INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A.

Claimants

v.

Argentine Republic

Respondent

ICISD Case No. ARB/03/23

Annulment Proceeding

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

Courtesy Translation

18 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)
Annex RA [No.]	Annex of the Argentine Republic
Application	Application for Annulment and Stay of Enforcement of the Award filed by the Argentine Republic, 9 October 2012
Arbitration Rules	Rules of Procedure for Arbitration Proceedings, in force since 10 April 2006
Argentina-Belgium/Luxembourg BIT	Agreement between the Government of the Argentine Republic and the Belgium/Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, signed on 28 June 1990, in force since 20 May 1994
Argentina-France BIT	Agreement between the Government of the Argentine Republic and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments, signed on 3 July 1991, in force since 3 March 1993
Argentina	Argentine Republic
art(s).	article(s)
Annulment Hearing	Annulment Hearing, held on June 2-3, 2014 at ICSID, Washington, D.C.
Award	*EDF International S.A, SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, of 11 June 2012
Centre / ICSID	International Centre for Settlement of Investment Disputes
Challenge	Challenge to Professor Gabrielle Kaufman-Kohler, filed by the Argentine Republic on 29 November 2007
Challenge Decision	*EDF International S.A, SAUR International S.A. and León Participaciones Argentinas S.A*, Challenge Decision Regarding Professor Gabrielle Kaufman-Kohler, 25 July 2008
Claimants	*EDF International S.A, SAUR International S.A. and León Participaciones Argentinas S.A.*
Convention / ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
Decision on Jurisdiction	*EDF International S.A, SAUR International S.A. and León Participaciones Argentinas S.A*, Decision on Objections to Jurisdiction , 5 August 2008
Freshfields	Freshfields Bruckhaus Deringer LLP
IBA Guidelines	IBA Guidelines of Conflicts of Interests in International Arbitration
ICJ	International Court of Justice
LA AR [N°]	Legal Authority of the Argentine Republic
Memorial on Annulment	Memorial on Annulment of the Argentine Republic, 28 May 2013
p(p).	page(s)

Respondent	Argentine Republic
Total v. Argentina (ICSID Case No. ARB/04/1)	Total S.A. v. Argentina
UNCITRAL	United Nations Commission on International Trade Law

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 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23) – 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 3 December 2012, the Secretary-General of ICSID 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, and attached Ms. Cheng's *curriculum vitae*. Afterwards, on 2 January 2013 the Secretary-General of ICSID informed the parties that Ms. Cheng had accepted her appointment. In such opportunity, the Secretary-General sent the parties the declaration under Arbitration Rule 6(2), signed by Ms. Cheng on 24 December 2012, and an additional declaration dated 21 December 2012 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), and *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15).

2. Subsequently, Ms. Cheng was appointed to serve as a member of the *ad hoc* committee in another annulment proceeding commenced by the Argentine Republic. Indeed, on 27 May 2014 the *ad hoc* committee was constituted in the annulment proceeding in the case of *Total S.A. v. Argentine Republic* (ICSID Case No ARB/04/1) (hereinafter, *Total v. Argentina*), composed by Eduardo Zuleta, Álvaro Castellanos and Teresa Cheng. The claimant in that case is represented by the law firm of Freshfields Bruckhaus Deringer LLP (hereinafter, Freshfields).

3. By letter dated 27 July 2015, the Secretary of the *ad hoc* committee in the *Total v. Argentina* proceeding transmitted the parties to that case a message from Ms. Cheng in which she stated that:

> 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 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. [1]

4. By letter of 29 July 2015, the Argentine Republic stated, both in this proceeding and in the *Total v. Argentina* proceeding 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 information in connection with the disclosure made in her letter dated 27 July 2015. Subsequently, on 3 August 2015 the Argentine Republic requested additional information about Ms. Cheng's past or present relationships with the law firm of Freshfields.[3]

5. On 6 August 2015, Ms. Cheng responded to the Argentine Republic's questions and requests for information.

> I refer to the Respondent's letter (English translation) dated 29 July 2015. The answers to the queries raised are set out below:
>
> *i) Why was the instruction given by Freshfields not disclosed to the parties to these proceedings before the advice was rendered or immediately*

[1] *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Annulment Proceeding, Letter from the Secretary of the *ad hoc* committee to the parties, 27 July 2015.

[2] Note PTN No. 143/AI/15 from the Argentine Treasury Attorney-General's Office to the members of the committees in this case and the case of *Total v. Argentina*, 29 July 2015.

[3] Note PTN No. 144/AI/15 from the Argentine Treasury Attorney-General's Office to the members of the committees in this case and the case of *Total v. Argentina*, 3 August 2015.

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.

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 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.

iii) Who is the party to whom Ms. Cheng gave legal advice?

The advice was given to China Shanshui Cement Group Ltd.

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 co-arbitrators. This can be seen in the text of the IBA Guidelines eg Articles 3.3.8 and 3.3.9.

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.

I refer to the letter from the Respondent dated 3 August 2015 stating the following:

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.

Based on my records and information, I provide my response as follows.

Within the past three years,

1. 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).

2. 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,

1. 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 the hearing of that application..

2. 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.[4]

6. Without prejudice to the statements below, it must be noted Freshfields' instructions to Ms. Cheng 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, are not mentioned in Ms. Cheng's professional background as detailed in her *curriculum vitae* submitted in *Total v. Argentina*, nor are they mentioned in the *curriculum vitae* submitted in this proceeding.

7. In light of the terms and facts disclosed in Ms. Cheng's communications, on 6 August 2015 the Argentine Republic proposed the disqualification of Ms. Cheng as a member of the annulment committees in this proceeding and in *Total v. Argentina*, pursuant to Article 57 of the ICSID Convention and Rule 9 of the Arbitration Rules, 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.[5]

8. On the same date, the Secretary of the *ad hoc* Committee reported that the proposal for disqualification of Ms. Cheng would be decided by the other members of the Committee, in accordance with article 58 of the ICSID Convention.[6] In addition, in accordance with Arbitration Rule 9(6), the Secretary advised that the annulment proceeding would be suspended until a decision was taken on the proposal for disqualification.

9. On 11 August 2015, the majority of the Committee established a schedule for the parties' and Ms. Cheng's submissions.[7] On 14 August 2015, the Argentine Republic informed Sir Christopher Greenwood and Prof. Yasuhei Taniguchi that the parties had reached an agreement to request a change in the schedule.[8] Claimants' counsel confirmed such agreement by means of an e-mail of the same date.[9]

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[4] First letter from the Secretary of the *ad hoc* Committee to the parties, 6 August 2015.

[5] Note SPTN No. 155/AI/15 from the Argentine Treasury General-Attorney's Office to the members of the committees in this case and the case of *Total v. Argentina*, 6 August 2015.

[6] Second letter from the Secretary of the *ad hoc* Committee to the parties, 6 August 2015.

[7] Letter from the Secretary of the *ad hoc* Committee to the parties, 6 August 2015.

[8] Note PTN No. 162/AI/15 from the Argentine Treasury General-Attorney's Office to the members of the *ad hoc* Committee, Sir Christopher Greenwood and Prof. Yasuhei Taniguchi, 14 August 2015.

[9] Email from Claimants' counsel to the Secretary of the *ad hoc* Committee, 14 August 2015.

II. LEGAL STANDARD FOR DISQUALIFICATION UNDER THE ICSID CONVENTION

10. 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,"[10] and it relates to the ease with which the lack of the required qualities can be perceived.[11] Professor Schreuer explains that "'[m]anifest' may be defined as easily understood or recognized by the mind."[12]

11. 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."[13] 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 procedure exists under the Convention, expressly or impliedly, for deciding on proposals for disqualification."[14] This ratifies the need for members of Annulment Committees to be, and appear to be, independent and impartial at all times.

12. 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"—

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[10] *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.

[11] *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.

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

[13] *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).

[14] *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.

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.[15] Pursuant to Article 57 of the ICSID Convention, the lack of such qualities warrants the disqualification of arbitrators and members of Annulment Committees.

13. 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.[16] 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 merits of the case.[17]

14. Under Articles 57 and 14(1) of the ICSID Convention, it is sufficient to establish the appearance of dependence or bias.[18] 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

[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, ¶ 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.

[16] *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.

[17] *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.

[18] *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.

> 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. [19]

15. 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,[20] as these are "matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy."[21] 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."[22]

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

> [T]he 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.[23]

17. 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

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[19] *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.

[20] *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.

[21] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Dissenting Opinion of Judge T. Buergenthal, ICJ Rep. 3, p. 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").

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

[23] *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.

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 relationship with any of the law firms involved in the dispute[24] 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.[25]

18. 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.

19. Finally, and even leaving aside the grounds for this disqualification proposal—which render Ms. Cheng's situation unsustainable—it should be noted that the situation of the members of an annulment committee is particularly important in terms of their independence and impartiality. Indeed, while a circumstance affecting an arbitrator's independence and impartiality is subject not only to disqualification but eventually to an annulment proceeding, if such a circumstance affects a member of the annulment committee, the only remedy provided for in the Convention is the challenge, without any further control being possible.

III. GROUNDS FOR THE DISQUALIFICATION PROPOSAL

A. The relationship between Ms. Cheng and a law firm that regularly litigates against the Argentine Republic in investment arbitration proceedings warrants her disqualification

20. The existence of a contemporaneous professional link between a member of an 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.[26] For this reason, Rule 6(2)(b) of the Arbitration

[24] *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.

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

[26] *Ibid.* at 7.

Rules provides that Arbitrators and Committee Members must attach a statement of "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.

21. Indeed, this was the obligation that Ms. Cheng assumed when she accepted her appointment in this annulment proceeding, as well as in the case of *Total v. Argentina*. In both opportunities, 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.[27]

22. In accepting her appointment in the present case, in December 2012, Ms. Cheng attached an additional declaration in which she informed the Secretary-General that, at that time, she was a member of the annulment committees in the cases of *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17) and *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15).[28] It should be stressed that in such declaration Ms. Cheng also pointed out who were both parties' representatives.[29] However, in the annulment proceeding in *Total v. Argentina* Ms. Cheng changed the practice she had adopted in this annulment proceeding and in *El Paso v. Argentina*. In effect, in the case of *Total v. Argentina*, Ms. Cheng omitted to mention the claimant's counsel.[30] Neither Ms. Cheng's additional declaration nor her *curriculum vitae* contained any references whatsoever to her link with Freshfields, which also represents claimants in ten investment arbitration proceedings against the Argentine Republic, including *Total v. Argentina*.

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[27] Ms. Cheng's Declaration in this annulment proceeding, 24 December 2012; Ms. Cheng´s Declaration in the annulment proceeding in the case of *Total v. Argentina* (ICSID Case No. ARB/04/1), 22 May 2014 (Annex A).

[28] Ms. Cheng's additional Declaration in this annulment proceeding, 21 December 2012.

[29] *Ibid.*

[30] Ms. Cheng's additional Declaration in the annulment proceeding in the case of *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), 23 May 2012 (Annex B); Ms. Cheng's additional Declaration in this annulment proceeding, 21 December 2012; Ms. Cheng's additional Declaration in the annulment proceeding in the case of *Total S.A. v. Argentina* (ICSID Case No. ARB/04/1), 24 April 2014 (Annex C).

23. It was not until a month before the hearing in the *Total v. Argentina* annulment proceeding, and after Ms. Cheng was appointed to serve on four annulment committees involving the Argentine Republic, that this party learnt of the links between Ms. Cheng and Freshfields. It should even be noted that some of such links were not informed by Ms. Cheng until after the Argentine Republic had specifically asked about past links. To this day, certain information has not yet been provided.

24. 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 of that year 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."[31] It must be noted that Dechert did not represent the claimant in the case in which Mourre served as an arbitrator, but in other cases. Without prejudice to the foregoing, the arbitrator disclosed such information given the litigation matters the law firm of Dechert held against Venezuela, in which Mr. Mourre clarified he would not be involved.[32]

25. In a second communication in response to Venezuela's concern about that 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.[33]

26. Under such circumstances, the Bolivarian Republic of Venezuela proposed the disqualification of Mr. Mourre, and in consequence thereof, Mr. Mourre submitted his

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[31] *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.

[32] *Ibid.*

[33] *Ibid.*, ¶ 8.

resignation.[34] Such resignation was subsequently accepted by the other arbitrators.[35]

27. 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* 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 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 relationship with the claimants' counsel in that arbitration but with lawyers representing claimants in other cases against Venezuela.

28. As will be explained below, not only did Ms. Cheng fail to disclose her past link with the law firm of Freshfields, but also she did not disclose a *contemporaneous* link with such law firm until after three months since such link had been terminated. This deprived the Argentine Republic of the possibility of adopting a position with respect to such contemporaneous link.

29. 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.[36] 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."[37]

30. In the context of ICSID, there is no doubt whatsoever 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).

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[34] *Ibid.*, ¶ 11.

[35] *Available at* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/12/21&tab=PRD.

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

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

31. In the case of *Grand River Enterprises et al v. United States of America*, Prof. Anaya was challenged on account of his representation of one of the parties in proceedings before human rights organisations.[38] 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."[39] 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.[40]

32. At the time of Ms. Cheng's appointment in *Total v. Argentina*, Ms. Cheng was aware of the conflicts that might arise out of her links with the representatives of one of the parties, even more so following the parties' and the Committee's discussion in this annulment proceeding of such issue in the parties' submissions and at the Hearing on Annulment, as will be explained below.

33. 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 in *Total v. Argentina* is a professional relationship with Freshfields on account of which she received compensation. The fact that Ms. Cheng may have received compensation from the client rather than from Freshfields does not affect her conflict of interest, since Freshfields was the one that generated such relationship. To make matters worse, Ms. Cheng decided to receive once again instructions from Freshfields in the course of the annulment proceeding in *Total v. Argentina* and 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

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

[39] *Ibid.*

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

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 breaches of the duty of disclosure and her lack of transparency warrant her disqualification

34. The duty of disclosure of those persons that are appointed to serve as arbitrators or members of annulment committees in 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.[41]

35. 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 the case in which he/she has been appointed."[42]

36. 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."[43]

37. This duty to disclose any and all relevant information to the parties is a continuing obligation.

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[41] *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.

[42] *Ibid*, ¶ 103.

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

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.[44]

38. In relation to what such declaration must contain, and to whether a period of time applies to determine what circumstances to disclose, Prof. Daele streeses that:

> No 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.[45]

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[44] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, and *AWG Group Limited v. Argentine Republic*, UNCITRAL Arbitration, Decision of the Second Proposal for Disqualification of an Arbitrator, 12 May 2008, ¶ 43. In this regard, Karel Daele notes that these adjustments have been made "to reflect current practice of 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 Paper of the ICSID Secretariat. *See* Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat, 12 May 2005, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Suggested%20Changes%20to%20the%20ICSID%20Rules%20and%20Regulations.pdf.

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

39. The importance of disclosing the existence of professional relationships with the counsel to 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**.[46]

40. The position of the Chairman of the Administrative Council is clearly intended to prevent conflicts of interest that can naturally and evidently arise from professional relationships involving those that are supposed to be relied upon to exercise independent judgment. Such 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 receive instructions from one of the parties' counsel. This is particularly so when one of the lawyers instructing the arbitrator is a law firm of the size and with the resources of Freshfields.

41. 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 Argentina had been notified that Ms. Cheng intended to receive instructions from Freshfields—which has represented and represents claimants in ten investment arbitration proceedings against Argentina—it would have emphatically objected to such circumstance.

42. Ms. Cheng recognized this obligation when, upon being appointed and pursuant to Rule 6(2), she stated in this annulment proceeding and in the proceeding in *Total v. Argentina* 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

[46] *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).

> proceeding.[47]

43. 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 links with the law firm of Freshfields.

44. By letter of the Secretary of the Committee dated July 27, submitted in the annulment proceeding in *Total v. Argentina*, Ms. Cheng informed the parties that, by that time more than three months before, she had been instructed by Freshfields 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 (hereinafter, the IBA Guidelines), 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.

45. 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 shareholder disputes on which Ms. Cheng had provided legal advice.

46. As noted above, in her letter dated August 6, 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.

47. The contents of this paragraph are sufficient to conclude that it is manifestly impossible for

[47] Ms. Cheng's Declaration in this annulment proceeding, 24 December 2012 (emphasis added); Ms. Cheng's Declaration in the annulment proceeding in the case of *Total v. Argentina* (ICSID Case No. ARB/04/1), 22 May 2014 (emphasis added) (Annex A).

Ms. Cheng to "be relied upon to exercise independent judgment," as required by Article 14(1) of the ICSID Convention.

48. 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 in Total v. Argentina and of this 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.

49. The lack of timely disclosure precluded the Argentine Republic from objecting to that 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 impossible for Ms. Cheng not to have noticed that she was being instructed by the law firm that represents the claimant in the *Total v. Argentina* annulment proceeding. Her decision to accept an instruction from Freshfields—which represents claimants in ten investment arbitration proceedings 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.

50. Secondly, the seriousness of the situation is ratified by Ms. Cheng's reference to the fact that the reason why she finally disclosed her relationship with Freshfields was 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, inter alia). All this evidences once more Ms. Cheng's total lack of transparency. If such potential process of appointment as an arbitrator had not taken place, this party would never have learnt that she was instructed by Freshfields *while the annulment proceedings in Total v. Argentina and in this case were pending.* Worse still, in her letter dated August 6 Ms. Cheng still holds that she did not have the obligation to disclose her contemporaneous link with Freshfields.

51. Thirdly, in her letter dated August 6 Ms. Cheng ratified that, in her opinion, Article 3.3.9 of the IBA Guidelines is not applicable. This article states: "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." In light of the facts that took place, 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.

52. 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. In addition, even if the IBA Guidelines made that distinction between offices and allowed for the possibility not to disclose relationships on the basis of the office related to 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."

53. Fourthly, Ms. Cheng's situation is actually provided for in Article 2.3.2 of the IBA Guidelines, which states: "The 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.[48]

54. 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

[48] IBA Guidelines, Part II, Introduction, ¶ 2.

interest situation, expressly state their willingness to have such a person act as arbitrator."[49] As already mentioned, in informing the parties of the conflict of interest only after the instruction was concluded, Ms. Cheng deprived the parties of their right to provide their views on the matter.

55. 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 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).[50]

56. 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, among other issues. Once again, the clarity of the information provided by Ms. Cheng in this regard is non-existent.

57. 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, in her response to his disqualification proposal, accurately identify the decision of the Hong Kong Court to which she refers.

58. Finally, Ms. Cheng also provided ambiguous and incomplete information in the final part of her 6 August 2015 communication, in response to the Argentine Republic's letter of 3 August 2015. On the one hand, it should be noted that it was only in such communication, and at the

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[49] *Ibid.*

[50] *See* First letter from the Secretary of the *ad hoc* Committee to the parties, 6 August 2015.

request of the Argentine Republic, that Ms. Cheng decided to disclose other relationships with Freshfields. In her July 27 letter, in the context of an appointment in another case, Ms. Cheng decided to disclose her relationship with Freshfields of this year, but she inexplicably failed to disclose previous relationships. It was only in response to the specific question made by the Argentine Republic on August 3 that Ms. Cheng finally decided to disclose her other relationships. This lack of transparency seems to be unprecedented in ICSID arbitration.

59. On the other hand, Ms. Cheng seems to downplay the importance of the (first?) instruction she received from 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.[51] 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:

> [I]t 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.[52]

60. In addition, 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. Indeed, Ms. Cheng accepted her appointment as a member of the annulment committee in the case of *Total v. Argentina* on 22 May 2014, and she attached her *curriculum vitae* with her academic and professional background and her relationships which "supposedly" showed her

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[51] *See ibid.* 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.

[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 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.

impartiality and independence as an arbitrator.[53] In particular, when describing her professional experience as a lawyer in her *curriculum vitae*, Ms. Cheng indicated her participation in litigation, mediation and international and domestic commercial arbitration. Moreover, Ms. Cheng pointed out her experience in arbitration. Specifically, she mentioned her participation as counsel only in three arbitration proceedings.[54] None of those cases took place within three years of her appointment as a member of this Committee.

61. The judgment of the Court of Appeal in *Shimizu Corporation v. The Attorney General* was rendered in January 1997, which means that the arbitration took place years before that date.[55] 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.[56] 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.

62. The concern is not that Ms. Cheng disclosed such information, but that she failed to disclose the arbitration where she did have a relationship with Freshfields. It was not until the Argentine Republic specifically asked her about her relationships with Freshfields that she disclosed on 6 August 2015 the case of *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

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[53] 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 in the instant annulment proceeding.

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

[55] *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.

[56] *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.

Provisions) Appeal Board dated 29 September 2008."[57]

63. In short, considering that 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 Ms. Cheng should have failed to timely—at the time of her appointment—mention her participation in an arbitration in which, precisely, she was instructed by Freshfields.

64. 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 decided to disclose her relationship with Freshfields contemporaneous with the annulment proceeding in *Total v. Argentina* and this proceeding, should have decided not to disclose her previous relationship with such law firm.

65. In this context, it is no minor matter that Ms. Cheng failed to disclose, at the time of accepting each of the appointments as a member of annulment committees in cases involving the Argentine Republic, especially in the case of *Total v. Argentina*, that her own son had worked with Freshfields in the Paris office.[58] Such office is actively involved in international arbitration, and at the time, the main lawyers who participate or have participated as counsel for Total S.A. in ICSID Case No. ARB/04/1—including Jan Paulsson, Georgios Petrochilos, Nigel Blackaby and Noah Rubins—worked in that office.

66. In brief, Ms. Cheng's relationships with Freshfields and her failure to adequately and timely disclose them, be they past or contemporaneous with the annulment proceeding in the case of *Total v. Argentina* and this proceeding, mean that, as stated above, she manifestly cannot be relied upon to exercise independent judgment.

C. Ms. Cheng's objectivity and open-mindedness with regard to one of the annulment claims submitted to the *ad hoc* Committee's consideration are tainted

67. One of the annulment claims put forth by the Argentine Republic in this proceeding is grounded on the fact that the Tribunal was not properly constituted in the original proceedings

[57] First letter from the Secretary of the *ad hoc* Committee to the parties, 6 August 2015.

[58] In *Impregilo S.p.A v. Argentine Republic* (ICSID Case No. ARB/07/17), Ms. Cheng accepted her appointment on 30 January 2012.

and that there was a serious departure from fundamental rules of procedure due to Ms. Gabrielle Kaufmann-Kohler's conflicts of interest and her breach of the duties of investigation, disclosure and notification, along with arbitrator Jesús Remón's conflict of interest.[59] Such annulment claim was discussed at length at the Hearing on Annulment in June last year.[60] Ms. Cheng herself posed a large number of questions concerning such claim at the Hearing on Annulment.[61]

68. In light of the conflicts of interest personally affecting Ms. Cheng in this proceeding and in *Total v. Argentina*, and of her failure to disclose such situations and the position Ms. Cheng has adopted in connection with the duty of disclosure, Ms. Cheng cannot be trusted to approach the referred to annulment claim with impartiality. In this regard, there have been cases in which disqualification proposals were sustained on the basis of situations that raised

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[59] Application for Annulment, § III.A; Memorial on Annulment, § IV.A; Reply on Annulment, § II.A.

[60] *See, e.g.*, corrected English Transcript of the Hearing on Annulment, 2 June 2014, 75:21-92:16, 100:9-104:12 (Argentine Republic's opening statements); corrected English Transcript of the Hearing on Annulment, 3 June 2014, 251:4-262:11 (Argentine Republic's closing statements), 350:16-359:22 (questions by the *ad hoc* Committee).

[61] *See, e.g.*, corrected English Transcript of the Hearing on Annulment, 2 June 2014, 78:9-11 ("MEMBER CHENG: Question: Just have the date when Professor Kaufmann-Kohler was appointed to the board of the UBS?"), 103:20-104:10 ("MEMBER CHENG: Can I ask the Parties to provide at some stage or if I have it--if it is in the Bundle, then I have missed it--the original disclosure statement by Mr. Remón? I don't think I find it in the evidence that has been filed, if that can be provided to me later. The reason I ask for that is that I remember--I can't remember which side made a comment about some general statements of disclosure made by Mr. Remón that his firm has acted for someone about something related to Argentina. I may have totally misremembered and, therefore, I ask to see the source document."), 142:5-11 ("MEMBER CHENG: Before you move on, can you help me with the--your case on the waive of point? Are they applicable to both Professor Kaufmann-Kohler as well as Professor Remón, and if so, how? Either you, yourself, will deal with it or maybe if Mr. Di Rosa is going to deal with it, I'd like to be clearer on that point."), 145:4-6 ("MEMBER CHENG: So that applies--your waiver applies only to Professor Remón and not Kaufmann-Kohler?"), 163:8-17 ("MEMBER CHENG: Can I just take you back--I'm sorry to take you back a little bit--to the point that you said it is, perhaps, not Article 52(1)(a), but (d), if it is reviewable at all by this Committee. Insofar as following the line and assuming that's the right argument and one is to go and review it under (d), is the review one of de novo or, again, still just limits it to looking at the procedures of the Challenge Decision? What's your position?"), 197:6-16 ("MEMBER CHENG: Just to let you know what I think I understand--and I may be wrong, and if that's the case, someone will correct me. I thought Argentina was saying that in the letter of the 16th of April, which I believe it's on your next slide, it was when Professor Remón said that the firm has traditionally provided legal advisory services, and, therefore, it must have gone back to those times. That was the implication that they got there about the timing. I believe that that's how they put it in what they have said."); corrected English Transcript of the Hearing on Annulment, 3 June 2014, 280:5-8 ("MEMBER CHENG: You asked to us look at the Wolfram Report. Of course, we haven't decided whether or not we can embark upon that, but I couldn't locate the Wolfram Report."), 350:18-351:8 ("MEMBER CHENG: Just one question that I'd like to give primarily to EDF to comment on. Argentina has set out a lot in their written submissions, but I don't think I've heard how you want to deal with it, and this is the question of the duty to disclose. You talked about Professor Remón's duty to disclose and out of abundance of caution, his letter, dated the 18th of April, if I remember correctly, as an indication and et cetera. How would you comment on Professor Kaufmann-Kohler's duty to disclose in the light of what Professor Remón has done comparatively? Is there anything you want to say about that?").

doubts for an objective observer as to the challenged arbitrator's ability to approach the questions to be decided in the arbitration with an open mind.[62]

69. Thus, for instance, in the case of *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13) the claimants argued that Mr. Boesch's serving as an arbitrator in the case of *Ruby Roz* gave rise to a manifest risk of pre-judgment on the part of the arbitrator given the similarities between the *Ruby Roz* case and the *Caratube* arbitration proceeding in which Mr. Boesch's disqualification had been proposed.[63] The unchallenged arbitrators upheld the proposal for disqualification and found that:

> **[I]ndependently of Mr. Boesch's intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that**, due to his serving as arbitrator in the *Ruby Roz* case and his exposure to the facts and legal arguments in that case, **Mr. Boesch's objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted**. In other words, a reasonable and informed third party would find it highly likely that Mr. Boesch would prejudge legal issues in the present arbitration based on the facts underlying the *Ruby Roz* case.
>
> The Unchallenged Arbitrators therefore conclude that the Claimants have demonstrated that **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. Accordingly, the Unchallenged Arbitrators find that **Mr. Boesch manifestly lacks one of the qualities required by Article 14(1) of the ICSID Convention** in this particular case.[64]

70. Along the same lines, in the arbitration proceeding of *CC/Devas (Mauritius) Ltd. and others v. The Republic of India*, the Republic of India proposed the disqualification of Prof. Orrego Vicuña on the basis of his interpretation of the essential security interests provision of the Argentina-U.S. BIT—which was similar to a provision the claimants intended to invoke—in

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[62] *See, e.g., Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, ¶¶ 90-91; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, UNCITRAL Arbitration, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, ¶ 64.

[63] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, ¶ 71.

[64] *Ibid.* ¶¶ 90-91 (emphasis added).

the awards issued in the cases of *CMS*, *Enron* and *Sempra*.[65] In addition, the disqualification proposal was based on the fact that, in a subsequent scholarly article, Prof. Orrego Vicuña had continued to defend his interpretation of the referred to provision.[66]

71. The President of the International Court of Justice, who decided the disqualification proposal, held that, in order to sustain such proposal, he had to find that there was "an appearance of pre-judgment of an issue likely to be relevant to the dispute on which the parties ha[d] a reasonable expectation of an open mind."[67] The respondent submitted that Prof. Orrego Vicuña had a "closed view" as to the interpretation of the essential security interests provision.[68] In sustaining the challenge, Judge Tomka concluded:

> The standard to be applied here evaluates the objective reasonableness of the challenging party's concern. In my view, being confronted with the same legal concept in this case arising from the same language on which he has already pronounced on the four aforementioned occasions **could raise doubts for an objective observer as to** Professor Orrego Vicuña's **ability to approach the question with an open mind**. The later article in particular suggests that, despite having reviewed the analyses of three different annulment committees, his view remained unchanged. Would a reasonable observer believe that the Respondent has a chance to convince him to change his mind on the same legal concept? Professor Orrego Vicuña is certainly entitled to his views, including to his academic freedom. But equally **the Respondent is entitled to have its arguments heard and ruled upon by arbitrators with an open mind**. Here, the right of the latter has to prevail. For this reason, I agree with the Respondent that Professor Orrego Vicuña should withdraw from this arbitration.
>
> Having considered all the relevant factors, I sustain the Respondent's Request to disqualify Professor Orrego Vicuña from serving as an arbitrator in these proceedings.[69]

72. The reasons on which Judge Tomka relied to sustain the challenge to Mr. Orrego Vicuña apply to this proceeding. Given that this case involves key issues relevant to the decision on annulment which affect Ms. Cheng personally and with respect to which she has already formed an opinion, an objective observer would be expected to have reasonable doubts as to

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[65] *See CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, UNCITRAL Arbitration, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuña as Co-Arbitrator, 30 September 2013, ¶¶ 17-19.

[66] *Ibid.* ¶ 22.

[67] *Ibid.* ¶ 58.

[68] *Ibid.* ¶ 61.

[69] *Ibid.* ¶¶ 64-65 (emphasis added).

Ms. Cheng's ability to address such issues with an open mind. In particular, Ms. Cheng's insistence that it was unnecessary to disclose that—while an annulment proceeding was pending in which Freshfields represented one of the parties and she was a member of the annulment committee—she worked with, or was instructed by, Freshfields in a certain matter (this being a clear situation giving rise to a potential conflict of interest which must undoubtedly be disclosed) suggests that, despite the fact that a similar issue was discussed at length at the Hearing on Annulment in this proceeding, and that the same issue has arisen in connection with Ms. Cheng herself given her potential appointment as an arbitrator in another case—which oddly enough Ms. Cheng failed to identify in her 6 August 2015 communication—her opinion will remain unchanged. In this context, no reasonable observer would believe that the Argentine Republic has a chance to convince Ms. Cheng to change her mind on such issues.

73. Indeed, Ms. Cheng has placed herself in a situation which is abhorrent to the law: being a judge in her own case. This is so given that this Committee's eventual decision on the duty of disclosure with respect to Ms. Kaufmann-Kohler's situation may indirectly contain a criticism or an endorsement of Ms. Cheng's own conduct. In light of this situation, it is impossible for the parties to rely upon her exercise of independent judgment.

74. In this regard, Ms. Cheng's situation has also placed the other two members of this Committee in a very delicate position. This is so given that, in order to decide on this proposal for disqualification, the other two members of the Committee must now rule on a situation similar to that affecting Ms. Kaufmann-Kohler in connection with her breach of the duty of disclosure—this being precisely one of the annulment grounds that gave rise to this proceeding. It is in order to avoid this delicate situation that the Argentine Republic requests that Ms. Cheng resign as a member of the *ad hoc* Committee in this annulment proceeding.

75. In sum, the Argentine Republic's right to have its arguments heard and ruled upon with an open mind must prevail. For this reason, Ms. Cheng must withdraw from this proceeding. Accordingly, as decided by the President of the International Court of Justice in the case of *CC/Devas*—should Ms. Cheng not choose to resign—Ms. Cheng's proposal for disqualification must be sustained.

IV. PRAYER FOR RELIEF

76. 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; pursuant to paragraph 74 hereof; and

(b) should Ms. Cheng fail to do so, that the majority of the Committee sustain this proposal to disqualify Ms. Teresa Cheng; and

(c) that each party bear its own expenses incurred in connection with this proposal for disqualification.

Respectfully submitted on 18 August 2015.

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