of the Institute for Transnational Arbitration.

*** The views presented herein are strictly the authors' personal views. The authors wish to thank Professor William W. Park and _____ for their thoughtful comments on the draft.

1 "The reputation and acceptability of the arbitral process depends on the quality of the arbitrators." A. Redfern & M. Hunter, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 217 (2d ed. 1991).

party's case.[2] Provided the arbitrator does not "allow this shared outlook to override his conscience and professional judgment,"[3] this need carry no suggestion of disqualifying partiality. This is a natural and unexceptional aspect of the party-appointment system in international arbitration.

There is a distinction to be drawn, however, between a general sympathy or predisposition and a positive bias or prejudice.[4] Bias in favor of, or prejudice against, a party or its case encompasses a willingness to decide a case in favor of the appointing party regardless of the merits or without critical examination of the merits.[5] Bias or prejudice constitutes partiality, which is the most fundamental basis for disqualification of an international arbitrator.

Some parties to international arbitrations have at times nominated arbitrators with a positive bias.[6] This may occur when parties from differing legal and cultural backgrounds approach the selection of arbitrators with differing assumptions as to the standards for qualifications and conduct of party-appointed arbitrators. Some parties accustomed to certain trade association arbitral rules,[7] labor arbitrations in some countries or some state laws in the United States, which allow for "non-neutral" party-appointed arbitrators, may believe that

---

2 Hunter, Ethics of the International Arbitrator, 53 Arbitration 219, 223 (1987) ("[W]hen I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias"); Carter, Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice, 3 Am. Rev. Int'l Arb. 153, 164 (1992); Hunter & Paulsson, A Code of Ethics for Arbitrators in International Commercial Arbitration?, 19 Int'l Bus. Law 153, 155 (1985).

3 Redfern & Hunter, supra note 1, at 221.

4 Hunter & Paulsson, supra note 2, at 154.

5 Id. at 155.

6 Id. at 153.

7 Hunter & Paulsson, supra note 2, at 156(e.g., Rules of the London Maritime Arbitrators Association).

arbitrators can and should be outright advocates for their appointing party inside the tribunal. Other parties may believe that party-appointed arbitrators should be strictly neutral and impartial, like the presiding arbitrator or a judge. Most take the middle ground described in the paragraph above, believing that "their" arbitrators can be generally predisposed to them personally or to their positions, as long as they can ultimately decide the case – without partiality – in favor of the party with the better case.

If an international arbitration commences on the basis of such differing assumptions, it is possible that one or both parties will lose confidence in the fairness of the process. Indeed, it is even possible that such a basic misunderstanding will fatally compromise the proceedings.[8] Whatever the divide between the parties, one must assume they share the expectation that arbitration will provide justice or, at least, avoid clear injustice. Although justice may be an amorphous concept, one certain pillar of justice is confidence in the ultimate fairness of the process, which rests substantially on a perception that the arbitrators are impartial.[9] Such confidence requires clearly-defined standards for both the qualifications and conduct of party-appointed arbitrators and full disclosure by candidates of information relevant to those standards. It is only against such shared standards that the parties, and their advising counsel, can confidently and reasonably measure and select their arbitrators.

---

[8] A misunderstanding between the government parties to the Buraimi Oasis arbitration as to the role of the party-nominated arbitrators led to the abandonment of the proceeding and resolution of the dispute by military intervention. Redfern & Hunter, supra note 1, at 200, citing Wetter, III The International Arbitral Process 357v (Oceana 1979).

[9] Hascher, ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators, 6 ICC Int'l Ct. Arb. Bull. 4, 11 (Nov. 1995).

Institutional arbitration rules do not, however, clearly define the standards for the selection of party-appointed arbitrators.[10] There also exists a dispute over the proper terminology for the test for disqualification of biased arbitrators. Even the International Bar Association's "Ethics for International Arbitrators" ("IBA Ethics"), which provides the best single set of rules for arbitrators, defines the standards in broad, general terms, which may themselves give rise to more problems. This can be a particular problem for parties or counsel who are either new to international arbitration or who have only a periodic involvement. Even experienced parties and counsel must be somewhat daunted each time they face the task of selecting arbitrators in the absence of clear, guiding principles applicable to all parties. Arbitrator candidates, as well, would benefit from clear standards guiding the disclosure process.

The absence of clear standards for selection of party-appointed arbitrators may undermine confidence in the international arbitral process and hence limit the growth of arbitration as a means of resolving international disputes. This is particularly unfortunate because, in the opinion of the authors, there is substantial common ground among experienced practitioners as to the basic standards for party-appointed arbitrators.

The purpose of this paper is to present in a succinct practitioner's format those general standards that appear to represent a consensus among international arbitration specialists. With the caveat that the disqualification of an arbitrator is dependent upon the specific facts of a concrete situation, and unique circumstances may apply to the selection of arbitrators in any

---

[10] The literature includes several excellent pieces on the topic of party-appointed arbitrators in international arbitration. These include: Redfern & Hunter, supra note 1, at 198-226; W.L. Craig, W.W. Park & J. Paulsson, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION § 12.04 at 209 (2d ed. 1990); Carter, supra note 2; Hunter & Paulsson, supra note 2; Hascher, supra note 9; Lowenfeld, The Party-Appointed Arbitrator in International Controversies: Some Reflections, 30 Texas Int'l L.J. 59 (1995); Smith, Impartiality of the Party- Appointed Arbitrator, 6 Arb. Int'l 320 (1990); and Mosk, The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal, 1 Transnat'l Law. 253 (1988).

given case, the general standards have been organized into three main categories, which are set forth in Section III below

II. STANDARDS OF IMPARTIALITY, INDEPENDENCE AND NEUTRALITY FOR PARTY-APPOINTED ARBITRATORS: BACKGROUND

A. Impartiality and Independence: Ultimately, A Test of Impartiality

All of the major private international arbitration rules contain some variation of the most fundamental standards for the qualification and conduct of arbitrators: impartiality and independence. These standards, or one standard in two-pronged form, are embodied in the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"),[11] the London Court of International Arbitration ("LCIA"),[12] and the American Arbitration Association's (AAA) International Rules.[13] The International Chamber of Commerce ("ICC") Arbitration Rules expressly require only independence.[14] The International Centre for the Settlement of Investment Disputes ("ICSID") Arbitration Rules do not specifically require impartiality or independence, but they do require that arbitrators sign a declaration that they will "judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation" other than as provided in the ICSID Convention.[15]

---

11 UNCITRAL Arbitration Rules, Art. 10(1).

12 LCIA Arbitration Rules, Art. 5.2, 10.3 (effective Jan. 1, 1998). The LCIA Rules also prohibit all arbitrators from advising a party on the merits or outcome of the dispute, either before or after appointment, or from acting as an advocate for any party in the arbitration. Id. Art. 5.2.

13 AAA International Rules, Art. 8.1 (effective April 1, 1997).

14 ICC Arbitration Rules, Art. 7(1) (effective Jan. 1, 1998). All arbitrators in an ICC proceeding must sign a Statement of Independence. Id. art. 7(2); Bond, The Selection of ICC Arbitrators and the Requirement of Independence, 4 Arb. Int'l 300, 303 (1988). The ICC Arbitration Rules also provide, however, that an arbitrator may be challenged for lack of independence "or otherwise." ICC Arbitration Rules, Art. 11(1).

15 ICSID Rules of Procedure for Arbitration Proceedings, Rule 6(2).

The traditional concepts of impartiality and independence, which are inter-related, warrant examination. An "impartial" arbitrator, by definition, is one who is not biased in favor of, or prejudiced against, a particular party or its case, while an "independent" arbitrator is one who has no close relationship – financial, professional or personal – with a party or its counsel.[16]

The IBA Ethics defines "partiality" in terms of favoring one of the parties or as being "prejudiced in relation to the subject-matter of the dispute".[17] It does not specifically address a prejudice against a party or define the meaning of the phrase "prejudiced in relation to the subject-matter of the dispute."

"Dependence" is defined by the IBA Ethics as arising from "relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties".[18] According to this source, the following may be considered as giving rise to justifiable doubts as to an arbitrator's impartiality or independence: (1) a material interest in the outcome of the dispute; (2) a position already taken in relation to the dispute; (3) current direct or indirect (i.e., via a member of family, firm or partner) business relationships with a party or a potentially important witness; (4) past business relationships of such a magnitude or nature as to be likely to affect an arbitrator's judgment; and (5) continuous and substantial social or professional relationships with a party or a potentially important witness.[19] This list is certainly helpful, but it is also general and incomplete. For example, it does not directly address family relationships.

---

16 Redfern & Hunter, supra note 1, at 220-21.

17 International Bar Association, Ethics for International Arbitrators § 3.1, reprinted in 26 I.L.M. 583, 584-89 (1987).

18 Id.

19 Id., § 3.2 - 3.5.

Since the UNCITRAL, LCIA and AAA rules, and the IBA Ethics all include a dual test of impartiality and independence for arbitrators, it is surprising that the ICC stands out by expressly including only the sole test of independence. Because of the elite position of the ICC in international arbitration, this omission deserves examination. The rationale for the ICC's emphasis of the independence test lies in the objective verifiability of this test.[20] Impartiality, on the other hand, is seen as a subjective notion that is difficult to assess at the outset of a case.[21] Nevertheless, the Deputy Secretary General and General Counsel of the ICC has explained that the ICC's test of independence should be viewed as broad enough to include both concepts of impartiality and neutrality.[22] Other authorities have noted as a general principle "that all ICC arbitrators should be impartial. . ."[23] Thus, the ICC test is not meant to exclude impartiality but to subsume it within the rubric of the more objective test of independence.

This analysis is supported by the fact that the independence requirement is initially found in the ICC Rules in a discussion of the nomination stage of the arbitration.[24] Parties must appoint, and the ICC must confirm, *only* arbitrators who are independent. But the ICC Rules recognize a second step in the proceeding – the challenge stage. At this phase, an arbitrator may be challenged for lack of independence "or otherwise".[25] Those two general words, "or

---

20 Hascher, supra note 9, at 5-6. See also Bond, supra note 14, at 304.

21 Hascher, supra note 9, at 5-6; Bond, supra note 14, at 304.

22 Hascher, supra note 9, at 6. See also Bond, supra note 14, at 304 ("the absence [of a reference to impartiality] must not be understood as an endorsement of the idea that an arbitrator in ICC arbitrations has the right to be biased as long as he is independent.")

23 Craig, Park & Paulsson, supra note 10, at 228.

24 ICC Rules, Art. 7(1).

25 Id. Art. 11(1).

otherwise", may carry a mountain of meaning, including within them the concept of impartiality. Nevertheless, it is clear that the ICC gives predominance to the concept of independence.

The new English Arbitration Act has taken the opposite step in simplifying the test by expressly requiring only impartiality.[26] Chapter 1 calls for an "impartial tribunal," and Chapter 24 provides for the removal of an arbitrator if "circumstances exist that give rise to justifiable doubts as to his impartiality;..." The drafters perceived that a strict interpretation of independence, meaning the absence of connections between arbitrators and parties, could be inconsistent with the benefits of retaining the most qualified and experienced arbitrators. While a lack of independence is considered relevant to a determination of impartiality, it is a disqualifying factor *only* when it is sufficiently substantial as to actually constitute partiality. In this view, independence is subsumed as a subset of the test of impartiality. The explanation for this approach is provided in the report accompanying the draft Act:[27]

> 101. The Model Law (Article 12) [UNCITRAL Model Law on International Commercial Arbitration] specified justifiable doubts as to the independence (as well as impartiality) of an arbitrator as grounds for his removal. We have considered this carefully, but despite efforts to do so, no-one has persuaded us that, in consensual arbitrations, this is either required or desirable. It seems to us that lack of independence, unless it gives rise to justifiable doubts about the impartiality of the arbitrator, is of no significance. The latter is, of course, the first of our grounds for removal. If lack of independence were to be included, then this could only be justified if it covered cases where the lack of independence did not give rise to justifiable doubts about impartiality, for otherwise there would be no point including lack of independence as a separate ground.
>
> 102. We can see no good reason for including "non-partiality" lack of independence as a ground for removal and good reasons for not doing so. We do not follow what is meant to be covered by a lack of independence

---

[26] Arbitration Act 1996, Chapters 1(a) and 24(1)(a) (June 17, 1996).

[27] Departmental Advisory Committee on Arbitration Law (Chairman, The Rt. Hon. Lord Justice Saville), Report on the Arbitration Bill ¶¶ 101-04 (February 1996).

> which does not lead to the appearance of partiality. Furthermore, the inclusion of independence would give rise to endless arguments, as it has, for example, in Sweden and the United States, where almost any connection (however remote) has been put forward to challenge the "independence" of an arbitrator. For example, it is often the case that one member of a barristers' Chambers appears as counsel before an arbitrator, who comes from the Chambers. Is that to be regarded, without more, as a lack of independence justifying the removal of the arbitrator? We are quite certain that this would not be the case in English law.... We would further note in passing that even the oath taken by those appointed to the International Court of Justice, and indeed to our own High Court, refers only to impartiality.
>
> 103. Further, there may well be situations in which parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent.
>
> 104. *We should emphasize that we intend to lose nothing of significance by omitting reference to independence. Lack of this quality may well give rise to justifiable doubts about impartiality, which is covered, but if it does not, then we cannot at present see anything of significance that we have omitted by not using this term.*

(Emphasis added.)

This approach is consistent with the reality, as evidenced in practice, that parties may waive a strict interpretation of independence, but may not waive the fundamental requirement of impartiality.[28] An arbitrator who is impartial but not wholly independent may be qualified, while an independent arbitrator who is not impartial must be disqualified. In selecting party-appointed arbitrators in international arbitration, the absolutely inalienable and predominant standard should be impartiality.

B. "Neutrality": Nationality and International Mindedness

Although, as a matter of semantics, the term "neutral" could be applied to encompass the standard of impartiality, including independence, it generally has a more narrow meaning in

---

[28] Redfern & Hunter, supra note 1, at 221.

international arbitration. The term "neutral" is often used to refer only to *national neutrality* (i.e., when the sole or presiding arbitrator is from a different country than that of either party).[29] The term can also be used to refer to a party-appointed arbitrator who is expected to vote for the party with the better case, despite having sympathy toward the party who appointed him or her because of a shared background, tradition or culture – the "middle ground" noted above.[30]

The gulf between these two usages of the term "neutral" is best illustrated by a real-life example. At the Iran-United States Claims Tribunal in The Hague, each of the three panels consisted of a U.S. national, an Iranian national, and a chairman from a third country. Many private parties and counsel developed a shorthand of referring to the third-country arbitrators as "the neutrals." This often led to rebukes from the U.S. arbitrators who, although appointed by the U.S. Government, considered themselves to be "neutral," i.e., fully impartial and independent.

Reality dictates that the nationality of the parties will always be a factor in the appointment of international arbitrators. When the parties appoint their own arbitrators, they will often favor an arbitrator of their own nationality or at least of common cultural and jurisprudential background. More striking – and indicative of the importance of the appearance as well as the actuality of absolute impartiality and independence for presiding arbitrators – is the prevailing practice in international arbitration that the presiding arbitrator be of a different nationality than the parties.[31] This serves to highlight the importance of national neutrality as a standard distinct from substantive impartiality and independence.

---

29 Lalive, On the Neutrality of the Arbitrator and of the Place of Arbitration, in Swiss Essays on International Arbitration at 23, 24 (1984).

30 Redfern & Hunter, supra note 1, at 221.

31 Lalive, supra note 27, at 24-25; Redfern & Hunter, supra note 1, at 223.

The institutional rules on the nationality of arbitrators vary. Most strict is ICSID: under the ICSID Arbitration Rules, *none* of the arbitrators may "have the same nationality as nor be a national of either party".[32] A sole or presiding arbitrator appointed by the ICC International Court of Arbitration "shall be of a nationality other than those of the parties," although in unusual circumstances such an arbitrator may be a national of one of the parties provided the parties do not object.[33] Similarly, the LCIA Rules prohibit the sole or presiding arbitrator from having the same nationality as either party unless all parties agree in writing.[34] The UNCITRAL Arbitration Rules do not absolutely restrict the nationality of the arbitrators, but they do provide that if an appointing authority is called upon to appoint a sole or presiding arbitrator, it should consider the "advisability of appointing an arbitrator of a nationality other than the nationality of the parties."[35] The AAA International Rules similarly provide that when the AAA acts as the appointing authority, it may on its own initiative or at the request of any party "appoint nationals of a country other than that of any of the parties".[36]

One leading authority has noted that neutrality can be taken beyond its geographic usage to include also religion, economic ideology and social environment, all of which may condition

---

32 ICSID Arbitration Rules, Art. 3(1).

33 ICC Rules, Art. 9(5). The parties may, however, appoint nationals of their own countries as arbitrators. The ICC Court has taken a strict approach to ensuring national neutrality in the presiding arbitrator, ruling in one case that a Swedish national, who was a partner in a New York-based law firm, was disqualified from serving as the presiding arbitrator because one of the parties was from the United States. Tupman, Challenge and Disqualification of Arbitrators in International Commercial Arbitration, 38 Int'l & Comp. L.Q. 26, 28 n.13 (1989).

34 LCIA Rules, Art. 6.1. The LCIA Rules define "nationality" to include that of controlling shareholders or interests. Id. Art. 6.2.

35 UNCITRAL Rules, Art. 6(4).

36 AAA International Rules, Art. 6(4).

an arbitrator's way of thinking.[37] The same expert has argued that the term should include a juridical open-mindedness, and an international outlook characterized by a sympathy for other countries' legal cultures and institutions (i.e., a comparative law approach) and an absence of legal nationalism or parochialism.[38]

This test of international mindedness makes sense because the arbitral panel may be required to determine the credibility of witnesses from differing cultures, to apply the laws of different nations and to create a procedural framework for resolving the dispute that accommodates the legitimate expectations of parties from different legal systems. These tasks require an open mindedness toward different legal procedures and rules.

While this aspect of neutrality should, to the greatest extent possible, apply to the sole or presiding arbitrator, it should not be applied to party-appointed arbitrators because it may prevent a party, in some circumstances, from appointing an arbitrator who hails from a common culture or legal system.[39] While neutrality in the sense discussed here should not be required of party-appointed arbitrators, parties should consider nominating arbitrators who embody these traits because such arbitrators will likely have greater credibility with the presiding arbitrator.

---

[37] Lalive, supra note 27, at 27. In one ICC case, a party challenged an arbitral panel because it did not include an arbitrator from a developing nation. The Court of Justice of Geneva rejected the challenge, noting that two of the arbitrators were from neutral countries (Sweden and Switzerland). Id. at 27 n.19, citing Westland Helicopters, Ltd. v. Egyptian Arab Republic, 26 November 1982, pp. 50-51.

[38] Lalive, supra note 27, at 27-28.

[39] The ICC attempts to apply the same standard of independence (and impartiality) to all arbitrators, but it does not apply the same test of cultural neutrality to party-appointed arbitrators that it applies to sole or presiding arbitrators.

C. Differing Standards for Party-Appointed Arbitrators?

1. General Practice

Some countries' laws treat party-appointed arbitrators differently than the presiding arbitrator. In the United States, for example, some states' laws allow, and sometimes even endorse, overt partiality for party-appointed arbitrators. Under New York state law, for example, a party-appointed arbitrator is presumed to be a partisan for the appointing party and is not characterized as "neutral" in the sense of the presiding arbitrator;[40] an arbitration award can be vacated on the ground of arbitrator partiality only if a party's rights were prejudiced by the bias of an arbitrator who was required to be "neutral" (i.e., a sole or presiding arbitrator).[41] The same standard is set forth in the Uniform Arbitration Act, which was promulgated in 1955 by the National Conference of Commissioners on Uniform State Laws,[42] and has been adopted in the U.S. by 34 states and the District of Columbia.[43]

The AAA-American Bar Association ("ABA") Code of Ethics for Arbitrators in Commercial Disputes ("AAA-ABA Code") also establishes patently different standards for sole or presiding arbitrators and for party-appointed arbitrators. After six canons of general applicability, the seventh canon of the AAA-ABA Code provides that party-appointed arbitrators should be considered "non-neutral" unless the parties' agreement, the applicable arbitration rules,

---

40 Carter, supra note 2, at 156, citing Statewide Ins. Co. v. Klein, 482 N.Y.S.2d 307 (App. Div. 2d Dept. 1984).

41 Id., citing New York Civil Practice Law & Rules § 7511(b)(1)(ii)(McKinney 1992).

42 7, Part I, Uniform Laws Ann. § 12(a)(2) (West 1997).

43 Id. at 1 (West 1997).

or the governing law requires all arbitrators to be neutral.[44] Thus, the Code's default provision *presumes* that party-appointed arbitrators are in fact partial unless otherwise agreed or provided.[45] The AAA Commercial Arbitration Rules also do not require that party-appointed arbitrators be neutral.[46]

In contrast, the Federal Arbitration Act in the U.S. makes no clear distinction between party-appointed arbitrators and sole or presiding arbitrators. The Act provides only one standard for refusing enforcement of an arbitration award based on arbitrator conduct: an award may be vacated for "evident partiality or corruption in the arbitrators, or either of them".[47] The reference to "the arbitrators, or either of them" is an indication that none of the arbitrators is permitted to be partial. Unlike New York case law, most federal courts have applied this single standard for the qualification and conduct of *all* arbitrators.[48]

---

[44] AAA-ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII, Introductory Note. The AAA-ABA Code is not part of the AAA Arbitration Rules, and is not automatically applicable to any given arbitration. It provides precatory guidelines which may, in a given case, be adopted by the parties. Interestingly, both the American Bar Association and the American Arbitration Association would prefer an across-the-board standard of neutrality. See commentary by Holtzmann in X Yearbook Commercial Arbitration 131, 137 (1985). Further, in 1990, the ABA's House of Delegates approved a resolution calling for amendment of the Code to reflect that party-appointed arbitrators in international arbitrations should serve as neutrals unless otherwise agreed. Redfern & Hunter, supra note 1, at 219, citing 1 World Arbitration and Mediation Report 4 (1990).

[45] Canon VII of the AAA-ABA Code distinguishes party-appointed arbitrators by actually allowing them to communicate with the appointing parties concerning any aspect of the case, provided that notice is given of the intent to do so, and also by making the disclosure requirements for party-appointed arbitrators less stringent. Id., Canon VII(B)(1) & (C)(2).

[46] AAA Commercial Arbitration Rules, Art. 12 (effective July 1, 1996).

[47] 9 U.S.C. § 10(b).

[48] Carter, supra note 2, at 160-61. See Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147 (1968); Florasynth, Inc. v. Pickholz, 750 F.2d 171, 173 (2d Cir. 1984); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1275 (2d Cir. 1971); Metropolitan Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co., 780 F. Supp. 885, 893 (D. Conn. 1991); Standard Tankers (Bahamas) Co. v. Motor Tank Vessel AKTI, 438 F. Supp. 153, 159 (E.D.N.C. 1977). A few federal courts have confused the issue by applying a lesser standard to party-appointed arbitrators. See, e.g., Stef Shipping Corp. v. Norris Grain Co., 209 F. Supp. 249, 253 (S.D.N.Y. 1962).

Similarly, the IBA Ethics does not distinguish between the qualifications or standards of conduct for party-appointed arbitrators and sole or presiding arbitrators.[49] None of the arbitrators is allowed to communicate with the parties unilaterally about the case except to the extent necessary to determine his or her competence, availability and whether there exist justifiable doubts as to impartiality and independence.[50] The standard for disclosure is the same for all arbitrators: all must disclose anything that might create justifiable doubts as to the prospective arbitrator's impartiality or independence.[51]

The UNCITRAL Model Law for International Commercial Arbitration, which has been adopted in many countries (e.g., Australia, Canada and Hong Kong) and some U.S. states, provides that an arbitrator may be challenged "only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence."[52] This indicates that independence and impartiality are required of all arbitrators.[53]

---

49 IBA Ethics for International Arbitrators §§ 5.1 and 5.3. Like the AAA-ABA Code, the IBA Ethics is not binding on the parties unless adopted by agreement.

50 Id. at § 4.1.

51 Id.

52 UNCITRAL Model Law, Art. 12(2).

53 It is interesting to note that the grounds for refusing enforcement of an award that are embodied in the UNCITRAL Model Law and in the New York Convention, which are identical, do not specifically reference arbitrator impartiality and independence Id., Art. 36; Convention on the Recognition and Enforcement of Foreign Arbitral Awards done at New York on June 10, 1958 ("New York Convention"), Art. V. The grounds for refusing enforcement include the following: (1) the arbitral tribunal was not composed or the arbitral procedure used was not in accordance with the parties' agreement or the law of the site of the arbitration; (2) proper notice of the appointment of the arbitrators or of the arbitration proceedings was not given; (3) the party was unable to present its case; or (4) the award goes beyond the bounds of the arbitration agreement. The first ground has been used for attacking an award on the basis of an alleged lack of independence. Imperial Ethiopian Government v. Baruch-Foster Corp., 535 F.2d 334, 335 n.1, 337 (5th Cir. 1976) (presiding arbitrator had previously drafted the civil code for the government party that prevailed).

2. Should Differing Standards Be Adopted?

There is a natural distinction between the parties' expectations for the party-appointed arbitrators and the presiding arbitrator. It is both realistic and unobjectionable for a party to an international arbitration, which by definition involves parties from different countries and legal systems – and a virtually unappealable outcome – to want the reassurance of having (consistent with the concept of impartiality) at least one "known-quantity" arbitrator.

The party-appointed arbitrators are in a different position than the presiding arbitrator in that they may have contact initially with the appointing party in an *ex parte* interview, they may also have *ex parte* contact during the selection of the presiding arbitrator, and they may initially have a general sympathy or predisposition in favor of the appointing party or some aspect of its case through a shared or similar economic, political, social, cultural, national, or legal background or through doctrinal positions taken in writings, lectures, or previous arbitrations.[54] As recognized in one leading treatise, a party has a right "to nominate an arbitrator compatible with its national and economic circumstances."[55]

It is also generally recognized that the party-appointed arbitrators may "serve" the appointing party in the limited sense –consistent with deciding the case impartially – of ensuring that the presiding arbitrator selected will not be inimical to the party's case, ensuring that the party's case is understood and carefully considered by the panel, "translating" the party's legal and cultural system (and occasionally the language) for the benefit and understanding of the other arbitrators, and ensuring that the procedure adopted by the panel will not unfairly disadvantage

---

[54] Hunter & Paulsson, supra note 2, at 155. See also Craig, Park & Paulsson, supra note 10, at 212.

[55] Craig, Park & Paulsson, supra note 10, at 228.

the appointing party.[56] One experienced arbitrator summarized the beneficial aspects of the party-appointment process in this way:

> As I see it, party-appointed arbitrators in international controversies perform two principal and overlapping functions.
>
> First, I think the presence of a party-appointed arbitrator gives some confidence to counsel who appointed him or her, and through counsel to the party-disputant. At least one of the persons who will decide the case will listen carefully – even sympathetically – to the presentation, and if the arbitrator is well chosen, will study the documents as well, whether or not they would have done so in any case. Thus the presence of a well chosen party-appointed arbitrator goes a long way toward promising (if not assuring) a fair hearing and a considered decision.
>
> Second, in an international case a party-appointed arbitrator serves as a translator. I do not mean just of language, though occasionally that is required as well, as even persons highly skilled in the language of arbitration may be confused by so-called *faux amis* (false friends) – words that look the same but have different meanings in different languages. I mean rather the translation of legal culture, and not infrequently of the law itself, when matters that are self-evident to lawyers from one country are puzzling to lawyers from another.[57]

Nonetheless, it bears repeated emphasis that party-appointed and presiding arbitrators alike are expected to maintain an impartial demeanor and to decide the case in favor of the party with the better factual and legal position.[58] Overt or evident partisan behavior by a party-appointed arbitrator, whether or not effective, undermines confidence in the system. The common wisdom is that when a party-appointed arbitrator crosses the line and acts as an advocate for the appointing party, the other arbitrators, particularly the presiding arbitrator, will discount or disregard the views of such an "advocate arbitrator, and thus, such conduct will rarely

---

[56] See generally Redfern & Hunter, supra note 1, at 204-05. It might be questioned whether the last point should be listed since it is the duty of all arbitrators to ensure that the procedure used does not unfairly prejudice either party.

[57] Lowenfeld, supra note 7, at 65.

[58] Redfern & Hunter, supra note 1, at 201, 221.

be successful."[59] In rare circumstances, partisan behavior may even be challenged by the opposing party.[60]

This concept of a "predisposed but ultimately impartial" party-appointed arbitrator does not require formally different standards for party-appointed and presiding arbitrators in international arbitration rules.[61] It is, as other authorities have said, "a delicate issue,"[62] but any attempt to define and codify this complex concept, which would take the form of "international arbitrators must be impartial but …," would undoubtedly undermine the all-important ultimate requirement of impartiality. The absence of attempts to codify the "delicate" position of party-appointed arbitrators in international arbitration rules presumably reflects a general sense of satisfaction with the prevailing practice.

D. Appearance of Bias

A question that commonly arises is whether the appearance of bias, as opposed to actual bias, should be sufficient to disqualify a potential arbitrator. The law in this area is admittedly confused. On the one hand, the U.S. Supreme Court and English courts have held that the mere appearance of bias is sufficient to disqualify an arbitrator.[63] On the other hand, some U.S. federal

---

59 Id. at 222; Lowenfeld, supra note 7, at 60.

60 Redfern & Hunter, supra note 1, at 222.

61 Hunter & Paulsson, supra note 2, at 155.

62 Lowenfeld, supra note 10, at 59; Hunter & Paulsson, supra note 2, at 155.

63 Tupman, supra note 31, at 50, citing Commonwealth Coatings Corp., 393 U.S. at 150; Metropolitan Properties Co. Ltd. v. Lannon [1969] Q.B. 577, 599 (*per* Lord Denning). See also Tamari v. Bache Halsey Stuart, Inc., 912 F.2d 1196, 1198 n.3 (7th Cir. 1980).

courts,[64] and an arbitral panel acting under the auspices of ICSID,[65] have held that the mere appearance of bias is not sufficient to disqualify an arbitrator.

A third alternative also exists. The AAA-ABA Code requires disclosure of certain relationships that are likely to create an appearance of partiality or bias.[66] The IBA Ethics says that a failure to disclose information may create an appearance of bias, which may be a ground for disqualification even if the non-disclosed information would not be disqualifying in itself.[67] At least one U.S. court has stated that the appearance of bias may be the basis for vacatur of an award when the arbitrator failed to disclose the challenged relationship, but actual bias is required for vacatur when the relationship has been disclosed.[68] According to the Ninth Circuit, the appearance of bias is sufficient to establish partiality in non-disclosure cases because it is the integrity of the process by which arbitrators are chosen (and not the arbitrator's decision itself), that is at issue, while in actual bias cases it is the integrity of the arbitrator's decision that is directly in question.[69]

---

64 Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993); Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1489 (9th Cir. 1991); Morelite Constr. Corp. v. New York City Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 83 (2d Cir. 1984); Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1498 (S.D.N.Y. 1977). This may reflect the general practice in the U.S. of not allowing courts to disqualify arbitrators in advance of an arbitration hearing; thus, disqualification issues generally arise in U.S. courts at the procedural stage of a motion to vacate the award, after the considerable expense of time and money have been incurred for preparing and presenting the case. See Aviall, Inc. v. Ryder System, Inc., 110 F.3d 892, 895, 897 (2d Cir. 1997).

65 Amco Asia Corp. v. Indonesia, ICSID Case ARB/81/8, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982).

66 AAA-ABA Code, Canon II(A)(2).

67 IBA Ethics, § 4.1.

68 Woods v. Saturn Distribution Corp., 78 F.3d 424, 427-28 (9th Cir. 1996).

69 Id. at 427.

The case for the appearance-of-bias test lies both in its objectivity (as opposed to looking into one's mind and determining actual bias) and the appearance it gives of a stricter test that will ensure confidence.[70] Nevertheless, from the practical vantage point of selecting the best arbitrators, the better position is not to make this a separate test for disqualification. Every arbitrator must be impartial to be qualified, and if determined to be partial, he or she is disqualified. Since bias constitutes one part of the definition of partiality, and one cannot read the mind of a prospective arbitrator, the appearance of bias or prejudice can certainly be considered in determining impartiality. But enshrining the "appearance of bias" as a second, and separate, test for disqualification confuses the issue, involves a second layer of subjectivity through application of a purely circumstantial evidence test, and may result in the exclusion of highly-qualified arbitrators with only minor connections to the dispute or the parties, thereby unnecessarily undermining the arbitration process.[71]

III. RECOMMENDED STANDARDS FOR ARBITRATORS

Given the importance of arbitrator selection in an international arbitration, it is not surprising that there have been some attempts to categorize arbitrator selection criteria relating to impartiality and independence.[72] None has attempted, however, to create a thorough framework of practical guidelines for determining whether a party appointee is disqualified. Although some

---

70 An unstated reason for this test is that it enables a court to soften the blow of disqualification by not having to find a prominent arbitrator to be actually biased.

71 See International Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 551-52 (2d Cir. 1981) ("To vacate an arbitration award where nothing more than an appearance of bias is alleged would be 'automatically to disqualify the best informed and most capable potential arbitrators.'")

72 For example, one author has attempted to categorize the disqualifying factors related to arbitrators into four categories: (1) substantive views, (2) organizational sympathies, (3) personal sympathies, and (4) procedural questions. Carter, supra note 2, at 154. Another author has discussed the ICC's confirmation or rejection of nominees under two general categories — a nominee's relationships with the parties and with the parties' attorneys — with various subcategories of each. Hascher, supra, note 9, at 6-10.

cases will present special circumstances that require a different analysis from the general norm, there is a clear need for practical guidelines for use by practitioners and arbitrators. To this end, set forth below is a set of "bright-line" standards for evaluating the impartiality of party-appointed arbitrators. In these standards, the term "party" includes party affiliates and employees, as well as potentially important witnesses for the party's case.

Before proceeding, one overarching point bears emphasis: full disclosure by arbitrator candidates underpins the success of any standards for impartiality. Parties must ask questions aggressively, and candidates must be fully forthcoming with all relevant facts.[73]

A. Disqualifying Factors

There are six factors that are so indicative of partiality that they can reasonably be treated as generally disqualifying for a party-appointed arbitrator:

1) a significant financial interest in the relevant project or dispute, or in a party or its counsel;

2) a close family relationship with a party or its counsel;

3) non-financial involvement in the relevant project, dispute or the subject matter of the dispute;

4) a public position taken on the specific matter in dispute;

5) involvement in the settlement discussions of the parties; and

6) an adversary relationship with a party.

It is noteworthy that the first three would generally be considered as independence criteria, but they reflect degrees of dependence that objectively indicate partiality.

---

[73] See Redfern & Hunter, supra note 1, at 225.

1. Significant Financial Interest in Project or Party

A significant, existing financial interest in one of the parties, in the relevant project or the dispute, or in a party's counsel should be an automatically disqualifying factor.[74] This is the most certain basis for disqualification.[75] It is reasonable to assume that any person with an immediate and significant financial interest will be tempted to decide consistently with that interest. The result may be either an unsupported decision favoring that interest or, in the proverbial effort to "bend over backwards," an unsupported decision against that interest. Whatever his or her ruling, the arbitrator will be subject to suspicion.

For example, a prospective arbitrator's employment with the appointing party or one of its affiliates creates partiality because of the obvious issues of financial dependency, job security and subordination.[76] The same would be true for an arbitrator who is a partner of, or is employed by or with, a party's counsel. If the potential arbitrator is a partner or employee of a law firm that has an ongoing representation of the appointing party – even if the firm is not acting as the party's counsel in the dispute in question or even if the arbitrator has not personally counseled the party – that relationship should be disqualifying.[77] One must assume that the firm will continue to have a relationship with the party, and so any arbitrator from the firm is likely to have a financial interest in the outcome of the case through the firm's present or future income from the appointing party, which may be at risk from a decision adverse to that party. In addition, an

---

74 Craig, Park & Paulsson, supra note 10, at 229; IBA Ethics §§ 3.2, 3.3.

75 See generally Carter, supra note 2, at 168.

76 Craig, Park & Paulsson, supra note 10, at 211, 229-30; Hunter & Paulsson, supra note 2, at 155. This analysis should also generally apply to a retired employee who currently receives unfunded retirement benefits from the company.

77 Craig, Park & Paulsson, supra note 10, at 211, 230; Hunter & Paulsson, supra note 2, at 155.

arbitrator who has a long relationship with a party either through employment or representation may be influenced by a knowledge of facts that are not presented as part of the evidence in the case.[78]

Just as obviously, a prospective arbitrator's significant ownership position in one of the parties by a significant share holding, or in the relevant project by being a partner or joint venturer, should be a disqualifying factor for the same reasons stated above.[79] The arbitrator would likely decide – or struggle to avoid deciding – according to that financial interest. In comparison, an arbitrator holding an insignificant interest, such as a mere $1000 worth of stock of a large, publicly-traded company, should not be disqualified for that reason alone.[80]

A significant, existing business relationship is also a disqualifying factor.[81] For example, a major creditor of a party may be subject to disqualification under this standard. The French Cour de Cassation vacated an arbitral award in a case in which an arbitrator appointed by a party was an official of one of the party's major creditors.[82] It should be noted, however, that the arbitrator in that case failed to disclose the relationship.

Another obvious disqualifying interest in this category would be any form of arbitrator fee contingent on the success of a party. This would include not merely a direct payment, but also a bonus or premium from the arbitrator's employer or from a third-party.

---

78 Craig, Park & Paulsson, supra note 10, at 231.

79 Carter, supra note 2, at 168.

80 See Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1503 (S.D.N.Y. 1987) (no conflict of interest requiring disqualification when new partners joined arbitrator's law firm during pendency of arbitration, and they had in the past billed, and expected in the future to bill, subsidiary of party less than $10,000 per year for legal services, because the amounts were minor and the services were unrelated to any issue in the arbitration).

81 IBA Ethics § 3.3.

Equally prone to promote partiality would be a promise or understanding of future employment – including subsequent arbitral appointments – in the event of a favorable award. Any of these would provide the arbitrator with a direct monetary incentive to advocate and decide for the party appointing him or her, without an unbiased assessment of the merits of the case.

2. Close Family Relationship

A close family relationship should also be an automatically-disqualifying factor. A close family relation should include the party's spouse, parents, grandparents, children, grandchildren, siblings, first cousins, nieces, nephews, and in-laws.

Close family relationships must be assumed to be too personal to survive the test of impartiality. Any ordinary person will (a) assess credibility differently in a family member than in a stranger, (b) have some financial connection with close family members, and (c) likely face family repercussions from a decision affecting a family member. These tensions are inconsistent with unbiased judging.

Upon objection of the opposing party, the ICC has refused to confirm party-nominated arbitrators whose cousin, brother and spouse, respectively, worked for, or was a partner in, the law firm that represented the nominating party.[83] Similarly, the Swiss Federal Court barred an arbitrator whose wife worked as an assistant for one of the party's counsel.[84] The Second Circuit

---

82 Hunter & Paulsson, supra note 2, at 155, citing Forges et Ateliers de Commentry Oissel v. Hydrocarbon Engineering, decided 20 February 1974 (2e chambre civile), 1975 Revue de l'arbitrage 238.

83 Hascher, supra, note 9, at 89

84 Hunter & Paulsson, supra note 2, at 155, citing Centrozap v. Orbis, decided 26 October 1966, ATF 92 I 271; JT 1967 I 518.

Court of Appeals in the U.S. vacated an award because of a father-son relationship between an arbitrator and an officer of a party.[85]

3. Non-Financial Involvement in the Subject Matter of the Dispute

A potential arbitrator who is, or in the past has been, in a decision making or controlling role, or has been significantly involved, in the project, the dispute or the subject matter of the dispute should also be disqualified. Examples include the architect or project manager in a construction case, the attorney who drafted or approved the agreement in a contract dispute, the consulting engineer who approved the plans and specifications for a project or piece of equipment in a case involving that project or equipment, a manager of a petroleum exploration and production venture in a case focusing on that venture, or an attorney who consulted with, or advised, a party about the dispute. A person in such a position will almost certainly have a professional or emotional stake in the status of the project or the origins of the dispute, and therefore, is likely to be influenced in judging the case by that present or prior role.

The ICC has refused to confirm party-nominated arbitrators who, respectively, had conducted a technical study related to the dispute, had translated written submissions for the case and had given legal opinions either to the parties or to entities with common interests such as affiliated companies or lenders.[86] Similarly, the French Cour de Cassation set aside an arbitral award when a party-appointed arbitrator did not disclose that he had previously consulted with the appointing party about the subject matter of the dispute.[87]

---

85 Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 84 (2d Cir. 1984).

86 Hasher, supra, note 9, at 7.

87 Hunter & Paulsson, supra note 2, at 155, citing Consorts Ury v. Galeries Lafayette, decided 13 April 1972 (2e chambre civile), 1975 Revue de l'arbitrage 235. See also Craig, Park & Paulsson, supra note 10, at 221.

4. Public Position Taken on Specific Matter in Dispute

If a prospective arbitrator has already taken a public position on a specific matter involved in the relevant dispute, then that should bar selection.[88] An example would be a professional who wrote an article or made an oral presentation referring to the specific dispute in issue and suggesting the proper outcome. This must be distinguished, however, from intellectual positions taken in articles or lectures on an issue that, fortuitously, arises in the dispute. For example, an article in a legal journal by a law professor generically taking a position on what the law should be in a given field should not be a disqualifying factor absent a reference to the particular dispute between the parties and the taking of a position with respect to that dispute. It is only if the potential arbitrator has publicly advocated a position on an issue as it relates to the specific dispute in arbitration (i.e., on a fact-specific level) that disqualification is warranted.

5. Involvement in Settlement Discussions

Although in some Asian cultures it is proper for an arbitrator also to act as mediator or conciliator in an attempt to settle the dispute,[89] this is generally considered improper, absent party consent, in Western countries.[90] Under the Western view, the belief is that the arbitrator's judgment will likely be affected by acting as mediator because of his or her private discussions with the parties in which they may confide confidential information that is never conveyed to the other party, they may engage in frank discussions of the weaknesses of their case, and they will undoubtedly entrust the arbitrator with their settlement offers and positions. Consistent with this

---

88 Carter, supra note 2, at 168; IBA Ethics § 3.2.

89 See Donahey, The Asian Concept of Conciliator/Arbitrator: Is It Translatable to the Western World?, at 5-6, included in the materials presented at the Eleventh Annual Joint Colloquium and Seminar on International Commercial Arbitration sponsored by AAA-ICSID-ICC in San Francisco (Oct. 1994).

90 Hunter & Paulsson, supra note 2, at 158.

view, the ICC allowed a challenge to an arbitrator who also served on the conciliation committee that attempted to settle the same dispute.[91]

6. Adversary Relationship with a Party

A significant, unrelated role adverse to a party may create prejudice against the adverse party, thus providing grounds for disqualification. In one case, a U.S. court vacated an award because the presiding arbitrator was involved in a separate arbitration as a representative and witness for a company against one of the parties to the present arbitration.[92] The arbitrator had negotiated and signed the contract for the adverse party in the other arbitration. Because of the adverse role and the arbitrator's conduct, the court decided the arbitrator was prejudiced against the party.

B. Non-Disqualifying Factors

Just as there are factors that should lead to the disqualification of a potential arbitrator, there are factors that – after full disclosure – generally should not. These include a potential arbitrator's:

1) professional writings and lectures;

2) professional associations;

3) position in the same industry or similarly-situated government; and

4) relationship with the arbitral institution.

---

91 Hascher, supra note 9, at 13.

92 Sun Ref. & Mkt. Co. v. Statheros Shipping Corp., 761 F. Supp. 293, 301-03 (S.D.N.Y. 1991).

Again, the second and third factors are technically related to the potential arbitrator's independence, but the degree of relationship is so minor that they are not objective indicators of partiality.

1. Professional Writings and Lectures

It should not be a disqualifying factor that a potential arbitrator has written articles or lectured concerning the legal or commercial issues involved in the case, as long as those writings and lectures do not take a position on the parties' specific dispute.[93] Likewise, it should not matter whether these papers or lectures involved procedural, liability or damage issues. An arbitrator is not bound by his or her previous writings and is always free to change his or her mind.[94] Indeed, it is not unusual for professionals to modify their views over time when they either learn new information or reflect further on the issues. It is also possible, of course, for an arbitrator to determine that general statements made, or positions taken, in his or her own writings are not applicable to the specific facts of a given case.

One of the advantages of international arbitration is the expertise the arbitrators bring to the tribunal. Professionals who are knowledgeable of the industry or the legal or commercial issues involved in a case are more likely to be good arbitrators than the uninitiated. Such people should not be disqualified because of their expertise in the area.

In an arbitration concerning a foreign government's nationalization of an oilfield, for example, counsel for the claimant might search the literature looking for a potential arbitrator who had published articles generally supportive of the principle of prompt, adequate and

---

93 Craig, Park & Paulsson, supra note 10, at 232-33; Carter, supra note 2, at 168.

94 Hascher, supra note 9, at 14-15, citing Reymond, Des connaissance personnelles de l'arbitre à son information privilègiée, Rev. arb. 1991.

effective compensation for an expropriation. Similarly, counsel for the government might consider a professional whose general writings indicate sympathy for the "third world" view on compensation. Such nominees should not be objectionable for that reason alone.[95]

The foregoing discussion applies, of course, only when the potential arbitrator wrote or lectured for general intellectual reasons. If the articles or lectures were initiated or subsidized by the appointing party or a trade association, that should be a disqualifying factor even if they do not specifically refer to the parties' dispute.

2. Professional Associations

One issue that attracts substantial attention concerns the professional associations of a potential arbitrator. As with professional publications and speeches, contacts between a party or its counsel and its appointed arbitrator through professional or commercial associations of which each is a member, through editorial boards of professional journals, or through conferences or court appearances, should not generally be a disqualifying factor.[96] Some authorities have taken the position that such relationships are too insignificant to disclose.[97] U.S. courts have often said that partiality is more likely to be found in a business, rather than a professional, relationship.[98]

The party-appointment system in international arbitration presupposes some knowledge by the party of the person to be appointed.[99] It is to be expected that a potential arbitrator has

---

95 Craig, Park & Paulsson, supra note 10, at 232.

96 Carter, supra note 2, at 168. See Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1502 (S.D.N.Y. 1987) (claim that arbitrator should disclose that he serves on the board of directors of a professional association with executives or counsel of a party "borders on the frivolous").

97 See Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1502 (S.D.N.Y. 1987); Hascher, supra note 9, at 8.

98 Andros Compania Maritima, S.A. v. Marc Rich & Co.,579 F.2d 691, 701 (2d Cir. 1978); Sun Ref. & Mkt. Co. v. Stratheros Shipping Corp., 761 F. Supp. 293, 299 (S.D.N.Y. 1991).

99 Amco Asia Corp. v. Indonesia, supra note 65, at 6.

been a co-member, officer or director of a professional or commercial association or journal with one of the parties, or a party's employee or counsel.[100] It is also to be expected that parties and their appointed arbitrators attend some of the same professional meetings and occasionally socialize. It bears noting that there are only a few professional associations for international arbitration and, of necessity, the most active international arbitrators and counsel are involved in, and know each other from, these associations. To require disqualification because of such generic professional relationships would deprive the parties of the practical benefits of being able to appoint some of the leaders in the field, and would interfere with the goal of obtaining a professional and knowledgeable arbitral panel.

In one case, a party attacked an arbitral award on the basis of an alleged bias by an arbitrator because his employer and one of the parties were members of the "Ring", a 28-member committee of the London Metals Exchange, which allegedly constituted an "old boy network."[101] In rejecting this claim of bias, the court said:

> The members of the LME, while known to each other commercially, sometimes deal with each other, and sometimes compete with each other directly. The fact of the matter is that arbitration of metal contracts disputes before the LME makes available to the parties "prominent and experienced members of the specific business community in which the dispute to be arbitrated arose"; no appearance of bias arises from the fact that, in such a community, "the wakes of the members often cross."

It goes without saying that there is a marked distinction between a general professional association between a party and a potential arbitrator and a close personal relationship. Occasional socializing at professional association meetings is not the same as frequent family

---

100 See generally Hascher, supra note 9, at 7-8.

101 Brandeis Intsel, Ltd. v. Calabrian Chem. Corp., 656 F. Supp. 160, 168-69 (S.D.N.Y. 1987).

visits in the home of a long-time personal friend who also happens to be a professional colleague. The latter may well be disqualifying because it may entail actual bias. The key to making the distinction lies in the breadth and depth of the relationship, which of course, should be disclosed.

3. Position in the Same Industry or Similarly-Situated Government

Another factor that may be considered is whether the potential arbitrator hails from the same industry as the appointing party. For example, in a dispute between Company A, an international energy company, and Company B, a state-owned oil company, a question might arise as to the appointment by Company A of an arbitrator employed by another private energy company involved in the same line of business. This should not generally be a disqualifying factor.[102] Provided the nominee's company does not have a current or imminent dispute with Company B, then he or she merely brings a general knowledge of the industry and expertise to bear on the problem – which is wholly consistent with the goal of having an expert panel.[102A] If, however, the potential arbitrator's company has a current dispute with Company B involving the same issues or the same project, or if the potential arbitrator hails from a company involved in a

---

[102] Carter, supra note 2, at 168. See Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1275 (2d Cir. 1971) (court would not vacate award because Westinghouse's party-appointed arbitrator's law firm had dealings with General Electric, which was litigating similar or identical contract clauses); Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1499-1500, 1505-06 (S.D.N.Y. 1987) (arbitrator's law firm's representation of other companies in the same industry as a party, that have unrelated joint ventures with a party, or that supply services or materials to a party do not create a conflict of interest).

[102A] Certain industries do exclude "over-involved" arbitrators. For example, the U.S. securities industry characterizes arbitrators as either "industry" or "public" arbitrators, depending on the percentage of work they do for securities firms, and the National Association of Securities Dealers Arbitration Code restricts the arbitrator role of lawyers who devote 20 percent or more of their time to securities industry clients. Although public relations purposes may justify such restrictions in consumer-related arbitration, the logic does not apply to arbitration of international disputes among experienced business persons. It is counter-productive in international arbitration to exclude those most qualified to assess disputes in specialized fields.

consortium, joint venture or a party to an operating agreement with Company B, and the dispute involves a common project or issue, then the potential arbitrator has a direct or indirect financial interest in the dispute and should be disqualified.

A more difficult issue arises if a government or government-controlled entity (e.g., the state-owned oil Company B) appoints an arbitrator who is employed by the same government. This has not been an uncommon practice by certain formerly-Communist states. The ICC has, in the past, taken the position that this is not a disqualifying factor with respect to Eastern European countries. [103] The rationale for this practice lies in the prevalence of the state in commercial affairs; it would be difficult, if not impossible, for the government to find an arbitrator of the same nationality with expertise in the subject matter of the dispute who is not a government employee. With the demise of the Communist governments in Eastern Europe, however, this rationale should be disappearing. Subject to such political realities, which hopefully will be rare, a potential arbitrator who is employed by a government party should be subject to the same standards as other party-appointed arbitrators and hence disqualified because of a financial interest.[104]

Even under the ICC's historic view, however, a government employee whose regular duties include representing the interests of the government, its agencies or government–owned companies, should be disqualified.[105] Similarly, if the arbitrator is directly subordinate to the

---

103 Tupman, supra note 33, at 43.

104 An exception to this might be warranted if the appointee were a judge of the International Court of Justice or the government's domestic court, with lifetime or other defined tenure, and whose normal duties require impartiality. Tenure makes financial concerns less relevant, and a regular practice of deciding cases impartially provides some reassurance of intellectual discipline.

105 Hascher, supra note 9, at 7.

state agency or enterprise that is a party to the arbitration, then the nominee should also be disqualified.[106]

Of course, there should be no problem with a government appointing an arbitrator from private industry within its country or from a different country's government or government-owned company. The fact that the potential arbitrator's own government, or government company, is in a similar position to that of the government involved in the dispute should not be a disqualifying factor, unless the other government, or government company, is involved in the same dispute with the private party. This is analogous to the situation described above of the private company appointing an arbitrator from another similarly-situated company.

4. Relationship with the Arbitral Institution

A relationship with an arbitral institution, such as sitting on its board of directors, should not be a disqualifying factor even when the institution is the appointing party. Such a relationship does not in and of itself create bias or partiality.

One U.S. court has held that the hiring by a party, while the arbitration was in progress, of the secretary of the arbitral institution that appointed the arbitrators did not create bias or partiality in the arbitrators themselves.[107] Another U.S. court decided that the hiring of the general counsel of an arbitral institution by an arbitrator's law firm while an arbitration was in progress did not establish partiality in the arbitrator.[108]

---

106 Craig, Park & Paulsson, supra note 10, at 231.

107 Tamari v. Bache Halsey Stuart, Inc., 619 F.2d 1196, 1200 (7th Cir. 1980). Id. The same court also held that there is no bias in a panel simply because its members are drawn from the industry that is the subject matter of the dispute. Id.

108 Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1499 (S.D.N.Y. 1987).

C. Factors Bearing Close Scrutiny

Identified below are certain factors that do not necessarily weigh conclusively against selection of an arbitrator, but merit close scrutiny in light of the particular circumstances. These include a potential arbitrator's:

1) past business relationship with a party or its counsel;

2) attenuated family relationship with a party or its counsel;

3) friendship with a party or its counsel;

4) affiliations between law firms;

5) office sharing among unaffiliated lawyers; and

6) service in other arbitrations.

Full disclosure by the potential arbitrator, and careful assessment by the appointing party, take on particular importance in these gray areas. One method of addressing problems in these areas is for arbitral institutions, or the parties in their arbitration clauses, to require a statement of impartiality by the parties' nominees. This forces the arbitrator to focus on the required standard of conduct and to make a positive commitment to comply with it.

1. Past Business Relationship

Past business relationships can include the potential arbitrator's legal representation of, direct employment by, or a consulting relationship with, the appointing party. The mere fact of a past business relationship should not, of itself, necessarily be a disqualifying factor.[109] It should be disqualifying only when it crosses the line demarking likely partiality. An appropriate place to draw that line is when past business relationships are such that they are likely to affect an

[109] IBA Ethics § 3.4.

arbitrator's impartial judgment either because of the nature of the relationship (e.g., past legal advice on similar issues) or because they are likely to give rise to future business.[110]

A concrete example involving the familiar attorney-client relationship can best illustrate the line. If the potential arbitrator's law firm has provided only periodic legal counsel to the appointing party, then the frequency and timing of the relationship should be examined to determine the likelihood either that future business from the appointing party could be affected by the outcome of the arbitrator's decision or that the nature of the past representation could unduly affect the nominee's judgment. A short, one-time relationship, several years in the past, unrelated to the subject matter of the dispute, should not be a disqualifying factor. The firm's regular provision of legal advice following each tax law revision by the government probably should be disqualifying, even if the last such advice was pegged to a tax law revision several years earlier. The latter instance, but not the former, would likely cause an arbitrator to have to balance his or her loyalties between impartially deciding the arbitration dispute and regular, albeit periodic, business with a client.

In one case, the French Court of First Instance held that a U.S. lawyer who had been corporate counsel of a party's parent company five years earlier was not disqualified because of the past relationship.[111] That relationship was disclosed at the outset of the proceedings, however, and was not challenged until after an award was rendered. Thus, the court's ruling can be analyzed as a waiver of the right to object to the arbitrator.

---

110 Id.

111 Craig, Park & Paulsson, supra note 10, at 231-32, citing Universal Pictures v. Inex Films & Inter-Export, Cour d'appel of Paris, 16 March 1978, 1978 Rev. arb. 501, sustained on other grounds, Cour de Cassation, 28 April 1980, 1982 Rev. arb. 424.

In another situation, the U.S. Supreme Court vacated an arbitral award when the presiding arbitrator failed to disclose that he had previously been retained as a consultant for one of the parties over a four or five year period, ending only a year before the arbitration began.[112] The ICC refused to confirm a nominee who was previously employed by an entity with an interest in the resolution of the dispute.[113] When no objection was raised, however, the ICC has confirmed party nominees who had once been employees, trainees or partners in the same law firm with the nominating party's counsel.[114] Other types of past relationships between a party or its counsel and a nominated arbitrator such as having been a student, fellow student, professor, co-employee, or co-counsel should not, without more, be disqualifying factors.[115]

One U.S. court has refused to vacate an award based on the representation of a party by an arbitrator's *former* law firm.[116] The arbitrator was unaware of the representation, and the court held that he had no duty to make inquiry of his former law firm about marginally disclosable facts. Another U.S. court refused to vacate an award when the lawyer who originally signed a petition for one party to sue the other party later ceased to represent the party and became a partner in an arbitrator's law firm.[117] The court noted that the lawyer and arbitrator were located in different offices, had never met one another and did not know of one another's involvement in the case. In addition, the lawyer ceased to represent the party before he changed

---

112 Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 147-48 (1968) (arbitrator had received a total of $12,000 in fees).

113 Hascher, supra note 9, at 7.

114 Hascher, supra note 9, at 8.

115 Hascher, supra note 9, at 8.

116 Al Harbi v. Citibank, N.A., 85 F.3d 680, 682 (D.C. Cir. 1996).

117 Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 991 F.2d 141, 146 (4th Cir. 1993).

law firms and became a partner in the arbitrator's firm, which occurred six months after the arbitration proceedings began.

Objective factors, such as the timing and extent of the past business relationship, can and must be disclosed and carefully considered. When future business prospects are concerned, however, a subjective element is involved. No party, arbitral institution or court can look into the mind of a potential arbitrator and determine whether he or she is, in fact, evaluating whether a decision favorable to the appointing party will affect future business. One partial solution would be for arbitral institutions, and the parties in ad hoc arbitrations, to prompt the thorough self-examination necessary by requiring any prospective arbitrator, as part of the disclosure statement, to provide a statement declaring that the past business relationships disclosed will not influence the nominee's decision and that the candidate knows of no reason why he or she cannot decide the case impartially.

2. Attenuated Family Relationship

An attenuated family relationship between a potential arbitrator and appointing party, meaning one beyond those close relationships listed above, should certainly be disclosed, along with such objective factors as the frequency and quality of the contacts. This relationship should be carefully scrutinized. As with past business relationships, attenuated family relationships also involve a subjective factor, which can be managed by requiring the potential arbitrator to declare that the relationship will not influence his or her decision and that the candidate knows of no reason why he or she cannot decide the case impartially.

3. Friendship

Should an arbitrator's friendship with the appointing party, or an employee or counsel, be a disqualifying factor? This is related to, but somewhat more problematic than, the issue discussed above of professional associations. Certainly, the fact that an arbitrator is an acquaintance of the nominating party or its counsel should not disqualify.[118] Close personal friendships, on the other hand, probably should be disqualifying.[119]

The arbitrator may be more likely to find in favor of the friend's client because of a desire to help (or at least not to hurt) the friend, to maintain the friendship or because of the friend's proven credibility. The opposing party may also have concerns about possible *ex parte* contacts between friends. Of course, some people are capable of setting aside personal friendships and deciding a case impartially. For this reason, parties should be able to waive friendship as a disqualifying factor if they know the arbitrator to be a person of great integrity.

Nevertheless, as a general rule a close friendship should disqualify an arbitrator. The issue, of course, is how close is close? Disclosure and scrutiny of objective criteria, again, is the first tier of protection. The data disclosed should include the closeness of personal ties between the appointing party and potential arbitrator: the length of time they have known each other, the frequency and quality of contacts, and whether their ties extend to frequent family visits in the home. Here, the subjectivity is pronounced because there are many degrees of friendship, which vary among cultures and among individuals. For example, many Americans, if put on the spot, may feel compelled to claim friendship with casual acquaintances. Again, to manage the subjective factor, the potential arbitrator should be required to make a declaration with his or her

---

118 Hascher, supra note 9 at 8.

119 Hascher, supra note 9, at 8.

disclosure statement that the nominee's relationship will not affect or influence his or her decision, and that the candidate knows of no reason why he or she cannot decide the case impartially.

The flip side of the coin of friendship, rarely addressed, is the situation in which there is antipathy between an arbitrator and a party of counsel. Is it relevant that the arbitrator dislikes one party or a party's counsel? What if the arbitrator and one side's counsel have carried on an acrimonious debate in scholarly journals or otherwise in the public eye? While exceptions can be imagined, in general it would be a mistake to consider such negative bias on the same footing as positive bias. To do so could encourage tactical maneuvers of a purely subjective nature, i.e., a challenge to one arbitrator simply because he or she has been the subject of public professional criticism by the other party or another arbitrator.

4. Affiliations Between Law Firms

Another problematic area is that of affiliations among law firms.[120] When the law firm of an arbitrator is affiliated with the law firm of one of the parties, the nature of the affiliation should be closely scrutinized. If the relationship involves merely a non-binding understanding to refer cases to one another when feasible, or involve English solicitors engaging barristers in unrelated cases,[121] generally this should not be disqualifying. If the relationship involves revenue sharing, partnerships or close economic involvement in one another's affairs, then the

---

120 Hasher, supra note 9, at 9.

121 Hascher, supra note 9, at 9.

relationship probably should be disqualifying. A full-time consultancy arrangement with a party's law firm should also normally be disqualifying.[122]

There may be many other types of affiliations, of varying degrees of economic cooperation, among law firms. In all cases, these should be disclosed, reviewed for objective indications of partiality and statements of impartiality required. Determining the disqualifying nature of these relationships requires a delicate balancing to show respect for legal cultural traditions, and to avoid discrimination against particular professional structures,[123] while not allowing such traditions to disguise the appointment of partial arbitrators.

5. Office Sharing Among Unaffiliated Lawyers

Office and service sharing among unaffiliated lawyers who act as counsel and arbitrator in a given dispute generally is not objectionable, but requires an examination of the individual facts. The obvious concern is that office sharing arrangements allow purposeful or accidental *ex parte* contacts between counsel for one party and an arbitrator.

In the United States, where office sharing among unaffiliated lawyers is the exception rather than the rule, the problem is easily addressed with full disclosure and close scrutiny of the relevant facts[124] Disclosure will reflect details of the office sharing arrangements that might raise concerns, such as the number of professionals who are tenants (are they the only two tenants, or are they two among many?), the extent of physical separation between counsel and arbitrator (are they in one room or adjacent rooms, so each can hear all telephone conversations of the other?),

---

122 Hunter & Paulsson, supra note 2, at 157.

123 Hascher, supra note 9, at 9, 10.

124 Hascher, supra, note 9, at 9; Jardine Matheson & Co. v. Saita Shipping, Ltd., 712 F. Supp. 423, 426 (S.D.N.Y. 1989) (renting of office space by arbitrator's employer to a party's lawyer does not create partiality).

the extent of overlapping substantive services (does one paralegal or junior attorney do research and drafting for both of them?), and the pre-existing rules for protecting confidentiality (does the secretary/office clerk promptly deliver or seal incoming telefaxes to the recipient attorney?, does each attorney have separate computer passwords?). If disclosure raises legitimate concerns, the parties can agree on procedures to avoid improper communications or else decide that another arbitrator candidate would be preferable.

Such close scrutiny is not required in circumstances in which office sharing by unaffiliated lawyers is standard procedure. The classic example arises when an arbitrator, whether party-appointed or not, and counsel for one party are English barristers belonging to the same chambers. Many lawyers may not understand that members of the English Bar must practice independently, and cannot affiliate with other barristers or other solicitors. Although barristers commonly do share sets of chambers, or "rooms," they must keep their work professionally distinct and confidential from each other, and they may not share fees or receipts. The staff in shared chambers are trained in procedures to keep each barrister's substantive work separate from that of the others.[125]

Just as English barristers from the same chambers may represent opposing interests in the English courts, it is not per se objectionable for them to represent opposing interests or serve as counsel and arbitrators in arbitrations.[126] In challenges after awards and during the appointment stage, courts have upheld the independent status of barristers from the same chambers who serve

---

125 For a detailed description of the barrister system, and issues raised when barristers from the same chambers take different roles in an arbitration, see John Kendall, Barristers, Independence and Disclosure, 8 Arb. Int'l 287 (1992).

126 Hasher, supra note 9 at 9.

as advocate and arbitrator in the same arbitration.[127] Non-English parties will continue to be bemused by this situation, which is exaggerated in international commercial arbitration by the fact that a small number of barristers in a very small number of sets of chambers specialize in the field as advocates and arbitrators.[128] To minimize unnecessary suspicion and time-delaying challenges, at least in cases involving non-English parties, it would seem the better part of valor for an advocate and arbitrator from the same chambers to disclose their "connection" as soon as one learns of the other's role in the case.[129]

6. Service in Other Arbitrations

In general, prior appointment as an arbitrator by one of the parties should not, standing alone, be a ground for disqualification.[130] But there are three basic concerns when a party-appointed arbitrator has served as an arbitrator in a prior case involving at least one of the parties or similar issues: (1) did the prior decision prejudge the liability of a party; (2) has the arbitrator been exposed to material evidence that is unknown to the other arbitrators or to one of the

---

127 Kendall, supra note 126 at 289-93, discussing among other cases, Kuwait Foreign Trading Contracting and Investment Co. (KFTIC) v. ECORI Estero Spa (Paris Court of Appeal, First Chamber, June 27, 1991) (refusal to annul a decision of an ad hoc tribunal, in which the president of the tribunal and counsel for the prevailing party were barristers in the same chambers, the president having been appointed before the prevailing party instructed its barrister-advocate), PPG Industries, Inc. v. Pilkington, PLC (High Court, Commercial Court, unreported, November 1, 1989) (in an English arbitration in which the parties differed over the arbitrator to replace PPG's original arbitrator, J. Saville ruled that Pilkington (the English party) could not object to PPG's candidate on grounds that he was a barrister in the same chambers as PPG's counsel).

128 One of the authors recently participated in an ICC arbitration in which five barristers from the same London chambers served as counsel and expert witnesses for both parties and as presiding arbitrator.

129 Kendall, supra note 126, at 298.

130 Craig, Park & Paulsson, supra note 10, at 233; Carter, supra note 2, at 168; Hascher, supra note 9, at 7, 9. See also Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 701 (2d Cir. 1978) (Society of Maritime Arbitrators' award upheld by the court although the presiding arbitrator had served on 19 arbitration panels with the president of a company that served as one of the party's agents, the agent's president had selected the chairman as presiding arbitrator in 12 of those cases, and the two had voted together in each arbitration).

parties; or (3) has the arbitrator become dependent upon substantial fees from one of the parties because of repeated appointments?

If a challenge is based only on the fact that an arbitrator is nominated by the same party or counsel who appointed him or her in a prior arbitration, that objection should be rejected because such prior service may only reflect that the arbitrator originally came with strong recommendations and proved his or her qualifications in the first arbitration. A strong position taken in one arbitration should not disqualify an arbitrator from future appointments. Similarly, many industrial, commercial and legal issues will be common from arbitration to arbitration. This is particularly the case with procedural issues. The fact that an arbitrator has taken a position on one or more of such issues in a prior arbitration should not be disqualifying.

If, however, an arbitrator has served on a prior panel involving one of the parties, and that panel's decision effectively prejudged the liability issue brought by or against a party who was not involved in the prior arbitration, then the arbitrator should be disqualified. The Paris Court of First Instance disqualified an arbitrator who had served as an arbitrator in a prior case involving the nominating party because the award in the first case effectively constituted an incidental declaration of the objecting party's liability in the second case.[131] In another case, the ICC refused to confirm a party's nominee in the second arbitration involving the same parties when the first award was being attacked in court.[132] But in other cases, the ICC has rejected challenges to arbitrators who have served in prior arbitrations either between the same parties or involving one of the parties, concluding that a decision in the first case would not constitute a

---

131 Hascher, supra note 9, at 10 n.32.

132 Hascher, supra note 9, at 10-11.

pre-judgment of the second.[133] In these situations, the facts of the specific case must be carefully examined to determine if a decision in one case will prejudge another. This concern may be alleviated in some cases if the separate arbitrations proceed simultaneously, rather than consecutively.[134]

A different situation occurs when one arbitrator has served on a panel in a separate arbitration involving one, but not both, of the parties, and the same or similar issues and arguments were brought. That situation must also be carefully scrutinized. It should not be objectionable that an arbitrator has served, or is serving, in another arbitration if the parties are the same in both arbitrations, nor should it be a basis for disqualification if the entire panel is the same in the two arbitrations. In both situations, either both parties or all arbitrators, including both party-appointed arbitrators, have been exposed to the same evidence and arguments. But if an arbitrator has likely heard or seen material evidence that is different from that to which the other panel members and one of the parties in the subsequent arbitration will see, then the appointing party may obtain an advantage because of the arbitrator's unique knowledge. In that situation, it may be proper to disqualify the arbitrator as a matter of fundamental fairness.

Finally, if a party-appointed arbitrator has been regularly and frequently appointed by the same party, has substantial knowledge of the party and has obtained substantial fees from the appointing party, then the prior appointments may be sufficient ground for a challenge.[135] In that case, the size of the fees, and the potential for dependency by the arbitrator upon the fees, may create partiality.

---

133 Hascher, supra note 9, at 11, 14.

134 Hascher, supra note 9, at 11.

135 Craig, Park & Paulsson, supra note 10, at 233.

IV. COMMUNICATIONS WITH PARTY-APPOINTED ARBITRATORS

The practical question of the proper scope of communication between a party and its appointed arbitrator arises both during and after the appointment process. Other than the AAA, the arbitration rules of the major institutions do not purport to regulate communications between a party and the arbitrator it appoints, other than to demand that the arbitrator be independent or impartial or both.[136] Because of this lacunae, this subject is addressed by both the IBA Ethics and the AAA-ABA Code.

A. Pre-Appointment Interview

Pre-appointment interviews with prospective arbitrators are not *per se* forbidden or unethical, although some arbitrators will refuse an interview as unseemly.[137] Although not prohibited, interviews are regulated to a certain degree by common sense, common practice and by the relevant codes of ethics. In the words of Professor Lowenfeld, who has written an engaging account of changing his originally-staunch opposition to pre-appointment interviews:

> If ... one of the principal functions of a party-appointed arbitrator is to give confidence in the process to the parties and their counsel, some basis for that confidence needs to be established. Sometimes that confidence can be based on mutual acquaintances, without direct personal contact; some potential arbitrators become well-known through published writings, lectures, committee work, or public office. Others are not so well-known, and I understand that lawyers or clients or both want to have a firsthand look. I think, however, some restraint should be shown by both sides.[138]

The AAA International Rules prohibit any *ex parte* communications between a party or its counsel and a prospective arbitrator except: (1) to advise the candidate of the general nature of

---

136 See AAA International Rules, Art. 7(2).

137 The authors have found that many English arbitrators, in particular, will refuse requests for interviews.

138 Lowenfeld, supra note 10, at 62. See also Craig, Park & Paulsson, supra note 10, at 224.

the controversy and the anticipated proceedings, and (2) to discuss the candidate's qualifications, availability or independence.[139] With a different emphasis, the IBA Ethics *requires* prospective arbitrators to make sufficient inquiry of the appointing party to be able to determine (a) if the arbitrator can give the time and attention necessary to arbitrate the dispute, (b) if the arbitrator is competent to decide the parties' dispute, and (c) whether there are grounds for justifiable doubts as to the arbitrator's impartiality or independence.[140] The IBA Ethics goes on to permit the potential arbitrator to respond to questions about his or her availability and suitability for the arbitration, but enjoins any discussion of the merits of the case with the appointing party or its counsel.[141]

The AAA-ABA Code contains no general provisions concerning this subject although, as noted, Canon VII specifies that party-appointed arbitrators are presumed to be "non-neutral."[142] Under this Canon, a "non-neutral" arbitrator may, with notice, communicate with the appointing party concerning any aspect of the case, which presumably includes the merits.[143] The only proviso is that at the first hearing, or earlier, the arbitrator must inform all parties and arbitrators that such communications have occurred, although the content of such communications need not be disclosed.[144] The IBA Ethics provides a better reflection of the general practice in international arbitration than does the AAA-ABA Code.

---

139 AAA International Rules, Art. 7(2).

140 IBA Ethics, § 5.1.

141 Id.

142 AAA-ABA Code, Canon VII, Introductory Note.

143 Id., Canon VII(C).

144 Id.

Under the various rules and the general practice of international arbitration, it would be proper for a party, or its counsel, to raise and discuss the following matters in the initial interview with a potential arbitrator:[145]

(1) the identities of the parties, counsel and witnesses;

(2) the estimated timing and length of hearings;

(3) a brief description of the general nature of the case sufficient to allow the candidate to determine if he or she is competent to decide the dispute, has disclosures to make, and has the time to devote to the matter;

(4) the arbitrator's background, qualifications and resume;

(5) the arbitrator's published articles and speeches;

(6) any expert witness appearances of the arbitrator, including positions taken;

(7) any prior service as an arbitrator, including decisions rendered (subject to any confidentiality requirements);

(8) whether there is anything in the arbitrator's background that would raise justifiable doubts as to his or her independence or impartiality, and any disclosures that the arbitrator would need to make;

(9) whether the arbitrator feels competent to determine the parties' dispute; and

(10) the availability of the arbitrator (*i.e.*, whether he or she can devote sufficient time and attention to the parties' dispute in a timely manner).

It must be emphasized that in international arbitration practice, parties and their counsel should avoid any discussion of the merits of the case beyond a description of the nature of the dispute and the issues involved sufficient for the candidate to evaluate his or her competence, disclosures and time commitments. The description of the nature of the case and the issues should be stated in a neutral fashion, avoiding advocacy or misrepresentation of the opposing

---

[145] See generally IBA Ethics, § 5.1; Carter, supra note 2, at 168; Lowenfeld, supra note 10, at 61-62; Hunter & Paulsson, supra note 2, at 154.

party's position. Any questions, including hypothetical ones, about what position the prospective arbitrator might or would take on any of the issues in dispute between the parties should be strictly avoided.[146] Certainly, the potential arbitrator should not express his or her beliefs or opinions on the merits of the dispute.[147] As a matter of common sense, the more extended the interview, the more reasonable the assumption that the bounds of propriety were exceeded. The ICC Court refused to confirm a party-appointed arbitrator who spent approximately 50-60 hours with the nominating party reviewing the case before appointment.[148]

A slightly more difficult question is whether an appointing party can attempt to ascertain a potential arbitrator's general position in generic terms, meaning without reference to the facts of the specific case. For example, can the party ask a potential arbitrator his or her general views on enforcing a contract as written as opposed to application of the doctrine of changed circumstances? The answer should be "no," although such views may sometimes be ascertained by reference to the potential arbitrator's writings, speeches, expert witness opinions, or positions taken in published arbitration awards.[149]

Some experienced international arbitrators who consent to interviews attempt to control the process by limiting the amount of time for the interview, by limiting the topics they will discuss consistent with those described above or by taking notes of the interview and making the notes available to all parties. Of course, it should be made known in advance to the interviewer

---

146 See Lowenfeld, supra note 10, at 61-62.

147 Hunter & Paulsson, supra note 2, at 154.

148 Hascher, supra note 9, at 7-8. An interview or consultation lasting only two hours was held not to establish partiality in Employers Ins. of Wausau v. National Union Fire Ins. Co., 933 F.2d 1481, 1489 (9th Cir. 1991).

149 See IBA Ethics, § 5.1; Lowenfeld, supra note 10, at 61-62; Carter, supra note 2, at 168.

that the candidate will make notes of the interview, and those notes will be tendered to the other parties.

B. Selection of the Presiding Arbitrator

As noted in the introduction, the prevailing practice in institutional and ad hoc international arbitrations is to have the party-appointed arbitrators jointly choose the presiding arbitrator. The question immediately arises as to the proper scope of communications between the parties and their party-appointed arbitrators on this step.

The IBA Ethics specifically allows a party-appointed arbitrator to obtain the views of the appointing party as to the acceptability of candidates for the position of the presiding arbitrator.[150] The AAA International Rules allow a party or its counsel to discuss with its party-appointed arbitrator the suitability of candidates for selection as the presiding arbitrator.[151] The AAA-ABA Code contains no general provisions regarding this matter, but Canon VII says that "non-neutral" arbitrators may consult with the appointing party as to the acceptability of candidates considered for the third arbitrator.[152]

The practice in international arbitration is to allow party-appointed arbitrators to consult with counsel for their appointing parties about the acceptability of potential candidates for the third arbitrator.[153] One rationale for this practice is that the parties and their counsel are often in a better position, by virtue of their greater resources, to collect any available information on the background and suitability of the candidates. It is certainly proper for a party-appointed

---

150 IBA Ethics, § 5.2.

151 AAA International Rules, Art. 7(2).

152 AAA-ABA Code, Canon VII(C).

153 Lowenfeld, supra note 10, at 63-64; Carter, supra note 2, at 168.

arbitrator to seek to prevent the appointment of a presiding arbitrator who holds beliefs inimical to the position of the appointing party.[154] Although the arbitrators may solicit views from the parties, they may not allow the parties directly or indirectly to dictate the outcome. Nor should consultations on the selection of third arbitrator candidates become a vehicle for inappropriate *ex parte* communications about the merits of the case between the appointing party and its party-appointed arbitrator.[155]

C. Post-Appointment Communications

The IBA Ethics strongly suggests that arbitrators avoid any unilateral communications regarding the case with any party or its representatives.[156] The AAA-ABA Code provides that all arbitrators may discuss with the parties such administrative matters as the time and place of the hearings and arrangements for the conduct of the proceedings as long as all parties and arbitrators are promptly informed of such communications and no final determinations are made on such matters until all parties are afforded an opportunity to express their views.[157] The AAA-ABA Code allows "non-neutral" arbitrators to have post-appointment communications with their appointing parties provided that they inform the other parties and arbitrators of their intention to do so.[158]

In international arbitration practice, party-appointed arbitrators should avoid any post-appointment communications with the parties appointing them, preferably even on administrative

---

154 Hunter & Paulsson, supra note 2, at 154.

155 Lowenfeld, supra note 10, at 64.

156 IBA Ethics, § 5.3.

157 AAA-ABA Code, Canon III(B)(1).

158 Id., Cannon VII(C).

matters and certainly on any matters other than the most administrative.[159] Any *ex parte* discussions arguably touching on the merits of the case could provide grounds for a challenge.[160] Particularly condemned are communications from arbitrators that inform parties about the deliberations of the Panel in advance of the issuance of the award.[161]

D. Post-Arbitration Communications

After the arbitration is concluded and the award has been paid or otherwise is no longer subject to proceedings to collect, confirm, vacate or appeal, parties may seek to de-brief their appointed arbitrators. At this stage, and provided the arbitrator is not involved in other arbitrations for the party, such interviews should not be considered improper as long as the confidentiality of the Panel's deliberations is maintained.[162] It would be proper, for example, for an arbitrator to give his impressions of the performance of a party's counsel or expert witnesses.

V. DISCLOSURE

It is a separate basis for challenge of a party-appointed arbitrator that grounds that might give rise to justifiable doubts as to the arbitrator's independence or impartiality were not disclosed. In many situations, arbitrators have been disqualified because of the failure to disclose relationships that might not have been disqualifying if initially disclosed.[163] Because of the importance of disclosure, arbitrators should err on the side of full disclosure.

---

159 Hunter & Paulsson, supra note 2, at 157.

160 IBA Ethics, §§ 5.1 and 5.3.

161 Hunter & Paulsson, supra note 2, at 157.

162 See generally Hunter & Paulsson, supra note 2, at 159 (discussion of dissenting opinions by minority arbitrators).

163 See, e.g., Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147-49 (1968). See also IBA Ethics § 4.1.

VI. CHALLENGES

To be successful, a challenge to an arbitrator should be made as soon as a party knows of facts justifying a challenge. Although no time limits are provided in any arbitral rules for raising a challenge, the failure to challenge an arbitrator on the basis of initially-disclosed relationships until after an award is rendered may lead to the conclusion that the challenging party has waived its challenge.[164]

In an ICC arbitration, the ICC International Court of Arbitration attempts to allow parties to appoint arbitrators of their choice with similar national, economic and cultural backgrounds, and to reject trivial challenges, but also to provide an arbitral panel in which the parties can have confidence. Because confidence in the constitution of the tribunal is so important, and a challenge after the proceedings have begun may prejudice the parties, the ICC is much more likely to sustain an objection to an arbitrator before the arbitrator is confirmed by the ICC than to admit a challenge after confirmation.

A study of ICC challenges to arbitrators has indicated that, during a multi-year study period, 72% of objections to arbitrators prior to confirmation have been sustained by the ICC International Court of Arbitration, while only 12% of challenges made after confirmation have been upheld.[165] When no objection was raised before confirmation, the ICC has confirmed arbitrators who may have been susceptible to a successful challenge such as an officer or employee of a company that owns shares in a party, a former partner of a party's lawyer, the

---

164 See Craig, Park & Paulsson, supra note 10, at 231-32, citing Universal Pictures v. Inex Films & Inter-Export, Cour d'appel of Paris, 16 March 1978, 1978 Rev. arb. 501, sustained on other grounds, Cour de Cessation, 28 April 1980, 1982 Rev. arb. 424.

165 Bond, supra note 14, at 306.

hierarchical superior to a party's counsel, an advisor to a party or one of its affiliated companies, and a consultant for a public enterprise party.[166] The lesson is clear that if parties wish to challenge the opposing party-appointed arbitrator, they should do so at the earliest stage at which they have sufficient information, preferably before confirmation.

VII. CONCLUSION

Tripartite arbitral panels, with two party-appointed arbitrators, are a fact of life in international commercial arbitration. When two entities from different commercial, legal and cultural backgrounds agree to dispute resolution by private arbitration, it is understandable that each wants to select an arbitrator who shares that party's background and also has an inclination toward that party's side of the case. It is a reality that this selection process is an integral part of the fairness, both actual and perceived, of international commercial arbitration.

It is also a reality that neither actual fairness nor perceived fairness can be achieved if arbitrators go beyond that understandable inclination toward "their" parties' side and act in a biased or prejudicial manner. A favorable inclination towards the selecting party's case is far from an unspoken commitment to ignore the merits in order to favor that party. Even the more cynical among us would agree that the ultimate integrity of international commercial arbitration rests on the impartiality of all arbitrators involved.

The question for international practitioners becomes, then, how to balance the tensions inherent in the party-appointed arbitrator regime. How can one select an arbitrator who is inclined to favor a party's case and, provided that party proves its case well on the facts and law, can be counted on to vote for that party? How can one select an arbitrator who will, at the very least, translate and explain that party's legal system and cultural Zeitgeist to the all-important

---

[166] Hascher, supra note 9, at 6-9.

independent chair? How can one do all this without selecting an arbitrator who is partial or appears partial, and so alienates the chair against the selecting party? How can one do all this without asking the arbitrator candidate the unacceptable questions? In fact, what are the acceptable questions and the unacceptable questions?

The purpose of this article, in addition to highlighting the known tensions in selecting a "predisposed but impartial" arbitrator, is to categorize the acceptable, unacceptable and unavoidably ambiguous criteria in this delicate selection process. The practitioner's checklist of disqualifying factors, non-disqualifying factors, and factors bearing close scrutiny cannot, of course, be used without the practical understanding that each case, each party and each potential arbitrator carries unique circumstances. The checklist will be most valuable if used by practitioners - and, from other perspectives, clients and arbitrators – as a set of red lights, green lights, and, most important, yellow lights guiding the party-appointed arbitration selection process.

ANEXO 17

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

BURLINGTON RESOURCES, INC.

Claimant

and

REPUBLIC OF ECUADOR

Respondent

ICSID Case No. ARB/08/5

DECISION ON THE PROPOSAL FOR DISQUALIFICATION OF PROFESSOR FRANCISCO ORREGO VICUÑA

Chairman of the Administrative Council
Dr. Jim Yong Kim

Secretary of the Tribunal
Mr. Marco Tulio Montañés-Rumayor

Representing the Claimant:

Mr. Alexander Yanos and
Ms. Noiana Marigo
Freshfields Bruckhaus Deringer LLP
New York, NY 10022
and
Mr. Nigel Blackaby
Freshfields Bruckhaus Deringer
Washington, DC 20004-2692
and
Mr. Christopher Pugh
Freshfields Bruckhaus Deringer
London, United Kingdom EC4Y1HS

Representing the Respondent:

Dr. Diego García Carrión
Procurador General del Estado
Dra. Christel Gaibor and
Dra. Blanca Gómez de la Torre
Procuraduría General del Estado
Av. Amazonas N39-123 y Arízaga
Quito, Ecuador
and
Messrs. Pierre Mayer, Eduardo Silva Romero
and José-Manuel García Represa
Dechert LLP
32 rue de Monceau
Paris, France 75008

Date: December 13, 2013

TABLE OF CONTENTS

A. THE PARTIES

1. The Claimant is Burlington Resources Inc. ("**Burlington**"), a company incorporated under the laws of the state of Delaware. The Respondent is the Republic of Ecuador ("**Ecuador**").

B. PROCEDURAL HISTORY

2. On August 4, 2008, Burlington, represented by the law firm Freshfields Bruckhaus Deringer ("**Freshfields**"), appointed Professor Francisco Orrego Vicuña to serve as arbitrator in this case. The Arbitral Tribunal was constituted on November 18, 2008, and the proceedings began on that date.

3. On January 20, 2009, the Tribunal and the Parties held a first session in Paris, France. On April 17, 2009, the Tribunal held a hearing on provisional measures in Washington D.C. On January 22, 2010, the Tribunal held a hearing on jurisdiction in Paris, issuing its Decision on Jurisdiction on June 2, 2010. A dissenting opinion by Professor Orrego Vicuña was attached to the Decision on Jurisdiction. The Tribunal then held a hearing on liability in Paris from March 8 through 11, 2011, issuing a Decision on Liability on December 14, 2012. A dissenting opinion by Professor Orrego Vicuña was attached to the Decision on Liability.

4. On July 8, 2013, Dechert (Paris) LLP ("**Dechert**"), counsel representing Ecuador, sent an unsigned letter (the "**July 8 letter**") to Professor Orrego Vicuña regarding news reports stating that he had been appointed as arbitrator multiple times ("**repeat appointments**") by Freshfields. In this context, Ecuador asked Professor Orrego Vicuña to disclose all of his appointments in cases in which Freshfields acted or acts as counsel, and in particular any cases accepted after signing his Declaration pursuant to ICSID Arbitration Rule 6 on August 11, 2008 (the "**2008 Declaration**"). Ecuador also asked for disclosure of the compensation paid in these proceedings.

5. On July 11, 2013, the Tribunal and the Parties held a telephone conference to discuss organizational matters ("**the July 11 conference**"). At the end of the conference, Professor Orrego Vicuña enquired as to the origin of the July 8 letter, mentioning that it was not signed. Counsel for Ecuador apologized for having sent the letter unsigned, indicating that this had been an administrative mistake.

6. On July 12, 2013, Professor Orrego Vicuña answered the July 8 letter (the "**July 12 response**"), providing the list of cases requested by Ecuador.

7. On July 24, 2013, Ecuador proposed the disqualification of Professor Orrego Vicuña (the "**Proposal**").

8. On July 25, 2013, the ICSID Secretariat notified the Parties that the proceedings were suspended until the Proposal was decided, pursuant to Rule 9(6) of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"). Professors Gabrielle Kaufmann-Kohler and Brigitte Stern ("**the unchallenged arbitrators**") were seized of

the challenge pursuant to Article 58 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**the ICSID Convention**").

9. On July 27, 2013, Burlington filed a Response to the Proposal (the "**Response**"), in which it proposed a briefing schedule for the disqualification procedure that would ensure the hearing scheduled to be held in August 2013 could take place. Burlington also invited the unchallenged arbitrators to issue a summary decision on the disqualification proposal, which could be supplemented at a later date.

10. On July 28, 2013, the unchallenged arbitrators invited Ecuador to comment on Burlington's proposed schedule.

11. On July 29, 2013, Ecuador submitted its comments on Burlington's proposed schedule. Besides raising arguments related to the merits of the Proposal, Ecuador acknowledged its duty to pursue its counterclaims as rapidly as possible, but stated that this duty had to "be balanced by the need to conduct this arbitration in a fair and cost and time effective manner". Accordingly, Ecuador proposed an alternative schedule.

12. Also on July 29, 2013, the unchallenged arbitrators fixed a calendar for the next steps in the disqualification procedure: Professor Orrego Vicuña would furnish explanations pursuant to Arbitration Rule 9(3) at his earliest convenience; Ecuador would submit a reply within 5 calendar days of receipt of Professor Orrego Vicuña's explanations; the Claimant would submit a rejoinder within 5 calendar days of receipt of the reply; and the unchallenged arbitrators would advise the Parties on further steps, including an estimated date of issuance of their decision, within 5 calendar days of receipt of the rejoinder.

13. On July 31, 2013, Professor Orrego Vicuña furnished his explanations. On the same day, the unchallenged arbitrators and the Parties held a telephone conference to address the calendar for the Parties' outstanding submissions on the Proposal, and the possibility of maintaining the August hearing.

14. During the telephone conference, the Parties agreed, and the unchallenged arbitrators confirmed in a subsequent letter, that Ecuador would submit its reply by August 5, 2013, and that Burlington would file its rejoinder by August 7, 2013. At the end of the conference, the President of the Tribunal asked the Parties to address two questions in their submissions:

    (1) What are the applicable standards for disclosure in an ICSID arbitration and what are the consequences of a breach of the duty to disclose?

    (2) Do parties to an ICSID arbitration have a duty to inquire about facts that may give rise to doubts as to an arbitrator's independence and impartiality? If such a duty exists, what is its source and scope?

15. On August 5, 2013, Ecuador filed a Reply to the Proposal (the "**Reply**") and on August 7, 2013, Burlington filed a Rejoinder on the Proposal (the "**Rejoinder**").

16. On October 15, 2013, Professors Kaufmann-Kohler and Stern advised the Secretary-General of ICSID that they had failed to reach a decision on the proposal to disqualify Professor Orrego Vicuña. On the same date, the Secretary-General informed the Parties that the decision on the Respondent's Proposal would now be taken by the Chairman of the Administrative Council ("**Chairman**"), in accordance with Article 58 of the ICSID Convention.

17. On October 21, 2013, Ecuador sent a letter to ICSID noting an LCIA Decision on Challenge of Arbitrator (LCIA Reference No. 1303). On October 24, 2013, Burlington objected to Ecuador's letter of October 21 and stated that the LCIA decision did not establish any governing principles of law as it was grounded on the specific facts of that case.

C. POSITION OF THE PARTIES

I. Ecuador's Position

18. On July 8, 2013, Ecuador asked Professor Orrego Vicuña to disclose "all cases that [he] accepted [as arbitrator] in which Freshfields acts as counsel", including the amount of fees received on account of those cases.[1] It stated that it had become aware of repeat appointments of Professor Orrego Vicuña by Freshfields through an article published in an arbitration newsletter on June 20, 2013.[2] This article addressed a decision on a proposal to disqualify Professor Orrego Vicuña in *Rusoro v. Venezuela*.[3] Ecuador stressed that Professor Orrego Vicuña had not disclosed in this proceeding any appointment in cases in which Freshfields acted or acts as counsel since his appointment and declaration in 2008.

19. Ecuador noted that its concern was even greater since it learned at the same time that in the *Rusoro* case Professor Orrego Vicuña had disclosed his appointment in *Repsol v. Argentina*.[4] Ecuador stated that it was unaware of this second appointment and argued that such disclosure should have been made in the present case.[5]

20. Ecuador's Proposal was based on three grounds:

(i) Professor Orrego Vicuña had been appointed by Freshfields in an "unacceptably high number of cases";[6]

(ii) Professor Orrego Vicuña breached his continuing obligation to disclose any circumstance that might cause his reliability for independent judgment to be questioned;[7] and

---

[1]Ecuador's Proposal For Disqualification of Professor Francisco Orrego Vicuña of July 24, 2013 (the "**Proposal**"), ¶3.
[2]Global Arbitration Review, *Arbitrator survives challenge over Freshfields appointments*, published on June 20, 2013 **(Exh. E-381)**.
[3]*Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB(AF)/12/5), Decision of June 20, 2013.
[4]*Repsol S.A. and Repsol Butano S.A. v. Argentine Republic* (ICSID Case No.ARB/12/38).
[5]Proposal, ¶ 6, footnote 2.
[6]*Id.*, ¶¶ 5, 41, 42-57.
[7]*Id.*, ¶¶ 5, 41, 58-70.

(iii) Professor Orrego Vicuña had displayed "a blatant lack of impartiality to the detriment of Ecuador" during the course of this arbitration.[8]

21. Regarding the first ground, Ecuador noted that Professor Orrego Vicuña has been appointed in eight ICSID cases by the same law firm between 2007 and 2013. It considers this an "excessively high number of appointments by the same law firm during such a limited period of time".[9]

22. The eight cases referred to in Ecuador's Proposal[10] are:

i. *Eni Dacion B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/04);

ii. *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/05);

iii. *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/08/07);

iv. *EVN AG v. Macedonia, former Yugoslav Republic* (ICSID Case No. ARB/09/10);

v. *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8);

vi. *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11);

vii. *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5);

viii. *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38).

23. Ecuador distinguished the *Rusoro* disqualification decision from the present case. According to published reports, the *Rusoro* tribunal rejected the challenge of Professor Orrego Vicuña because Venezuela had been aware of eight appointments since 2008, and a potential ninth, in cases where Freshfields acted or acts as counsel, and that the additional appointment in the *Repsol* case was not sufficient to disqualify Professor Orrego Vicuña. Ecuador noted the *Rusoro* tribunal's recognition that "excessive dependence on one law firm can be seen as undermining an arbitrator's independence, can require full disclosure, and may even lead to a successful challenge."[11] Ecuador also asserted that "the number of acceptable appointments needs to be determined in each case based on the circumstances."[12]

24. According to Ecuador, Professor Orrego Vicuña's excessive dependence on Freshfields is shown by his eight appointments in ICSID cases since 2007, which undermines his independence in this case.[13]

---

[8] *Id.*, ¶¶ 5, 41, 71-76.
[9] *Id.*, ¶ 44.
[10] *Id.*, ¶ 42.
[11] *Id.*, ¶ 54.
[12] *Id.*, ¶ 56.
[13] *Id.*, ¶ 57.

25. With respect to the second ground for disqualification, Ecuador contended that Professor Orrego Vicuña failed to fulfill his duty of disclosure "both prior to and after his appointment."[14] Ecuador argued that at the time Professor Orrego Vicuña was appointed in the present case, he did not disclose his prior or contemporaneous appointments by Freshfields in the *ENI Dación BV v. Venezuela* and *Itera v. Georgia* ICSID cases. Ecuador noted that subsequently, Professor Orrego Vicuña failed to disclose his appointments by Freshfields in five additional ICSID cases, contrary to the obligation he had assumed in his 2008 Declaration.[15]

26. Ecuador argued that Professor Orrego Vicuña had adopted an inconsistent view of his duty of disclosure.[16] To substantiate its allegation, Ecuador submitted Professor Orrego Vicuña's declaration of June 6, 2011 in *Pan American Energy v. Bolivia*, a case in which Dechert acted as counsel for Bolivia and in which Professor Orrego Vicuña disclosed that he had been appointed as an arbitrator by Freshfields in *Itera, EVN*, and *Burlington*.[17]

27. Responding to Professor Orrego Vicuña's explanation that all his appointments were readily accessible on the ICSID website, Ecuador noted three points:

(i) The ICSID website only started identifying counsel at the end of 2010, over two years after the 2008 Declaration;[18]

(ii) The burden of disclosure lies on Professor Orrego Vicuña, who assumed a continuing obligation in his 2008 Declaration. Ecuador had no obligation to investigate an arbitrator's appointments;[19]

(iii) Professor Orrego Vicuña's conduct had been inconsistent since he disclosed his Freshfields appointments in the *Rusoro* case only upon request by one party, but made such disclosure *sua sponte* in the *Pan American* case in June 2011.[20]

28. Ecuador cited decisions[21] on the scope of the duty of disclosure to demonstrate that Professor Orrego Vicuña was obliged to inform Ecuador of all his appointments by Freshfields.[22] It relied on the following factors identified in *Suez*: (1) whether the failure to disclose was inadvertent or intentional, (2) whether it was the result of an honest exercise of discretion, (3) whether the non-disclosed facts raise obvious questions about impartiality and independence, and (4) whether the non-disclosure is an

---

[14] *Id.*, ¶ 60.
[15] *Id.*, ¶ 60-61.
[16] *Id.*, ¶ 62.
[17] Signed Declaration of Professor Orrego Vicuña in the *Pan American* case, June 6, 2011 **(Exh.E-384)**.
[18] Proposal, ¶ 64.
[19] *Id.*, ¶ 65.
[20] *Id.*, ¶ 66.
[21] *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB/10/5) ("**Tidewater**"); *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) and *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic* (ICSID Case No. ARB/03/19), (together "**Suez**").
[22] Proposal, ¶ 67.

aberration on the part of a conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality.[23]

29. Ecuador noted that Professor Orrego Vicuña's ICSID appointments by Freshfields were not publicly known until after he signed his declaration on August 11, 2008, and that the failure to disclose these form part of a pattern of circumstances raising "obvious questions" as to Professor Orrego Vicuña's impartiality and independence, thus fulfilling the *Suez* test.[24]

30. With respect to the third ground for disqualification, Ecuador argued that Professor Orrego Vicuña demonstrated a manifest lack of independence and impartiality to the detriment of Ecuador in the conduct of the proceedings, including at the July 11, 2013 telephone conference.[25] Ecuador alleged that "the vast majority of questions" asked by Professor Orrego Vicuña during the hearings were favorable to the Claimant or attempted to undermine Ecuador's position and the credibility of some of its witnesses.[26]

31. Ecuador submitted that Professor Orrego Vicuña demonstrated "a pattern of consistently dissenting from the Arbitral Tribunal's majority on those points that were decided in Ecuador's favor."[27]

32. In Ecuador's Reply, it argued that Professor Orrego Vicuña's July 31 explanations show partiality and loss of neutrality, both in tone and content.[28] Ecuador stated that Professor Orrego Vicuña's *in personam* attacks directed at Dechert, which represents Ecuador in this case, demonstrate a strong bias against it.[29] In particular, the Respondent argued that these explanations are "shocking and unacceptable", demonstrating an "intolerable lack of impartiality", thus removing any possible doubts as to the need to remove Professor Orrego Vicuña from the Tribunal.[30]

33. Ecuador observed that Professor Orrego Vicuña "confuses the requirement to disclose a potential conflict of interest with the decision as to whether the number of appointments creates a conflict of interest".[31] By stating that "in the circumstances of this case no such conflict of interest arises in my understanding", Professor Orrego Vicuña failed to account for the viewpoint of the Parties.

34. Ecuador rebutted Professor Orrego Vicuña's statement that all information about his professional activities is public. For example, it noted that appointments in ICC or UNCITRAL cases are not always public, thus necessitating disclosure by the

---

[23] *Id.*, ¶ 68.
[24] *Id.*, ¶ 70.
[25] *Id.*, ¶ 71.
[26] *Id.*, ¶ 72.
[27] *Id.*, ¶ 73.
[28] Ecuador's Reply on the Proposal for Disqualification of Professor Francisco Orrego Vicuña of August 5, 2013 ("**Reply**"), ¶¶ 7-13.
[29] *Id.*, ¶¶ 9-10.
[30] *Id.*, ¶¶ 2-3.
[31] *Id.*, ¶ 15.

arbitrator.[32] In this context, Ecuador argued that the burden of providing information is on the arbitrator, and the Parties have no obligation to obtain such information.

35. Ecuador argued that it had no duty to continuously investigate arbitrators in the framework of an ICSID arbitration.[33] It recognized that it is standard practice to investigate arbitrators at the initial moment of their appointment, but that this practice does not create a positive duty to investigate an arbitrator throughout the proceeding.[34] Furthermore, it argued that practical reasons militate against the existence of such a duty.[35]

36. Ecuador also argued that Professor Orrego Vicuña's July 31 explanations were an attack on its counsel that demonstrated he had "stepped outside of his role as arbitrator" and could no longer be seen as a neutral decision maker.[36]

37. Ecuador stated that Burlington failed to show that the proposal was not timely filed.[37] According to Ecuador, the word "promptly" in Arbitration Rule 9(1) refers to "the date of actual knowledge" of the event.[38] Ecuador argued that it only became aware of the full extent of Professor Orrego Vicuña's appointments by Freshfields through his July 12 response. The proposal was filed on July 24, 2013, 13 days later, and hence was promptly filed.[39]

38. Finally, Ecuador submitted that "Professor Orrego Vicuña's bias has [...] become evident based on the Comments that he submitted in response to Ecuador's Proposal for Disqualification. Such bias therefore also requires his disqualification."[40]

II. Burlington's Position

39. Burlington responded that Ecuador's Proposal was untimely and unfounded.[41] It claimed that the proposal to disqualify represented "a transparent attempt to sabotage these proceedings", most notably with regard to the August hearing.[42]

40. Burlington argued that the Proposal was belated with respect to both repeat appointments and the alleged bias during the proceedings. A proposal for disqualification must be made "promptly" and a failure to do so amounts to a waiver.[43]

41. Burlington submitted that all the information on which Ecuador relied had been public before or by February 19, 2013,[44] hence the trigger for Ecuador's challenge was not

---

[32] *Id.*, ¶ 18.
[33] *Id.*, ¶¶ 78-94
[34] *Id.*, ¶ 87.
[35] *Id.*, ¶¶ 87-94.
[36] *Id.*, ¶¶ 27 and 29.
[37] *Id.*, ¶ 31.
[38] *Id.*, ¶¶ 33-34.
[39] *Id.*, ¶¶ 35-36.
[40] *Id.*, ¶ 60.
[41] Burlington's Response to Respondent's Proposal to Disqualify Professor Francisco Orrego Vicuña ("**Response**"), ¶ 1.
[42] *Id.*, ¶ 3.
[43] *Id.*, ¶ 13.
[44] *Id.*, ¶ 2.

June 20, 2013. It noted that Professor Orrego Vicuña was appointed to the *Rusoro* case on October 15, 2012, and this fact had been public since then.[45] The appointment in *Repsol*, on which Ecuador relies, was disclosed in the media on February 19, 2013, and was published on the ICSID website on or around March 6, 2013, "about 140 days, or almost three times the delay considered sufficient to warrant dismissal of a challenge in the *Suez* case".[46] Relying on case law, and on Ecuador's own pleadings in another case[47], Burlington argued that Ecuador waived its right to challenge Professor Orrego Vicuña on the basis of these repeat appointments because it waited more than four months after the relevant facts became public to make this challenge.[48]

42. Burlington argued that the challenge based on Professor Orrego Vicuña's conduct during the arbitration was not promptly filed. The hearing on liability took place over two years earlier and the dissent in the Decision on Liability was issued more than six months earlier, thus the Proposal "falls manifestly outside the scope of a "prompt" application for disqualification".[49]

43. Burlington submitted that Ecuador "misunderstands or chooses to misunderstand the party-driven nature of arbitral appointments".[50] In the present case, different parties being advised by the same law firm appointed Professor Orrego Vicuña to the eight cases under scrutiny. As a result, it argued that Ecuador's Proposal "implicitly threatens the due process right of all parties in investment arbitration to their choice of arbitrators under the ICSID Convention – and, indeed, to their choice of counsel".[51]

44. Burlington submitted that the Proposal did not reach the high standard for disqualification in Article 57 of the ICSID Convention.[52]

45. It argued that non-disclosure of the appointment in *Repsol* does not in itself support a challenge based on repeat appointments, but merely justifies enquiring into potential economic dependence between the appointed arbitrator and the law firm.[53] Professor Orrego Vicuña has been appointed in more than eighty cases over his career, and has held other important functions, thus he was not economically dependent on Freshfields nor did he derive a significant portion of his income from these appointments.[54] In the present case, Ecuador had made no attempt to prove such economic dependence.

46. Relying on prior decisions, in particular on *Tidewater*[55], Burlington argued that multiple appointments by the same party, *without more*, are not a valid ground for a challenge.[56]

---

[45] *Id.*, ¶ 15.
[46] *Id.*, ¶ 13.
[47] *Murphy Exploration and Production Company International v. Republic of Ecuador,* UNCITRAL Arbitration pursuant to the Ecuador-United States BIT.
[48] Response, ¶¶ 17-18.
[49] *Id.*, ¶ 20.
[50] *Id.*, ¶ 25.
[51] *Id.*, ¶ 25.
[52] *Id.*, ¶ 26.
[53] *Id.*, ¶ 34.
[54] *Id.*, ¶ 39.
[55] *Tidewater supra* note 21, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern (December 23, 2010) **(Exh. CL 299)**.

47. Burlington argued that Ecuador's allegations of bias in the conduct of the arbitration were without merit and "a vexatious attempt to improperly review ordinary arbitral discretion".[57]

48. In its Rejoinder, Burlington reiterated that Ecuador had not provided any facts that would lead an objective observer to discern a manifest lack of independence of Professor Orrego Vicuña.[58]

49. Burlington stated that all the facts on which Ecuador relied were public for many months before Ecuador filed its Proposal. Furthermore, Burlington argued that counsel for Ecuador acknowledged that it was aware of five of the eight appointments of Professor Orrego Vicuña since June 2011. The sixth appointment in the *Ampal* case was published in the media on October 22, 2012; the seventh appointment in the *Rusoro* case was reported in the media on January 9, 2013; and the eighth appointment in the *Repsol* case was made public in media reports on February 19, 2013, and could be accessed on the ICSID website as of March 2013.[59] Additionally, Burlington argued that each of these appointments forming the basis of the challenge – including *Rusoro*, *Repsol* and *Ampal* - were disclosed on the ICSID website.[60]

50. Burlington argued that knowledge of notorious facts should be imputed to Ecuador and its specialist counsel, and that Burlington could not be asked to prove that Ecuador had knowledge of public facts.[61] Burlington noted that Ecuador acknowledged that certain domestic legal systems recognize a "should have known" standard, and submitted that this standard should apply in the present context.[62] According to Burlington, Ecuador's "willful blindness" is in breach of good faith.[63]

51. Burlington argued that the standard to disqualify an ICSID arbitrator is very high, that the manifest lack of independence must be established by objective evidence, and that supposition or speculation cannot substitute for proof of facts.[64]

52. Burlington further argued that Ecuador's claims of bias on the basis of Professor Orrego Vicuña's July 31 explanations were without merit, as he simply exercised his right to respond under the ICSID system.[65]

---

[56]Response, ¶ 37.
[57]*Id.*, ¶ 42.
[58]Burlington's Rejoinder to Respondent's Proposal to Disqualify Professor Francisco Orrego Vicuña ("**Rejoinder**"), ¶ 5.
[59]*Id.*, ¶ 6.
[60]*Id.*, ¶ 55.
[61]*Id.* ¶ 7.
[62]*Id.*, ¶¶ 7, 49 and 50.
[63]*Ibid,* ¶ 56.
[64]Rejoinder, ¶¶ 16-17; *Opic Karimun Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB/10/14) ("**OPIC**"), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) ¶ 45 **(Exh. CL-302)**; *Participaciones Inversiones Portuarias SARL v. Gabonese Republic* (ICSID Case No.ARB/08/17), Decision on Proposal for Disqualification of an Arbitrator (November 12, 2009), ¶ 22 **(Exh. CL-310)**; *S.G.S. Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No.ARB/01/13), Decision on Claimant's Proposal to Disqualify Arbitrator (December 19, 2002) ¶ 26 **(Exh. CL-311)**.

53. Burlington asserted that no challenge on the ground of repeat appointments had been successful.[66] It stated that repeat appointments give rise to concern only if they create a financial dependence. In the three relevant cases, repeat appointments by the same party, without more, did not constitute a valid ground for a challenge.[67] *A fortiori*, this should apply to cases where different parties appoint the same arbitrator, even if they are represented by the same law firm.[68]

54. Additionally, Burlington argued that good faith requires parties to exercise at least minimal due diligence with respect to the relationship of arbitrators and opposing counsel. If there are facts that should have prompted a party to make further inquiry during an arbitral proceeding, the party may not later claim bias on the basis of those facts.[69] According to Burlington, this reasoning is especially relevant in this case because Professor Orrego Vicuña's appointments were public.[70] It also argued that Ecuador could easily have discovered the relevant appointments, for example by a "Google Alert", and thus Ecuador's challenge had not been brought in good faith.[71]

55. Finally, Burlington argued that upholding Ecuador's challenge on the basis of repeat appointment would have negative systemic effects for investment arbitration[72] and that repeat appointments are "a necessary part of the practice for the foreseeable future".[73]

D. PROFESSOR ORREGO VICUÑA'S EXPLANATIONS

56. On July 12, 2013, Professor Orrego Vicuña disclosed all of his Freshfields appointments, as requested by Ecuador.[74] Professor Orrego Vicuña also furnished explanations pursuant to ICSID Arbitration Rule 9(3) on July 31, 2013.[75]

57. In his July 12 letter, Professor Orrego Vicuña acknowledged the duty to continuously disclose any circumstance that might raise doubts as to his independent judgment and stated that "none of the appointments made in any way interferes with the arbitrator's independence to judge impartially" in this case.

58. Professor Orrego Vicuña noted that all the information requested was posted on the ICSID website. Regarding *Repsol*, Professor Orrego Vicuña explained that he disclosed that appointment because a party in *Rusoro* requested a list of all his appointments, just as Dechert was doing now.

---

[65] *Id.*, ¶ 21.
[66] *Id.*, ¶ 33.
[67] *Tidewater, supra* note 55; *OPIC supra* note 64; and *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB/10/09), Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (May 20, 2011) **(Exh.CL-301)**.
[68] Rejoinder, ¶ 36.
[69] *Id.*, ¶ 49.
[70] *Id.*, ¶ 50.
[71] *Id.*, ¶¶ 53 and 56.
[72] *Id.*, ¶ 57.
[73] *Id.*, ¶ 63.
[74] See *supra* ¶ 6.
[75] See *supra* ¶13.

59. Pursuant to Ecuador's request, Professor Orrego Vicuña disclosed having been appointed in seven other cases since 2007 where Freshfields acted or acts as counsel: *ENI Dación BV v. Venezuela* in 2007, *Itera International Energy LLC and Itera Group v. Georgia* in 2008, *EVN AG v. Macedonia* in 2009, *Pan American Energy v. Bolivia* in 2011, *Ampal-American Israel Corporation v. Egypt* in 2012, *Rusoro Mining Ltd v. Venezuela* in 2012, and *Repsol, S.A. and Repsol Butano, S.A. v. Argentina* in 2013. He noted that *ENI Dación* was settled in 2008 before the tribunal was constituted, and that *Itera* and *EVN* were discontinued in the early stages of the proceedings in 2010 and 2011 respectively. He also indicated that the remaining four cases were still in the early stages of the proceedings. Professor Orrego Vicuña noted that the appointments in *ENI, Itera, EVN* and *Burlington* were made more than three years ago.

60. With respect to fees earned in these arbitrations, Professor Orrego Vicuña did not disclose his remuneration in these cases and referred to any institutional policy which ICSID may have in respect of disclosure of fees.

61. In his July 31 explanations, Professor Orrego Vicuña stated as follows:

> "I appreciate your invitation to comment on the proposal for disqualification that Dechert LL. P. has brought on behalf of the Government of Ecuador in respect of this arbitrator in Burlington v. Ecuador. I should state at the outset that I have had and continue to have the most harmonious and respectful relations with the government of Ecuador in many dispute settlement proceedings and other work in the field of international law and related subjects, and that at no point I have experienced the mistrust that Dechert now invokes as an over-dramatization of this challenge. The same hold true for counsel from Dechert.
>
> These comments shall not deal with the applicable law as this aspect has already been discussed in detail by counsel for the parties. I shall restrict these comments to factual questions in respect of which I believe that counsel for Dechert is wrong.
>
> The first such question is the alleged non-compliance with the continuing obligation to disclose potential conflicts of interest. I fully agree with this principle but, as held in many disqualification cases, the number of appointments does not per se create a conflict of interest and the circumstances of each case must be considered individually. In the circumstances of this case no such conflict of interest arises in my understanding as I have kept with my tradition of being fully independent from the parties, including financial aspects. It is thus an overstatement to argue, like Dechert does, that several appointments make highly probable that an arbitrator cannot be relied upon to exercise independent and impartial judgment.
>
> All my professional activities are in any event in the public knowledge, not least fully reported in the ICSID webpage and on many occasions, like in Repsol, in the press. The editors for the Global Arbitration Review will no doubt be delighted to learn that it has become a source of information capable of triggering a challenge, but the fact of the matter is that the Repsol appointment has been reported in the press for many months, including the Financial Times, the Wall Street Journal and the press throughout Latin America.
>
> Dechert further asserts that I would have continuously supported Freshfields position in the cases to which I have been appointed by the latter. One may

wonder on which information Dechert bases its conclusion in this respect, as not even I know that. In fact, the Eni case was settled before the tribunal was constituted and EVN was settled before proceedings started. The Itera case was settled during its early phase, and Pan American, Ampal, Rusoro and Repsol are also at the start-up period. That conclusion is rather based on speculation. The only case that has had a record of relevant time is Burlington.

Dechert also finds inconsistency in the fact that while no prior cases were reported at the time of the Burlington statement of independence made by this arbitrator in 2008, in other later cases complete listing of appointments were indicated. The reason appears to be simple. Before 2008 there were no cases, as the Eni case did not see a tribunal established in 2007 or at any time thereafter. In the following years the policy in respect of disclosing gradually changed, in part as a result of ICSID practice and in part because of the IBA Guidelines on conflicts of interest had become of common application. This is the very reason why all such information was later published in the ICSID webpage.

A second issue that needs to be commented on is why only ICSID cases have been disclosed by this arbitrator in recent correspondence. The reason is still more evident. There are no other appointments by Freshfields in any other forum at any other time. Dechert, like Holey Foag did in Rusoro, has come up with a new standard in respect of appointments of judges ad-hoc to the International Court of Justice, asserting that counsel for the appointing government in a given case before that Court have to be counted among the cases in respect of which disclosure is required under arbitration proceedings.

With respect, this new purported standard is utterly wrong. Judges ad-hoc are nominated by governments but confirmed by the Court and both under the Statute and Rules of the Court they have the same obligations of impartiality and independence as any other judge. Judges ad-hoc are indeed members of the Court like any other Judge. They do not represent the nominating government and have no links of dependency with that government, least of all with any counsel that governments decide to appoint. Moreover, the Court requests comments from the other party so as to ascertain whether there could be any objection to that appointment. This has been the procedure followed in the Peru-Chile maritime delimitation dispute before that Court, which Dechert brings up as a non-ICSID case that was not reported.

A third issue concerns Dechert's allegations in respect of the behavior of this arbitrator in the Burlington case, arguing that there is a blatant lack of impartiality to the detriment of Ecuador. Dechert indicates as examples of this behavior the fact that I partly dissented on the decision on jurisdiction and also partly dissented in the decision on liability. Those dissents are partial dissents and Dechert fails to note that in many other matters I concurred with the Tribunal. Neither is Dechert privy to the deliberations of the Tribunal where many other points of agreement are regularly reached.

More importantly, those dissents concern subjects on which I have long held publicly known views, in particular the interpretation of treaties, privity in international arbitration and questions concerning the umbrella clause. All of it has been addressed in scholarly publications that are well known and could hardly be regarded as views held in detriment of Ecuador. The very counsel for

> Dechert have cited to some of these publications in the submissions before the Tribunal when convenient to their position.
>
> Arbitrators are appointed by the parties not because they favor such party but because their previously held views are considered the right ones. It is then for the tribunal to decide on which party is right or wrong, taking into account both the law and the facts of the case. I have known of no party appointing an arbitrator that holds views contrary to that party's understanding of its rights. I can assume that this is also what Dechert does when requested by a client to propose the names of likely arbitrators for appointment.
>
> Dechert also complains about this arbitrator's behavior in the hearing on liability and in a recent telephone conference on pre-hearing arrangements to the hearing that had been scheduled for August. For an arbitrator to ask questions at a hearing is a fundamental right that it is not to be suppressed as otherwise only questions of the like of one party could be asked either to the parties or to their witnesses. Both parties had the opportunity to answer such questions and no complaints were made in this respect. None of it could be attributed to an intention to cast Ecuador's position in an unfavorable light as argued by counsel for Dechert.
>
> The telephone conference is not different. This arbitrator had the right to ask about the meaning of an unsigned *ex parte* letter he had received from Dechert. It was then explained that it was meant to be signed by counsel Eduardo Silva Romero and that the fact that it had not been signed was purely an administrative mistake, for which he apologized. Now it is argued that to ask such question is a reason for disqualification. Neither to ask about the implications of that letter for the programmed hearing is in any way a form of misbehavior, particularly when the implications asked about turned to be very real.
>
> Lastly there are some ethical assertions that cannot be left unanswered. Dechert admonishes this arbitrator to resign on ethical grounds as if Dechert's views were proven correct. This is certainly not the case. Moreover, the real ethical question seems to lie with Dechert's submissions and the handling of confidential information. To the best of this arbitrator's knowledge the correspondence concerning disclosure and other matters in Pan American v. Bolivia is part of the confidential record of that case. Dechert is in the knowledge of such correspondence as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert, a use that in any event should be consented to by the other party to that case.
>
> Thank you again for the invitation to comment."

62. In summary, Professor Orrego Vicuña rejected Ecuador's allegations of partiality in the course of the arbitration.

E. DECISION BY THE CHAIRMAN

I. Applicable Legal Standard

63. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

> *"A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."*

64. Article 14(1) of the ICSID Convention provides:

> *"Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators".*

65. While the English version of Article 14 of the ICSID Convention refers to "*independent judgment*," the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). [76] Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.[77]

66. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control.[78] Independence and impartiality both "*protect parties against arbitrators being influenced by factors other than those related to the merits of the case*".[79] Articles 57 and 14(1) of the ICSID

---

[76]The French version refers to "*indépendance dans l'exercice de leurs fonctions.*"

[77]***Suez***, *supra* note 21, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007), ¶ 28 **(Exh. EL-202, CL-294)**; ***OPIC***, *supra* note 64, ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012), ¶ 59 ("***Getma***") **(Exh. EL-220)**; *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB/07/30), Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012), ¶ 54 ("***ConocoPhillips***") **(Exh. EL-212)**; *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No.ARB/07/16), Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, (March 19, 2010) ¶ 36 ("***Alpha***") **(Exh. CL-296, EL-205)**; *Tidewater supra* note 55, ¶ 37; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB/12/13), Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013),¶ 55 ("***Saint-Gobain***") **(Exh. EL-201)**.

[78]*Suez*, *supra* note 21, ¶ 29; *Getma*, *supra* note 77,¶ 59; *ConocoPhillips*, *supra* note 77, ¶ 54

[79]*ConocoPhillips*, *supra* note 77, ¶ 55; *Universal supra* note 67 ¶ 70; *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 (August 12, 2010), ¶ 43 ("***Urbaser***").

Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.[80]

67. The applicable legal standard is an "objective standard based on a reasonable evaluation of the evidence by a third party".[81] As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[82]

68. Regarding the meaning of the word "manifest" in Article 57 of the Convention, a number of decisions have concluded that it means "evident" or "obvious,"[83] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[84]

69. The Chairman notes that the Parties in this case have relied in varying degrees on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines").[85] The IBA Guidelines, which are not binding in an ICSID challenge, have been recognized as useful guidance in prior cases.[86] While it is true that these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

II. Analysis

70. Three grounds are invoked to disqualify Professor Orrego Vicuña:

i. His repeat appointments as arbitrator by Freshfields;

ii. His non-disclosure of these appointments in this case; and

iii. His conduct in these proceedings, including his dissent from the Tribunal's 2010 Decision on Jurisdiction and 2012 Decision on Liability; and his conduct during the pre-hearing telephone conference of July 11, 2013, in his July 12 response and July 31 explanations.

71. Arbitration Rule 9(1) reads as follows:

---

[80] *Urbaser*, *supra* note 79, ¶ 43
[81] *Suez*, *supra* note 77, ¶¶ 39-40
[82] *Idem.*
[83] *Suez*, *supra* note 77, ¶ 34; *Alpha*, *supra* note 77, ¶ 37; *Universal*, *supra* note 67, ¶ 71.
[84] C. Schreuer, The ICSID Convention, Second Edition (2009), p. 1202, ¶¶ 134-154; *Saint-Gobain*, *supra* note 77, ¶ 59.
[85] Ecuador stated that "the IBA Guidelines do not apply in this case" (Proposal, note 17) and Burlington stated that "(t)he IBA Rules on Conflicts were primarily designed for commercial arbitrations where the pool of available experienced arbitrators and the pool of competent law firms is extremely broad. The same is not true for investment arbitrations, where the pool of arbitrators and law firms with real experience is very small" (Response, ¶ 29).
[86] *Alpha*, *supra* note 77, ¶ 56; *Urbaser supra* note 79, ¶ 37.

> "*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.*"

72. 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."[87]

73. As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case by case basis. In *Urbaser*, the tribunal decided that filing a challenge within 10 days of learning of the underlying facts fulfilled the *promptness* requirement.[88] In *Suez*, the tribunal held that 53 days was too long.[89] In *Azurix*, the tribunal found that 8 months was too long.[90] In *CDC*, a filing after 147 days was deemed untimely[91] and in *Cemex*, 6 months was considered too long.[92]

74. In this case the Respondent acknowledges that it knew of four of the eight appointments of Professor Orrego Vicuña since June 2011 [*EVN, Itera, Burlington and Pan American*]. In addition, the appointment of Professor Orrego Vicuña by Freshfields became public in October 2012 in the *Ampal* case, in January 2013 in the *Rusoro* case, and in February 2013 in the *Repsol* case. There is no doubt that all relevant information concerning the *Repsol, Ampal* and *Rusoro* cases was publicly available on the ICSID website before, or by, March 7, 2013.

75. Taking all of these facts into consideration, the Chairman finds that the Respondent had sufficient information to file its Proposal for Disqualification of Professor Orrego Vicuña on the basis of repeat appointments and non-disclosure of such appointments well before it did so on July 24, 2013. Similarly, the Respondent knew about Professor Orrego Vicuña's conduct at the 2011 hearing on liability and his dissents attached to the 2010 Decision on Jurisdiction and 2012 Decision on Liability, and these were not raised promptly. As a result, the Proposal is dismissed to the extent that it relies on these grounds of challenge.

76. The challenge based on Professor Orrego Vicuña's conduct following the July 8 letter was raised in a timely manner. The Chairman addresses below the merits of these grounds for challenge.

---

[87] *Suez*, *supra* note 77, ¶ 18.
[88] *Urbaser supra* note 79 ¶ 19.
[89] *Suez*, *supra* note 77, ¶ 26.
[90] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Challenge to the President of the Tribunal (February 25, 2005) (unpublished) (reported in the Decision on Annulment, 1 September 2009, ¶¶ 35 and 269).
[91] *CDC Group PLC v. Republic of Seychelles* (ICSID Case No.ARB/02/14), Decision on Annulment (June 29, 2005) ¶ 53.
[92] *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) ¶ 41 (**Exh. CL-295**).

77. As to Professor Orrego Vicuña's conduct during the July 11, 2013 teleconference, the Chairman notes the right of arbitrators to ask questions and satisfy themselves of the legal merits of the arguments put forward by the parties. The record in this case does not provide objective evidence of bias in this regard.

78. Professor Orrego Vicuña's written comments in **his July 31 explanations** are fully set out in paragraph 61 of this decision. To the extent that these comments address circumstances related to the proposal for disqualification they are relevant and appropriate, and do not provide a basis for challenge.

79. However, in this instance, the challenged arbitrator concluded his explanations with allegations about the ethics of counsel for the Republic of Ecuador. He stated:

> "[l]astly there are some ethical assertions that cannot be left unanswered. Dechert admonishes this arbitrator to resign on ethical grounds as if Dechert's views were proven correct. This is certainly not the case. Moreover, the real ethical question seems to lie with Dechert's submissions and the handling of confidential information. To the best of this arbitrator's knowledge the correspondence concerning disclosure and other matters in Pan American v. Bolivia is part of the confidential record of that case. Dechert is in the knowledge of such correspondence as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert, a use that in any event should be consented to by the other party to that case."

Such comments do not serve any purpose in addressing the proposal for disqualification or explaining circumstances relevant to the allegations that the arbitrator manifestly lacks independence or impartiality.

80. In the Chairman's view, a third party undertaking a reasonable evaluation of the July 31, 2013 explanations would conclude that the paragraph quoted above manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel. Therefore, on the facts of this case, the Chairman upholds the challenge.

F. DECISION

81. Having considered all of the facts alleged and the arguments submitted by the Parties, and for the above reasons, the Chairman decides that the Republic of Ecuador's proposal to disqualify Professor Francisco Orrego Vicuña is upheld.

[signed]

Chairman of the ICSID Administrative Council
Dr. Jim Yong Kim

ANEXO 18

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES
WASHINGTON, D.C.

EN EL ARBITRAJE ENTRE

REPSOL S.A. AND REPSOL BUTANO S.A.
DEMANDANTES

y

REPÚBLICA ARGENTINA
DEMANDADA

Caso CIADI No. ARB/12/38

DECISIÓN SOBRE LA PROPUESTA DE RECUSACIÓN A LA MAYORÍA DEL TRIBUNAL

PRESIDENTE DEL CONSEJO ADMINISTRATIVO
DR. JIM YONG KIM

Secretario del Tribunal
Sr. Gonzalo Flores

Fecha: 13 de diciembre de 2013

REPRESENTANDO A LAS DEMANDANTES:

SR. NIGEL BLACKABY
SR. LLUÍS PARADELL
SRA. NATALIA ZIBIBBO
FRESHFIELDS BRUCKHAUS DERINGER US LLP
701 PENNSYLVANIA AVENUE N.W., SUITE 600
WASHINGTON, D.C. 20004
Y
SR. MIGUEL VIRGÓS
SR. CÁNDIDO PAZ-ARES
SR. CARLOS PAREDES
URÍA MENÉNDEZ ABOGADOS, SLP
PRÍNCIPE DE RODRIGO URÍA
MADRID 28002
ESPAÑA
Y
SR. SANTIAGO CARREGAL
SR. ALBERTO MOLINARIO
SR. JULIO FERNÁNDEZ MOUJÁN
MARVAL, O'FARRELL & MAIRAL
AV. LEANDRO N. ALEM 928 PISO 7
BUENOS AIRES (C1001AAR)
ARGENTINA

REPRESENTANDO A LA REPÚBLICA ARGENTINA:

DRA. ANGELINA MARÍA ESTHER ABBONA
PROCURADORA DEL TESORO DE LA NACIÓN
PROCURACIÓN DEL TESORO DE LA NACIÓN ARGENTINA
POSADAS 1641
BUENOS AIRES (C1112ADC)
ARGENTINA

ÍNDICE

A. HISTORIA PROCESAL

1. El 3 de diciembre de 2012 Repsol S.A. y Repsol Butano S.A. ("**Demandantes**"), dos compañías incorporadas en el Reino de España, presentaron ante el Centro Internacional de Arreglo de Diferencias relativas a Inversiones ("**CIADI**" o "**Centro**") una Solicitud de Arbitraje en contra de la República Argentina ("**Argentina**").

2. El 18 de diciembre de 2012 la Secretaria General del CIADI registró la Solicitud de Arbitraje de conformidad con el Artículo 36(3) del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados ("**Convenio**").

3. Puesto que las Partes no lograron llegar a un acuerdo respecto al método de constitución del tribunal, el 19 de febrero de 2013 las Demandantes escogieron la fórmula prevista por el Artículo 37(2)(b) del Convenio. Las Demandantes designaron al Profesor Francisco Orrego Vicuña, nacional de la República de Chile, como árbitro y propusieron al Sr. Henri Álvarez, nacional de Canadá, como presidente del tribunal.

4. El 7 de marzo de 2013 el Centro informó a las Partes que el Profesor Orrego Vicuña había aceptado su nombramiento y les remitió copias de su declaración prestada de conformidad con la Regla 6(2) de las Reglas Procesales Aplicables a los Procedimientos de Arbitraje del CIADI ("**Reglas de Arbitraje**") y de su declaración adicional (adjuntas como **Anexo A** a esta Decisión).

5. El 11 de marzo de 2013 Argentina comunicó al Centro que se oponía a la propuesta de designación del Sr. Henri Álvarez como presidente del tribunal, que procedería a designar un árbitro en los próximos días, y que propondría la recusación del Profesor Orrego Vicuña una vez que el tribunal se constituyere.

6. El 15 de marzo de 2013 Argentina designó a la Profesora Brigitte Stern, nacional de la República de Francia, como árbitro en este caso.

7. El 20 de marzo de 2013 las Demandantes solicitaron que el Presidente del Consejo Administrativo del CIADI ("**Presidente**") designase al presidente del tribunal de conformidad con el Artículo 38 del Convenio y la Regla 4(1) de las Reglas de Arbitraje.

8. El 25 de marzo de 2013 el Centro informó a las Partes que la Profesora Brigitte Stern había aceptado su nombramiento y les remitió copias de su declaración prestada de conformidad con la Regla 6(2) de las Reglas de Arbitraje y de su declaración adicional.

9. El 29 de abril de 2013 el Centro propuso cinco candidatos para presidente del tribunal. El 17 de mayo de 2013 las Partes contestaron a esta propuesta. El 20 de mayo de 2013 el Centro informó a las Partes que no se había llegado a acuerdo sobre ninguno de los candidatos propuestos.

10. El 3 de mayo de 2013 el Profesor Orrego Vicuña presentó una segunda declaración adicional, copia de la cual fue transmitida por el Centro a las Partes el 5 de mayo de 2013 (adjunta como **Anexo B** a esta Decisión).

11. El 29 de mayo de 2013 el Centro informó a las Partes su intención de nombrar al Dr. Claus von Wobeser, nacional de los Estados Unidos Mexicanos y miembro de la Lista de Árbitros del Centro, como presidente del tribunal. El Centro invitó a las Partes a que comunicasen cualquier observación que pudieran tener respecto de este nombramiento. La carta del Centro incluyó una copia del *curriculum vitae* del Dr. von Wobeser y de una declaración del Dr. von Wobeser (adjunta como **Anexo C** a esta Decisión).

12. Mediante carta de 5 de junio de 2013 Argentina solicitó información adicional al Dr. von Wobeser. Dicha información fue proporcionada por el Dr. von Wobeser el 10 de junio de 2013 y transmitida el mismo día por el Centro a las Partes (adjunta como **Anexo D** a esta Decisión). El Centro invitó a las Partes a remitir cualquier observación que pudieran tener respecto a la designación del Dr. von Wobeser a más tardar el 17 de junio de 2013.

13. El Centro no recibió observaciones y por lo tanto informó a las Partes el 18 de junio de 2013 que procedería con el nombramiento del Dr. von Wobeser. Ese mismo día, Argentina informó al Centro que había presentado una carta con objeciones al nombramiento del

Dr. von Wobeser, la que no había sido recibida por el Centro debido a un desperfecto en las transmisiones electrónicas. Tras tomar conocimiento de esta situación, el Centro invitó a Argentina a remitir nuevamente dicha comunicación, la que fue recibida el 19 de junio de 2013.

14. El 24 de junio de 2013 las Demandantes comunicaron al Centro que no tenían objeciones al nombramiento del Dr. von Wobeser.

15. El 25 de junio de 2013 el Dr. von Wobeser remitió al Centro una declaración complementaria (adjunta como **Anexo E** a esta Decisión), que fue transmitida por el Centro a las Partes al día siguiente. El 26 de junio de 2013 Argentina remitió al Centro otra carta con objeciones al nombramiento del Dr. von Wobeser.

16. Tras considerar cuidadosamente las observaciones planteadas por Argentina, el 28 de junio de 2013 el Centro comunicó a las Partes que había decidido proceder con la designación del Dr. von Wobeser como presidente del tribunal.

17. Mediante carta de 11 de julio de 2013, la Secretaria General del CIADI notificó a las Partes que el Dr. von Wobeser había aceptado su nombramiento como presidente del tribunal y les remitió copias de su declaración prestada de conformidad con la Regla 6(2) de las Reglas de Arbitraje, y de su declaración adicional (adjuntas como **Anexo F** a esta Decisión). Además, la Secretaria General del CIADI informó a las Partes que el Tribunal se consideraba constituido y el procedimiento iniciado en esa misma fecha.

18. El 17 de julio de 2013, Argentina propuso la recusación del Profesor Orrego Vicuña y del Dr. von Wobeser, de conformidad con el Artículo 57 del Convenio del CIADI (la "**Propuesta**").

19. El 18 de julio de 2013, el Centro informó a las Partes que el procedimiento quedaba suspendido, de conformidad con la Regla 9(6) de las Reglas de Arbitraje, hasta que se tomase una decisión sobre la Propuesta. El Centro también fijó un calendario procesal para las presentaciones escritas de las Partes sobre la Propuesta.

20. En cumplimiento de dicho calendario procesal – que fuera posteriormente modificado por las Partes – Argentina presentó los fundamentos de su Propuesta el 29 de julio y las

Demandantes contestaron el 9 de agosto de 2013. El 16 de agosto de 2013, el Profesor Orrego Vicuña y el Dr. von Wobeser ofrecieron explicaciones, de conformidad con la Regla 9(3) de las Reglas de Arbitraje. El 26 de agosto de 2013, ambas Partes presentaron observaciones adicionales a la Propuesta.

21. El 17 de octubre de 2013 Argentina informó al Centro de una decisión no relacionada con el presente caso, emitida en un arbitraje CNUDMI (UNCITRAL), la que consideraba relevante para la Propuesta. Argentina no proporcionó una copia de dicha decisión. El 21 de octubre de 2013 las Demandantes transmitieron sus comentarios a la carta de Argentina.

B. ARGUMENTOS DE LAS PARTES SOBRE LA PROPUESTA DE RECUSACIÓN DEL PROFESOR FRANCISCO ORREGO VICUÑA Y EXPLICACIONES DEL ÁRBITRO

1. Propuesta de recusación presentada por Argentina

22. Los fundamentos de la propuesta de recusación del Profesor Orrego Vicuña presentada por Argentina están contenidos en sus cartas de 11 y 26 de marzo, 17 de julio y 17 de octubre de 2013, y en sus escritos de 29 de julio y 26 de agosto de 2013. Dichos fundamentos se describen, sumariamente, a continuación.

23. Argentina sostiene que el Profesor Orrego Vicuña carece manifiestamente de las cualidades exigidas por el Artículo 14(1) del Convenio del CIADI.[1] En particular, Argentina sostiene que el Profesor Orrego Vicuña "no podría inspirar jamás plena confianza en su imparcialidad de juicio"[2] y que el Profesor Orrego Vicuña no gozaría de amplia consideración moral.[3]

24. Argentina basa su Propuesta en:

---

[1] Fundamentos de las Propuestas de Recusación de Francisco Orrego Vicuña y Claus von Wobeser de 29 de julio de 2013 ("**Propuesta**") ¶¶1-2 y ¶¶66 y siguientes; y Segunda Presentación de la República Argentina sobre las Propuestas de Recusación de Francisco Orrego Vicuña y Claus von Wobeser de 26 de agosto de 2013 ("**Segunda presentación de la Demandada**") ¶4.
[2] Propuesta ¶2; Segunda presentación de la Demandada ¶7.
[3] Propuesta ¶¶38, 66-69; Segunda presentación de la Demandada ¶11.

i. La anulación de tres laudos emitidos por tribunales presididos por el Profesor Orrego Vicuña, que generan en él una *animosidad manifiesta* contra Argentina; y

ii. Los servicios prestados al gobierno de Chile por el Profesor Orrego Vicuña en el pasado, y una opinión legal de 1998 en relación con la solicitud de extradición de Augusto Pinochet.

a) Predisposición contra Argentina

25. Argentina sostiene que el Profesor Orrego Vicuña "presidió tres tribunales CIADI que emitieron laudos condenando a la República Argentina, que luego fueron anulados a solicitud de la República Argentina, con fuertes críticas de los respectivos comités de anulación".[4]

26. Luego de revisar las razones esgrimidas por los respectivos comités de anulación, Argentina señala que:

> "En efecto, se trata de conclusiones devastadoras para el desempeño profesional de Orrego Vicuña, sobre temas fundamentales de derecho internacional [...] en función de una solicitud de una parte a la que ahora se pretende que Orrego Vicuña juzgue nuevamente".[5]

> "La anulación de tres laudos emitidos por tribunales presididos por la misma persona no tiene precedentes en la historia del CIADI, y mucho menos cuando la solicitante de las tres anulaciones es la misma parte. Ningún observador imparcial podría siquiera sugerir que estas tres anulaciones no han tenido un impacto profundamente negativo sobre la disposición del Sr. Orrego Vicuña respecto de la República Argentina (cualquiera sea la opinión que se tenga sobre los laudos anulados y sobre las decisiones de anulación). Ningún observador imparcial sugeriría que el Sr. Orrego Vicuña puede inspirar plena confianza en su imparcialidad para juzgar a la parte que solicitó y obtuvo esas tres anulaciones".[6]

27. En su segunda presentación, Argentina sostiene que:

---

[4] Propuesta ¶¶8,10-20 refiriéndose a *CMS Gas Transmission Company c. República Argentina* (Caso CIADI No. ARB/01/8), Decisión sobre Anulación del 25 de septiembre de 2007; *Sempra Energy International c. República Argentina* (Caso CIADI No. ARB/02/16), Decisión sobre Anulación del 29 de junio de 2010; y a *Enron Creditors Recovery Corporation (anteriormente Enron Corporation) y Ponderosa Assets, L.P. c. República Argentina* (Caso CIADI No. ARB/01/3), Decisión sobre Anulación del 30 de julio de 2010.

[5] Propuesta ¶15.

[6] Propuesta ¶21.

"El punto central aquí no es si esos tres comités de anulación estuvieron o no en lo cierto al anular y criticar fuertemente los laudos. El punto es que todas esas descalificaciones de laudos firmados por Orrego Vicuña se produjeron como consecuencia y en los términos de solicitudes de esta parte…". [7]

28. Y también sostiene que:

"es imposible que el presente caso no involucre algún aspecto de esas medidas [de emergencia], y por ende la defensa [de estado de necesidad] esgrimida por la República Argentina a ese respecto. En consecuencia, la anulación de una decisión de Orrego Vicuña donde tomaba posición respecto de la defensa del estado de necesidad y su aplicación a la crisis argentina constituye una circunstancia adicional que fortalece la presente recusación". [8]

29. En apoyo de su posición, Argentina se refiere a un artículo de 2010 del Profesor Orrego Vicuña, en el que supuestamente el mismo "intentó defender su posición después de la anulación de *CMS*". Para Argentina, dicha publicación "agrega una causal adicional y autónoma de recusación". [9]

30. Argentina también sostiene que el artículo del Profesor Orrego Vicuña "hace suyo" el punto de vista del economista Sebastián Edwards en una publicación del 2008. Argentina sostiene que Edwards mantiene una visión despectiva de Argentina y que por lo tanto el Profesor Orrego Vicuña tiene una visión "prejuiciosa y despreciativa de la República Argentina". En particular, Argentina sostiene que el artículo del Profesor Orrego Vicuña suscribe la tesis de que "como la Argentina ha sufrido muchas crisis no se le debe permitir invocar el estado de necesidad", lo que implica "un claro prejuzgamiento respecto de una de las partes en este caso y respecto de las defensas que podría esgrimir. Este tipo de visiones, además de ser discriminatorias y haber dado lugar a la recusación de otros árbitros, [Nota omitida] constituye la negación misma de la imparcialidad y, en definitiva, de la justicia". [10]

---

[7] Segunda presentación de la Demandada ¶32.
[8] Segunda presentación de la Demandada ¶37.
[9] Propuesta ¶22, nota al pie No. 36 citando Francisco Orrego Vicuña, *Softening Necessity*, en LOOKING TO THE FUTURE 741 (Mahnoush H. Arsanjani y otros eds., 2010).
[10] Propuesta ¶¶23-25, nota al pie No. 40 citando Sebastián Edwards, *Al sur de la crisis*, LETRAS LIBRES, diciembre de 2008, p. 10.

b) Vínculos con el régimen de Augusto Pinochet

31. Argentina señala que "el señor Orrego Vicuña ejerció cargos y funciones del más alto nivel representando al gobierno *de facto* del General Augusto Pinochet". Argentina observa que estas funciones incluyeron "representar a Chile en negociaciones relativas a un conflicto limítrofe con la Argentina - que fracasaron y pusieron a ambos países al borde de un conflicto armado, el que solo pudo ser evitado luego de la mediación papal - y ante el Reino Unido como embajador entre los años 1983 y 1985".[11]

32. Argentina agrega que "[l]a vinculación entre Orrego Vicuña y Pinochet no es algo que la República Argentina meramente indica, sino que se trata de circunstancias 'de conocimiento público' como las propias Demandantes reconocen. [Nota omitida] Además, no puede negarse que resulta moralmente condenable haber ejercido algunos de los más altos cargos y responsabilidades de un gobierno de facto, que no sólo derrocó a un gobierno constitucional sino que luego cometió violaciones masivas a los derechos humanos condenados internacionalmente [...] [Nota omitida]".[12]

33. Argentina sostiene también que en 1998 el Profesor Orrego Vicuña emitió una opinión legal realizando "una serie de argumentaciones para evitar que Pinochet [fuera] extraditado [...] para ser juzgado por crímenes contra la humanidad (incluyendo la tortura)"[13], en las que habría invocado actos que "constituyen *violaciones al derecho internacional*, cometidas en contra de la República Argentina..." y "...violaciones de principios fundamentales del derecho internacional en materia de neutralidad cometidas contra la Argentina".[14]

34. Argentina concluye que el Profesor Orrego Vicuña defendió "a un dictador y violador sistemático de los derechos humanos," lo que "impide manifiestamente que Orrego Vicuña inspire plena confianza en su imparcialidad de juicio en el presente arbitraje".[15]

---

[11] Propuesta ¶28.
[12] Segunda presentación de la Demandada ¶11.
[13] Propuesta ¶29.
[14] Propuesta ¶¶32 y 37; Segunda presentación de la Demandada ¶¶12 y 16.
[15] Propuesta ¶¶29, 33-38.

2. Observaciones de las Demandantes

35. Los argumentos de las Demandantes sobre la propuesta de recusación del Profesor Orrego Vicuña están contenidos en su carta de 21 de octubre de 2013 y en sus escritos de 9 y 26 de agosto de 2013. Dichos argumentos se describen, sumariamente, a continuación.

a) Predisposición contra Argentina

36. Las Demandantes sostienen que Argentina no ha probado que exista nexo alguno entre las anulaciones en los casos *CMS*, *Enron* y *Sempra* y la alegación de que el Profesor Orrego Vicuña no puede juzgar el presente asunto en base a los hechos del caso, el TBI aplicable y los argumentos a presentarse en el arbitraje.[16] Para las Demandantes, "se trata de meras especulaciones sin prueba objetiva alguna".[17]

37. Las Demandantes observan que los laudos dictados en los casos *CMS*, *Enron* y *Sempra* fueron decisiones unánimes dictadas por tribunales formados por tres árbitros, y que "los laudos fueron sostenidos sin reservas por los árbitros nombrados por la propia Argentina en cada uno de esos casos". [18]

38. Las Demandantes continúan señalando que "los casos *CMS*, *Enron* y *Sempra* se referían a reclamaciones bajo el tratado bilateral de protección de inversiones (TBI) Argentina-Estados Unidos, contra medidas de emergencia adoptadas por Argentina a partir del 2002 que abrogaron los regímenes tarifarios de los servicios públicos". En comparación, en el caso presente "se invoca el TBI Argentina-España, que no contiene una cláusula parecida al artículo XI del TBI Argentina-Estados Unidos. Además la reclamación no es contra las medidas de emergencia de 2002, sino contra las expropiaciones de YPF e YPF Gas ocurridas en 2012, diez años más tarde y en circunstancias muy distintas a la crisis económica y financiera de 2002". [19]

---

[16] Observaciones de las Demandantes a las Propuestas de Recusación de la Demandada, de 9 de agosto de 2013 ("**Observaciones de las Demandantes**") ¶52.
[17] Observaciones de las Demandantes ¶38 y 42.
[18] Observaciones de las Demandantes ¶39. Las Demandantes reconocen la existencia de una disidencia parcial menor en *Sempra*, sobre un tema que no fue objeto de anulación.
[19] Observaciones de las Demandantes ¶40.

39. Las Demandantes destacan jurisprudencia CIADI que refuerza la idea de que la existencia de decisiones previas emitidas por un árbitro no prueba falta de imparcialidad, incluso cuando las mismas resultan "erróneas o anuladas".[20]

40. Las Demandantes también destacan la extensa y prestigiosa carrera en el área del derecho internacional del Profesor Orrego Vicuña, incluyendo como presidente de otros cinco tribunales CIADI que emitieron laudos que no han sido anulados.[21]

41. Finalmente, las Demandantes observan que el artículo de 2010 del Profesor Orrego Vicuña es una publicación académica que se refiere a disposiciones que no se encuentran presentes en el tratado entre España y Argentina, tratado en cuestión en el presente caso.[22]

b) Vínculos con el régimen de Augusto Pinochet

42. Las Demandantes observan que el Profesor Orrego Vicuña ha mantenido cargos importantes en todos los gobiernos democráticamente elegidos en Chile posteriores al régimen de Pinochet[23] y que ha ocupado otros importantes cargos internacionales, lo que confirmaría el amplio reconocimiento del que goza tanto en Chile como internacionalmente.[24]

43. En cuanto a la opinión legal de 1998 del Profesor Orrego Vicuña relativa a la extradición de Pinochet a España, las Demandantes destacan que su posición era compartida por Argentina y Chile a través de sus gobiernos democráticamente elegidos,[25] por ser incompatible con el principio legal de soberanía de los Estados.[26] Las Demandantes agregan que la opinión legal del Profesor Orrego Vicuña en relación con el proceso de extradición de Pinochet "en ningún caso

---

[20] Observaciones de las Demandantes ¶¶43-45, refiriéndose a *Abaclat y otros c. República Argentina* (Caso CIADI No. ARB/07/5) ("**Abaclat**") y a *Suez, Sociedad General de Aguas de Barcelona S.A., e InterAgua Servicios Integrales del Agua S.A. c. República Argentina* (Caso CIADI No. ARB/03/17) y *Suez, Sociedad General de Aguas de Barcelona, S.A. y Vivendi Universal, S.A. c. República Argentina* (Caso CIADI No. ARB/03/19) (conjuntamente "**Suez**").
[21] Observaciones de las Demandantes ¶51.
[22] Observaciones de las Demandantes ¶53.
[23] Observaciones de las Demandantes ¶¶64, 67-71.
[24] Observaciones de las Demandantes ¶¶72-77.
[25] Observaciones de las Demandantes ¶64.
[26] Observaciones de las Demandantes ¶63.

evidenci[a] en modo objetivo, y mucho menos en forma manifiesta, una falta de imparcialidad en este caso, que nada tiene que ver ni en lo más remoto con el episodio de dicha extradición". [27]

3. Explicaciones del Profesor Orrego Vicuña

44. En relación con las decisiones de anulación en los casos *CMS*, *Enron* y *Sempra*, el Profesor Orrego Vicuña destaca el derecho de toda parte en una controversia a solicitar la anulación y niega que las citadas decisiones hayan generado resentimiento de su parte. El Profesor Orrego Vicuña observa que, con posteridad a dichas decisiones, ha sido designado en importantes cargos académicos, lo que refutaría el pretendido impacto de las anulaciones sobre su reputación.[28]

45. En cuanto a su publicación de 2010, el Profesor Orrego Vicuña explica "[la publicación] no tuvo por objeto discutir esas anulaciones sino proveer un análisis del estado actual del debate sobre este tema y las publicaciones de los autores, lo que no podría ignorar las manifestaciones de la jurisprudencia".[29]

46. Además, el Profesor Orrego Vicuña destaca su participación en numerosas iniciativas encaminadas a promover la integración entre Chile y Argentina.[30] El Profesor Orrego Vicuña explica que su opinión legal sobre la extradición de Pinochet fue emitida a solicitud del Gobierno de Chile y "no tenía por objeto exonerar [a Pinochet] de responsabilidad sino que los juicios correspondientes se condujesen en Chile".[31] El Profesor Orrego Vicuña añade que "ha tenido una actitud de permanente adhesión a la protección de los derechos humanos como consta en Chile y en la comunidad internacional".[32]

[27] Observaciones de las Demandantes ¶85.
[28] Explicaciones del Profesor Francisco Orrego Vicuña, pág. 1-2.
[29] Explicaciones del Profesor Francisco Orrego Vicuña, pág. 2.
[30] Explicaciones del Profesor Francisco Orrego Vicuña, pág. 3.
[31] Explicaciones del Profesor Francisco Orrego Vicuña, pág. 3-4.
[32] Explicaciones del Profesor Francisco Orrego Vicuña, pág. 4.

C. ARGUMENTOS DE LAS PARTES SOBRE LA PROPUESTA DE RECUSACIÓN DEL DR. CLAUS VON WOBESER Y EXPLICACIONES DEL ÁRBITRO

1. Propuesta de recusación presentada por Argentina

47. Los argumentos de Argentina sobre la propuesta de recusación del Dr. Claus von Wobeser están contenidos en sus cartas de 5, 17, 19 y 26 de junio y 17 de julio de 2013, y en sus escritos de 29 de julio y 26 de agosto de 2013. Dichos argumentos se describen, sumariamente, a continuación.

48. Argentina sostiene que el Dr. von Wobeser carece manifiestamente de las cualidades exigidas por el Artículo 14(1) del Convenio del CIADI.[33]

49. Argentina basa su propuesta de recusación en:

a) El nombramiento del Dr. von Wobeser por un inversor el año 2004 en un arbitraje CIADI contra Argentina; y la oposición de Argentina a su designación como presidente del tribunal en otros arbitrajes CIADI;
b) Los vínculos entre el Dr. von Wobeser y Freshfields Bruckhaus Deringer ("**Freshfields**"), abogados de las Demandantes en este caso.

a) Nombramiento y propuestas de designación del Dr. von Wobeser en otros arbitrajes contra Argentina

50. El Dr. von Wobeser fue nombrado árbitro por el inversor en *CIT c. Argentina* ("**CIT**"), un caso CIADI iniciado el año 2004.[34] Argentina sostiene que este nombramiento pone al Dr. von Wobeser en una posición adversa a la Argentina en general.[35]

51. El caso *CIT* se refería a las medidas de emergencia adoptadas por Argentina a fines del 2001.[36] Según Argentina, "*es imposible* que este caso no involucre de alguna u otra manera el análisis de las medidas de emergencia referidas," ya que "la privatización de YPF [...] se produjo durante la década previa a que se adoptaran dichas medidas de emergencia y en algún

[33] Propuesta ¶1 y ¶¶66 y siguientes.
[34] *CIT Group, Inc. c. República Argentina* (Caso CIADI No. ARB/04/9).
[35] Propuesta ¶47.
[36] Propuesta ¶48.

caso en años bastante cercanos a esas medidas" y "estas [...] fueron medidas de alcance absolutamente general [...] que abarcaron también sectores energéticos en los que YPF opera".[37]

52. Argentina destaca haberse opuesto a la propuesta de nombramiento del Dr. von Wobeser por parte del Centro en tres casos previos[38] e indica que no expresó motivos para su oposición porque ello no le fue requerido en su oportunidad.[39]

b) Vínculos entre el Dr. von Wobeser y los abogados de las Demandantes

53. Argentina sostiene que "son múltiples y preocupantes los probados intereses en común y vinculaciones entre el señor von Wobeser y los abogados de las Demandantes"[40] y que ello debe resultar en su recusación.

54. Argentina señala que el Dr. von Wobeser y Freshfields representaron de forma conjunta a una compañía de telecomunicaciones contra una entidad estatal mexicana en un arbitraje ante la Cámara de Comercio Internacional (CCI) que concluyó en el año 2004. Argentina alega que el Dr. von Wobeser sólo reveló detalles de su papel en este arbitraje después de que ello fuera específicamente solicitado por Argentina,[41] y que el no "reportar en forma completa sus vínculos con el estudio jurídico de las Demandantes" constituye una causal de recusación.[42] En opinión de Argentina el Dr. von Wobeser y Freshfields "llevaron adelante la estrategia del caso de manera conjunta" en el arbitraje ante la CCI.[43]

55. Argentina señala que el Dr. von Wobeser no calificó su participación como "limitada", sino que informó que había participado como abogado de las demandantes "asesorando en temas de derecho mexicano", y que Freshfields había participado, también en representación de las demandantes, "llevando la parte internacional". [44]

---

[37] Propuesta ¶49.
[38] Segunda Presentación de la Demandada ¶65.
[39] Segunda Presentación de la Demandada ¶68.
[40] Propuesta ¶64.
[41] Propuesta ¶55.
[42] Segunda Presentación de la Demandada ¶73.
[43] Propuesta ¶56.
[44] *Ibídem.*

56. Argentina también observa que el Dr. von Wobeser se encuentra participando como árbitro en un tribunal en un caso CIADI contra Guatemala y como conciliador en un procedimiento de conciliación CIADI que involucra a Guinea Ecuatorial, y alega que en ambos casos fue nombrado por Freshfields.[45]

2. Observaciones de las Demandantes

57. Los argumentos de las Demandantes sobre la propuesta de recusación al Dr. von Wobeser están contenidos en su carta de 24 de junio de 2013, y en sus escritos de 9 y 26 de agosto de 2013. Dichos argumentos se describen, sumariamente, a continuación.

a) Nombramiento y propuestas de designación del Dr. von Wobeser en otros arbitrajes contra Argentina

58. Las Demandantes destacan que el caso *CIT* "versaba sobre las medidas de pesificación adoptadas por Argentina en 2002, y su impacto sobre contratos de *leasing* entre particulares", y que en el caso presente "se trata de un escenario totalmente distinto", esto es, "la expropiación de YPF e YPF Gas que tuvo lugar en 2012". Las Demandantes añaden que "en el arbitraje *CIT* nunca hubo ninguna decisión sobre el fondo del asunto: el caso fue terminado de mutuo acuerdo por las partes en mayo de 2009". [46]

59. Las Demandantes destacan también "la variedad de designaciones de que ha sido objeto [el Dr. von Wobeser], tanto por empresas particulares como por Estados" y "el hecho de haber dictado laudos tanto en contra de la parte que le ha designado como árbitro como de su contraria, y laudos a favor de Estados y de particulares".[47]

60. En opinión de las Demandantes, el hecho que Argentina se opusiera al nombramiento del Dr. von Wobeser en otros casos CIADI es "irrelevante, y no aporta ningún elemento objetivo de falta de imparcialidad". Argentina nunca indicó las razones por las que rechazaba estos nombramientos, y "en cualquier caso, la voluntad de Argentina de aceptar o no al Dr. von

[45] Propuesta ¶58, refiriéndose a *Teco Guatemala Holdings, LLC c. República de Guatemala* (Caso CIADI No. ARB/10/23), y a *República de Guinea Ecuatorial c. CMS Energy Corporation* (Caso CIADI No. CONC(AF)/12/2).
[46] Observaciones de las Demandantes ¶87.
[47] Observaciones Adicionales de las Demandantes de 26 de agosto de 2013 ("**Observaciones Adicionales de las Demandantes**") ¶11.

Wobeser en otros arbitrajes no puede ser el criterio objetivo que determine si el Dr. von Wobeser reúne o no el requisito de imparcialidad para ser presidente del Tribunal nombrado por el CIADI en el presente asunto".[48]

b) Vínculos entre el Dr. von Wobeser y los abogados de las Demandantes

61. Las Demandantes argumentan que los vínculos alegados por Argentina son "contactos mínimos: un caso en el que el Dr. von Wobeser estuvo involucrado junto con la firma Freshfields, limitadamente como asesor en materia de Derecho mexicano, terminado hace nueve años [...]; un solo nombramiento por parte de un cliente de Freshfields (la República de Guatemala) como árbitro en un tribunal CIADI; y la circunstancia de que el Dr. von Wobeser haya sido designado en otro asunto como conciliador, por común acuerdo de ambas partes, una de ellas representada por Freshfields".[49]

62. Las Demandantes argumentan que el hecho de que el Dr. von Wobeser haya estado involucrado en más de noventa arbitrajes "hace insignificantes sus mínimos contactos con el bufete Freshfields".[50]

3. Explicaciones del Dr. von Wobeser

63. El Dr. von Wobeser señala que siempre ha procedido "de manera independiente, objetiva e imparcial al analizar y resolver un caso de arbitraje", independientemente de las características particulares de la parte que le designe en cada caso.

64. En cuanto a su relación profesional con Freshfields, el Dr. von Wobeser defiende que "esta es una situación natural que deriva del ejercicio del arbitraje, en el cual, hay un número reducido a nivel mundial de profesionistas que nos enfocamos en la materia y también hay diversas y complejas conexiones con todo tipo de personas e instituciones. Es habitual que dos profesionistas coincidan en un mismo caso representando a alguna parte o bien coincidan en

[48] Observaciones de las Demandantes ¶89.
[49] Observaciones de las Demandantes ¶90.
[50] Observaciones Adicionales de las Demandantes ¶12.

alguna otra capacidad. Dicha situación es por si, insuficiente para considerar que existe una carencia de imparcialidad e independencia para que un árbitro resuelva un caso".[51]

D. DECISIÓN DEL PRESIDENTE

1. Estándar legal aplicable

65. El Artículo 57 del Convenio del CIADI permite a una parte proponer la recusación de cualquier miembro del tribunal. Este Artículo dispone lo siguiente:

> *"Cualquiera de las partes podrá proponer a la Comisión o Tribunal correspondiente la recusación de cualquiera de sus miembros por la carencia manifiesta de las cualidades exigidas por el apartado (1) del Artículo 14. Las partes en el procedimiento de arbitraje podrán, asimismo, proponer la recusación por las causas establecidas en la Sección 2 del Capítulo IV".*

66. El Artículo 58 del Convenio del CIADI establece que corresponde al Presidente decidir sobre una propuesta de recusación de la mayoría de los árbitros.

67. Argentina ha pedido que el Presidente solicite una recomendación externa que le guíe en su decisión sobre la Propuesta. Las Demandantes se oponen a esta solicitud. Este tipo de recomendaciones han sido solicitadas en raras ocasiones en el pasado y, en cada oportunidad, fue debido a las circunstancias específicas de cada uno de los casos. En cada una de dichas ocasiones las partes fueron informadas de que la decisión final sería tomada por el Presidente, tal y como lo requiere el Convenio. Las circunstancias del presente caso no justifican dicha solicitud. En consecuencia, el Presidente decidirá la Propuesta en base a los argumentos presentados por las Partes y las explicaciones ofrecidas por los árbitros recusados, como está previsto en los artículos 57 y 58 del Convenio y en las Reglas de Arbitraje.

68. La propuesta de recusación en este caso alega que el Profesor Orrego Vicuña y el Dr. von Wobeser carecen manifiestamente de las cualidades exigidas por el Artículo 14(1). Por lo tanto, no es necesario analizar una posible inelegibilidad de los árbitros "por las causas *establecidas en la Sección 2 del Capítulo IV*".

69. El Artículo 14(1) del Convenio del CIADI dispone:

---

[51] Explicaciones del Dr. Claus von Wobeser.

> "*Las personas designadas para figurar en las Listas deberán gozar de amplia consideración moral, tener reconocida competencia en el campo del Derecho, del comercio, de la industria o de las finanzas e inspirar plena confianza en su imparcialidad de juicio. La competencia en el campo del Derecho será circunstancia particularmente relevante para las personas designadas en la Lista de Árbitros*".

70. Mientras que la versión en inglés del Artículo 14 del Convenio del CIADI se refiere a "*independent judgment*" (juicio independiente), la versión en español requiere "imparcialidad de juicio". [52] Puesto que ambas versiones son igualmente auténticas, es aceptado que los árbitros deben ser imparciales e independientes.[53]

71. La imparcialidad implica la ausencia de sesgos o predisposición hacia alguna de las partes. La independencia se caracteriza por la ausencia de un control externo.[54] Los requisitos de independencia e imparcialidad "*protegen a las partes ante la posibilidad de que los árbitros estén influenciados por factores distintos a los relacionados con los hechos del caso*".[55] Los Artículos 57 y 58 del Convenio del CIADI no requieren evidencia de dependencia o

---

[52] La versión en francés se refiere a "*indépendance dans l'exercice de leurs fonctions*".

[53] Las Partes están de acuerdo en este punto. Propuesta ¶¶70-72; Observaciones de las Demandantes ¶13, al igual que la jurisprudencia del CIADI: *Suez supra* nota 20, Decisión sobre la Propuesta de Recusación de un miembro del Tribunal de Arbitraje (22 de octubre de 2007) ("**Decisión Suez**") ¶28. *OpicKarimun Corporation c. República Bolivariana de Venezuela* (Caso CIADI No. ARB/10/14), Decisión sobre la Propuesta de Recusación del Profesor Philippe Sands, Árbitro (5 de mayo de 2011) ¶45 ("**OPIC**"); *Getma International y otros c. República de Guinea* (Caso CIADI No. ARB/11/29), Decisión sobre la Propuesta de Recusación del Árbitro Bernardo M. Cremades (28 de junio de 2012) ¶59 ("***Getma***"); *ConocoPhillips Company y otros c. República Bolivariana de Venezuela* (Caso CIADI No. ARB/07/30), Decisión sobre la Propuesta de Recusación del Sr. L. Yves Fortier, Árbitro, de 27 de febrero de 2012 ¶54 ("***ConocoPhillips***"); *Alpha Projektholding GmbH c. Ucrania* (Caso CIADI No. ARB/07/16), Decisión sobre la Propuesta de la Demandada de Recusación del Árbitro Dr. Yoram Turbowicz, (19 de marzo de 2010) ¶36 ("***Alpha***"); *Tidewater Investment SRL y Tidewater Caribe, C.A. c. República Bolivariana de Venezuela* (Caso CIADI No. ARB/10/5), Decisión sobre la Propuesta de la Demandante de Recusación de la Profesora Brigitte Stern (23 de diciembre de 2010) ¶37 ("***Tidewater***"); *Saint-Gobain Performance Plastics Europe c. República Bolivariana de Venezuela* (Caso CIADI No. ARB/12/13), Decisión sobre la Propuesta de la Demandante de recusar al Sr. Gabriel Bottini del Tribunal en virtud del Artículo 57 del Convenio del CIADI (27 de febrero de 2013) ¶55 ("***Saint-Gobain***").

[54] *Decisión Suez, supra* nota 53 ¶29; *Getma, supra* nota 53 ¶59; *ConocoPhillips, supra* nota 53 ¶5.

[55] *Urbaser S.A. y Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa c. República Argentina* (Caso CIADI No. ARB/07/26), Decisión sobre la Propuesta de la Demandante de Recusación del Profesor Campbell McLachlan, Árbitro (12 de agosto de 2010) ¶43 ("***Urbaser***"); *ConocoPhillips, supra* nota 53 ¶55; *Universal Compression International Holdings, S.L.U. c. República Bolivariana de Venezuela* (Caso CIADI No. ARB/10/9), Decisión sobre la Propuesta de Recusación de la Profesora Brigitte Stern y el Profesor Guido Santiago Tawil, Árbitros (20 de mayo de 2011) ¶70 ("***Universal***").

predisposición real, sino que es suficiente con establecer la apariencia de dependencia o predisposición.[56]

72. El estándar legal aplicable es un "estándar objetivo, basado en una evaluación razonable de la prueba, realizada por un tercero". Como consecuencia, la creencia subjetiva de la parte que propone la recusación no es suficiente para satisfacer los requisitos del Convenio.[57]

73. En cuanto al adjetivo "manifiesta" del Artículo 57, una serie de decisiones han concluido que significa "obvia o evidente"[58] y que se refiere a la "facilidad con la que la supuesta falta de cualidades puede percibirse.[59]

74. El Presidente observa que ambas Partes se han referido a otros conjuntos de normas y directrices en sus argumentos. Si bien es cierto que estas normas o directrices puede servir como referencias de utilidad, el Presidente tiene la obligación de decidir conforme al estándar contenido en el Convenio del CIADI. De acuerdo con ello, esta decisión se toma de conformidad con los Artículos 57 y 58 del Convenio del CIADI.

2. Análisis

a) Propuesta de recusación del Profesor Orrego Vicuña

75. Argentina invoca dos motivos para recusar al Profesor Orrego Vicuña:

i. Una supuesta predisposición contra Argentina, que surgiría de las anulaciones de los laudos en *CMS*, *Enron* y *Sempra*; y

ii. Sus vínculos con el régimen de Augusto Pinochet.

[56] *Urbaser, supra* nota 55 ¶43.
[57] *Decisión Suez*, *supra* nota 53 ¶¶39-40.
[58] *Decisión Suez*, *supra* nota 53 ¶34; *Alpha, supra* nota 53 ¶37; *Universal*, *supra* nota 55 ¶71.
[59] C. Schreuer, The ICSID Convention, Segunda Edición (2009), página 1202 ¶134 -154, *Saint-Gobain*, *supra* nota 53 ¶59.

i. Supuesta predisposición contra Argentina

76. En opinión de Argentina, su exitosa anulación de los laudos en *CMS*, *Enron* y *Sempra* produjo en el Profesor Orrego Vicuña una predisposición negativa en contra de Argentina, lo que hace que no pueda inspirar confianza en su imparcialidad de juicio en este caso.

77. El Presidente observa que los casos *CMS*, *Enron* y *Sempra* se basaban en un conjunto de hechos diferentes, se referían a diferentes disposiciones legales, y surgieron en épocas diferentes a la del presente caso.

78. Además, el recurso de anulación bajo el Convenio del CIADI – si bien limitado y excepcional – se encuentra disponible para todas las partes en diferencias ante el CIADI bajo las causales enumeradas en el Artículo 52 del Convenio. Este es un derecho consagrado en el Convenio y que el mismo Profesor Orrego Vicuña reconoce en sus explicaciones. El ejercicio con éxito de este derecho por parte de Argentina en casos previos no constituye evidencia de que el Profesor Orrego Vicuña carezca manifiestamente de la capacidad de ejercer juicio imparcial en este caso.

79. En cuanto a la publicación del Profesor Orrego Vicuña del 2010, el Presidente observa que esta publicación refleja una opinión sobre una disposición legal que no se encuentra presente en el instrumento jurídico invocado en este caso. Asimismo, las referencias del Profesor Orrego Vicuña a una publicación de un tercero no constituyen evidencia de la carencia manifiesta de imparcialidad contra Argentina, tal y como requiere el Artículo 57 del Convenio.

ii. Vínculos con el régimen de Augusto Pinochet

80. La participación del Profesor Orrego Vicuña en el gobierno de Chile durante los años 70 y 80, y su opinión legal en el marco del proceso de extradición de Pinochet, son hechos no controvertidos por las Partes. Las Partes, sin embargo, no están de acuerdo en si estas circunstancias indican una carencia manifiesta de las cualidades exigidas por el Artículo 14(1) del Convenio.

81. La opinión legal del Profesor Orrego Vicuña en relación con la extradición de Pinochet, y de forma más general, los servicios diplomáticos y legales prestados por el Profesor Orrego Vicuña al gobierno de Chile hace más de 20 años no guardan relación con este caso, ni temporal ni materialmente, y no son suficientes para demostrar una carencia manifiesta de las facultades requeridas por el Artículo 14(1) tal y como se prevé en el Artículo 57 del Convenio.

b) Propuesta de recusación del Dr. von Wobeser

82. Argentina invoca tres motivos para recusar al Dr. Von Wobeser:

i. Su nombramiento en el caso *CIT*;
ii. Su propuesta de designación como presidente en tres otros casos CIADI contra Argentina; y
iii. Sus supuestos vínculos con los abogados de las Demandantes en este caso

i. Su nombramiento en el caso *CIT*

83. El Presidente observa que este caso fue iniciado en el año 2004 y trataba sobre un conjunto de hechos diferentes, con un tratado diferente al invocado en el presente caso. Dicho caso fue terminado por acuerdo de las partes en el año 2009 sin que se emitiese una decisión sobre el fondo del asunto. No existe ninguna base para considerar que la participación del Dr. von Wobeser como árbitro en el caso *CIT* conduce a una carencia manifiesta de imparcialidad en este caso.

ii. Propuesta de designación como presidente en otros tres casos CIADI contra Argentina

84. El hecho que Argentina objetara a la propuesta de designación del Dr. von Wobeser en otros tres casos CIADI tampoco demuestra que el mismo carece de las cualidades requeridas bajo en Artículo 14(1) del Convenio. Esto es simplemente una indicación de la preferencia de una de las partes que puede o no encontrarse justificada en cada uno de estos casos y que puede cambiar a lo largo del tiempo.

iii. Supuestos vínculos con los abogados de las Demandantes

85. Finalmente, en relación con los supuestos vínculos entre el Dr. von Wobeser y Freshfields, la propuesta de Argentina se basa en su participación como abogado en un caso ante la CCI no relacionado con el presente caso y en sus nombramientos en *Teco c. Guatemala*[60] y en *Guinea Ecuatorial c. CMS*.[61]

86. El Presidente observa que el caso antes la CCI concluyó hace alrededor de nueve años, se basaba en una disputa comercial sin relación con los hechos de este caso, y que el Dr. von Wobeser tuvo una participación limitada como experto en derecho mexicano. En *Teco*, el Dr. von Wobeser fue nombrado como co-árbitro por Guatemala, representada por Freshfields. Un único nombramiento por una parte diferente en un caso sin relación alguna, aun cuando representada por la misma firma, no constituye evidencia de la carencia manifiesta de las cualidades exigidas por el Artículo 14(1) del Convenio del CIADI. De forma similar, la designación del Dr. von Wobeser por acuerdo de las partes en *Guinea Ecuatorial c. CMS* no demuestra vínculos inapropiados con Freshfields. Un tercero razonable evaluando estos hechos no concluiría que los mismos evidencian una carencia manifiesta de las cualidades exigidas bajo el Artículo 14(1) del Convenio del CIADI.

[60] *Teco, supra* nota 45.
[61] *Guinea Ecuatorial c. CMS, supra* nota 45.

E. DECISIÓN

87. Por las razones arriba indicadas, habiendo considerado todos los hechos alegados y los argumentos presentados por las Partes, el Presidente rechaza la Propuesta de Recusación del Profesor Francisco Orrego Vicuña y del Dr. Claus von Wobeser presentada por la República Argentina.

Presidente del Consejo Administrativo del CIADI
Dr. Jim Yong Kim

Anexo A

DECLARACIÓN–Regla de Arbitraje6(2)

Repsol S.A. y Repsol Butano S.A.
c.
República Argentina

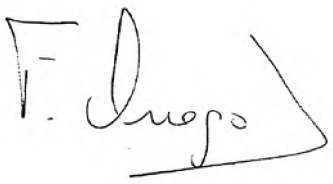
(Caso CIADI No. ARB/12/38)

A mi leal saber y entender no hay razón alguna por la que no deba servir en el Tribunal de Arbitraje constituido por el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones con respecto a la diferencia entre Repsol S.A. y Repsol Butano S.A.y la República Argentina (Caso CIADI No. ARB/12/38).

Me comprometo a mantener con carácter confidencial toda la información que llegue a mi conocimiento a consecuencia de mi participación en este proceso, así como del contenido de cualquier laudo que este Tribunal dicte.

Juzgaré con equidad, de acuerdo con la ley aplicable y no aceptaré instrucción o compensación alguna de ninguna otra fuente con respecto al procedimiento, salvo según lo dispuesto en el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados y en los Reglamentos y Reglas adoptados de conformidad al mismo.

Adjunto una declaración sobre (a) mi experiencia profesional, de negocios y otras relaciones (de haberlas) con las partes, tanto anteriores como actuales y (b) cualquier otra circunstancia por la que una parte pudiera cuestionar la confianza en mi imparcialidad de juicio. Reconozco que al firmar esta declaración asumo la obligación continua de notificar prontamente al Secretario General del Centro cualquier relación o circunstancia de aquellas mencionadas que surjan posteriormente durante este procedimiento.



Firma: Fecha: 6 de marzo de 2013

Francisco Orrego Vicuña

Declaración adicional adjunta	X
Sin declaración adicional adjunta	

FRANCISCO ORREGO VICUÑA
ARBITRATOR

Santiago
Avenida El Golf 40. Piso 6
Santiago 755-0107. Chile
Tel. 56-2 441-6300
Fax. 56-2 441-6399

London
20 Essex Street Chambers
20 Essex Street
London WC2R 3AL
Tel. 44 (0) 20 7842 1200
Fax. 44 (0) 20 7842 1270

Singapore
Maxwell Chambers No. 02-09
32 Maxwell Road,
Singapore 069115
Tel. 65 62257230
Fax. 65 62249462

E-Mail for all addresses: forregovicuna@20essexst.com
www.20essexstreet.com

6 de marzo de 2013

Declaración adicional del Profesor Francisco Orrego Vicuña en el caso

Repsol, S.A. y Repsol Butano, S.A. c. República Argentina

(Caso CIADI ARB/12/38)

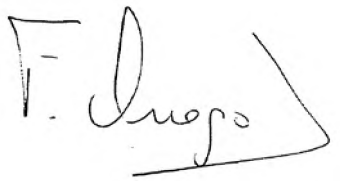
He aceptado la designación que han hecho los Demandantes en el caso de referencia para que el suscrito se desempeñe como árbitro en el procedimiento correspondiente. Deseo hacer la siguiente Declaración adicional para los efectos de la debida transparencia y la información de las partes. Ninguno de los hechos que se indican a continuación afectan en forma alguna mi completa independencia e imparcialidad en relación a las partes que intervienen en este caso.

Deseo informar en primer lugar que en el pasado me he desempeñado en diversos tribunales de arbitraje del CIADI que han tenido a la República Argentina como una de las partes, en todos ellos en calidad de Presidente del Tribunal por designación del propio CIADI. Estos casos han sido los de CMS, Sempra, Enron y Camuzzi, cuya información detallada puede encontrarse en la página web del CIADI. Aún cuando algunos de estos casos continúan en diferentes etapas, el suscrito no participa en la actualidad en ninguno de los correspondientes tribunales.

Deseo informar enseguida que entre los estudios jurídicos que representan a los Demandantes en este caso se cuentan Uría Méndez, Marval, O'Farrell y Mairal, y Freshfields, Bruckhaus, Deringer US LLP. Este último me designó árbitro en los casos Itera c/ Georgia (Arb/08/7) y EVN c/ Macedonia (Arb/09/10), los cuales fueron transados. También fui designado árbitro en los casos Burlington c/ Ecuador (Arb/08/5), que continúa, y

en los casos Pan American Energy c/ Bolivia (Arb/10/8), Ampal c/ Egipto (Arb/12/11) y Rusoro c/ Venezuela (Arb/AF/12/5), que se encuentran en su fase inicial. La información correspondiente a estos casos igualmente se encuentra disponible en la página web del CIADI.

Atentamente,



Francisco Orrego Vicuña

Anexo B

{In Archive} Repsol, S.A. y Repsol Butano, S.A. c. República Argentina (Caso CIADI No. ARB/12/38)

Gonzalo Flores to: nigel.blackaby, adqm, candido.paz-ares, carlos.paredes, jfm, Lluis.PARADELL, miguel.virgos, natalia.zibibbo, sc, grupo_ciadi 05/03/2013 04:46 PM

Cc: Marisa Planells-Valero

Archive: This message is being viewed in an archive.

Estimadas señoras y señores,

Sírvanse ver el siguiente mensaje que el Profesor Francisco Orrego-Vicuña nos ha solicitado transmitirles el día de hoy:

"En el año 2007 fui designado por Freshfields en el caso ENI Dación B. V. v. Venezuela (ARB/07/4), el cual fue transado con anterioridad a que se constituyera el tribunal; esta información fue involuntariamente omitida en la declaración del 6 de marzo de 2013 y se agrega ahora para la debida información de las partes".

Atentamente,

Gonzalo Flores
Team Leader | Legal Counsel
1818 H Street, NW | MSN U3-301 | Washington, DC 20433 USA
T 202-458-1505 | F 202-522-2615/2077 | gflores@worldbank.org

ICSID CIRDI CIADI
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
CENTRE INTERNATIONAL POUR LE RÈGLEMENT DES DIFFÉRENDS RELATIFS AUX INVESTISSEMENTS
CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

To: Nigel.Blackaby@Freshfields.Com
Adqm@Marval.Com.Ar
Candido.Paz-Ares@Uria.Com
cc: Marisa Planells-Valero

Anexo C

CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

1818 H STREET, NW | WASHINGTON, DC 20433 | EE.UU.
TELÉFONO (202) 458 1534 | FACSÍMIL (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

29 de mayo de 2013

Por correo electrónico

Repsol, S.A. y Repsol Butano, S.A.
Atn. Sr. Nigel Blackaby
Sr. Lluís Paradell
Sra. Natalia Zibibbo
Freshfields Bruckhaus Deringer US LLP
701 Pennsylvania Avenue N.W., Suite 600
Washington, D.C. 20004
y
Atn. Sr. Miguel Virgós
Sr. Cándido Paz-Ares
Sr. Carlos Paredes
Uria Menéndez Abogados, SLP
Príncipe de Rodrigo Uría
Madrid 28002
España
y
Atn. Sr. Santiago Carregal
Sr. Alberto Molinario
Sr. Julio Fernández Mouján
Marval, O'Farrell & Mairal
Av. Leandro N. Alem 928 piso 7
Buenos Aires (C1001AAR)
Argentina

República Argentina
Atn. Dra. Angelina María Esther Abbona
Procuradora del Tesoro de la Nación
Argentina
Posadas 1641
C1112ADC, Buenos Aires
Argentina

Ref: Repsol, S.A. y Repsol Butano, S.A. c. República Argentina
(Caso CIADI No. ARB/12/38)

Estimadas señoras y señores,

Me dirijo a ustedes con relación a la constitución del Tribunal de Arbitraje en el caso de referencia.

De acuerdo con los artículos 38 y 40(1) del Convenio del CIADI, es la intención del Centro nombrar al Dr. Claus von Wobeser, nacional de los Estados Unidos Mexicanos, como tercer árbitro y designarle como Presidente del Tribunal de Arbitraje en este caso. El Dr. von Wobeser integra la Lista de Árbitros del CIADI, designado por el Presidente del Consejo Administrativo del CIADI. Sírvanse encontrar adjunta copia del *curriculum vitae* del Dr. von Wobeser, en archivos del Centro.

El Dr. von Wobeser nos ha solicitado informarles lo siguiente:

"*No tengo conflicto de interés para actuar en el presente caso, ni existen circunstancias de tal naturaleza que pudieran dar lugar a dudas justificadas respecto a mi imparcialidad o*

independencia. No obstante lo anterior, por razones de transparencia, deseo informar a las partes y al CIADI lo siguiente:

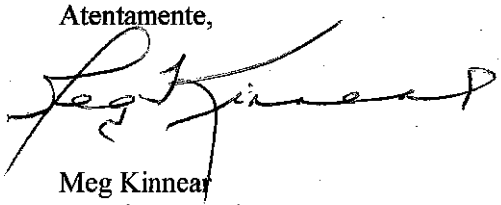
He participado como árbitro, nombrado por la demandante, en el caso CIADI entre CIT Group Inc. y la República Argentina (Caso CIADI No. ARB/04/9). El caso fue descontinuado, de conformidad con la Regla 44 de las Reglas de Arbitraje del CIADI, el 12 de mayo de 2009.

Actualmente me desempeño como abogado en dos casos en contra de PEMEX (accionista de Repsol). Uno de ellos implica la solicitud de anulación de un laudo arbitral. El otro es un caso en contra de PEMEX Exploración y Producción (PEP).

Adicionalmente, las firmas de abogados que representan a las Demandantes son bufetes activos en el arbitraje internacional, y en este sentido estoy y he estado involucrado en casos en los que dichas firmas de abogados han participado o participan."

Cualquier observación que las partes pudieren tener respecto de este nombramiento deberá presentarse a más tardar el día viernes 7 de junio de 2013.

Atentamente,



Meg Kinnear
Secretaria General

Adjunta: lo indicado

Anexo D

México D.F. a 10 de junio de 2013.

Dra. Angelina M.E. Abbona
Procuradora del Tesoro de la Nación Argentina

Ref.: Repsol, S.A. y Repsol Butano, S.A. c. República Argentina (Caso CIADI No. ARB/12/38).

Estimada Dra. Abbona:

En respuesta al oficio suscrito el 5 de junio del 2013 emitido por la Procuración del Tesoro de la Nación, mismo que me fue remitido por la Secretaría del CIADI, a continuación me permito proporcionar la información que ustedes solicitan.

Primeramente, deseo manifestar que todos los arbitrajes comerciales en los que he participado (tanto institucionales como *ad hoc*) son de naturaleza confidencial, por lo tanto, la revelación que realizo a continuación, la he efectuado excluyendo los datos específicos de las partes que intervinieron en cada caso. En relación con los arbitrajes de inversión seguidos ante el CIADI, la información de dichos casos es pública y se encuentra disponible para consulta en la página de dicha institución.

En atención a lo anterior, a continuación desgloso con el mayor detalle que me permite la confidencialidad de los asuntos en los que he participado, la siguiente información:

1) Lista de casos en los que *he participado* en los que las firmas de abogados de las Demandantes han participado.

   a. Arbitraje ante la Corte de Arbitraje de la CCI
   Carácter en que he participado: Presidente del tribunal arbitral (nombrado por los co-árbitros).
   Objeto de dicha controversia: Disputa comercial.
   Otra información relevante: La firma de abogados Uría Menendez participó como abogados de la Demandante. No se dictó laudo, las partes llegaron a un acuerdo.

   b. Arbitraje ante la Corte de Arbitraje de la CCI
   Carácter en que he participado: Presidente del tribunal arbitral (designado por la Corte de Arbitraje de la CCI).
   Objeto de dicha controversia: Disputa comercial.
   Otra información relevante: El despacho Marval O´Farrel & Mairal representó a una de las partes.

   c. Arbitraje ante la Corte de Arbitraje de la CCI
   Carácter en que he participado: Abogado de los Demandantes (asesorando en temas de derecho mexicano).

Objeto de dicha controversia: Disputa entre una empresa de telecomunicaciones contra una entidad del Estado Mexicano.
Otra información relevante: La firma Freshfields, Bruckhaus, Deringer participó como abogados de la Demandante llevando la parte internacional.

d. Arbitraje *ad hoc* bajo las Reglas de Arbitraje de CNUDMI
Carácter en que he participado: Abogado de los Demandantes.
Objeto de dicha controversia: Disputa entre accionistas.
Otra información relevante: El presidente del tribunal arbitral fue Nigel Blackaby, socio de Freshfields, Bruckhaus, Deringer, quien fue nombrado por los co-árbitros.

2) Lista de casos en los que *participo actualmente* en los que las firmas de los abogados de las Demandantes participan.

a. TECO Guatemala Holdings, LLC c. República de Guatemala (Caso CIADI No. ARB/10/23)
Carácter en que participo: Co-árbitro (nombrado por la República de Guatemala).
Objeto de dicha controversia: Disputa de Inversión.
Otra información relevante: Freshfields, Bruckhaus Deringer, es la firma de abogados que representa a la República de Guatemala.

b. República de Guinea Ecuatorial c. CMS Energy Corporation (Caso CIADI No. CONC (AF)/12/2)
Carácter en que participo: Conciliador Único (designado conjuntamente por ambas partes).
Objeto de dicha controversia: Controversia relacionada con temas tributarios.
Otra información relevante: La firma de abogados Freshfields, Bruckhaus Deringer representa a los Demandados.

c. Arbitraje *ad hoc* bajo las Reglas de Arbitraje de CNUDMI.
Carácter en que participo: Presidente del Tribunal Arbitral (designado por los co-árbitros).
Objeto de dicha controversia: Controversia relacionada con telecomunicaciones.
Otra información relevante: El procedimiento fue suspendido por acuerdo de las partes desde abril del 2011. Actualmente, se ha iniciado un procedimiento para dar por concluido el arbitraje. La firma de abogados Freshfields, Bruckhaus, Deringer participa como abogados de la Demandante.

3) ¿En qué arbitrajes participa o ha participado- como presidente del tribunal, árbitro de parte o abogado- indicando el carácter de su participación e identificando los casos en los que el TBI México-España haya sido invocado?

He participado en un solo caso en el cual el TBI México- España ha sido invocado. En dicho caso actué como abogado de parte, nombrado por la empresa española, quien inició un arbitraje contra el Gobierno Mexicano. El caso concluyó por un desistimiento.

A continuación presento una lista del número de arbitrajes en los que he participado y el carácter de dicha participación. En cuanto a los datos específicos de estos casos, la

información resulta en su mayoría confidencial (salvo aquellos casos disponibles públicamente).

		Presidente del Tribunal	Arbitro Único	Coárbitro	Abogado de una de las partes	Secretario u Otro
Arbitraje Internacional Institucional	ICC	5	1	17	17	6
	Otro	9	2	17	3	2
Arbitraje Internacional *Ad Hoc*		3			2	1
Arbitraje Doméstico		1	1	1	3	

4) ¿En qué arbitrajes internacionales y casos ante cortes de Estados Unidos e Inglaterra ha participado como experto en derecho mexicano o derecho internacional, a pedido de que parte y sobre qué temas versaba su participación?

a. He participado como experto en derecho mexicano en seis casos de arbitraje comercial ante la Corte de Arbitraje de la ICC. En tres de ellos nombrado como experto del Demandado y en tres de ellos nombrado por los abogados de la parte Demandante.

b. Fui nombrado en un caso como experto del Demandado en un Arbitraje Comercial *ad hoc*. Mi participación versó sobre cuestiones de derecho mexicano.

c. He participado como experto en derecho mexicano en dos casos de arbitraje del Capítulo 11, del TLCAN, bajo el Mecanismo Complementario del CIADI: (i) ARB (AF)/00/01 ADF Group, Inc. vs. United States of America, en el cual fui nombrado por el Demandado, y (ii) ARB (AF)/04/0) Corn Products, Inc. vs. The Republic of Mexico, en el cual fui nombrado por el Demandante.

d. He participado como experto en derecho mexicano en disputas de responsabilidad civil ante las cortes de Estados Unidos en diversas ocasiones. En un caso relacionado

con empresas del sector alimentos participe como experto nombrado por la Demandante. En otros seis casos me nombró el Demandado y acudí como experto a las cortes del Estado de Texas.

e. También he actuado como experto en temas de derecho mexicano relacionado con la nulidad y reconocimiento de laudo, ante Cortes de Estados Unidos en alrededor de cinco casos.

f. He actuado como experto en derecho mercantil en varias ocasiones ante las cortes de los Estados Unidos asesorando en disputas del sector bancario.

g. Participe como experto en temas de derecho mexicano, en un caso marítimo ante el tribunal comercial de Londres, Inglaterra.

5) Si mantiene o ha mantenido en los años recientes una relación profesional con el estudio Bomchil de la República Argentina y, en su caso, duración y objeto de esa relación.

Durante 1980-1983, fui socio administrador de la Oficina en Paris de Goodrich, Riquelme y Asociados y representante de la Asociación Latinoamericana de despachos de "Bomchil, Castro, Goodrich, Claro, Arosemena y Asociados". Ambas firmas mantenían una relación profesional, ya que, tenían conjuntamente una oficina en Londres.

Desde 1986, fecha en que fundé el despacho Von Wobeser y Sierra, S.C., no mantengo relación profesional con Bomchil, Castro, Goodrich, Claro, Arosemena y Asociados.

6) Si mantiene o ha mantenido en los años recientes una relación profesional con el gobierno mexicano o con alguna entidad controlada o relacionada con ese gobierno y, en su caso, duración y objeto de esa relación.

Von Wobeser y Sierra, no ha asesorado al gobierno de México. He participado en asuntos que involucran como parte contraria al gobierno mexicano (PEMEX, CFE, SCT, API Manzanillo).

Regularmente brindo asesoría en leyes de arbitraje (de manera honorífica y sin contraprestación). En este sentido he sido consultado por funcionarios del poder legislativo y ejecutivo en la evaluación de iniciativas de reforma del arbitraje en México. También he proporcionado asesoría en las negociaciones del TLCAN al gobierno Mexicano, respecto del tema de solución de controversias.

He actuado como árbitro, designado por Mexico, en un caso bajo el Mecanismo Complementario del CIADI: Robert Azinian and others v. The Republic of Mexico. También, el gobierno de México me designó como juez *ad hoc* en el caso de Jorge Castañeda Gutman ante la Corte Interamericana de Derechos Humanos.

En 2002-2006, desempeñé un cargo honorífico como Presidente del Consejo Consultivo del Instituto Nacional de Migración.

En virtud de la amplia información que me ha sido solicitada, tomando en consideración que no tengo un recuento escrito de todos los casos en que he participado y que como es públicamente conocido he tenido una actividad intensa en materia de arbitraje comercial y de inversión, es posible que mi memoria pueda haber omitido algún detalle respecto de lo solicitado.

Espero la anterior información sea de utilidad y quedo disponible en caso de que requieran complementar o ampliar la misma.

Saludos cordiales,

Claus von Wobeser

Anexo E

Repsol, S.A. y Repsol Butano, S.A. c. República Argentina (Caso CIADI No. ARB/12/38)

Marisa Planells-Valero
89273 ICS

to: M. Alejandra Etchegorry, adqm@marval.com.ar, candido.paz-ares@uria.com,

06/26/2013 12:08 PM

Cc: Gonzalo Flores
Bcc: Laura Amelia Pettinelli, Lina Maritza Del Carmen Diaz Brabo

Estimadas señoras y señores,

Sírvanse ver la siguiente comunicación que el Dr. Claus von Wobeser nos ha solicitado transmitirles.

Atentamente,

Marisa Planells-Valero
1818 H Street, NW | MSN U3-301 | Washington, DC 20433 USA
T 202-458-9273 | F 202-522-2615/2077 | mplanellsvalero@worldbank.org

ICSID INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
CIRDI CENTRE INTERNATIONAL POUR LE REGLEMENT DES DIFFÉRENDS RELATIFS AUX INVESTISSEMENTS
CIADI CENTRO INTERNACIONAL DE ARREGLO DE DIFERENCIAS RELATIVAS A INVERSIONES

----- Forwarded by Marisa Planells-Valero/Person/World Bank on 06/26/2013 12:04 PM -----

From: Claus von Wobeser <cvonwobeser@vwys.com.mx>
To: '"gflores@worldbank.org"' <gflores@worldbank.org>
Cc: '"mplanellsvalero@worldbank.org"' <mplanellsvalero@worldbank.org>
Date: 06/25/2013 06:59 PM
Subject: Ampliación de información Repsol

México D.F. a 25 de junio de 2013.

Ref.: Repsol, S.A. y Repsol Butano, S.A. c. República Argentina (Caso CIADI No. ARB/12/38).

Estimado Dr. Gonzalo Flores,
CIADI

Me permito complementar la información que proporcioné el pasado 22 de mayo 2013.
Hago de su conocimiento que participé como co-árbitro, designado por la parte Demandante, en dos procedimientos de arbitraje tramitados ante la Cámara de Comercio Internacional, en los que el Demandado fue Nucleoeléctrica Argentina, S.A. En dichos arbitrajes el Tribunal Arbitral resolvió a favor del Demandado.

Asimismo le informo que participé en un arbitraje privado, bajo las reglas de LCIA, entre una empresa mexicana y una empresa de los EUA. El carácter en el que participé fue como abogado de la Demandada. El objeto de la controversia fue una disputa comercial. En este arbitraje el Presidente del Tribunal Arbitral es o fue Nigel Blackaby (socio de Freshfields Bruckhaus, Deringer, quien fue designado por

ambas partes, la actora y la demandada).Cabe aclarar que durante el procedimiento arbitral mi despacho dejó de representar a la Demandada y desconozco el estado o resultado del mismo.

Espero la anterior información sea de utilidad y quedo disponible en caso de que requieran complementar o ampliar la misma.

Saludos cordiales,

Claus von Wobeser

CLAUS VON WOBESER
ABOGADO
VON WOBESER Y SIERRA, S.C.
Guillermo González Camarena 1100, Piso 7,
Col. Santa Fe, México, D.F., C.P. 01210
Dir.: 52 (55) 5258 1011 y 12
Conm: 52 (55) 5258 1000
Fax: 52 (55) 5258 1098 y 99
cvonwobeser@vwys.com.mx
www.vonwobeserysierra.com

To: "M. Alejandra Etchegorry" <Maetchego@Yahoo.Com.Ar>
"Adqm@Marval.Com.Ar" <Adqm@Marval.Com.Ar>
"Candido.Paz-Ares@Uria.Com" <Candido.Paz-Ares@Uria.Com>
cc: Gonzalo Flores
bcc: Laura Amelia Pettinelli
Lina Maritza Del Carmen Diaz Brabo

Anexo F

DECLARACIÓN – Regla de Arbitraje 6(2)

Repsol S.A. y Repsol Butano S.A.
c.
República Argentina

(Caso CIADI No. ARB/12/38)

A mi leal saber y entender no hay razón alguna por la que no deba servir en el Tribunal de Arbitraje constituido por el Centro Internacional de Arreglo de Diferencias Relativas a Inversiones con respecto a la diferencia entre Repsol S.A. y Repsol Butano S.A. y la República Argentina.

Me comprometo a mantener con carácter confidencial toda la información que llegue a mi conocimiento a consecuencia de mi participación en este proceso, así como del contenido de cualquier laudo que este Tribunal dicte.

Juzgaré con equidad, de acuerdo con la ley aplicable y no aceptaré instrucción o compensación alguna de ninguna otra fuente con respecto al procedimiento, salvo según lo dispuesto en el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados y en los Reglamentos y Reglas adoptados de conformidad con el mismo.

Adjunto una declaración sobre (a) mi experiencia profesional, de negocios y otras relaciones (de haberlas) con las partes, tanto anteriores como actuales y (b) cualquier otra circunstancia por la que una parte pudiera cuestionar la confianza en mi imparcialidad de juicio. Reconozco que al firmar esta declaración asumo una obligación continua de notificar prontamente a la Secretaria General del Centro cualquier relación o circunstancia de aquéllas mencionadas que surjan posteriormente durante este procedimiento.

Firma: _____ Fecha: 11 julio 2013

Dr. Claus von Wobeser

Se adjunta declaración	X
No se adjunta declaración	

11 de julio de 2013.

Gonzalo Flores
Marisa Planells-Valero
Consejería Jurídica
Centro Internacional de Arreglo de Diferencias Relativas a Inversiones
1818 H. Street, NW, MSN U3-301
Washington, D.C., 20433, EE.UU
Teléfono: (202)458 1534
Fax: (202)522 2615
gflores@worldbank.org; mplanellsvalero@worldbank.org

Vía e-mail y mensajería.

Ref.: Caso CIADI ARB/12/38 Repsol, S.A. y Repsol Butano, S.A. c. República Argentina.

Estimado licenciado Flores,

En seguimiento a la carta de fecha 28 de junio de 2013, por medio de la presente le comunico mi aceptación para fungir como presidente del tribunal en el caso de referencia. En este sentido le informo que acepto el nombramiento de conformidad con lo dispuesto en la Regla 5(3) de las Reglas de Arbitraje del CIADI.

En adición a lo anterior y de conformidad con la Regla 6(2) de las Reglas de Arbitraje del CIADI, acompaño a la presente el formato de Declaración respectivo.

Sin más por el momento, reciba saludos cordiales.

Atentamente,

Claus von Wobeser

DECLARACIÓN – REGLA DE ARBITRAJE 6(2)

Repsol, S.A. y Repsol Butano, S.A.

c.

República Argentina

(Caso CIADI No. ARB/12/38)

Por medio de la presente manifesto que no existen circunstancias que pudieran llevar a alguna de las Partes en este arbitraje a cuestionar la confianza en mi imparcialidad de juicio.

Independientemente de lo anterior, meramente por razones de transparencia, hago del conocimiento de las Partes y del Centro Internacional de Arreglo de Disputas de Inversión (CIADI) lo siguiente:

Experiencia profesional con las Partes (tanto anteriores como actuales).

Participé como árbitro, en el caso CIADI: *CIT Group Inc. c. República Argentina* (Caso CIADI No. ARB/04/9). En dicho arbitraje fui nombrado por la empresa demandante CIT Group, Inc. El caso fue descontinuado de conformidad con la Regla 44 de las Reglas de Arbitraje del CIADI, el 12 de mayo del 2009.

También, hago de su conocimiento que participé como co-árbitro, designado por una parte demandante, en dos procedimientos de arbitraje tramitados ante la Cámara de Comercio Internacional. En dichos arbitrajes, el demandado fue *Nucleoeléctrica Argentina, S.A.* En ambos casos el tribunal arbitral resolvió a favor del demandado, Nucleoeléctrica Argentina, S.A.

Actualmente, actúo como abogado en dos casos en contra de PEMEX (accionista de Repsol). Uno de los casos se relaciona con un procedimiento de anulación de un laudo arbitral. El otro caso es en contra de PEMEX Exploración y Producción (PEP).

Relación profesional con los despachos que representan a la Demandante.

Los despachos de abogados designados para representar a la Demandante, son despachos sumamente activos en el arbitraje internacional, por lo que, estoy y he estado involucrado en casos en los cuales dichos despachos también han participado o participan. En atención a lo anterior, a continuación desgloso con el mayor detalle que me permite la confidencialidad de los asuntos en los que he participado, la siguiente información:

1) Lista de casos en los que he participado en los que las firmas de abogados de las Demandantes han participado.

    a. Arbitraje ante la Corte de Arbitraje de la CCI
    Carácter en que he participado: Presidente del tribunal arbitral (nombrado por los co-árbitros).

Objeto de dicha controversia: Disputa comercial.
Otra información relevante: La firma de abogados Uría Menendez participó como abogados de la parte demandante. No se dictó laudo, las partes llegaron a un acuerdo.

b. Arbitraje ante la Corte de Arbitraje de la CCI
Carácter en que he participado: Presidente del tribunal arbitral (designado por la Corte de Arbitraje de la CCI).
Objeto de dicha controversia: Disputa comercial.
Otra información relevante: El despacho Marval O´Farrel & Mairal representó a una de las partes.

c. Arbitraje ante la Corte de Arbitraje de la CCI
Carácter en que he participado: Abogado de los demandantes (asesorando en temas de derecho mexicano).
Objeto de dicha controversia: Disputa entre una empresa de telecomunicaciones contra una entidad del Estado Mexicano.
Otra información relevante: La firma Freshfields, Bruckhaus, Deringer participó como abogados de la empresa demandante llevando la parte internacional. El arbitraje terminó en el año 2004.

d. Arbitraje *ad hoc* bajo las Reglas de Arbitraje de CNUDMI
Carácter en que he participado: Abogado de los demandantes.
Objeto de dicha controversia: Disputa entre accionistas.
Otra información relevante: El presidente del tribunal arbitral fue Nigel Blackaby, socio de Freshfields, Bruckhaus, Deringer, quien fue nombrado por los co-árbitros.

e. Arbitraje bajo las reglas de LCIA.
Carácter en que he participado: Abogado de la parte demandada.
Objeto de dicha controversia: arbitraje privado, entre una empresa mexicana y una empresa de los EUA. El objeto de la controversia fue una disputa comercial.
Otra información relevante: El Presidente del Tribunal Arbitral es o fue Nigel Blackaby (socio de Freshfields Bruckhaus, Deringer, quien fue designado por ambas partes, la actora y la demandada). Cabe aclarar que durante el procedimiento arbitral mi despacho dejó de representar a la demandada y desconozco el estado o resultado del mismo.

2) Lista de casos en los que *participo actualmente* en los que las firmas de los abogados de las Demandantes participan.

a. TECO Guatemala Holdings, LLC c. República de Guatemala (Caso CIADI No. ARB/10/23)
Carácter en que participo: Co-árbitro (nombrado por la República de Guatemala).
Objeto de dicha controversia: Disputa de Inversión.
Otra información relevante: Freshfields, Bruckhaus Deringer, es la firma de abogados que representa a la República de Guatemala.

b. República de Guinea Ecuatorial c. CMS Energy Corporation (Caso CIADI No. CONC (AF)/12/2)
Carácter en que participo: Conciliador Único (designado conjuntamente por ambas partes).
Objeto de dicha controversia: Controversia relacionada con temas tributarios.
Otra información relevante: La firma de abogados Freshfields, Bruckhaus Deringer representa a CMS Energy Corporation.

c. Arbitraje *ad hoc* bajo las Reglas de Arbitraje de CNUDMI
Carácter en que participo: Presidente del Tribunal Arbitral (designado por los co-árbitros).
Objeto de dicha controversia: Controversia relacionada con telecomunicaciones.
Otra información relevante: El procedimiento fue suspendido por acuerdo de las partes desde abril del 2011. Actualmente, se ha iniciado un procedimiento para dar por concluido el arbitraje. La firma de abogados Freshfields, Bruckhaus, Deringer participa como abogados de la parte demandante.

Otras circunstancias

Finalmente hago de su conocimiento que he participado en un solo caso en el cual el TBI México- España ha sido invocado. En dicho caso actué como abogado de parte, nombrado por la empresa española, quien inició un arbitraje contra el Gobierno Mexicano. El caso concluyó por un desistimiento.

En virtud de lo anterior, confirmo mi disponibilidad para actuar como presidente del tribunal en el presente caso.

Firma:  Fecha: 11 de julio de 2013.

Claus von Wobeser

ANEXO 19

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

BLUE BANK INTERNATIONAL & TRUST (BARBADOS) LTD.

Claimant

and

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID CASE NO. ARB/12/20

DECISION ON THE PARTIES' PROPOSALS TO DISQUALIFY A MAJORITY OF THE TRIBUNAL

Chairman of the ICSID Administrative Council
Dr. Jim Yong Kim

Secretary of the Tribunal
Alicia Martín Blanco

Representing the Claimant:

Mr. Pedro J. Martínez-Fraga
Mr. Ryan Reetz
Mr. Harout Jack Samra
Mr. Kamal H. Sleiman
DLA Piper LLP (US)
200 South Biscayne Boulevard,
Suite 2500
Miami, Florida 33131
United States of America

Representing the Respondent:

Dr. Manuel Enrique Galindo
Procurador General (E) de la República
Dra. Magaly Gutiérrez
Dra. Yarubith Escobar
Procuraduría General de la República
Paseo Los Ilustres c/c Av. Lazo Martí
Santa Mónica, Caracas
Venezuela

Mr. Osvaldo César Guglielmino
Mr. Diego Brian Gosis
Mr. Facundo Pérez Aznar
Guglielmino & Asociados
175 SW 7th Street, Suite 2110
Miami, Florida 33130
United States of America

Date: November 12, 2013

TABLE OF CONTENTS

A. THE PARTIES

1. The Claimant is Blue Bank International & Trust (Barbados) Ltd. (**"Blue Bank"**), a company incorporated under the laws of Barbados. The Respondent is the Bolivarian Republic of Venezuela (**"Venezuela"**).

B. PROCEDURAL HISTORY

2. On June 25, 2012, the International Centre for Settlement of Investment Disputes (**"ICSID"** or the **"Centre"**) received a Request for Arbitration filed by Blue Bank against Venezuela.

3. In its Request, the Claimant alleged that Venezuela breached the 1994 Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, in force since 1995.

4. The Secretary-General registered the Request for Arbitration on August 7, 2012.

5. By letter of October 8, 2012, the Claimant appointed Mr. José María Alonso, a national of the Kingdom of Spain, as arbitrator. Mr. Alonso accepted his appointment on October 22, 2012. Copies of Mr. Alonso's declaration, statement and *curriculum vitae* were circulated to the Parties on October 24, 2013, pursuant to Rule 6(2) of the ICSID Rules of Procedure for Arbitration Proceedings (**"Arbitration Rules"**). Mr. Alonso's statement indicated as follows:

> *"As of March 2012, I have been a Partner at Baker & McKenzie Madrid, S.L.P. in charge of the Dispute Resolution department in Madrid (Spain).*
>
> *Baker & McKenzie Madrid, S.L.P. is a firm belonging to Baker & McKenzie International (Swiss Verein). All the firms that form part of Baker & McKenzie International are independent and the remuneration of Partners therefore depends mainly on the turnover of each particular firm.*
>
> *Neither myself nor Baker & McKenzie Madrid, S.L.P. have or have had any relationship with the parties of the proceedings.*
>
> *Notwithstanding the above, I am aware of arbitration proceedings before the ICSID against the Bolivarian Republic of Venezuela in an unrelated matter initiated by Baker & McKenzie New York and Baker & McKenzie Caracas in 2011, in which they represented a company called Legreef [sic] Investments. As stated above, in spite of belonging to Baker & McKenzie International, both firms are independent from Baker & McKenzie Madrid, S.L.P. and there is no relationship whatsoever between myself or Baker & McKenzie Madrid, S.L.P. and*

> *Legreef [sic] International or the aforementioned arbitration proceedings. Therefore I will not be provided with any information, intervene or take part in said proceedings.*
>
> *I therefore consider myself completely independent and impartial to act as an arbitrator in this [sic] proceedings."*

6. By letter of November 5, 2012, the Respondent appointed Dr. Santiago Torres Bernárdez, a national of the Kingdom of Spain, as arbitrator. Dr. Torres Bernárdez accepted his appointment on November 15, 2012. Copies of his declaration, statement and *curriculum vitae* were circulated to the Parties on November 16, 2012. Dr. Torres Bernárdez's statement indicated as follows:

> *"Por la presente declaro ser en la actualidad árbitro designado por la República Argentina en dos casos CIADI, a saber "Abaclat and others v. Argentine Republic" (caso CIADI No.ARB/07/5) y "Giordano Alpi and others v. Argentine Republic (caso CIADI No.ARB/08/9)".*
>
> *No he tenido ni tengo ninguna [sic] tipo de relación con el Demandante o la Demandada en el presente caso y ni yo ni mi familia tenemos inversiones u otros intereses económicos en VENEZUELA y/o BARBADOS."*

7. On November 5, 2012, Respondent submitted a proposal to disqualify Mr. Alonso pursuant to Article 57 of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**"Convention"**) and Rule 9 of the ICSID Arbitration Rules (**"Respondent's November 5 Letter"**). This proposal was filed before the constitution of the Tribunal. The Centre confirmed receipt on November 9, 2012.

8. On May 3, 2013, the Centre reminded the Parties that no steps had been taken towards the constitution of the Tribunal, since the appointment of Dr. Torres Bernárdez.

9. On May 4, 2013, the Claimant requested that the President of the Tribunal be designated by the Chairman of the ICSID Administrative Council ("**Chairman**"). By letter of May 23, 2013, the Secretary-General proposed five candidates to the Parties to be considered as the presiding arbitrator. None of these proposals resulted in a mutually agreeable candidate.

10. On June 12, 2013, and before the Tribunal had been constituted, the Claimant submitted a proposal to disqualify Dr. Torres Bernárdez pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (**"Claimant's June 12 Letter"**). In this letter, the Claimant indicated that Mr. Alonso and Dr. Torres Bernárdez would be a majority of the members of the tribunal (once constituted) and, accordingly, requested

that the Chairman decide the challenges in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9.

11. On July 2, 2013, the Centre informed the Parties of its understanding that the intent of both Parties was to treat Respondent's November 5 Letter and Claimant's June 12 Letter as a proposal for disqualification of the majority of the members of the tribunal, which would be decided by the Chairman in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9. Venezuela confirmed the Centre's understanding by letter of July 3, 2013. No further comments were received from the Claimant.

12. By letter of July 31, 2013, the Centre informed the Parties of its intention to propose to the Chairman the appointment of Mr. Christer Söderlund, a national of the Kingdom of Sweden, as the presiding arbitrator. By letter of August 7, 2013, the Respondent objected to the proposal of Mr. Söderlund as the presiding arbitrator. The Claimant did not submit observations.

13. By letter of August 13, 2013, the Centre transmitted to the Parties Mr. Söderlund's reply to Respondent's objections. Having carefully considered the correspondence exchanged on this matter, the Centre informed the Parties that it would proceed with the appointment of Mr. Söderlund. Mr. Söderlund accepted his appointment on August 15, 2013.

14. The Tribunal was constituted on August 16, 2013 in accordance with Article 37(2)(b) of the ICSID Convention. On the same date, the Centre transmitted the proposals to disqualify Mr. Alonso and Dr. Torres Bernárdez to the three members of the Tribunal, declared the proceeding suspended in accordance with ICSID Arbitration Rule 9(6), and established a procedural calendar for the Parties' submissions on the disqualification proposals.

15. On August 23, 2013, the Respondent submitted additional observations to Respondent's November 5 Letter (**"Respondent's August 23 Observations"**). The Claimant did not submit additional observations.

16. On September 2, 2013, the Parties requested an extension to file their second round of observations until September 12, 2013. The Parties' request was granted on September 3, 2013.

17. On September 2, 2013, Dr. Torres Bernárdez submitted a letter to the Centre (i) furnishing explanations in accordance with ICSID Arbitration Rule 9(3) (**"Dr. Torres Bernárdez's Explanations"**) and (ii) submitting his resignation in

accordance with ICSID Arbitration Rule 8(2). The Centre circulated this letter to the Parties, to Mr. Alonso, and to Mr. Söderlund on September 6, 2013.

On September 9, 2013, Mr. Alonso furnished explanations in accordance with ICSID Arbitration Rule 9(3) (**"Mr. Alonso's Explanations"**). The Centre circulated Mr. Alonso's explanations to the Parties and to Mr. Söderlund on the same date.

18. On September 9, 2013, the Parties were invited to submit simultaneous observations on any of the documents filed regarding the proposals to disqualify Mr. Alonso and Dr. Torres Bernárdez by September 19, 2013. On September 19, 2013, Respondent submitted its observations (**"Respondent's September 19 Observations"**). On the same date, the Claimant submitted its observations in two separate documents: one document dealing with the resignation of Dr. Torres Bernárdez and another document relating to the proposed disqualification of Mr. Alonso (**"Claimant's September 19 Observations"**).

19. On October 4, 2013, the Parties were invited to submit reply observations, including arguments regarding the standard for disqualification under Article 57 of the ICSID Convention and its application to the present case by October 11, 2013.

20. On October 10, 2013, the Claimant requested an extension of time to submit its reply observations. The Centre granted an extension of time to both Parties until October 24, 2013. Respondent submitted its reply observations on October 24, 2013 (**"Respondent's October 24 Observations"**). No additional comments were received from Claimant.

C. POSITIONS OF THE PARTIES AND OBSERVATIONS BY MR. ALONSO AND DR. TORRES BERNÁRDEZ

21. The facts, arguments and observations presented in relation to Mr. Alonso (I) and Dr. Torres Bernárdez (II) are summarized below.

I. Mr. José María Alonso

1. Respondent's arguments

22. Respondent's proposed disqualification of Mr. Alonso is based on his position at Baker & McKenzie, a firm that represents the claimant investor in the case *Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/5) (**"*Longreef v. Venezuela*"**) through its offices in New York and Caracas.

23. In particular, Mr. Alonso is (i) a Managing Partner of the Litigation and Arbitration Department of Baker & McKenzie Madrid and (ii) a Member of the Steering Committee

of the Global Arbitration Practice Group and the Steering Committee of the Baker & McKenzie International European Dispute Practice Group. In addition, Respondent alleged that the office of Baker & McKenzie in Caracas represents complainants in administrative proceedings against the State.[1]

25. Respondent noted that Baker & McKenzie is structured and publicized as a global legal practice, and that each office cannot be considered as a separate legal person for the purposes of a challenge application. It argued that this conclusion is reinforced by the facts that Mr. Alonso is a member of international or global committees within the global law firm and that part of his remuneration depends on the global returns of the firm.[2]

26. Respondent argued that the fact that Longreef Investments A.V.V. is a current client of the law firm where Mr. Alonso is a partner is sufficient to give rise to reasonable doubts as to Mr. Alonso's independence and impartiality, even if Mr. Alonso received minimal remuneration from this client.[3] Respondent contended that Mr. Alonso has direct and indirect economic interests in the outcome of these two cases against Venezuela, given that part of his remuneration depends on the results of other firms (including income derived from the *Longreef v. Venezuela* case), and that a favorable result in *Longreef v. Venezuela* in addition to a vote favorable to the Claimant in the present case would contribute to the expansion of the practice of Baker & McKenzie in the investment arbitration community.[4]

27. Respondent argued that Mr. Alonso's interests are adverse to Venezuela's interests ("*relación adversa*") because Baker & McKenzie represents interests against Venezuela, and Mr. Alonso is a partner and co-manager of Baker & McKenzie's global arbitration practice.[5]

28. Respondent noted that in this case Mr. Alonso would be deciding issues similar or identical to those which Baker & McKenzie would be arguing against Venezuela in *Longreef v. Venezuela*.[6]

29. Respondent argued that the potential to challenge judges or arbitrators where there are doubts about their independence or impartiality exists in most legal systems and

---

[1] Respondent's November 5 Letter, p. 2
[2] Respondent's September 19 Observations, ¶ 3; Respondent's October 24 Observations, ¶ 7
[3] Respondent's September 19 Observations, ¶ 4
[4] Respondent's October 24 Observations, ¶¶ 3-5
[5] Respondent's August 23 Observations, ¶¶ 7-10
[6] Respondent's August 23 Observations, ¶ 7

constitutes a general principle of law under Article 38 of the Statute of the International Court of Justice.[7]

30. Respondent contended that Articles 14 and 57 of the ICSID Convention establish the conditions for the disqualification of arbitrators. Article 14(1) requires that arbitrators "may be relied upon to exercise independent judgment".[8]

31. Respondent contended that any reasonable person would have justifiable doubts as to whether an arbitrator that coordinates the global arbitration practice of a firm could sign an award rejecting arguments that are being defended by other partners of the same firm against the same respondent.[9]

32. Accordingly, Respondent requests that Mr. Alonso be disqualified from the Tribunal.

2. <u>Observations by the Claimant</u>

33. The Claimant stated that no principle of law compels the Chairman to disqualify Mr. Alonso.[10] In particular, the Claimant contended that Respondent had mischaracterized the facts and the legal standard.

34. The Claimant submits that Articles 14(1) and 57 of the ICSID Convention provide for an objective standard, "presumably reasonableness"[11], to establish "manifest lack of impartiality or independence".[12] However, it is claimed that Venezuela had not established any facts demonstrating that Mr. Alonso manifestly lacked impartiality or independence. In addition, it argued that Venezuela could not meet the standard established by the term "manifest".

35. According to the Claimant, Venezuela has mischaracterized the structure and functioning of the *Verein* structure of Baker & McKenzie International, Mr. Alonso's status as a partner, and his title and functions as a member of Baker & McKenzie's International Arbitration Steering Committee.[13]

36. The Claimant further contends that the legal authorities cited by Venezuela undermine its position because they all emphasize the arbitrator's direct involvement in cases

---

[7] Respondent's November 5 Letter, p. 8-12; Respondent's October 24 Observations, ¶ 11
[8] Respondent's November 5 Letter, p. 4; Respondent's October 24 Observations, ¶¶ 12-13
[9] Respondent's November 5 Letter, p. 6; Respondent's October 24 Observations, ¶¶14 and 22
[10] Claimant's September 19 Observations, p. 1
[11] *Id.*, p. 3
[12] *Id.*, p. 5
[13] *Id.*, p. 9-13

against the State party, whereas no such direct involvement existed or exists with respect to Mr. Alonso.[14]

37. Accordingly, the Claimant requests that the Chairman deny Respondent's proposal to disqualify Mr. Alonso.

3. Explanations by Mr. Alonso

38. Mr. Alonso states that there is no reason to disqualify him from serving as an arbitrator in this case. In particular, he notes that the firm where he is a partner, Baker & McKenzie Madrid, and the firms that represent Longreef Investments A.V.V. against Venezuela, Baker & McKenzie New York and Caracas, are separate legal entities that function independently, and that he does not lead the global arbitration practice of Baker & McKenzie. Mr. Alonso states that his partnership in Baker & McKenzie Madrid and his membership in Baker & McKenzie's International Arbitration Steering Committee do not meet the standard for disqualification under the ICSID Convention or the IBA Guidelines.

39. Mr. Alonso states that Baker & McKenzie Madrid, Baker & McKenzie New York and Baker & McKenzie Caracas are members of the Swiss *Verein* Baker & McKenzie International. As explained in the attachment to his declaration, these firms constitute independent legal entities.[15]

40. Moreover, Mr. Alonso states that his income as a partner depends primarily on the results achieved by Baker & McKenzie Madrid, and that the impact on his income of any profit derived by Baker & McKenzie New York and Caracas from the *Longreef v. Venezuela* case would be nonexistent or insignificant.[16]

41. Mr. Alonso further states that Baker & McKenzie Madrid operates with absolute autonomy and does not receive instructions from any other firm.[17]

42. Mr. Alonso explains that he is a member of Baker & McKenzie's International Arbitration Steering Committee. However, he states that he does not co-manage this Committee and that his membership does not mean that he manages Baker & McKenzie's global arbitration practice. Furthermore, this Committee gives no instructions on the management of individual cases.[18]

---

[14] *Id.*, p. 13
[15] Mr. Alonso's Explanations, ¶ 1
[16] *Id.*, ¶ 2
[17] *Id.*, ¶ 3
[18] *Id.*, ¶ 3

43. Mr. Alonso states that the standard for disqualification under the ICSID Convention and the IBA Guidelines are different.[19] Whereas the ICSID Convention requires manifest lack of impartiality or independence, the IBA Guidelines require only justifiable doubts. He states that neither of these standards is met in this case.

44. Mr. Alonso concludes that there is no basis to find reasonable doubt as to his capacity to act impartially, especially given that he does not or has never personally represented any of the Parties, he has never acted in any case against the Respondent and he has no economic or other interest in the result of the *Longreef v. Venezuela* case.[20]

II. Dr. Santiago Torres Bernárdez

1. Claimant's arguments

45. The Claimant's proposed disqualification of Dr. Torres Bernárdez is based on (i) repeat appointments by the Argentine Republic, and by Venezuela when represented by the former Attorney General (*Procurador del Tesoro*) of the Argentine Republic; and on (ii) Dr. Torres Bernárdez's alleged systematic findings in favor of States.[21]

46. In particular, the Claimant contends that: (i) in five of the seven investment arbitration cases in which Dr. Torres Bernárdez has been appointed as an arbitrator, current counsel for Venezuela represented the appointing party;[22] (ii) each one of these seven appointments was made by a respondent State;[23] and (iii) there is no published decision on any significant issue in which Dr. Torres Bernárdez has ruled against the party that appointed him.[24]

47. According to the Claimant, the reference to "independent judgment" in Article 14(1) of the ICSID Convention has been interpreted as including a requirement of impartiality, and the term "manifest" in Article 57 of the ICSID Convention is generally acknowledged to mean "obvious" or "evident", and imposing a relatively heavy burden of proof on the challenging party.[25]

48. The Claimant relies on the IBA Guidelines and on several decisions issued by ICSID tribunals to determine whether the facts in the present case could lead a reasonable

---

[19] *Id.*, ¶ 5
[20] *Id.*, ¶ 8
[21] Claimant's June 12 Letter, p. 1
[22] *Id.*, p. 17-22
[23] *Id.*, p. 3
[24] *Id.*, p. 3, 22-27
[25] *Id.*, p. 4-7

person to conclude that an arbitrator lacks independence or impartiality.[26] The Claimant contends that the present case differs from the cases it refers to[27] because the facts in the present case demonstrate actual bias as opposed to the appearance of bias that was argued but not substantiated in those other cases.[28]

49. Accordingly, the Claimant requests that Dr. Torres Bernárdez be disqualified from the Tribunal.

2. Observations by the Respondent

50. The Respondent contends that no comments are necessary in light of Dr. Torres Bernárdez's resignation from the Tribunal.[29]

3. Explanations by Dr. Torres Bernárdez

51. Together with his resignation, Dr. Torres Bernárdez submitted explanations to the Claimant's proposal for his disqualification.

52. Regarding repeat decisions in favor of respondent States, Dr. Torres Bernárdez states that most of those decisions and awards were made unanimously with the other members of the Tribunal[30] and that there is no rule that prevents him from issuing dissenting opinions whenever he disagrees with the tribunal.[31]

53. Dr. Torres Bernárdez also states that appointments are made by the parties to the proceedings and not by counsel representing those parties, and that the ICSID Convention and the ICSID Arbitration Rules do not limit the number of times that a party may appoint the same arbitrator.[32] In any case, Dr. Torres Bernárdez states that Mr. Guglielmino was representing the appointing party in only three of the seven cases where Dr. Torres Bernárdez was appointed as an arbitrator.[33]

54. Dr. Torres Bernárdez states that he is independent[34] and that he has never had any personal, professional or other kind of relationship with Respondent's counsel.[35]

---

[26] *Id.*, p. 8-10
[27] Respondent's August 23 Observations, ¶¶ 1, 4 and 5; Respondent's September 19 Observations, ¶¶ 6-11; Respondent's October 24 Observations, ¶¶ 16-17
[28] Claimant's June 12 Letter, p. 15
[29] Respondent's September 19 Observations, ¶ 2
[30] Dr. Torres Bernárdez's Explanations, ¶¶ 7-9
[31] *Id.*, ¶¶ 14-15
[32] *Id.*, ¶¶ 21-24
[33] *Id.*, ¶¶ 26-27
[34] *Id.*, ¶¶ 12, 29-30

D. DECISION BY THE CHAIRMAN

I. The applicable legal standard

55. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

> *"A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."*

56. The disqualifications proposed in this case allege a manifest "*lack of the qualities required by paragraph (1) of Article 14*" of two of the members of the Tribunal. Accordingly, it is unnecessary to address disqualification "*on the ground that [an arbitrator] was ineligible for appointment to the Tribunal under Section 2 of Chapter IV*".

57. Article 14(1) of the ICSID Convention provides:

> *"Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."*

58. While the English version of Article 14 of the ICSID Convention refers to "*independent judgment,*"[36] the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.[37]

---

[35] *Id.*, ¶ 26

[36] The French version refers to "*indépendance dans l'exercice de leurs fonctions*"

[37] *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic* (ICSID Cases Nos. ARB/03/17 and ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007), ¶ 28 ("***Suez***"); *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011), ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012), ¶ 59 ("***Getma***"); *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to

59. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control.[38] Independence and impartiality both "*protect parties against arbitrators being influenced by factors other than those related to the merits of the case*".[39] 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.[40]

60. The applicable legal standard is an "*objective standard based on a reasonable evaluation of the evidence by a third party*".[41] As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[42]

61. Finally, regarding the meaning of the word "manifest" in Article 57 of the Convention, a number of decisions have concluded that it means "evident" or "obvious,"[43] and that it relates to the ease with which the alleged lack of the qualities can be perceived.[44]

62. The Chairman notes that the Parties have referred to other sets of rules or guidelines in their arguments, such as the IBA Guidelines. While these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012), ¶ 54 ("***ConocoPhillips***"); *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, (March 19, 2010) ¶ 36 ("***Alpha***"); *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator (December 23, 2010), ¶ 37; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013), ¶ 55 ("***Saint-Gobain***")

[38] *Suez*, supra note 37, ¶ 29; *Getma*, supra note 37, ¶ 59; *ConocoPhillips*, supra note 37, ¶ 54

[39] *ConocoPhillips*, supra note 37, ¶ 55; *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 (May 20, 2011), ¶ 70 ("***Universal***"); *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 (August 12, 2010), ¶ 43 ("***Urbaser***")

[40] *Urbaser*, supra note 39, ¶ 43

[41] *Suez*, supra note 37, ¶¶ 39-40

[42] *Id.*

[43] *Suez*, supra note 37, ¶ 34; *Alpha*, supra note 37, ¶ 37; *Universal*, supra note 39, ¶ 71; *Saint-Gobain*, supra note 37, ¶ 59

[44] C. Schreuer, The ICSID Convention, Second Edition (2009), p. 1202, ¶¶ 134-154 on the interpretation of manifest in Article 52 of the ICSID Convention

II. Timeliness

63. ICSID Arbitration Rule 9(1) requires that the party proposing a challenge under Article 57 of the ICSID Convention must do so "*promptly, and in any event before the proceeding is declared closed*".

64. In a number of ICSID cases, the disputing parties announced their intention to challenge an arbitrator before the tribunal had been constituted. In these instances, the Centre reminded the parties that the tribunal is not constituted, and the proceeding does not begin, until the Secretary-General has notified the parties that all arbitrators have accepted their appointments.[45] A challenge becomes effective only after this notification has been made.

65. In this case, the Parties filed their proposals to disqualify Mr. Alonso and Dr. Torres Bernárdez before the Tribunal was constituted. While these challenges did not become effective until the Tribunal was constituted, there is no doubt that both challenges were filed "*promptly*" in the sense of ICSID Arbitration Rule 9(1).

III. The challenge of Mr. Alonso

66. The following facts are undisputed: (i) Mr. Alonso is a partner in Baker & McKenzie Madrid; (ii) Baker & McKenzie New York and Baker & McKenzie Caracas represent the claimant in a parallel proceeding against the Respondent (*Longreef v. Venezuela*); (iii) Mr. Alonso has no direct involvement in the parallel *Longreef v. Venezuela* case; and (iv) Mr. Alonso is a member of Baker & McKenzie's International Arbitration Steering Committee.

67. The sharing of a corporate name, the existence of an international arbitration steering committee at a global level, and Mr. Alonso's statement that his remuneration depends "primarily" but not exclusively on the results achieved by the Madrid firm imply a degree of connection or overall coordination between the different firms comprising Baker & McKenzie International.

68. In addition, given the similarity of issues likely to be discussed in *Longreef v. Venezuela* and the present case and the fact that both cases are ongoing, it is highly probable that Mr. Alonso would be in a position to decide issues that are relevant in *Longreef v. Venezuela* if he remained an arbitrator in this case.

69. In view of the above, the Chairman concludes that it has been demonstrated that a third party would find an evident or obvious appearance of lack of impartiality on a

---

[45] ICSID Arbitration Rule 6(1)

reasonable evaluation of the facts in this case. Accordingly, the Chairman finds that Mr. Alonso manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention in this particular case.

IV. The challenge of Dr. Torres Bernárdez

70. Dr. Torres Bernárdez has resigned from the Tribunal. As a result, it is no longer necessary to address the proposal for his disqualification, which is accordingly dismissed.

E. CONCLUSIONS

71. For the reasons above, the Chairman decides as follows:

i. Respondent's proposal to disqualify Mr. Alonso pursuant to Article 57 of the ICSID Convention is upheld.

ii. Claimant's proposal to disqualify Dr. Torres Bernárdez pursuant to Article 57 of the ICSID Convention is dismissed.

Chairman of the ICSID Administrative Council
Dr. Jim Yong Kim

ANEXO 20

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE ARBITRATION PROCEEDING BETWEEN

ABACLAT AND OTHERS
CLAIMANTS

and

ARGENTINE REPUBLIC
RESPONDENT

ICSID Case No. ARB/07/5

DECISION ON THE PROPOSAL TO DISQUALIFY A MAJORITY OF THE TRIBUNAL

CHAIRMAN OF THE ADMINISTRATIVE COUNCIL
DR. JIM YONG KIM

Secretary of the Tribunal
Mr. Gonzalo Flores

Date: February 4, 2014

REPRESENTING THE CLAIMANTS:

MS. CAROLYN B. LAMM

MR. JONATHAN C. HAMILTON

MS. ABBY COHEN SMUTNY

MS. ANDREA J. MENAKER

MR. FRANCIS A. VASQUEZ, JR.

WHITE & CASE LLP

WASHINGTON, D.C. 20005, USA

AND

MR. PAOLO MARZANO

MRS. CECILIA CARRARA

LEGANCE STUDIO LEGALE ASSOCIATO

ROME, ITALY

AND

DR. JOSÉ ALFREDO MARTÍNEZ DE HOZ, JR.,

PÉREZ ALATI, GRONDONA, BENITES, ARNTSEN & MARTINEZ DE HOZ (JR.)

BUENOS AIRES, ARGENTINA

REPRESENTING THE ARGENTINE REPUBLIC:

DRA. ANGELINA MARÍA ESTHER ABBONA

PROCURADORA DEL TESORO DE LA NACIÓN

PROCURACIÓN DEL TESORO DE LA NACIÓN ARGENTINA

BUENOS AIRES

ARGENTINA (C1112ADC)

CONTENTS

A. PROCEDURAL HISTORY

1. On September 14, 2006, a number of individuals and corporations claiming to hold sovereign bonds issued by the Argentine Republic ("**Claimants**") submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") against the Argentine Republic ("**Argentina**" or "**Respondent**").

2. On February 7, 2007, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**Convention**").

3. The Arbitral Tribunal was constituted on February 6, 2008. Its members were Dr. Robert Briner, a Swiss national, appointed as President pursuant to Article 38 of the ICSID Convention, Professor Georges Abi-Saab, an Egyptian national, appointed by Argentina, and Professor Albert Jan van den Berg, a Dutch national, appointed by the Claimants. Following the resignation of Dr. Briner due to ill health, the Tribunal was reconstituted on September 2, 2009, with Professor Pierre Tercier, also a Swiss national, being appointed as President of the Tribunal by agreement of the parties.

4. Following written submissions, a hearing on jurisdiction took place in Washington D.C. from April 7 to 13, 2010. On August 4, 2011, the Tribunal, by a majority composed of Professors Tercier and van den Berg, issued a Decision on Jurisdiction and Admissibility. On October 28, 2011, Professor Abi-Saab issued a Dissenting Opinion on the Decision on Jurisdiction and Admissibility.

5. On September 15, 2011, Argentina submitted a Proposal to Disqualify Professors Tercier and van den Berg under Article 57 of the ICSID Convention. The proceeding was suspended pursuant to ICSID Arbitration Rule 9(6).

6. Professor Abi-Saab tendered his resignation from the Tribunal by letter dated November 1, 2011.

7. On December 21, 2011, the Chairman of the ICSID Administrative Council rejected the Proposal to Disqualify Professors Tercier and van den Berg, pursuant to Article 58 of the ICSID

Convention. The proceeding was resumed on that same date in accordance with ICSID Arbitration Rule 9(6).

8. On December 22, 2011, Professors Tercier and van den Berg consented to Professor Abi-Saab's resignation, as envisaged in ICSID Arbitration Rule 8(2).

9. On January 19, 2012, the Tribunal was reconstituted, its members being Professor Tercier, Professor van den Berg, and Dr. Santiago Torres Bernárdez, a Spanish national, appointed by Argentina to replace Professor Abi-Saab.

10. On May 9, 2012, the Tribunal held a procedural hearing in Washington D.C.

11. Between May 9, 2012 and November 4, 2013, the Tribunal has issued 13 Procedural Orders and 3 set of Directions concerning the conduct of these proceedings.[1]

12. On July 7, 2012, the Tribunal unanimously issued Procedural Order No. 12 concerning the conduct of the proceedings and the procedural calendar. In this Procedural Order, the Tribunal divided the steps leading to the hearing into two main phases: Phases 2 and 3. It further divided Phase 2 into three sub-phases: Phases 2A and 2B, which would run in parallel, and would later merge into Phase 2C.

13. In Phase 2A, the Claimants and the Respondent would file a Memorial and Counter-Memorial setting forth their respective cases on liability and quantum. The Respondent could also address issues of jurisdiction and admissibility but only to the extent that they had not been addressed and decided in the Decision on Jurisdiction and Admissibility.

14. Phase 2B would concern a verification of the Claimants' database by one or more independent experts to be appointed by the Tribunal (the "**Database Verification Process**").

---

[1] Procedural Order No. 10 (June 18, 2012), Procedural Order No. 11 (June 27, 2012), Procedural Order No. 12 (July 7, 2012), Procedural Order No. 13 (September 27, 2012), Procedural Order No. 14 (November 1, 2012), Procedural Order No. 15 (November 20, 2012), Procedural Order No. 16 (January 11, 2013), Procedural Order No. 17 (February 08, 2013), Procedural Order No. 18 (March 25, 2013), Procedural Order No. 19 (April 8, 2013), Procedural Order No. 20 (April 24, 2013), Procedural Order No. 21 (May 2, 2013), Procedural Order No. 22 (July 30, 2013), Directions from the Tribunal to the Parties of September 26, October 21, and November 4, 2013.

15. Procedural Order No. 12 granted the parties an opportunity to participate in the Database Verification Process, and, to this end, to retain their own experts. Phase 2B was to be completed by a report of the Independent Expert(s). Originally, this report was to be issued upon the filing of Respondent's Counter-Memorial on Phase 2. Phase 2B also envisaged a document production phase that would follow the issuance of the expert(s) report.

16. Phases 2A and 2B would merge into Phase 2C after the conclusion of the document production. In Phase 2C, the Claimants and the Respondent were to submit a Reply and Rejoinder, respectively, which would address (i) issues of liability and quantum, (ii) jurisdiction and admissibility, should the Respondent raise these in its Counter-Memorial on Phase 2B, and (iii) any comments arising from the Database Verification Process. If the Respondent raised issues of jurisdiction and admissibility in its Counter-Memorial, the Claimants could file a Rejoinder on these issues. This exchange of written pleadings would be followed by a hearing on Phase 2.

17. The above steps were reflected in a schedule included in Procedural Order No. 12.

Phase	Date	Party	Description
2A	15 Sept 12 (2 months)	Claimants	Claimants file their Memorial on Phase 2
	15 Nov 12 (2 months)	Respondent	Respondent files its Memorial on Phase 2
2B	15 Nov 12	External Expert(s)	Report on the verification of Claimants' database in compliance with the requirements set forth in § 501(iii) of the Decision by one or more experts appointed by the Tribunal after consultation of the Parties
	30 Nov 12 (2 weeks)	Requesting Party	Both Parties file their Request for Document Production
	14 Dec 12 (2 weeks)	Producing/ Objecting Party	Both Parties produce non-contentious documents and file their objections concerning contentious document requests
	28 Dec 12 (2 weeks)	Requesting Party	Both Parties file answers to objections concerning contentious document requests
	11 Jan 13 (2 weeks)	Objecting Party	Both Parties reply to answer to the objections concerning contentious document requests
	1 Feb 13 (3 weeks)	Tribunal	Decision on Document Production Requests to be issued
2C	1 Apr 13 (2 months)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2
	3 Jun 13 (2 months)	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2
	3 July 13 (1 month)	Claimants	Rejoinder Memorial on Jurisdiction
	July/Sept/Oct TBC	ALL	Hearing on Phase 2
	TBD	Claimant & Respondent	Post-Hearing Briefs
		Tribunal	Decision on Phase 2

18. On September 27, 2012, the Tribunal, by majority, issued Procedural Order No. 13 addressing issues of confidentiality and the further conduct of the proceedings. In particular, Procedural Order No. 13 granted the Claimants (i) the right to address issues of individual jurisdiction in their Phase 2 Memorial and (ii) approval to amend the contents of the Database, under specified conditions. Procedural Order No. 13 also extended the dates for submission of the Claimants' Memorial and the Respondent's Counter-Memorial. Procedural Order No. 13 was accompanied by a Statement of Dissent issued by Dr. Torres Bernárdez. Dr. Torres Bernárdez agreed with the extension granted, but considered that (i) the Claimants should not be allowed to include issues of individual jurisdiction in their Phase 2 Memorial and file a Rejoinder on jurisdiction and (ii) the entire schedule fixed in Procedural Order No. 12 should be revised to factor the Database Verification Process in the sequence of pleadings.

19. The Claimants filed their Phase 2 Memorial on Jurisdiction and Merits in English on October 1, 2012. A translation into Spanish was filed on October 8, 2012.

20. On November 1, 2012, the Tribunal unanimously issued Procedural Order No. 14, extending the deadline for Argentina's submission of its Counter-Memorial by one week, the same additional time the Claimants had taken to submit the Spanish version of its Memorial on Jurisdiction and Merits.

21. On November 20, 2012, the Tribunal, by majority, issued Procedural Order No. 15, (i) appointing Dr. Norbert Wühler, a German national, as the independent database verification expert envisaged in Procedural Order No. 12; (ii) asking Dr. Wühler to prepare a *Work Proposal* to be presented to the parties and the Tribunal; and (iii) defining the scope of the expert's mandate, the terms of his retainer and the procedure applicable to his role. Procedural Order No. 15 further modified the schedule for phases 2B and 2C.

PHASE	Date	PARTY	Description
2A	30 Sept 12 (2 months)	Claimants	Claimants' Memorial on Phase 2 (CL MP2)
	26 Dec 12 (2 months)	Respondent	Respondent's Memorial on Phase 2 (RSP MP2)

2B	23 Dec 2012	External Expert(s)	Submission of the Expert's Work Proposal
	4 Jan 2013	Claimants & Respondent	Both Parties submit their Comments on Expert's Proposal
	7 Jan 2013	Requesting Party	Both Parties file their Request for Document Production
	14 Jan 2013	Tribunal	Decision on the Expert's Proposal
	21 Jan 2013 (2 weeks)	Producing/ Objecting Party	Both Parties produce non-contentious documents and file their objections concerning contentious document requests
	28 Jan 2013	Claimants & Respondent	Both Parties submit their Summary & Documents to Expert (provided his Work Proposal is confirmed)
	4 Feb 2013 (2 weeks)	Requesting Party	Both Parties file answers to objections concerning contentious document requests
	18 Feb 2013 (2 weeks)	Objecting Party	Both Parties Reply to answer to the objections concerning contentious document requests
	11 Mar 2013 (3 weeks)	Tribunal	Decision on Document Production Requests to be issued
	15 Mar 2013	External Expert(s)	Draft Report on the verification of Claimants' database
	25 March 2013	Claimants & Respondent	Both Parties produce documents according to the Tribunal's decision
	15 Apr 2013	Claimants & Respondent	Both Parties comment on Draft Report on the verification of Claimants' database
	30 Apr 2013	External Expert(s)	Final Report on the verification of Claimants' database (Database Verification Report)
2C	1 Jul 2013 (2 months)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2
	2 Sept 2013 (2 months)	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2
	16 Sept 2013 (**TBC**)	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	Oct/Nov 2013 TBC	ALL	Hearing on Phase 2 (Hearing P2)
	TBD	Claimants & Respondent	Post-Hearing Briefs
	TBD	Tribunal	Decision on Phase 2

22. In this modified schedule, the Tribunal fixed dates for the steps involved in the Database Verification Process, postponing the deadline for the submission of the Reply and the Rejoinder in Phase 2 to July 2 and September 2, 2013, respectively.

23. Dr. Torres Bernárdez appended a Dissenting Opinion to Procedural Order No. 15, opposing Dr. Wühler as a sole expert, and reiterating his disagreement with the schedule of submissions.

24. Argentina filed its Phase 2A Counter Memorial on Jurisdiction and Merits on December 26, 2012.

25. On January 11, 2013, the Tribunal unanimously issued Procedural Order No. 16, addressing issues concerning the languages of the proceeding and postponing the deadline for each party to file a request for document production until January 16, 2013.

26. On February 8, 2013, the majority of the Tribunal issued Procedural Order No. 17, confirming the appointment of Dr. Wühler as the Tribunal's Database Verification Expert and setting a modified schedule.

PHASE	Date	Party	Description
2A	30 Sept 12 (2 months)	Claimants	Claimants' Memorial on Phase 2 (CL MP2)
	26 Dec 12 (2 months)	Respondent	Respondent's Memorial on Phase 2 (RSP MP2)
2B	26 Dec 2012	External Expert(s)	Submission of the Expert's Work Proposal
	7 Jan 2013	Claimants & Respondent	Both Parties submit their Comments on Expert's Proposal
	22 Jan 2013	External Expert(s)	Submission of the Expert's Alternative Proposal
	31 Jan 2013	Claimants & Respondent	Submission of Comments on Expert's Alternative Proposal
	25 Jan 2013	Requesting Party	Both Parties file their Request for Document Production
	8 February 2013	Tribunal	Decision on the Expert's Proposal
	12 February 2013 (18 days)	Producing/ Objecting Party	Both Parties produce non-contentious documents and file their objections concerning contentious document requests
	15 February 2013	Claimants & Respondent	Both Parties submit their Summary & Documents to Expert
	18 Feb 2013 (6 days)	Requesting Party	Answer to objections concerning contentious document requests
	22 Feb 2013 (4 days)	Objecting Party	Reply to answer to the objections concerning contentious document requests
	11 Mar 2013 (17 days)	Tribunal	Decision on Document Production Requests to be issued

	25 March 2013 (14 days)	Claimants & Respondent	Production of documents according to the Tribunal's decision
	30 April 2013	External Expert(s)	Draft Report on the verification of Claimants' database
	30 May 2013	Claimants & Respondent	Both parties submit comments on Draft Report on the verification of Claimants' database
	15 June 2013	External Expert	Final Report on the verification of Claimants' database (Database Verification Report)
2C	1 Aug 2013 (8 weeks)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2 (CL ReplyMP2)
	+ 8 weeks as of receipt of Spanish CL ReplyMP2	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2 (RSP REjMP2)
	+ 4 weeks as of receipt of English RSP REjMP2 **(TBC)**	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	18-30 Nov 2013 TBC	ALL	Hearing on Phase 2
	TBD	Claimants & Respondent	Post-Hearing Briefs
	TBD	Tribunal	Decision on Phase 2

27. Dr. Torres Bernárdez dissented from Procedural Order No. 17, objecting to the procedural calendar, the appointment of Dr. Wühler, and generally the Database Verification Process.

28. On March 25, 2013, the Tribunal unanimously issued Procedural Order No. 18 concerning production of documents.

29. On April 8, 2013, the Tribunal unanimously issued Procedural Order No. 19 concerning the conduct of the database verification process. Attached to Procedural Order No. 19 was a letter from Professor Tercier noting the parties' increasing failure to comply with the established

timetable, and advising that the Tribunal would henceforth be stricter on time limits and requests for extension of time.

30. On April 24, 2013, the Majority of the Tribunal issued Procedural Order No. 20 extending the deadline for the independent expert's draft Database Verification Report until May 31, 2013. Dr. Wühler had requested this extension due to delays caused by interruptions in access to the Database. Dr. Torres Bernárdez dissented from Procedural Order No. 20 on the basis of his stated opposition to the Database Verification Process.

31. On May 2, 2013, the Tribunal issued Procedural Order No. 21 concerning the management of the Claimants' Database and the procedural calendar, setting new dates as follows:

i. Submission of the Draft Verification Report by Dr. Wühler: May 31, 2013.
ii. Comments by both parties: July 1, 2013.
iii. Issuance of Final Verification Report: July 15, 2013.
iv. All other deadlines are suspended.

Dr. Torres Bernárdez dissented from Procedural Order No. 21 on the basis of his stated opposition to the Database Verification Process.

32. By letter of July 22, 2013, the Tribunal gave each party the opportunity to comment on the other party's comments of July 15, 2013. The Tribunal established the following additional steps concerning the Database Verification:

i. Each party to respond to the other party's July 15, 2013 comments on the Draft Verification Report: Deadline July 31, 2013.
ii. Issuance of Final Verification Report: Deadline August 31, 2013.

Dr. Torres Bernárdez dissented from this letter on the basis of his stated opposition to the Database Verification Process.

33. On July 30, 2013, the Tribunal issued Procedural Order No. 22 regarding the management of the Claimants' Database. Dr. Torres Bernárdez appended an Individual Statement of Dissent to Procedural Order No. 22.

34. The Final Database Verification Report was issued by the Expert on August 31, 2013 and transmitted to the parties on September 5, 2013.

35. On September 26, 2013, the Tribunal issued Directions to the parties, stating that it would proceed as set out in Procedural Orders No. 15 and 17, while re-adjusting the relevant deadlines. The Tribunal then set a modified schedule.

PHASE	Date	Party	Description
2C	7 November 2013 (9 weeks)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2 (CL ReplyMP2) (CL ReplyMP2)
	+ 9 weeks as of receipt of Spanish CL ReplyMP2	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2 (RSP REjMP2)
	+ 4 weeks as of receipt of English RSP REjMP2 **(TBC)**	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	June 2014 (TBC)	ALL	Hearing on Phase 2
	TBD	Claimants and Respondent	Post-Hearing Briefs
	TBD	Tribunal	Decision on Phase 2

36. The Tribunal also advised the parties that the three arbitrators would be available for a hearing during June 2014, and invited the parties to confirm the dates during that period on which they would be available for the hearing.

37. Dr. Torres Bernárdez dissented from the Tribunal's Directions as to the above timetable on the basis that it gave the Claimants the last opportunity to respond by filing a Rejoinder Memorial on Jurisdiction contrary, in his view, to Rule 31 of the ICSID Arbitration Rules.

38. By letter of October 3, 2013, Argentina requested an 11-month extension to file its Rejoinder Memorial, requesting the same time that the Claimants had for the filing of its Reply,

and objected to the hearing dates proposed by the Tribunal, claiming Argentina had prior commitments in other ICSID cases. By letter of October 9, 2013, the Claimants objected to Argentina's request and confirmed their agreement with the hearing dates proposed by the Tribunal.

39. In its Directions of October 21, 2013, the majority of the Tribunal decided to hold the hearing in the last two weeks of June, and stated:

> *The Arbitral Tribunal has taken note of Respondent's schedule in the first half of 2013. It should be recalled that the hearing has been postponed various times (PO17* [sic] *of 7 July 2012: Jul/Sep/Oct 2013; PO 15 of 20 November 2012: Oct/Nov 2013; PO17 of 8 February 2013: 18-30 November 2013; PO21 of 2 May 2013: calendar suspended). In order to ensure the progress of this arbitration, the majority of the Arbitral Tribunal has decided to hold the hearing as suggested, i.e., in the last two weeks of June 2014.*

Dr. Torres Bernárdez dissented, indicating that Argentina should be granted an extension to file its Rejoinder Memorial, that the calendar should be adjusted, and accordingly that the hearing dates set by the Tribunal should be changed.

40. On October 24, 2013, Argentina reiterated its request for an 11-month extension to file its Rejoinder.

41. In its Directions of November 4, 2013, the Tribunal granted a 15-day extension requested by the Claimants, and set a modified schedule.

PHASE	Date	Party	Description
2C	19 November 2013 (75 days)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2 (CL ReplyMP2) (CL ReplyMP2)
	+ 75 days as of receipt of Spanish CL ReplyMP2	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2 (RSP REjMP2)
	+ 4 weeks as of receipt of English RSP REjMP2 **(TBC)**	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	June 2014 (TBC)	ALL	Hearing on Phase 2 (Hearing P2)

	TBD	Claimants and Respondent	Post-Hearing Briefs
	TBD	Tribunal	Decision on Phase 2

Dr. Torres Bernárdez approved the extension of time for filing the Reply requested by the Claimants on the condition that a similar extension be granted to the Respondent, but rejected the schedule because it allowed the Claimants to submit a further Rejoinder Memorial on Jurisdiction.

42. By letter of November 20, 2013, Argentina repeated its objections, requesting an extension to file its Rejoinder on October 4, 2014.

43. By letter of November 28, 2013, the Tribunal rejected Argentina's requests for an extension to file its Rejoinder Memorial on Phase 2, and stated:

> "*The Arbitral Tribunal does not find it justified or appropriate to rely on the number of days between the filing of Respondent's Counter-Memorial and the filing of Claimants' Reply Memorial to grant Respondent an exactly same amount of days for the filing of its Rejoinder Memorial. Both Parties have been occupied with various aspects of these proceedings, including most recently the Verification Process and the Database update issues, which are both relevant for the next steps of the proceedings, so that it would be inappropriate to assume that Claimants enjoyed 314 days to prepare their Reply Memorial. The Arbitral Tribunal believes that the period of 10.5 weeks as of receipt of Claimants' Reply Memorial is sufficient for Respondent to prepare its Rejoinder Memorial. The Tribunal notes that the Parties are aware since the issuance of Order No. 15 of 20 November 2012 (containing the timetable including the Verification Process) that the deadlines fixed for the filing of Claimants' Reply Memorial in Phase 2 and Respondent's Rejoinder Memorial in Phase 2 are equally calculated as of the date of the filing of the Final Verification Report (i.e., in Block 2C: '(2 months)'; see also Timetable to PO17: in Block 2C: '(8 weeks)'.*"

Dr. Torres Bernárdez dissented from this decision.

44. By letter of November 29, 2013, Argentina reiterated its objections to the fixed schedule. By email of December 13, 2013, the Tribunal invited the Claimants to comment on Argentina's November 29 letter. The Claimants submitted comments on December 17, 2013.

45. On December 19, 2013, Argentina proposed the disqualification of Professors Tercier and van den Berg, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration

Rule 9 ("**Proposal**"). On that same date, the Centre informed the parties that the proceedings were 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.

46. In compliance with that procedural calendar, the Claimants replied to the Proposal on December 27, 2013. Professors Tercier and van den Berg furnished a joint explanation on December 30, 2013, as envisaged by ICSID Arbitration Rule 9(3). Both Parties submitted additional comments on the Proposal on January 13, 2014.

B. PARTIES' ARGUMENTS REGARDING THE PROPOSAL TO DISQUALIFY PROFESSORS TERCIER AND VAN DEN BERG AND THE ARBITRATORS' EXPLANATIONS

1. Argentina's Proposal for Disqualification

47. Argentina's arguments on the proposal to disqualify Professors Tercier and van den Berg were set forth in its submissions of December 19, 2013 and January 13, 2014. These arguments are summarized below.

48. Argentina argues that Professors Tercier and van den Berg manifestly lack the qualities required by Article 14(1) of the ICSID Convention. Argentina claims that the procedural decisions on the briefing calendar demonstrates an "absolute lack of equality in the treatment accorded to the parties to the detriment of the right of defense of the Argentine Republic which clearly prevents the challenged arbitrators from being relied upon to exercise independent judgment."[2]

49. Argentina argues that the periods allowed by the Tribunal for each party to prepare its defense in this case are disproportionate and result in a total lack of fairness in the treatment accorded to the parties. Argentina bases this Proposal on the decision issued by the Majority of the Tribunal on November 28, 2013 (the "**Decision**") and the facts surrounding it. The November 28, 2013 Decision confirmed the deadlines for the next submissions in the case.

---

[2] Proposal for the Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg of December 19, 2013 ("**Proposal**") ¶2. Observations on the Proposed Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg of January 13, 2014 ("**Respondent's Second Submission**") ¶2.

Argentina argues that this Decision means the Claimants had 314 days to prepare their Reply Memorial on Phase 2 (calculated from the date they received the English translation of the Argentine Republic's Counter-Memorial on Phase 2), while Argentina would have 75 days to prepare its Rejoinder Memorial on Phase 2 (calculated from the date it received the Spanish translation of Claimants' Reply on Phase 2).[3]

50. Argentina submits that it asked three times for the same time-limit as the Claimants, but received an answer from the Tribunal rejecting the request only after its third request.[4] Moreover, Argentina states that on one of these occasions, the Majority of the Tribunal granted the Claimants' a 15-day extension to file their Reply Memorial on Phase 2 while ignoring the Respondent's extension request. Argentina submits that this is a clear violation of the principle of equal treatment by the Majority of the Tribunal.[5]

51. Argentina states that the Majority of the Tribunal has disregarded Argentina's repeated opposition to the case procedural calendar since it was established by Procedural Order No. 15 of November 20, 2012.[6] Argentina also states that the Majority of the Tribunal ignored Argentina's numerous hearings and deadlines in other arbitrations when it fixed and confirmed this schedule.[7] Argentina submits that it has been asking the Tribunal to set deadlines for the submission of main pleadings that ensured equal treatment to the parties since December 14, 2012.[8]

52. Argentina argues that the Database Verification Process did not interfere substantially with the Claimants' overall ability to prepare their Reply Memorial on Phase 2. Argentina states that both parties were allowed only one month to review the draft Report submitted by the Independent Expert on May 31, 2013 and that the parties submitted their comments between July 15-31, 2013. Accordingly, Argentina submits that the time spent by the parties on the Database

---

[3] Proposal ¶5. Respondent's Second Submission ¶¶5 and 19.
[4] Proposal ¶¶7-9.
[5] Proposal ¶8.
[6] Proposal ¶14.
[7] Proposal ¶12.
[8] Proposal ¶15.

Verification Process between Argentina's Counter-Memorial and Claimants' Reply does not justify the difference in time allocated to each party to file their second round of pleadings.[9]

53. Argentina states that the Proposal to Disqualify is timely as it was triggered by the communications from the Majority of the Tribunal of November 28 and December 13, 2013.[10]

54. Argentina concludes that the manner in which Professors Tercier and van den Berg have conducted the proceedings in this case breaches the principle of equal treatment and has caused Argentina to lose confidence in their capacity to exercise independent and impartial judgment.[11]

2. Claimants' Observations

55. The Claimants' arguments on the proposal to disqualify Professors Tercier and van den Berg were set forth in their submissions of December 27, 2013 and January 13, 2014. These arguments are summarized below.

56. The Claimants state that Professors Tercier and van den Berg's impartiality and ability to decide this case fairly has already been affirmed in this proceeding in response to Argentina's challenge in September 2011. They state that nothing has changed in the interim, and nothing in Argentina's Proposal demonstrates otherwise.[12]

57. The Claimants argue that a disagreement with a Tribunal ruling is not a valid basis for arbitrator disqualification under the ICSID Convention.[13] The Claimants state that Argentina has raised no objections to the character or conduct of the challenged arbitrators and that it has based the present challenge "solely on its disagreement with the Tribunal's procedural ruling with respect to Argentina's request for an extension of time."[14]

---

[9] Proposal ¶13. Respondent's Second Submission ¶9.
[10] Respondent's Second Submission ¶44.
[11] Proposal ¶¶18-19. Respondent's Second Submission ¶23.
[12] Observations by the Claimants to the Respondent's Proposals for Disqualification of December 27, 2013 ("**Claimants' Observations**") page 1.
[13] Claimants' Observations page 2. Claimants' Additional Observations to the Respondent's Proposal for Disqualification of January 13, 2014 ("**Claimants' Additional Observations**") page 1.
[14] Claimants' Observations page 6. Claimants' Additional Observations page 1.

58. The Claimants argue that Argentina's claim that the refusal to grant its extension constitutes a breach of the principle of equal treatment is meritless. They state that the eight months following the filing of Argentina's Counter-Memorial were dedicated to two matters outside the briefing schedule: a months-long discovery phase and a months-long phase to perform an independent review and verification of the Claimants' Database. Accordingly, "contrary to Argentina's claims that its right to defense has not been respected, much of the procedure implemented by the Tribunal has been dedicated precisely to ensuring that right."[15]

59. The Claimants state that the Database Verification Process was a lengthy process in which both parties prepared multiple, comprehensive submissions with respect to the scope of the expert's work and the conclusions that he ultimately reached.[16] Accordingly, the Claimants disagree with Argentina's assertion that the Claimants had eleven months to prepare their Reply Memorial on Phase 2.[17]

60. The Claimants submit that the Tribunal has given both parties multiple opportunities to present their arguments with respect to Argentina's extension request, duly considered the parties' positions, and fully explained its reasons for rejecting Argentina's request on November 28, 2013.[18]

61. The Claimants submit that this Proposal was not filed "promptly" as required by the ICSID Arbitration Rules and that Argentina waived its right to challenge the arbitrators. The Claimants note that the Tribunal issued Procedural Order No. 15 on November 20, 2012, thirteen months prior to the submission of Argentina's Proposal, and that Argentina "failed to assert any request for disqualification, or any intention to file, when the purported issue arose more than a year ago." They add that "Argentina had ample opportunity to file a disqualification request," and point to "Argentina's tactical abuse of ICSID procedures to its advantage [...] by trying to award itself additional time for the Rejoinder, in direct contravention of the Tribunal's ruling."[19]

---

[15] Claimants' Observations pages 8-9.
[16] Claimants' Observations page 9.
[17] Claimants' Observations page 10.
[18] Claimants' Observations page 10-11.
[19] Claimants' Observations page 13. Claimants' Additional Observations page 2.

62. The Claimants conclude that Argentina's Proposal is "groundless on its face" and must not be permitted to extend the procedural calendar.[20]

3. Arbitrators' Explanations

63. Professors Tercier and van den Berg provided a joint explanation stating that they had complied with their duty to exercise independent judgment as required by Article 14(1) of the ICSID Convention, and that "none of the grounds and circumstances invoked by the Respondent in its Request relate to the exercise of [their] independent judgment."[21]

C. DECISION BY THE CHAIRMAN

1. Request for Recommendation

64. Article 58 of the ICSID Convention states that the decision on any proposal to disqualify the majority of arbitrators shall be taken by the Chairman of the ICSID Administrative Council.

65. Argentina has asked the Chairman to request a recommendation from a third party before deciding the Proposal.[22] The Claimants have opposed this request.[23]

66. The Chairman has requested recommendations on a proposal to disqualify an arbitrator on rare occasions in the past, in light of the specific circumstances of the case at issue. In each such case, the parties were informed that the final decision would be taken by the Chairman, as prescribed by the Convention. The circumstances in this Proposal do not justify such a request. Accordingly, the Chairman has decided the Proposal on the basis of the submissions presented by the parties and the explanations provided by the challenged arbitrators, in accordance with Articles 57 and 58 of the ICSID Convention and the Arbitration Rules.

2. Timeliness

67. Arbitration Rule 9(1) reads as follows:

---

[20] Claimants' Observations page 5. Claimants' Additional Observations page 2.
[21] Professor Tercier's and Professor van den Berg's Joint Explanations.
[22] Proposal ¶47. Respondent's Second Submission ¶42-43.
[23] Claimants' Observations page 14. Claimants' Additional Observations page 4.

> "*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.*"

68. As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case by case basis.[24]

69. In this case, Argentina filed the Proposal on December 19, 2013. It arose from a November 28, 2013 Tribunal ruling on Argentina's request for an extension of time and facts surrounding that request. Such a time period falls within an acceptable range and hence, this disqualification proposal was filed promptly for the purposes of Arbitration Rule 9(1).

3. Merits

70. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

> *"A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."*

71. A number of decisions have concluded that the word "manifest" in Article 57 of the Convention means "evident" or "obvious,"[25] and that it relates to the ease with which the alleged lack of the required qualities can be perceived.[26]

---

[24] See *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) ¶73 ("**Burlington**").

[25] *Burlington*, *supra* note 24 ¶68, footnote 83; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20) ¶61, footnote 43 ("**Blue Bank**"); *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (December 13, 2013) ¶73, footnote 58 ("**Repsol**").

[26] C. Schreuer, The ICSID Convention, Second Edition (2009), page 1202 ¶¶134-154.

72. The disqualification proposed in this case alleges that Professors Tercier and van den Berg manifestly lack the qualities required by Article 14(1).

73. Article 14(1) of the ICSID Convention provides:

> *"Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."*

74. While the English version of Article 14 of the ICSID Convention refers to "*independent judgment*," the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). [27] Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.[28]

75. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both "protect parties against arbitrators being influenced by factors other than those related to the merits of the case." [29]

76. 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.[30]

77. The legal standard applied to a proposal to disqualify an arbitrator is an "objective standard based on a reasonable evaluation of the evidence by a third party." As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention. [31]

78. The Respondent has referred to other sets of standards and guidelines in its arguments. While these rules or guidelines may serve as useful references, the Chairman is bound by the

---

[27] The French version refers to "*indépendance dans l'exercice de leurs fonctions.*"
[28] The Parties agree on this point: Proposal ¶25; Claimants' Observations page 5. So does ICSID jurisprudence: Burlington *supra* note 24 ¶65, Blue Bank *supra* note 25 ¶58, Repsol *supra* note 25 ¶70.
[29] Burlington *supra* note 24 ¶66, Blue Bank *supra* note 25 ¶59, Repsol *supra* note 25 ¶71.
[30] *Ibid.*
[31] Burlington *supra* note 24 ¶67, Blue Bank *supra* note 25 ¶60, Repsol *supra* note 25 ¶72.

standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

79. This has been a lengthy arbitration and it is a complex proceeding. The Tribunal has addressed numerous requests from both parties and has issued an extensive number of procedural orders and directions to the parties. Each of the Tribunal's rulings has been rendered following thorough argument by each of the parties and due deliberation among the members of the Tribunal. Some of these rulings have granted the requests of the parties, while others have denied such requests.

80. The mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention. If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.

81. The Respondent's disqualification proposal in this case was triggered by a procedural ruling. This ruling, which included the reasons on which it was based, was adopted after argument by both parties and due deliberation by the Tribunal. The Respondent is clearly dissatisfied with the ruling in question. However, the ruling in itself and the surrounding facts described in the Proposal do not prove a manifest lack of impartiality on the arbitrators who rendered it.

82. In the Chairman's view, a third party undertaking a reasonable evaluation of the November 28, 2013 ruling, and surrounding facts, would not conclude that they evidence a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

D. DECISION

83. Having considered all of the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chairman rejects the Argentine Republic's Proposal to Disqualify Professor Pierre Tercier and Professor Albert Jan van den Berg.

[Signed]

_____

Chairman of the ICSID Administrative Council
Dr. Jim Yong Kim

ANEXO 21

ARNOLD & PORTER LLP

Paolo Di Rosa
Paolo.DiRosa@aporter.com

+1 202.942.5060
+1 202.942.5999 Fax

601 Massachusetts Ave., NW
Washington, DC 20001-3743

29 November 2016

VIA ELECTRONIC MAIL (PDF)

Ms. Meg Kinnear
Secretary-General
International Centre for Settlement of Investment Disputes
MSN J2–200
1818 H Street, N.W.
Washington, DC 20433

Re: *Víctor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) — Rectification Proceeding

Dear Ms. Kinnear:

Over the 18 years that the above-captioned case has been at ICSID, it unfortunately has become a pattern for Claimants Víctor Pey Casado and the President Allende Foundation ("**Claimants**") to cast baseless aspersions against the Republic of Chile ("**Chile**") and its representatives, and to demand relief that the ICSID system simply does not afford. Claimants' 22 November 2016 request for disqualification of two members of the Rectification Tribunal, which Chile received only yesterday, is but the latest example.[1]

The ICSID Convention does not contemplate any mechanism for challenging a member of a rectification tribunal. This is not an oversight. It is a function of the fact that arbitrator challenges and rectification proceedings are incompatible. As the Commentary to the original version of the ICSID Arbitration Rules (1968) explains, "Unlike an interpretation, revision or annulment of an award . . . [,] the rectification of an award can ***only*** be made by the Tribunal that rendered the award."[2] 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***."[3] Thus,

[1] Chile reserves its right to respond (as necessary) to the specious accusations contained in Claimants' request for disqualification.

[2] ICSID Arbitration Rules (1968), Note D to Arbitration Rule 49 (emphasis added); *see also* C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, Art. 49, ¶ 36 (2d. ed. 2009) ("Supplementation and rectification can only be made by the tribunal that rendered the award. This is in contrast to interpretation and revision which are to be made 'if possible' by the original tribunal").

[3] C. Schreuer et al., THE ICSID CONVENTION: A COMMENTARY, Art. 49, ¶ 36 (2d. ed. 2009) (emphasis added); *see also* ICSID Arbitration Rules (1968), Note D to Arbitration Rule 49 ("If, for ***any*** reason, that Tribunal cannot be

Footnote continued on next page

Claimants' request for disqualification is nugatory, since, if successful, the arbitrator challenge would necessarily render moot the rectification proceeding. The Centre should not tolerate this type of request.[4]

Chile therefore respectfully requests that ICSID lift the suspension of the proceeding that it granted earlier today, and dismiss Claimants' request for disqualification as inconsistent with the rectification proceeding that Claimants themselves initiated.

Respectfully submitted,

Paolo Di Rosa
Gaela K. Gehring Flores

Footnote continued from previous page
reconvened, ***the only remedy would be a proceeding under Chapter VII of these Rules*** [*i.e.*, interpretation, revision, or annulment]") (emphasis added).

[4] Chile is aware that arbitrator challenges have been permitted in the annulment context, even though the Convention does not expressly authorize such challenges. However, the Arbitration Rule that has been used to permit challenges to *ad hoc* committee members (*viz.*, Arbitration Rule 53) does not apply here. Arbitration Rule 53 states that "[t]he 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." (emphasis added). Therefore, Arbitration Rule 53 does not apply to rectification proceedings.

ANEXO 22

CENTRE INTERNATIONAL POUR LE RÈGLEMENT DES DIFFÉRENDS RELATIFS AUX INVESTISSEMENTS

BSG Resources Limited, BSG Resources (Guinea) Limited et BSG Resources (Guinea) SARL

c.

République de Guinée

(Affaire CIRDI ARB/14/22)

DÉCISION SUR LA PROPOSITION DE RÉCUSATION DE TOUS LES MEMBRES DU TRIBUNAL ARBITRAL

Président du Conseil administratif
Dr. Jim Yong Kim

Secrétaire du Tribunal
M. Benjamin Garel

Date : 28 décembre 2016

REPRÉSENTATION DES PARTIES

Représentant les Demanderesses :

M. Karel Daele
M. James Libson
Mishcon de Reya LLP
Africa House
70 Kingsway
WC2B 6AH
London
Royaume-Uni

Représentant la Défenderesse :

M. Laurent Jaeger
M. Noël Chahid-Nourai
M. Yann Schneller
M. Quirec de Kersauson
Orrick Herrington & Sutcliffe
31, avenue Pierre Ier de Serbie
75782 Paris Cedex 16
France

et

M. Michael Ostrove
M. Scott Horton
M. Théobald Naud
Mme Sârra-Tilila Bounfour
DLA Piper UK LLP
27, rue Laffitte
75009 Paris
France

TABLE DES MATIÈRES

I. HISTORIQUE DE LA PROCÉDURE

1. Le 1er août 2014, BSG Resources Limited a introduit une Requête d'arbitrage devant le Centre international pour le règlement des différends relatifs aux investissements (« **CIRDI** » ou le « **Centre** ») contre la République de Guinée (« **Guinée** » ou la « **Défenderesse** »).

2. Le 8 septembre 2014, le Secrétaire général du CIRDI a enregistré la Requête d'arbitrage conformément à l'article 36(3) de la Convention pour le règlement des différends relatifs aux investissements entre États et ressortissants d'autres États (« **Convention CIRDI** »), sous le numéro d'affaire CIRDI ARB/14/22.

3. Le 5 février 2015, le Secrétaire général a notifié aux Parties que les trois arbitres avaient accepté leur nomination et que le Tribunal était donc réputé constitué à cette date, conformément à l'article 6(1) du Règlement de procédure relatif aux instances d'arbitrage du CIRDI (« **Règlement d'arbitrage du CIRDI** »). M. Benjamin Garel, Conseiller juridique au CIRDI, a été désigné en qualité de Secrétaire du Tribunal.

4. Le Tribunal se compose de Mme Gabrielle Kaufmann-Kohler, ressortissante suisse, Présidente, nommée par ses co-arbitres conformément à l'accord des Parties relatif au mode de constitution du Tribunal en application de l'article 37(2)(a) de la Convention CIRDI ; M. Albert Jan van den Berg, ressortissant néerlandais, nommé par les Demanderesses ; et M. Pierre Mayer, ressortissant français, nommé par la Défenderesse.

5. Le 23 avril 2015, le Tribunal a tenu sa première session avec les Parties. Au cours de cette première session, les Parties ont confirmé que le Tribunal était régulièrement constitué et qu'elles n'avaient aucune objection à la nomination d'un quelconque des membres du Tribunal.

6. Le 13 octobre 2015, BSG Resources (Guinea) Limited et BSG Resources (Guinea) SÀRL ont introduit une autre Requête d'arbitrage devant le CIRDI contre la Guinée. Le 25 novembre 2015, le Secrétaire général a enregistré cette Requête d'arbitrage conformément à l'Article 36(3) de la Convention CIRDI, sous le numéro d'affaire CIRDI ARB/15/46.

7. Le 7 décembre 2015, le Tribunal dans l'affaire CIRDI ARB/15/46 a été constitué conformément à l'article 37(2)(a) de la Convention CIRDI. Il était composé des mêmes membres que le Tribunal dans l'affaire CIRDI ARB/14/22.

8. Le 14 février 2016, les Tribunaux ont rendu l'Ordonnance de procédure n° 1 dans l'affaire CIRDI ARB/15/46 et l'Ordonnance de procédure n° 5 dans l'affaire CIRDI ARB/14/22 mettant en œuvre, à la demande des Parties, la consolidation des deux affaires au sein de l'affaire CIRDI ARB/14/22. Le même jour, le Tribunal dans l'affaire CIRDI ARB/15/46 a rendu l'Ordonnance de procédure n° 2 prenant note de la fin de l'instance ARB/15/46 conformément à l'article 43(1) du Règlement d'arbitrage du CIRDI.

9. Le 9 août 2016, les Parties ont soumis au Tribunal leurs demandes de production de documents, sous la forme de *Redfern Schedules*.

10. Le 5 septembre 2016, le Tribunal a rendu l'Ordonnance de procédure n° 7 (« OP7 »), qui contenait ses décisions sur les demandes en production de documents soumises par les Parties.

11. Le 3 octobre 2016, les Parties ont produit des documents en application de l'OP7.

12. Par lettre en date du 15 octobre 2016, BSG Resources Limited, BSG Resources (Guinea) Limited et BSG Resources (Guinea) SARL (les « **Demanderesses** ») ont soutenu que la Défenderesse retenait certains documents pertinents et importants que le Tribunal lui avait ordonné de produire dans l'OP7. Les Demanderesses ont demandé au Tribunal d'ordonner à la Défenderesse de produire ces documents et d'indiquer les démarches qu'elle avait prises pour identifier et collecter les documents dont la production avait été ordonnée par l'OP7.

13. Par lettre en date du 22 octobre 2016, la Défenderesse a nié avoir retenu des documents pertinents et a expliqué les démarches entreprises pour se conformer à la décision du Tribunal dans l'OP7.

14. Par courriels en date des 22 et 24 octobre 2016, les Demanderesses ont sollicité l'autorisation de répondre à la lettre de la Défenderesse en date du 22 octobre 2016. Par courriel en date du 24 octobre 2016, le Tribunal a informé les Parties qu'il ne souhaitait plus recevoir de communications de leur part en ce qui concernait la production de documents, et qu'il reviendrait rapidement vers elles avec d'autres instructions.

15. Par lettre en date du 27 octobre 2016, le Tribunal a adressé le message suivant aux Parties :

> *Après avoir examiné la position des Parties, y compris les réponses de la Défenderesse à l'Annexe 1, le Tribunal considère que donner suite à ces questions de production de documents à ce stade de la procédure ne contribuera pas de manière significative à la résolution de ce différend. Ceci étant dit, il note que, si les Demanderesses souhaitent soutenir que le non-respect de l'Ordonnance de procédure no. 7 entraine des conséquences juridiques telles que des « adverse inferences », elles peuvent le faire plus tard au cours de la procédure, en particulier dans leurs prochaines écritures prévues au calendrier, ainsi qu'à l'audience. De plus, le Tribunal rappelle aux Parties qu'elles ont une obligation continue de produire les documents pertinents si et quand ceux-ci deviennent disponibles. Toutes les autres demandes sont rejetées.*

16. Le 4 novembre 2016, les Demanderesses ont proposé la récusation des trois membres du Tribunal sur le fondement de l'article 57 de la Convention CIRDI et de l'article 9 du Règlement d'arbitrage du CIRDI (la « **Proposition** »). Le même jour, le Centre a informé les Parties que la procédure avait été suspendue jusqu'à ce qu'une décision ait été prise au sujet de la Proposition, en application de l'article 9(6) du Règlement d'arbitrage CIRDI. Le Centre a également établi un calendrier procédural pour les écritures des Parties sur la Proposition.

17. Le 11 novembre 2016, la Défenderesse a soumis sa réponse à la Proposition.

18. Par lettre en date du 15 novembre 2016, les trois membres du Tribunal ont fourni conjointement des explications, comme le permet l'article 9(3) du Règlement d'arbitrage du CIRDI.

19. La Défenderesse et les Demanderesses ont soumis des observations supplémentaires, respectivement par courriel en date du 22 novembre 2016 et par lettre en date du 23 novembre 2016.

II. LES ARGUMENTS DES PARTIES

A. La Proposition des Demanderesses

20. Les arguments des Demanderesses au soutien de leur proposition de récuser les membres du Tribunal étaient exposés dans leurs écritures du 4 novembre 2016 et du 23 novembre 2016. Ces arguments sont résumés ci-dessous.

1) Le fondement de la Proposition de récusation des membres du Tribunal

a. Le prétendu préjugé par le Tribunal d'une question au centre de l'arbitrage

21. Les Demanderesses soutiennent que le Tribunal a préjugé d'une question au centre de l'arbitrage, « *ce qui suscite des doutes raisonnables quant à l'impartialité des membres du Tribunal et traduit un profond parti pris à l'encontre des Demanderesses* »[1].

22. La prétention des Demanderesses concerne la décision du Tribunal du 27 octobre 2016 relative aux demandes de production de documents présentées par les Demanderesses (la « **Décision** »). Au cours de la phase de production de documents, les Demanderesses avaient cherché à obtenir de la Défenderesse « *la production de Courriels et de Délibérations concernant le processus et le raisonnement suivis pour l'octroi des Droits Miniers aux Demanderesses* »[2]. Selon les Demanderesses, ces documents essentiels se rapportaient aux questions cruciales qui se posent en l'espèce, car ils contribueraient à établir si les droits miniers avaient été obtenus par les Demanderesses conformément à une procédure régulière et dans le cadre de négociations conduites dans des conditions de pleine concurrence[3].

23. Les Demanderesses soutiennent que, dans l'OP7, le Tribunal a reconnu que les Courriels et les Délibérations étaient pertinents et importants pour l'issue de l'affaire et que, cependant, il est parvenu à la conclusion contraire le 27 octobre 2016 en décidant « *que donner suite à ces questions de production de documents à ce stade de la procédure ne contribuera pas de manière significative à la résolution de ce différend* » et en rejetant la demande des Demanderesses[4].

24. Les Demanderesses considèrent que :

> *En concluant que la production des Courriels et des Délibération (qui, jusqu'à il y a quelques semaines, étaient considérés pertinents et importants) ne contribuera plus de manière significative à la résolution du différend, le*

---

[1] Proposition, ¶ 38 (traduit de l'anglais).

[2] Proposition, ¶ 35 (traduit de l'anglais).

[3] Proposition, ¶ 35 ; voir aussi Obs. Suppl. Dem., ¶¶ 20-36.

[4] Proposition, ¶ 36.

> *Tribunal a sans aucun doute préjugé des questions vivement contestées dans le présent arbitrage*[5].

25. Les Demanderesses font valoir que la Décision du Tribunal relative à la production de documents est viciée parce qu'elle est fondée sur l'argument tardif et inexact de la Guinée, selon lequel elle n'avait pas le contrôle des documents demandés et était dans l'incapacité de les rechercher[6]. Elles avancent en outre qu'il existe des doutes raisonnables quant à l'impartialité du Tribunal car celui-ci n'a tenu aucun compte de la rétention par la Guinée de documents pertinents et importants sans justification légitime et qu'il n'a pas examiné ces documents[7]. Selon les Demanderesses, ces craintes sont amplifiées par le refus du Tribunal de leur permettre de répondre à la lettre de la Guinée en date du 22 octobre 2016[8].

26. Sur le fondement de ces éléments, les Demanderesses concluent que :

> *Un tiers qui se livrerait à un examen raisonnable de la décision extraordinaire du Tribunal de permettre à la Guinée de retenir ce qui pourrait bien représenter des centaines de Courriels potentiellement pertinents et importants pour l'issue de l'affaire et du refus du Tribunal de faire droit à la demande des Demanderesses de répondre à la défense de la Guinée, conclurait que les membres du Tribunal sont manifestement dépourvus de l'impartialité requise par la Convention CIRDI*[9].

b. La prétendue violation par le Tribunal de la garantie d'une procédure régulière et des droits des Demanderesses

27. De l'avis des Demanderesses, la production de documents est une composante essentielle de l'arbitrage international et elle joue un rôle fondamental pour discerner la vérité[10]. Les Demanderesse soutiennent que les documents demandés seront cruciaux pour leur permettre de satisfaire à la charge de la preuve qui pèse sur elles et pour démontrer que les droits miniers objets du différend ont été obtenus en toute légalité[11]. Selon les Demanderesses, le refus du

---

[5] Proposition, ¶ 37 (traduit de l'anglais).

[6] Proposition, ¶¶ 38-39; voir aussi Obs. Suppl. Dem., ¶¶ 37-51.

[7] Proposition, ¶¶ 40-41.

[8] Proposition, ¶ 42 ; voir aussi Obs. Suppl. Dem., ¶¶ 78-80.

[9] Proposition, ¶ 43 (traduit de l'anglais).

[10] Proposition, ¶¶ 44-47.

[11] Proposition, ¶ 47.

Tribunal d'ordonner la production de ces documents constitue un déni de la garantie d'une procédure régulière, qui viole le droit les Demanderesses de faire valoir leurs arguments et d'être traitées d'une manière équitable[12]. Les Demanderesses ajoutent que « [c]*e déni de la garantie d'une procédure régulière ainsi que la violation des droits les plus fondamentaux des Demanderesses suscitent des doutes raisonnables quant à l'impartialité des arbitres et au parti pris dont ils font preuve à l'encontre des Demanderesses* »[13].

28. Les Demanderesses soutiennent que la décision du Tribunal n'était pas justifiée par le calendrier procédural de l'instance[14].

29. Elles font également valoir que, contrairement à ce que suggère le Tribunal, la possibilité de demander que soit tirées des conséquences à l'encontre de la Défenderesse (« *adverses inferences* ») n'apaiserait pas leur craintes[15]. Elles notent que les tribunaux arbitraux tirent rarement des « *adverse inferences* » et que les « *adverse inferences* » ne peuvent pas remplacer de manière satisfaisante des éléments de preuve non divulgués[16].

30. Pour les Demanderesses,

> *un tiers qui se livrerait à un examen raisonnable des décisions extraordinaires du Tribunal de priver les Demanderesses de centaines [sic] Courriels, Délibérations et autres documents qui les aideront à établir leur innocence, à affaiblir la position de la Guinée et les preuves produites par celle-ci et à attaquer la crédibilité des témoins de la Guinée au cours de leur contre-interrogatoire, conclurait que les membres du Tribunal sont manifestement dépourvus de l'impartialité requise par la Convention CIRDI.*[17]

[12] Proposition, ¶¶ 48-49.

[13] Proposition, ¶ 50 (traduit de l'anglais).

[14] Proposition, ¶ 51.

[15] Proposition, ¶ 52 ; voir aussi Obs. Suppl. Dem., ¶¶ 111-114.

[16] Proposition, ¶ 52 ; Obs. Suppl. Dem., ¶ 112-113.

[17] Proposition, ¶ 53 (traduit de l'anglais) ; voir aussi Obs. Suppl. Dem., ¶¶ 94-105.

c. Les observations supplémentaires des Demanderesses sur la Proposition

31. Les Demanderesses soutiennent que des faits nouveaux survenus postérieurement à la Décision du Tribunal ont renforcé la pertinence des documents qui n'ont pas été produits par la Défenderesse[18].

32. Les Demanderesses font en outre valoir que le Tribunal avait déjà accordé un traitement préférentiel à la Guinée dans ses décisions rendues sur des demandes antérieures qui lui avaient été présentées en août et septembre 2016[19].

33. Les Demanderesses avancent enfin que leur Proposition est présentée de bonne foi et qu'elle n'avait pas pour objet de retarder la procédure[20].

d. Les observations des Demanderesses sur la réponse de la Défenderesse

34. *En premier lieu,* les Demanderesses rejettent l'argument de la Défenderesse selon lequel le Tribunal a simplement exercé son pouvoir discrétionnaire d'ordonner la production de documents supplémentaires. Elles relèvent qu'elles n'avaient pas cherché à obtenir de nouveaux documents ni de documents supplémentaires, mais qu'elles avaient simplement demandé une clarification des obligations de la Défenderesse en matière de production de documents[21].

35. *En deuxième lieu,* les Demanderesses soutiennent que le rappel par le Tribunal de l'obligation continue des Parties de produire des documents, sur laquelle s'appuie la Défenderesse, est futile car la manière dont ces documents contestés deviendront disponibles pour la Défenderesse à un stade ultérieur n'est pas claire[22].

36. *En troisième lieu,* les Demanderesses rejettent l'argument de la Défenderesse selon lequel le Tribunal n'a pas préjugé du fond du différend en refusant la production des documents

[18] Obs. Suppl. Dem., ¶¶ 85-88.

[19] Obs. Suppl. Dem., ¶¶ 89-93.

[20] Obs. Suppl. Dem., ¶¶ 137-152.

[21] Obs. Suppl. Dem., ¶¶ 107-108.

[22] Obs. Suppl. Dem., ¶¶ 115-116.

contestés au motif que la portée de la décision du Tribunal est limitée dans le temps par les termes « *à ce stade* »[23]. Pour les Demanderesses,

> [*c'*]*est à ce stade-ci de la procédure, à un moment où les Demanderesses pourraient, dans des circonstances normales, intégrer les éléments de preuve obtenus dans le cadre de la production des documents dans leur Mémoire en Réponse et dans leurs preuves testimoniales supplémentaires, que les documents demandés auraient pu contribuer à la résolution du différend, et non à un stade ultérieur, lorsque les Demanderesses auront déjà déposé leur dernier mémoire sur le fond et leur dernière série de témoignages*[24].

37. *En quatrième lieu,* les Demanderesses considèrent que, contrairement aux affirmations de la Défenderesse, les décisions du Tribunal en matière de production de documents, en date du 5 septembre 2016 et du 27 octobre 2016 sont incohérentes[25]. Pour les Demanderesses, la décision de l'OP7 a imposé à la Défenderesse une obligation de produire les documents demandés, alors que la Décision du 27 octobre 2016 a de fait révoqué cette obligation en refusant de reconfirmer la décision prise dans l'OP7[26].

38. *Enfin,* les Demanderesses rejettent l'argument de la Défenderesse « *selon lequel le refus d'un tribunal d'ordonner la production de documents ne saurait constituer une violation du droit d'une partie à la garantie d'une procédure régulière et à son droit de faire valoir ses arguments, car cela reviendrait à dire qu'une partie dispose d'un droit absolu de se voir accorder toutes demandes de production de documents* »[27]. Pour les Demanderesses, une partie est traitée de manière inéquitable et elle est privée du droit à une procédure régulière si elle se voit refuser la production de documents ou autres éléments de preuve importants[28].

---

[23] Obs. Suppl. Dem., ¶¶ 117-125.

[24] Obs. Suppl. Dem., ¶ 120 (traduit de l'anglais).

[25] Obs. Suppl. Dem., ¶¶ 126-129.

[26] Obs. Suppl. Dem., ¶ 127.

[27] Obs. Suppl. Dem., ¶ 130 (traduit de l'anglais).

[28] Obs. Suppl. Dem., ¶ 136.

2) Le critère juridique applicable

39. Les Demanderesses soutiennent que : (a) en disposant que les arbitres doivent « *offrir toute garantie d'indépendance dans l'exercice de leurs fonctions* », l'article 14 de la Convention CIRDI exige d'eux qu'ils soient tout à la fois impartiaux et indépendants ; (b) l'impartialité renvoie à l'absence de parti pris ou de préjugé à l'égard d'une partie et l'indépendance se caractérise par l'absence d'un contrôle extérieur[29] ; (c) il n'est pas nécessaire de rapporter la preuve réelle d'un parti pris ou d'un défaut d'indépendance et l'apparence est suffisante[30] ; (d) le critère juridique applicable est un critère objectif fondé sur une appréciation raisonnable des éléments de preuve par un tiers[31] ; et (e) le terme « manifeste » qui est employé par l'article 57 de la Convention CIRDI signifie « flagrant » (« *obvious* ») ou « évident » (« *evident* ») et se réfère à la facilité avec laquelle le défaut de la qualité requise peut être perçu[32].

40. Les Demanderesses font en outre valoir que « *le critère juridique qui s'applique à la récusation d'arbitres dans des instances CIRDI* […] *est celui de savoir si un tiers raisonnable, ayant connaissance de l'ensemble des faits, considèrerait qu'il existait des motifs raisonnables de douter que l'arbitre possédait les qualités requises d'impartialité et/ou d'indépendance* »[33].

41. Les Demanderesses concluent qu'un observateur tiers estimerait que le Tribunal les a traitées de manière inéquitable et que :

> *[…] le principe de la garantie d'une procédure régulière a été violé, que les Demanderesses ont été privées de leur droit de faire valoir pleinement leurs arguments et de présenter leur défense et qu'elles ont été traitées de manière inéquitable par le Tribunal. Il conclurait que les faits établissent la preuve manifeste d'une apparence d'un défaut d'impartialité et d'un préjugé à*

---

[29] Proposition, ¶ 29.

[30] Proposition, ¶ 30.

[31] Proposition, ¶ 31.

[32] Proposition, ¶ 32.

[33] Obs. Suppl. Dem., ¶ 5 (traduit de l'anglais).

l'égard des Demanderesses. La proposition de récusation doit donc être accueillie[34].

B. La Réponse de la Défenderesse

42. Les arguments de la Défenderesse pour s'opposer à la Proposition des Demanderesses de récusation des membres du Tribunal étaient exposés dans leurs écritures du 11 novembre 2016[35]. Ces arguments sont résumés ci-dessous.

1) L'absence de bien-fondé de la Proposition de récusation

43. *En premier lieu*, la Défenderesse soutient que le Tribunal a respecté les règles applicables à la production de documents et s'est conformé à sa mission à cet égard[36]. La Défenderesse ajoute que les tribunaux arbitraux disposent d'un pouvoir discrétionnaire pour ordonner la production de documents, notamment du pouvoir de tirer des « *adverse inferences* »[37]. La Défenderesse souligne également que le Tribunal a rappelé aux Parties leur obligation continue de produire les documents pertinents si et quand ceux-ci deviennent disponibles[38].

44. *En deuxième lieu,* la Défenderesse soutient que le Tribunal n'a pas préjugé du fond du différend[39]. Selon la Défenderesse, le Tribunal n'a pas conclu que la production des documents demandés ne contribuerait pas à la résolution du différend[40]. Le Tribunal a plutôt estimé que la production de documents supplémentaires n'était pas nécessaire à ce stade de la

---

[34] Obs. Suppl. Dem., ¶¶ 104-105 (traduit de l'anglais).

[35] Comme cela a été mentionné au ¶ 18 ci-dessus, la Défenderesse a soumis des observations supplémentaires par courriel en date du 22 novembre 2016, qui est ainsi rédigé :

« *La République de Guinée a pris connaissance du courrier de Mme le professeur Gabrielle Kaufmann-Kohler, M. le professeur Albert Jan van den Berg et M. le professeur Pierre Mayer du 15 novembre 2016, lesquels confirment avoir agi en conformité avec les principes procéduraux fondamentaux, de manière impartiale et indépendante.*

La déclaration des membres du Tribunal confirme que la décision remise en cause par les Sociétés BSGR est intervenue dans le cadre de la conduite normale d'une procédure d'arbitrage. Cette décision n'est donc pas susceptible de justifier leur récusation.

Sous réserve de cette observation supplémentaire, la République de Guinée s'en remet à ses écritures du 11 novembre 2016. »

[36] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 37-45.

[37] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 38-43.

[38] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 44.

[39] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 46-59.

[40] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 48.

procédure[41]. La Défenderesse fait également valoir que les documents demandés par les Demanderesses ne sont pas de nature à soutenir leur thèse, et donc la décision du Tribunal ne pourrait pas porter préjudice aux Demanderesses[42].

45. *En troisième lieu*, la Défenderesse soutient qu'il n'y a pas d'incohérence entre les décisions du Tribunal du 5 septembre 2016 et du 27 octobre 2016, étant donné que la première décision portait sur la production de documents et que la seconde décision était relative à des mesures supplémentaires sollicitées par les Demanderesses concernant la production de documents[43].

46. *En quatrième lieu*, la Défenderesse fait valoir que la Proposition repose sur une présentation trompeuse de la décision du Tribunal du 27 octobre 2016. Pour la Défenderesse, le Tribunal n'a pas décidé, comme le prétendent les Demanderesses, que les documents demandés « *ne contribueront plus de manière significative à la résolution du différend* »[44]. La Défenderesse soutient que le Tribunal a au contraire décidé que « *donner suite à ces questions de production de documents à ce stade de la procédure ne contribuera pas de manière significative à la résolution de ce différend* »[45]. La Défenderesse avance donc que le Tribunal s'est ménagé la possibilité de revenir sur sa décision à un stade ultérieur de la procédure si les mesures sollicitées devenaient pertinentes[46].

47. *En cinquième lieu*, la Défenderesse considère que le Tribunal a respecté les droits des Demanderesses à une procédure régulière[47]. Selon la Défenderesse, le Tribunal dispose du pouvoir de statuer discrétionnairement sur les demandes de production de documents et, par conséquent, il n'a pas porté atteinte au droit des Demanderesses de présenter leur défense en exerçant ce pouvoir[48]. La Défenderesse soutient que, bien au contraire, la possibilité de demander au Tribunal de tirer des « *adverse inferences* » fondées sur une production de

---

[41] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 48.

[42] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 52-59.

[43] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 62-64.

[44] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 65.

[45] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 66, qui cite la décision du Tribunal du 27 octobre 2016.

[46] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 67.

[47] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 69-76.

[48] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 70-73.

documents prétendument défectueuse protège les droits des Demanderesses à une procédure contradictoire[49].

48. *En sixième lieu*, la Défenderesse soutient que la décision du Tribunal de rejeter leurs demandes de production de documents n'a pas violé le droit des Demanderesses à un traitement équitable[50].

2) Le critère juridique applicable

49. La Défenderesse soutient que l'article 57 de la Convention CIRDI exige que la partie qui met en cause l'impartialité d'un arbitre a la charge de prouver son caractère « manifeste »[51]. Pour la Défenderesse, cette charge de la preuve est élevée et il est insuffisant d'établir un défaut apparent d'impartialité ; le défaut d'impartialité doit être établi par des preuves objectives de nature à convaincre un observateur raisonnable, sans qu'il soit nécessaire de recourir à une analyse approfondie des faits. La Défenderesse fait en outre valoir que la jurisprudence sur laquelle s'appuient les Demanderesses confirme le degré élevé de preuve requis pour une demande en récusation[52].

50. La Défenderesse soutient que les faits invoqués par les Demanderesses ne suscitent pas le moindre doute objectif quant à l'impartialité des arbitres, mais relèvent uniquement du désaccord d'une partie avec une décision de procédure[53].

C. Explications des arbitres

51. Par lettre en date du 15 novembre 2016, les arbitres Kaufmann-Kohler, van den Berg et Mayer ont soumis une déclaration conjointe, qui est ainsi rédigée :

> *Cher Secrétaire du Tribunal,*
>
> *Nous faisons référence à la proposition des Demanderesses en date du 4 novembre 2016 relative à la récusation de tous les membres de ce Tribunal*

[49] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 75-76.

[50] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 77-80.

[51] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 26.

[52] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶¶ 27-34.

[53] Réponse de la Défenderesse, en date du 11 novembre 2016, ¶ 35.

arbitral, ainsi qu'à la réponse de la Défenderesse en date du 11 novembre 2016.

Nous ne commenterons pas les soumissions des Parties. Nous confirmons que nous considérons avoir conduit, et que nous avons l'intention de continuer à conduire, cette instance en conformité avec les principes fondamentaux de la procédure, en particulier avec les principes d'équité procédurale (due process), d'impartialité et d'indépendance.

Cordialement,

Albert Jan van den Berg

Pierre Mayer

Gabrielle Kaufmann-Kohler[54]

III. DÉCISION DU PRÉSIDENT

A. Le critère juridique applicable

52. L'article 57 de la Convention CIRDI permet à une partie de demander la récusation de tout membre d'un tribunal. Il est ainsi rédigé :

> *Une partie peut demander à la Commission ou au Tribunal la récusation d'un de ses membres pour tout motif impliquant un défaut manifeste des qualités requises par l'article 14, alinéa (1). Une partie à une procédure d'arbitrage peut, en outre, demander la récusation d'un arbitre pour le motif qu'il ne remplissait pas les conditions fixées à la section 2 du chapitre IV pour la nomination au Tribunal arbitral.*

53. La récusation demandée en l'espèce est fondée sur l'argument selon lequel tous les membres du Tribunal sont manifestement dépourvus des qualités requises par l'article 14, alinéa (1) de la Convention CIRDI. Il n'est par conséquent pas nécessaire d'examiner la récusation « *pour le motif qu'[un arbitre] ne remplissait pas les conditions fixées à la section 2 du chapitre IV pour la nomination au Tribunal arbitral.* »

[54] Lettre du Tribunal en date du 15 novembre 2016.

54. Un certain nombre de décisions ont conclu que le terme « manifeste » employé à l'article 57 de la Convention CIRDI signifie « évident » (« *evident* ») ou « flagrant » (« *obvious* »)[55] et qu'il fait référence à la facilité avec laquelle le défaut allégué des qualités requises peut être discerné[56].

55. L'article 14(1) de la Convention CIRDI dispose :

> *Les personnes désignées pour figurer sur les listes doivent jouir d'une haute considération morale, être d'une compétence reconnue en matière juridique, commerciale, industrielle ou financière et offrir toute garantie d'indépendance dans l'exercice de leurs fonctions. La compétence en matière juridique des personnes désignées pour la liste d'arbitres est particulièrement importante.*

56. Alors que la version anglaise de l'article 14 de la Convention CIRDI fait référence à un « *independent judgment* » et la version française à « *toute garantie d'indépendance dans l'exercice de leurs fonctions* », la version espagnole exige une « *imparcialidad de juicio* » (impartialité dans le jugement). Les trois versions faisant également foi, il est admis que les arbitres doivent être tout à la fois impartiaux et indépendants[57].

---

[55] Voir *Suez, Sociedad General de Aguas de Barcelona SA. c. République argentine* (Affaires CIRDI ARB/03/17 et ARB/03/19), Décision sur la proposition de récusation d'un membre du Tribunal arbitral (22 octobre 2007) (« ***Suez*** »), ¶ 34 ; *Alpha Projektholding GmbH c. Ukraine* (Affaire CIRDI ARB/07/16), Décision sur la proposition de la Défenderesse de récuser l'Arbitre Dr. Yoram Turbowicz (19 mars 2010) (« ***Alpha*** »), ¶ 37 ; *Universal Compression International Holdings, S.L.U c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/10/9), Décision sur la proposition de récusation du Prof. Brigitte Stern et du Prof. Guido Santiago Tawil, Arbitres (20 mai 2011) (« ***Universal*** »), ¶ 71 ; *Saint-Gobain Performance Plastics Europe c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/12/13), Décision sur la proposition de la Demanderesse de récuser M. Gabriel Bottini du Tribunal sur le fondement de l'article 57 de la Convention CIRDI (27 février 2013) (« ***Saint-Gobain*** »), ¶ 59 ; *Blue Bank International & Trust (Barbados) Ltd. c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/12/20), Décision sur les propositions des parties de récuser une majorité des membres du Tribunal (12 novembre 2013) (« ***Blue Bank*** »), ¶ 47 ; *Burlington Resources Inc. c. République d'Équateur* (Affaire CIRDI ARB/08/5), Décision sur la proposition de récusation du Professeur Francisco Orrego Vicuña (13 décembre 2013) (« ***Burlington*** »), ¶ 68 ; *Abaclat et autres c. République argentine* (Affaire CIRDI ARB/07/5), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (4 février 2014) (« ***Abaclat*** »), ¶ 71 ; *Repsol, S.A. et Repsol Butano, S.A. c. République argentine* (Affaire CIRDI ARB/12/38), Décision sur la proposition de récusation des Arbitres Francisco Orrego Vicuña et Claus von Wobeser (13 décembre 2013) (« ***Repsol*** »), ¶ 73 ; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. et ConocoPhillips Gulf of Paria B.V. c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/07/30), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (5 mai 2014) (« ***Conoco*** »), ¶ 47.; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. et ConocoPhillips Gulf of Paria B.V. c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/07/30), Décision sur la proposition de récusation d'une majorité des membres du Tribunal (1 juillet 2015) (« ***Conoco et al.*** »), ¶ 82.

[56] C. Schreuer, The ICSID Convention, Second Edition (2009), page 1202 ¶¶134-154.

[57] *Suez*, ¶ 28 ; *OPIC Karimum Corporation c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/10/14), Décision sur la proposition de récusation du Professor Philippe Sands, Arbitre (5 mai 2011), ¶ 44 ; *Getma International et autres c. République de Guinée* (Affaire CIRDI ARB/11/29), Décision sur la proposition de récusation de l'Arbitre Bernardo M. Cremades (28 juin 2012) (« ***Getma*** »), ¶ 59 ; *ConocoPhillips Company et autres. c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/07/30), Décision sur la proposition de récusation de L. Yves Fortier, Q.C., Arbitre (27 février 2012) (« ***ConocoPhillips*** »), ¶ 54 ; *Alpha*, ¶ 36 ; *Tidewater Inc. et autres. c. République bolivarienne du Venezuela* (Affaire CIRDI ARB/10/5), Décision sur la proposition

57. L'impartialité renvoie à l'absence de parti pris ou de préjugé à l'égard d'une partie. L'indépendance se caractérise par l'absence d'un contrôle extérieur[58]. L'indépendance de même que l'impartialité « *protègent les parties contre le risque que les arbitres ne soient influencés par des facteurs autres que ceux liés au bien-fondé de l'affaire* »[59]. Les articles 57 et 14(1) de la Convention CIRDI n'exigent pas la preuve d'un défaut d'indépendance ou d'un parti pris réel ; au contraire, il est suffisant d'établir l'apparence d'un défaut d'indépendance ou d'un parti pris[60].

58. Le critère juridique appliqué à une proposition de récusation d'un arbitre est un « *critère objectif fondé sur une appréciation raisonnable des éléments de preuve par un tiers* »[61]. En conséquence, la croyance subjective de la partie qui demande la récusation n'est pas suffisante pour répondre aux exigences de la Convention.[62]

B. Célérité de la demande

59. L'article 9(1) du Règlement d'arbitrage est ainsi rédigé :

> *Une partie demandant la récusation d'un arbitre en vertu de l'article 57 de la Convention soumet sa demande dûment motivée au Secrétaire général dans les plus brefs délais, et en tout état de cause avant que l'instance ait été déclarée close.*

60. La Convention et le Règlement CIRDI ne précisent pas le nombre maximum de jours pendant lequel une proposition de récusation doit être soumise. Par conséquent, la question de savoir si une proposition a été présentée dans les délais doit être tranchée au cas par cas[63]. Des tribunaux ont précédemment conclu qu'une proposition était soumise dans les délais si elle était présentée dans les 10 jours suivant la date à laquelle la partie concernée avait pris

---

de la Demanderesse de récuser le Professeur Brigitte Stern, Arbitre (23 décembre 2010) (« ***Tidewater*** »), ¶ 37 ; *Saint-Gobain*, ¶ 55 ; *Burlington*, ¶ 65 ; *Abaclat,* ¶ 74 ; *Repsol,* ¶ 70 ; *Conoco,* ¶ 50; *Conoco et al.*, ¶ 80.

[58] *Suez*, ¶ 29 ; *ConocoPhillips*, ¶ 54 ; *Burlington,* ¶ 66 ; *Abaclat,* ¶ 75 ; *Conoco,* ¶ 51; *Conoco et al.*, ¶ 81.

[59] *ConocoPhillips*, ¶ 55 ; *Universal*, ¶ 70 ; *Urbaser S.A. et autres c. République argentine,* Décision sur la proposition des Demanderesses de récuser le Professeur Campbell McLachlan, Arbitre, ARB/07/26, 12 août 2010 (« ***Urbaser*** »), ¶ 43 ; *Burlington,* ¶ 66 ; *Abaclat,* ¶ 75 ; *Conoco,* ¶ 51; *Conoco et al.*, ¶ 81.

[60] *Urbaser*, ¶ 43 ; *Blue Bank*, ¶ 59 ; *Burlington,* ¶ 66 ; *Abaclat,* ¶ 76 ; *Conoco*, ¶ 52; *Conoco et al.*, ¶ 83.

[61] *Suez,* ¶¶ 39-40 ; *Abaclat,* ¶ 77 ; *Burlington,* ¶ 67 ; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84.

[62] *Burlington*, ¶ 67 ; *Abaclat*, ¶ 77 ; *Blue Bank*, ¶ 60 ; *Repsol*, ¶ 72 ; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84.

[63] *Burlington*, ¶ 73; *Conoco*, ¶ 39; *Abaclat*, ¶ 68; *Conoco et al.*, ¶ 63.

connaissance des faits sur lesquels elle était fondée,[64] mais qu'une demande soumise après 53 jours était hors délais[65].

61. La Défenderesse n'a pas prétendu que la Proposition était présentée en dehors des délais requis.

62. En l'espèce, la Proposition a été soumise 7 jours après la décision du Tribunal ayant donné lieu à la Proposition. Par conséquent, la Proposition a été soumise dans les plus brefs délais aux fins de l'article 9(1) du Règlement d'arbitrage.

C. Fond

63. Comme cela été rappelé ci-dessus, les deux Parties ont eu la possibilité de présenter des commentaires sur les questions relatives à la production de documents pertinents, d'abord dans leurs *Redfern Schedules* soumis le 9 août 2016 et ultérieurement dans leurs observations supplémentaires, à savoir la lettre des Demanderesses du 15 octobre 2016 et la réponse de la Défenderesse à cette lettre en date du 22 octobre 2016 [66].

64. Le Tribunal a ensuite rendu sa décision sur la demande des Demanderesses en date du 15 octobre 2016, en indiquant que « *donner suite à ces questions de production de documents à ce stade de la procédure ne [contribuerait] pas de manière significative à la résolution de ce différend* »[67].

65. Le Tribunal a aussi expressément indiqué que les Demanderesses étaient libres de traiter le prétendu non-respect par la Défenderesse de l'OP 7 et ses conséquences juridiques, telles que des « *adverse inferences* », « *dans leurs prochaines écritures prévues au calendrier, ainsi qu'à l'audience* »[68], donnant ainsi aux Demanderesses d'autres possibilités d'aborder ces questions de preuve.

---

[64] *Urbaser*, ¶ 19.

[65] *Suez*, ¶¶ 22-26.

[66] Voir ¶¶ 9-14.

[67] Lettre du Tribunal du 27 octobre 2016. Soulignement ajouté.

[68] Lettre du Tribunal du 27 octobre 2016. Soulignement ajouté.

66. Le Tribunal a enfin rappelé aux Parties leur « *obligation continue de produire les documents pertinents si et quand ceux-ci deviennent disponibles* »[69].

67. Par conséquent, et après un examen rigoureux des arguments des Parties, le Président ne voit dans la Décision du Tribunal aucune preuve ni d'un préjugé des questions objets du différend, ni d'une violation du principe de garantie d'une procédure régulière.

68. S'il se peut que les Demanderesses ne soient pas satisfaites de la Décision du Tribunal, la simple existence d'une décision défavorable est insuffisante pour établir la preuve d'un défaut manifeste d'impartialité, comme l'exigent les articles 14 et 57 de la Convention CIRDI. S'il en était autrement, les procédures pourraient être continuellement interrompues par une partie insatisfaite, ce qui aurait pour effet de perturber et prolonger abusivement la procédure arbitrale.

69. Selon le Président, un tiers qui procèderait à un examen raisonnable de la Décision du Tribunal et des circonstances factuelles sur lesquelles la Proposition des Demanderesses est fondée, ne conclurait pas à un défaut manifeste des qualités exigées à l'article 14(1) de la Convention CIRDI. Par conséquent, la Proposition de récusation doit être rejetée.

IV. DÉCISION

70. Après avoir examiné l'ensemble des faits allégués et les arguments soumis par les Parties, et pour les raisons énoncées ci-dessus, le Président rejette la Proposition des Demanderesses de récuser tous les membres du Tribunal.

[SIGNATURE]

_____

Président du Conseil administratif du CIRDI

Dr. Jim Yong Kim

[69] Lettre du Tribunal du 27 octobre 2016.

ANEXO 23

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceedings between

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A.

(Claimants)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/03/17

and

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.

(Claimants)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/03/19

In the arbitration under the Rules of the
United Nations Commission on International Trade Law between

AWG Group (Claimant)

and

The Argentine Republic (Respondent)

Date: October 22, 2007

DECISION ON THE PROPOSAL FOR THE DISQUALIFICATION OF A MEMBER OF THE ARBITRAL TRIBUNAL

I. Background

1. On April 17, 2003, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received a Request for Arbitration ("the Request" or "the first Request") against the Argentine Republic ("the Respondent" or "Argentina") from Aguas Argentinas S.A.("AASA"), Suez, Sociedad General de Aguas de Barcelona S.A. ("AGBAR"), Vivendi Universal S.A. ("Vivendi") and AWG Group Ltd ("AWG"), (together, "the Claimants"). AASA was a company incorporated in Argentina. Suez, and Vivendi, both incorporated in France, AGBAR, incorporated in Spain, and AWG, incorporated in the United Kingdom, were shareholders in AASA. The Request concerned the Claimants' investments in a concession for water distribution and waste water treatment services in the city of Buenos Aires and some surrounding municipalities and a series of alleged acts and omissions by Argentina, including Argentina's alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.[1]

2. Also on April 17, 2003, the Centre received a second Request for Arbitration ("the Request" or "the second Request") against the Argentine Republic from Aguas Provinciales de Santa Fe S.A. ("APSF"), Suez, Sociedad General de Aguas de Barcelona S.A. ("AGBAR") and InterAguas Servicios Integrales del Agua S.A. ("InterAguas" together, "the Claimants"). APSF was a company incorporated in Argentina. Suez, incorporated in France, and AGBAR and InterAguas, both incorporated in Spain, were major shareholders in APSF. This second Request concerned the Claimants' investments in a concession for water distribution and waste water treatment in the Argentine Province of Santa Fe and a series of alleged acts and omissions by Argentina, including

[1] On the same date, the Centre received a further request for arbitration under the ICSID Convention regarding water concessions in Argentina from Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. As explained below, this request would later be registered by the Centre and submitted by agreement of the parties to one same Tribunal, but that proceeding would eventually be discontinued following an agreement between the parties.

Argentina's alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.

3. In the first Request, Claimants Suez and Vivendi, invoked Argentina's consent to dispute settlement through ICSID arbitration provided in the 1991 Bilateral Investment Treaty between France and the Argentine Republic (the "Argentina–France BIT")[2] and AGBAR relied on Argentina's consent in the 1991 Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain (the "Argentina-Spain BIT")[3]. Claimant AWG invoked Argentina's consent to arbitrate investment disputes under the 1990 Bilateral Investment Treaty between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland (the "Argentina-UK BIT")[4], which provides in Article 8(3) that in the event an investment dispute is subject to international arbitration Argentina and the investor concerned may agree to refer their dispute either to ICSID arbitration or to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") and that failing such agreement after a period of three months the parties are bound to submit their dispute to UNCITRAL Rules arbitration. Although the required three months had elapsed without agreement, AWG in its Request for Arbitration invited Argentina to agree to extend ICSID arbitration to AGW's claims under the Argentina-UK BIT.

4. In the second Request, the Claimants invoked Argentina's consent to dispute settlement through ICSID arbitration provided in the 1991 Bilateral Investment Treaty

---

2 Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements (Agreement between the Government of the Republic of France and the Government of the Republic of Argentina for the Promotion and Reciprocal Protection of Investments), signed on 3 July 1991 and in force since 3 March 1993; 1728 UNTS 298.

3 Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina (Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic), signed in Buenos Aires on 3 October 1991 and in force since 28 September 1992; 1699 UNTS 202.

4 Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990, and in force since 19 February 1993; Treaty Series No. 41 (1993).

between France and the Argentine Republic (the "Argentina–France BIT")[5] and in the 1991 Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain (the "Argentina-Spain BIT").[6]

5. On April 17, 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of both Requests to the Argentine Republic and to the Argentine Embassy in Washington D.C.

6. On July 17, 2003, the Acting Secretary-General of the Centre registered both Requests, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or "the Convention"). The case relating to the first Request was registered as ICSID Case No. ARB/03/19 with the formal heading of Aguas Argentinas, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic. On that same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal. Argentina did not agree to extend ICSID jurisdiction to the claims of AWG but it did agree to allow the case, although subject to UNCITRAL rules, to be administered by ICSID. Also on July 17, 2003, the Acting Secretary-General of the Centre registered the second Request, pursuant to Article 36(3) of the Convention. This case was registered as ICSID Case No. ARB/03/17 with the formal heading of Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic.

---

[5] Accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements (Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments), signed on 3 July 1991 and in force since 3 March 1993; 1728 UNTS 298.

[6] Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina (Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic), signed in Buenos Aires on 3 October 1991 and in force since 28 September 1992; 1699 UNTS 202.

7. The parties could not reach an agreement on the number of arbitrators to comprise the arbitral tribunals in these cases nor on the method for their appointment. Accordingly, on September 22, 2003, the Claimants requested the relevant Tribunals to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; *i.e.* one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimants appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator. The Argentine Republic in turn appointed as arbitrator Professor Pedro Nikken, a national of Venezuela.

8. In the absence of an agreement between the parties on the name of the presiding arbitrator, on October 21, 2003 the Claimants, invoking Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), requested the Centre to make this appointment. With the agreement of both parties, the Centre appointed Professor Jeswald W. Salacuse, a national of the United States of America, as the President of the Tribunal. The Parties agreed that the same Tribunal would hear all three cases indicated above, in addition to a fourth case[7] against Argentina involving the privatization of the water system in the Province of Cordoba, which was subsequently discontinued following an agreement between the parties.

9. On February 17, 2004, the Deputy Secretary-General of ICSID, in accordance with ICSID Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. In connection with their appointment, each member of the Tribunal made declarations pursuant to Rule 6 of the ICSID Arbitration Rules with respect to circumstances affecting reliability for exercising independent judgment.

---

[7] ICSID Case No. ARB/03/18.

10. On June 7, 2004, the Tribunal held a session with the parties at the seat of the Centre in Washington, D.C. During the session the parties in the ICSID cases confirmed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect. Similarly, in the case governed by the UNCITRAL Rules, AWG and Argentina also agreed that the Tribunal had been properly constituted.

11. Having been duly constituted, the Tribunal under both ICSID and UNCITRAL Rules proceeded to hear the above entitled cases and to make a series of important decisions concerning their timetables and procedures on submission of documents, the jurisdiction of the tribunal[8], requests by a group of non-governmental organization to participate as amicus curiae[9], the withdrawal of certain parties, and various other matters concerning the orderly management and processing of the arbitral proceedings. From May 28 to June 1, 2007, the Tribunal with the full participation of the parties held a hearing on the merits in ICSID Case No. ARB/03/17. With respect to ICSID Case No. ARB/03/19 and the case subject to UNCITRAL Rules, with the completion of the various phases for the submission of documents, the Tribunal with the agreement of the parties fixed the dates for a hearing on the merits in these cases for the period October 29 to November 8, 2007 at the offices of the Centre in Washington, DC.

II. The Proposal for the Disqualification of Professor Gabrielle Kaufmann-Kohler

12. On October 12, 2007, the Respondent filed with the Secretary of the Tribunal a Proposal (hereinafter "Respondent's Proposal") under Article 57 of the Convention and Rule 9 of the ICSID Arbitration Rules to disqualify Professor Gabrielle Kauffman-Kohler

---

[8] Decision on Jurisdiction, May 16, 2006.

[9] Order in response to a Petition for Participation as *Amicus Curiae*, March 17, 2006.

as a member of the Tribunal "… by virtue of the objective existence of justified doubts with respect to her impartiality." (para. 1) ("…en virtud de la existencia objetiva de dudas justificadas respecto de su imparcialidad.") The alleged basis for this request arose out of the fact that Professor Kaufman-Kohler had been a member of an ICSID tribunal in the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*[10], hereinafter referred to as the *Aguas del Aconquija* case, which had rendered an award against Argentina on August 20, 2007.

13. The *Aguas del Aconquija* case, which concerned a conflict between the parties arising out of the privatization of the water and sewage system in the Argentine province of Tucumán in 1995, had a protracted history beginning with an ICSID arbitration initiated in 1996 which resulted in a an award in 2000, which was subsequently subject to a decision on annulment in 2002[11] which in turn led to the constitution of a new tribunal in April 2004, of which Professor Kaufmann-Kohler, having been appointed by the claimants in the case, was a member. It was this tribunal that would render an award of $105,000,000, plus interests and costs, in favor of the claimants and against Argentina on August 20, 2007, and which has caused Argentina to seek to disqualify Professor Kaufmann-Kohler as an arbitrator in the three cases being considered by the present Tribunal. Argentina's Proposal, which will be discussed at length later in this decision, argues that the award in the *Aguas del Aconquija* case is so flawed, particularly in its findings of fact and its appraisal of the evidence, that Professor Kaufmann-Kohler's very participation in that decision "… reveals a prima facie lack of impartiality of the above mentioned arbitrator, made evident through the most prominent inconsistencies of the award that result in the total lack of reliability towards Ms Gabrielle Kaufmann-Kohler." (Respondent Proposal para. 8).

14. Once the Tribunal became aware of the Respondent's Proposal, Professor Kaufmann-Kohler immediately withdrew from Tribunal deliberations, and the two

---

[10] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3.

[11] Decision on Annulment, July 3, 2002 (English) (Spanish).

remaining members suspended proceedings in three above-entitled cases pursuant to Rule 9 of the ICSID Arbitration Rules on October 15, 2007, forwarded the Respondent's Proposal to the Claimants with a request for their observations, and invited Professor Kaufmann-Kohler to furnish any explanations that she wished to make, in accordance with ICSID Arbitration Rule 9(3).

15. By letter of October 16, 2007, Professor Kaufmann-Kohler responded in part as follows:

> "I do not wish to comment on the merits of the proposal, but to state that I have always considered it my duty as an arbitrator to be impartial and exercise independent judgment and that I intend to comply with such duty in these arbitrations as in all others in which I serve."

The Tribunal also forwarded Professor Kaufmann-Kohler's explanation to the parties for any comment they wished to make.

16. On October 17, 2007, the Claimants submitted a letter in which they requested that Argentina's challenge be dismissed and that the scheduled dates for the hearings on the merits be maintained. On October 17, 2007, Argentina submitted a new letter reaffirming its Proposal in the light of Professor Kaufmann-Kohler's statement.

17. ICSID Arbitration Rule 9(4) requires that in the event of a challenge to one member of an arbitral tribunal, "…the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned." Professor Kaufman-Kohler having withdrawn from all deliberations of the Tribunal until the matter of the challenge against her is resolved, the undersigned other Tribunal members have considered the various documents submitted in this case, as well as the relevant legal authorities, and have arrived at the following decision.

III. Timeliness of the Respondent's Proposal

18. 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. As Prof. Albert Jan van den Berg has stated in his Report on Challenge Procedure, cited by Argentina in its proposal (footnote 39), handling challenges involves a balancing of interests the first of which is that "… the arbitration should take place with due dispatch and the possibility of delaying tactics should be reduced to a minimum."[12] Recognizing that such challenges may be abused, arbitration rules normally provide that challenges that are not timely should not be considered. In the three cases for which this Tribunal is responsible, two different sets of rules are applicable: the ICSID Convention and Rules in Case Nos. ARB/03/17 and ARB/03/19 and the UNCITRAL Rules in *Anglian Water Limited (AWG) v. The Argentine Republic*. We consider first the application of the UNCITRAL rules to the last-mentioned case.

19. Article 11 of the UNCITRAL Rules governs challenges to arbitrators. Paragraph 1 of that article provides:

> A party who intends to challenge an arbitrator shall send notice of his challenge with fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to the party.

20. The circumstances referred to in articles 9 and 10 are "… any circumstances likely to give rise to justifiable doubts as to his [*i.e.* the challenged arbitrator's] impartiality or independence."

21. According to Argentina's Proposal, the circumstance that gave rise to such doubts was the issuance of the award in the *Aguas del Aconquija* case on August 20, 2007. It is undisputed that Argentina had knowledge of that award on that date. Therefore, under

---

[12] Reprinted in T. Varady *et al.*, *International Commercial Arbitration: A Transnational Perspective* (2nd ed, 2003) p. 381.

UNCITRAL Rules, the very latest that Argentina might have lodged a challenge against Professor Kaufmann-Kohler based on knowledge of that circumstance was September 4, 2007. Since the Tribunal did not receive Argentina's Proposal to challenge Professor Kaufmann-Kohler until October 12, 2007, some fifty-two days after Argentina had knowledge of the decision in the *Aguas del Aconquija* case and some thirty-eight days after the deadline specified by article 11(1) of the UNCITRAL Rules, its Proposal may not be considered under the UNCITRAL Rules and we therefore dismiss its challenge in the *Anglian Water Group (AWG) v. Argentina* case as being untimely.

22. With respect to the two ICSID cases to be decided by the Tribunal, neither the ICSID Convention nor the ICSID Rules specify a definite, quantifiable deadline beyond which a challenge is not to be considered. However, ICSID Rules are not without limits with respect to time. Article 9(1) of the ICSID Rules provides that:

> 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 therefore. (emphasis supplied)

The Spanish language version of Rule 9 requires the challenging party to file its proposal *"sin demora,"* *i.e.* without delay. In the same vein, according to the French version of Rule 9, the proposal should be filed *"dans les plus brefs délais."* The application of Rule 9(1) raises the question of whether Argentina filed its proposal "promptly" or "without delay."

23. The word "promptly" is defined by the Oxford English Dictionary as "readily, quickly, directly at once, without a moment's delay."[13] Webster's Unabridged Dictionary (2nd ed) in similar vein defines the term as "readily, quickly, expeditiously."[14] In his

---

[13] Oxford English Dictionary (Oxford: Clarendon Press; New York: Oxford University Press, 1989) p. 620.

[14] Webster's Unabridged Dictionary (New World Dictionaries/Simon and Schuster, 2nd ed, 1979) p. 1441.

authoritative work on the ICSID Convention, Prof. Christoph Schreuer specifically addresses the question of the meaning of "promptly" with respect to challenges to disqualify an arbitrator. He states:

> Promptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification.[15]

Under the ICSID Rules, the sanction for the failure to object promptly is waiver of the right to make an objection. Thus, Schreuer also writes:

> Under Arbitration Rule 27, a party that fails to object promptly to a violation of a relevant rule is deemed to have waived its rights to object.[16]

24. Did Argentina act promptly in making its proposal to disqualify Professor Kaufman-Kohler as an arbitrator in the two cases governed by ICSID Rules? In paragraph 3 of its Proposal, Argentina defends the timing of its submission in the following terms:

> "In spite of its submission being timely, the Republic of Argentina asserts that it attempted to make this proposal more time in advance. But one thing is the simple understanding of the arbitrariness committed in the award that concludes proceeding by some one who participates therein, and a very different one is to prepare a written submission for that understanding to be reached with certainty by someone who has not known the case."

---

[15] C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p.1198 (§10).

[16] Ibid. §10.

Article 27 of the ICSID Arbitration Rules provides:

> A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

25. In its letter of October 17 2007, Argentina added, as justification for its delay in filing the Proposal, that it needed some time for the analysis of the *Aguas del Aconquija* award and that:

> "…the Argentine Republic had to file the request for challenge while, at the same time, preparing for the hearing of this case, which entailed a major effort."

26. We can appreciate that an analysis of the award in the *Aguas del Aconquija* case, a decision of 265 pages, as well as a review of the transcript and other documents, is a task that might require more than a day or two. On the other hand, Argentina's delay of fifty-three days in submitting its Proposal, a document of just 23 pages, does not constitute acting promptly given the nature of the case and the fact that hearings on the merits were scheduled to take place within two weeks of the submission. The Respondent's proposal does not develop elaborate legal arguments that would have necessitated extensive legal research and the selection of various errors from the hearing transcript is also not a task that would reasonably require nearly two months to be achieved. Moreover, to facilitate the efficient functioning of the arbitration, Argentina might have notified the Tribunal much earlier than it did of its intention to challenge one of the arbitrators, setting out its basic case on that issue, with supporting documents to follow at a later time. Taking all of these factors into consideration, we conclude that Argentina did not file its Proposal to disqualify Professor Kaufmann-Kohler "promptly" within the meaning of Article 9(1) of the ICSID rules and that therefore it has waived such objection under Article 27.

IV. A Consideration of the Substance of the Respondent's Proposal of Disqualification

27. Article 56 of the ICSID Convention governs the process of challenging arbitrators. It provides that a party may propose the disqualification of a member of the

Tribunal on account of any fact indicating a *manifest* lack of the qualities required by paragraph (1) of Article 14. (Emphasis added). Article 14 (1) states the qualities that an ICSID arbitrator must meet. It provides:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment.* (Emphasis added)

28. Thus, for purposes of deciding on Argentina's Proposal, it is essential to determine whether Professor Kaufmann-Kohler manifestly lacks the quality of being a person who may be relied upon to exercise independent judgment, as Argentina seems to allege. Although Argentina did not point to this fact, the Spanish language version of the Convention Article 14(1) appears to be slightly different from that of the English language version. The Spanish version of Article 14(1) refers to a person who "…inspira[r] plena confianza en su imparcialidad de juicio. (*i.e.* who inspires full confidence in his impartiality of judgement.) Since the treaty by its terms makes both language versions equally authentic, we will apply the two standards of independence and impartiality in making our decisions. Such an approach accords with that found in many arbitration rules which require arbitrators to be both independent and impartial.[17]

29. The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp.[18] Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence

---

[17] The Rules of the London Court of International Arbitration (LCIA) state that arbitrators "shall be and remain at all times impartial and independent of the parties." The International Arbitration Rules of the American Arbitration Association (AAA) state that "[a]rbitrators acting under these rules shall be impartial and independent." The UNCITRAL Arbitration Rules also emphasize the importance of both concepts, in relation to the appointing authority's obligations concerning selection of arbitrators, an arbitrator's duty of disclosure, and in relation to grounds for challenge.

[18] On this point, see Jean-Francois Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, 2007 (translated by Berti & Ponti)), p. 348.

of a bias or predisposition toward one of the parties. Thus Webster's Unabridged Dictionary defines 'impartiality' as "freedom from favoritism, not biased in favor of one party more than another."[19] Thus it is possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial.

30. Independence and impartiality are states of mind. Neither the Respondent, the two members of this tribunal, or any another body is capable of probing the inner workings of any arbitrator's mind to determine with perfect accuracy whether that person is independent or impartial. Such state of mind can only be inferred from conduct either by the arbitrator in question or persons connected to him or her. It is for that reason that Article 57 requires a showing by a challenging party of any fact indicating a manifest lack of impartiality or independence.

31. What is the fact that Respondent alleges that manifestly demonstrates Professor Kaufmann-Kohler's lack of independence and impartiality? The only fact alleged in support of that conclusion is that Professor Kaufmann-Kohler participated in and signed the award in the *Aguas del Aconquija* case, which was rendered on August 20, 2007. In that respect, Argentina's challenge to an arbitrator in this case is unlike such challenges in other many other cases.

32. Many, if not most, prior ICSID cases concerning challenges to arbitrators are based on some alleged professional or business relation between the challenged arbitrator or one of his or her associates and a party in the case.[20] That situation does not exist in the present case. The Respondent does not allege and certainly does not offer any evidence that Professor Kaufmann-Kohler, her legal and professional associates, or anyone connected to her have or had any kind of a relationship at all with any of the parties in the case, let alone a relationship that might taint her independence as an arbitrator. As recognized by the other members of this Tribunal, as well as her

---

[19] Webster's Unabridged Dictionary (\New World Dictionaries/Simon and Schuster, 2nd ed, 1979), p. 911.

[20] See for example Decision on the Challenge to the President of the Committee, Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), available online at http://www.worldbank.org/icsid/cases/9deci-e.pdf

professional associates, Professor Kaufman-Kohler is known as a distinguished university academic, lawyer, and arbitrator of the highest professional standing, and the Respondent offers no evidence or facts to challenge her reputation and standing, except for the fact that she was a member of the tribunal that unanimously rendered an award in the *Aguas del Aconquija* case.

33. Moreover, it should also be noted that the Tribunal in the present case was constituted on February 17, 2004 and has functioned without objection from any of the parties for nearly four years in what was originally four and ultimately became three complicated cases. During that time, the Tribunal has held three hearings with the parties, made decisions on numerous requests and petitions, and has had countless interactions together and with the parties in order to carry out its functions according to the treaties and rules that govern its operations. Argentina offers no evidence whatsoever with respect to Professor Kaufman-Kohler's comportment during that period of time of any act or fact that would bring into question her independence or impartiality. Indeed, there can be none. On that score, the undersigned member of the Tribunal affirm in the strongest possible way based on their own knowledge and observation throughout that time that since the constitution of the Tribunal on February 17, 2004 Professor Gabrielle Kaufmann-Kohler has conducted herself in accordance with the highest professional standards and with absolutely strict and uncompromising independence and impartiality.

34. Thus the only fact from which Argentina seeks to draw an inference of lack of impartiality and independence is that Professor Kaufmann-Kohler participated in and signed the award against Argentina in the *Aguas del Aconquija*. We turn now to consider the implications of that fact. At the outset, it must be recalled that Article 57 of the ICSID Convention requires a "manifest lack of the qualities required" of an arbitrator. The term "manifest" means "obvious" or "evident." Christoph Schreuer, in his *Commentary*, observes that the wording *manifest* imposes a "relatively heavy burden of proof on the party making the proposal…" to disqualify an arbitrator.[21] Thus, in order to

[21] C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p.1200 (§16).

conclude that Professor Kaufmann-Kohler lacks independence or impartiality, we would have to find that participation in the award was in and of itself obvious evidence of such a state of mind. We have reviewed the award in the *Aguas del Aconquija* case but can find no evidence from its text of a lack of impartiality or independence by Professor Kaufmann-Kohler. The award was a unanimous decision rendered by three distinguished arbitrators, including one appointed by Argentina. In its Proposal, Argentina contests many of the findings of fact by that tribunal and it argues that because the tribunal's interpretations of the facts and evaluation of the evidence is, in the Argentinean view, so wrong, the tribunal, or at least Professor Kaufmann-Kohler, could not have acted independently and impartially in arriving at such a decision.

35. With respect to the basis of Argentina's argument, it must be pointed out that a difference of opinion over an interpretation of a set of facts is not in and of itself evidence of lack of independence or impartiality. It is certainly common throughout the world for judges and arbitrators in carrying out their functions honestly to make determinations of fact or law with which one of the parties may disagree. The existence of such disagreement itself is by no means manifest evidence that such judge or arbitrator lacked independence or impartiality. Even if an appellate body should ultimately reverse such determination, that reversal in and of itself would by no means be evidence of a failure of impartiality or independence. A judge or arbitrator may be wrong on a point of law or wrong on a finding of fact but still be independent and impartial. We are in no way suggesting that we accept or dismiss any of Argentina's various challenges to the facts determined by the tribunal in the *Aguas del Aconquija* case. We are not equipped to make such a determination. We have not reviewed the thousands of pages of documents in that case, and we have not listened to the testimony of witnesses over eleven days as did the tribunal in the case. Determinations of facts in an arbitral or judicial proceeding are crucially dependent on an evaluation of the credibility of witnesses. The only persons capable of making that determination in the *Aguas del Aconquija* case were the three arbitrators who participated in the hearings and actually listened to the witnesses. While we, as two members of the Tribunal, have jurisdiction to judge the independence and

impartiality of Professor Kaufmann-Kohler, we have no jurisdiction to review the substance of the *Aguas del Aconquija* award.

36. Even though Professor Kaufman-Kohler is independent of the parties, is it still possible to conclude that she is not impartial toward the parties, and specifically Argentina, because of her participation in the *Aguas del Aconquija* award? In more general terms, does the fact that an arbitrator or a judge has made a decision that a party in one case interprets as against its interests mean that such judge or arbitrator cannot be impartial to that party in another case? Further, does the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case mean that such judge cannot decide the law and the facts impartially in another case? We believe that the answer to all three questions is no. A finding of an arbitrator's or a judge's lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.

37. It is also important to underscore that although the *Aguas del Aconquija* case and the cases being heard by the present Tribunal all involve Argentina as a respondent and arose out of the privatization of water and sewage systems in that country, the two situations are distinctly different. For one thing, the cases being heard by the present Tribunal are linked to the measures and actions taken by the Argentine government to deal with the serious crisis that struck the country in 2001. Those measures and actions were not in any way involved in the *Aguas del Aconquija* case, which arose out of events some five years earlier. Secondly, the present Tribunal will be required to apply Argentina's bilateral investment treaties with Spain and the United Kingdom, neither of which was applicable in the *Aguas del Aconquija.* And finally, the application of general international legal principles, as well as the determination of damages (if any), are highly fact-specific, and the facts in the cases being heard by the present Tribunal are far different from those found in the *Aguas del Aconquija* case.

38. After analyzing Argentina's various contentions in its Proposal, we find only Argentina's belief, unsubstantiated by objective evidence, that the award in the *Aguas del Aconquija* case, because of alleged improper findings of fact, is sufficient to demonstrate Professor Kaufmann-Kohler's lack of independence and impartiality. Paragraph 47 of Argentina's Proposal states: "Based on all the considerations hereinabove stated, the Republic of Argentina asserts that it is manifest that Mrs. Kaufmann-Kohler may not be relied upon to exercise independent judgment with respect to the Claimants' claim."

39. Although Argentina does not ask the question specifically in its Proposal, the above-quoted statement raises the question of whether, in applying the standards of Article 14 of the Convention to challenges, one is to use a subjective standard based on the belief of the complaining party or an objective standard based on a reasonable evaluation of the evidence by a third party. In other words, when the English version of article 14 calls for a person "…who may be relied upon to exercise independent judgment" and the Spanish versions requires one "...who inspires full confidence in his impartiality of judgment" are we to look only to the challenger's belief or lack thereof in the presence of that quality or are we to require a showing of evidence that a reasonable person would accept as establishing the absence of the qualities required by Article 14? We have concluded that an objective standard is required by the Convention.

40. Implicit in Article 57 and its requirement for a challenger to allege a fact indicating a *manifest* lack of the qualities required of an arbitrator by Article 14, is the requirement that such lack be proven by objective evidence and that the mere belief by the challenge of the contest arbitrator's lack of independence or impartiality is not sufficient to disqualify the contested arbitrator. Previous ICSID decisions on challenges to arbitrators support our position. For example, the Challenge Decision in the *SGS v. Pakistan* case[22] confirmed this view in the following terms:

---

[22] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13). Decision on Claimant's Proposal to Disqualify Arbitrator of December 19, 2002, 8 *ICSID Rep.* 398 (2005)

> [T]he party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made."[23]

41. Two arbitrators in *Amco Asia Corp. v. Indonesia*[24] held that mere appearance of partiality was not a sufficient ground for disqualification of the arbitrator. The challenging party must prove not only facts indicating the lack of independence, but also that the lack is 'manifest' or 'highly probable', not just 'possible' or 'quasi-certain'.[25] The decision on the challenge to the President of the annulment committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) took a similar approach in stating that that the challenging party shall rely on established facts and "not on any mere speculation or inference."[26]

> Indeed, the application of a subjective, self-judging standard instead of an objective would enable any party in arbitration who becomes discontented with the process for any reason to end it at any time at its sole discretion simply by claiming that an arbitrator is not independent or impartial, a result that would undermine and indeed destroy the system of investor-State arbitration that was so carefully established by the states that have agreed to the Convention.

---

[23] SGS Challenge Decision, page 5.

[24] ICSID Case ARB/81/1, Decision on the Proposal to Disqualify an Arbitrator (June 24, 1982) (unreported). Referred to in M.W. Tupman, *"Challenge and Disqualification of Arbitrators in International Commercial Arsitration"* 38 Int'l & Comp. L.Q. 44 (1989) p.44. The case is also referred to in C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p.1200 (§18).

[25] Ibid. p.45 (Decision at p.8).

[26] Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Challenge to the President of the Committee, para. 25.

42. After carefully examining the various allegations contained in Argentina's Proposal, we find no evidence whatsoever that indicates in any way that Professor Gabrielle Kaufmann-Kohler is not independent and impartial in the above-entitled cases. We therefore hold that the Proposal by Argentina to disqualify her is without foundation.

IV. Conclusion

43. We conclude that the Proposal by Argentina to disqualify Professor Gabrielle Kaufmann-Kohler must be dismissed because it was not filed in a timely manner and because it failed to prove any fact indicating a manifest of lack of independence or impartiality. In making this decision, we have been mindful both of the sincerity with which Argentina has advance and argued its Proposal and the duty imposed on us by the ICSID Convention and Rules to decide this matter fairly and promptly in accordance with the prevailing law.

44. As from today, we terminate the state of suspension of the proceedings in the above entitled cases and affirm the schedule of hearings fixed by agreement of the parties to be held from October 28, 2007 through November 8, 2007 at the offices of the Centre in Washington, D.C.

Professor Jeswald W. Salacuse
President

Professor Pedro Nikken
Arbitrator

ANEXO 24

INTERNATIONAL CENTRE FOR

SETTLEMENT OF INVESTMENT DISPUTES

Compañía de Aguas del Aconquija S.A. & Vivendi Universal

v.

Argentine Republic (ICSID Case No. ARB/97/3)

DECISION ON THE CHALLENGE TO THE PRESIDENT OF THE COMMITTEE

Introduction

1. On 21 November 2000, an ICSID Tribunal consisting of Judge Francisco Rezek, President, Judge Thomas Buergenthal and Mr. Peter Trooboff unanimously dismissed a claim brought by Compañía de Aguas del Aconquija S.A. and its parent company, now Vivendi Universal ("the Claimants") against the Argentine Republic. On 20 March 2001, the Claimants requested annulment of the award pursuant to Article 52 of the ICSID Convention. Under Article 52 (3), the Chairman of the Administrative Council appointed three members of the Panel of Arbitrators, the undersigned and Mr. Yves Fortier, C.C., Q.C., as an *ad hoc* Committee to consider the request. The three members agreed that Mr. Fortier would be the President of the Committee.[1] At its first session in Washington on 21 June 2001, all members made declarations in terms of Rule 6 of the Arbitration Rules. Mr. Fortier qualified his declaration in one respect, and the Respondent reserved the right to challenge him. Subsequently it did so.

---

[1] On the election of the President by members of an *ad hoc* Committee see C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) pp. 1013–1014 (§345).

Chapter V of the Convention is entitled "Replacement and Disqualification of Conciliators and Arbitrators". Article 56 provides that once a Commission or Tribunal has been constituted and has begun its proceedings, its composition shall remain unchanged, subject to contingencies such as the death, incapacitation or resignation of a member. Articles 57 and 58 of the Convention deal with the procedure to be followed in case of a proposal to disqualify any member of a Commission or Tribunal. In particular Article 58 states that a proposal to disqualify a conciliator or arbitrator is to be decided "by the other members of the Commission or Tribunal . . . provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision". Arbitration Rule 9 deals with issues of disqualification of arbitrators in further detail.

3. Chapter V does not refer to disqualification of the members of *ad hoc* Committees. Nor does Article 52. 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."

Chapter V is not mentioned, although it deals with questions that could well arise with respect to the membership of Committees. However 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.

4. Before doing so Mr. Fortier made an explanation of his position in terms of Rule 9 (3). This was circulated to the Parties, who were given a brief period to comment on it. The Claimants made no observations. By

letter of 12 September 2001 the Respondent confirmed its earlier challenge and made certain additional observations, which are discussed below.

Competence of Members of the Committee to Decide on a Disqualification Proposal

5. An initial question concerns our competence to decide on the proposal. Although neither Party raised the issue, it might be argued that the failure of Article 53 (4) of the Convention to refer to Chapter V or to apply it to the disqualification of members of *ad hoc* Committees was deliberate. If so, the Administrative Council was arguably incompetent to achieve by a Rule what the Convention itself specifically did not achieve and thus by implication precluded. It is necessary to consider this question before turning to the circumstances of the present case.

6. The rule-making powers of the Administrative Council are set out in Article 6 of the Convention. This provides, *inter alia*, that:

> "(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:
>
> . . .
>
> "(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
>
> . . .
>
> "The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.
>
> "(2) The Administrative Council may appoint such committees as it considers necessary.
>
> "(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."

The Council consists of one representative of each Contracting State (Article 4).

7. It is not entirely clear from the Convention whether annulment requests and proceedings pursuant to such requests under Article 52 come within the term "arbitration proceedings" in Article 6 (1) (c), or whether they are to be considered as distinct. There are indications both ways. On the one hand annulment proceedings occur before a separate *ad hoc* Committee, separately constituted; on the other hand, the role of the Committee is narrowly defined and could be seen an ancillary to the arbitration function of ICSID as a whole. Nothing turns on this, however, since in any event the 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.

8. Article 52 (3) provides that no member of an *ad hoc* Committee can have been a member of the Tribunal which rendered the award. In addition no member may have the same nationality as any of the members of the Tribunal or of either Party or have been nominated to the Panel of Arbitrators by either of the States concerned. This covers some issues relating to the independence of members of *ad hoc* Committees but it does not do so exhaustively. Although such members must be Panel members (and may therefore be presumed to have the general qualities required), they may still have or have had particular links with the parties to an annulment proceeding which would disqualify them from sitting. Yet it is not clear that the Chairman of the Administrative Council would have inherent power to decide such issues in the absence of any article or rule to that effect. 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. Although Arbitration Rule 9 itself refers to Article 57 of the Convention (which does not apply to disqualification of Committee members), Rule 9 is sufficiently self-contained and can be given effect without relying on powers expressly conferred by the Convention itself on

other bodies. 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.

9. 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."[2]

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.[3]

10. 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

---

[2] For the text of the 1968 Arbitration Rules see 1 *ICSID Reports* p. 63.

[3] See *ICSID Annual Report 1985*, p. 18.

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.

11. 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. Admittedly, the catalogue of provisions incorporated by reference in Article 52 (4) appears a considered one. The provisions incorporated are not only concerned with the powers of Committees. They apply to a range of questions, including the status of decisions made. On the other hand the matter of disqualification might simply have been overlooked, and other aspects of Chapter V are clearly apt to be applied to *ad hoc* Committees.

12. The point is noted as follows by Schreuer's *Commentary*:

> "the application of Arbitration Rules 8–12 to annulment proceedings is only possible on the assumption that the omission of the Convention's Chapter V from the list of provisions in Art. 52(4) was unintentional. If the omission of Arts. 56–58 from Art. 52(4) is interpreted as a deliberate exclusion, it is not permissible to reintroduce these Articles under the guise of the corresponding Arbitration Rules... If this were otherwise, one could introduce the procedures for interpretation, revision and annulment in respect of decisions on annulment by way of applying the pertinent Arbitration Rules, a result that is clearly not intended by the Convention."[4]

[4] C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p. 1042 (§422).

But as Schreuer also notes,[5] 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.[6]

13. 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.

The Question of Disqualification

14. We turn then to the particular question raised by the challenge to Mr. Fortier. The governing standard here is not in doubt. It is set forth in Article 14 of the Convention, which is applied to members of annulment Committees by Article 57 of the ICSID Convention. Article 14 provides as follows:

> "(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

Neither Mr. Fortier's moral character nor his competence in the field of law have been questioned by the Respondent. The issue centres only on the question of his independence and impartiality with respect to the parties to the dispute, specifically the Claimants, i.e. on whether he "may be relied upon to exercise independent judgment".

---

[5] Ibid., p. 1039 (§412).

[6] Cf. Vienna Convention on the Law of Treaties, 1969, Art. 31 (3).

15. Arbitration Rule 6, as applied to *ad hoc* Committees by Arbitration Rule 53, requires from each of the members a declaration that there is to the best of their knowledge no reason why they should not serve, and a "statement of . . . past and present professional, business and other relationships (if any) with the parties". In his statement of 18 June 2001, Mr. Fortier advised that one of the partners in his law firm Ogilvy Renault had been engaged by Vivendi's predecessor, Compagnie Générale des Eaux, to advise on certain matters relating to taxation under Quebec law. Mr. Fortier had had no personal involvement in the work, which was wholly unrelated to the present case.

16. In response to certain questions put by the Respondent at the first session, Mr. Fortier affirmed that the remuneration involved was *de minimis*. He subsequently provided a memorandum from his firm stating that the work done for Vivendi S.A. had "always been very limited and, in relative terms, is inconsequential to our firm's total billing". The responsible tax partner of the firm provided a further memorandum outlining in general terms the nature of the work done and specifying the fees charged. According to this statement, fees of approximately $216,000 had been billed, of which the great majority (approximately $204,000) concerned work done in the period 1995–1999. The work was done for Vivendi S.A. but on instructions from a United States law firm which was acting generally in the matter. The work remaining to be done by Ogilvy Renault in respect of the matter was trivial; it concerned only the winding up of the arrangements in question and would involve fees of not more than $2000. The partner undertook that he would not accept any further instructions from Vivendi S.A. until after the completion of this Committee's mandate.

17. In its statement of 12 September 2001 the Respondent noted that the retainer from Compagnie Générale des Eaux was a continuing one and stated that the amounts charged on that retainer since 1995 "cannot be considered by the Republic of Argentina as *de minimis*". It also stressed the importance of the present proceedings. In these circumstances it affirmed its challenge under Article 14 of the Convention. It had originally relied, *inter alia*, on the following provisions of the Code of Ethics for International Arbitrators (International Bar Association, 1987):

> Rule 3.1: The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an

> arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.
>
> Rule 3.2: Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure as described in Article 4 below.

Rule 4 establishes, in effect, the obligation of arbitrators to declare all facts or circumstances that may give rise to justifiable doubts.

18. Consistently with this Code of Ethics, Arbitration Rule 6 of the ICSID Arbitration Rules, which is directly applicable here, imposes the obligation to declare "past and present professional, business and other relationships (if any) with the parties". The fundamental principle is that arbitrators shall be and remain independent and impartial; in terms of Article 14 (1) of the Convention, they must be able to be "relied on to exercise independent judgment". Exactly the same principle applies to the members of *ad hoc* Committees. The role of the other members of this Committee is to determine whether there is "a manifest lack of the qualities required by paragraph (1) of Article 14".

19. Certain initial points should be made. First, although various legal entities within the Vivendi group have been mentioned (Compagnie Générale des Eaux, Vivendi S.A., Vivendi Universal), it does not appear that there is any relevant distinction between them for present purposes. Accordingly we approach the question on the basis that one of the claimant companies, or at any rate a company within the Vivendi group, is a client of Mr. Fortier's law firm in an as yet uncompleted matter. The great bulk of the work was done before the present proceedings were commenced and only a minor amount of work remains to be done. Mr. Fortier at no stage has had any personal involvement with the work or with the Claimant companies in relation thereto, and the work done bears no relationship to the present dispute.

20. Secondly, a question arises with respect to the term "manifest lack of the qualities required" in Article 57 of the Convention. This might be thought to set a lower standard for disqualification than the standard laid down, for example, in Rule 3.2 of the IBA Code of Ethics, which refers to an "appearance of bias". The term "manifest" might imply that there could be circumstances which, though they might appear to a reasonable observer to create an appearance of lack of independence or bias, do not do so manifestly. In such a case, the arbitrator might be heard to say that, while he might be biased, he was not *manifestly* biased and that he would therefore continue to sit. As will appear, in light of the object and purpose of Article 57 we do not think this would be a correct interpretation.

21. Decisions on a proposal to disqualify an arbitrator under Article 57 have been made in two previous cases. In the *Amco Asia* case, the Respondent challenged the Claimant's party-appointed arbitrator, Mr. Rubin, on a number of grounds. Prior to his appointment as arbitrator (but after the commencement of the arbitration) Mr. Rubin had personally given a limited amount of tax advice to the principal shareholder in the Claimant company. His law firm had also, prior to the commencement of the arbitration, had a profit sharing arrangement with the lawyers acting for the Claimants. During the period of that arrangement neither the shareholder nor the Claimant had been clients of either law firm. In their unpublished decision of 14 June 1982,[7] the other two arbitrators (Professors Goldman and Foighel) first affirmed by reference to the object and purpose of the Convention, that . . .

> "an absolute impartiality . . . of all the members of an arbitral tribunal, is required, and it is right to say that no distinction can and should be made, as to the standard of impartiality, between the members of an arbitral tribunal, whatever the method of their appointment."[8]

But they went on to say that this requirement did not preclude the appointment as an arbitrator of a person who has had, before his appointment, some relationship with a party, unless this appeared to create a risk of inability to

---

[7] ICSID Case ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, Decision on the proposal to disqualify an arbitrator, of 24 June 1982, unpublished.

[8] As cited by M. Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration", *ICLQ*, v. 38, 1989, p.26 at p. 45.

exercise independent judgment. In this context, in their view, the existence of some prior professional relationship in and of itself did not create such a risk "whatever the character—even professional—or the extent of said relations."[9] As to Article 57, they laid stress on the term "manifest", which in their view required "not a possible lack of the quality, but . . . a highly probable one."[10] On this basis they rejected the challenge. In their view, legal advice (with a fee, in 1982, of Can$450) given by someone who had never been "regular counsel of the appointing party" was minor and had no bearing on the reliability of the arbitrator; nor could the links between the two law firms "create any psychological risk of partiality".[11] Thus Mr. Rubin's lack of reliability was not manifest; indeed, in their view, it was not even reasonably apprehended.

22. The decision has been strongly criticized.[12] To the extent that it concerned a personal relationship of legal advice given by the arbitrator to a party or to a related person after the dispute in question had arisen, it can in our view only be justified under the *de minimis* exception. That the advice was given on an unrelated matter, though a relevant factor, can hardly be sufficient. The fact remains that a lawyer-client relationship existed between the claimant and the arbitrator personally during the pendency of the arbitration; this must surely be a sufficient basis for a reasonable concern as to independence, unless the extent and content of the advice can really be regarded as minor and wholly discrete.

23. The second decision under Article 57 was given on 19 January 2001 in the *Zhinvali* case, which is still pending. There the challenge was based on the existence of occasional, purely social, contacts between the arbitrator in question and an executive instrumental in the claimant's investment. The other two arbitrators stressed the absence of any professional or business relationship between the arbitrator and the person concerned, and concluded that to suggest that a merely occasional personal contact could manifestly affect the judgment of an arbitrator, in the

[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid., p. 51.

absence of any further facts, was purely speculative.[13] They accordingly dismissed the challenge.

24. On the crucial question of the threshold test, the *travaux préparatoires* of Article 57 give little guidance. Schreuer says only that the requirement that the lack of impartiality must be manifest "imposes a relatively heavy burden of proof on the party making the proposal".[14] Some guidance is however to be obtained from general authorities in the field of international arbitration. According to Fouchard, Gaillard & Goldman, the existence of business relations between an arbitrator and one of the parties does not necessarily lead to the existence of a relationship of dependency that would justify a challenge.[15] They note, realistically, the large number of possibilities that exist for arbitrators to have or have had some "professional contact" with the parties. In this respect, an illustrative case is that of *Philipp Brothers*,[16] where it was stressed that a professional party could not be allowed to challenge *en bloc* all other professionals within his or her milieu. The authors also refer to an ICC arbitration where counsel acting for one of the parties belonged to the same firm as the president of the arbitral tribunal. The Paris *Cour d'appel* held that belonging to such an "association of interests" as a large law firm with multiple divisions and specializations does not imply economic dependency sufficient to justify disqualification.[17]

25. It is not necessary to consider the implications of the term "manifest" in Article 57 for cases in which there is any dispute over the facts, since there is none in the present case. On the one hand it is clear that that term cannot preclude consideration of facts previously undisclosed or unknown, provided that these are duly established at the time the decision is made. On the other hand, the term must exclude reliance on speculative

---

[13] ICSID Case ARB/00/1, *Zhinvali Development Ltd. v. Republic of Georgia*, Decision on Respondent's Proposal to Disqualify Arbitrator, 19 January 2001 (Davis Robinson, Seymour J. Rubin), unpublished.

[14] Schreuer, *Commentary*, p. 1200, §16, and see ibid., p. 1199, §14 for a review of the *travaux*. On the meaning of the term "manifestly" in Arts. 36 (3) and 52 of the Convention see ibid., pp. 458–460, §§45–47, pp. 932–936, §§137–146, respectively. It is implicit in what we have said that the term may have a different meaning in these different contexts.

[15] *Traité d'arbitrage commercial international*, Paris, Litec, 1999, pp. 584.

[16] TGI Paris, 28 October 1988 and 29 June 1989, *Rev. arb.* 1990, p. 497.

[17] Judgment of 28 June 1991, *Rev. arb.* 1992, p. 568, reported by P. Bellet; cited by Fouchard, Gaillard & Goldman, pp.584–585.

assumptions or arguments—for example, assumptions based on prior and in themselves innocuous social contacts between the challenged arbitrator and a party. But in cases where (as here) the facts are established and no further inference of impropriety is sought to be derived from them, the question seems to us to be whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party. If (and only if) the answer is yes can it be said that the arbitrator may not be relied on to exercise independent judgment.[18] That is to say, the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality. If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld. Once the other arbitrators or Committee members had become convinced of this conclusion, there would no longer be room for the view that the deficiency was not "manifest".

26. Turning to the facts of the present case, it is true that a partner of Mr. Fortier's had (and still has) the Claimants or one of their affiliates as a client. But we do not think that this, in and of itself, is enough to justify disqualification in the circumstances of this case. Relevant on the other hand are the following facts: (a) that the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency;[19] (b) that Mr. Fortier personally has and has had no lawyer-client relationship with the Claimants or its affiliates; (c) that the work done by his colleague has nothing to do with the present case; (d) that the work concerned does not consist in giving general legal or strategic advice to the Claimants but concerns a specific transaction, in which Ogilvy Renault are not the lead firm; (e) that the legal relationship will soon come to an end with the closure of the transaction concerned.

---

[18] For examples of the application of a test of this kind to diverse facts see e.g. *AT & T Corporation v. Saudi Cable Co.* [2000] 2 Lloyd's Rep. 127; *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700.

[19] Mr. Fortier declined, in our view reasonably, to provide details of his overall remuneration with Ogilvy Renault. Disclosure of that information, confidential to him and his partners, was not necessary in order to decide on the proposal for disqualification.

27. In these specific circumstances we see no reason to regard Mr. Fortier's independence as in any way impaired by the facts disclosed. We therefore do not need to rely on any *de minimis* rule as a basis for our conclusion. We note that the Respondent does accept in principle the existence of such a rule.[20] While we agree with the Respondent that the amount of fees earned in the transaction since its inception is not *de minimis*, it is the case that only a small amount will have been charged for the last stages of the work, in the period 2000–2002. This is the relevant period for the purposes of the present annulment request. If necessary, the *de minimis* rule would have provided a further basis for rejecting the proposal for disqualification.

Conclusions

28. To summarise, we agree with earlier panels which have had to interpret and apply Article 57 that the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator or Committee member. All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently. In the present case, for the reasons given above, the continuing relationship between another partner of Ogilvy Renault and Vivendi is not significant enough for this purpose. Accordingly the proposal for disqualification submitted by the Respondent must be dismissed.

Professor James Crawford SC *Professor José Carlos Fernández Rozas*

3 October 2001

[20] See above, paragraph 17.

ANEXO 24

International Centre for Settlement of Investment Disputes

Washington, D.C.

DECISION ON JURISDICTION

in the matter of an arbitration

between

Vannessa Ventures Ltd.

and

The Bolivarian Republic of Venezuela

(ICSID Case N° ARB(AF)/04/6)

Members of the Tribunal

Dr. Briner, President

Professor Brigitte Stern

Judge Charles Brower

Secretary of the Tribunal

Ms. Claudia Frutos-Peterson

ON BEHALF OF THE CLAIMANT
Mr. John Laskin
Mr. John Terry
Torys LLP
Suite 3000
Toronto, ON
Canada M5K 1N2

ON BEHALF OF THE RESPONDENT
Dra. Gladys Gutiérrez Alvarado
Procuradora General de la República
Avenida Lazo Martí
Edificio Procuraduría General de la República
Piso 8, Santa Mónica
Caracas, Venezuela
AND
Dr. Ronald E.M. Goodman
Mr. Paul S. Reichler
Foley & Hoag LLP
1875 K Street, N.W., Suite 800
Washington, D.C. 20006
U.S.A.

August 22, 2008

TABLE OF CONTENTS

1. BACKGROUND

In order to understand the main events which led up to this dispute and to identify the various Parties directly or indirectly involved, the Arbitral Tribunal felt it useful to briefly describe the background and the occurrences which led to this Arbitration.

The Las Cristinas property is located in the south eastern corner of Venezuela in the State of Bolivar. It consists of a number of mining concessions held by Venezuela through the Ministry of Energy and Mines. It contains what is reported to be one of the largest gold reserves in the world.

Corporación Venezolana de Guayana ("CVG") is a Government agency created in 1960 to oversee the economic development of the Guayana Region in Bolivar State, where the Las Cristinas ("Las Cristinas") property is located.

Placer Dome, Inc. ("PDI") was a Canadian corporation with its head office in Vancouver. It was listed on various stock exchanges and described as one of the largest gold mining companies of the world. In 2006, it was acquired and absorbed into by Barrick Gold Corporation which has its headquarters in Toronto, Canada and is quoted on the Toronto and New York stock exchanges. After a selection process, PDI was selected for the development of the gold mines in the Las Cristinas concessions 4, 5, 6 and 7. For this purpose, CVG entered on 25 July 1991 into a Shareholders Agreement ("Shareholders Agreement 1991")[1] with PDI. According to this Agreement, two mining companies were formed, Minera Las Cristinas ("MINCA") and Relaves Mineros Las Cristinas ("REMINCA"). The purpose of MINCA was to initially explore and, if economic feasibility is established, produce gold in Las Cristinas 4, 5, 6 and 7. REMINCA was to evaluate and, if economic feasibility is established, process existing tailings on Las Cristinas 4 and 5. REMINCA is apparently not directly at issue in this Arbitration.

Seventy percent of the shares of the capital stock of MINCA were subscribed by Placer Dome de Venezuela, C.A. identified as the "PDI Investor", a domestic Venezuelan company ("PDV"). Apparently for tax purposes, the shares of PDV were not held directly by the

[1] CD-5.

Canadian parent company PDI, but through an intermediary company Placer Dome Ltd. (Barbados) ("PD Barbados"). CVG in turn held 30% of the shares of MINCA.

On 4 March 1992, CVG and MINCA entered into a Work Contract to explore and exploit Las Cristinas ("Work Contract")[2]. This contract designated MINCA as the sole and exclusive operator for the exploration, development and exploitation of Las Cristinas 4, 5, 6 and 7 for an initial period of twenty years with extensions of additional ten year periods so long as the project remained economically feasible.

Upon the discovery of the presence of copper on the Las Cristinas property, the Ministry of Energy and Mines issued copper concessions to CVG for Las Cristinas 4, 5, 6 and 7 on 30 December 1996[3]. These copper concessions were transferred to MINCA on 28 January 1999[4].

Between 1995 and 1998, Pre-Feasibility Studies, Feasibility Studies and Updates thereto were prepared[5].

The July 1996 Feasibility Study Update was approved: (i) by the MINCA Board of Directors at a meeting held on 1 August 1996[6]; and (ii) by the Ministry of Energy and Mines by letter dated 26 June 1997[7]:

In view of the increased financial needs for the construction phase, the shareholders of MINCA in August 1996 agreed to a re-organization of the corporate structure whereby PDV's shareholding would be increased from 70% to 95% and CVG's shareholding reduced from 30% to 5% with an option for CVG to increase its ownership to 30% in the future through cash and non-cash contributions[8]. This re-organization was formalized in the 1997 Amended Shareholders Agreement entered into on 31 July 1997 (Shareholders Agreement 1997)[9].

---

2 CD-20.
3 CD-39.
4 CD-40.
5 CD-29.
6 CD-32.
7 CD-33.
8 CD-43.
9 CD-30.

For various reasons and from 1999 onwards, mainly because of the important decline of the price of gold, exploitation was apparently never really commenced and at a Board of Directors Meeting of MINCA held on 15 July 1999 the Project was suspended[10].

After MINCA had made the decision to further suspend its activities, CVG, PDI, PDV and MINCA entered into an agreement on 8 August 2000[11] according to which the suspension of the performance of the Work Contract was extended for a further year from 15 July 2000.

During this time, attempts were made to review the strategic options for the property with the help of an investment advisor and to find a third-party investor to become involved in the project. PDI also made a formal proposal to CVG to sell its interest in MINCA in exchange for future royalty payments to it. No agreements were reached between the Parties regarding the future direction of the project.

In October 2000, General Rangel Gomez became President of CVG. He wrote a letter on 11 July 2001 to the Minister of Energy and Mines informing him that CVG intended to assume total control of MINCA[12].

On 13 July 2001, the "Original Transaction Agreement (PBV)" was entered into which provided among other things for Vannessa Ventures Ltd., a company organized under the laws of the Province of British Columbia, Canada ("Vannessa" or "the Claimant") and its wholly-owned subsidiary IHC Corp., a corporation organized under the laws of Barbados and PD Barbados to acquire the PDV shares and certain loans.

General Rangel Gomez, President of CVG, was informed in writing by William M. Hayes, Executive Vice President – United States and Latin America, about this transaction which was publicly announced the same day[13].

On 14 July 2001, General Rangel Gomez wrote a letter to PDV according to which CVG did not acknowledge or agree with this share sales agreement[14].

---

10 CD-57.
11 CD-60.
12 CD-90.
13 CD-95.
14 CD-97.

The transaction was closed on 25 July 2001 when the Original Transaction Agreement (PBV) was replaced by the Transaction Agreement (PBV)[15] between PD Barbados, Vannessa and Vannessa Holdings Corporation, a corporation organized under the laws of Barbados ("Vannessa Barbados"). PDV later changed its name to Vannessa Venezuela C.A.

On 6 August 2001, CVG proceeded to rescind the Work Contract upon 90 days notice of breach to MINCA[16].

On 6 November 2001, 90 days after CVG's notice of breach, CVG issued a formal notice of termination of the Work Contract and granted MINCA an additional seven days to vacate Las Cristinas[17].

On 16 November 2001, CVG forcefully took possession of the Las Cristinas mine site.

On 8 March 2002, the Ministry of Energy and Mines issued two Resolutions, Resolution 35[18] transferring to the Republic the Las Cristinas gold concessions and Resolution 36[19] declaring MINCA's concession to the Las Cristinas copper concessions expired.

On 29 April 2002, President Chavez issued a Presidential Decree reserving Las Cristinas gold concessions for direct exploitation by the Government of Venezuela[20]. This Decree was published on 7 May 2002.

On 10 September 2002, President Chavez issued a further Presidential Decree reserving the copper concessions for direct exploitation, which Decree was published on 12 March 2003[21].

2. PROCEDURAL HISTORY

2.1. Arbitration Agreement and Constitution of the Arbitral Tribunal

15 CD-4.
16 CD-109.
17 CD-148.
18 CD-166.
19 CD 167.
20 CD-172.
21 CD-173.

On July 9, 2004, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received an arbitration request from Vannessa Ventures S.A. ("the Claimant") against the Bolivarian Republic of Venezuela ("the Respondent" or "Venezuela") under the ICSID Additional Facility Mechanism provided by the 1996 Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments ("BIT").

By letters of August 23 and September 15, 2004, the Claimant supplemented its Request for Arbitration.

On October 28, 2004, the Secretary-General informed the Parties of his approval to access the Additional Facility Mechanism pursuant to Article 4(5) of the Additional Facility Rules. On the same day, the Secretary-General registered the request and invited the Parties to proceed with the constitution of an arbitral tribunal pursuant to Article 5(a) and (e) of the Additional Facility Arbitration Rules.

In the absence of an agreement between the Parties on the constitution of the Arbitral Tribunal, it was decided that pursuant to Article 6(1) of the Additional Facility Arbitration Rules, the Tribunal would be composed of three arbitrators, with one appointed by each party, and the third, who would be the President of the Tribunal, appointed by agreement of the Parties.

On January 27, 2005, the Claimant appointed the Honorable Charles N. Brower, a national of the United States of America, as arbitrator. On February 15, 2005, the Respondent appointed Mr. Jan Paulsson, a national of France, as arbitrator.

On May 20, 2005, the Parties informed the Centre that they had jointly appointed Mr. V.V. Veeder, a British national, as the third and presiding arbitrator.

On June 7, 2005, the Acting Secretary-General of ICSID notified the Parties and the above-mentioned arbitrators that the Tribunal had been constituted and the proceeding deemed to have begun on that day in accordance with Article 13(1) of the Additional Facility Arbitration Rules. On the same date, the Parties were informed that Mr. José Antonio Rivas, ICSID Counsel, had been appointed as Secretary of the Tribunal in this case. Later on, Mr. Rivas was replaced by Dr. Claudia Frutos-Peterson, ICSID Counsel.

2.2. Proceedings

On July 29, 2005, the Tribunal held its first session with the Parties in London. Present at the session were:

- The Members of the Tribunal,
- The Secretary of the Tribunal,
- On behalf of the Claimants: Messrs. John Terry and Ms. Julie Maclean of Torys LLP, and
- On behalf of the Respondent: Mr. Ronald Goodman of Winston & Strawn LLP.

During the session, the Tribunal decided on several procedural matters and, in agreement with the Parties, set a timetable for the Parties' respective submissions and production of documents. This timetable was later amended on several occasions per the Parties' requests.

On January 13, 2006, in accordance with the amended timetable, the Claimant submitted its Memorial.

On February 28, 2006, the Claimant submitted an amendment to its Request for Arbitration. After hearing the Respondent's objections to this request, the Tribunal decided, pursuant to Articles 35 and 47 of the Additional Facility Arbitration Rules, to grant the Claimant's request and to introduce the amendment as an ancillary claim.

2.3. Proceeding on Jurisdiction

On July 5, 2006, the Respondent raised objections to the Tribunal's jurisdiction and requested a suspension of the proceedings in accordance with Additional Facility Arbitration Rule 45(4). On July 10, 2006, the Claimant objected to the Respondent's challenge and request.

On July 14, 2006, the Centre informed the Parties that the Tribunal had suspended the proceeding in accordance with Article 45(4) of the Additional Facility Arbitration Rules and set out a schedule for the Parties' respective submissions on jurisdiction. The schedule was modified twice subsequently per the Parties' requests.

In accordance with the revised schedule, the Respondent on August 28, 2006, submitted its Memorial on Jurisdiction. On December 16, 2006, the Claimant submitted its Counter-Memorial on Jurisdiction. On February 16, 2007, the Respondent filed its Reply on Jurisdiction, and on February 16, 2007, the Claimant submitted its Rejoinder on Jurisdiction.

On April 25, 2007, the Tribunal was provided with a revised list of participants for the upcoming hearing on jurisdiction. Among the persons listed as representing the Claimant was Prof. Christopher Greenwood. On April 27, 2007, the Centre transmitted to the Parties further declarations by two Tribunal members with respect to Prof. Greenwood. On May 3, 2007, the Respondent submitted its observations on the further declarations. On May 4, 2007, the Tribunal invited the Claimant to provide any observations which it might have with respect to the Respondent's letter in this matter. The Claimant provided its observations the same day.

As agreed, on May 7, 2007, the hearing on jurisdiction took place in London. At the hearing, the following persons appeared as legal counsel and representatives for the Claimant: Messrs. John Laskin and John Terry and Mesdames Julie Maclean and Ruth Anne Flear of Torys LLP, as well as Prof. Greenwood of Essex Chambers. Ms. Marianna Almeida and Messrs. John Morgan and Ross Melrose, all of Vanessa Ventures Ltd., also appeared as representatives of the Claimant.

The following persons appeared on behalf of the Respondent as its legal counsel and representatives: Messrs. Ronald Goodman, Dmitri Evseev, Bonard Molina-Garcia and Kelby Ballena and Mesdames Cristina Sorgi and Margarita Sánchez, all of Winston & Strawn LLP; Mr. Paolo Di Rosa and Ms. Gaela Gehring Flores of Arnold & Porter LLP, and Messrs. Gustavo Álvarez and Tulio Cusman of the Procuraduría General of the Bolivarian Republic of Venezuela.

During the session, after hearing the Parties' positions regarding the participation of Prof. Greenwood in the case, the President of the Tribunal submitted his resignation. His resignation was accepted by his two co-arbitrators, Judge Brower and Mr. Paulsson, in accordance with the Additional Facility Arbitration Rules. Before the session ended, Mr. Paulsson also submitted, with the Parties' consent, his resignation for personal reasons. The

proceeding was consequently suspended until the vacancies on the Tribunal were filled according to Additional Facility Arbitration Rule 17(1).

2.4. Reconstitution of the Tribunal and Resumption of the Proceeding on Jurisdiction

On June 21, 2007, the Respondent appointed Prof. Brigitte Stern, a national of France, as an arbitrator to replace Mr. Paulsson. On October 18, 2007, the Respondent and the Claimant separately informed the Centre that the Parties had agreed to appoint Dr. Robert Briner, a national of Switzerland, as the third, presiding arbitrator to replace Mr. Veeder.

On October 29, 2007, after Dr. Briner had accepted his appointment, the Tribunal was deemed to have been reconstituted and the proceeding to have resumed.

On November 29, 2007, the Tribunal informed the Parties that the hearing on jurisdiction would be held in Paris on February 14 and 15, 2008. On December 28, 2007, the Tribunal confirmed these dates, and noted that February 16 could be added if necessary. On January 31, 2008, the Parties informed the Tribunal of their agreement on a proposed schedule for the hearing. On February 7, 2008, the Tribunal informed the Parties of its approval of the proposed schedule.

The hearing on jurisdiction was held in Paris on February 14 and 15, 2008. At the hearing, the following persons appeared as legal counsel and representatives for the Claimant: Messrs. John Laskin and John Terry and Ms. Ruth Anne Flear of Torys LLP, and Prof. Christopher Greenwood of Essex Chambers. The following persons also appeared as representatives of the Claimant: Ms. Marianna Almeida and Messrs. John Morgan and Ross Melrose, all of Vanessa Ventures Ltd.

The following persons appeared as legal counsel and representatives for the Respondent: Messrs. Ronald Goodman and Paul Reichler and Mesdames Janis Brennan, Geraldine Fischer and Angélica Villagrán-Agüero of Foley Hoag LLP, Ms. Gaela Gehring Flores and Messrs. Dmitri Evseev, Bonard Molina-Garcia and Kelby Ballena of Arnold & Porter LLP, and Mr. Gustavo Álvarez of the Procuraduría General of the Bolivarian Republic of Venezuela. Messrs. Carlos Mouriño Vaquero, Luis García Montoya and Gustavo Grau Fortoul also appeared as independent experts/advisers for the Respondent.

3. JURISDICTION

3.1. Introduction

The Respondent in the letter of its counsel to ICSID of 5 July 2005 raised four jurisdictional objections:

> ***Summary of Objections***
>
> ***1. This dispute arises directly out of the Republic's decision not to permit the acquisition of an existing business enterprise by Claimant, and therefore falls squarely within the exclusion from investor-state arbitration agreed by the Contracting Parties under the Agreement Between The Government of Canada and the Government of The Republic of Venezuela for the Promotion and Protection of Investments ("BIT"), Annex Article II(3)(b) (the "acquisition exception").***
>
> *The investor-state dispute resolution provisions pursuant to which this case has been registered with ICSID are contained in Article XII of the BIT. However, Annex Article II(3)(b) of the BIT states:*
>
> > *Decisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to the provisions of Article XII of this Agreement.*
>
> *Clearly, a dispute that arises directly out of a Contracting Party's decision not to permit the acquisition of an existing business enterprise is outside the Tribunal's jurisdiction. As the Republic will demonstrate, the present dispute fits squarely within the jurisdiction exclusion of Annex Article II(3)(b), because it stems from the Republic's refusal to permit Claimant's takeover of MINCA, the business enterprise at issue in this proceeding.*
>
> ***2. Claimant has never acquired any rights to Las Cristinas or did so in a manner contrary to the Republic's laws.***
>
> *Vannessa's alleged rights to Las Cristinas stem from the 25 July 2001 Transaction Agreement with Placer B-V, an offshore subsidiary of Placer Dome. Under that agreement, Vannessa, contrary to the Amended Shareholder's Agreement, purported to assume all obligations of Placer Dome under the Amended Shareholders' Agreement and all other related documents. (See Cl. Ex. 4, § 2.02(b)). At the same time, Placer B-V disclaimed any warranties as to the nature, validity or assignability of any of the rights purportedly being transferred. (See id. At § 2.04(a)). In fact, Placer B-V's attempted assignment of any rights to*

Las Cristinas to Vannessa was invalid. As a result, Claimant has never possessed any legitimate rights to Las Cristinas under the Amended Shareholders Agreement or related documents, and has no standing to bring such claims before this Tribunal.

Furthermore, even if Vannessa did acquire rights to MINCA, such rights were acquired in a manner that prevents them from being classified as an "investment" under the BIT. Article I(f) of the BIT requires that an "investment" in the territory of a Contracting Party be "in accordance with the latter's laws." It therefore flows that an acquisition that takes place in circumvention of explicit statutory and contractual prohibitions cannot serve as the basis of any claims under the BIT because it does not meet the BIT's definition of an "investment", to which the substantive protections of the BIT attach.

Here, the 25 July 2001 Transaction Agreement and surrounding events point to a scheme devised by Placer Dome and Vannessa in an unlawful attempt to force CVG and the Republic to accept a new and unknown own entity in place of Placer Dome, just as the final extension of the MINCA work contract was set to expire. It can hardly be doubted that the Contracting Parties intended to exclude from the scope of their consent to arbitrate disputes concerning alleged rights acquired under such circumstances.

3. Vannessa has not waived its right to initiate or continue proceedings in relation to the subject matter of this dispute in the courts of Venezuela, and has therefore failed to comply with an essential jurisdictional requirement of Article XII (3)(b) of the BIT.

Article XII (3)(b) of the BIT states that an investor may refer a dispute to arbitration under the BIT only where

> *The investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind.*
>
> *Article XII (12) (a) of the BIT confirms that the waiver constitutes a jurisdictional requirement*
>
> *Where an investor brings a claim under this Article regarding loss or damage suffered by an enterprise the investor directly or indirectly owns or controls, the following provisions shall apply:*
>
> *…(ii) both the investor and the enterprise must give the waiver referred to in subparagraph (3)(b) ….*

On 8 July 2004, Vannessa filed its Request for Arbitration in the present case. On that date, Vannessa also submitted statements on behalf of itself, Vannessa Venezuela and MINCA, purporting to waive the right to initiate or continue any proceedings within the meaning of Article XII(3)(b). At the time,

however, MINCA and Vannessa had no fewer than ten cases pending before the Political-Administrative Chamber of the Venezuelan Supreme Court based on the same facts as its ICSID claims ("related proceedings"), and had taken no affirmative steps to withdraw many of them.

In one such case, the Political-Administrative Chamber of the Venezuelan Supreme Court rendered a final judgment against MINCA a week after Vannessa filed its Request for Arbitration. Then, on 15 September 2004, MINCA filed a new claim, seeking extraordinary review and nullification of that decision by the Constitutional Chamber of the Venezuelan Supreme Court.

Over the next two months, in the context of Venezuela's opposition to the registration of Vannessa's Request for Arbitration (partly on the basis of Article XII(3)(b)), Vannessa and MINCA filed motions to discontinue the related proceedings (except the case mentioned in the preceding paragraph). These motions, however, specifically reserved the right to initiate future proceedings based on the same claims.

Venezuelan law recognizes two forms of voluntary withdrawal of a claim, one of which is with prejudice to future suits and the other without prejudice. Depending on the stage of the proceeding, withdrawal without prejudice may require consent of the opposing party and/or of the court. Withdrawal with prejudice does not. As of today, none of the related proceedings has been withdrawn with prejudice by Vannessa.

The BIT, however, is unequivocal in its requirement that an investor must renounce its right not only to continue ongoing litigations, but also to initiate new ones, before its Request for Arbitration can be validly submitted. In other words, the BIT requires a legally binding waiver of claims, which must be with prejudice to the filing of future claims. Venezuela first drew attention to Vannessa's non-compliance with Article XII(3)(b) shortly after the filing of the Request for Arbitration. Nevertheless, Vannessa has failed to take sufficient steps to follow through on the waivers submitted to the Tribunal. To the contrary, Vannessa's and MINCA's conduct in the courts of Venezuela subsequent to the filing of the Request for Arbitration demonstrates that it is unwilling to act in accordance with the waivers submitted to the Tribunal. Because the waivers are an essential jurisdictional requirement under Article XII of the BIT, Claimant's case must be dismissed forthwith.

4. In its Request for Arbitration, Claimant failed to assert a claim under the BIT with respect to the cancellation of MINCA's copper concessions.

In accordance with Article XII(3)(d) of the BIT,

> *An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:*
>
> …

> *(d) not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.*
>
> *MINCA's copper concessions were officially cancelled by the MEM on 8 March 2002, by means of a public resolution, and with notice of the same to MINCA. Thus, MINCA and Vannessa became aware of the alleged breach no later than 8 March 2002. To the extent that Vannessa brings forth claims for "loss and damages suffered by Vannessa and its investments ... Vannessa Venezuela ... and ... MINCA" (Cl. Memorial ¶ 1) on the basis of the cancellation of the copper concessions, it is barred under Article XII(3)(d) from asserting a claim based on such cancellation as of 8 March 2005. Nonetheless, Vannessa first articulated a claim based on the cancellation of the copper concessions in its Memorial dated 13 January 2006 – ten months after the deadline imposed by Article XII(3)(d) of the BIT.*
>
> *As the Republic first noted in its correspondence of 7 October 2005, Vannessa's Request for Arbitration (dated 8 July 2004), failed to articulate a claim of treaty breach based on the cancellation of the copper concessions. Neither Vannessa's list of alleged breaches of the BIT (paragraphs 91-100), nor its list of remedies requested (paragraphs 101-02) mentions the cancellation of MINCA's copper concessions as the basis for a claim under the BIT. Vannessa's subsequent attempts to expand the scope of this arbitration to include claims regarding the cancellation of the copper concessions are out of time; in accordance with the BIT, such claims cannot be considered by this Tribunal.*
>
> * * *
>
> *For the foregoing reasons, the Republic submits that the present dispute is not within the competence of the Tribunal and requests that this arbitration be dismissed accordingly.*

The Respondent therefore raised four objections, namely

- the Acquisition Exception, i.e., that the Republic had decided not to permit the acquisition of the MINCA shares by the Claimant;
- the Venezuelan Law Issue, i.e., that the Claimant never acquired any rights to Las Cristinas or did so in a manner contrary to the Republic's laws;
- the Waiver Issue, i.e., that the Claimant had not in a definite fashion waived its right to initiate or continue proceedings in the courts of Venezuela in relation to the subject matter of this dispute; and

- the Copper Concessions Claim, i.e., that the Claimant had not in a timely fashion commenced arbitration with respect to the Copper Concessions.

These objections were further developed in the two Submissions of the Respondent of 28 August 2006 and 16 February 2007 and answered by the Claimant in its Submissions of 15 December 2006 and 16 April 2007.

Although the Arbitral Tribunal considers that it is presently not in a position to decide the second issue which it therefore joins to the merits, it is in a position to decide the three other defenses raised by the Respondent regarding the competence of this Tribunal. It will therefore in the following paragraphs explain it decision regarding the arguments of the Parties to the extent that this is needed.

3.2. Acquisition Exception

3.2.1. Introduction

The Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (BIT) provides in Article XII:

Settlement of Disputes between an Investor
And the Host Contracting Party

> *1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.*

However, the Annex to the BIT provides in II(3)(b):

> (b) *Decisions by either Contracting Party not to permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors or prospective investors shall not be subject to the provisions of Article XII of this Agreement.*

The meaning of the word "Decisions" is disputed.

3.2.2. Position of the Respondent

The Respondent points to a long line of letters and actions taken by CVG objecting to the transfer of the PDV shares commencing immediately after it was informed on 13 July 2001 of the transaction between PDI and the Claimant.

• *14 July 2001*	*The CVG states to Placer Dome that the CVG "does not acknowledge or agree with the share sales agreement with the aforementioned company, or any other company.*
• *16 July 2001*	*The CVG-appointed directors of MINCA refuse to attend a meeting of the MINCA board of directors called at the request of Claimant.*
• *20 July 2001*	*The CVG asks Placer Dome to reconsider its negotiations "behind the back" of the Republic.*
• *6 August 2001*	*The CVG, faced with Placer Dome's repudiation and impossibility of accepting Claimant's acquisition, decides to rescind the Work Contract and gives notice of rescission.*
• *17 August 2001*	*Vannessa seizes control of MINCA; the CVG representatives reject "illegitimate transfer by Placer Dome of shares in Placer Dome Venezuela" to Claimant and refuse to attend further meetings.*
• *29 August 2001*	*The CVG-appointed directors advise MINCA that they will not attend the board meeting on 30 August pursuant to their objection to the transaction.*
• *26 October 2001*	*The CVG director attends Special Shareholders' Meeting of MINCA and declares that the CVG does not recognize Vannessa acquisition.*
• *6 November 2001*	*The CVG gives final notice of termination of the Work Contract.*

- *16 November 2001* — *The CVG takes possession of Las Cristinas.*
- *20 November 2001* — *The CVG writes the MEM to inform it of the CVG's actions and to reiterate that cancellation of the Work Contract was motivated by Placer Dome's illegitimate attempt to have Claimant acquire its rights and obligations.*
- *8 March 2002* — *The MEM cancels copper concessions associated with the project.* [22]

3.2.3. Position of the Claimant

According to the Claimant, the Respondent took no actions which could be qualified as "Decisions" not to permit the Claimant's acquisition of the shares of PDV. When terminating the Work Contract with letter of 6 August 2001[23], Mr. Angel Gomez in his capacity as President of CVG qualified the conduct of PDI stating that the transfer of the MINCA shares constituted violations of the Work Contract, of the Shareholders Agreement of 1997 and of the Extension Agreement of 8 August 2000. However, this letter and the final termination of the Work Contract on 6 November 2001[24] were measures terminating the investment of the Claimant but not "Decisions" by Venezuela *"not to permit … acquisition of an existing business enterprise or a share of such enterprise by the Canadian investor Vannessa".*

3.2.4. The Tribunal's Decision

The term "Decision" is not defined in the BIT, it therefore needs to be interpreted by the Tribunal.

The Parties have not drawn the attention of the Tribunal to any *travaux préparatoires* which might cast some light on the meaning of the term "Decisions". Mr. Greenwood of behalf of the Claimant stated that *"there are no travaux préparatoires of which we are aware. We have asked Venezuela if there are any travaux préparatoires but we have not been given any"*[25].

---

22 Memorial on Jurisdiction of 28 August 2006, pages 42 and 43.
23 CD-109.
24 CD-148.
25 Hearing Transcript, Day 1, page 208, 19-22; see also: Mr. Terry, Transcript, Day 2, page 128, 14-25 & 129, 1-6.

The Arbitral Tribunal is also not aware that the interpretation of the word "Decisions" ever gave rise to any dispute between the Contracting Parties involving the procedure provided for in Article XIV of the BIT.

The BIT is a treaty between two States and is therefore governed by international public law. With respect to the interpretation of treaties, Article 31 of the Vienna Convention on the Law of Treaties of 1969 provides:

> *1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*

The Arbitral Tribunal is not aware of any elements listed from paragraphs 2 through 4 which could be taken into consideration. It bases its analysis therefore only on paragraph 1 taking into account the text, including the preamble and annexes.

The Parties have adduced definitions contained in a number of legal and general dictionaries. The Arbitral Tribunal notes that the Respondent has quoted the definition in

Black's Law Dictionary, but from the abridged 6th Edition of 1991[26]. The definition in the 8th Edition of 2004, however, reads as follows:

> ***Decision**, n. 1. A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.*

It is obvious from the file that CVG from the beginning did not recognize the transfer of the shares. It is also not contested that CVG took a number of measures demonstrating its opposition to the transfer of the shares, finally culminating in the termination of the Work Contract.

The Tribunal comes to the conclusion that the ordinary meaning of the term "Decision" necessitates, as indicated in Black's Law Dictionary (8th Edition), a determination in the form of a ruling or an order. Leaving aside the question whether or not CVG would at all have been empowered to render any such ruling or order, it is obvious from the file that it never ruled on the permissibility or lack thereof of the share transfer. What it complained of and acted accordingly was that it considered the behavior of PDI and the Claimant to constitute a breach of the agreements binding PDI to the Las Cristinas Project. It, however, never stated that it did not authorize the transfer of the shares which, after all, were transferred and have remained with the Claimant.

The Respondent did not draw the attention of the Arbitral Tribunal to any other measures of an official Venezuelan body which could be characterized to constitute a "Decision".

The context of the term "Decision" in the Treaty and an interpretation in the light of its object and purpose in no way affect this interpretation based on the ordinary meaning to be given to the term "Decision".

The Arbitral Tribunal therefore holds that Annex II(3)(b) of the BIT does not apply and that this defense of the Respondent is denied.

---

[26] Respondent's Reply on Jurisdiction, page 14, footnote 49.

3.3. The Venezuelan Law Issue

3.3.1. Introduction

This issue deals with two intermingled questions. Firstly, whether the Claimant through the Transaction Agreement (PBV) was legally able to acquire the rights which PDI (indirectly) held in the Las Cristinas project and, secondly, assuming that it was able to acquire these rights, if this acquisition was in conformity with the BIT.

According to Article I(f) of the BIT,

> *"investment" means any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State, in the territory of the other Contracting Party in accordance with the latter's laws.*

3.3.2. Position of the Respondent

The position of the Respondent may be summarized as follows:

- The successive Shareholders Agreements (1991 and 1997) should be considered as creating a joint venture between PDI and CVG;
- Due to the nature of the agreement between the Parties, there are intuitu personae obligations;
- PDV is not a real party to the two Shareholders Agreements, but has to be considered as an investor of PDI;
- The 1991 Shareholders Agreement provides that (Article V. D.);

> *[…] the parties cannot assign their rights or delegate their obligations hereunder without the other party's prior consent […].*

- PDI sold its affiliated company PDV to the Claimant in breach of the above quoted provisions;

- Article 9 of the MINCA Bylaws states that:

  "Stockholders shall have a preferential right to acquire the shares which other Stockholders wish to sell [...].

  Any transfer made in violation of this Article shall be void and without any effect upon the company. Notwithstanding the foregoing, transfers of shares to related companies wholly-owned by Shareholders, directly or indirectly, or by the Shareholders' parent company are hereby authorized.[...]

- By selling PDV to the Claimant, PDI also breached Article 9 of the MINCA Bylaws;

- The breach of the Shareholders Agreements and of the MINCA Bylaws rendered the assignment of the shares to Vannessa null and void and the Claimant therefore never acquired property of the MINCA shares;

- Furthermore, as a result of said breaches, the Claimant made no investment within the meaning of the BIT as the investment was not made in accordance with ... the laws of Venezuela insofar as a violation of a contract is ipso facto a violation of Venezuelan law pursuant to Article 1159 of the Venezuelan Civil Code, which provides that "Contracts shall have the force of Law between the Parties";

- In addition, the Claimant did not make the investment in good faith. For this reason also, no investment in accordance with the law of Venezuela, embodying the principle of good faith occurred;

- The Respondent furthermore considers that the investment, if an investment was ever made, was achieved in bad faith, which would also constitute a violation of international public law and would therefore deny jurisdiction for the Arbitral Tribunal to decide any alleged claims of the Claimant arising from the alleged breach of the BIT.

3.3.3. Position of the Claimant

- The Claimant respected all the formalities imposed by Venezuelan law with regard to the transfer of the shares of PDV;

- PDI did not breach the Shareholders Agreements as neither Article 10.01 of the 1997 version nor Article V.D. of the 1991 version restricted PDI's ability to sell its shares in its subsidiaries to a third party;

- PDI did not breach Article 9 of the MINCA Bylaws. This Article only provided a right of first refusal relating to the sale of MINCA shares, but contained no requirement with respect to the sale of PDV shares;

- Even if a breach of the above-mentioned provisions would have occurred, said breach cannot be considered to constitute a violation of Venezuelan law;

- No intuitu personae obligations on PDI existed, which could have prevented the transfer of shares to the Claimant;

- A transfer of shares could only be deemed to be null and void ab initio under Venezuelan law if it violated an express rule of law, which was not the case. Moreover, a contract must be considered as valid until a court declares its nullity.

3.3.4. The Tribunal's Decision

The Arbitral Tribunal notes that the main defense of the Respondent, namely that the transfer of the PDV shares constituted a breach of the Shareholders Agreements and of the MINCA By-Laws and therefore rendered this transfer null and void with the result that the Claimant never acquired property in the MINCA shares is likely to constitute a defense on the merits of the case. At the same time, the Respondent alleges as a jurisdictional objection that this transfer was unlawful under Venezuelan law within the meaning of the BIT according to which the investment must be *"in accordance with the laws of Venezuela"*.

The Arbitral Tribunal has received a great number of expert opinions on questions of Venezuelan law, but it has not had the benefit of the examination of such experts by the Parties, nor have the members of the Arbitral Tribunal been able to put questions to the experts.

Based on the record presently before it, the Arbitral Tribunal therefore does not consider itself to be in a position to determine in a final way at the present time whether or not the

MINCA shares are owned or controlled by the Claimant in accordance with Venezuelan law as is required for this Arbitral Tribunal to have jurisdiction (Article 1(f) BIT).
The Arbitral Tribunal has considered whether it would therefore be more rational from a procedural viewpoint to re-open the procedure on jurisdiction and ask for further filings and an oral hearing with examination of experts. The Tribunal, however, is conscious of the fact that the possible breach by the original investor PDI of agreements with CVG is an element that might be relevant for the jurisdictional issue, but might also have consequences on the merits. On balance, the Arbitral Tribunal therefore considers that justice is better served if this objection to the competence of the Tribunal is joined to the merits and that new time-limits be fixed for the further procedures (ICSID Additional Facility Arbitration Rule 45(5)).

3.4. The Waiver Issue

3.4.1. Introduction

Article XII(3)(b) of the BIT states that an investor may submit a dispute to arbitration under the BIT *only if*

> *the investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind.*

Article XII(12)(a) of the BIT further confirms that the waiver must be made not only by the investor, but also by any enterprise in which the investor has invested:

> *Where an investor brings a claim under this Article regarding loss or damage suffered by an enterprise the investor directly or indirectly owns or controls, the following provisions shall apply:*
>
> *... (ii) both the investor and the enterprise must give the waiver referred to in subparagraph (3)(b) ...*

In a letter to the ICSID Secretary-General dated 8 July 2004, filed with the Request for Arbitration, John Morgan, President of Vannessa, stated:

I, John Morgan, on behalf of Vannessa Ventures Ltd., consent to arbitration in accordance with the procedures set out in the Agreement Between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (the "Bilateral Investment Treaty"), and waive the right of Vannessa Ventures Ltd. to initiate or continue any other proceedings in relation to the measures of the Government of Venezuela that are alleged to be in breach of the Bilateral Investment Treaty before the courts or tribunals of Venezuela or in a dispute procedure of any kind.

Vannessa also filed with the Request for Arbitration:

(a) a Resolution of the Vannessa Board of Directors dated 18 June 2004, that stated, among other things:

Vannessa waives its right to initiate or continue any other proceedings in relation to the measures that are alleged to be in breach of the Bilateral Investment Treaty before the courts or tribunals of Venezuela or in a dispute settlement procedure of any kind;

(b) a letter to the ICSID Secretary-General dated 8 July 2004 from Marianna Almeida, legal representative of Vannessa Venezuela, declaring, together with the consent to arbitration, that Vannessa Venezuela,

… renuncio al derecho a iniciar o continuar cualquier otro procedimiento en relación con las medidas del Gobierno de la República Bolivariana de Venezuela que se pretende que constituyen incumplimiento del Tratado Bilateral de Inversiones ante las cortes o tribunales de Venezuela o en cualquier otro tipo de procedimiento de arreglo de controversias.

(c) a letter to the ICSID Secretary General dated 8 July 2004 from Marianna Almeida, legal representative of MINCA, declaring, together with the consent to arbitration, that MINCA,

… renuncio al derecho a iniciar o continuar cualquier otro procedimiento en relación con las medidas del Gobierno de la República Bolivariana de Venezuela que se pretende que constituyen incumplimiento del Tratado Bilateral de Inversiones ante las cortes o tribunales de Venezuela o en cualquier otro tipo de procedimiento de arreglo de controversias.

According to the Claimant,

> *The filing by Vannessa of these waivers with the Request for Arbitration fulfilled the requirements of Articles XII(3)(b) (the requirement that the investor (Vannessa) file the waiver) and Article XII(12)(a)(ii) (the requirement that the investments (Vannessa Venezuela and MINCA) file the waiver).*

3.4.2. Position of the Respondent

According to the Respondent, the purpose of the waiver requirement is to ensure that the Claimant as well as the companies affiliated to the Claimant should not later on, possibly after the close of the investment dispute, be in a position to commence actions against the State arising from claims which were the object of the BIT procedure. The Respondent states that the Claimant had a choice in its form of withdrawal from Venezuelan court proceedings, namely either withdrawal with prejudice or withdrawal without prejudice. According to the Venezuelan Civil Procedure Code, the act by which a party withdraws from a case is termed *"desistimiento",* which can be effected in one of two ways: (a) withdrawal with prejudice to future suits (*"desistimiento de la demanda")* or (b) withdrawal without prejudice to future suits (*"desistimiento del procedimiento")*:

> *There are critical differences between these two methods of withdrawal. Withdrawal with prejudice ("disistimiento de la demanda") forecloses a given claimant from filing suit again on the same claim or claims. In other words, the claimant does not retain the right to re-initiate its claim in the same forum. As Venezuelan administrative law expert Dr. Gustavo Grau explains,*
>
> > *... the object of the withdrawal of Article 263 (withdrawal with prejudice) is the claim itself ... the term "claim" in this context must be understood as the equivalent of a* ***cause of action*** *or the* ***right that is claimed against the other party.*** *In accordance with the provisions of Article 263 of the CCP, the effect on the proceedings of a withdrawal with prejudice is like* ***res judicata****, like that of a ruling handed down by judicial authority, i.e., once approved by the judge, it terminates the suit definitively, without any possibility of a new suit being field by means of an identical claim, with the same parties and the same purpose.*
>
> *On the other hand, if a claimant withdraws without prejudice effecting a "desistimiento del procedimiento", that claimant may re-file the same suit on the same claim and retains the right to re-initiate his cause of action in domestic courts. As expert Dr. Grau notes, this type of withdrawal without prejudice refers to "the possibility that the claimant may limit the scope of its withdrawal to*

> *simply not continuing with the **proceedings** ["withdrawal without prejudice"] initiated by its filing of the claim." Additionally, Dr. Grau explains that "the object of the withdrawal stated by the claimant is limited to a **termination of the procedural stage**, that is, the claimant has the option of not continuing with the process, without prejudice to the same party re-filing said claim subsequently, after a period of ninety (90) days following approval of the withdrawal.*
>
> *As indicated above, the difference between the two forms of withdrawal is significant because depending on which of the two forms the claimant chooses, the outcome will be substantially different. Dr. Grau notes,*
>
> > *... this distinction, far from being a merely dogmatic or trivial, represents an element of summary importance, in order to be able to determine the consequences of each type of withdrawal, and specifically to determine whether a claimant may bring the same claim against the same counterparty and within the same scope, even after having filed a withdrawal.* [27]

The Respondent furthermore states that the Claimant and its affiliated companies in the various cases pending before Venezuelan courts did not immediately withdraw pending actions with the competent court, as on 15 September 2004, one month after the Claimant filed its Request for Arbitration, MINCA filed a new claim before the Constitutional Chamber of the Venezuelan Supreme Court seeking extraordinary review and nullification of a decision of that Court.

According to the Respondent, the purpose of the waiver provisions in the BIT is clear in that a Party cannot circumvent the BIT by alleging that it had waived its right to initiate or continue its right to bring a claim while at the same time preserving its right to re-initiate it at a later date.

3.4.3. Position of the Claimant

According to the Claimant, the *desistimiento* was drafted by Hernández-Breton, the head of the Administrative Law Litigation Department of the Caracas Office of Baker & McKenzie. The Claimant furthermore submitted reports from two Venezuelan experts, Dr. Ramón Escovar and Professor Luis Ortiz Alvarez who opine that the *desistimiento* filed was appropriate and that the Constitutional Chamber's decision definitively prevents Vannessa from re-opening any of its court actions.

---

[27] Memorial on Jurisdiction of 28 August 2006, pages 70 and 71.

According to the Claimant, the form of the *desistimiento* chosen was in order to not be deemed to have waived the rights to the Additional Facility Procedure before ICSID or possible enforcement actions of an award. The action before the Supreme Constitutional Court did not relate to any claim advanced in these ICSID proceedings but only concerned a previous decision on costs which MINCA considered to be wrong.

3.4.4. The Tribunal's Decision

This Arbitral Tribunal is confronted with the question as to what might occur in the future if the Claimant or one of its affiliated companies seizes a Venezuelan court. The statements of the experts presented by the Parties come to opposing conclusions.

The Arbitral Tribunal has read with attention the Decision of the Constitutional Chamber of the Supreme Court of Justice of 28 October 2005 where this court of highest instance had held as follows:

> *In this regard, the Chamber must note that Article XII (3)(c) of the Agreement between the Government of the Republic of Venezuela and the Government of Canada for the Promotion and Protection of Investments, signed in Caracas on July 1, 1996, and incorporated to our legal system through the corresponding approbatory law (Special O.G. No. 5,207 of 01.20.98) "an investor may submit a controversy [...] to arbitration according to paragraph (4) if: [...] (b) the investor has waived its right to bring or continue any proceeding regarding the measure that it purports to be a default on this agreement before the courts by the contracting party or in any type of proceeding for the settlement of disputes."*
>
> *Having seen the contents of that rule, this Chamber deems that it cannot be sustained that the revision requested is in no way related to the controversy arisen with regard to the exploration, development and exploitation of alluvial and vein gold in the area named Las Cristinas, between the parent company of the plaintiff and the Republic and Corporación Venezolana de Guayana, because the sentencing to pay court costs that is now being impugned had its origin, precisely, on a request for formalization of arbitration regarding the same dispute, but made to our national jurisdiction by way of the Political-Administrative Chamber of this Supreme Court.*
>
> *From this perspective, the Chamber cannot make a thorough examination regarding this review, not assessing the fairness of the monetary sentence against the petitioner, because by having requested the [International Centre for Settlement of Investment Disputes] to settle the conflict arisen, it undoubtedly waived filing or continuing any proceeding related – either indirectly or directly –*

> *to the so-often referred to controversy. For this reason, this Chamber must declare that it dismisses the review requested. So it is decided."* [28]

It would therefore seem to this Tribunal that it need not try to analyze the opinions of the experts called upon by the Parties regarding the question of what the difference between the various waivers under Venezuelan procedural law is and whether or not the Claimant and its affiliated companies chose the proper version. The Supreme Court has clearly stated that the waiver prevents Venezuelan courts from deciding claims regarding the Las Cristinas Project. In its Decision, the Supreme Court not only refers to the proceedings pending before it regarding the petition to review a cost decision of a previous judgment, but the Constitutional Chamber went on to state

> *... because by having requested the [International Centre for Settlement of Investment Disputes] to settle the conflict arisen, it undoubtedly waived filing or continuing any proceeding related – either indirectly or directly – to the so-often referred to controversy.*

In view of the fact that the question of the scope of the waiver, if this issue should in the future arise, is a matter to be decided under Venezuelan law by the Venezuelan Courts, this Tribunal considers that the Supreme Court of Venezuela is best qualified to interpret Venezuelan law. The Tribunal therefore holds that the waiver fulfils the requirements of the BIT and that this defense of the Respondent is denied.

3.5. Copper Concessions Claim

3.5.1. Introduction

Article XII, paragraph 2 of the BIT provides:

> *If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement,*

[28] Decision of the Constitutional Chamber of the Supreme Court of Justice, 28 October 2005, V V 321A/7.

and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article XII, paragraph 3 of the BIT provides:

An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:

a. ...

b. ...

c. ...

d. not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

The question which arises is whether the Claimant when delivering its notice in writing regarding the alleged breach of the BIT with respect to the Copper Concessions held by MINCA did so within the three-year period provided for in Article XII(3)(d) of the BIT.

3.5.2. Position of the Respondent

The Respondent holds that the Copper Concessions Claim was not pleaded prior to the expiry of the statute of limitations contained in the BIT and is therefore time barred. The Respondent considers that when the Claimant submitted the dispute to investor-state arbitration on 8 July 2004, the date on which it presented its Request for Arbitration to ICSID, this Request did not include the Copper Concessions Claim. The date on which the Claimant first became aware of the potential BIT breach was, at the latest, 8 March 2002, but the Claimant first presented its Copper Claim in January 2006 as part of its Memorial, therefore more than three years after 8 March 2002. According to the Respondent, the Claimant's Request for Arbitration contained no allegations of a breach of the BIT or a request for relief in relation to the cancellation of MINCA's Copper Concessions and the references in the Request for Arbitration to the Copper Concessions either fail to constitute any such claim or are so vague that they shed no light on the Claimant's alleged Copper Claim.

3.5.3 Position of the Claimant

According to the Claimant, its claim arising from the cancellation of the Copper Concessions is not time-barred:

> *The mining of, and contracts and concessions in respect of, gold and copper at Las Cristinas have always been intertwined.*
>
> …
>
> *Vannessa makes two claims in this arbitration that involve the copper concessions. The first claim is about Resolution 36 of the Ministry of Energy and Mines dated March 8, 2002, which revoked MINCA's concession to the Las Cristinas copper concessions. The second claim is about Presidential Chavez's Decree 1962, published March 12, 2003, that reserved the copper concessions for direct exploitation by the Government of Venezuela. These are the only two claims that Venezuela asserts are time-barred.*
>
> *Vannessa's first claim about Resolution 36 was clearly pleaded at paragraphs 74, 88(v), 95 and 102 of the Request for Arbitration. Vannessa sets out these paragraphs at paragraph 212 of its Counter-Memorial on Jurisdiction. Venezuela has never set out any proper basis for concluding that Vannessa's pleading of this claim in its Request for Arbitration is deficient. The Request for Arbitration setting out this claim was filed on July 9, 2004, less than three years after Resolution 36 was issued on March 8, 2002. This claim is therefore not time-barred.*
>
> *While Vannessa did not make a specific reference to Decree 1962 in its pleadings until it filed its memorial on Merits on January 13, 2006, it amended its Request for Arbitration to include this claim, with the Tribunal's consent, effective February 28, 2006. This claim was pleaded in both the Memorial and the Request for Arbitration less than three years after Presidential Decree 1962 was published on March 12, 2003. This claim too is therefore not time-barred.* [29]

3.5.4 The Tribunal's Decision

On 8 March 2002, the Ministry of Energy and Mines issued Resolution 36[30] declaring MINCA's concession to the Las Cristinas Copper Concessions expired.

---

29 Claimant's Rejoinder on Jurisdiction of 16 April 2007, pages 81 and 82.

30 CD-167.

For the Arbitral Tribunal, only this date is relevant regarding the commencement of the statute of limitation period. The Presidential Decree of President Chavez of 10 September 2002 published on 12 March 2003 reserving the Copper Concessions for direct exploitation by the Government of Venezuela is of no relevance in this context as already the previous Resolution of 8 March 2002 of the Ministry of Energy and Resources had deprived MINCA of any right to exploit the Copper Concessions which CVG had transferred to it on 28 January 1999.

The relevant document regarding the interruption of the statute of limitation is therefore the Request for Arbitration filed on 8 July 2004.

According to Article XII, paragraph 2 of the BIT in order to initiate the dispute the Investor must deliver a

> *notice in writing to the other Contracting Party alleging that a measure taken or not taken by the latter Contracting Party is in breach of this Agreement, and that the investor or an enterprise owned or controlled directly or indirectly by the investor has incurred loss or damage by reason of, or arising out of, that breach.*

The Arbitral Tribunal considers that the purpose of such a statute of limitation provision is to require diligent prosecution of known claims and insuring that claims will be resolved when evidence is reasonably available and fresh, therefore to protect the potential debtor from late actions.

The Tribunal keeps in mind that this dispute between the Parties mainly concerns the gold mining rights which had been granted to MINCA with the Work Contract in 1992, whereas the copper rights were only granted in 1999 and that little, if any, mining activity regarding copper exploitation is recorded. As long as the Respondent was given notice with the filing of the Request for Arbitration that its claims under the BIT not only concerned the gold mining rights but that the alleged treatment by the Respondent regarding the MINCA Copper Concessions also constituted a subject matter of this dispute, the purpose of the prescription provision is fulfilled.

In this context, the Arbitral Tribunal notes that in paragraph 13 of the Request for Arbitration, the Las Cristinas Project is described as *"a gold and copper mining project".* In paragraph 74,

the Claimant states (i) *"in cancelling the copper concessions, the Ministry did not follow the administrative procedures with which it was required to comply under Venezuelan law"*.

In paragraph 88, the Claimant recited the written notice of breaches of the BIT which on 5 June 2002 was given to the Minister of Foreign Affairs of the Government of Venezuela in accordance with Article XII(2) of the BIT. In this list, it mentioned under (v) *"the expropriation of MINCA's mining rights in Las Cristinas through resolutions of the Ministry of Energy and Mines in March 2002 reassuming the rights to Las Cristinas and canceling the Las Cristinas copper concessions held by MINCA."* (Emphasis added).

In the Chapter of the Request for Arbitration dealing with the breaches of the BIT, in paragraph 91, the Claimant in a general way refers to the alleged expropriation of the Claimant's investments in the Las Cristinas project and the lack of fair and equitable treatment and full protection and security with respect to MINCA and in paragraph 95, reference is made to *"the actions taken by the Ministry of Energy and Mines"*.

From an objective viewpoint, the Request for Arbitration must be understood to have included the alleged violations of MINCA's rights (and therefore of the Claimant) relating to the Copper Concessions and the Respondent was therefore, upon receipt of the Request, aware of the fact that the dispute also concerned the termination of the Copper Concessions.

The Arbitral Tribunal therefore holds that the Copper Concessions Claim is not time-barred and that this defense of the Respondent is denied.

NOW THEREFORE,

THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS :

a) The defense raised by the Respondent that the Arbitral Tribunal lacks jurisdiction because the Claimant has never acquired any right to the Las Cristinas or did so in a manner not in accordance with the laws of Venezuela, as required by Article 1(f) of the applicable bilateral investment treaty, is joined to the merits.

b) The other three objections to jurisdiction of the Arbitral Tribunal are denied.

c) The allocation of the costs of this phase of the proceeding is reserved for later.

d) The Arbitral Tribunal, after consultation with the Parties, will issue an Order for the further procedure.

The Arbitral Tribunal

[Signed]	[Signed]	[Signed]
Professor Brigitte Stern	Dr. Robert Briner	Judge Charles N. Brower
Arbitrator	President	Arbitrator