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[Par courriel]

Le 27 avril 2018

Madame Laura Bergamini
Secrétaire du Comité *ad hoc*
ICSID
Washington D.C.

Réf. : Victor Pey Casado et Fondation Président Allende c. République du Chili (Affaire No. ARB-98-2. Nouvel examen- Mémoire en annulation de la Sentence du 13-09-2016)

Madame,

We have been instructed as members of the legal team representing the Claimant in the case of **Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2**. This document is submitted in support of the *Memoire en Demande sur l'Annulation de la Sentence du 13 September 2016*.

As will be clear from previous communications, one of the critical issues being raised by the Claimant, is that there is an appearance of conflict of interest, or potential for there to be an appearance of conflict of interest on the basis that Barrister Members of Essex Court Chambers have acted for the State of Chile in the past, and, are members of the tribunal presiding over it.

Whilst, the Respondent has sought to argue that Barristers are self-employed, and are therefore independent of one another, there is a relevant issue in this matter, given the historical and current involvement of Barristers of Essex Court Chambers, and the State of Chile and entities under its control.

It is noted that there are serious considerations that the Tribunal is required to deliberate carefully before matters can proceed further. It is quite clear that these matters have been raised at the earliest opportunity and that the Respondent and Essex Court Chambers have failed to respond to requests for disclosure of records that would enable the Tribunal to properly rule on such a fundamental question of the independence and impartiality, and by extension, the integrity of the procedure.

The following document represents the Claimant's submissions on these matters.

1. The Claimants raise this complaint on the basis that a potential conflict of interest has arisen concerning the arbitrators during the course of the proceedings

2. The Claimants were not previously aware of a potential conflict of interest between the Republic of Chile and the arbitrators Messrs Veeder and Berman prior to a publication of September 18, 2016 mentioning secret links ("sigilosos") between Essex Court Chambers and the Republic of Chile.
3. Indeed, neither the Republic of Chile nor the arbitrators have disclosed any connection between Essex Court Chambers and the respondent party - which, has itself emphasized that the scope of this relationship is confidential - when appointing the said referees. It is quite clear that prior to appointment being effective, there is an obligation to disclose any matters that could give rise to a conflict of interest arising or to the existence of a potential conflict under the objective observer test of impartiality. Thus, the Claimants were not able to identify a potential conflict during the reasonable investigation conducted between December 12, 2013 and February 6, 2014, in accordance with the IBA rules on conflicts of interest in international arbitration. The State of Chile has thus violated Rule 7 (a) of the IBA on conflicts of interest in international arbitration. It was at the very least incumbent upon the arbitrators, Messrs Veeder and Berman, to raise the issue with the parties with a view to withdrawing from further consideration of the matter at issue and to recuse themselves from any further involvement in the proceedings. They failed to do so and their failure represents a fundamental breach of their professional obligations and their duty of candour.
4. It is quite clear that had the Claimants been aware of the existence of such relationships, at the material time, they would have naturally refrained from appointing Mr. Veeder as arbitrator, as they had done in May 2013 by waiving the appointment of Mr. Albert Van den Berg after *he* revealed his professional relations with the Chilean State.
5. Moreover, the Claimant would have opposed the appointment of Mr Berman as arbitrator.
6. The objections were raised immediately after the links between Essex Court Chambers and the Republic of Chile came to light, and therefore it is argued that the issues complained of were raised at the first available opportunity. It is quite clear that it would be fundamentally unfair to disadvantage the Claimants due to the non-disclosure lack of candour on the part of the Respondent.
7. Indeed, on 20 September 2016, namely two days the secret links ("sigilosos") between the Respondent and Essex Court Chambers were made public for the first time, the Claimants requested that the arbitrators Messrs Veeder and Berman comply with their obligation of disclosure, and that they disclose:
 - i. *"If in Essex Court Chambers there would be members, assistants or other persons who would receive instructions, funding or who would be involved, in any way whatsoever, directly or indirectly, with the Republic of Chile,*

- ii. *If the Republic of Chile has disclosed to the Tribunal the nature and scope of any financial or other reports it may have had with members of the Essex Court Chambers - the Claimants are able to state categorically that they had absolutely none of them before the appointment of the arbitrators in the Tribunal of the present arbitral proceedings, nor after-,*
- iii. *whether or not both arbitrators conducted, and on what date, a reasonable inquiry - by virtue of their duty of due diligence - to identify conflicts of interest, facts or circumstances reasonably likely to raise legitimate doubts as to their impartiality in the present arbitral proceedings in which the Republic of Chile has been convicted for breach of fair and equitable treatment, including the denial of justice, by the Arbitral Award of 8 May 2008 (Piere Lalive , Mr Chemloul, E. Gaillard), conviction confirmed by the Decision of the Ad Hoc Committee of 18 December 2012 (LY Fortier QC, P. Bernardini, A. El-Kosheri),,*
- iv. *if so, on what date each of the arbitrators would have known, if any, of any reports from the Republic of Chile with members, assistants or other persons of the Essex Court Chambers ,*
- v. *if members or associates of the Essex Court Chambers represent Chile on a regular basis,*
- vi. *if in the last three years members of the Essex Court Chambers have acted for the Republic of Chile, or a body dependent on it, in cases unrelated to this arbitration without the two arbitrators having personally taken part in it ,*
- vii. *If a law firm-Chamber or an expert who shares significant fees or other income with members of the Essex Court Chambers renders services to the Republic of Chile, or to an organization belonging to it,*
- viii. *if a law firm-Chamber associated with or forming an alliance with members of the Essex Court Chambers but who does not share significant fees or other income from members of the Essex Court Chambers, renders services to the Republic of Chile, or to an organization belonging to it.”¹*

8. On October 13, 2016, the Claimants also sent an application through the ICSID to the Respondent State requesting them to:

"In the event of confirmation of fears that the Republic of Chile has not disclosed to the Centre all of its relations with members of the Essex Court Chambers, the Claimants request that the Republic of Chile fully disclose it to them by 17 October 2016 at the latest given the fact that the time limit of the Arbitration Rule no. 49 ends eight business days after, in particular

¹ Pièce C125, Courrier des Demanderesses à Mme la Secrétaire Générale du CIRDI du 20 septembre 2016

1. *If the State of Chile, or a body dependent on it, is a current or former client of Essex Court Chambers, and on what dates,*
2. *if the Republic of Chile, or a body dependent on it, is a regular or occasional customer of members of the Essex Court Chambers, and on what dates,*
3. *the amount of millions of dollars that the Republic of Chile, or an organization dependent on it, paid to members and persons related to the Essex Court Chambers until September 13 2016, and the dates of the payments correspondingly from the dates on which the two arbitrators were appointed in this Arbitral Tribunal,*
4. *the financial amounts committed by the Republic of Chile, or a body dependent on it, for a future period with members of these Chambers, and the dates of the corresponding agreements,*
5. *whether the services which the Republic of Chile or a body dependent on it receives from members of the Essex Court Chambers relate to strategic advice or specific transactions,*
6. *if the work of members of the Essex Court Chambers for the Republic of Chile, or an organization dependent on it, is carried out in the places where the two arbitrators in the present proceedings are engaged or elsewhere, and from what dates,*
7. *whether the members of the Essex Court Chambers in the service of the Republic of Chile have set up an ethical screen or a Chinese Wall as a shield for the said two arbitrators with regard to the other works, and on what dates,*
8. *Who are the members, assistants or other persons of said Chambers who receive instructions, financing or who are involved, in any manner, directly or indirectly, with the Republic of Chile or an organization dependent on it ,*
9. *if in the last three years members of the Essex Court Chambers acted for the Republic of Chile, or an organization dependent on it, in cases unrelated to this arbitration without the two arbitrators having personally taken part in it*
10. *if a law firm-Chamber or an expert who would share significant fees or other income with members of the Essex Court Chambers renders services to the Republic of Chile, or to an organization belonging to it, and from which dates*
11. *if a law firm-Chamber associated with or forming an alliance with members of the Essex Court Chambers, but who does not share significant fees or other income from members of the Essex Court Chambers, renders services to the Republic of Chile, or to an organization belonging to it and on what dates."*²

9. The Claimants' requests and questions were not followed up, despite their reiteration on October 27, 2016, in their motion to correct the Sentence of September 13, 2016.

² Pièce C174bis, page 8

10. On 21 November 2016, the Resubmission Court simply refused to follow up.
11. The Claimants have repeated their requests on more than one occasion, during the procedure for correcting material errors, however this has been to no avail, and no action has been taken in respect of the issue.
12. In March 2017, the Claimants sent a formal request for information to the Chilean administration.
13. On April 12, 2017, the Chilean Ministry of Foreign Affairs acknowledged the existence of relations between Essex Court Chambers and the State of Chile since 2005, but refused to give details, arguing that this information fell within the "national interest".
14. On 27 June 2017, the Claimants then requested Chilean courts to order the Ministry of Foreign Affairs to produce the payments made to members of the said group of lawyers.
15. On 24 July 2017, the 28th Civil Court of Santiago de Chile, after having accepted the request of the Spanish Foundation, ordered:

*"That the prejudicial measure for the production of documents available to the Ministry of Foreign Affairs for the purpose of accrediting the existence of payments made by the Ministry of Foreign Affairs or any other body subordinate to it be decreed to any member or lawyer of the Cabinet of Foreign Affairs or lawyers of the firm referred to as Essex Court Chambers, London (United Kingdom), since 1 January 2005 to date."*³
16. The Republic of Chile has since refused to comply with this injunction.
17. In consideration of the fact that the Claimants raised this complaint as soon as they became aware of the links between the Republic of Chile and Essex Court Chambers, the Claimants are entitled to raise the complaint relating to the defect in the constitution of the Tribunal and further, the serious violation of a resulting fundamental rule of procedure before the ad hoc Committee.
18. The existence of close ties between the Republic of Chile and Essex Court Chambers, not revealed to the Claimants during the proceedings, is likely to call into question the impartiality and independence of the arbitrators.
 - (a) Close relations between the Republic of Chile and previous or current members of Essex Court Chambers since 1998 to date
19. As the Claimants have already explained in their Application for Annulment, it wasn't until after the surrender of the Resubmission Award that they

³ Pièce C110

became aware of the fact that the Republic of Chile had frequent links with several barristers of Essex Court Chambers, two of whom are the Arbitrators of the Resubmission Tribunal, namely Messrs. Veeder and Berman. This information was not revealed to them during the Resubmission Procedure.

20. It was on 18 September 2016, after a public statement by the Minister of Foreign Affairs, that the Claimants learned that Chile was working in secret with members of Essex Court Chambers.
21. The Claimants were also subsequently informed that other members of Essex Court Chambers had represented the Republic of Chile in the past, both before and after the Resubmission Procedure, or continued to do so at this day. Some of this information has been corroborated, in particular:
 - **Mr. Samuel Wordsworth** QC, Counsel of the Republic of Chile before the International Court of Justice in Maritime Dispute Proceedings (*Peru v. Chile*). This proceeding, initiated on January 16, 2008, was completed by a judgment dated January 27, 2014. It will be recalled that the Resubmission Procedure was initiated on June 18, 2013, and that the proceedings for the annulment of the Initial Award occupied the parties between September 2008 and December 2012. Mr. Wordsworth also represents Chile before the International Court of Justice in the case of Obligation to Negotiate Access to the Pacific Ocean (*Bolivia v. Chile*), initiated on April 24, 2013, which is still ongoing.
 - **Mr Christopher Greenwood** QC, who advised Chile in the proceedings Maritime Dispute (*Peru v. Chile*) before the International Court of Justice;
 - **Mr Simon Bryan** and **Stephen Houseman**, who defended Coromine Ltd. -associated with CODELCO, the largest copper production and export company in the world, wholly owned by the Chilean State, in 2007 - in a case related to Compañía Minera Doña Inés de Collahuasi, whose head office is in Chile.
 - **Mr Lawrence Collins**, who represented the Republic of Chile in the extradition of General Pinochet to the United Kingdom initiated by the President of the Allende Foundation, who became a member of Essex Court Chambers in 2012.
22. Despite these numerous and repeated links, links that have existed over a significant period of time, no relevant disclosure was made by Messrs. Veeder and Berman at the time of their appointment in the Resubmission Procedure.
23. Previous and contemporaneous relationships between the Republic of Chile and Essex Court Chambers, which have not been disclosed by the arbitrators Messrs. Veeder and Berman, nor by the Republic of Chile, are thus at the origin of the request for production of documents that the Claimants formulated on December 21, 2017, and that they have had to rehearse in

March and April 2018, in accordance with Procedural Order No. 1 of March 7, 2018.

24. The Claimants submit that these links, which are significant in their extent, give rise to an apparent (or at the very least the appearance) conflict of interest which, having not been disclosed, creates the appearance of a lack of independence and impartiality of the Resubmission Tribunal.

b) Close relations between the Republic of Chile and Essex Court Chambers constitute a potential conflict of interest

25. The business relationship between members of Essex Court Chambers and the Republic of Chile constitutes a potential conflict of interest in accordance with the IBA Guidelines on Conflict of Interest in International Arbitration hereinafter ("IBA Rules"), placing doubt on the impartiality and independence of the arbitrators Messrs. Veeder and Berman.
26. Indeed, the IBA Rules identify a number of situations that create a conflict of interest between the arbitrators and the parties that resemble the nature and extent of the relationship between the Republic of Chile and Essex Court Chambers.
27. Although these rules apply to members of a law firm, a different structure from a Chambers in the strict sense, the Claimants will show that in reality given the similarities between the operation of Essex Court Chambers and a traditional law firm or solicitors' practice, no less stringent rules apply to this structure. The question must be whether in the circumstances of the instant case it is appropriate and equitable to allow reliance on an archaic principle, that arguably has no application in proceedings of an international character, that prevents the unveiling of a conflict.

i. Close relations between the Republic of Chile and Essex Court Chambers reveal a potential conflict of interest under the Non-Waivable Red List, the Waivable Red List and the Orange List of IBA Rules

28. According to the Non-Waivable Red List, which lists the most serious situations, namely those in which "*an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances*" and for which "*acceptance of such a situation cannot cure the conflict*", Article 1.4 refers to the situation in which:

"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"⁴.

⁴ IBA Rules, article 1.4 de la Non-waivable red list.

29. In light of the above, it is respectfully submitted that this situation would be fully applicable in the present case, relating to Messrs. Veeder and Berman.

30. In the Waivable red list, which lists the situations "*serious but not as severe*" as those of the Non-Waivable red list, and in which "because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered, but only when the parties, being aware of the conflict of interest, expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4 (c) ", the article 2.3.5 addresses the situation in which:

"The arbitrator's law firm currently has significant commercial relationship with one of the parties, or an affiliate of one of the parties".

31. Again, it is respectfully submitted that the situation in the instant case, could be seen to accurately portray the relationship between the Republic of Chile and Essex Court Chambers.

32. In the Orange list, which groups together situations that are "*depending on the facts of a given case*", Article 3.1 .4 the situation in which:

"Arbitrator's law firm, 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".

33. Article 3.2.1 of the Orange List also covers the situation in which:

"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".

34. Or Article 3.2.3 of the Orange List:

"The arbitrator or his firm represents a party, or an affiliate of one party to the arbitration, on a regular basis, but such representation does not concern the current dispute".

35. Once again, those situations would apply to Messrs. Veeder and Berman in the instant case.

36. In order to determine the exact nature and extent of the relations maintained, it is essential that the Claimants and the Tribunal have access to a number of documents which the Republic of Chile is known to have in its possession.

ii. The membership of Messrs Veeder and Berman at a Chamber rather than a law firm is indifferent to the assessment of conflict of interest.

37. In developing the 2004 International Bar Association Conflict of Interest Guidelines (IBA Rules), the question of the application of the disclosure requirement to barristers was addressed during the preparatory work.

38. It has thus been pointed out that:

"While the peculiar nature of the constitution of barristers' chambers is well recognized and accepted in England by the legal profession and by the courts, it is reported by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in the light of the content of the room, which is well understood that the chambers of chambers should be treated in the same way as law firms.

(...)

*the Working Group considers that full disclosure to the parties of the involvement of more than one barrister in the same chambers in any particular case is highly desirable. Thus, **barristers (including persons who are 'door tenants' or otherwise affiliated to the same chambers)** should make full disclosure as soon as they become aware of the involvement of another member of the same chambers in the same arbitration, whether as arbitrator, counsel, or in any other capacity". (emphasis added)*

39. In accordance with the recommendations made by the Working Group, Article 3.3.2 of the Orange List of IBA Rules 2014, which identifies situations that may give rise to legitimate doubts in the parties' minds as to impartiality and independence of the arbitrator, expressly refers to the case where arbitrators and counsel intervening during the same arbitration would be members of the same chambers:

"The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers".

40. If the examples listed above, concerning situations involving a conflict of interest under the Non-Waivable Red List, the Waivable Red List and the Orange List do not specifically relate to the situation where one of the parties has ties to the chambers in which one of the arbitrators' practises (unlike a law firm), the Claimants consider that they remain nonetheless applicable to the circumstances of the case.

41. This type of conflict of interest has been considered by the drafters of the IBA Rules, as evidenced by Rule No. 6 and its commentary.

42. Rule 6, which deals with relations between a party and the exercise structure to which an arbitrator belongs, provides that:

"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, 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".

43. The commentary to Rule 6 briefly discusses the application of this provision to barristers, stating that:

"Although barristers' chambers should not be equated with law firms for the purpose 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".

44. It should be noted that the actual translation of Rule No. 6 applied to the situation of barristers in the various lists of examples provided by the IBA Rules appears to be well below the application of this Rule to lawyers who are members of a law firm.
45. Or, there is no objective reason to apply preferential treatment to barristers in relation to solicitors or other types of lawyers practicing in a law firm for the purpose of applying the rules relating to the disclosure of conflicts of interest. An objective situation of quasi law firms summarized by Mr. Peter Ashrof in *"The reality of those barristers' chambers most active in international arbitration."*
46. This differentiated application of the IBA Rules according to whether a lawyer is practicing in a law firm or a barrister in chambers is involved, has no basis in the Convention or the Arbitration Rules, and no justification since the functioning of the chambers has evolved during the last two decades to the extent that they can be said to strongly resemble that of law firms. As Prof Griffiths-Baker says:
- "chambers afford other benefits for individual barristers. They may call upon each other for advice on points of law, share the cost of training, (...) this in turn has strengthened collegiality amongst barristers (...)."*
47. In particular, Chambers have developed marketing and promotional techniques similar to those used by law firms. The success of a barrister can be put forward to serve the promotional interests of the chambers, which allows it to profit, as well as all its members.
48. Indeed, and as the doctrine of international arbitration explains:

"In England, and a few other jurisdictions, some lawyers practice together in 'chambers' which are organized as collections of sole practitioners who share certain common costs but who are otherwise financially and professionally independent. English courts historically rejected claims that a barrister, nominated as arbitrator, should be removed because he or she was in the same chambers as counsel to one of the parties. Foreign courts also generally reached similar results.

These conclusions rested, however, on assumptions regarding the commercial structure and professional setting of barristers' chambers. In recent years, this structure and setting has significantly evolved, with barristers' chambers increasingly engaging in common promotional, training and other professional activities comparable to those of law firms. As a consequence, conclusions regarding barristers' independence must be re-examined in light of the realities of contemporary practice. That re-examination has occurred in several recent cases, with some authorities now holding that, at least in international cases, the relationship between members of barristers' chambers are

relevant to an arbitrators' independence in much the same manner that relationships within law firms are relevant" (nous soulignons)⁵.

"Not all are convinced, however, that the integrity of proceedings remains uncompromised when barristers from one set of chambers serve as arbitrators and counsel in the same 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" (nous soulignons)⁶.

"Significant changes occurred in the 90's and the beginning of the 2000's to the way in which chambers presented and marketed themselves. The practice of law in general became more commercial and the prohibition on advertising by barristers was lifted. Some chambers grew very considerably in size and whereas chambers used to be known simply by the postal address of the building from which the members practiced, more and more they started to brand themselves by the name of the chambers, the previous address of the chambers or the name of an illustrious former head of chambers" (nous soulignons)⁷.

"The use of advertisements alone seriously impeaches the sweeping assertion that these are merely "independent self-employed practitioners". A reasonable complainant viewing these advertisements could understandably harbour doubts as to the barristers' ability impartially to judge their fellow members of chambers. Indeed, barristers that tout their skills as a unit may fairly be said to have a stake in the success of their fellow barrister" (nous soulignons)⁸.

49. This advertising, and the resulting increase of activity, has a direct influence on the performance of the chambers, since chambers are financed by their members in proportion to their income, and with common services being offered.

50. As noted by practitioners Mark Green and Edith A Robertson in a study conducted on this topic:

"1) Barristers (...) can benefit from considering how the collective entity -the chambers- can be made more profitable. It is not necessarily appropriate for the chambers entity to make a profit in the sense of a financial surplus. However, it is relevant to talk about a

⁵ **Pièce CL339**, Born (G.), « Chapter 12 : Selection, Challenge and Replacement of Arbitrators in International Arbitration » in *International Commercial Arbitration*, 2nd Ed., 204, Kluwer International Law, p. 1894.

⁶ **Pièce CL340** - W. W. Park, « Arbitrator Bias », *Transnational Dispute Management*, Vol. 12, Issue 6, November 2015.

⁷ **Pièce CL153**, K. Daele, « Chapter 6 : Challenge and Disqualification on the Ground of Independence Issues » in *Challenge and Disqualification of Arbitrators in International Arbitration*, Kluwer Law International, 2012, § 6-107.

⁸ **Pièce CL154** - A. H. Merjian, « Caveat arbitrator : Laker Airways and the Appointment of Barristers as Arbitrators in Cases involving Barrister-Advocates from the Same Chambers », *Journal of International Arbitration*, 2000, pp. 31-70.

profitable set of chambers, in the sense of a chambers that offers each of its barrister members the opportunity to pursue a profitable practice.

The income of chambers (...) is directly related to the amount of money that the members of chambers receive over any given period, regardless of the procedure or process adopted for contributions.

*2) Chambers are financed by contributions from members. The 2002 BDO Stoy Hayward Survey of Barristers' Chambers found that the most popular way of calculating contributions was to take a percentage of the member's income"*⁹.

51. Dr. Marc K Peter, Director of LexisNexis Butterworths, shares a similar analysis:

"Greater numbers of individual barristers and chambers are engaging in strategic, well executed marketing plans to attract regular, well-paid work.

The LN survey indicates that over half of barristers believe that having a clear marketing strategy cemented directly to business goals can lead to the success of the chambers" (nous soulignons)¹⁰.

52. The foregoing considerations apply particularly to Essex Court Chambers, which occupy a prominent place in London's international arbitration practitioners, and describe itself as *"a leading set of barristers' chambers, specializing in commercial and financial litigation, arbitration, public law and public international law "*.

53. As the court also noted in the case of *Hrvatska Elektroprivreda v. Slovenia* in a case concerning them directly:

"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.

(...)

It is, however, equally true that this practice is not universally understood let alone universally agreed, and that Chambers themselves have evolved in the

⁹ **Pièce CL343**, Green (M.)- Robertson (E.A.), associate at BDO Stoy Hayward et directeur at Falcon Chambers, respectivement, « [Running a profitable set of chambers](http://bit.ly/2F7HL5f) », article publié le 14 février 2003 dans *Reporter* 153 NLJ 209, accessible dans <http://bit.ly/2F7HL5f> ; v. également **pièce CL346**, Smith (C.), « [Mansfield team move chambers](http://bit.ly/2F6e58A) », un article publié le 9 novembre 2015 dans *Reporter LS Gaz*, 9 Nov, 6 (2), accessible dans <http://bit.ly/2F6e58A>, qui relève que les Chambers bénéficient des contributions des barristers à leur frais en proportion des honoraires perçus par ces derniers, d'en moyenne 25%.

¹⁰ **Pièce CL344**, Peter (M.), directeur at LexisNexis Butterworths, *Smart Investment (Pt2)*, article publié le 24 janvier 2016 dans *Reporter* 166 NLJ 7684, p20, accessible dans <http://bit.ly/2FedULA> ; voir également pièce **CL345**, Ronan (C), chief executive, St John's Buildings, *Driving change at the Bar*, un article publié le 14 juillet 2017 dans *Reporter* 167 NLJ 7754, p20, accessible dans <http://bit.ly/2FiZpGg>

modern market place for professional services with the consequence that they often present themselves with a collective connotation. Essex Court Chambers' elaborate website, obviously serving marketing purposes, contains special sections entitled "about us" and "how we operate" and quotes with apparent approval a Law Directory which states that the Chambers are recognized as "a premier commercial operator..." (nous soulignons)¹¹.

54. Finally, although they are independent professionals, the barristers share rooms within a chambers, which makes it likely that, in the normal course of their daily interactions, they are led to discuss among themselves the files they are dealing with, in the absence of prohibition to the contrary or wall of China created for this purpose for the needs of a file, as affirmed by Mr. Athelstane Aamodt, barrister at 4-5 Gray's Inn Square:

The first thing I do when I go into chambers is check my pigeonhole. I wager that all barristers do this, on average, about one hundred times a day. The reason for this is simple. Paper in your pigeonhole usually means that you've been paid.

My morning will invariably be punctuated by people dropping in for a chat. Barristers love to natter, and the conversations will invariably involve stories about a recent courtroom victory or defeat, or an unreasonable client/opponent/judge/ solicitor.¹²

55. The reasons set out above demonstrate that there is no reason, in international arbitration, to differentiate the manner in which conflicts of interest are assessed dependent on whether it is individuals from chambers or from law firms that are called into question.

56. In these circumstances, the links existing between the Republic of Chile and members of Essex Court Chambers, which were not revealed by the arbitrators Veeder and Berman, reveal a conflict of interest which casts doubt on the independence and impartiality of the Resubmission Tribunal, and justifies the annulment of the Resubmission Award.

2. In the absence of any revelation of the close ties between the Republic of Chile and Essex Courts Chambers the independence and impartiality of the arbitrators is called into question.

57. Arbitrators acting under the auspices of the parties have the obligation to disclose any circumstance that might call into question their independence and impartiality (i). This disclosure obligation extends to facts that are in the public domain (ii). In the particular case where the arbitrator is a barrister, as indicated above, there is no reason in international arbitration, particularly in

¹¹ **Pièce CL157** *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Order Concerning the Participation of Counsel, 6 May 2008, §§17 et s.

¹² **Pièce CL342**, Aamodt (A.), *A life in the day*, Reporter, 166 NLJ 7692, p22, accessible dans <http://bit.ly/2csync5>

the ICSID system, to treat it differently than if he was a member of a law firm. The fact that there exists a prior relationship or there is reason to believe that there may exist a relationship that is capable of constituting a conflict there is a requirement to investigate the matter regardless of where it concerns a law firm, a barrister's chambers or another legal entity.

(i) The obligation to disclose of arbitrators

58. Arbitrators are required to disclose any circumstance likely to call into question their independence and impartiality

59. The disclosure obligations of arbitrators under the auspices of ICSID are governed by section 6 (2) of the Regulations. This article details the statement that must be completed by the arbitrators, which includes:

"Attached to this is a statement regarding (a) my business and other professional relationships (if any) with the parties, past and present, and (b) any other circumstance that could lead a party to question my guarantee of independence. I acknowledge that by signing this declaration, I agree that I shall continue to notify the Secretary General of the Center as soon as possible of any relationship or circumstance that may arise in the course of the proceeding."

60. Also note similar terms used in Article 3 of these IBA Principles:

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.

An advance declaration or waiver in relation to possible conflicts of interest arising from facts and circumstances that may arise in the future does not discharge the arbitrator's ongoing duty of disclosure under General Standard 3(a).

Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

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.

61. In the instant case, Messrs. Veeder and Berman failed to disclose other decisive circumstances.

62. As one author indicates, the reference to "any other circumstance" in the second limb of Article 6 (2) is understood as the widest possible:

*"The term 'any other circumstance' refers to any other circumstance than the relationships of the arbitrator with the parties. It is a catch-all category that includes virtually any kind of relationship, interest or contact with anything or anyone that is in some degree related to the case. It includes relationships of the arbitrator and the arbitrator's law-firm with counsel, co-arbitrators and fact or expert witnesses appearing in the matter"*¹³.

63. According to the same author, the doubt which an arbitrator may have on the content of his statement must be resolved in favour of the revelation:

*"The disclosure is limited to those circumstances that 'might cause the arbitrator's reliability for independent judgment to be questioned'. By requiring the disclosure of circumstances that 'might cause' the arbitrator's reliability to be questioned, only those circumstances that do not cause the reliability to be questioned are excluded from disclosure. If there is a possibility, not a certainty, that a circumstance calls the arbitrator's reliability for independent judgment into question, disclosure should be made"*¹⁴.

64. As the Claimants have also explained in § 130 of their Motion for Annulment, the content of the disclosure must be assessed from the point of view of the parties:

*"1-017. The drafting history of the ICSID Rules supports this point. (...)
1-023. The question of whether or not a circumstance must be disclosed, must thus be answered from the perspective of the parties. The reference to 'a party' indicates that a subjective standard is adopted whereby the judgment of the parties is decisive in order to determine whether the arbitrator must make a disclosure or not.(...)
1-026 A good example is the use of English barristers in international arbitration (...) non-English parties and counsel are far less familiar with the concept of barrister chambers (...)
1-028. (...) the test for disqualification is an objective one. The test for disclosure and the test for disqualification are thus of a different nature.(...)
1-037. The issue as to whether a fact requires disclosure is to be viewed from the perspective of the parties. That is the meaning of the 'may be questioned by the parties' language in ICSID Rule 6(2)(b)"*¹⁵.

ii. The disclosure obligation extends to facts that are in the public domain

¹³ **Pièce C153**, 'Chapter 1: Disclosure', in Karel Daele, Challenge and Disqualification of Arbitrators in International Arbitration, International Arbitration Law Library, Volume 24 (© Kluwer Law International; Kluwer Law International 2012) pp. 1 - 64, § 1-020.

¹⁴ **Ibid.**, pp. 1 - 64, § 1-021

¹⁵ **Pièce C153**, Daele (Karel), Challenge and Disqualification of Arbitrators in International Arbitration, International Arbitration Law Library, Volume 24(© Kluwer Law International; Kluwer Law International 2012)

65. As specified by the arbitral jurisprudence and the doctrine, the Convention does not exclude publicly available information from the scope of the disclosure obligations:

66. Indeed, Daele emphasizes:

*"(...) exempted information in the public domain from disclosure (...) such exemption is nowhere to be found in the ICSID Rules and it has been rejected in other ICSID challenge decisions that will be analyzed"*¹⁶.

67. Several decisions have also been made in this regard. As the Claimants have already explained in §129 of the Motion for Annulment, the Tribunal in *Tidewater Inc et altri v. Venezuela* decided that:

*"Arbitration Rule 6(2) does not limit disclosure to circumstances which would not be known in the public domain. The wording of this rule is all encompassing without distinguishing among categories of circumstances to be disclosed"*¹⁷.

68. The ICSID tribunals also considered that arbitrators should not rely on the diligence of the parties and were in a better position to disclose information, even if it was available to the public:

*"The Two Members agree with Tidewater that in general, in considering the scope of her duty of disclosure, the arbitrator may not count on the due diligence of the parties' counsel. As pointed out by Tidewater, arbitrators will always be in 'the best position to gather, evaluate, and disclose accurate information relevant to their potential conflicts'"*¹⁸.

69. The Motion of November 7, 2017 also cites in §128 the same statement made by the Chairman of the Administrative Council of ICSID in *Universal Compression v. Venezuela*:

*"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"*¹⁹.

70. In addition to the precedents cited in the Motion for Annulment, this Submission would seek to highlight:

- a) In the case of *Conoco c. Venezuela*, the arbitrators rejected the challenge mainly because the referee had proceeded to a complete revelation of the facts in question.

¹⁶ **Ibid.**

¹⁷ **Pièce C105**, *Tidewater Inc et altri v. Venezuela*, ICSID Case No ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 décembre 2010, §46, accessible dans <http://bit.ly/2sJW0rd>

¹⁸ **Pièce C152**, *Tidewater v. Venezuela*, decision on the proposal to disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, 20 May 2011, §§90, 94 accessible dans <http://bit.ly/2qoV4XP>

¹⁹ **Pièce C152**, §§90, 94

71. Messrs. Berman and Veeder did not reveal anything, either before or after the acceptance by Chile on April 12, 2017 that there existed relations between the Government and members of their group of lawyers, an opacity that should clarify the documents of which the production has been solicited from the Respondent since September 20, 2016, reiterated before the Ad Hoc Committee on December 21, 2017 and February 2, 2018, the Court Chambers helping to maintain the opacity despite the invitation made by the Claimants to reveal the information solicited in letters dated March 23, 30 and April 16, 2018.

(b) The *Vivendi* Ad Hoc Committee considered (1) the conduct of the International Arbitrator and (2) the extent or (3) timing of disclosure as the primary factors to be considered by the ad hoc Committee:

*“Turning to the facts of the present case, it is accepted 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. It is however relevant on the other hand that: (a) the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency”*²⁰ [emphasis added].

In the instant case, the converse position is evidenced, regarding Mr. Berman and Veeder, who did not reveal anything and, moreover, explicitly refused to require the State of Chile to disclose relationships with ECC members, as well as to conduct a reasonable investigation into this matter. These three decisions make it necessary for Chile to disclose the solicited documents in order to determine the extent of those reports and then to assess whether they are sufficiently important to cast a reasonable doubt on the certainty of an independent and impartial judgment.

(c) Similarly, in *Suez v. Argentina II*, the two unrefuted arbitrators took into account that the arbitrator in question had fulfilled his duty to reveal.

In the case of *Pey Casado*, Mr Berman and Veeder refused to disclose to the Center and the Claimants the existing relationships between members of their Chambers and the Respondent State.

d) In *Cemex v Argentina* an arbitrator had been challenged on the ground that he was a former member of a group of lawyers of which the opposing party's counsel was a member. The other two arbitrators took into account in their Decision that the arbitrator in question disclosed his relationship with this group of lawyers the same day he was asked to do so.

Mr Berman and Veeder systematically refused to disclose, solicit or inquire into anything that might concern the relations between the Respondent State and the group of lawyers of which they are members.

²⁰ **Pièce CL267**, *Compania de Aguas del Aconquija SA. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (Oct. 3, 2001), §26

e) In the *Tidewater* case the arbitrators Mr Campbell McLachlan and Rigo Sureda considered that the requirements of Rule 6 (2) in relation to Articles 14 (1) and 57 of the Convention require that the absence of disclosure by the arbitrators could be a ground of challenge when " *the facts or circumstances surrounding such non-disclosure are of such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment.*"

The opacity maintained by the State of Chile, Messrs. Berman and Veeder, and the EC Chambers in this case make it necessary to order the disclosure of the solicited material in order to determine the undisclosed facts and shed light on the possibility of an apparent and objective conflict of interest that may call into question the impartiality and / or independence of the arbitrators.

(f) The ad hoc Committee in the case of *Nations Energy v. Panama* in considering a challenge based on Articles 14 and 57 and Rule 6 (2) took into consideration the challenge, if non-disclosure was an honest exercise of its discretion and undisclosed information was in the public domain.

In this case, the facts constituting the potential hold of the State of Chile on the ECC is kept secret - even refusing to comply with the order of the 28th Civil Court of Santiago - which evidences the fact that the Committee requires that Chile disclose its communications.

72. Messrs Franklin Berman and VV Veeder failed to observe the IBA Rules of Conflict of Interest in International Arbitration, the Ethics of International Arbitrators of 1987 and the Conduct of Legal Professionals of May 28, 2011, in not revealing the relationship between the Respondent State, and the members of Essex Court Chambers when approached to be appointed as arbitrator, refrained from conducting a reasonable inquiry into the matter and refused to do so when it was explicitly requested in October and November 2016, as well as in June 2018 after the production of the recognition by Chile on April 12, 2017, of an existing relationship between it and members of their Chambers.

73. In particular, they failed in the Rules on the Ethics of International Arbitrators:

3. Elements of bias.

3.3 Any direct or indirect business relationship between an arbitrator and a party (...) will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence.

3. Elements of bias.

3.3 Any current direct or indirect business relationship between an arbitrator and a party (...) will normally give rise to justifiable doubts as to a prospective arbitrator's impartiality or independence.

4. Duty of Disclosure

4.1 A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.

4.2 A prospective arbitrator should disclose:

(a) any past or present business relationship, whether direct or indirect as illustrated in Article 3.3, (...) with any party to the dispute (...). With regard to present relationships, the duty of disclosure applies irrespective of their magnitude, but with regard to past relationships only if they were of more than a trivial nature in relation to the arbitrator's professional or business affairs. (...);

4.3 The duty of disclosure continues throughout the arbitral proceedings as regards new facts or circumstances.

4.4 Disclosure should be made in writing and communicated to all parties and arbitrators.

74. They also failed in Rule 3.1 of the IBA on the Conduct of Legal Professionals

3.1 A lawyer shall not assume a position in which a client's interests conflict with those of the lawyer, another lawyer in the same firm, or another client, unless otherwise permitted by law, applicable rules of professional conduct, or, if permitted, by client's Authorization,

As officially interpreted:

3.3 (...) Every lawyer is called upon to observe the relevant rules on conflicts of interest when engaging in the practice of law outside the jurisdiction in which the lawyer is admitted to practice.

75. As the Claimants have explained in their Application for Annulment, if the mere "absence of a declaration cannot in itself prove the lack of independence", the courts and ad hoc committees of ICSID take into account that "facts and circumstances that have not been disclosed may call into question the guarantee of independence of an arbitrator".

76. The assessment of the "facts and circumstances of the lack of disclosure" has been extensively discussed by the ICSID tribunals. In particular, the Vivendi Ad Hoc Committee, in its assessment of the circumstances of the case, considered the conduct of the international arbitrator in question, and in particular the existence, scope and timing of the revelation as the first factors to be considered by the ad hoc committee.

77. Therefore, the arbitrators Messrs. Veeder and Berman thus cast doubt on their constitutional independence resulting in a defect in the Tribunal's Constitution and a serious breach of a fundamental rule of procedure.

78. Finally, the obligation of disclosure also extends to the parties.

iii. Parties are also required to disclose facts that may give rise to a conflict of interest

79. While the Convention does not require parties to disclose facts of which they are aware and which may give rise to a conflict of interest, a provision to this effect has been included in the IBA Rules.

80. Article 7 (a) and (b) of the IBA rules provide as follows:

"(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.

(b) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of the identity of its counsel appearing in the arbitration, as well as of 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"²¹.

81. The commentary to this article states that:

"(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. The parties' duty of disclosure 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) has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award"²².

iv. The absence of so many revelations by Messrs. Veeder and Berman of the Republic of Chile calls into question the independence and impartiality of arbitrators

82. In view of the foregoing, the Claimants were entitled to expect the Republic of Chile to disclose to them and the Tribunal relevant details of its relationship with other members of Essex Court Chambers.

²¹ Règles de l'IBA, Règle générale 7

²² Règles de l'IBA, Commentaire de la Règle générale 7

83. It is notable that the Republic of Chile had made a revelation of this nature before the First Ad Hoc Committee. Thus, in December 2009, at the time of the establishment of the First Ad Hoc Committee to decide the Respondent's request to cancel the entire Initial Award, it had revealed the relationships that could be seen as likely to raise a conflict of interest with any member of the Committee. When the Center announced on December 4, 2012 its intention to appoint Mr. Yves Fortier as a member of the first ad hoc committee, the State of Chile revealed, on December 15 following, the relationship between one of its lawyers with the group of lawyers to which Mr. Fortier belonged. The same day, the Center requested further explanations and the Republic of Chile responded without delay.

84. Moreover, in the absence of any revelation by the Republic of Chile, there is the no less questionable objection of Messrs. Berman and Veeder.

85. Indeed, in failing to disclose the business relationship between the Respondent State and Essex Court Chambers, when approached to be appointed arbitrators, and refusing to conduct a reasonable inquiry into it when was explicitly solicited in October and November 2016 and in June 2018, Mr Veeder and Berman thus cast doubt on their impartiality and independence, constituting a flaw in the Tribunal's Constitution and the violation of a fundamental procedural rule.

1.3 The objective lack of impartiality and independence of the arbitrators constitutes a flaw in the constitution of the Tribunal and a serious breach of a fundamental procedural rule.

199. As recalled by the President of the ICSID Administrative Council on numerous occasions:

"Impartiality implies the absence of bias or predisposition towards one of the parties, independence is characterized by the absence of external control. (...) Articles 57 and 58 of the ICSID Convention do not require proof of actual dependence or predisposition, but it is sufficient to establish the appearance of dependence or predisposition".

(a) In particular, in *Getma v. Guinea*, the court said that:

"the concept of independence of Article 14 (1) of the ICSID Convention means a duty of independence and impartiality.⁵⁶ The duty of independence refers to the absence of relations with the parties of nature to influence the decision of an arbitrator ⁵⁷. The duty of impartiality refers to the absence of bias against one of the parties ⁵⁸. These are objective criteria, and these criteria of independence and impartiality the purpose of protecting the parties against arbitrators being influenced by factors other than those relating to the merits of the case »⁵⁹"

86. In the present case, as has been shown, the lack of disclosure of the arbitrators of the links maintained between the Republic of Chile and Essex Court Chambers, Chambers to which belong two of the three arbitrators of

the Resubmission Tribunal, is likely to create the objective appearance of a lack of impartiality and independence of these arbitrators.

87. Accordingly, and as has been detailed, the complaint alleging the lack of independence and impartiality of the Tribunal constitutes both a ground for annulment under Article 52 (1) (a) than Article 52 (1) (d).

The requirement of independence and impartiality of the arbitrators is indeed a rule.

Sincerely

A handwritten signature in black ink, appearing to read 'Dr. Garcés', with a long horizontal flourish extending to the right.

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

A handwritten signature in black ink, appearing to read 'T. Cadman', with a vertical line to the right of the signature.

Toby M. Cadman
Guernica 37 International Justice Chambers