INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the proceeding between

VICTOR PEY CASADO AND FOUNDATION "PRESIDENTE ALLENDE"

Claimants

AND

THE REPUBLIC OF CHILE

Respondent

ICSID Case No. ARB/98/2

DECISION ON THE PROPOSALS TO DISQUALIFY MR. V.V. VEEDER QC AND SIR FRANKLIN BERMAN QC

Chairman of the Administrative Council
Dr. Jim Yong Kim

Secretary of the Tribunal
Mr. Benjamin Garel

Date: 13 April 2017

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I. PROCEDURAL HISTORY

1. On 21 February 2017, the Centre transmitted the Decision of the Chairman of the Administrative Council on the Claimants' 22 November 2016 Proposal to disqualify Sir Franklin Berman QC and Mr. V.V. Veeder QC to the Parties.

2. Paragraphs 1 to 39 of the 21 February 2017 Decision recite the relevant procedural history to that date and may be referred to as background for this Decision.

3. On 23 February 2017, the Claimants proposed the disqualification of Mr. V.V. Veeder QC in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Veeder Proposal**").

4. By letter dated 23 February 2017, the Centre informed the Parties that the rectification proceeding was suspended until the Veeder Proposal was decided, pursuant to ICSID Arbitration Rule 9(6), and that the proposal would be decided by the other members of the Tribunal pursuant to Article 58 of the ICSID Convention.

5. By letter dated 24 February 2017, the Claimants submitted that Sir Franklin Berman QC could not decide the Veeder Proposal because of a conflict of interest between him and Mr. V.V. Veeder QC. The Claimants asked the Centre to invite Sir Franklin Berman QC to provide his position on the matter prior to establishing a calendar for the submissions on the Veeder Proposal. The Claimants also informed the Centre that they would submit additional grounds to disqualify Sir Franklin Berman QC from the deciding the Veeder Proposal.

6. On 28 February 2017, the Claimants proposed that Sir Franklin Berman QC be disqualified from deciding the Veeder Proposal, and that the matter be referred to and decided by the Permanent Court of Arbitration. The Claimants also requested that the Veeder Proposal be referred to and decided by the Permanent Court of Arbitration.

7. By letter dated 1 March 2017, the Centre informed the Parties that: (a) Sir Franklin Berman QC had declined to consider and decide the Veeder Proposal; (b) the proposal to disqualify Sir Franklin Berman QC from deciding the Veeder Proposal was therefore moot; (c) there were no circumstances justifying referral of the Veeder Proposal to the Permanent Court of Arbitration; and (d) the Veeder Proposal would be decided by the Chairman of the

Administrative Council of ICSID. A schedule of submissions and the letter dated 1 March 2017 from Sir Franklin Berman QC to the Secretary-General of ICSID were transmitted to the Parties. The 1 March 2017 letter read:

> *Dear Secretary-General,*
>
> *I have seen the circular notification from the Secretary to the Tribunal of a renewed challenge by the Claimant Parties to the appointment of my co-arbitrator, Mr VV Veeder, in the wake of the rejection by the Chairman of the Administrative Council of the earlier challenge to both Mr Veeder and me. The Secretary's letter indicates that, under the terms of Article 58 of the ICSID Convention and ICSID Arbitration Rule 9, the decision on this new challenge falls to be decided by Me. Mourre and myself, as the two remaining members of the Tribunal.*
>
> *Notwithstanding the above, it does not seem to me right that I should sit on this challenge.*
>
> *If I were to do so, any ruling I proceeded to make on the challenge would lay itself open to an accusation that I lacked the necessary objectivity and impartiality, either because I had just myself been under challenge by the same Parties, or because both the old and the new challenges implicate directly the relationship between members of the same Barristers' Chambers, as is the case with Mr Veeder and myself.*
>
> *Furthermore, and perhaps more important still, the new challenge, based as it is on the same ground as the old challenge, is not dissimilar to an appeal against the rejection of the latter.*
>
> *For all of the above reasons, it would be more conducive to the health of the arbitration system under the Convention and the Rules if the new challenge, like the old, were to be heard and decided by the Chairman of the Administrative Council. That would not, in my view, be in any sense incompatible with the provisions of the Convention and the Rules, taken in their entirety.*
>
> *Since writing the above, I have seen a copy of the further letter from counsel for the Claimant Parties, dated 24 February 2017. While I do not accept the argument as to an 'objective conflict of interests,' the letter serves nevertheless to reinforce my view that the only acceptable solution is for the new challenge to Mr Veeder to be decided by the Chairman of the Administrative Council.*
>
> *Please feel at liberty to circulate the terms of this letter as you think fit.*

8. On 4 March 2017, the Claimants proposed the disqualification from the rectification Tribunal of Sir Franklin Berman QC in accordance with Article 57 of the ICSID Convention and ICSID

Arbitration Rule 9 (the "**Berman Proposal**"). The Claimants also requested that the Berman Proposal be referred to and decided by the Permanent Court of Arbitration.

9. By letter dated 6 March 2017, the Centre informed the Parties that it was treating the Claimants' Veeder Proposal and Berman Proposal as a proposal to disqualify a majority of the Tribunal, to be decided simultaneously by the Chairman of the Administrative Council of ICSID in accordance with Article 58 of the ICSID Convention. The Centre also sent the Parties Mr. V.V. Veeder QC's explanations, dated 6 March 2017 and a revised schedule of submissions which superseded the schedule transmitted on 1 March 2017.[1] Finally, the Centre informed the Parties that there were no circumstances justifying referral of the Berman Proposal to the Permanent Court of Arbitration.

10. By letter dated 7 March 2017, the Claimants asked the Centre to suspend the schedule of submissions set in its letter dated 6 March 2017 until the Centre arranged for the Claimants to consult certain documents from the Centre's archives relating to the resignation of Mr. V.V. Veeder QC in the *Vannessa Ventures Ltd. v. Venezuela* case (ICSID Case No. ARB(AF)/04/6) (the "***Vannessa Ventures* documents**").

11. By letter dated 10 March 2017, the Centre again informed the Parties that case documents other than those published on the ICSID website are not public and cannot be disclosed by the Centre without consent of the parties to that case. The Centre confirmed that the schedule set out in its letter dated 6 March 2017 remained in place.

12. By letter dated 11 March 2017, the Claimants asked the Centre to rule on a possible breach of Article 58 of the ICSID Convention. The Claimants submitted that the breach was caused by Sir Franklin Berman having declined to decide the Veeder Proposal and by the Centre subsequently considering the Claimants' proposal to disqualify Sir Franklin Berman QC from deciding the Veeder Proposal as moot.

13. By letter dated 13 March 2017, the Claimants asked to consult the *Vannessa Ventures* documents in the presence of the Respondent, Mr. V.V. Veeder QC and the Chairman of the Administrative Council.

[1] Mr. V.V. Veeder QC's explanations dated 6 March 2017 are annexed to this Decision.

14. By email dated 13 March 2017, the Claimants submitted the Spanish versions of their proposals to disqualify the majority of the Tribunal. The Centre transmitted these to the Respondent.

15. By email dated 14 March 2017, the Centre informed the Claimants that the Spanish version of the Veeder Proposal was missing from their email dated 13 March 2017. The Claimants provided the missing document on the same day.

16. By email dated 14 March 2017, the Respondent requested that the 7-day period for submission of its Response start running from 14 March 2017, the date on which the Spanish translation of the Veeder Proposal was actually received.

17. By letter dated 14 March 2017, the Centre invited the Respondent to submit its Response by Wednesday 22 March 2017, and invited the Parties to submit their observations on Mr. V.V. Veeder QC's explanations by the same date. The Centre also informed the Parties that Sir Franklin Berman QC had indicated that he did not wish to provide any comment or explanation regarding the Berman Proposal. Finally, the Centre reiterated that case documents other than those published on the ICSID website are not public and can only be disclosed to third parties by the Centre with the consent of the parties to that case. The Centre noted that such consent had not been communicated to it and therefore the Centre could not produce the *Vannessa Ventures* documents for inspection by the Parties.

18. By letter dated 15 March 2017, the Claimants noted that the revised date for the submission of its Response by the Respondent was set more than 7 days after the Spanish translation of the Veeder Proposal was filed. The Claimants also requested that they be granted time to review the Respondent's Response before filing their observations on Mr. V. V. Veeder QC's explanations. Finally the Claimants inquired about the authority of the Chairman of the Administrative Council to review *Vannessa Ventures* documents *in camera.*

19. By letter dated 15 March 2017, the Centre informed the Parties that the Respondent's Response and the Parties' observations on Mr. V. V. Veeder QC's explanations were to be filed on Tuesday 21 March 2017, not on Wednesday 22 March 2017 as erroneously indicated in the Centre's letter dated 14 March 2017. The Centre also informed the Parties that they would have a further opportunity to submit final observations on a date to be determined based

on whether Mr. V.V. Veeder QC filed further explanations. Finally, the Centre advised the Parties that the Chairman of the Administrative Council would consider and decide the proposals to disqualify the majority of the Tribunal on the basis of the submissions and evidence on the record of this case.

20. On 21 March 2017, the Respondent submitted its Response to the Claimants' proposals, and the Claimants submitted their observations on Mr. V.V. Veeder QC's explanations.

21. On 21 March 2017, Mr. V.V. Veeder QC indicated that he did not wish to submit further explanations. The Centre invited the Parties to submit their final observations by 24 March 2017.

22. On 24 March 2017, the Claimants submitted their final observations and the Respondent informed the Centre that it had no further observations.

II. PARTIES' ARGUMENTS

A. The Claimants' Position

1) The Proposal to Disqualify Mr. V.V. Veeder QC

23. The Claimants' position was set forth in their Veeder Proposal of 23 February 2017, their Further Observations of 21 March 2017 and their Final Observations of 24 March 2017. It is summarized below.

24. The Claimants' proposal stems from Mr. V.V. Veeder QC's 11 December 2016 explanations regarding his resignation as President of the tribunal in the *Vannessa Ventures v. Venezuela* case, submitted in the context of the Claimants' first challenge to the majority of the Tribunal (the "**First Proposal**").[2] The Claimants make two points.

25. First, the Claimants contend that Mr. V.V. Veeder QC lied when he stated that he "***learnt at the jurisdictional hearing, for the first time***" that Sir Christopher Greenwood QC, a member of Essex Court Chambers, was acting as counsel for the Claimant in the *Vannessa Ventures*

[2] Claimants' Veeder Proposal, paras. 1-2.

case. The Claimants submit that Mr. V.V. Veeder QC did not learn of this fact at the jurisdictional hearing, but rather twelve days before the jurisdictional hearing.[3]

26. Second, the Claimants take issue with Mr. V.V. Veeder QC's explanation that he "*did not resign because [Professor Greenwood] and [Professor Veeder] were both members of the same barristers' chambers*" but because Professor Greenwood was "*also co-counsel with [Mr. Veeder] acting for a different party in a different and unrelated ICSID Case.*" The Claimants argue that this explanation is incomplete and misleading because it fails to mention that Mr. Veeder QC resigned in the *Vannessa Ventures* case after counsel for Venezuela raised an objection based on the fact that Professor Greenwood and Mr. V.V. Veeder QC practiced in the same chambers.[4]

27. The Claimants submit that Mr. V.V. Veeder QC's misleading omissions in the 11 December 2016 explanations, which were repeated in his explanations dated 6 March 2017, are proved by the correspondence exchanged in the *Vannessa Ventures* case before the jurisdictional hearing, and by the transcript of the *Vannessa Ventures* hearing.[5]

28. The Claimants argue that Mr. V.V. Veeder QC's explanations submitted on the First Proposal and repeated in the Veeder Proposal demonstrate the Respondent's influence over members of Essex Court Chambers. They also argue that they establish a manifest lack of impartiality under Articles 14 and 57 of the ICSID Convention.[6]

2) The Proposal to Disqualify Sir Franklin Berman QC

29. The Claimants' position was set forth in their Berman Proposal of 4 March 2017, their Further Observations of 21 March 2017 and their Final Observations of 24 March 2017. It is summarized below.

30. The Claimants' proposal stems from the reasons for declining to decide the Veeder Proposal given by Sir Franklin Berman QC in his letter dated 1 March 2017.[7]

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[3] Claimants' Veeder Proposal, paras. 23-26; Claimants' Further Observations, paras. 47-58.
[4] Claimants' Veeder Proposal, paras. 27-33.
[5] Claimants' Veeder Proposal, paras. 34, 38; Claimants' Further Observations, paras. 1-30.
[6] Claimants' Further Observations, paras. 31-58.
[7] Claimants' Berman Proposal, paras. 1-2.

31. The Claimants submit that Sir Franklin Berman QC acknowledged that he could only have rejected the Veeder Proposal if he had ruled on it, thereby prejudging the issues raised therein.[8]

32. The Claimants also contend that Sir Franklin Berman QC ignored the distinct allegations in the Veeder Proposal by considering that the First Proposal and the Veeder Proposal were identical and that the latter was a disguised appeal of the former.[9]

33. The Claimants add that by ignoring their request to the Centre, Sir Franklin Berman QC had prevented them from accessing the *Vannessa Ventures* documents, thereby furthering the imbalance between the Parties with respect to access to crucial information.[10]

34. The Claimants further allege that Sir Franklin Berman QC inappropriately recommended that the Veeder Proposal be decided by the Chairman of the Administrative Council of ICSID.[11]

35. They argue that his 1 March 2017 letter disregards the ICSID Convention, English law and the IBA Rules on Conflicts of Interest in International Arbitration[12] and is evidence of a manifest and objective bias and absence of impartiality to the detriment of the Claimants.[13]

36. In addition, the Claimants consider that Sir Franklin Berman QC's refusal to decide the Veeder Proposal breached the ICSID Convention.[14]

B. The Respondent's Position

37. The Respondent recites the recent procedural history of this case arguing that the Claimants have abused the ICSID system.[15] It asks ICSID to consider all mechanisms available to end the Claimants' abuse.[16]

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[8] Claimants' Berman Proposal, paras. 3, 6, 10, 47; Claimants' Further Observations, para. 63.
[9] Claimants' Berman Proposal, paras. 4, 9; Claimants' Further Observations, para. 63.
[10] Counsel for the Respondent were counsel for Venezuela in *Vannessa Ventures*. Claimants' Berman Proposal, paras. 9-10.
[11] Claimants' Berman Proposal, paras. 5, 9; Claimants' Further Observations, para. 65.
[12] Claimants' Berman Proposal, paras. 35-53.
[13] Claimants' Berman Proposal, paras. 2, 7-10, 53, 70, 77.
[14] Claimants' Further Observations, paras. 65-69.
[15] Respondent's Response, paras. 1-15.
[16] Respondent's Response, paras. 16-18.

38. The Respondent asks the Chairman of the Administrative Council to dismiss the Claimants' proposals to disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC.[17] It also requests an order that the Claimants pay any further advances on costs, and that the Respondent be awarded its costs, expenses and interest.[18] The Respondent adds that the Tribunal should grant such relief if the Chairman of the Administrative Council lacks authority to do so.[19]

III. ANALYSIS

A. The Applicable Legal Standard

39. 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.*

40. The disqualifications proposed in this case allege that two members of the Tribunal manifestly lack 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.*"

41. A number of decisions have concluded that the word "manifest" in Article 57 of the ICSID Convention means "evident" or "obvious,"[20] and that it relates to the ease with which the

[17] Respondent's Response, para. 19(a).

[18] Respondent's Response, para. 19(b) and (c).

[19] Respondent's Response, footnote 42.

[20] See *Suez, Sociedad General de Aguas de Barcelona SA. 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 (October 22, 2007) ("***Suez***"), ¶ 34; *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/ 16), Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, (March 19, 2010) ("***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, Arbitrators (May 20, 2011), ("***Universal***"), ¶ 71; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/ 13), Decision on Claimant's Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013) ("***Saint-Gobain***"), ¶ 59; *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 (November 12, 2013) ("***Blue Bank***"), ¶ 47; *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) ("***Burlington***"), ¶ 68; *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 04, 2014) ("***Abaclat***"), ¶ 71; *Repsol, S.A. and Repsol Butano, S.A.*

alleged lack of the required qualities can be perceived.[21]

42. Article 14(1) of the ICSID Convention 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.*

43. 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, it is accepted that arbitrators must be both impartial and independent.[22]

44. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control.[23] Independence and impartiality both "*protect parties against arbitrators being influenced by factors other than those related to the merits of the case*."[24] Articles 57 and 14(1) of the ICSID Convention do not require proof of

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v. Argentine Republic (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (December 13, 2013) ("***Repsol***"), ¶ 73; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and 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 (May 05, 2014) ("***Conoco***"), ¶ 47; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and 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 (July 1, 2015) ("***Conoco et al.***"), ¶ 82.

[21] C. Schreuer, The ICSID Convention, Second Edition (2009), page 1202 ¶¶134-154.

[22] *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, Arbitrator (May 5, 2011), ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11 /29), Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012) ("***Getma***"), ¶ 59; *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., Arbitrator (February 27, 2012) ("***ConocoPhillips***"), ¶ 54; *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, Arbitrator (December 23, 2010) ("***Tidewater***"), ¶ 37; *Saint-Gobain*, ¶ 55; *Burlington*, ¶ 65; *Abaclat*, ¶ 74; *Repsol*, ¶ 70; *Conoco*, ¶ 50; *Conoco et al.*, ¶ 80.

[23] *Suez*, ¶ 29; *ConocoPhillips*, ¶ 54; *Burlington*, ¶ 66; *Abaclat*, ¶ 75; *Conoco*, ¶ 51; *Conoco et al.*, ¶ 81 .

[24] *ConocoPhillips*, ¶ 55; *Universal*, ¶ 70; *Urbaser S.A. and others v. Argentine Republic*, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ARB/07/26, August 12, 2010 ("***Urbaser***"), ¶ 43; *Burlington*, ¶ 66; *Abaclat*, ¶ 75; *Conoco*, ¶ 51; *Conoco et al.*, ¶ 81.

actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.[25]

45. The legal standard applied to a proposal to disqualify an arbitrator is an "*objective standard based on a reasonable evaluation of the evidence by a third party*."[26] As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[27]

B. Timeliness

46. Arbitration Rule 9(1) reads as follows:

> *A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.*

47. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.[28] Previous tribunals have found that a proposal was timely when filed within 10 days of learning the underlying facts,[29] but untimely when filed after 53 days.[30]

48. The Respondent has not made any submission regarding the timeliness of the Claimants' Proposals.

49. The Veeder Proposal was filed 74 days after Mr. V.V. Veeder QC submitted his explanations on 11 December 2016, and 2 days after the resumption of the rectification proceeding following the 21 February 2017 Decision of the Chairman of the Administrative Council on the First Proposal. As the Veeder Proposal could not have been submitted earlier while the

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[25] *Urbaser*, ¶ 43, *Blue Bank*, ¶ 59; *Burlington*, ¶ 66; *Abaclat*, ¶ 76; *Conoco*, ¶ 52; *Conoco et al.*, ¶ 83.

[26] *Suez*, ¶¶ 39-40; *Abaclat*, ¶ 77; *Burlington*, ¶ 67; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84.

[27] *Burlington*,¶ 67; *Abaclat*, ¶ 77; *Blue Bank*, ¶ 60; *Repsol*, ¶ 72; *Conoco*, ¶ 53; *Conoco et al.*, ¶ 84.

[28] *Burlington*, ¶ 73; *Conoco*, ¶ 39; *Abaclat*, ¶ 68; *Conoco et al.*, ¶ 63.

[29] *Urbaser*, ¶ 19.

[30] *Suez*, ¶¶ 22-26.

proceeding was suspended, the Veeder Proposal was filed promptly for the purposes of Arbitration Rule 9(1).

50. The Berman Proposal was filed 3 days after Sir Franklin Berman QC sent his 1 March 2017 letter and was filed promptly for the purposes of Arbitration Rule 9(1).

C. Merits

1) The Proposal to Disqualify Mr. V.V. Veeder QC

51. The Claimants' proposal to disqualify Mr. V.V. Veeder QC rests, in substance, on two grounds: a) Mr. V.V. Veeder QC lied concerning when he learned that Sir Christopher Greenwood QC's was appearing as counsel for the claimants in the *Vannessa Ventures* case ('**First Ground**"); and b) Mr. V.V. Veeder QC lied when he explained his resignation was not due to the fact that Sir Christopher Greenwood was practicing at Essex Court Chambers ("**Second Ground**").

52. It is worth recalling that the Claimants' First Proposal had submitted that Mr. V.V. Veeder QC should have resigned from the Rectification Tribunal in the present case on the same basis as his resignation from the *Vannessa Ventures* tribunal. Mr. V.V. Veeder QC had explained that the circumstances of his resignation in *Vannessa Ventures* were different and of no relevance to this case.

53. Having reviewed the submissions and documents filed by the Parties and Mr. V.V. Veeder QC, the Chairman of the Administrative Council does not find any evidence that Mr. V.V. Veeder QC lied as alleged by the Claimants.

a) <u>First Ground</u>

54. On 11 December 2016, Mr. V.V. Veeder QC wrote that he "*learnt at the jurisdictional hearing, for the first time, that one of the counsel acting for the claimant (Vanessa Ventures) was an English barrister who was, at that time, also co-counsel with me acting for a different party in a different and unrelated ICSID Case*."

55. It is clear that the phrase "*at the jurisdictional hearing*" was used to signify "*at the time of the jurisdictional hearing*" and not to indicate the precise moment when Mr. V.V. Veeder QC became aware of Sir Christopher Greenwood QC's involvement as counsel.

56. In his explanations dated 6 March 2017, Mr. V.V. Veeder QC confirmed that he learned about Sir Christopher Greenwood's involvement as counsel in the *Vannessa Ventures* case during the hearing preparation period, a few days before the hearing started.

57. The Chairman of the Administrative Council cannot consider that Mr. V.V. Veeder QC's generic reference to "*at the jurisdictional hearing*" instead of "*days before the jurisdictional hearing*" constitutes a lie or a misleading formulation.

b) Second Ground

58. On 11 December 2016, Mr. V.V. Veeder QC explained that he resigned from the *Vannessa Ventures* tribunal because Sir Christopher Greenwood QC was his co-counsel and co-arbitrator in two unrelated ICSID cases, not because he was a member of Essex Court Chambers.

59. The Claimants contend that Mr. V.V. Veeder QC failed to mention that the respondent in the *Vannessa Ventures* case had also objected based on Messrs. Veeder and Greenwood's practicing in the same chambers. The Claimants submit that this omission was deliberate and designed to mislead as to the true reasons for Mr. V.V. Veeder QC's resignation.

60. In his 6 March 2017 explanations, Mr. V.V. Veeder QC has re-confirmed that he did not resign from the *Vanessa Ventures* case because he practiced in the same chambers as Sir Christopher Greenwood.

61. The Claimants contend that the documents from the *Vannessa Ventures* case contradict Mr. V.V. Veeder QC's explanations and show that Mr. V.V. Veeder QC resigned after Venezuela raised its objection based on the Essex Court Chambers relationship.

62. The Chairman of the Administrative Council has reviewed the documents submitted by the Claimants with their Further Observations dated 21 March 2016, in particular the letter from counsel for Venezuela dated 3 May 2007 and the transcript of the hearing.

63. In their letter dated 3 May 3007, counsel for Venezuela noted that Sir Christopher Greenwood QC "*is a door-tenant of the same Chambers from which Mr. Veeder practices, is a co-arbitrator with Mr. Veeder in a separate ICSID proceeding, and is co-counsel with Mr. Veeder in another ICSID proceeding*."

64. The transcript of the hearing during which Mr. V.V. Veeder QC resigned reads, in relevant part:

> *PRESIDENT VEEDER: I am greatly troubled by the circumstances in which Professor Greenwood was instructed as counsel by the Claimant last autumn, and that this development was not disclosed to the Tribunal, ICSID or the Respondent until recently.*
>
> *I do not consider that I can continue in this arbitration as Chairman of this Tribunal unless both parties expressly consent to my doing so now, and Professor Greenwood withdraws from this case with immediate effect.*
>
> *[…]*
>
> *I thank the parties for their exchanges. Having carefully considered those exchanges, I cannot, in these circumstances, continue as President of this Tribunal, and accordingly I shall forthwith submit my resignation as a member of this Tribunal in accordance with Article 14, subparagraph (3) of the arbitration additional facility rules.*

65. Nothing in these documents supports the Claimants' assertion that Mr. V.V. Veeder QC's resignation was because Sir Christopher Greenwood QC was a barrister in the same chambers as Mr. V.V. Veeder QC.

66. The fact that Mr. V.V. Veeder QC resigned after Venezuela raised the Essex Court Chambers objection does not establish that this objection was the cause of the resignation, as the Claimants contend.

67. To the contrary, Mr. V.V. Veeder QC has explained twice that his resignation was prompted by the other grounds raised by counsel for Venezuela in their letter dated 3 May 3007. In the Chairman of the Administrative Council's view, the Claimants' characterization of Mr. V.V. Veeder QC's explanations as incomplete, misleading and untruthful is unsupported. A third party undertaking a reasonable evaluation of Mr. V.V. Veeder QC's explanations, the

surrounding facts and the evidence relied upon in the Claimants' Veeder Proposal would not find a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

2) The Proposal to Disqualify Sir Franklin Berman QC

68. The Chairman of the Administrative Council is not convinced by the arguments advanced by the Claimants in support of the Berman Proposal.

69. *First*, Sir Franklin Berman QC did not state that he could only have rejected the Veeder Proposal if he had ruled on it. Rather, he expressed his concern that any decision he would reach would be used against him. The Claimants' filing of the Berman Proposal following his decision not to decide the Veeder Proposal appears to validate such concern.

70. *Second*, Sir Franklin Berman QC did not state that the First Proposal and the Veeder Proposal were "completely identical."[31] Rather, he noted that the two proposals were "*not dissimilar*" because of the grounds on which they rest. The Chairman notes in that respect that Mr. V.V. Veeder QC's alleged omissions regarding his resignation in the *Vannessa Ventures* case had in fact been raised by the Claimants in their further observations on the First Proposal submitted on 13 January 2017.[32]

71. *Third*, it is clear that Sir Franklin Berman QC did not prevent the Claimants from accessing the *Vannessa Ventures* documents as contended by the Claimants. Not only did he not have authority to authorize the disclosure of these documents, but the Claimants had requested these documents from the Centre, not from Sir Franklin Berman.

72. *Fourth*, Sir Franklin Berman QC did not "recommend" that the Veeder Proposal be decided by the Chairman of the Administrative Council so as to further a conspiracy against the Claimants. He merely indicated that the Veeder Proposal, if not decided by the unchallenged arbitrators, could be decided by the same authority that decided the First Proposal and that he did not view this as incompatible with the ICSID Convention and Rules.

[31] Claimants' Berman Proposal, para. 4.
[32] Claimants' Further Observations to the First Proposal dated 13 January 2017, paras. 82-84.

73. *Fifth*, the Chairman of the Administrative Council notes the clear contradiction in the Claimants' position regarding Sir Franklin Berman QC's recusal from the decision of the Veeder Proposal. The Claimants sought such recusal twice (in their letter dated 24 February 2017 and in their 28 February 2017 Proposal to Disqualify Sir Franklin Berman QC) and approved such recusal in their Berman Proposal dated 4 March 2017, acknowledging that they had themselves requested it and that it became moot.[33]

74. At the same time, the Claimants contend in their 21 March 2017 observations that Sir Franklin Berman QC's recusal breached the ICSID Convention, and if accepted, the proposed recusal would have caused a vacancy on the Rectification Tribunal.

75. This is both incorrect and irrelevant. The Proposal to Disqualify Sir Franklin Berman QC from deciding the Veeder Proposal dated 28 February 2017 only concerned whether or not Sir Franklin Berman QC could decide the Veeder Proposal; it became moot, as acknowledged by the Claimants, when Sir Franklin Berman QC declined to decide the Veeder Proposal. If Sir Franklin Berman QC had not declined to decide the Veeder Proposal, and if the 28 February 2017 disqualification proposal had been accepted, no vacancy would have been created on the Rectification Tribunal, because the Claimants only requested that Sir Franklin Berman QC be removed from the decision on the Veeder Proposal.

76. In light of the foregoing, the Chairman of the Administrative Council cannot find any evidence of Sir Franklin Berman QC's lack of impartiality to decide the Claimants' requests for rectification.

77. In the Chairman of the Administrative Council's view, a third party undertaking a reasonable evaluation of Sir Franklin Berman QC's letter dated 1 March 2017 would not find a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

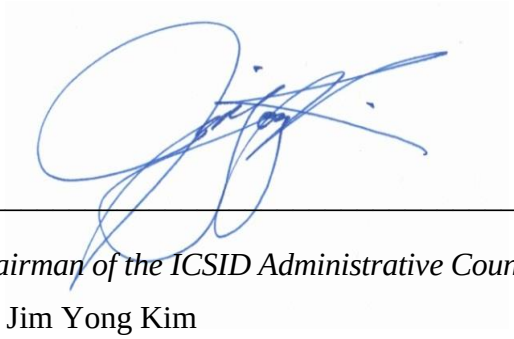
IV. DECISION

78. Having considered all the facts alleged as well as the arguments and evidence submitted by the Parties, and for the reasons stated above, the Chairman of the Administrative Council

[33] Claimants' Berman Proposal, paras. 1 and 68, footnote 9.

dismisses the Claimants' Proposals to disqualify Mr. V.V. Veeder QC and Sir Franklin Berman QC.

79. The Respondent's requests in paragraphs 19 (b) and (c) of its Response that the Claimants pay any further advances on costs, and that the Respondent be awarded its costs, expenses and interest will have to be submitted to, and decided by, the Tribunal.



Chairman of the ICSID Administrative Council
Dr. Jim Yong Kim

OBSERVATIONS OF V.V.VEEDER
(of 6 March 2017)

Re: ICSID Arbitration No ARB/98/2 - Victor Pey Casado & Fondation Presidente Allende v Republic of Chile – The Claimants' Second Proposal dated 23 February 2017

1. I refer to paragraph (iii) of M. Garel's letter dated 1 March 2017 inviting me, as the arbitrator to whom the Claimants' Second Proposal relates, to furnish any observations to the Chairman of the Administrative Council in accordance with Rule 9(3) of the ICSID Arbitration Rules.

2. Given the controversies between the Parties over the Claimants' successive proposals and the pending status of this proceeding, I think it best to leave the merits or demerits of the Second Proposal to the Chairman with no contribution from me – save for my observations on the following matters.

3. In my letter dated 11 December 2016, to which the Claimants have taken such exception, I was attempting briefly to explain that my personal experience in another ICSID arbitration was not relevant to the purpose invoked by the Claimants in their First Proposal. This is no criticism of the Claimant's counsel: they could not know this other arbitration's relevant events from the subsequent tribunal's published jurisdictional decision and award, as these events were known to me as the presiding arbitrator in that arbitration.

4. At the time of my letter dated 11 December 2016, I was relying upon my own memory of events taking place almost ten years ago without access to any contemporary documentation. I had nonetheless a recollection of the somewhat dramatic events taking place shortly before and, particularly, during the jurisdictional hearing in London on 4 May 2007. It was and remains my firm recollection that I resigned as the presiding arbitrator because I had been made aware that the claimant had instructed as co-counsel, Professor G, a person who at that time was acting with me as co-counsel in another ICSID arbitration and that the claimant had not disclosed these instructions until shortly before the jurisdictional hearing. It was entirely my decision. That factor was, to my mind, the relevant factor for the Claimants' First Proposal, rather than the strict chronology of events in the days preceding the

jurisdictional hearing to which the Claimants appear to attach such significance (both in their First and Second Proposals).

5. Last week, fortuitously, I found in an old electronic archive some of the relevant contemporary documentation from this jurisdictional hearing. I had assumed that all such electronic documentation had been destroyed long ago, along with all paper copies of that arbitration's files, following my resignation as presiding arbitrator at the jurisdictional hearing. With the benefit of this contemporary documentation, it is now possible for me to provide the following factual chronology, taking place within a period of just over one week up to and including the jurisdictional hearing of 7 May 2007. (Given his public status, I have edited a certain person's full name to "Professor G" in this document. His name is not a relevant issue; and it would serve no good purpose to embroil him into the Parties' current and somewhat public controversies).

6. On 25 or 26 April 2007, upon my receipt from ICSID of the list of the parties' participants attending the jurisdictional hearing in London, I became aware from that list that Professor G was instructed as co-counsel by the claimant. These instructions had not been disclosed previously to the tribunal or the respondent; and I had no previous knowledge of Professor G's involvement in the arbitration. It is not correct, as the Claimants appear to suggest, that I knew of Professor G's involvement since 20 May 2005 (paragraph 26(1) of their Second Proposal).

7. By letter from ICSID to the parties of Friday 27 April 2007, I responded with the following disclosure, beyond my original declaration made at the outset of the arbitration: "I wish to make the further declaration of my professional relationship with Professor [G]. Professor [G], as an independent member of the English Bar, is a door-tenant at Essex Court Chambers (from which I also practice), he is currently a co-arbitrator with me in an (unrelated) ICSID arbitration; and he is one of several co-counsel with me in another (also unrelated) ICSID arbitration. I do not consider myself that this relationship affects adversely my independence, impartiality or ability to serve on this Tribunal."

8. By letter of Thursday, 3 May 2007, the respondent notified the tribunal and the claimant of the respondent's objection to the participation of Professor G at the jurisdictional hearing. The respondent referred to my disclosure of 27 April 2007 to

the effect that Professor G was a door-tenant at Essex Court Chambers from which I practised, a co-arbitrator with me in a separate ICSID arbitration and co-counsel with me in another ICSID arbitration. The respondent also referred to the second arbitrator's different association with Professor G, as also separately disclosed by that second arbitrator in ICSID's same letter of 27 April 2007.

9. By letter from ICSID to the parties of Friday 4 May 2007, as the tribunal's president, I requested the claimant to respond in writing to the respondent's letter of 3 May 2007, by close of business that same day.

10. The claimant responded by letter later that same day (Friday 4 May 2007). The claimant there disputed the respondent's attempt to exclude Professor G on several legal and factual grounds. Given the different time zones, I do not currently recall whether I saw this letter that evening or on the following day. In any event, there was no further correspondence with the parties regarding Professor G until the jurisdictional hearing, after the weekend.

11. The jurisdictional hearing began on Monday morning, 7 May 2007. It lasted about two hours. The tribunal heard oral submissions from both parties regarding the respondent's application to exclude Professor G as co-counsel in the arbitration. The claimant confirmed that Professor G had been instructed some six or so months earlier; and that he was instructed to participate at the jurisdictional hearing as counsel and not as an expert witness.

12. That debate was cut short when I decided, with the consent of my two arbitral colleagues, to resign from the tribunal. I did so for three cumulative reasons: first, because I felt professionally uncomfortable at my acting as the presiding arbitrator when one party's leading counsel in that arbitration (Professor G) was also acting with me as co-counsel in another (albeit unrelated) pending arbitration; second, because it was unclear to me whether the tribunal, in the particular circumstances of that case, had any power to exclude Professor G as counsel from the arbitration under the tribunal's procedural orders, the ICSID Convention or the ICSID Arbitration Rules; and, third, because the respondent was maintaining its strong objection to Professor G participating in the arbitration, which the claimant was continuing to dispute no less strongly. I should add that, to my own mind, neither party was acting

in bad faith or otherwise attempting maliciously to thwart the arbitral process then still in its early stages.

13. For different reasons, the third arbitrator (appointed by the respondent) also resigned from the tribunal during the jurisdiction hearing. The second arbitrator (appointed by the claimant) did not resign; and he continued to act as arbitrator with two replacement arbitrators up to the award. After my resignation, I had no further involvement with the arbitration. My knowledge of the case was limited to its published jurisdictional decision and award of 22 August 2008 and 16 January 2013 respectively.

14. There are four other matters to which I should like to respond.

15. First, the Claimants advance grave allegations of dishonesty, mendacity and bias against me throughout their Second Proposal: see (inter alia) paragraphs 26, 31, 34 and 38 of their Second Proposal. I dispute each and every such allegation. I am however content to let the relevant facts speak for themselves.

16. Second, in paragraph 33 of their Second Proposal, the Claimants appear to suggest that I have colluded in this arbitration with counsel for the Respondent. If this suggestion is being made, it is wholly incorrect.

17. Third, as explained above, I have here made use of contemporary documentation in my possession that is not available to the Claimants (although listed in the tribunal's award). For my own part, I would have no objection if copies of such contemporary documentation were disclosed to the Parties. I list this documentation in the footnote below; and, for ease of reference, I am sending electronic copies of such documentation to ICSID under separate cover.[1] However, the decision to disclose copies of such documentation to the Parties does not lie with me; and such disclosure may not be relevant or necessary for present purposes. It might, however, assuage the Claimants' evident concerns..

[1] This documentation comprises: (i) ICSID's letter dated 27 April 2007; (ii) the respondent's letter dated 3 May 2007; (iii) ICSID's letter dated 4 May 2007; (iv) the claimant's letter also dated 4 May 2007; and (v) the verbatim uncorrected transcripts (English and Spanish) of the jurisdictional hearing of 7 May 2007. I have searched for any written document containing the formal consent of my two co-arbitrators to my resignation at the jurisdictional hearing; but I have been unable to find it (if it ever existed). ICSID may have this written consent. It is, in any event, evidenced by the transcript.

18. Fourth, I re-confirm that I did *not* resign from the tribunal because Professor G and I were barristers practising from the same barristers' chambers in London. As English barristers, we conducted our respective practices independently, without reference to the other. Rightly or wrongly, that is how English barristers have worked for centuries. They still do. That is why I did not know of Professor G's involvement in the arbitration until the jurisdictional hearing (on 25 or 26 April 2007). That is also why I did not and could not know of the involvement of other barristers from these same chambers apparently advising the Respondent in wholly unrelated matters and proceedings, who were never instructed as counsel in this current arbitration (nor me with any of them in any arbitral or legal proceedings). For many years, long pre-dating my involvement in this current arbitration, I have not practised as counsel.

19. Last, but not least, I re-confirm my willingness and ability to act as an arbitrator in accordance with the requirements of Article 14(1) of the ICSID Convention and my original declaration of 31 January 2014 made in this current arbitration.

20. Although I am requested to submit my observations 'by Wednesday, 22 March 2017 at the latest', ICSID Arbitration Rule 9(3) separately requires me to submit these observations "without delay". Accordingly, I think it right to submit my observations at this earlier stage, particularly with regard to Paragraph 17 above.

V.V.Veeder
6 March 2017