INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Total S.A.

Claimant

v.

Argentine Republic

Respondent

ICISD Case No. ARB/04/1

Annulment Proceeding

GROUNDS FOR THE ARGENTINE REPUBLIC'S PROPOSAL TO DISQUALIFY MS. TERESA CHENG

Courtesy Translation

12 August 2015

PROCURACIÓN DEL TESORO DE LA NACIÓN
Posadas 1641
C1112ADC Buenos Aires
República Argentina

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GLOSSARY OF TERMS

§(§)	section(s)
¶(¶)	paragraph(s)
AL A RA [No.]	Legal Authority of the Argentine Republic in the annulment proceeding
Application for Annulment	Application for Annulment and Stay of Enforcement of the Award filed by the Argentine Republic, 27 March 2014
Arbitration Rule(s)	Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes in force since 1 January 2003
Argentina	Argentine Republic
Argentina-France BIT	Agreement between the Government of the Argentine Republic and the Government of the French Republic for the Reciprocal Promotion and Protection of Investments, signed on 3 July 1991, in force since 3 March 1993
art(s).	article(s)
Award	Award of 27 November 2013
BIT	Agreement between the Government of the Argentine Republic and the Government of the French Republic for the Reciprocal Promotion and Protection of Investments, signed on 3 July 1991, in force since 3 March 1993
Centre	International Centre for Settlement of Investment Disputes
Claimant	Total S.A.
Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Decision on Jurisdiction	Decision on Objections to Jurisdiction , 25 August 2006
Decision on Liability	Decision on Liability, 27 December 2010
Exhibit A RA [No.]	Exhibit of the Argentine Republic in the annulment proceeding
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
p(p).	page(s)
Respondent	Argentine Republic
Total	Total S.A.
Treaty	Agreement between the Government of the Argentine Republic and the Government of the French Republic for the Reciprocal Promotion and Protection of Investments, signed on 3 July 1991, in force since 3 March 1993
UNCITRAL	United Nations Commission on International Trade Law
USD	US dollars

GROUNDS FOR THE ARGENTINE REPUBLIC'S PROPOSAL TO DISQUALIFY MS. TERESA CHENG

The Argentine Republic hereby respectfully submits the Grounds for its Proposal to Disqualify Ms. Teresa Cheng in the case of *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) – Annulment Proceeding, pursuant to Article 57 of the ICSID Convention and Rule 9 of the Arbitration Rules. This proposal is based upon facts indicating Ms. Cheng's manifest lack of the qualities required by paragraph (1) of Article 14 of the ICSID Convention.

I. PROCEDURAL AND FACTUAL BACKGROUND

1. On 6 May 2014, the Secretary of the *ad hoc* Committee transmitted a letter informing the parties of the Centre's intent to recommend Ms. Teresa Cheng as a member of the *ad hoc* Committee in this case. Afterwards, on 27 May 2014, the Secretary of the Committee informed the parties of Ms. Cheng's acceptance of her appointment. In such opportunity, the Secretary also sent the parties the declaration under Arbitration Rule 6(2), signed by Ms. Cheng on 22 May 2014, her curriculum vitae, and an additional statement in which Ms. Cheng provided information on her participation as a member of the *ad hoc* Committees in the annulment proceedings in the cases of *Impregilo S.p.A v. Argentine Republic* (ICSID Case No. ARB/07/17), *EDF International S.A., SAUR International and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), and *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15).

2. By letter dated 27 July 2015, that is, once all the annulment submissions had been made and **only one month before the hearing on annulment**, the Secretary of the *ad hoc* Committee transmitted to the parties a message from Ms. Cheng in which she stated that: [1]

> I wish to inform the parties that I was instructed by counsels of Freshfields Bruckhaus Deringer LLP (Hong Kong office) in a matter which was completed.
>
> I was instructed to give an oral advice on a matter which is unrelated to investment law or investor-state disputes. The disputes are mainly shareholders' disputes which has nothing to do with Total S.A. nor Argentine Republic. The instructions was received on 24 April 2015 and the

[1] Letter from the Secretary of the *ad hoc* Committee to the Parties, 27 July 2015.

> conference where the oral advice was rendered lasted for about one hour and was held on 30 April 2015.
>
> …
>
> I note article 3.3.9 of the IBA Guideline on Conflicts of Interest in International Arbitration provides for "*The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel."* I do not think it is applicable.
>
> I am of the view that there is no conflict of interest arising. Out of abundance of caution, I thought it best to have this be disclosed to the parties.

3. By letter of 29 July 2015, the Argentine Republic stated that "Ms. Cheng's statements place[d] the Argentine Republic in a position in which its right of defence and due process [were] adversely affected, and they undermine[d] confidence in the independence and impartial judgment of an arbitrator."[2] In addition, the Argentine Republic requested Ms. Cheng additional information in connection with Ms. Cheng's first letter. On 4 August Ms. Cheng submitted some answers by letter transmitted by the Secretary of the Committee:

> QUESTION i).- Why was the instruction given by Freshfields not disclosed to the parties to these proceedings before the advice was rendered or immediately thereafter?
> At the time, I took the view that there is no need for disclosure given the difference of the parties, the nature of disputes, the legal issues and the identity of the solicitors of Freshfields (Hong Kong office) involved in that matter and those in the proceedings before this Committee..
> Recently, in the context of considering what need to be disclosed in a potential appointment as arbitrator, I became aware that there seems to be a view that such a situation might fall within the ambit of Article 3.3.9 of the IBA Guidelines on Conflicts of Interest in International Arbitration. I have considered that no disclosure is required, however, out of abundance of caution I made the statement.
> QUESTION ii).- What are the legal aspects of shareholder disputes on which Ms. Cheng provided legal advice?
> […]
> From the best of my recollection, the oral advice sought related to an overview of the Hong Kong court procedures in relation to the disputes in actions HCA1661/2014 and 1766/2014.
> I was not involved in the matter after the oral advice.
> The names of the parties (in Chinese) in the two actions (which are part of a number of other Hong Kong court actions) are set out in the court judgments. The subject matters of the disputes would have been set out in the court judgments that have been rendered in those actions. The judgments

[2] Note PTN No. 143/AI/15 from the Argentine Treasury Attorney-General's Office to the Members of the Committees, 29 July 2015.

> can be accessed at the following link by entering the relevant case number(s) provided above:
> http://legalref.judiciary.gov.hk/lrs/common/ju/judgment.jsp
> I was not fully appraised of all the details of the substantive disputes in those cases as the oral advice sought, to the best of my recollection, is on an overview of what procedural steps, according to the Rules of the High Court in Hong Kong, can/should be taken. In other words the advice relates to the Hong Kong court procedures and not the substantive merits of the disputes.
> QUESTION iii).- Who is the party to whom Ms. Cheng gave legal advice?
> The advice was given to China Shanshui Cement Group Ltd.
> QUESTION iv).- Why does Ms. Cheng think article 3.3.9 of the IBA Guidelines on Conflicts of Interest in International Arbitration is not applicable?
> The IBA Guidelines make a distinction between parties, law firms, counsel, co-counsel and coarbitrators. This can be seen in the text of the IBA Guidelines eg Articles 3.3.8 and 3.3.9.
> QUESTION v).- Was Ms. Cheng's advice given in exchange for remuneration or for no remuneration?
> The advice was rendered for remuneration: 4 hours at my normal hourly rate as barrister.

4. On 3 August 2015 the Argentine Republic requested additional information about any relationships, whether present or past, that Ms. Teresa Cheng currently had or had had with the law firm of Freshfields.[3]

5. By letter of 5 August 2015, the Secretary of the Committee transmitted Ms. Cheng's message in response to the request made by the Argentine Republic. In such message, Ms. Cheng provided the following information:

> **QUESTION - In this connection, the Argentine Republic requests that Ms. Teresa Cheng also inform of any and all relationships, of whatever nature, and whether present or past, that she has or has had with the law firm Freshfields Bruckhaus Deringer LLP and/or any of its members/partners and/or former members/partners.**
> Within the past three years,
> The matter disclosed in the message in ICSID's letter dated 27th July in the *Total v Argentina* annulment proceedings is the only instructions from Freshfields Bruckhaus Deringer LLP (Hong Kong office).
> The only matter that Freshfields Bruckhaus Deringer LLP is representing a party before me is the annulment proceedings in *Total v Argentina*.
> Beyond the past three years,
> I was instructed by Freshfields Bruckhaus Deringer LLP (Hong Kong office) to act as Counsel in a matter resulting in a Decision on Stay Application of the Hong Kong Telecommunications (Competition Provisions) Appeal Board dated 29 September 2008. I was no longer involved in the matter after

[3] Note PTN No. 144/AI/15 from the Argentine Treasury General-Attorney's Office to the Members of the Committees, 3 August 2015.

> the hearing of that application.
> I was co-arbitrator in a commercial arbitration in or around 2004 where Freshfields Bruckhaus Deringer LLP (Hong Kong office) was representing the respondent before me. I was appointed by the Claimant. The arbitration has been completed.
> I refer to the general request to inform the parties of "any and all relationships, of whatever nature…….with the law firm….and/or any of its members/partners and/or former members/partners."
> I have been elected/appointed to various offices/positions of various professional associations/bodies/arbitral institutions over the years as set out in my CV. Over these periods, some members/partners and/or former members/partners of Freshfields Bruckhaus Deringer LLP have been or may have been members or office bearers in these professional associations/bodies/arbitral institutions during the same periods.
> I have sat and/or am sitting as co-arbitrators and have acted as co-counsels in arbitrations with former members/partners of Freshfields Bruckhaus Deringer LLP (Hong Kong office) after they have left Freshfields Bruckhaus Deringer LLP (Hong Kong office). Some of the former members/partners of Freshfields Bruckhaus Deringer LLP (Hong Kong office) have acted and/or are acting as counsel in arbitrations before me.
> From June to August, 2011, my son had a summer internship with Freshfields Bruckhaus Deringer LLP (Paris office). He has not been further employed by Freshfields Bruckhaus Deringer LLP after the internship.

6. Without prejudice to the statements below, it must be noted that the contract with Freshfields to act as counsel in a matter before the Hong Kong Telecommunications Appeal Board, in which case a decision was adopted on 29 September 2008,[4] is not mentioned in Ms. Cheng's professional background as detailed in her curriculum vitae.

7. In light of the terms and facts disclosed in Ms. Cheng's communications—and pursuant to Article 57 of the ICSID Convention and Rule 9 of the Arbitration Rules—on 6 August 2015 the Argentine Republic proposed the disqualification of Ms. Cheng as a member of the Annulment Committees in the cases of *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), on the basis of facts indicating Ms. Cheng's manifest lack of the qualities required by paragraph (1) of Article 14 of the ICSID Convention.

8. As a consequence of this Disqualification Proposal, the majority of the Committee set an extremely tight schedule for the parties' and Ms. Cheng's submissions. The Argentine Republic understands this and is a victim of this unfortunate situation which has been brought about only by Ms. Cheng's belated disclosure of her links with Freshfields. Without prejudice to the

[4] Letter from the Secretary of the *ad hoc* Committee to the Parties, 5 August 2015.

foregoing—and despite the fact that the parties and the Committee should now be engaged in the preparation of the Hearing on Annulment—the Argentine Republic will comply with the tight schedule set by the Committee. Nevertheless, the majority of the Committee is hereby requested to take all the time it needs to consider and decide this delicate situation which compromises the integrity of the proceedings. In addition, it is respectfully requested that the deliberations on this Disqualification Proposal not be affected by the fact that the Hearing on Annulment is scheduled to be held in a few days' time, and that the Committee consider the possibility of postponing the Hearing.

II. LEGAL STANDARD FOR DISQUALIFICATION UNDER THE ICSID CONVENTION

9. For a proposal to disqualify to be upheld, Article 57 requires "a manifest lack of the qualities required by paragraph (1) of Article 14." The term "manifest" in Article 57 means "obvious" or "evident,"[5] and it relates to the ease with which the lack of the required qualities can be perceived.[6] Professor Schreuer explains that "'[m]anifest' may be defined as easily understood or recognized by the mind."[7]

10. With respect to the disqualification of a member of an annulment committee, "Article 52 [of the ICSID Convention] incorporates Rule 9 of the Arbitration Rules (entitled "Disqualification of Arbitrators") into the annulment procedure."[8] It has even been held specifically in connection with the members of Annulment Committees that: "[a]d 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

[5] *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, *AWG Group v. Argentine Republic*, UNCITRAL Arbitration, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, ¶ 34.

[6] *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, ¶ 68; *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V., Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015, ¶ 47.

[7] CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 932 (2001).

[8] Nations Energy, Inc. and others v. Republic of Panama, ICSID Case No. ARB/06/19, Decision on Claimants' Proposal to Disqualify Dr. Stanimir A. Alexandrov (Annulment Proceeding), 7 September 2011, ¶ 46. (free translation).

procedure exists under the Convention, expressly or impliedly, for deciding on proposals for disqualification."[9] This ratifies the need for members of Annulment Committees to be, and appear to be, independent and impartial at all times.

11. Pursuant to Article 14(1) of the ICSID Convention, arbitrators and members of Annulment Committees shall *"inspirar plena confianza en su imparcialidad de juicio"* (inspire full confidence in their impartiality of judgment)—according to the authentic Spanish text of the ICSID Convention—be persons who "may be relied to exercise independent judgment"—according to the authentic English text of the Convention—and *"offrir toute garantie d'indépendance dans l'exercice de leur fonctions"* (offer every guarantee of independence in the exercise of their functions—according to the authentic French text. Indeed, pursuant to Article 14(1) of the ICSID Convention, the persons designated to serve as arbitrators and members of Annulment Committees must be individuals who may be relied upon to exercise both impartial and independent judgment.[10] Pursuant to Article 57 of the ICSID Convention, the lack of such qualities warrants the disqualification of arbitrators and members of Annulment Committees.

12. In this regard, impartiality refers to the absence of predisposition towards a party and the issues at stake, whilst independence is characterised by the absence of external control.[11] Further, there is consensus that the concept of independence in Article 14(1) encompasses a duty to act with both independence and impartiality, and that these requirements serve the purpose of protecting parties against arbitrators being influenced by factors other than those related to the

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

[10] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 58; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013, ¶ 65; *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V., Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015, ¶ 50.

[11] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 59; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013, ¶ 66.

merits of the case.[12]

13. Under Articles 57 and 14(1) of the ICSID Convention, it is sufficient to establish the appearance of dependence or bias.[13] In such connection, the tribunal in the case of *Urbaser v. Argentina* held that:

> 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. [14]

14. The strict application of Article 14(1) of the ICSID Convention renders it unacceptable for arbitrators or members of Annulment Committees to exercise a jurisdictional function on the parties to a dispute when they create an appearance of dependence or bias,[15] as these are "matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy."[16] Along the same lines, in interpreting the ICSID Convention, the Chairman of the Administrative Council stated that "[a]rticles 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."[17]

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[12] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011, ¶ 70.

[13] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 59.

[14] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa and the Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010, ¶ 43.

[15] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 59.

[16] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Dissenting Opinion of Judge T. Buergenthal, ICJ Rep. 3, 9. ("*Judicial ethics are not matters strictly for hard and fast rules—I doubt that they can ever be exhaustively defined—they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy.*")

[17] *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶¶ 59-60. ("*Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias. The applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party.' As a consequence, the*

15. Similarly, the unchallenged members of the arbitral tribunal in the case of *Caratube v. Kazakhstan* noted that

> …the issue is not [the challenged arbitrator's] actual independence and, even more so, not his actual impartiality, his state of mind, his ethical or moral strength, but rather whether a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.[18]

16. It is precisely on account of this reason that the ICSID Convention imposes on arbitrators and members of Annulment Committees a duty to disclose any circumstances that might give rise to a challenge to their independence or impartiality, pursuant to Rule 6(2) of the ICSID Arbitration Rules. Needless to say, this comprises the duty to disclose any contractual or work relationship with any of the law firms involved in the dispute[19] without any time limits, given that the relevant factor is not how such relationships are valued by the arbitrator or member of the Annulment Committee but rather how they may be perceived by the parties.[20]

17. As a consequence, the questions to be asked in order to render a decision on this proposal for disqualification are as follows: May Ms. Teresa Cheng "be relied upon to exercise independent judgment"? Does she offer every guarantee of independence in the exercise of her functions? Is Ms. Teresa Cheng's independence guaranteed, so that the parties may be protected against her being influenced by factors other than those related to the merits of the case? The answer to these questions is, from an objective perspective, manifestly negative.

III. GROUNDS FOR THE DISQUALIFICATION PROPOSAL

A. Contractual relationship between Claimant's law firm and a member of the *ad hoc* Committee

18. The existence of a contemporaneous contractual relationship between a member of an

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subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.")

[18] *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/3, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, decided by a majority of the Tribunal, 20 March 2014, ¶64.

[19] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify a Majority of the Tribunal, ¶ 103.

[20] Karel Daele, *Challenge and Disqualifiation of Arbitrators in International Arbitration*, "Disclosure," International Arbitration Law Library (2012), at 6.

annulment committee and the law firm of one of the parties involved in an annulment proceeding is an extremely serious and relevant circumstance when it comes to assessing the independence and impartiality of a member of the Committee.[21] For this reason, Rule 6(2)(b) of the Arbitration Rules provides that Arbitrators and Committee Members must state "any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party." As elaborated upon in this section, this is an evident practice within the framework of ICSID.

19. Indeed, this was the obligation that Ms. Cheng assumed when she accepted her appointment in this arbitration. In such opportunity, Ms. Cheng stated: "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. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."[22]

20. In that opportunity, Ms. Cheng attached her curriculum vitae and a letter in which she informed the Secretary-General that she had been a member of the Annulment Committee in the case of *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17) and that, in that moment, she was a member of the Annulment Committees in the cases of *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), and *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15).[23] It should be stressed that in such letter Ms. Cheng also noted that in all those proceedings, the Argentine Republic was represented by the *Procuradora del Tesoro*, Dra. Angelina Abbona.[24] Neither Ms. Cheng's letter nor her curriculum vitae contained any references whatsoever to her link with Claimant's law firm in this arbitration, Freshfields Bruckhaus Deringer LLP, which also represents claimants in nine other investment arbitration proceedings—in addition to this proceeding—against the Argentine Republic.

21. It was not until a month before the hearing in this arbitration proceeding, and after Ms. Cheng

[21] *Id.* p. 7.

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

[23] Letter from Ms. Teresa Cheng to the Secretary-General, 22 May 2014.

[24] *Id*.

was appointed to serve on four annulment committees involving the Argentine Republic, that this party learnt of the links between Ms. Cheng and Claimant's law firm. It should even be noted that one of such links was not informed by Ms. Cheng until after the Argentine Republic had specifically asked about past links.

22. A similar situation occurred in the recent case of *Fábrica de Vidrios Los Andes v. Venezuela* (*Favianca v. Venezuela*), in which, in compliance with his duty under Arbitration Rule 6(2)(b), one of the arbitrators (Alexis Mourre) stated—in March 2015—that as from May 2015 he would have a consultancy agreement with the law firm of Dechert LLP. The arbitrator specified that he would not be a Dechert LLP lawyer and that he would only work on specific matters that such law firm would ask him to participate in. The arbitrator confirmed that "I do not consider me a Dechert lawyer for conflict purposes and I do not see Dechert's activities, except for the Dechert cases I work on, to be such as to cast any doubt on my independence and impartiality."[25] Without prejudice to the foregoing, the arbitrator disclosed such information given that the law firm of Dechert was involved in litigation matters against Venezuela, in which—according to Mr. Mourre—he would not be involved.[26]

23. In a second communication in response to Venezuela's concern about such future relationship, arbitrator Mourre added: "I however understand and respect the position of the Bolivarian Republic of Venezuela. In view of the importance attached to all arbitrators having the full confidence of the parties, if the Republic still believes that my statement is not compatible with my duties of independence and impartiality, I will have no choice but to resign as arbitrator in this case."[27] Under such circumstances, the Bolivarian Republic of Venezuela proposed the disqualification of Mr. Mourre as an arbitrator, and in consequence thereof, Mr. Mourre submitted his resignation.[28] Such resignation was subsequently accepted by the other arbitrators.[29]

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[25] *Fábrica De Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/12/21), Decision on the Proposal to Disqualify a Majority of the Tribunal, 16 June 2015, ¶ 6.

[26] *Id*.

[27] *Id.*, ¶ 8.

[28] *Id.*, ¶ 11.

[29] According to the information available on the website on the Centre https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/12/21&tab=PRD.

24. While rather more serious, Ms. Cheng's situation is analogous to that occurred in the case of *Favianca v. Venezuela.* Both arbitrator Mourre—who resigned *for the sake of transparency* in light of his *future* contractual link with a law firm that litigates against Venezuela before ICSID tribunals—and the other two arbitrators, Prof. Hi-Taek Shin and Mr. Yves Fortier—in accepting Mr. Mourre's resignation—considered that such future contractual link would adversely affect the arbitrator's duties of independence and impartiality. It should even be stressed that in such case, arbitrator Mourre would not have a contractual relationship with the claimants' counsel in that arbitration but with lawyers representing claimants in other cases against Venezuela.

25. As will be explained below, not only did Ms. Cheng fail to disclose her past link with Claimant's law firm, but also she did not disclose a *contemporaneous* link with the law firm until after three months since such link had been terminated. This deprived the Argentine Republic of the possibility of taking a position with respect to such contemporaneous contractual link. In addition, the tight timetable set by the majority of the Committee to address this Disqualification Proposal—in light of the moment in which Ms. Cheng disclosed her links with Freshfields—precludes such a delicate issue from being properly addressed.

26. The foregoing evidences that what must be taken into account in particular is not what the members of arbitral tribunals or annulment committees deem to be relevant but what the parties consider may affect their independent judgment.[30] In addition, no person can be a judge of his or her own conflict of interest; in other words, Ms. Cheng cannot be considered to have the ability to decide that it is not necessary to provide certain information when—despite the existence of doubts—she considers that there is no conflict whatsoever. As has been noted, "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."[31]

27. In the context of ICSID, there is no doubt that any contractual or work relationships between an arbitrator and a law firm involved in a specific case must be disclosed in the first session of the tribunal or prior to that, pursuant to ICSID Rule 6(2).

28. In the case of *Grand River Enterprises et al v. United States of America,* Prof. Anaya was

[30] Karel Daele, *Challenge and Disqualifiation of Arbitrators in International Arbitration*, "Disclosure," International Arbitration Law Library (2012), at 17.

[31] R. c. Gough, [1993] UKHL 1 (opinion of Lord Goff of Chieveley).

challenged on account of his representation of one of the parties in proceedings before human rights organisations.[32] In such connection, the Secretary-General informed the arbitrator that "representing or assisting parties" in those procedures "would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding."[33] Several cases can be cited in which, in a situation like the present one, the arbitrator concerned chose to resign from his or her position. For example, in the case of *Nations Energy v. Panama*, one of the arbitrators informed that his law firm was representing a Panamanian authority in a matter unrelated to the arbitration proceeding in which he was acting as an arbitrator. Notwithstanding this, following the claimants' submission of a disqualification proposal, the arbitrator submitted his resignation.[34]

29. At the time of her appointment in this case, Ms. Cheng was aware of the conflicts that might arise out of her links with the parties' representatives. In fact, in the letter Ms. Cheng submitted at the time of her appointment, she highlighted those cases in which she was serving on annulment committees in cases involving Argentina, and noted that Argentina was represented by Dra. Angelina Abbona, in her capacity as *Procuradora del Tesoro*.[35]

30. The lack of impartiality as to the information provided is self-evident when account is taken of the fact that what Ms. Cheng failed to disclose at the time of her appointment is a contractual relationship with Claimant's counsel on account of which she received compensation. To make matters worse, she decided to hold once again a remunerated contractual relationship with Claimant's counsel in the course of this proceeding. This is further compounded by the fact that the position adopted by Ms. Cheng—which evinces her lack of understanding of the conflict of interest—would not preclude Ms. Cheng and Freshfields from continuing to enter into remunerated professional contracts. As a consequence, the decision to be adopted by the majority of the Committee on this Disqualification Proposal is crucial.

B. Ms. Teresa Cheng's relationship with Claimant's counsel, her breaches of the duty of

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[32] *Grand River Enterprises et al v. United States of America*, UNCITRAL Case, Notice of Decision on Challenge to Arbitrator of 28 November 2007.

[33] *Id.*

[34] Karel Daele, *Challenge and Disqualifiation of Arbitrators in International Arbitration*, "Disclosure," International Arbitration Law Library (2012), at 43.

[35] Letter from Ms. Teresa Cheng to the Secretary-General, 22 May 2014.

disclosure and her lack of transparency warrant her disqualification

31. By letter of the Secretary of the Committee dated July 27, Ms. Cheng informed the parties that, by that time more than three months before, she had been instructed by Claimant's counsel to give legal advice in another case. She claimed that her participation in that case had finished and transcribed the contents of Article 3.3.9 of the IBA Guidelines on Conflicts of Interests in International Arbitration, although she claimed that such article was not applicable. Ms. Cheng offered no explanations as to why she mentioned that article or why she did not consider it applicable.

32. In its letter dated July 29, the Argentine Republic asked Ms. Cheng, *inter alia*, i) the reason why the instruction given by Freshfields had not been disclosed to the parties before the advice was rendered or immediately thereafter, ii) the reason why she thought Article 3.3.9 of the IBA Guidelines was not applicable, and iii) which were the legal aspects of shareholders disputes on which Ms. Cheng had provided legal advice.

33. As noted above, in her letter dated August 4, Ms. Cheng stated that at the time of the instruction by Freshfields, she considered that

> there is no need for disclosure given the difference of the parties, the nature of the disputes, the legal issued and the identity of the solicitors of Freshfields (Hong Kong office) involved in that matter and those in the proceedings before this Committee. Recently, in the context of considering what need to be disclosed in a potential appointment as arbitrator, I became aware that there seems to be a view that such a situation might fall within the ambit of Article 3.3.9 of the IBA Guidelines on Conflicts of Interest in International Arbitration. I have considered that no disclosure is required, however, out of abundance of caution I made the statement.

34. The contents of this paragraph are sufficient to conclude that it is manifestly impossible for Ms. Cheng to "be relied upon to exercise independent judgment," as required by Article 14(1) of the ICSID Convention. Firstly, aside from any other considerations, it is simply unacceptable for a member of an ICSID Annulment Committee to affirm (and reaffirm) that there was no need to inform the parties that, *in the course of the annulment proceeding,* she had been instructed by the law firm representing one of the parties. This is a situation that *par excellence* must be disclosed and, in light of the objection of one of the parties, it is inconsistent with the role as a member of the Committee.

35. The lack of timely disclosure precluded the Argentine Republic from objecting to that contractual relationship with Freshfields and enabled Ms. Cheng to carry out the professional instruction given by Freshfields (thus consolidating a professional relationship that, in addition,

was not new since it involved at least a prior case that had not been informed by Ms. Cheng either). It is indisputable that Ms. Cheng made a conscious decision not to disclose such contractual relationship, given her direct relationship with this proceeding. In other words, it is impossible for Ms. Cheng not to have noticed that she was being instructed by the law firm that represents Claimant in this case. Her decision to accept an instruction from Freshfields—which also represents claimants in nine other arbitrations against the Argentine Republic—can certainly make some sense for her future professional development at a global level, but her decision not to disclose it is at odds with basic notions of ethics and transparency. In addition, the effect that this proceeding may have on those other arbitrations involving Freshfields is undeniable.

36. Secondly, the seriousness of the situation is ratified by Ms. Cheng's reference to the fact that the reason why she finally disclosed the instruction was related to a "potential appointment as arbitrator" (without giving any details whatsoever as to who the parties to that case are, whether Freshfields is also involved in the case, whether she finally accepted the appointment or not, etc., all of which evidences Ms. Cheng's total lack of transparency). This shows that if such potential process of appointment as an arbitrator had not taken place, the parties to this case would never have learnt that she was instructed by Freshfields *while this annulment proceeding was pending.* This is particularly so if account is taken of the fact that in her letter dated August 5 Ms. Cheng still holds that she did not have the obligation to disclose her contemporaneous contractual link with Claimant's law firm.

37. Thirdly, in her letter dated August 4 Ms. Cheng ratifies that in her opinion Article 3.3.9 of the IBA Guidelines is not applicable. This article states: *"[t]he arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel."* In light of the facts of this case, the only possibility to consider the inapplicability of this article is to argue that the Freshfields lawyers that instructed Ms. Cheng purportedly work in the Hong Kong office and not in New York (Ms. Cheng does not adopt this distinction in an express manner, but rather she suggests it) as if they were watertight compartments.

38. Although the IBA Guidelines are not formally applicable, while—as stated by Ms. Cheng—they "make a distinction between parties, law firms, counsel, co-counsel and co-arbitrators," *they do not make a distinction between the offices to which the lawyers belong for the purposes of the duty to inform and the existence of conflicts of interest.* In any case, it is Ms. Cheng—rather than the IBA Guidelines—the one that makes this distinction.

39. In addition, even if the IBA Guidelines made that distinction between offices and allowed for the possibility not to disclose contractual relationships on the basis of the office that instructed the arbitrator, this is a distinction that is clearly at odds with the standard set in the ICSID Convention (which is applicable to this case): arbitrators must be individuals who "may be relied upon to exercise independent judgment."

40. Fourthly, Ms. Cheng's situation is actually provided for in Article 2.3.2 of the IBA Guidelines, which states: "[t]he arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the parties" (it should be noted that the provision does not distinguish between offices to which the parties' lawyers belong). This is a much more serious situation than the one identified by Ms. Cheng (or in any case, by those who referred her to the IBA Guidelines in the context of her appointment as an arbitrator in another case), as Article 2.3.2 is included in the Waivable Red List rather than in the Orange one as is the case of Article 3.3.9. It should be recalled that the red lists "detail specific situations that, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator´s impartiality and independence. That is, in these circumstances, an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances."[36]

41. In addition, because of their seriousness, the situations covered by the Waivable Red List can "be considered waivable, but only if and when the parties, being aware of the conflict of interest situation, expressly state their willingness to have such a person act as arbitrator."[37] As already mentioned, in informing the parties of the conflict of interest only after the contractual relationship had finished, Ms. Cheng deprived the parties of their right to provide their views on the matter.

42. In the fifth place, regarding the legal aspects of the disputes between shareholders with respect to which Ms. Cheng provided legal advice, she was manifestly ambiguous about the facts she considered in the case at issue. On the one hand, Ms. Cheng referred the parties to a website of the Hong Kong Court, without even indicating precisely what decision she was referring to (which decision, according to Ms. Cheng, purportedly contains the subject-matter of the disputes). However, the link provided by Ms. Cheng contains several decisions, and it is

[36] IBA Guidelines, at 17.

[37] *Id.*

impossible to determine which of them Ms. Cheng is referring to (although it should be noted that at least one of such decisions refers to issues that are similar to those at stake in this proceeding; accordingly, under the IBA Guidelines it should have been disclosed, *even though it did not involve, in addition, a link with Claimant's law firm.*[38]).

43. In light of this absolute failure to disclose information in the face of this party's request, Ms. Cheng's final assertion on this issue, that "the advice relates to the Hong Kong court procedures and not the substantive merits of the disputes," is obviously insufficient. It is clear that there is usually a connection between the legal procedures that may be used and the merits of the dispute, who can use such procedures, what rights are involved, and so on. Once again, the clarity of the information provided by Ms. Cheng in this regard is non-existent.

44. In short, this is yet another circumstance that shows Ms. Cheng's absolute lack of transparency and warrants her disqualification. In any event, Ms. Cheng is hereby requested to accurately identify the decision of the Hong Kong Court to which she refers.

45. Finally, Ms. Cheng also provided ambiguous and incomplete information in her 5 August 2015 communication. On the one hand, it should be noted that it was only in such communication, and at the request of the Argentine Republic, that she decided to disclose other relationships with Freshfields. In her July 27 letter, in the context of an appointment in another case, she decided to disclose her relationship with Freshfields of this year, but she inexplicably failed to disclose previous relationships. She also failed to disclose them in her August 4 letter, where she answered the first questions posed by the Argentine Republic. It was only in response to the specific question made by the Argentine Republic on August 3 that she finally decided to disclose her other relationships. This lack of transparency seems to be unprecedented in ICSID arbitration.

46. On the other hand, Ms. Cheng seems to downplay the importance of her (first?) instruction with Freshfields given that it took place more than three years ago and, according to the IBA Guidelines, it was unnecessary to disclose such instruction due to the period of time elapsed.[39]

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[38] *Id*, at 19.

[39] *See* Ms. Teresa Cheng's communications to the Parties, 4 and 5 August 2014. This is without prejudice to the fact that she failed to disclose her relationships with Freshfields in her first acceptance as a member of an annulment committee in a case involving the Argentine Republic. Such case was *Impregilo S.p.A v. Argentine Republic* (ICSID Case No. ARB/07/17), where she accepted her appointment on 30 January 2012.

Firstly, this reference is based on the IBA Guidelines which, as has been recognized, are not binding in an arbitration proceeding such as the present one. In this regard:

> 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.[40]

47. Secondly, the three-year rule is not the one that Ms. Cheng had in mind at the time of accepting her appointment and deciding what to disclose or not to disclose to the parties in this arbitration.

48. Indeed, Ms. Teresa Cheng accepted her appointment as a member of the *ad hoc* Committee in the instant proceeding on 22 May 2014, and she attached a *curriculum vitae* with her academic and professional background and her relationships which "supposedly" showed her impartiality and independence as an arbitrator.[41] In particular, when describing her professional experience as a lawyer in her *curriculum vitae*, she indicated her participation in litigation, mediation and international and domestic commercial arbitration. Moreover, Ms. Teresa Cheng pointed out her experience in arbitration. Specifically, she mentioned her participation as counsel only in three arbitration proceedings.[42] None of those cases took place within three years of her appointment as a member of this Committee.

49. The judgment of the Court of Appeal in *Shimizu Corporation v. The Attorney General* was

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[40] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011, ¶ 74; *see also, e.g., 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, ¶ 62; *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, ¶ 69; *Caratube International Oil Company LLP & 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, ¶ 59.

[41] Ms. Teresa Cheng submitted similar *curricula vitae* in the annulment proceedings captioned *Impregilo v. Argentine Republic*, *El Paso Energy International Company v. Argentine Republic* and *EDF International S.A. v. Argentine Republic*.

[42] Ms. Teresa Cheng's *curriculum vitae*, at 4.

rendered in January 1997, which means that the arbitration took place years before that date.[43] The judgment in *S.Y. Engineering Co. Ltd. v. Hong Kong Housing Authority* appears to have been rendered in 2001, which means the situation is analogous.[44] Finally, the arbitral proceeding in *Covington Marine Corporation and Another v. Xiamen Shipbuilding Industry Co. Ltd*. took place during 2004 and the award was rendered in January 2005. That is to say, none of the three cases Ms. Cheng *decided* to disclose took place after 2005.

50. The concern is not that she disclosed such information, but that she failed to disclose the arbitration where she did have a contractual relationship with Freshfields. It was not until the Argentine Republic specifically asked her about her relationships with Freshfields that she disclosed on 5 August 2015 the case *Hutchison Telephone Company Limited et al. v. The Telecommunications Authority, Commerce and Economic Development Bureau (Government of the Hong Kong Special Administrative Region).* It should be noted that the obscurity of Ms. Cheng's answer is such that she does not even mention the name of the case where she was instructed by Freshfields, notwithstanding the Argentine Republic's specific and precise question. Ms. Cheng simply stated that she had "act[ed] as Counsel in a matter resulting in a Decision on Stay Application of the Hong Kong Telecommunications (Competition Provisions) Appeal Board dated 29 September 2008."[45]

51. In short, considering Ms. Teresa Cheng specifically indicated her participation as counsel in arbitration proceedings that took place from (at least) 1997 to 2005, there is no reason why she should have failed to timely—at the time of her appointment as a member of the *ad hoc* Committee—mention her participation in an arbitration where, precisely, she had a work relationship with Claimant's counsel in this arbitration—Freshfields.

52. In any case, aside from the fact that Ms. Cheng was not guided by the IBA Guidelines three-year reference with regard to cases where Freshfields was not involved, such parameter is not included in the ICSID Rules. It is simply unacceptable that Ms. Cheng, when she finally

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[43] *Shimizu Corporation v. The Attorney General* [1997] HKCA 529, [1997] 1 HKC 417, CACV 185/1996, Court of Appeals, Judgment, 17 January 1997, *available at* http://www.hklii.hk/cgi-bin/sinodisp/eng/hk/cases/hkca/1997/529.html?stem=&synonyms=&query=shimizu&nocontext=1.

[44] *SY Engineering Co. Ltd. v. Hong Kong Housing Authority*, [2001] 2 HKC 226, *according to information available at* http://legal.infoxenter.co/index.php?option=com_content&view=article&id=3752&catid=37&Itemid=76.

[45] Ms. Teresa Cheng's communication to the Parties, 5 August 2015.

decided to disclose her contractual relationship with Freshfields contemporaneous with this proceeding (and when she answered the first questions posed by this party), should have decided not to disclose her previous contractual relationship with such law firm.

53. In this context, it is no minor matter that she failed to disclose, at the time of accepting each of the four appointments as a member of annulment committees in cases involving the Argentine Republic, that her own son had worked with Freshfields in the Paris office.[46] Such office is actively involved in international arbitration, and at the time, the main lawyers who participate or have participated as counsel for Claimant in this case—including Jan Paulsson, Georgios Petrochilos, Nigel Blackaby and Noah Rubins—worked in that office. It should also be pointed out that Claimant is a French company.

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

C. Failure to disclose other relationships with Claimant's law firm

55. The duty of disclosure of those persons that are appointed as arbitrators or members of annulment committees under ICSID arbitrations has been widely recognised. This was emphasised by the Chairman of the Administrative Council in the following terms:

> 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. 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.[47]

56. More specifically, in order to ensure the parties have any and all relevant information about the appointment of an arbitrator, the Chairman stressed that "an arbitrator´s Arbitration Rule 6(2) declaration should include details of any professional relationships with counsel to a party in

[46] In *Impregilo S.p.A v. Argentine Republic* (ICSID Case No. ARB/07/17) – Annulment Proceeding, Ms. Teresa Cheng accepted her appointment as a member of the annulment committee on 30 January 2012.

[47] *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 Tawil, Arbitrators, 20 May 2011, ¶ 92.

the case in which he/she has been appointed."[48]

57. The duty of disclosure under Rule 6(2), in particular with regard to professional links between an arbitrator and one of the parties' counsel, serves the purpose of allowing the parties to adopt such measures as may be necessary to prevent the integrity of the proceedings from being undermined. As was explained in relation to the duty of disclosure, in the *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), "[t]he obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects."[49]

58. This duty to inform the parties of any and all relevant information is a continuing obligation. In other words, the arbitrator or the member of the committee must keep the parties informed in a timely manner, during the whole proceeding, of any circumstances that might affect the confidence that the parties must have in his or her independent judgment. The Tribunal in the *Suez II* case explained:

> Subsequent to the commencement of the proceedings in the above-entitled cases, ICSID Arbitration Rule 6 was amended to provide that arbitrators, once appointed, have "…a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during …[a] proceeding.." While this amendment does not itself apply to this case, it does raise an interpretation question with respect to the prior version of the Rule. Specifically, are we to interpret old Rule 6 as implicitly containing an obligation of continuing disclosure and that the new version of Rule 6 has simply made that obligation explicit? Or, are we to interpret the old version of Rule 6 as not including a continuing obligation of disclosure? We think that the correct approach is to hold that the old version contained implicitly a continuing obligation of disclosure and that Professor Kaufmann-Kohler and the other members of the Tribunal had a continuing obligation of disclosure in the above-entitled cases. Commentators agree with this interpretation of the original Arbitration Rule 6.[50]

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[48] *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 Tawil, Arbitrators, 20 May 2011, ¶ 103.

[49] *Case Concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), ICJ, Judgment, 20 April 2010, ¶ 115.

[50] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision of the Second Proposal for Disqualification of an Arbitrator, 12 May 2008, ¶ 43. In this regard, Karel Daele, in his work entitled "Challenge and Disqualification of Arbitrators in International Arbitration," published in 2012, notes that these adjustments have been made "to reflect current practice of

59. In relation to what the referred to declaration must contain, and to whether a period of time applies to determine what circumstances to disclose, Prof. Daele remarks that

> [n]o aspects are carved out of the analysis. If such a relationship exists, it must be disclosed, irrespective of the nature of the relationship (professional, business, personal or familial), irrespective of the significance of the relationship (trivial or substantial) and irrespective of whether or not it calls the arbitrator's impartiality or Independence into question.
>
> Disclosure is required of both 'past' and 'present' relationships. Importantly, in relation to 'past' relationships, there is no cut-off date. Relationships that go back ten years ago or even longer still have to be disclosed.[51]

60. The importance of disclosing the existence of professional relationships with the counsel of one of the parties, be they past or future, has been highlighted by the ICSID Chairman of the Administrative Council, who categorically expressed:

> 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**.[52]

61. The position of the Chairman of the Administrative Council is clearly intended to prevent conflicts of interest that can naturally and evidently arise from contractual relationships involving those that are supposed to be relied upon to exercise independent judgment. Such contractual relationships can be expected to form the basis of future contracts or appointments as an arbitrator. An arbitrator cannot serve as such and at the same time enter into contracts with one of the parties' counsel. This is particularly so when one of the lawyers that instructs the arbitrator is a law firm of the size and with the resources of Freshfields.

62. In any case, the parties should be informed of such interest so that they can have the opportunity to submit their observations, if any—as was the case in *Favianca v. Venezuela*. The Argentine Republic did not have such opportunity and the harm is now irreparable. If

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asking the arbitrators to include in their statements under the Rule, an affirmation of past relationships and presented to the parties." Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration*, "Disclosure," International Arbitration Law Library (2012), at 2. This trend was already being observed in 2004 in the Working Document of the ICSID Secretariat.

[51] Karel Daele, *Challenge and Disqualifiation of Arbitrators in International Arbitration*, "Disclosure," International Arbitration Law Library (2012), at 6.

[52] *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 Tawil, Arbitrators, 20 May 2011, ¶ 103 (emphasis added).

Argentina had been notified that Ms. Cheng intended to enter into a contract with Freshfields—which has represented and represents claimants in 10 cases against Argentina—it would have emphatically objected to such circumstance.

63. Ms. Cheng recognized this obligation when, upon being appointed and pursuant to Rule 6(2), she stated that "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. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."[53] However, despite having made that declaration, Ms. Cheng failed to tell the truth when she did not disclose such circumstances that are crucial to the Argentine Republic, that is, Ms. Cheng's contractual links with Claimant's law firm.

IV. PRAYER FOR RELIEF

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

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

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

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

Respectfully submitted on 12 August 2015,

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

[53] Ms. Cheng's Declaration, 22 May 2014 (emphasis added).