

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES**

**GABRIEL RESOURCES LTD.
AND GABRIEL RESOURCES (JERSEY) LTD.**

Claimants and Applicants on Annulment

VS.

ROMANIA

Respondent

**ICSID CASE NO. ARB/15/31 – ANNULMENT
PROCEEDINGS**

**RESPONDENT'S REPLY TO THE APPLICANTS'
DISQUALIFICATION PROPOSAL**

25 November 2024

Before:

Professor Eduardo Zuleta Jaramillo (President)
Professor Lawrence Boo
Professor Dr Maxi Scherer

LALIVE

LDDP
LEAUA DAMCALI DEACONU PAUNESCU
Attorneys & Counselors

TABLE OF CONTENTS

1	INTRODUCTION	1
2	THE BAR TO DISQUALIFY AN ICSID ANNULMENT COMMITTEE MEMBER IS HIGH AND HAS NEVER BEEN MET	2
3	THE “CONNECTIONS” TO WHICH THE APPLICANTS REFER CANNOT GIVE RISE TO DOUBTS REGARDING PROF. DR. SCHERER’S IMPARTIALITY AND INDEPENDENCE	6
3.1	Professional relationships do not in and of themselves taint an arbitrator’s independence and impartiality	6
3.2	Connections through academic publications and professional associations <i>a fortiori</i> do not taint an arbitrator’s independence and impartiality	8
3.3	Purportedly Personal Relationships	9
4	THE PROPOSAL IS UNTIMELY	12
5	PRAYERS FOR RELIEF	14

1 INTRODUCTION

- 1 Romania refers to and maintains its comments of 8 November 2024 on the Applicants' letter to the Committee dated 30 October 2024. The Applicants now propose to disqualify Prof. Dr. Maxi Scherer as a member of the Committee, pursuant to Article 57 of the ICSID Convention and Rule 9(1) of the (2006) Arbitration Rules, allegedly due to "a manifest lack of independence and impartiality under ICSID Convention Article 14(1)."¹
- 2 As is customary for this type of challenge, the applicant will quote the dictum that "[j]ustice must not only be done but must also be seen to be done". These Applicants and this proposal are no exception.² In reality though, it would be the *admission* of this type of tactical (and late) challenge that would fall foul of the dictum: the Applicants' proposal does not pass the straight-face test. As previously explained, there is no basis to doubt Prof. Dr. Scherer's independence and impartiality and thus no reason for her to step down or to disqualify her.³
- 3 The proposal is so clearly unwarranted that it can only be understood as designed both to i) soften up the members of the Committee to the arguments that the Applicants put forward to seek to annul the Award (as previously explained),⁴ and ii) delay these proceedings and the enforcement of the Award. This is highly improper and Romania requests that the Committee move forward expeditiously with these proceedings and, as Romania has requested and will reiterate in due course, allow Romania to enforce the Award.
- 4 Lastly, Romania notes that it took the Applicants two convoluted letters, eighteen pages, stuffed with 79 footnotes and fifteen new legal authorities, to try to explain why Prof. Dr. Scherer should resign or be removed.

¹ Applicants' Proposal to Disqualify, p. 1 (para. 1).

² Applicants' Proposal to Disqualify, p. 3 *et seq.* (para. 9).

³ Respondent's Letter to Committee dated 8 November 2024.

⁴ Respondent's Letter to Committee dated 8 November 2024, p. 1 *et seq.* (para. 3).

Romania respectfully submits that any applicant who has a legitimate ground will be able to pinpoint it crisply.

2 THE BAR TO DISQUALIFY AN ICSID ANNULMENT COMMITTEE MEMBER IS HIGH AND HAS NEVER BEEN MET

- 5 The bar to disqualify an ICSID arbitrator and *a fortiori* an ICSID annulment committee member is high and, according to publicly available information, has never been met with regard to an annulment committee member. Indeed, **none of the (fourteen) known disqualification proposals in ICSID annulment proceedings have succeeded to date.**
- 6 The Respondent has five comments on the Applicants' description of the alleged legal standard.⁵
- 7 **First**, as the Applicants note, impartiality refers to the absence of bias against a party, while independence involves the absence of relationships which might influence an arbitrator.⁶ As explained in Section 3, the notion of influence is critical, yet the Applicants have conveniently ignored it.
- 8 **Second**, the legal standard to establish lack of independence or impartiality is an objective one, *i.e.*, it is based on a third party's reasonable evaluation of the evidence.⁷ The Applicants describe this third party as "a reasonable independent observer" and indeed the case law confirms that the relevant perspective is not that of the challenging party, nor of the challenged

⁵ Applicants' Proposal to Disqualify, p. 1 *et seq.* (paras. 2-8).

⁶ Applicants' Proposal to Disqualify, p. 1 (para. 5); see also, *Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision to Disqualify Prof. Orrego Vicuña dated 13 December 2013, at **Exhibit AL-0015**, p. 14 (para. 66) ("Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both '*protect parties against arbitrators being influenced by factors other than those related to the merits of the case*'.").

⁷ Applicants' Proposal to Disqualify, p. 2 *et seq.* (para. 6) (quoting **AL-0049**, p. 23 (para. 73)).

arbitrator.⁸ The Applicants' allegation that this third party cannot be "a member of the international arbitration community"⁹ is not supported.¹⁰

- 9 **Third**, under Article 57 of the ICSID Convention, the lack of independence and impartiality (or appearance thereof) must be "manifest", *i.e.*, as the Applicants recognize, "evident" or "obvious".¹¹ More specifically, the Applicants must meet a two-prong test in relation to the term "manifest",¹² as set out by the *SGS v. Pakistan* tribunal:

"The standard of appraisal of a challenge set forth in Article 57 (...) may be seen to have two constituent elements: (a) there must be a

⁸ *Total S.A. v. Argentine Republic*, Decision on Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, ICSID Case No. ARB/04/01, 26 August 2015, at **Exhibit RLA-236**, p. 22 (paras. 102-103) ("(...) it is not the discretion **of the arbitrator or the committee member** that determines the existence of impartiality and independence for purposes of deciding the issue of disqualification, the mere subjective criterion of **the party requesting the disqualification** is neither sufficient to meet the standard of the ICSID Convention.") (emphasis added).

⁹ Applicants' Proposal to Disqualify, p. 3 (para. 7).

¹⁰ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, Recommendation in Respect of the Proposal for the Disqualification of Judge Hascher and Prof. Fernández Arroyo, ICSID Case No. ARB/07/30, 16 September 2022, at **Exhibit RLA-237**, p. 11 (para. 23) ("The assessment is to be made from the perspective of a **reasonable third person**, *i.e.* it is an objective test **rather than as viewed subjectively by Venezuela or the Claimants.**") (emphasis added).

¹¹ Applicants' Proposal to Disqualify, p. 3 (para. 8) (quoting *İmeks İnşaat v. Turkmenistan*, ICSID Case No. ARB/21/23, Disqualification Decision dated 31 October 2023, at **Exhibit AL-0049**, p. 24 (para. 76); *Blue Bank International & Trust v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **Exhibit AL-0014**, p. 11 (paras. 59-60)).

¹² See, *Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jaime Jurado v. Republic of Panama*, Decision on the Proposal to Disqualify Dr. Alexandrov, ICSID Case No. ARB/06/19, 7 September 2011 (Spanish original with unofficial partial translation), at **Exhibit RLA-238**, p. 1 (para. 65) ("the burden of proving facts that make it evident and highly probable, *and not merely possible*, that [the arbitrator] is a person who cannot be relied upon to render an independent and impartial decision rests on the one who proposes the challenge"); see also, *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, PCA Case No. IR-2019/1, PCA Secretary-General Recommendation dated 4 March 2019, at **Exhibit AL-0017**, p. 8 (para. 47); *Caratube v. Kazakhstan*, ICSID Case No. ARB/13/13, Disqualification Decision dated 20 March 2014, at **Exhibit AL-0043**, p. 18 *et seq.* (para. 57).

fact or facts (b) which are of such a nature as to ‘indicat[e] a manifest lack of the qualities required by’ Article 14(1).”¹³

- 10 For the first prong, the Applicants were required, but failed (as explained below), to establish facts “of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case.” Furthermore, “mere speculation or inference” is not sufficient and cannot “be a substitute for such facts.”¹⁴
- 11 For the second prong, “inference must rest upon, or be anchored to, the facts established.” In other words, the inferences cannot “themselves rest merely on other inferences.”¹⁵ As explained in Section 3, the Applicants have failed to discharge this burden.
- 12 In *Suez v. Argentina*, noting that an “alleged connection must be evaluated *qualitatively* in order to decide whether it constitutes a fact indicating a manifest lack of the quality of independence of judgment and impartiality”, the majority of the tribunal deciding on a challenge identified four criteria to assess such connection and “its effect on that arbitrator’s independence and impartiality”, namely proximity, intensity (and frequency), dependence (for benefits or advantages) and materiality.”¹⁶

¹³ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Claimant’s Proposal to Disqualify Arbitrator, ICSID Case No. ARB/01/13, 19 December 2002, at **Exhibit RLA-239**, p. 5 (para. 20) (referred to in *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated 5 February 2016, at **Exhibit AL-0012**, p. 38 (para. 110)); see also, *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, PCA Case No. IR-2019/1, PCA Secretary-General Recommendation dated 4 March 2019, at **Exhibit AL-0017**, p. 8 (para. 50).

¹⁴ *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **Exhibit RLA-239**, p. 6 (para. 20); see also, *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Case No. ARB/03/19, 22 October 2007, at **Exhibit RLA-240**, p. 19 (para. 41).

¹⁵ *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **Exhibit RLA-239**, p. 6 (para. 20).

¹⁶ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Case No. ARB/03/19, 12 May 2008, at **Exhibit RLA-241**, p. 19 *et seq.* (paras.

- 13 **Fourth**, the Applicants wrongly state that justifiable doubts may arise out of “an accumulation of factors”, even where none of the circumstances would be sufficient “if viewed in isolation”.¹⁷ They do not refer to any ICSID jurisprudence in support of this assertion, and at least one ICSID tribunal, in *Amco v. Indonesia*, found that, on the contrary, each fact on its own must meet a certain threshold of relevance:

“(…) [Indonesia] has alleged that a combination of facts may have a greater impact than just their summing up. This is a right view, **provided each fact has a minimum [bearing on] its own**, which in the view of the undersigned, is not the case here.”¹⁸

- 14 In addition, the Applicants have failed to establish the connection between “isolated facts that occurred over many years” and “how they affected the independence of [Prof. Dr. Scherer].”¹⁹

- 15 **Finally**, the Applicants suggest that the mere existence of alleged “relationships” is enough to prove the lack of impartiality and independence of an arbitrator.²⁰ This is, however, incorrect as the *Nations Energy v. Panama* tribunal confirmed:

“the mere fact that a relationship exists ‘in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator’s impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals

33 and 35) (referred to in *Misen Energy v. Ukraine*, ICSID Case No. ARB/21/15, Disqualification Decision dated 15 April 2022, at **Exhibit AL-0047**, p 34 (para. 142)).

¹⁷ Applicants' Proposal to Disqualify, p. 12 (para. 22).

¹⁸ K. Daele, Standards for Disqualification (Chapter 5), in *Challenge and Disqualification of Arbitrators in International Arbitration*, 2012, at **Exhibit AL-0039**, p. 22 (of the pdf) (para. 5-074) (reporting on this part of the *Amco v. Indonesia* Challenge Decision of 24 June 1982, which is not public).

¹⁹ *Total v. Argentina*, Decision on Proposal to Disqualify dated 26 August 2015, at **Exhibit RLA-236**, p. 27 (para. 127).

²⁰ See, e.g., Applicants' Proposal to Disqualify, p. 5 *et seq.* (paras. 11 and 24).

living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions.”²¹

- 16 As described below, the Applicants’ proposal is disconnected from the legal standards set out in the ICSID Rules and Convention as well as from the IBA Guidelines on Conflicts of Interest.

3 THE “CONNECTIONS” TO WHICH THE APPLICANTS REFER CANNOT GIVE RISE TO DOUBTS REGARDING PROF. DR. SCHERER’S IMPARTIALITY AND INDEPENDENCE

- 17 The Applicants point to so-called “connections” between Prof. Dr. Scherer and “Respondent, its counsel team, and (...) Prof. Tercier”.²² As noted in *Suez et al. v. Argentina*, “an alleged connection (...) in and of itself is not sufficient to establish a fact that would establish a manifest lack of (...) impartiality and independence”.²³
- 18 None of these purported connections can give rise to doubts regarding Prof. Dr. Scherer’s impartiality and independence, whether they be professional (**Section 3.1**), academic (**Section 3.2**), or personal (**Section 3.3**). Furthermore, as previously explained, Prof. Dr. Scherer also shares many connections with White & Case.²⁴

3.1 Professional relationships do not in and of themselves taint an arbitrator’s independence and impartiality

- 19 The Respondent refers the Committee to its comments regarding the Applicants’ allegations concerning the professional relationships between Prof. Dr. Scherer, Ms. Maria Athanasiou (the assistant to the Tribunal in

²¹ *Nations Energy et al. v. Panama*, Decision on Proposal to Disqualify dated 7 September 2011 (Spanish original with unofficial partial translation), at **Exhibit RLA-238**, p. 1 (para. 66) (referring to *Suez et al. v. Argentina*, Decision on Second Proposal to Disqualify dated 12 May 2008, at **Exhibit RLA-241**, p. 18 (para. 32)).

²² Applicants’ Proposal to Disqualify, p. 5 *et seq.* (para. 11).

²³ See, para. 15 above (referring to **RLA-241**, p. 18 (para. 32)).

²⁴ See, Respondent’s Letter to Committee dated 8 November 2024, p. 4 *et seq.* (paras. 13-14).

the underlying Arbitration) and Ms. Niuscha Bassiri, and makes the following **five additional comments**.

- 20 **First**, the Applicants do not deny that Ms. Athanasiou worked at WilmerHale with Prof. Dr. Scherer **over fifteen years ago**, at the start of her arbitration career between 2007 and 2009.²⁵ Putting aside the passage of time, the Applicants fail to explain how this professional relationship could possibly taint Prof. Dr. Scherer’s independence and impartiality in an annulment proceeding relating to an arbitration in which Ms. Athanasiou assisted the Tribunal.
- 21 Similarly, the Applicants note that Ms. Athanasiou worked at Hanotiau & van den Berg with Ms. Bassiri from 2011 to 2013.²⁶ The idea that this relationship **from over ten years ago** could somehow taint Prof. Dr. Scherer’s independence and impartiality is bewildering.²⁷
- 22 **Second**, even if Ms. Athanasiou worked under the guidance of and obtained referrals from either Prof. Dr. Scherer or Ms. Bassiri,²⁸ these facts could not cast doubts on Prof. Dr. Scherer’s independence and impartiality in this case. They cannot be “characterized as a relationship, [which] could be interpreted by a reasonable third person as capable of influencing [Prof. Dr. Scherer]’s judgment.”²⁹

²⁵ Respondent's Letter to Committee dated 8 November 2024, p. 4 (para. 13); Applicants' Proposal to Disqualify, p. 5 *et seq.* (paras. 11(b) and 21).

²⁶ Applicants' Proposal to Disqualify, p. 6 *et seq.* (paras. 11(c) and 21).

²⁷ The IBA Orange List includes the situation where two arbitrators are (present tense) lawyers in the same law firm or have been “within the past three years”. IBA Guidelines on Conflicts of Interest in International Arbitration, at **Exhibit AL-0019**, p. 17 (items 3.2.1 and 3.2.3). Here, not only does the relationship go back a decade, but it does not involve two arbitrators sitting together.

²⁸ Applicants' Proposal to Disqualify, p. 8 *et seq.* (para. 14(b) and (c)).

²⁹ See, *Fábrica de Vidrios Los Andes C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., ICSID Case No. ARB/12/21, 28 March 2016, at **Exhibit RLA-242**, p. 10 *et seq.* (para. 46).

- 23 **Third**, the Applicants rely on LinkedIn posts which are anodyne³⁰ and which must be contrasted with social media posts that were found to cast doubt on an arbitrator’s independence and impartiality.³¹
- 24 **Fourth**, the Applicants do not explain or provide support for their allegation that “a partner’s activities may be assimilated to her partner, especially for co-founders of a two-partner law firm as in the case of Prof. Dr. Scherer and Ms. Bassiri.” Which “activities” should be “assimilated” and in what way remains a mystery, especially when the “activities” at issue are trivial (having purportedly “provid[ed] a professional reference and to ‘hav[ing] great memories of working together’”).³²

3.2 Connections through academic publications and professional associations *a fortiori* do not taint an arbitrator’s independence and impartiality

- 25 The Applicants speculate that a “virtual ‘relationship’” may have “blossom[ed]” between Prof. Dr. Scherer and Ms. Isabel San Martín, due to the latter’s role as group advisor of the Young ICCA group of mentees for whom Prof. Dr. Scherer is the mentor for the 2023-2024 cycle.³³ However, the Applicants have failed to explain how Ms. San Martín’s limited role in “assist[ing] with the organizational aspects and keeping the mentees engaged”³⁴ could give rise to an inference that Prof. Dr. Scherer and Ms. San Martín have a relationship, let alone one that could influence

³⁰ Applicants' Proposal to Disqualify, p. 5 *et seq.* (paras. 11(b)-(c), 14(b)-(c), and 21).

³¹ Contrast with *World Anti-Doping Agency v. Sun Yang and Fédération Internationale de Natation*, Decision of the Swiss Federal Tribunal 4A_318/2020 dated 22 December 2020, at **Exhibit RLA-243** (award annulled for arbitrator bias on the grounds of unacceptable tweets posted by the presiding arbitrator during the pendency of the proceedings, which repeatedly employed extremely violent language against one of the parties); S. Moody, "US arbitrator disqualified from Russia case over LinkedIn post", GAR dated 21 August 2024, at **Exhibit RLA-244** (reporting on the *SCM Group and Rinat Akhmetov v. Russian Federation*, PCA Case No 2019-34, Decision Upholding the Respondent's Challenge, 31 July 2024) (challenge upheld for appearance of bias on the basis of LinkedIn posts showing support for Ukraine in the wake of Russia’s invasion in 2022).

³² Applicants' Proposal to Disqualify, p. 9 (para. 14(c)).

³³ Applicants' Proposal to Disqualify, p. 7 *et seq.* (para. 14(a)).

³⁴ Respondent's Letter to Committee dated 8 November 2024, p. 5 (para. 13).

Prof. Dr. Scherer and cause a manifest lack of independence and impartiality in this case.

- 26 Moreover, any “relationship” of this nature between Prof. Dr. Scherer and Ms. San Martín would at best fall under the Green List of the IBA Guidelines,³⁵ and would not give rise to a conflict of interest (actual or in appearance), nor require disclosure by Prof. Dr. Scherer.³⁶
- 27 By way of clarification, the Respondent’s prior reference to Ms. San Martín as a “junior” member of the LALIVE team was to reflect the fact that she only recently joined the team working on this case.
- 28 With respect to Dr. Crenguța Leaua,³⁷ the Respondent refers the Committee to its prior comments regarding the submission by Dr. Leaua and Ms. Bassiri for the Delos Guide to Arbitration Places (GAP), co-chaired by Prof. Dr. Scherer.³⁸ The Applicants have said nothing new in their proposal, nor have they explained, let alone demonstrated, how this joint submission could have possibly created a relationship that would taint Prof. Dr. Scherer’s independence and impartiality.

3.3 Purportedly Personal Relationships

- 29 The Applicants equally grasp at straws when pointing to supposed personal relationships between Prof. Dr. Scherer, Ms. Athanasiou and Prof. Tercier.³⁹
- 30 The sole basis on which the Applicants claim an “ongoing personal connection” between Prof. Dr. Scherer and Ms. Athanasiou is Prof.

³⁵ IBA Guidelines on Conflicts of Interest, at **Exhibit AL-0019**, p. 19 (item 4.3.1) (“The arbitrator has a relationship with another arbitrator, or with the counsel for one of the parties, through membership in the same professional association, or social or charitable organisation, or through a social media network”) and (item 4.3.4) (“The arbitrator was a speaker, moderator, or organiser in one or more conferences, or participated in seminars or working parties of a professional, social, or charitable organisation, with another arbitrator or counsel to the parties”).

³⁶ IBA Guidelines on Conflicts of Interest, at **Exhibit AL-0019**, p. 15 (Part II, para. 7).

³⁷ Applicants' Proposal to Disqualify, p. 9 (para. 14(d)).

³⁸ Respondent's Letter to Committee dated 8 November 2024, p. 4 *et seq.* (para. 13).

³⁹ Applicants' Proposal to Disqualify, p. 5 *et seq.* (paras. 11(b), 11(e), 14(b) and 14(e)).

Dr. Scherer’s reply “see you soon” to Ms. Athanasiou’s comment on Prof. Dr. Scherer’s LinkedIn post.⁴⁰ However, this banal response cannot give rise to an inference that Prof. Dr. Scherer and Ms. Athanasiou have a close personal relationship, let alone one that would influence Prof. Dr. Scherer and cause a manifest lack of independence and impartiality in this case.⁴¹

- 31 The Applicants note that “it is unclear whether Prof. Tercier facilitated Prof. Dr. Scherer in obtaining her position at Université de Fribourg, or whether and to what extent they spent time together or developed a personal kinship at the university”.⁴²
- 32 Thus, by their own admission, the Applicants’ questions about a “personal kinship” between Prof. Dr. Scherer and Prof. Tercier are speculative and not based on any facts that could give rise to an inference that Prof. Dr. Scherer may not be relied upon to exercise independent and impartial judgment. In addition, Prof. Dr. Scherer was a guest lecturer as far back as 2009, 2011, and 2013.

⁴⁰ Applicants' Proposal to Disqualify, p. 8 (para. 14(b)).

⁴¹ See, *Fábrica de Vidrios et al. v. Venezuela*, Decision on Proposal to Disqualify dated 28 March 2016, at **Exhibit RLA-242**, p. 10 *et seq* (para. 46).

⁴² Applicants' Proposal to Disqualify, p. 9 (para. 14(e)).

- 33 The French,⁴³ German,⁴⁴ and Spanish⁴⁵ appellate court cases to which the Applicants refer⁴⁶ are also inapposite.
- 34 The Applicants seek to characterize Prof. Dr. Scherer and Prof. Tercier’s alleged relationship as a “close personal friendship” falling under the Orange List of the IBA Guidelines.⁴⁷ They have, however, made no attempt to prove any such friendship. In any event, the Orange List does not refer to a relationship between two arbitrators where one served in a past proceeding and one is serving in the annulment proceeding relating to that past arbitration.
- 35 Any relationship that Prof. Dr. Scherer may have had with Prof. Tercier as a result of the teaching assignments at the University of Fribourg would not fall within the Green List.⁴⁸ Although the Green List includes relationships where “[t]he arbitrator teaches in the same faculty or school as another arbitrator”,⁴⁹ it again does not refer to situations involving two arbitrators, where one served in a past proceeding and one is serving in the

⁴³ Paris Court of Appeal decision No. 4/2023 dated 10 January 2023, at **Exhibit AL-0048**, p. 13 (para. 64) (referring to tribute by Prof. Clay to Prof. Gaillard, asserting that he consulted the latter “‘before any important decision’, thereby revealing the **intensity** of a relationship **that went beyond ordinary friendship.**”) (unofficial translation, emphasis added).

⁴⁴ Decision of the Higher Regional Court of Frankfurt am Main dated 10 January 2008, at **Exhibit AL-0036**, p. 2 (para. II.B) (“**a friendly relationship** between the opposing counsel and the judge **is generally not sufficient** to assume the judge’s bias”) (unofficial translation, emphasis added). There, the challenge was upheld because the arbitrator had failed to disclose that he was the opposing counsel’s tenant in the same building where the latter had his office.

⁴⁵ Madrid Court of Appeal decision 506/2011 dated 30 June 2011, at **Exhibit AL-0038**, p. 7 (section 9) (listing the disclosures that the challenged arbitrator had made in that case and noting that “it is clear (...) that the challenged arbitrator has a friendly relationship with several members of the law firm that is defending [one of the parties]. A son-in-law of the challenged arbitrator works [at that law firm] and it is clear (...) that the reason why he performs such work is because of this friendship (...).”) (unofficial translation). In that case, the arbitrators had to decide in equity and not in law (see, p. 6, last paragraph).

⁴⁶ Applicants’ Proposal to Disqualify, p. 12 *et seq.* (para. 23, fn. 55).

⁴⁷ Applicants’ Proposal to Disqualify, p. 11 (para. 20).

⁴⁸ See also, Madrid Court of Appeal decision 506/2011 dated 30 June 2011, at **Exhibit AL-0038**, p. 9 (fourth paragraph) (noting that “the **teaching work** [at the same university] of the arbitrator with a partner of the law firm defending the interests of the party, **does not denote or imply friendship**, dependence, or any other circumstance that may lead to doubt the impartiality and independence of the arbitrator.”) (unofficial translation, emphasis added).

⁴⁹ IBA Guidelines on Conflicts of Interest, at **Exhibit AL-0019**, p. 19 (item 4.3.3).

annulment proceeding relating to that past arbitration. Even if this relationship was considered to fall within the Green List, it would not give rise to a conflict of interest (actual or in appearance), nor require any disclosure by Prof. Dr. Scherer.⁵⁰

4 THE PROPOSAL IS UNTIMELY

36 The Applicants argue that their disqualification proposal was filed promptly in accordance with Rule 9(1) of the (2006) Arbitration Rules because:⁵¹

- a) they “set out their grounds for inviting Prof. Dr. Scherer to step down **within a week** of her disclosure about her connection to Ms. San Martín” on 30 October 2024 (“**Initial Disqualification Letter**”);⁵² and
- b) filed the formal proposal “a mere **four days** after Prof. Dr. Scherer declined to resign” on 16 November 2024.⁵³

37 However, this timeline is misleading. Aside from Ms. San Martín’s presence in the Respondent’s team, all of the grounds for disqualification raised by the Applicants are based on information that was available to the Applicants (publicly or otherwise) when ICSID first informed the Parties of the proposed composition of the Committee on 18 September 2024:⁵⁴

- a) Prof. Dr. Scherer’s connection to Ms. Athanasiou and Ms. Bassiri is based on:

⁵⁰ IBA Guidelines on Conflicts of Interest, at **Exhibit AL-0019**, p. 15 (para. 7).

⁵¹ Applicants' Proposal to Disqualify, p. 14 (para. 25); *Misen Energy v. Ukraine*, Decision on Proposal to Disqualify dated 15 April 2022, at **Exhibit AL-0047**, p. 27 (para. 112) (“Promptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification”).

⁵² As noted in Respondent's Letter to Committee dated 8 November 2024, p. 2 *et seq.* (paras. 7-9), the Applicants expressly confirmed on 27 September 2024 that they did not have any observations on the proposed committee members. They further raised no observations pursuant to Prof. Dr. Scherer’s declaration about her involvement as chair in another case involving Romania on 8 October 2024.

⁵³ Applicants' Proposal to Disqualify, p. 14 (para. 28).

⁵⁴ Letter from ICSID to the Parties dated 18 September 2024 (Proposed Annulment Committee Members, including disclosures made by Prof. Dr. Scherer and attaching her CV).

- Ms. Athanasiou’s employment at WilmerHale from 2007 to 2009: over **fifteen years** before the Initial Disqualification Letter;
 - Ms. Athanasiou’s employment at Hanotiau & van den Berg from 2011 to 2013: over **ten years** before the Initial Disqualification Letter;
 - The joint submission by Dr. Leaua and Ms. Bassiri for the Delos Guide to Arbitration Places (GAP), co-chaired by Prof. Dr. Scherer: Dr. Leaua’s post, dated 8 June 2023 on LinkedIn regarding that report: over **one year** before the Initial Disqualification Letter;⁵⁵
 - Ms. Athanasiou’s comment on Prof. Dr. Scherer’s LinkedIn post dated 31 August 2024: **60 days** before the Initial Disqualification Letter;⁵⁶
 - Ms. Athanasiou’s exchange with Ms. Bassiri regarding her LinkedIn post dated 2 September 2024: **58 days** before the Initial Disqualification Letter.⁵⁷
- b) Prof. Dr. Scherer’s connection to Prof. Tercier based on her time as a guest lecturer at Université de Fribourg in 2009, 2011, and 2013 was a matter of public knowledge, and in any event disclosed in her CV made available by ICSID to the Applicants on 18 September 2024: **42 days** before the Initial Disqualification Letter.
- 38 According to the ICSID cases relied on by the Applicants themselves, tribunals have held that a delay of 53 days or more (of learning of the underlying facts) to file a disqualification proposal was too long.⁵⁸

⁵⁵ Dr. Leaua’s LinkedIn post dated 8 June 2023, at **Exhibit R-699**.

⁵⁶ The Applicants note that the precise date of the post is unclear; see, Applicants’ Proposal to Disqualify, p. 5 (fn. 16). While the date is not indicated on LinkedIn itself, this information can be found using a LinkedIn post date extractor. Prof. Dr. Scherer’s LinkedIn post dated 30 August 2024, at **Exhibit R-700**; Ms. Athanasiou’s comment on Prof. Dr. Scherer’s LinkedIn post dated 31 August 2024, at **Exhibit R-701**.

⁵⁷ LinkedIn Comments of Ms. Athanasiou and Ms. Bassiri dated 2 September 2024, at **Exhibit R-702**.

⁵⁸ Applicants’ Proposal to Disqualify, p. 16 (para. 27). See, *Misen Energy v. Ukraine*, Decision on Proposal to Disqualify dated 15 April 2022, at **Exhibit AL-0047**, p. 27 (para. 113) (“In Suez

Therefore, even on the Applicants' case, the above grounds for disqualification in the Applicants' proposal are untimely and should be dismissed.

- 39 The Applicants have provided no explanation as to why they waited until after Prof. Dr. Scherer's email of 24 October 2024 disclosing her participation in the same Young ICCA mentoring group as Ms. San Martín, to raise the above objections. On the contrary, as Romania previously noted, the Applicants expressly confirmed on 27 September 2024 not having any observations and thus waived the right to later raise issues that were already then known or knowable through a reasonable enquiry.⁵⁹

5 PRAYERS FOR RELIEF

- 40 Based on the above, Romania respectfully asks the unchallenged members of the Committee to:
- a) Reject the Applicants' proposal to disqualify Prof. Dr. Scherer,
 - b) Order the Applicants to bear jointly and severally the costs arising from the disqualification proposal.

v. Argentina, a challenge filed **53 days** after learning the relevant facts was held to be **too long**. In Burlington v. Ecuador, two grounds for challenge were **dismissed** because they related to facts which had been public for **more than four months** prior to filing the challenge. The tribunal in Azurix v. Argentina found that a delay of **eight months** was **not prompt** filing. In CDC v. Seychelles, a filing **after 147 days** was deemed **untimely**, and in Cemex v. Venezuela, **six months** was considered **too long**."); IBA Guidelines on Conflicts of Interest in International Arbitration, at **Exhibit AL-0019**, p. 9 (Part I, section 4(a) also providing that "(a) [i]f, **within 30 days after** (i) the receipt of any disclosure by the arbitrator, or **(ii) a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator**, a party does not raise an express objection with regard to that arbitrator, (...) the party is deemed to have waived any potential conflict of interest in respect of the arbitrator based on such facts or circumstances and may not raise any objection based on such facts or circumstances at a later stage. **A party shall be deemed to have learned of any facts or circumstances under 4(a)(ii) that a reasonable enquiry would have yielded** if conducted at the outset or during the proceedings.").

⁵⁹ Respondent's Letter to Committee dated 8 November 2024, p. 2 (para. 7).

Respectfully submitted,

25 November 2024

For and on behalf of Romania,

Counsel for the Respondent



Matthias Scherer
Lorraine de Germiny
Emilie McConaughey
Isabel San Martín



Crenguța Leaua
Andreea Simulescu
Liliana Deaconescu
Corina Tănase
Andra Soare-Filatov

RESPONDENT'S LIST OF FACTUAL EXHIBITS

Exhibit No.	Description	Date
R-699	Dr. Leaua's LinkedIn post	8 June 2023
R-700	Prof. Dr. Scherer's LinkedIn post	30 August 2024
R-701	Ms. Athanasiou's comment on Prof. Dr. Scherer's LinkedIn post	31 August 2024
R-702	LinkedIn Comments of Ms. Athanasiou and Ms. Bassiri	2 September 2024

RESPONDENT'S LIST OF LEGAL AUTHORITIES

Exhibit No.	Description
RLA-236	<i>Total S.A. v. Argentine Republic</i> , Decision on Argentine Republic's Proposal to Disqualify Ms. Cheng, ICSID Case No. ARB/04/01, 26 August 2015
RLA-237	<i>ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela</i> , Recommendation in Respect of the Proposal for the Disqualification of Judge Hascher and Prof. Fernández Arroyo, ICSID Case No. ARB/07/30, 16 September 2022
RLA-238	<i>Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jaime Jurado v. Republic of Panama</i> , Decision on the Proposal to Disqualify Dr. Alexandrov, ICSID Case No. ARB/06/19, 7 September 2011 (Spanish original with unofficial partial translation)
RLA-239	<i>SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan</i> , Decision on Claimant's Proposal to Disqualify Arbitrator, ICSID Case No. ARB/01/13, 19 December 2002
RLA-240	<i>Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic</i> , Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Case No. ARB/03/19, 22 October 2007

RLA-241	<i>Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic</i> , Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Case No. ARB/03/19, 12 May 2008
RLA-242	<i>Fábrica de Vidrios Los Andes C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela</i> , Reasoned Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., ICSID Case No. ARB/12/21, 28 March 2016
RLA-243	<i>World Anti-Doping Agency v. Sun Yang and Fédération Internationale de Natation</i> , Decision of the Swiss Federal Tribunal 4A_318/2020
RLA-244	S. Moody, "US arbitrator disqualified from Russia case over LinkedIn post", GAR