COUR PERMANENTE D'ARBITRAGE PERMANENT COURT OF ARBITRATION

PCA Case No. AA518

IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF LATVIA AND THE GOVERNMENT OF THE KYRGYZ REPUBLIC FOR THE PROMOTION AND PROTECTION OF INVESTMENTS, DATED MAY 22, 2008

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976

- between -

VALERI BELOKON

- and -

THE KYRGYZ REPUBLIC

DECISION ON CHALLENGES TO ARBITRATORS

PROFESSOR KAJ HOBÉR

AND PROFESSOR JAN PAULSSON

October 6, 2014

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I. INTRODUCTION

1. This decision resolves challenges to Professor Kaj Hobér and Professor Jan Paulsson in an arbitration between Mr. Valeri Belokon (the "**Claimant**") and the Kyrgyz Republic (the "**Kyrgyz Republic**" or the "**Respondent**," and together with the Claimant, the "**Parties**") under the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 1976 (the "**UNCITRAL Rules**"), pursuant to the Agreement between the Government of the Republic of Latvia and the Government of the Kyrgyz Republic for the Promotion and Protection of Investments, signed on May 22, 2008 and entered into force on January 29, 2009 (the "**Treaty**").

2. The Claimant is represented in the present case by Mr. Audley Sheppard and Ms. Christina Schuetz of Clifford Chance LLP (London, United Kingdom). The Respondent is represented by Mr. Niyaz Aldashev of Lorenz International Lawyers (Bishkek, Kyrgyz Republic).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

3. The below summary of the factual background and procedural history of this challenge proceeding is based primarily on documents provided by the Parties. Where no documents were provided, it is based on the Parties' description of events.

4. By a **Request for Arbitration** dated August 2, 2011, the Claimant commenced arbitral proceedings against the Respondent pursuant to Article 9(2)(d) of the Treaty and Article 3 of the UNCITRAL Rules. *Inter alia*, the Claimant asserted that the Respondent had breached its obligation to accord fair and equitable treatment to the Claimant's investment in the Kyrgyz Republic.

5. In his Request for Arbitration, the Claimant appointed Professor Hobér as the first arbitrator, indicating, in Paragraph 88, that Professor Hobér had "confirmed to the Claimant's legal representatives that he [was] not aware of any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

6. By letter dated September 5, 2011, the Respondent appointed Mr. Niels Schiersing as the second arbitrator.

7. By letter dated September 30, 2011, Professor Paulsson informed the Parties that he had accepted Professor Hobér's and Mr. Schiersing's invitation to act as presiding arbitrator and declared that he was "aware of no circumstances likely to give rise to justifiable doubts as to [his] impartiality or independence."

8. From September 2011 to September 2012, the Parties exchanged written submissions on the merits of the case. A hearing on the merits scheduled for December 2012 was postponed due to a medical emergency.

9. In early November 2013,[1] the Claimant filed a **Supplemental Submission** dated November 1, 2013, updating its claim of breach of the fair and equitable treatment standard, in particular regarding denial of justice. In this context, the Claimant cited three writings by Professor Paulsson: (i) his expert opinion in *Chevron Corporation and Texaco Petroleum Corporation v.*

[1] The precise dates on which the Supplemental Submission was filed by the Claimant and received by the Respondent are a contested issue between the Parties, as to which, see ¶¶ 89-90 below.

The Republic of Ecuador (the "**Chevron Expert Opinion**");[2] (ii) his award as a sole arbitrator in *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania* (the "**Pantechniki Award**");[3] and (iii) his monograph titled *Denial of Justice in International Law*[4] (the "**Monograph**," and together with the Chevron Expert Opinion and the Pantechniki Award, "**Professor Paulsson's Writings**").

10. By letter dated November 18, 2013,[5] the Respondent informed the Tribunal and the Claimant of its "intention to send its notice on challenge of Professor Paulsson's sitting as Chairman of this Tribunal in due course." Noting the references in the Claimant's Supplemental Submission to Professor Paulsson's Writings, the Respondent stated that "it appears that Professor Paulsson, Chairman of this Tribunal, has fixed his view as to [the] meaning of the concept 'denial of justice'."

11. By e-mail dated November 20, 2013, the Respondent requested that the Claimant provide "a copy of the disclosure of Mr Hobér as per the Section 88 of the Request for Arbitration." The Claimant replied on the same day, indicating that the Claimant's counsel, Mr. Sheppard, had "sought and received oral confirmation from Mr Hober during a telephone call in the week prior to the filing of the Request for Arbitration that Mr Hober was not aware of any circumstances likely to give rise to justifiable doubts as to his impartiality or independence."

12. By e-mail dated November 22, 2013, the Respondent noted that "there is no evidence of any disclosure by Mr Hober" and notified the Tribunal and the Claimant of its "intention to challenge" Professor Hobér's appointment as arbitrator.

13. By letter dated November 28, 2013, the Respondent submitted to the Permanent Court of Arbitration (the "**PCA**") its "Request for Challenge of Messrs Jan Paulsson and Kaj Hobér in the Matter of an Arbitration under the UNCITRAL Rules (1976) Between Valeri Belokon and the Kyrgyz Republic" pursuant to Article 12(1)(b) of the UNCITRAL Rules (the "**Challenges**").

14. By e-mail dated November 29, 2013, the Claimant confirmed that it opposed the Respondent's Challenges.

15. By letter dated December 2, 2013, the PCA invited the Respondent to provide certain additional documents and pay the PCA's administrative fee. The Respondent submitted the documents requested by the PCA on December 3, 2013.

16. From December 9-13, 2013, a hearing on the merits was held. The Parties filed post-hearing briefs on February 24, 2014.

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[2] *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, PCA Case No. 2009-23, Expert Opinion of Jan Paulsson dated March 12, 2012 (Exhibit CR-7).

[3] *Pantechniki S.A. Contractors & Engineers v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award dated July 30, 2012 (Annex VI/Exhibit CR-3).

[4] Cambridge University Press, 2005 (Annex VII/Exhibits CR-1 and CR-2).

[5] Similar but not identical versions of this letter have been provided by the Claimant and the Respondent in this challenge proceeding. The Respondent filed, as Annex IV to the Challenges, a signed version of this letter dated, on its face, November 16, 2013. However, in the Challenges, the Respondent stated that the letter was dated November 18, 2013. The Claimant filed, as Exhibit CR-9, another signed version of the letter, dated November 18, 2013, together with a cover e-mail of the same date. Given this cover e-mail, and the Respondent's reference to the November 18 date, I understand that the version of the letter filed by the Claimant as Exhibit CR-9 is the version that was actually transmitted by the Respondent to the Claimant, and that this occurred on November 18, 2013.

17. By letter dated June 24, 2014, the PCA acknowledged receipt of the administrative fee from the Respondent and invited the Parties to confirm their agreement to the Secretary-General of the PCA acting as appointing authority for the purpose of deciding the Respondent's Challenges. The Respondent and the Claimant confirmed their agreement by e-mail dated June 30, 2014 and letter dated July 8, 2014, respectively.

18. By letter dated July 9, 2014, the PCA confirmed that the PCA Secretary-General would decide the Respondent's Challenges and established a schedule for the making of written submissions by the Parties and the arbitrators. The PCA advised the Parties that the Secretary-General may provide reasons for his decisions on challenges if requested to do so by a Party.

19. By e-mail dated July 24, 2014, the Respondent informed the PCA that it had no further submissions to make in support of the Challenges.

20. By letter dated August 8, 2014, the Claimant submitted its "Response to KR's Challenges of Professors Hobér and Paulsson" (the "**Response**").

21. By letter dated August 19, 2014, the PCA invited the Respondent to comment on the Claimant's Response by August 26, 2014. Further to a request by the Respondent, the Claimant agreed to and the PCA confirmed the extension of the deadline for comments until September 5, 2014.

22. By e-mail dated August 21, 2014, the Claimant requested that the PCA Secretary-General render his decision on the Respondent's Challenges with reasons.

23. By e-mail dated September 4, 2014, the Respondent indicated that it had no comments on the Claimant's Response and requested that the PCA Secretary-General render his decision on the Challenges without reasons.

24. By e-mail of the same date, Professor Paulsson indicated that he did not wish to make any comments with respect to the Respondent's Challenges.

25. By letter dated September 9, 2014, the PCA informed the Parties that the PCA Secretary-General would render his decision on the Respondent's Challenges with reasons.

26. I note that no communications have been received from Professor Hobér or Mr. Schiersing with respect to the Respondent's Challenges.

III. THE CHALLENGE TO PROFESSOR HOBÉR

A. The Respondent's Position

27. The Respondent challenges Professor Hobér's independence and impartiality on four grounds: (i) his relationship with the Claimant's counsel; (ii) his non-disclosure of certain facts; (iii) his previously stated views on the concept of 'denial of justice'; and (iv) his repeated representation of investors in investor-State arbitrations. The Respondent submits that the "totality of the facts" gives rise to justifiable doubts as to Professor Hobér's independence and impartiality.[6]

[6] Respondent's Challenges, p. 8.

28. The Respondent submits that arbitrators must not only be impartial, but also appear to be impartial.[7] It asserts that the applicable test under Article 10(1) of the UNCITRAL Rules is an "objective one, pursuant to which it has to be determined whether a reasonable, fair-minded and informed person has justifiable doubts as to the arbitrator's impartiality."[8]

29. While specifying that "it does not in any way question [Professor Hobér's] integrity or competence or detract from [his] qualifications to serve as an arbitrator in other cases," the Respondent submits that:

> the facts . . . raise an appearance of lack of independence and bias that undermines the confidence in the investor-State system. The arguments laid out here, viewed globally, confirm that in the eyes of the public there is an appearance of a lack of impartiality and independence as well as an appearance of bias and there are circumstances that give rise to justifiable doubts as to the impartiality of [Professor Hobér].[9]

30. With regard to the first ground for the challenge, the Respondent indicates that Professor Hobér was previously appointed as arbitrator by the Claimant's counsel in *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* ("***Liman***").[10] According to the Respondent, this appointment creates the appearance of "a strong relationship of cooperation and reciprocal trust" between Professor Hobér and the Claimant's counsel and suggests that Professor Hobér is "too familiar with privileged insight into the Claimant's Counsel's view on relevant legal issues and *vice versa*."[11]

31. The Respondent also points to "more seemingly innocuous cues" that "nevertheless confirm the presence of an unduly close rapport."[12] It notes that Professor Hobér and the Claimant's counsel contributed chapters to the same 2008 publication (*Investment Treaty Law: Current Issues III*, edited by Andrea K. Bjorkland, Ian A. Laird and Sergey Ripinsky), were speakers at the same three conferences held in May 2011, May 2012 and June 2013, and are members of the editorial board of the Oxford University Press *Investment Claims* service.[13] According to the Respondent, these instances show that there exists "an especially close relationship aimed at mutual professional collaboration and advancement" between Professor Hobér and the Claimant's counsel.[14]

32. The Respondent recognizes that some of the listed circumstances may individually fall under the Green List of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "**IBA Guidelines**"), which enumerates "specific situations where no appearance of, and no actual conflict of interest exists from the relevant objective point of view."[15] While stating that the IBA Guidelines provide non-binding guidance regarding conflicts of interest generally, the

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[7] Respondent's Challenges, pp. 5-7.
[8] Respondent's Challenges, p. 5, quoting *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on the Challenge to Mr. Judd L. Kessler dated December 3, 2007, ¶80.
[9] Respondent's Challenges, p. 12.
[10] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award dated June 22, 2010 (Exhibit CR-4).
[11] Respondent's Challenges, pp. 7-8.
[12] Respondent's Challenges, p. 9.
[13] Respondent's Challenges, p. 9. *See also* Annexes IX-XII.
[14] Respondent's Challenges, p. 9. *See also* p. 10, referring to *Consorts d'Allaire c/. SAS SGS Holding France)* - ASA Bulletin - 1st Quarter 2011.
[15] Respondent's Challenges, p. 9; IBA Guidelines, art. 6 (Exhibit CRR-2).

Respondent submits that they provide "no specific guidance" where, as here, there is an "accumulation of circumstances" showing the closeness of a relationship.[16]

33. With regard to the second ground for the challenge, the Respondent submits that, while "there was no evidence of any disclosure by Mr Hobér despite what was initially suggested by the Claimant in its Request for Arbitration," Professor Hobér should have disclosed his appointment by the Claimant's counsel in *Liman*.[17]

34. Regarding the third ground for the challenge, the Respondent asserts that Professor Hobér has previously stated his views with respect to the "meaning of the legal concept of 'denial of justice'."[18] It also asserts that the "apparent prejudgment" of Professor Hobér is "aggravated" by the fact that he was appointed in *Liman* and in the present case by the same counsel, "who relied its case on the same interpretation of the legal concept of 'denial of justice' that forms a key plank of the Claimant's case in this arbitration."[19]

35. As for the fourth ground for the challenge, the Respondent suggests that Professor Hobér's "repeated representation of claimants in investor-State arbitrations buttresses the conclusion reached by a reasonable and informed third party that there is [a] likelihood that, as arbitrator, he could be influenced by factors other than the merits of the case."[20]

36. Finally, the Respondent submits that a challenge may be introduced at any stage of the arbitration, citing in support the Explanation to General Standard 3(d) of the IBA Guidelines.[21]

B. The Claimant's Position

37. The Claimant objects to the Respondent's challenge to Professor Hobér as being (1) out of time and (2) unjustified.

1. Timeliness of the challenge

38. The Claimant submits that the Respondent's challenge to Professor Hobér does not comply with the requirement of Article 11(1) of the UNCITRAL Rules that a challenge be notified within 15 days after the appointment of the arbitrator or after the circumstances on which the challenge is based "became known" to the challenging party.[22]

39. According to the Claimant, in the latter case, the 15-day time period runs from the date on which the challenging party "could reasonably have known" of the circumstances on which the challenge is based, and not from the date of the challenging party's "actual knowledge" of those circumstances.[23] In support, the Claimant refers to the decision on the challenge to Professor Orrego Vicuña in *Burlington Resources Inc. v. Republic of Ecuador*, in which, argues the Claimant, it was "found that the [Republic of Ecuador] had had sufficient information to file its proposal for disqualification over four months before it did so, since information about

[16] Respondent's Challenges, pp. 5, 9.
[17] Respondent's Challenges, pp. 2-3.
[18] Respondent's Challenges, p. 3.
[19] Respondent's Challenges, pp. 4, 7.
[20] Respondent's Challenges, pp. 10-11.
[21] Respondent's Challenges, p. 7.
[22] Claimant's Response, ¶¶53-54.
[23] Claimant's Response, ¶55.

Prof. Orrego Vicuña's previous appointments as arbitrator [was] publicly available on the ICSID website."[24]

40. The Claimant suggests that, in the present case, the circumstances on which the challenge is based were either known to the Respondent or publicly available more than 15 days before the Respondent notified its intention to make this challenge. Thus, the Respondent knew that Professor Hobér had not made any disclosures since September 2011. Information about the arbitrators and counsel acting in *Liman* was publicly available on the Energy Charter Treaty website as of early 2008. The final award in that case was issued in June 2010, and excerpts of it were published by the International Centre for Settlement of Investment Disputes ("**ICSID**") in May 2013. The conferences at which Professor Hobér and Mr. Sheppard spoke and the publications to which they contributed are also a "matter of public record."[25]

2. Merits of the challenge

41. The Claimant submits that the Respondent did not provide any evidence that "would cause a reasonable and informed third party to reach the conclusion that there was a likelihood that [Professor Hobér] may be influenced by factors other than the merits of the present case as presented by the Parties in reaching his decision as arbitrator."[26] Noting that the Respondent's Challenges were made two weeks before the hearing on the merits, and that the Respondent then delayed the payment of the PCA's administrative fee for several months, the Claimant also submits that the Respondent's Challenges were "opportunistically motivated: to postpone the hearing; to intimidate the arbitrators; and/or to lay the foundation for a challenge to any unfavourable award."[27]

42. The Claimant confirms that Professor Hobér was appointed as arbitrator in early 2008 by the claimants in *Liman*, who were then represented by Mr. Sheppard and others from Clifford Chance (but not Ms. Schuetz, as she only joined the team in the autumn of 2009).[28] However, the Claimant emphasizes that Mr. Sheppard and his colleagues did not "appoint" Professor Hobér; rather, they "recommended" Professor Hobér to the claimants, who chose him from a short list of candidates.[29]

43. The Claimant further declares that it is not aware of any other clients represented by Clifford Chance appointing Professor Hobér as arbitrator in the past three years.[30]

44. According to the Claimant, the standard for deciding challenges is "an objective one, often phrased as 'would a reasonably well informed person believe that the perceived apprehension – the doubt – is justifiable? Is it ascertainable by that person and so serious as to warrant the removal of the arbitrators?'"[31] Under this standard, argues the Claimant, a single prior appointment is insufficient to give rise to justifiable doubts.[32]

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[24] Claimant's Response, ¶55, referring to *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/07/14, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña dated December 13, 2013, ¶¶75-76 (Exhibit CRA-7).
[25] Claimant's Response, ¶¶ 56-60.
[26] Claimant's Response, ¶100.
[27] Claimant's Response, ¶3.
[28] Claimant's Response, ¶46.
[29] Claimant's Response, ¶47.
[30] Claimant's Response, ¶48.
[31] Claimant's Response, ¶63, referring to Challenge Decision of January 11, 1995, ¶ 23 in Ybk Com Arb 227, p. 234.
[32] Claimant's Response, ¶64.

45. In support, the Claimant refers to the Orange List of the IBA Guidelines, covering "situations that should be disclosed and may—but not necessarily—give rise to justifiable doubts," which includes "the circumstance where the arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm." The Claimant also refers to two decisions rejecting challenges to Professor Brigitte Stern, each made on the ground that she had been appointed by the same respondent State on three prior occasions.[33]

46. The Claimant confirms that Professor Hobér and Mr. Sheppard have "both been speakers at a few of the same conferences and contributed to the same publications, from time to time."[34] However, according to the Claimant, these circumstances do not evidence "any special relationship" between them, but only that "they are both well regarded (one assumes) within the arbitral community by some others in that community."[35]

47. The Claimant further submits that the "mere fact that Mr Hobér did not make a declaration referring to the *Liman* case does not of itself give [rise] to justifiable doubts."[36]

48. In addition, the Claimant argues that the denial of justice claim in *Liman* was based on facts different from those in the present case and that, ultimately, the *Liman* tribunal unanimously rejected the claimants' (Clifford Chance's clients') denial of justice case, which "augurs against any inference that Prof. Hobér is favourably disposed toward such an argument or toward Clifford Chance LLP."[37]

49. Finally, the Claimant submits that the Respondent "provides no substantiation whatsoever" with respect to its assertion that Professor Hobér invariably represents claimants in investor-State arbitrations.[38] As a counter-example, the Claimant indicates that Professor Hobér is presently acting as counsel for Hungary in *EDF International S.A. (France) v. Republic of Hungary*.[39]

IV. REASONING

50. The Respondent challenges Professor Hobér's independence and impartiality essentially on the basis of his relationship with the Claimant's counsel. Additional grounds for the challenge invoked by the Respondent include non-disclosure, a previously expressed view on the concept of 'denial of justice,' and repeat appointments by investors in investor-state arbitrations. The Claimant, in addition to denying that any of these circumstances give rise to justifiable doubts as to Professor Hobér's independence and impartiality, submits that the challenge is out of time according to Article 11(1) of the UNCITRAL Rules and therefore inadmissible.

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[33] Claimant's Response, ¶¶64-66, referring to *Tidewater Inc. and others v. the Bolivarian Republic of Venezuela*, ICSID Case No. ARB 10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern dated December 23, 2010 (Exhibit CRA-4) and *Universal Compression International Holdings SLU v. the Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, Arbitrators dated May 20, 2011 (Exhibit CRA-5).
[34] Claimant's Response, ¶52.
[35] Claimant's Response, ¶72.
[36] Claimant's Response, ¶71, referring to *Vivendi v. Argentina*, ICSID Cases Nos. ARB/03/19 and ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal dated May 12, 2008 (Exhibit CRA-1).
[37] Claimant's Response, ¶69.
[38] Claimant's Response, ¶75.
[39] Claimant's Response, ¶76, referring to *EDF International S.A. (France) v. Republic of Hungary*, UNCITRAL.

51. I will now address the timeliness and the merits of the challenge. As a preliminary matter, I note that, although the reasons that follow address only the issues that I consider necessary to arrive at my decision, I have considered all the submissions of the Parties.

A. Timeliness of the challenge

52. Article 11(1) of the UNCITRAL Rules requires that:

> A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in Articles 9 and 10 became known to that party.

53. To verify whether the 15-day time limit has been respected in the present case, two dates must be identified: the date on which the Respondent notified the challenge, and the date on which the circumstances giving rise to the challenge became known to the Respondent.

54. The Respondent indicated its "intention to challenge" Professor Hobér in a two-line e-mail dated November 22, 2013 stating non-disclosure as the ground for the challenge. The Challenges were filed with the PCA with a statement of all the grounds on November 28, 2013. As will be seen, whether November 22 or 28, 2013 is taken to be the date of notification of the challenge is immaterial to my conclusion on timeliness.

55. As regards the date on which the circumstances giving rise to the challenge became known to the Respondent, I note that the Respondent relies not on several individual grounds, but on an "accumulation of circumstances," which, together, give rise to the challenge.[40] Accordingly, the relevant date is not the date on which any one of the circumstances invoked by the Respondent became known to it, but the date on which it became aware of a sufficient number of circumstances to form the basis of a challenge.

56. While the Respondent did not directly address the question of timeliness of the challenge in its submissions, it did imply in its narrative of events leading to the challenge that the triggering event was the receipt on November 20, 2013 of the confirmation by the Claimant's counsel that Professor Hobér, at the time of his appointment, had not made any disclosures.[41] If the November 20, 2013 confirmation were taken to be the proverbial final straw that broke the camel's back, the Respondent's challenge to Professor Hobér would be timely.

57. I cannot, however, ascribe such a role to the November 20, 2013 confirmation. It did not provide the Respondent with any new information, which, added to previously available information, could have given rise to the challenge. The fact that Professor Hobér had not made any disclosures was known to the Respondent from the moment that it received the Claimant's Request for Arbitration dated August 2, 2011, as this document stated explicitly that Professor Hobér had "confirmed to the Claimant's representative that he [was] unaware of any circumstances likely to give rise to justifiable doubts as to his independence or impartiality."[42] Even assuming, against probability, that the Respondent found this phrase to be ambiguous, the Respondent could (and should) have sought clarification immediately and not, as it did, over two years later.

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[40] Respondent's Challenges, p. 9. *See also* p. 8, where the Respondent refers to the "totality of the facts."
[41] *See* Respondent's Challenges, p. 2.
[42] Claimant's Request for Arbitration, ¶88 (Exhibit CR-5).

58. I must therefore consider whether there is another circumstance that became known to the Respondent 15 days or less before it notified the challenge, and which, added to other previously known circumstances, gave rise to the challenge.

59. The Claimant states, without being contradicted by the Respondent, that the information regarding the involvement of Professor Hobér and Clifford Chance in *Liman* became publicly available on the Energy Charter Treaty website in early 2008 and that excerpts of the *Liman* award, which must have been necessary for the formulation of the Respondent's argument that Professor Hobér has fixed views on the question of denial of justice, were published on the ICSID website in May 2013.[43] The publication to which both Professor Hobér and Mr. Sheppard contributed was published in 2008, and the conferences in which both Professor Hobér and either Mr. Sheppard or Ms. Schuetz participated took place in May 2011, May 2012 and June 2013.[44]

60. Even if the most recent of these events, the conference of June 2013, is taken to be the event that created the accumulation of circumstances necessary to give rise to the Respondent's challenge, the challenge was nevertheless notified some five months after this circumstance became public.

61. The Respondent chose to make no reply to the Claimant's argument that the challenge was out of time, despite being given an opportunity to make additional comments. It did not even allege that it became aware of the circumstances giving rise to the challenge (other than non-disclosure) 15 days or less before notifying the challenge. The Respondent having provided no information as to when it became aware of the relevant circumstances, I can only assume that these circumstances became known to the Respondent around the time when information regarding them became publicly available.

62. I therefore find that the Respondent has failed to comply with the time limit set forth in Article 11(1) of the UNCITRAL Rules and that the challenge to Professor Hobér is untimely as a result. Nevertheless, I find it prudent to consider the substance of the challenge. For the reasons that follow, I conclude that, even if the challenge had been presented in a timely manner, the circumstances in question do not give rise to justifiable doubts as to Professor Hobér's independence and impartiality.

B. Merits of the challenge

63. The principal ground for the Respondent's challenge is Professor Hobér's relationship with the Claimant's counsel. Based on the Respondent's submissions, this relationship consists of: (i) one prior appointment in 2008 of Professor Hobér as arbitrator by a claimant represented by a Clifford Chance team including Mr. Sheppard (in *Liman*); (ii) the contribution by Professor Hobér and Mr. Sheppard of separate chapters to the same 2008 book; (iii) participation by Professor Hobér and either Mr. Sheppard or Ms. Schuetz in the same three conferences held in May 2011, May 2012 and June 2013; and (iv) Professor Hobér and Mr. Sheppard sitting together on one editorial board.

64. These circumstances are far from sufficient to show the existence of the kind of relationship between Professor Hobér and the Claimant's counsel that would give rise to justifiable doubts as to Professor Hobér's independence or impartiality on the part of a reasonable and fair-

[43] Claimant's Response, ¶¶56-57.
[44] Respondent's Challenges, Annexes IX-XII.

minded third person.[45] One prior appointment is insufficient to suggest that Professor Hobér in some way depends on the Claimant's counsel. Nor is there an appearance of partiality when, in the one prior appointment case, Professor Hobér ruled against the client that appointed him.[46] As for the handful of occasions over six years on which Professor Hobér and either Mr. Sheppard or Ms. Schuetz contributed to the same book, participated in the same conference or sat on the same editorial board, they also fall short of establishing the kind of close connection between Professor Hobér and the Claimant's counsel that would give rise to justifiable doubts. Two contributors to one book, as well as two speakers at one conference, may have no relationship at all, having each been invited to contribute or speak by the book's editors or the conference's organizers, as the case may be. Moreover, the frequency and intensity of the cited contacts does not exceed the frequency and intensity of the contacts that any two counsel and arbitrator active in the field of investor-State arbitration may have.

65. While the Respondent appears to suggest that the question of Professor Hobér's contacts should be regarded together with the other circumstances on which the Respondent bases its challenge, the latter add little to the persuasiveness of the Respondent's argument.

66. Thus, the Respondent refers to Professor Hobér's "previously stated views" on the "concept of 'denial of justice'" in *Liman*, where Clifford Chance relied "on the same interpretation of the legal concept of 'denial of justice'" as in this case.[47] As discussed in the context of Professor Paulsson's challenge below, I have doubts that the "concept of 'denial of justice'" as presented in the challenge to Professor Hobér is sufficiently specific for an appearance of pre-judgment to arise in the present case. Here, it suffices to say that there are insufficient facts to give rise to justifiable doubts as to Professor Hobér's ability to keep an open mind on the "concept of 'denial of justice'." .

67. As an additional ground for the challenge, the Respondent also refers to Professor Hobér's non-disclosure of any circumstances likely to give rise to justifiable doubts as to his independence or impartiality at the time of his appointment. The Respondent specifies that Professor Hobér should have disclosed his appointment in *Liman*.[48]

68. Circumstances that do not constitute sufficient grounds for a challenge to be sustained under Article 10(1) of the UNCITRAL Rules, because they do not "give rise" to justifiable doubts as to an arbitrator's independence and impartiality may nevertheless fall within an arbitrator's duty to disclose under Article 9, because they are "likely to give rise" to justifiable doubts. In certain cases, a failure to disclose circumstances that the arbitrator had a duty to disclose can, in itself, give rise to justifiable doubts as to that arbitrator's independence and impartiality. However, in the present case I find that Professor Hobér's appointment in *Liman* (as well as his other contacts with the Claimant's counsel, listed in paragraph 63 above) did not even rise to the standard for disclosure under Article 9—they were not likely to give rise to justifiable doubts as to Professor Hobér's independence and impartiality. An arbitrator may of course choose the prudent course of disclosing all of his prior contacts with the party appointing him and that party's counsel, or even all of his professional activities; however, Article 9 of the UNCITRAL Rules does not impose such a burdensome disclosure requirement.

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[45] *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on the Challenge to Mr. Judd L. Kessler dated December 3, 2007, ¶80.
[46] *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award dated June 22, 2010, Section K (Exhibit CR-4).
[47] Respondent's Challenges, pp. 3-4, 7-8.
[48] Respondent's Challenges, pp. 2-3.

69. Finally, the Respondent refers to Professor Hobér's "repeated representation of claimants in investor-State arbitrations."[49] Given that the Respondent brings forward no evidence (save for Professor Hobér's appointment in *Liman*, discussed above) to substantiate this assertion, it does not affect my conclusions as to Professor Hobér's impartiality and independence.

70. Therefore, having reviewed the facts and circumstances of the challenge and the submissions of the Parties, I do not find the Respondent's doubts regarding Professor Hobér's independence and impartiality to be justifiable under the circumstances.

V. THE CHALLENGE TO PROFESSOR PAULSSON

A. The Respondent's Position

71. The Respondent challenges the appointment of Professor Paulsson as presiding arbitrator on the ground of his "previously stated views" on the "concept of 'denial of justice'," which, according to the Respondent, give rise to "a justifiable appearance of doubt as to his capacity for impartiality and/or open-mindedness."[50]

72. Specifically, the Respondent asserts that Professor Paulsson has previously expressed views on the concept of 'denial of justice' in the Chevron Expert Opinion, the Pantechniki Award and the Monograph, all of which were cited in the Claimant's Supplemental Submission.[51] The Respondent specifies that the Supplemental Submission was delivered to it on November 13, 2013.[52]

73. In the Respondent's view, Professor Paulsson's Writings suggest that he "stuck to his views in different occasions and roles as a sole arbitrator, an independent legal expert as well as an academic defending his view"[53] and that he "consistently has taken the view on the concept of 'denial of justice' interpreting it in such way that it conforms the interests of an investor, but not a state."[54] The Respondent submits that a reasonable observer would not believe that the Respondent "has a chance" of convincing Professor Paulsson to change his mind with respect to "the meaning of the concept of 'denial of justice'."[55]

74. According to the Respondent, the circumstances of the present case resemble those in which a challenge to Professor Orrego Vicuña was recently sustained in *CC/Devas (Mauritius) Ltd. and others v. The Republic of India* ("***CC/Devas***").[56]

75. Finally, the Respondent submits that it is concerned that it "has become normal for investment arbitrators to constantly switch hats: one minute acting as counsel, the next framing the issue as an academic, or influencing policy as government representative or expert witness.'"[57] As with Professor Hobér, the Respondent submits that it has "so far no reasons to doubt Professor

[49] Respondent's Challenges, p. 10.
[50] Respondent's Challenges, p. 3.
[51] Respondent's Challenges, pp. 2-3.
[52] Respondent's Challenges, p. 2.
[53] Respondent's Challenges, p. 2.
[54] Respondent's Challenges, p. 3.
[55] Respondent's Challenges, p. 3.
[56] Respondent's Challenges, pp. 2-3, referring to *CC/Devas (Mauritius) Ltd. and others v. The Republic of India*, UNCITRAL, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña dated September 30, 2013 (Exhibit CRA-6).
[57] Respondent's Challenges, p. 11

Paulsson's personal intention to act impartially and independently,"[58] but that the facts suggest "an appearance of lack of independence and bias that undermines the confidence in the investor-State system."[59]

B. The Claimant's Position

76. The Claimant objects to the Respondent's challenge to Professor Paulsson as being (1) out of time and (2) unfounded.

1. Timeliness of the challenge

77. As with the challenge to Professor Hobér, the Claimant submits that in making its challenge to Professor Paulsson the Respondent failed to comply with the requirement of Article 11(1) of the UNCITRAL Rules that a challenge be notified within 15 days of the date on which the circumstances on which the challenge is based became known to the challenging party.[60]

78. Specifically, the Claimant states that it filed the Supplemental Submission on November 1, 2013, while the Respondent notified the Claimant of its intention to challenge Professor Paulsson only on November 18, 2013.[61]

2. Merits of the challenge

79. Also as with the challenge to Professor Hobér, the Claimant submits that the Respondent provides no evidence that would give rise to justifiable doubts as to Professor Paulsson's impartiality and independence, and suggests that the challenge to Professor Paulsson is "opportunistically motivated."[62]

80. According to the Claimant, "prior writings do not per se cause a reasonable third person having knowledge of all the facts to conclude that justifiable doubts exist about that arbitrator's impartiality or independence."[63] Thus, the Green List of the IBA Guidelines includes the case where "[t]he arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated)."[64]

81. The Claimant refers to the challenge decision in *CC/Devas*, which stated that sustaining a challenge "requires more than simply having expressed any prior view," requiring in addition "an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind."[65] The Claimant specifies that in *CC/Devas*, Professor Orrego Vicuña was disqualified because he had applied a consistent

[58] Respondent's Challenges, p. 3.
[59] Respondent's Challenges, p. 12. *See also* ¶¶ 28-29 above.
[60] Claimant's Response, ¶¶84-85.
[61] Claimant's Response, ¶¶86-87.
[62] Claimant's Response, ¶¶ 3, 100. *See also* ¶ 43 above.
[63] Claimant's Response, ¶92.
[64] Claimant's Response, ¶93.
[65] Claimant's Response, ¶94 citing *CC/Devas (Mauritius) Ltd. and others v. The Republic of India*, UNCITRAL, Decision on Challenge to Hon. Marc Lalonde and Professor Orrego Vicuña dated September 30, 2013, ¶58 (Exhibit CRA-9).

interpretation of the concept of "essential security interests" in three prior investor-State arbitrations and had affirmed his interpretation in a subsequent academic article.[66]

82. The Claimant submits that, in contrast, Professor Paulsson's Writings are "general opinions and/or historical surveys," "uncontroversial," do not reflect a bias in favour of investors, and are in any event not focused on the present case.[67] In sum, Professor Paulsson's Writings do not suggest that he is incapable of giving his full attention and consideration to the positions developed by each party on the question of denial of justice.[68]

83. With regard to the Chevron Expert Opinion, the Claimant asserts that Professor Paulsson discussed "the content of the denial of justice standard in general terms" and "stressed that the role of the tribunal is to determine 'whether the actions or inaction of national courts transgress the standards applicable in international law.'"[69] Regarding the Pantechniki Award, the Claimant indicates that it concerned alleged wrongful application of the law and that Professor Paulsson rejected the investor's denial of justice claim against Albania.[70] As for the Monograph, the Claimant submits that it surveys the historical evolution of the concept of 'denial of justice' and seeks to identify its modern definition.[71]

84. Finally, the Claimant refers to the decisions rejecting challenges to Professor Campbell McLachlan in *Urbaser SA & Anor v. Argentine Republic* and Professor Philippe Sands QC in *Içkale İnşaat Limited Şirketi v. Turkmenistan*. In the first case, the Claimant submits that the challenge was rejected notwithstanding Professor McLachlan's previously expressed views on the most-favoured nation standard because "there was no reason to believe that Prof. McLachlan was incapable of keeping an open mind on the issues of the present case."[72] In the second case, although Professor Sands had previously ruled on the interpretation of the same provision of a bilateral investment treaty, the challenge was dismissed because "there was 'no overlap of facts relevant to the earlier (Kilic) arbitration and those relevant to the merits of the present case.'"[73]

VI. REASONING

85. The Respondent challenges Professor Paulsson on the ground of his previously stated views on the concept of 'denial of justice.' The Claimant, in addition to denying that Professor Paulsson's previously stated views give rise to justifiable doubts as to his independence and impartiality in the present case, submits that the challenge is untimely according to Article 11(1) of the UNCITRAL Rules and therefore inadmissible.

86. I will now address the timeliness and the merits of the challenge to Professor Paulsson. As with the challenge to Professor Hobér, as a preliminary matter I note that, although the reasons that

[66] Claimant's Response, ¶95.
[67] Claimant's Response, ¶89.
[68] Claimant's Response, ¶99.
[69] Claimant's Response, ¶88(a).
[70] Claimant's Response, ¶88(b).
[71] Claimant's Response, ¶88(c).
[72] Claimant's Response, ¶97, quoting *Urbaser SA & Anor v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator dated August 12, 2010, ¶54 (Exhibit CRA-3).
[73] Claimant's Response, ¶98, quoting *Içkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Claimant's Proposal to Disqualify Philippe Sands dated July 11, 2014, ¶119 (Exhibit CRA-8).

follow address only the issues that I consider necessary to arrive at my decision, I have considered all the submissions of the Parties.

A. Timeliness of the challenge

87. As stated above, pursuant to Article 11(1) of the UNCITRAL Rules, a challenge must be notified within 15 days of the appointment of the challenged arbitrator or the date on which the circumstances giving rise to the challenge became known to the challenging party.

88. The Parties agree that the Respondent notified its challenge to Professor Paulsson on November 18, 2013.

89. The Parties also appear to agree that the circumstances giving rise to the challenge became known to the Respondent upon reading the Claimant's Supplemental Submission.[74] However, while the Respondent states that the Supplemental Submission was "delivered" to it on November 13, 2013, the Claimant states that it filed the Supplemental Submission on November 1, 2013.[75]

90. These two statements are not as contradictory as they seem at first glance. The Supplemental Submission is dated, on its face, November 1, 2013. In its November 18, 2013 letter notifying the challenge, the Respondent found it "important to reiterate again that the exhibits to the Supplemental Submission were delivered to the Counsel for the Respondent on 13 November 2013" and "thus reiterate[d] that the hard copy as well as respective exhibits to the Claimant's Supplemental Submission were made available to the Respondent on 13 November 2013 only."[76] Based on the Respondent's letter, I understand that it is the hard copy of the Supplemental Submission and its accompanying exhibits that were delivered to the Respondent on November 13, 2013. I then see no reason to doubt the Claimant's assertion that the Supplemental Submission was filed (in soft copy) on November 1, 2013; that is, 17 days before the Respondent notified its challenge to Professor Paulsson.

91. The only remaining question is whether the Claimant's Supplemental Submission, without the accompanying exhibits, sufficed to provide the Respondent with the information needed to make this challenge. I believe that it did. It was clear from the Supplemental Submission that the Claimant was now making a denial of justice claim. The Supplemental Submission also referred to Professor Paulsson's Writings, thus informing the Respondent that Professor Paulsson had previously written on the subject of denial of justice. This information was sufficient for the Respondent to realize that it might wish to bring a challenge against Professor Paulsson. It was then the Respondent's responsibility to research the grounds for the challenge (for example, by obtaining copies of Professor Paulsson's Writings) and notify the challenge within the 15-day time limit.

92. I therefore find that the Respondent has failed to comply with the time limit set forth in Article 11(1) of the UNCITRAL Rules and that the challenge to Professor Paulsson is untimely as a result. Nevertheless, I find it prudent to consider the substance of the challenge. For the reasons that follow, I conclude that, even if the challenge had been presented in a timely manner, the circumstances in question do not raise justifiable doubts as to Professor Paulsson's independence and impartiality.

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[74] *See* Respondent's letter dated November 18, 2013 (Exhibit CR-9); Claimant's Response, ¶¶ 86.
[75] Respondent's Challenges, p. 2; Claimant's Response, ¶¶ 14, 86.
[76] Respondent's letter dated November 18, 2013, ¶¶19, 23 (Exhibit CR-9).

B. Merits of the challenge

93. Noting that in its Supplemental Submission the Claimant makes its case on denial of justice by reference to Professor Paulsson's Writings, the Respondent submits that Professor Paulsson's previously stated views on the "concept of 'denial of justice'" give rise to a "justifiable appearance of doubt as to his capacity for impartiality and/or open-mindedness."[77] According to the Respondent, Professor Paulsson has "stuck to his views" on three separate occasions and has consistently interpreted 'denial of justice' in a manner favoring investors.[78]

94. The Claimant replies that Professor Paulsson's Writings are in the nature of "general opinions and/or historical surveys," are uncontroversial, do not reflect any bias, and in no way suggest that Professor Paulsson "is not capable of giving his full attention and consideration to the positions developed by each party."[79]

95. Both Parties cite H.E. President Peter Tomka's recent challenge decision in *CC/Devas*.[80] In that decision, President Tomka stated that:

> . . . knowledge of the law or views expressed about the law are not *per se* sources of conflict that require removal of an arbitrator; likewise, a prior decision in a common area of law does not automatically support a view that an arbitrator may lack impartiality. Thus, to sustain any challenge brought on such a basis requires more than simply having expressed any prior view; rather, I must find, on the basis of the prior view and any other relevant circumstances, that there is an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties have a reasonable expectation of an open mind.[81]

96. President Tomka went on to sustain the challenge to Professor Orrego Vicuña (and reject the challenge to Hon. Marc Lalonde). Notably, President Tomka found that Professor Orrego Vicuña had in prior writings assumed a consistent position on a *specific legal issue*, several times interpreting the "essential security interests" clause of investment treaties in reference to customary international law on the state of necessity, thus raising doubts for an objective observer as to Professor Orrego Vicuña's ability to approach this specific legal issue with an open mind.[82]

97. By contrast, in the present case, the Respondent has not been able to identify a specific legal issue that Professor Paulsson might have pre-judged. The Respondent's reference to the "concept of 'denial of justice'" is insufficiently specific. Denial of justice is a general cause of action under international law that may be invoked in a multitude of circumstances. As Professor Paulsson states in the Monograph, "claims of denial of justice cannot be decided without balancing a number of complex considerations which tend to be specific to each instance."[83] As such, the mere fact that Professor Paulsson has written on the general topic of denial of justice only suggests that he has expertise on that subject, but would not raise doubts

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[77] Respondent's Challenge, pp. 2-3, 11.
[78] Respondent's Challenge, p. 2.
[79] Claimant's Response, ¶¶89, 96, 99.
[80] Respondent's Challenges, pp. 2-3; Claimant's Response, ¶94.
[81] *CC/Devas (Mauritius) Ltd. and others v. The Republic of India*, ICSID Case No. ARB/07/14, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña dated December 13, 2013, ¶58 (Exhibit CRA-6).
[82] *CC/Devas (Mauritius) Ltd. and others v. The Republic of India*, ICSID Case No. ARB/07/14, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña dated December 13, 2013, ¶¶59, 61-62 (Exhibit CRA-6).
[83] Cambridge University Press, 2005, p. 8 (Exhibits CR-1).

on the part of a reasonable and fair-minded third person as to Professor Paulsson's ability in the present case to approach the Parties' arguments regarding the Claimant's denial of justice claim with an open mind.

98. While the Respondent has not attempted to demonstrate by specific reference to Professor Paulsson' Writings that there is an appearance of pre-judgment with regard to any legal issue more specific than 'denial of justice' generally, I have nevertheless examined the denial of justice claim made by the Claimant in its Supplemental Submission, as well as each of Professor Paulsson's Writings. On this basis, I am satisfied that Professor Paulsson's Writings do not reveal fixed views on any specific legal issue likely to be relevant in the present case on which the Parties have a reasonable expectation of an open mind. I would add that I have found no indication that Professor Paulsson has consistently interpreted the concept of 'denial of justice' in a manner favoring investors. For example, as noted by the Claimant, in the Pantechniki Award Professor Paulsson rejected the investor's denial of justice claim.

99. Therefore, having reviewed the facts and circumstances of the challenge, and the submissions of the Parties, I do not find the Respondent's doubts regarding Professor Paulsson's independence and impartiality to be justifiable under the circumstances.

* * *

VII. DECISION

NOW THEREFORE, I, Hugo Hans Siblesz, Secretary-General of the Permanent Court of Arbitration, having considered the submissions of the Parties, and having established to my satisfaction my competence to decide the Challenges in accordance with the UNCITRAL Rules,

HEREBY DISMISS the challenge brought against Professor Hobér.

HEREBY DISMISS the challenge brought against Professor Paulsson.

Done at The Hague on October 6, 2014.

Hugo Hans Siblesz