

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

IN THE ARBITRATION PROCEEDING BETWEEN

**CANEPA GREEN ENERGY OPPORTUNITIES I, S.Á R.L. AND  
CANEPA GREEN ENERGY OPPORTUNITIES II, S.Á R.L.**

CLAIMANTS

and

**KINGDOM OF SPAIN**

RESPONDENT

**ICSID Case No. ARB/19/4**

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**DECISION ON THE SECOND PROPOSAL TO DISQUALIFY  
MR. PETER REES QC**

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*Issued by*

Professor Sean David Murphy  
Professor Silvina S. González Napolitano

*Secretary of the Tribunal*

Ms. Ana Constanza Conover Blancas

*Date:* 10 February 2020

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## I. INTRODUCTION

### A. Request for Arbitration and Constitution of the Tribunal

1. On 1 February 2019, Canepa Green Energy Opportunities I, S.á r.l. and Canepa Green Energy Opportunities II, S.á r.l. (“**Claimants**”) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against the Kingdom of Spain (“**Respondent**”). The Claimants and the Respondent are hereinafter collectively referred to as the “**Parties.**”
2. On 25 February 2019, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).
3. On 11 September 2019, the Tribunal was constituted with Professor Sean Murphy, appointed by agreement of the Parties as presiding arbitrator; Mr. Peter Rees QC, appointed by the Claimants; and Professor Silvina González Napolitano, appointed by the Respondent.

### B. Respondent’s First Proposal to Disqualify Mr. Rees

4. On 11 October 2019, the Respondent filed a proposal for disqualification of Mr. Rees, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the “**First Proposal for Disqualification**”). On the same date, the Centre informed the Parties that the proceeding had been suspended until the other Members of the Tribunal, Professor Sean Murphy and Professor Silvina González Napolitano (the “**Unchallenged Arbitrators**”), ruled on the proposal, in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9.
5. On 19 November 2019, having received observations from both Parties and Mr. Rees, the Unchallenged Arbitrators rejected the First Proposal for Disqualification (the “**Decision on the First Proposal for Disqualification**”). The proceeding was resumed on the same date, pursuant to ICSID Arbitration Rule 9(6).

### C. Respondent's Second Proposal to Disqualify Mr. Rees

6. On 2 October 2019, the European Commission (the "EC") filed an application for leave to intervene as a non-disputing party in this proceeding pursuant to ICSID Arbitration Rule 37(2) (the "**Application to Intervene**").
7. On 27 November 2019, following an invitation from the Tribunal to provide comments, the Parties filed their observations on the EC's Application to Intervene.
8. On 2 December 2019, ICSID transmitted to the Parties a disclosure from Mr. Rees in which he stated the following:

In light of the EU's request to intervene in this arbitration, and my continuing duty of disclosure, I wish to disclose that on 26 September 2019 I was appointed arbitrator by Nord Stream 2 AG (a Swiss corporation) in an UNCITRAL arbitration brought against the EU. At present the EU are challenging my appointment and the PCA has, yet, to make a decision on the challenge. The circumstances of the arbitration and of the challenge are in the public domain.

The arbitration is unrelated to this arbitration in that the subject matter is entirely different, the parties are entirely different (save that the EU is now seeking to intervene in this arbitration), and counsel involved in that arbitration are entirely different from counsel in this arbitration.

This disclosure is made out of an abundance of caution and I confirm that these circumstances do not impact or affect my independence and impartiality.

9. On the same date, the Centre informed the Parties that Mr. Rees had recused himself from deciding on the EC's Application to Intervene and, accordingly, such decision was to be issued by Professor Murphy and Professor González Napolitano, without the involvement of Mr. Rees.
10. On 10 December 2019, the Respondent filed a second proposal for the disqualification of Mr. Rees, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Second Proposal for Disqualification**").
11. On the same date, the Centre informed the Parties that the proceeding had been suspended until the Second Proposal for Disqualification was decided, pursuant to ICSID Arbitration Rule 9(6). The Parties were also informed that the Proposal would be decided by the

Unchallenged Arbitrators, in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

#### **D. Schedule for Filing of Submissions**

12. On 11 December 2019, the Centre transmitted to the Parties and Mr. Rees the procedural calendar for the submission of written observations on the Second Proposal for Disqualification, which had been fixed by the Unchallenged Arbitrators.
13. On 20 December 2019, in compliance with the procedural calendar, the Claimants submitted their Comments on the Second Proposal for Disqualification (“**Claimants’ Observations**”).
14. On 23 December 2019, Mr. Rees furnished his explanations on the Second Proposal for Disqualification, as envisaged by ICSID Arbitration Rule 9(3) (“**Rees’ Explanations**”).
15. Both Parties were allowed to submit simultaneously additional observations on the Second Proposal for Disqualification by 10 January 2020. No additional observations were received from either Party by that date.

#### **E. Respondent’s Request for Additional Submissions and Information from Mr. Rees**

16. On 13 January 2020, the Respondent requested further disclosures from Mr. Rees concerning the reasons for which a challenge against him was upheld in an UNCITRAL arbitration involving Nord Stream 2 AG and the European Union (“EU”) (the “*Nord Stream case*”). On the same date, ICSID transmitted a copy of the Respondent’s request to the Unchallenged Arbitrators and separately to Mr. Rees, and the Claimants commented on the Respondent’s request, upon receiving an invitation from the Unchallenged Arbitrators to provide observations.
17. On 15 January 2020, the Unchallenged Arbitrators transmitted to the Parties a message from Mr. Rees of 13 January 2020 containing his observations on the Respondent’s request for further disclosures (“**Rees’ Additional Explanations**”). The Unchallenged Arbitrators invited the Parties to submit any additional observations following Mr. Rees’ Additional Explanations relating to the Respondent’s Second Proposal for Disqualification by 17 January 2020.

18. On 17 January 2020, the Respondent submitted additional observations concerning its Second Proposal for Disqualification (“**Respondent’s Additional Observations**”). No additional observations were received from the Claimants by that date.

## **II. THE PARTIES’ SUBMISSIONS**

### **A. Respondent’s Submissions**

19. The Respondent’s arguments on the second proposal to disqualify Mr. Rees were set forth in its submissions of 10 December 2019 and 17 January 2020. These arguments are summarized below.

#### **1. Applicable Legal Standards**

20. The Respondent considers as applicable law: (1) the ICSID Convention, (2) the international custom and (3) the general principles of law recognized by civilized nations, in accordance with the sources of public international law mentioned in Article 38 of the Statute of the International Court of Justice.<sup>1</sup>

21. *First*, the Respondent refers to Articles 14 and 57 of the ICSID Convention and submits that these provisions must be interpreted in accordance with the Vienna Convention on the Law of Treaties (“**VCLT**”). The Respondent argues, *inter alia*, that: (1) in view of the difference among the three authentic language versions of Article 14 of the ICSID Convention, this article should be interpreted as requiring arbitrators to be both independent and impartial (in conformity with Article 33(4) of the VCLT);<sup>2</sup> and (2) an arbitrator must be disqualified if there is *any* indication of its lack of independence or impartiality based on the wording of Article 57 of the ICSID Convention indicating that a party may propose the disqualification of an arbitrator on account of “*any fact*” indicating a manifest lack of qualities (pursuant to a good faith interpretation of the ordinary meaning of the terms of the Convention, as required by Article 31 of the VCLT).<sup>3</sup> Accordingly, the Respondent concludes that “[a]n interpretation of Articles 57 and 14 of the ICSID Convention making a challenge to the arbitrators especially

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<sup>1</sup> Second Proposal for Disqualification, ¶ 2; Respondent’s Additional Observations, ¶ 6.

<sup>2</sup> Second Proposal for Disqualification, ¶¶ 12-15.

<sup>3</sup> *Ibid.*, ¶¶ 16-18, 24.

difficult would be contrary to a proper interpretation of the ICSID Convention in accordance with the VCLT”<sup>4</sup> and that the “word ‘manifest’ cannot be misunderstood as a legitimization of stains and doubts on the impartiality and independence of arbitrators.”<sup>5</sup>

22. Moreover, the Respondent claims that Articles 14 and 57 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.<sup>6</sup> The Respondent also argues that the applicable legal standard is an “objective standard based on the reasonable analysis of evidence by a third party,”<sup>7</sup> and that an inference of manifest bias suffices as a basis for disqualification if it is anchored to facts.<sup>8</sup>

23. **Second**, the Respondent argues that the international custom regarding arbitration demands “(1) impartiality and independence on the arbitrators; and (2) that they can be disqualified when there is any reasonable doubt about the lack of those qualities.”<sup>9</sup> For instance, the Respondent refers to the criteria adopted by the International Bar Association (“**IBA**”) in its Guidelines on Conflict of Interest in International Arbitration, under which an arbitrator must be disqualified if there is any reasonable doubt or indication of a lack of impartiality.<sup>10</sup> The Respondent argues that such international custom is reflected in the international arbitration practice and cannot be different in the ICSID cases under the argument that the Article 57 of the ICSID Convention uses the word “*manifest*”.<sup>11</sup>

24. **Finally**, the Respondent claims that it is a general principle of international law that adjudicators must be independent and impartial and they can be disqualified if “there is any slight doubt that they are biased.”<sup>12</sup> The Respondent adds that the general principles of law do not require strict evidence nor require the challenging party to prove actual bias; rather, bias can be inferred from the facts of the case.<sup>13</sup>

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<sup>4</sup> *Ibid.*, ¶ 23.

<sup>5</sup> Respondent’s Additional Observations, ¶ 8.

<sup>6</sup> Second Proposal for Disqualification, ¶ 49.

<sup>7</sup> *Ibid.*, ¶ 50.

<sup>8</sup> *Ibid.*, ¶ 52.

<sup>9</sup> *Ibid.*, ¶ 27.

<sup>10</sup> *Ibid.*, ¶ 21.

<sup>11</sup> *Ibid.*, ¶ 28.

<sup>12</sup> *Ibid.*, ¶ 33.

<sup>13</sup> *Ibid.*, ¶ 34.

## 2. Grounds for Disqualification

25. The Respondent bases its Second Proposal for Disqualification on three grounds: (1) that Mr. Rees lacks independence or impartiality because he is in conflict with the EU, given that the EU challenged his appointment as arbitrator in the *Nord Stream* case;<sup>14</sup> (2) that, given Mr. Rees' decision to recuse himself from ruling on the EC's Application to Intervene in this case, Mr. Rees has acknowledged that he has a conflict with the EU, which thus precludes his independence and impartiality;<sup>15</sup> and (3) that Mr. Rees' conflict with the EU regarding its intervention in this case cannot be separated from other aspects of this case.<sup>16</sup>

26. The Respondent summarizes its position as follows:

[T]he Challenged Arbitrator has an open conflict with the European Union ("EU") that has led him to recuse himself from acting in relevant stages of the Arbitration procedure. If Mr. Rees is not capable of an impartial and independent judgment regarding the legal person of the EU, he cannot have impartiality and independence to decide on a case where the EU international law is core in the arbitration.

This leaves no room for an impartial and fair determination on relevant issues as the jurisdiction, the applicable law or the State aid legal framework. All these EU matters are key in the dispute at hand.<sup>17</sup>

27. With respect to the first ground, the Respondent observes that the EU challenged Mr. Rees in the *Nord Stream* case, and therefore "there is a clear conflict between the EU and the Challenged Arbitrator."<sup>18</sup> Further, the Respondent considers that, because the EU and its Member States share an identical position on the Energy Charter Treaty ("ECT") and its applicability to intra-EU disputes, "to be in conflict with the EU is to be in conflict with the Kingdom of Spain."<sup>19</sup>

28. With respect to the second ground, by recusing himself from deciding on the EC's Application to Intervene, Mr. Rees recognized that he lacks the necessary independence and impartiality

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<sup>14</sup> *Ibid.*, ¶¶ 35-40.

<sup>15</sup> *Ibid.*, ¶¶ 41-45.

<sup>16</sup> *Ibid.*, ¶¶ 46-48.

<sup>17</sup> *Ibid.*, ¶¶ 3-4.

<sup>18</sup> *Ibid.*, ¶ 38.

<sup>19</sup> *Ibid.*, ¶ 39.

to decide on issues affecting the EU or EU legislation.<sup>20</sup> The Respondent submits that neither the ICSID Convention nor the ICSID Arbitration Rules authorize an arbitrator to select the phases of the proceeding in which she or he wants to be involved. On the contrary, ICSID Arbitration Rule 8(1) expressly provides that “[i]f an arbitrator becomes incapacitated or unable to perform the duties of his office” the procedure for disqualification will apply. In the view of the Respondent, Mr. Rees’ self-recusal from ruling on the EC’s Application to Intervene evidences that he is unable to perform the duties of his office and warrants his disqualification.<sup>21</sup>

29. With respect to the third ground, the fact that “all the dispute orbits around EU legislation” renders Mr. Rees unable and incapable of acting for any phase of the proceeding, whether relating to jurisdiction, merits or quantum.<sup>22</sup>
30. The Respondent concludes that, beyond any reasonable doubt, Mr. Rees “has a clear and open conflict with the EU and in the same way he acknowledges he must not decide on an EU amicus curiae application due to his conflict with the EU.” Accordingly, he cannot be a member of a Tribunal who must decide on a dispute with several relevant EU-related issues.<sup>23</sup> Otherwise, the Respondent’s right to be heard by an independent and impartial tribunal would be violated and the Respondent’s right of defense would be harmed.
31. Finally, the Respondent claims that the grounds for disqualification in the Second Proposal for Disqualification must be considered together with the grounds of the First Proposal for Disqualification.<sup>24</sup>
32. Based on the above, the Respondent concludes that Mr. Rees must be disqualified to preserve the independence and impartiality of the arbitration.

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<sup>20</sup> *Ibid.*, ¶¶ 29, 41, 44, 54; Respondent’s Additional Observations, ¶ 28.

<sup>21</sup> Second Proposal for Disqualification, ¶ 43.

<sup>22</sup> *Ibid.*, ¶¶ 46-48.

<sup>23</sup> *Ibid.*, ¶ 69.

<sup>24</sup> Respondent’s Additional Observations, ¶¶ 11-12, 30.

## **B. Claimants' Submissions**

33. The Claimants' arguments on the second proposal to disqualify Mr. Rees were set forth in their submission of 20 December 2019. These arguments are summarized below.

### **1. Applicable Legal Standards**

34. The Claimants submit that the legal standard applicable to the disqualification of an arbitrator is contained at Articles 14 and 57 of the ICSID Convention and refer to their previous submissions in this regard contained in their observations on the First Proposal for Disqualification.<sup>25</sup>

35. In addition, the Claimants refer to the Unchallenged Arbitrators' findings in their Decision on the First Proposal for Disqualification that *(1)* the standard for a challenge under the ICSID Convention "embodies an objective criterion that imposes the stringent requirement of a 'manifest' lack of the three types of qualities set forth in Article 14(1)";<sup>26</sup> and *(2)* the Respondent bears the burden to show that Mr. Rees' alleged lack of impartiality or independence is "evident" or "obvious".<sup>27</sup>

36. The Claimants submit that the Respondent has reproduced in its Second Proposal for Disqualification the same arguments concerning the applicable legal standard contained in its First Proposal for Disqualification, without regard to the fact that the Unchallenged Arbitrators expressly rejected the Respondent's submissions as to the applicable legal standard in their Decision on the First Proposal for Disqualification.

### **2. Grounds for Disqualification**

37. The Claimants argue that the Second Proposal for Disqualification is a dilatory tactic employed by the Respondent, and that it is devoid of merit and should be dismissed. The Claimants argue that none of the grounds mentioned by the Respondent "would lead an objective observer to

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<sup>25</sup> Claimants' Observations, ¶ 9 and fn. 13.

<sup>26</sup> *Ibid.*, ¶ 9 (citing the Decision on the First Proposal for Disqualification, ¶ 55).

<sup>27</sup> *Ibid.*, ¶ 10 (citing the Decision on the First Proposal for Disqualification, ¶ 50).

discern a lack of independence on the part of Mr. Rees, let alone the ‘*manifest*’ lack of independence required under the applicable legal standard.”<sup>28</sup>

38. With respect to the first ground for disqualification, the Claimants submit that the allegation that Mr. Rees is now in conflict with both the EU and the Respondent is meritless for the following main reasons: the EU is not a party to this proceeding; the *Nord Stream* case has no relevance to or overlap with the present proceeding as it is completely unrelated (e.g., it concerns different parties and different legal issues); the circumstances of the challenge in the *Nord Stream* case have no relevance to the present case (press reports indicated that the challenge concerned Mr. Rees’ connections to Royal Dutch Shell (“**Shell**”) and Shell’s connection to the Nord Stream 2 pipeline); and the Respondent and the EU are not the same entity, and thus any conflict with the EU would not result in a conflict with the Respondent (otherwise, the EC could not be allowed to intervene as a non-disputing party in this case and, in any case, an *amicus* intervention cannot be allowed if it would result in the disqualification of a Member of the Tribunal, as it would disrupt the proceeding).<sup>29</sup>
39. With respect to the second ground for disqualification, the Claimants argue that Mr. Rees’ decision to recuse himself from ruling on the EC’s Application to Intervene does not warrant his disqualification based on the following: ICSID Arbitration Rule 8(1) is inapplicable in this case because the term “incapacity” contained in that provision refers to a mental or physical inability to participate in a case for issues of health and does not relate to a supervening conflict of interest (in this case, Mr. Rees does not suffer any mental or physical inability that renders him incapable or unable to “perform the duties of the office” within the meaning of ICSID Arbitration Rule 8(1)); Mr. Rees’ decision to recuse himself was as a precautionary measure and not a recognition of any lack of independence or impartiality; and nothing in the ICSID Convention or the ICSID Arbitration Rules prevents a partial recusal of an arbitrator (in fact, the Tribunal has broad case management powers and a partial recusal is a proportionate and appropriate case management decision in circumstances such as in this case where a confined issue arises for determination within a proceeding).<sup>30</sup>

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<sup>28</sup> *Ibid.*, ¶ 5.

<sup>29</sup> *Ibid.*, ¶¶ 12-19.

<sup>30</sup> *Ibid.*, ¶¶ 20-23.

40. With respect to the third ground for disqualification, the Claimants assert that Mr. Rees is capable of making determinations concerning EU law. The Claimants submit that the mere fact of being subject to a challenge by the EU does not mean that Mr. Rees cannot interpret and apply EU law. As mentioned above, the challenge in the *Nord Stream* case was based on Mr. Rees' connections to Shell which in no way concerns or affects the ability of Mr. Rees to interpret or apply EU law.<sup>31</sup>
41. Finally, the Claimants submit that, in any event, their claims are based exclusively on Respondent's breaches of the ECT and they do not rely on EU law. As the Tribunal is not called upon to decide issues of EU law, the Respondent's submissions concerning the need to make determinations on EU law have no relevance in this case.<sup>32</sup>

### III. MR. REES' EXPLANATIONS

42. Mr. Rees provided his Explanations on 23 December 2019 and Additional Explanations on 13 January 2020.
43. In his Explanations, Mr. Rees indicated that the EU's challenge in the *Nord Stream* case had been upheld and, as a result, he was no longer involved in that arbitration. In addition, he confirmed that "the subject matter of that arbitration, and the basis of the challenge, have nothing whatsoever to do with the subject matter of this arbitration."<sup>33</sup>
44. Moreover, Mr. Rees noted that his decision to recuse himself from the decision on the EC's Application to Intervene was made out of an abundance of caution and that, even though there was no connection between the two arbitrations, and he would have been independent and impartial in participating in any decision, he "wished to ensure that the determination in this arbitration of the application by the EU could not be considered in any way to have been influenced by [his] involvement, at the time [he] recused [himself], in the *Nord Stream* 2 arbitration."<sup>34</sup>

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<sup>31</sup> *Ibid.*, ¶¶ 24-26.

<sup>32</sup> *Ibid.*, ¶ 27.

<sup>33</sup> Rees' Explanations, ¶¶ 1-2.

<sup>34</sup> *Ibid.*, ¶ 3.

45. In his Additional Explanations, following a request for further disclosures from the Respondent, Mr. Rees provided additional details on the background to the challenge in the *Nord Stream* case and the findings of the Decision of the Secretary General of the PCA of 9 December 2019 concerning that challenge. On the basis of the information disclosed, Mr. Rees restated that the challenge was limited to his involvement with Shell and was wholly unrelated to the subject matter of this arbitration.<sup>35</sup>

#### IV. ANALYSIS OF THE UNCHALLENGED ARBITRATORS

##### A. Applicable Law

46. The relevant treaty for deciding on the Second Proposal for Disqualification is the ICSID Convention, and in particular Articles 57 and 14.<sup>36</sup> The Unchallenged Arbitrators acknowledge as well the relevance of Articles 31 and 32 of the VCLT when interpreting a treaty,<sup>37</sup> which includes taking into account any relevant rules of international law applicable in the relations between the parties to that treaty.<sup>38</sup> In the context of the Second Proposal for Disqualification, the salient rules are to be found in the standard set forth in the ICSID Convention and in the ICSID Arbitration Rules. The Unchallenged Arbitrators do not view other rules of international law as changing that standard.

47. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

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<sup>35</sup> Rees' Additional Explanations.

<sup>36</sup> Both Parties cite to the ICSID Convention and ICSID Arbitration Rules. *See* Second Proposal for Disqualification, ¶¶ 8-19; Claimants' Observations, ¶ 9.

<sup>37</sup> Spain acceded to the VCLT on 16 May 1972. Luxembourg ratified the VCLT on 23 May 2003. Although the VCLT applies only to treaties that are concluded by States after the entry into force of the VCLT as between those States (VCLT, Article 4), the rules set forth in Articles 31 and 32 are widely accepted as reflecting customary international law, and have been used as such repeatedly by the International Court of Justice, other international courts and tribunals, and States since the adoption of the VCLT in 1969.

<sup>38</sup> VCLT, Article 31(3)(c).

48. The disqualification proposed in this case alleges that Mr. Rees manifestly lacks the qualities required by Article 14(1) of the ICSID Convention. Accordingly, it is unnecessary to address disqualification “on the ground that [an arbitrator] was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.”<sup>39</sup>

49. Article 14(1) of the ICSID Convention in English provides:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

50. For its part, Article 14(1) of the ICSID Convention in Spanish provides:

*Las personas designadas para figurar en las Listas deberán gozar de amplia consideración moral, tener reconocida competencia en el campo del Derecho, del comercio, de la industria o de las finanzas e inspirar plena confianza en su imparcialidad de juicio. La competencia en el campo del Derecho será circunstancia particularmente relevante para las personas designadas en la Lista de Árbitros.*

51. While the English version of Article 14 of the ICSID Convention refers to “independent judgment” (and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*”), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, the Unchallenged Arbitrators agree with earlier decisions that arbitrators must be both independent and impartial.<sup>40</sup>

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<sup>39</sup> Further, it is noted that the Claimants have not contended that the Respondent’s Proposal was untimely under ICSID Arbitration Rule 9(1).

<sup>40</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal dated 22 October 2007 (Annex 3 of Claimants’ observations on the First Proposal for Disqualification) (“*Suez*”), ¶ 28; *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands dated 5 May 2011 (Annex 15 of Claimants’ observations on the First Proposal for Disqualification), ¶ 44; *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C. dated 27 February 2012 (Annex 16 of Claimants’ observations on the First Proposal for Disqualification), ¶ 54; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz dated 19 March 2010 (Annex 7 of Claimants’ observations on the First Proposal for Disqualification) (“*Alpha*”), ¶ 36; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern dated 23 December 2010 (Annex 15 of Claimants’ observations on the First Proposal for Disqualification) (“*Tidewater*”), ¶ 37; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID

52. The Respondent argues that “Articles 57 and 14 of the ICSID Convention must be interpreted as an obligation to disqualify an arbitrator if there is ‘*any indication*’ of its lack of independence or impartiality”<sup>41</sup> or “any slight doubt” of bias.<sup>42</sup> The Unchallenged Arbitrators, however, remain of the view that the word “manifest” in Article 57 of the ICSID Convention should be understood as meaning “evident” or “obvious,”<sup>43</sup> and that it relates to the ease with which the alleged lack of the required qualities can be perceived. As such, there is a burden to establish facts showing that the arbitrator is a person who may not be relied upon to exercise independent and impartial judgment. As for who bears that burden, “the party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made.”<sup>44</sup> In this instance, that Party is the Respondent.
53. As for what is meant by the allied concepts of “independence” and of “impartiality,” the former concept speaks principally to the absence of external control, while the latter concept relates to the absence of bias or predisposition towards a party. Both concepts seek to protect the parties from having arbitrators who are influenced by factors unrelated to the merits of the case.

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Case No. ARB/08/5, Decision on the Proposal to Challenge Mr. Francisco Orrego Vicuña dated 13 December 2013 (Annex 14 of Respondent’s First Proposal for Disqualification) (“*Burlington*”), ¶ 65; *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on the Proposal to Disqualify a Majority of the Tribunal dated 4 February 2014 (Annex 11 of Claimants’ observations on the First Proposal for Disqualification) (“*Abaclat*”), ¶ 74; *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposed Challenge of the Majority of the Tribunal, 13 December 2013 (Annex 15 of Respondent’s First Proposal for Disqualification) (“*Repsol*”), ¶ 70.

<sup>41</sup> Second Proposal for Disqualification, ¶ 24 (emphasis in the original).

<sup>42</sup> *Ibid.*, ¶ 33.

<sup>43</sup> See *Suez*, ¶ 34; *Alpha*, ¶ 37; *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 (Annex 18 of Claimants’ observations on the First Proposal for Disqualification), ¶ 71; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposal to Challenge the Majority of the Tribunal Submitted by the Parties dated 12 November 2013 (Annex 13 of Respondent’s First Proposal for Disqualification) (“*Blue Bank*”), ¶ 47; *Burlington*, ¶ 68; *Abaclat*, ¶ 71; *Repsol*, ¶ 73.

<sup>44</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant’s Proposal to Disqualify J. Christopher Thomas dated 19 December 2002 (Claimants’ Annex 9 of Claimants’ observations on the First Proposal for Disqualification), ¶ 20.

## **B. Relevance of the IBA Guidelines**

54. In the course of its pleadings, the Respondent has referred to the IBA Guidelines on Conflict of Interest in International Arbitration. While these guidelines may serve as a reference, the Unchallenged Arbitrators are bound by the standards set forth in the ICSID Convention. Accordingly, this decision is made based upon the relevant provisions of the ICSID Convention and ICSID Arbitration Rules.<sup>45</sup>

## **C. Nature of the Challenge Concerning Mr. Rees**

55. As indicated above, the ICSID Convention's standard for a challenge, which is found in Article 57, embodies an objective criterion that imposes the stringent requirement of a "manifest" lack of the three types of qualities set forth in Article 14(1) – namely the qualities of "high moral character," "recognized competence," and reliability to exercise independent and impartial judgment.

56. The Respondent does not seek to impugn Mr. Rees' character, nor does it raise any doubt as to his legal competence. Instead, the Respondent focuses its attention on the last of the three qualifications: reliability to exercise independent or impartial judgment.

## **D. Ground 1: Challenged Arbitrator Lacks Independence or Impartiality Because He Is in Conflict with the European Union**

57. The first ground for disqualification asserts that Mr. Rees lacks independence or impartiality because he is "in conflict with the European Union."<sup>46</sup>

58. As previously indicated,<sup>47</sup> Mr. Rees disclosed on 2 December 2019 that he had been appointed by Nord Stream 2 AG, a Swiss corporation, as an arbitrator in an arbitration against the EU (as such, the *Nord Stream* case is not an "intra-EU" investor-State arbitration<sup>48</sup>). Further, according to the Respondent, in that case the company is challenging EU law.<sup>49</sup> Those facts alone, of course, do not create a "conflict" between Mr. Rees and the European Union that

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<sup>45</sup> See *Blue Bank*, ¶ 62.

<sup>46</sup> Second Proposal for Disqualification, ¶¶ 35-40.

<sup>47</sup> See *supra* ¶ 8.

<sup>48</sup> See Claimants' Observations, ¶ 14.

<sup>49</sup> Second Proposal for Disqualification, ¶ 38.

would preclude his service as an arbitrator in that case. If they were to do so, then all party-appointed arbitrators would be unable to serve as they would be in “conflict” with the party that did not appoint them.

59. Thereafter, a challenge was brought in that case by the EU against Mr. Rees.<sup>50</sup> That fact alone also does not create a conflict between Mr. Rees and the EU that would preclude his service in that case. If it were to do so, then all challenged arbitrators would be unable to serve immediately upon being challenged.
60. Given that such facts, standing alone, do not demonstrate that Mr. Rees would lack independence or impartiality in that case, the Unchallenged Arbitrators do not see how they can do so in this case.
61. The EU’s challenge against Mr. Rees in the other case has been upheld, such that Mr. Rees is no longer involved in that case. This fact was indicated by Mr. Rees in his Explanations transmitted to the Parties on 23 December 2019.<sup>51</sup> On 13 January 2020, Respondent requested that Mr. Rees be required by the Unchallenged Arbitrators to provide certain information concerning the challenge in the *Nord Stream* case. On that same date, Mr. Rees provided additional information, which appears to have addressed the Respondent’s request, as the Respondent did not seek any further information in its Further Observations of 17 January 2020.
62. The Respondent argues that the EU’s successful challenge in the *Nord Stream* case has “severely aggravated” the “conflict” between Mr. Rees and the EU, such that Mr. Rees lacks independence and impartiality in this case.<sup>52</sup> The basis for the challenge in the *Nord Stream* case, however, did not concern Mr. Rees’ relationship to the EU, which is the respondent in that case. Rather, the basis of the challenge was Mr. Rees’ relationship to Shell, which is providing financing to the claimant in that case.<sup>53</sup> In other words, the doubts as to his

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<sup>50</sup> Respondent’s Additional Observations, ¶ 15.

<sup>51</sup> Rees’ Explanations, ¶ 1.

<sup>52</sup> Respondent’s Additional Observations, ¶¶ 15, 18.

<sup>53</sup> Rees’ Additional Explanations; Claimants’ Observations, ¶ 16; Respondent’s Additional Observations, ¶ 9.

impartiality and independence in that case did not arise from any relationship of Mr. Rees to the EU.

63. The Respondent has not identified any other aspect of the *Nord Stream* case that would call into question Mr. Rees' independence of impartiality in this case. Further, Mr. Rees has confirmed "that the subject matter of that arbitration, and the basis of the challenge, have nothing whatsoever to do with the subject matter of this arbitration"<sup>54</sup> and that "the challenge was limited to [his] involvement with Shell and was wholly unrelated to the subject matter of this arbitration."<sup>55</sup> As such, the Unchallenged Arbitrators do not regard the successful challenge in the *Nord Stream* case as demonstrating a "conflict" of Mr. Rees in relation to the EU, in the sense of a relationship that calls into question his independence or impartiality.<sup>56</sup>
64. It is further noted that the EU is not a party in this case. The EU has requested leave to intervene in this case as a non-disputing party, so as to address two discrete issues: (1) whether Article 26 of the Energy Charter Treaty applies with respect to a dispute between an investor of one EU Member and another EU Member; and (2) whether EU law on State aid is relevant as a matter of law for the interpretation of the substantive investment protection provisions of the Energy Charter Treaty and, if so, precludes the award of damages in a dispute under the Energy Charter Treaty between an investor of one EU Member and another EU Member. There does not appear to be any connection between the *Nord Stream* case or the challenge in that case and these discrete issues.
65. While the Respondent has noted the successful challenge of an arbitrator in *FREIF v. Spain*,<sup>57</sup> that challenge was based on an arbitrator having previously expressed a clear view on substantive issues to be decided in that case.<sup>58</sup> Respondent has not identified any clear views

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<sup>54</sup> Rees' Explanations, ¶ 2.

<sup>55</sup> Rees' Additional Explanations.

<sup>56</sup> Moreover, it would appear that, by Mr. Rees no longer being involved in the *Nord Stream* case, any concerns about his role in that case in relation to this case are diminished not aggravated.

<sup>57</sup> Respondent's Additional Observations, ¶ 10.

<sup>58</sup> *FREIF Eurowind Holdings Ltd. v. Kingdom of Spain*, SCC Arbitration V 2017/06, SCC Board's Decision on the Challenge to Professor Kaj Hobér, 7 January 2020 (Annex 35 of Respondent's Second Proposal for Disqualification), ¶ 70.

previously expressed by Mr. Rees on substantive issues to be addressed in this case,<sup>59</sup> including views expressed in the context of the *Nord Stream* case (which appears to have been at a very early stage when Mr. Rees was discharged from his duties).

66. The Respondent has taken what may be conflicting positions by indicating that the EU should be permitted to intervene in this case so as to provide a view that is different from that of the Respondent, while for purposes of this Second Proposal for Disqualification arguing that the EU and the Respondent share an “identical position.”<sup>60</sup> The Claimants and the Respondent also differ on whether EU law is relevant to the disposition of this case.<sup>61</sup> The critical point, however, is that whether or not the Respondent’s and the EU’s positions are aligned, and whether or not EU law is relevant to this case, there has been no demonstration that Mr. Rees is biased against the positions that the Respondent may advance in this case, nor biased against the positions that the EU may advance if it is permitted to intervene.

67. In light of the evidence presented, the Unchallenged Arbitrators find that Mr. Rees is not in conflict with the EU so as to demonstrate a manifest lack of independence or impartiality in this case.

**E. Ground 2: Challenged Arbitrator Has Acknowledged That He Has a Conflict with the European Union, Which Thus Precludes Independence and Impartiality**

68. The second ground for disqualification asserts that Mr. Rees lacks independence or impartiality because he “has acknowledged that he has a conflict with the European Union” and “has recognized that he is incapable or unable to perform the duties of his office.”<sup>62</sup>

69. Mr. Rees has not said that he has a conflict with the EU or that he is incapable or unable to perform his service as an arbitrator. Rather, Mr. Rees decided on 2 December 2019 to recuse

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<sup>59</sup> For the Unchallenged Arbitrators decision relating to the *Rockhopper* case, see Decision on the First Proposal for Disqualification, ¶¶ 79-83. While the Respondent maintains in this challenge that “the Challenged arbitrator already expressed an opinion for the Litigation Fund” concerning the intra-EU objection, Second Proposal for Disqualification, ¶ 47, the Unchallenged Arbitrators found that the Respondent’s had presented no evidence to that effect.

<sup>60</sup> See Claimants’ Observations, ¶ 17.

<sup>61</sup> See Claimants’ Observations, ¶ 27; Respondent’s Additional Observations, ¶¶ 19-27.

<sup>62</sup> Second Proposal for Disqualification, heading III(2) and ¶ 44; see also Respondent’s Additional Observations, ¶¶ 15-16, 28.

himself from a pending decision on whether to allow the EU to intervene in this case. He explains that he took that decision “out of an abundance of caution.” At the time of his decision, Mr. Rees was the subject of a challenge by the EU in the *Nord Stream* case. Mr. Rees explained that even

though there is no connection between the two arbitrations, and I would have been independent and impartial in participating in any decision, I wished to ensure that the determination in this arbitration of the application by the EU could not be considered in any way to have been influenced by my involvement, at the time I recused myself, in the Nord Stream 2 arbitration.<sup>63</sup>

70. The Respondent’s challenge with respect to this decision<sup>64</sup> essentially raises two questions: (1) was it possible under ICSID rules for Mr. Rees to recuse himself from participating in a procedural decision in this case? If so, (2) does his recusal demonstrate a lack of independence or impartiality?
71. With respect to the first question, Respondent notes that there is no rule within the ICSID Convention that allows an arbitrator to recuse himself or herself from deciding upon a part or procedural aspect of a case, such that Mr. Rees’ recusal was a “procedural irregularity.”<sup>65</sup> Rather, according to the Respondent, if an arbitrator “becomes incapacitated or unable to perform the duties of his office,”<sup>66</sup> the procedure for disqualification applies. The Unchallenged Arbitrators note, however, that Mr. Rees is not incapacitated or unable to perform the duties of his office; he has exercised his duty in a particular instance and at a particular time by recusing himself from a specific procedural decision.
72. Neither Party has identified a case in which an ICSID arbitrator has recused himself from participating in a procedural decision. Nevertheless, there have been ICSID cases in which an arbitrator has recused himself or herself from making a decision to avoid an appearance of bias. For example, in *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, the president of the tribunal declined to participate in deciding a challenge by the claimants against a co-arbitrator, in part because the claimants had previously challenged the

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<sup>63</sup> Rees’ Explanations, ¶ 3.

<sup>64</sup> Second Proposal for Disqualification, ¶¶ 41-44.

<sup>65</sup> Respondent’s Additional Observations, ¶ 28.

<sup>66</sup> ICSID Arbitration Rule 8(1).

president himself. The president's decision not to participate resulted in the challenge instead being decided (and rejected) by the Chairman of the Administrative Council of ICSID. Thereafter, in a proceeding seeking to annul the tribunal's award, the claimants argued that there had been a failure to apply the law because, by declining to participate, the president had not fulfilled his obligations under Article 58 of the ICSID Convention. The Committee in the annulment proceeding disagreed, finding that the reason for the declining to participate "cannot be qualified as unreasonable or interpreted as evidencing a lack of impartiality to the detriment of the Applicants."<sup>67</sup> Among other things, the Committee stated:

President Berman's further comment that if he were to sit on the new challenge against Mr. Veeder, he would be open to the accusation that he (President Berman) lacked the necessary impartiality because he had just been challenged by the Applicants or because both the previous and the new challenge were concerned with the relationship between members of the same barristers' chambers, obviously sought to safeguard the integrity of the proceedings and more specifically the Applicants' rights and interests in that respect. This behaviour is the opposite of behaviour evidencing partiality to the detriment of the Applicants.<sup>68</sup>

73. In any event, the Unchallenged Arbitrators regard the issue before them as falling within the scope of Article 44 of the ICSID Convention, which provides that: "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." With this in mind, the Unchallenged Arbitrators regard it as within the scope of an arbitrator's duties to recuse himself or herself from participating in a procedural decision, *ex abundante cautela*, if he or she deems it necessary to avoid an appearance of bias.
74. With respect to the second question, Mr. Rees' decision appears to have been an effort to avoid any concerns that others might have about his sitting in judgment in this case on a request by the EU, while simultaneously being challenged in another case by the EU. Whether or not such concerns would be well-founded, they might have existed. For example, a view by Mr. Rees opposing the intervention by the EU in this case might be perceived by some as a negative reaction to his being challenged by the EU in the other case. Conversely, a view

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<sup>67</sup> See *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment dated 8 January 2020, ¶ 569.

<sup>68</sup> *Ibid.*, ¶ 570.

by Mr. Rees supporting intervention in this case might be perceived by some as an effort to secure favor from the EU with respect to the challenge in the other case. While such recusal may not have been necessary, the Unchallenged Arbitrators view it as a reasonable step, at the time it was taken, to avoid any real or apparent conflict of interest regarding the EU's request to intervene in this case.

75. In light of the above, the Unchallenged Arbitrators do not find that Mr. Rees' recusal from participating in the decision on whether to allow the EU to intervene in this case constitutes an acknowledgement by him that he is unable to exercise independence and impartiality in this case.

**F. Ground 3: Challenged Arbitrator's Conflict of Interest Regarding EU Intervention in this Case Cannot Be Separated from Other Aspects of this Case**

76. The third ground for disqualification asserts that Mr. Rees lacks independence or impartiality because, if there exists a conflict of interest for him in deciding upon the request of the EU to intervene in this case, that conflict cannot be separated from the other aspects of this case. As such, he has a conflict of interest with respect to this entire case and cannot be viewed as capable of exercising independence and impartiality.
77. As indicated above with respect to the first ground, the Unchallenged Arbitrators find that Mr. Rees is not in conflict with the EU so as to demonstrate a manifest lack of independence or impartiality in this case. Further, as indicated above with respect to the second ground, the Unchallenged Arbitrators do not find that Mr. Rees' recusal from participating in the decision on whether to allow the EU to intervene in this case constitutes an acknowledgement by him that he is unable to exercise independence and impartiality in this case. Left for decision relating to this third ground is whether the decision on the EU's request to intervene is intertwined with other aspects of this case, such that Mr. Rees' decision to recuse himself should have broader implications. According to the Respondent, this entire case revolves around EU law; if there is a reason for Mr. Rees to recuse himself from the decision of the EU to intervene, then that reason should carry-over as well to other aspects of this case,

leading to a conclusion that there is real or apparent bias of Mr. Rees vis-à-vis the entire case.<sup>69</sup>

78. The Unchallenged Arbitrators regard Mr. Rees' recusal from the decision on whether to allow the EU to intervene as related to the particular circumstances of there being two active cases in which he was serving as an arbitrator, and a concern about his sitting in judgment in this case on an intervention request by the EU, while simultaneously being challenged in another case by the EU. Thus, the recusal decision was grounded in a concern about direct EU participation simultaneously in both cases whereby there might be an appearance that Mr. Rees was acting in one case in a manner that was affecting, or was being affected by, another case.
79. Going forward in this case, those particular circumstances no longer exist, given that Mr. Rees is no longer subject to a challenge by the EU in the other case. The Unchallenged Arbitrators do not see any broader implications for this case of Mr. Rees' recusal from the determination of whether to allow the EU to intervene. In short, the recusal does not demonstrate a lack of independence or impartiality on the part of Mr. Rees to decide the other matters at issue in this case, including any that may concern EU law.

**G. Consideration of the Grounds for Second Proposal to Disqualify in Conjunction with Grounds that Were Advanced for the First Proposal to Disqualify**

80. The Respondent requested in its Further Observations that the Unchallenged Arbitrators consider the grounds for this proposal to disqualify in conjunction with the grounds that were advanced for the First Proposal to disqualify Mr. Rees.<sup>70</sup>
81. The Unchallenged Arbitrators previously decided that the grounds set forth in the First Proposal, whether viewed individually or collectively, did not demonstrate a manifest lack of independence or impartiality on the part of Mr. Rees in this case. Further, as indicated above, the Unchallenged Arbitrators do not regard the individual grounds advanced in the Second Proposal as demonstrating a manifest lack of such independence or impartiality.

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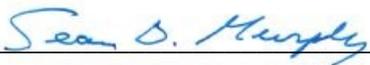
<sup>69</sup> Second Proposal for Disqualification, ¶¶ 46-47.

<sup>70</sup> Respondent's Additional Observations, ¶¶ 11-12.

82. The Unchallenged Arbitrators have carefully considered the totality of the grounds raised by the Respondent in both challenges and do not view them as establishing, collectively, a manifest lack of independence or impartiality on the part of Mr. Rees in this case. Indeed, the two challenges had different orientations. The first challenge principally raised concerns about Mr. Rees' relationship with the Claimants, Claimants' counsel, and a litigation fund. This challenge principally raised concerns about Mr. Rees being "in conflict" with the EU. The two challenges, which were individually unsuccessful, are not related in a way that might lead them collectively to be successful.

## V. DECISION

83. Having considered all the facts alleged and the arguments submitted by the Parties, and for the reasons stated above, the Unchallenged Arbitrators reject the Respondent's Second Proposal to disqualify Mr. Rees.
84. The Unchallenged Arbitrators remind the Parties that, in the absence of their consent, this Decision is not to be made public.
85. The costs of this challenge proceeding are reserved.



Professor Sean David Murphy



Professor Silvina S. González Napolitano