

International Centre for Settlement of Investment Disputes

In the proceeding between:

Total S.A.

(Claimant)

v.

Argentine Republic

(Respondent)

ICSID CASE NO. ARB/04/01

**DECISION ON ARGENTINE REPUBLIC'S PROPOSAL
TO DISQUALIFY MS. TERESA CHENG**

Rendered by:

Mr. Álvaro Castellanos, Member of the *ad hoc* Committee
Mr. Eduardo Zuleta, Chairman of the *ad hoc* Committee

Secretary of the *ad hoc* Committee:

Ms. Giuliana Canè

August 26, 2015

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I. PROCEDURAL BACKGROUND

1. On March 27, 2014 the Argentine Republic lodged an Application for Annulment and Stay of Enforcement of the Award rendered by the Arbitral Tribunal in ICSID Case No. ARB/04/1 Total S.A. v. Argentine Republic on November 27, 2013.
2. On April 2, 2014 the Secretary-General of ICSID registered the Application for Annulment pursuant to ICSID Arbitration Rules 50(2)(a) and (b). In accordance with Arbitration Rule 54(2) the Secretary-General informed the parties of the provisional stay of enforcement of the Award.
3. The *ad hoc* Committee was constituted on May 27, 2014. In accordance with Article 52(3) of the ICSID Convention, the Chairman of the ICSID Administrative Council appointed as members of the *ad hoc* Committee Mr. Eduardo Zuleta Jaramillo a national of Colombia, Mr. Álvaro Castellanos Howell of a national of Guatemala, and Ms. Teresa Cheng a national of China. Mr. Eduardo Zuleta Jaramillo was appointed Chairman of the Committee.
4. In accordance with the procedural timetable agreed by the Parties, on July 11, 2014 both Parties submitted observations on the Application for Stay of Enforcement of the Award lodged by the Argentine Republic. On August 12, 2014, both Parties submitted a second round of observations on the briefs of the counterparty.
5. On October 6, 2014 the *ad hoc* Committee held with the parties a first procedural session and a hearing on the Application for Stay of Enforcement of the Award at the Centre's headquarters in Washington, D.C.
6. On October 21, 2014, the *ad hoc* Committee issued Procedural Order No. 1 on issues of procedure.
7. On December 4, 2014, the Committee rendered a Decision on the Application for Stay of Enforcement of the Award.
8. On December 22, 2014, the Argentine Republic submitted its Memorial on Annulment, followed by a courtesy translation on January 6, 2015. On March 9, 2015, Total S.A. submitted its Counter-Memorial on Annulment, followed by a courtesy translation on March 20, 2015. On May 4, 2015, the Argentine Republic filed its Reply on Annulment followed by a courtesy translation on May 19, 2015, as well as the revised original version (in Spanish). On July 10, 2015 Total submitted its Rejoinder on Annulment followed by a courtesy translation on July 22, 2015.
9. On July 27, 2015, the ICSID Secretariat sent the Parties a letter from Ms. Teresa Cheng advising the parties that on April 2015 she had been contacted by lawyers from Freshfields Bruckhaus Deringer LLP (Hong Kong office) in a matter already concluded. Ms. Cheng said the matter involved oral advice on an issue that was not related to investment law or disputes between States and investors and that it mainly

concerned disputes between shareholders that had nothing to do with Total S.A. or with the Argentine Republic. The lawyers of Freshfields Bruckhaus Deringer LLP involved in that matter are not the lawyers of Freshfields Bruckhaus Deringer LLP (New York office) that are before the Committee in this proceeding. Ms. Cheng stated that she understood that this situation did not pose a conflict of interest, but out of an abundance of caution she considered it appropriate to communicate this circumstance to the parties.

10. On July 29, 2015, the Argentine Republic sent a letter to the members of the Annulment Committees of which Ms. Cheng is a member, in which it requested Ms. Cheng to clarify certain questions referred to in said letter.
11. On August 4, 2015, the ICSID Secretariat sent to the Parties the response furnished by Ms. Cheng to questions raised by the Argentine Republic on July 29, 2015.
12. On August 5, 2015, the ICSID Secretariat sent to the parties Ms. Teresa Cheng's letter in response to a request from the Argentine Republic on August 3, requiring that Ms. Cheng disclose all relationships she has or had with Freshfields Bruckhaus Deringer LLP.
13. On August 6, 2015 the Argentine Republic filed a Proposal for Disqualification of Ms. Teresa Cheng in English and Spanish, under Article 57 of the ICSID Convention and Arbitration Rule 9. Pursuant to Arbitration Rule 9(6) on the same day, the Centre informed the parties that the proceeding was suspended until the majority of the *ad hoc* Committee, comprising Mr. Zuleta and Mr. Castellanos, decided on the Disqualification Proposal.
14. On August 7, 2015, Mr. Zuleta and Mr. Castellanos, established a procedural timetable for the submissions of the Parties in respect of the Disqualification Proposal. An expedited timetable was set in response to the state of the proceedings at the time Ms. Cheng's declaration and Argentina's disqualification proposal were filed.
15. Complying with the procedural timetable, the Argentine Republic submitted additional observations on the Proposal to Disqualify on August 12, 2015 and a courtesy translation on August 14, 2015. Total submitted observations on the Proposal to Disqualify on August 17, 2015 and a courtesy translation on August 19, 2015. Ms. Teresa Cheng furnished explanations in accordance with Arbitration Rule 9(3) in English and Spanish on August 18, 2015.
16. The Argentine Republic sent a letter dated August 19, 2015 to Ms. Cheng in English and Spanish, requesting additional information. Ms. Cheng sent a reply to Argentina's request in English and Spanish on August 20, 2015.
17. Both parties submitted final observations on the Disqualification Proposal on August 24, 2015 and courtesy translations on August 26, 2015.

II. POSITION OF THE PARTIES ON THE PROPOSED DISQUALIFICATION OF TERESA CHENG

A. Position of the Argentine Republic

18. The Argentine Republic (“Argentina” or the “Respondent”) requested that Ms. Teresa Cheng to resign from her position as a member of the *ad hoc* Committee in these annulment proceedings, and if she did not do so, the majority of the Committee should accept the proposal to disqualify her. In addition, Argentina requested that Total S.A. (“Total” or the “Claimant”) be ordered to pay all costs and expenses arising in connection with the Disqualification Proposal based on its failure to disclose the relationships between its law firm and one of the members of the *ad hoc* Committee.
19. The Respondent stated that it understands that the timetable established to consider the disqualification proposal was based on the late disclosure by Ms. Cheng of her relationship with the law firm representing Total in the present annulment proceeding. Nevertheless, Respondent asked the majority of the Committee to take the necessary time to consider and decide this delicate issue that affects the integrity of the proceedings, and even to evaluate the postponement of the hearing on annulment fixed for September 1 and 2, 2015.¹
 - a. **Grounds for the Disqualification Proposal and Application of the Procedure under the ICSID Convention to the disqualification of a member of the *ad hoc* Committee**
20. In its Additional Observations on the Proposal of the Argentine Republic to Disqualify Teresa Cheng, Argentina responded to the arguments raised by the Claimant about the timing of the submission of the Disqualification Proposal and its purpose, as well as to the application of the disqualification mechanism provided for in the ICSID Convention for annulment proceedings.
21. With regard to the timing of submission of the Disqualification Proposal, Argentina stated that this is due to the late disclosure of Ms. Cheng, who waited until the annulment submissions were filed and the hearing was only one month away to inform the Parties about advice given to Freshfields Bruckhaus Deringer (“Freshfields”) in April 2015 and other revelations which she should have done before providing the advice in question and before accepting her appointment as member of this *ad hoc* Committee.²
22. Argentina emphasizes that, contrary to Claimant’s statements, the Disqualification Proposal was not filed for any tactical or dilatory reasons, but as a result of Ms. Cheng’s disclosures.³ The submission of disqualification proposals is not an exclusive practice of the Argentine Republic in the context of investment arbitration.⁴

¹ Grounds for the Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶¶7-8.

² Argentine Republic’s Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶18.

³ *Ibid.*, ¶19.

⁴ *Ibid.*, ¶20.

Disqualification proposals submitted by Respondent have been based upon justified grounds, in such a way that in one of those cases the proposal was accepted and in the other the arbitrator resigned.⁵ Argentina also refers to the case of *EDF International S.A., SAUR Internacional S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, an annulment committee of which Ms. Cheng is also a member and in which the existence of a conflict of interest affecting one of the arbitrators of the tribunal has been extensively discussed.⁶

23. Furthermore, according to Argentina, the procedure provided for in the ICSID Convention for disqualifying an arbitrator is applicable to the disqualification of a member of an annulment committee.
24. Argentina indicates that Total failed to identify a single case that concluded that the mechanism for disqualification is not applicable to annulment proceedings. On the contrary, the Respondent points to two cases in which this mechanism has already been used in the disqualification of members of annulment committees—*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (“*Vivendi I*”) and *Nations Energy v. Panama*⁷ — and recalls the considerations of those decisions in that regard.⁸
25. The Respondent criticizes Claimant’s stance on the inapplicability of the mechanism for disqualification to annulment proceedings based on the procedure of appointment of annulment committee members. Argentina argues that regardless of who appoints an annulment committee member, or the fact that the latter does not have jurisdiction to decide the merits of the dispute, does not mean that said persons are exempted from acting with independence and impartiality.⁹
26. Argentina also notes that because the annulment committee members are selected from the Panel of Arbitrators, they must meet the general qualities required by Article 14(1) of the Convention, namely that they must inspire upon full confidence in both their impartiality and independent judgment¹⁰ These requirements are even more relevant in respect of annulment committees, for if a circumstance of this kind would eventually affect a member of a committee, the disqualification mechanism would be the only remedy available and there would be no possibility of subsequent control, as is the case with arbitration proceedings.¹¹

b. The standard for disqualification proposed by Argentina

27. The Republic of Argentina proposed the disqualification of Ms. Teresa Cheng as a member of the *ad hoc* Annulment Committee because, in its opinion, Ms. Cheng

⁵ *Ibid.*, ¶¶21-22.

⁶ *Ibid.*, ¶22.

⁷ *Ibid.*, ¶24.

⁸ *Ibid.*, ¶¶23-27.

⁹ *Ibid.*, ¶¶28-29.

¹⁰ *Ibid.*, ¶30.

¹¹ *Ibid.*, ¶31.

manifestly lacks the qualities required by paragraph (1) of Article 14 of the ICSID Convention.¹²

28. Regarding the legal standard applicable to the disqualification, Argentina states that Article 57 of the ICSID Convention requires that there be a *manifest* absence of the qualities required of arbitrators by Article 14(1) of the Convention, insofar as the lack of the required qualities can be perceived as obvious and evident.¹³
29. The disqualification of a member of an annulment committee proceeds given that Article 52 of the ICSID Convention incorporates Rule 9 of the Arbitration Rules into the annulment process. Referring to the disqualification of the president of the *ad hoc* committee in the *Vivendi I* case, the Respondent concludes that committee members must be and appear to be independent and impartial, and that no other procedure exists under the Convention to decide on proposals for disqualification.¹⁴
30. In accordance with Article 14(1), the persons designated to serve as arbitrators and members of annulment committees must inspire full confidence in their impartiality and in their independence of judgment, so that the lack of these qualities warrants their disqualification under Article 57 of the ICSID Convention.¹⁵ According to Argentina, there is consensus that Article 14(1) encompasses a duty to act with both independence and impartiality.¹⁶
31. The Respondent explains that the standard that must be satisfied under Articles 57 and 14(1) of the ICSID Convention for a challenge to be successful is the appearance of dependence or predisposition or bias.¹⁷ Citing the disqualification decision in the case of *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, Argentina indicates that this appearance must be evidenced by a third party based on a reasonable evaluation of the facts in the present case.¹⁸ For this reason, arbitrators and members of annulment committees have a legal duty to disclose any circumstances that might give rise to a challenge to their independence or impartiality, including “... *the duty to disclose any contractual or work relationship with any of the law firms involved in the dispute without any time limits, given that the relevant factor is not how such relationships are valued by the arbitrator or member of the Annulment Committee but rather how they may be perceived by the parties.*”¹⁹

¹² Grounds for the Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶7.

¹³ *Ibid.*, ¶9.

¹⁴ *Ibid.*, ¶10.

¹⁵ *Ibid.*, ¶11.

¹⁶ *Ibid.*, ¶12.

¹⁷ *Ibid.*, ¶¶13-14; Argentine Republic’s Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶31: “*In this regard, it is sufficient to refer to the most recent decisions on disqualification rendered in ICSID proceedings, which confirm that the challenge mechanism of ICSID does not require proof of actual dependence or bias; rather, it is sufficient to establish that there is an evident appearance of dependence or bias based on a reasonable evaluation of the facts of the case from the point of view of a third-party observer.*”

¹⁸ Grounds for the Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶15.

¹⁹ Grounds for the Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶16.

c. Grounds for the Proposal for Disqualification

32. Argentina bases its proposal for disqualification on three main grounds: (i) the alleged contractual relationship between Freshfields, the Claimant's law firm in this annulment proceeding, and a member of the *ad-hoc* Committee; (ii) Ms. Teresa Cheng's relationship with Claimants' counsels, her breaches of the duty of disclosure and her lack of transparency; and (iii) failure to disclose other relationships with Claimant's law firm.

i. Contractual relationship between Ms. Cheng and Freshfields

33. Respondent argues that Ms. Cheng has direct links with Freshfields and has been instructed by said law firm, and therefore she should be removed from this annulment committee.²⁰

34. In fact, Argentina argues that Ms. Cheng failed to disclose remunerated contractual relationships with the law firm representing the Claimant, including those links that occurred prior to her appointment as a member of the *ad hoc* Committee, as well as a contemporaneous relationship that was only disclosed until three months after it had occurred.²¹

35. The remunerated contractual relationships referred to by Argentina are: (i) oral advice given on a matter of domestic law to a Chinese company (the "Chinese Company"), which was requested by the lawyers of Freshfields' Hong Kong office;²² and (ii) acting as legal counsel instructed by Freshfields in a case concerning the Decision on Stay Application of the Hong Kong Telecommunications Appeal Board in 2008.²³

36. Argentina also refers to the two-month internship of Ms. Cheng's son in Freshfields' Paris office in 2011²⁴ and her relationships with some members/partners and/or former members/partners of Freshfields in professional associations.²⁵

37. According to the Argentine Republic, none of these relationships were included by Ms. Cheng in her statement under Arbitration Rule 6(2)(b) of May 22, 2014.²⁶

38. According to the Respondent, this situation is apposite to the one that led to the disqualification of one of the arbitrators in the case of *Favianca v. Venezuela*, concerning a consultancy agreement with a law firm representing interests against one of the parties to the arbitration. On that occasion, the arbitrator in question

²⁰ Argentine Republic's Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶3; ¶¶33-34.

²¹ Grounds for the Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶25; ¶30.

²² *Ibid.*, ¶¶2-3.

²³ *Ibid.*, ¶5.

²⁴ *Ibid.*, ¶5.

²⁵ In this regard, Argentina highlights a series of relationships in this type of association between Ms. Cheng and Mr. Jan Paulsson, "... who has great influence in the firm *Freshfields Bruckhaus Deringer LLP*." Argentine Republic's Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶54.

²⁶ Grounds for the Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶¶18-21, ¶25.

resigned for the sake of transparency and the others considered his future contractual link would affect his independence and impartiality.²⁷

39. Argentina deems that in the context of ICSID there is no doubt that contractual or work relationships between an arbitrator and a law firm involved in a specific case must be disclosed in the first session of the tribunal or prior to that, pursuant to Arbitration Rule 6(2). This is so because no person can be a judge of his or her own conflict and because what must be taken into account in particular is not what the arbitrators deem to be relevant but what the parties consider may affect their independent judgment.²⁸
40. Specifically with regard to the advice given by Ms. Cheng to the Chinese Company, Argentina points out that the difference underlined by Total and Ms. Cheng between barrister and solicitor is irrelevant because it was Freshfields who sought for and gave instructions to Ms. Cheng. Thanks to Freshfields, Ms. Cheng received US\$5,000, which cannot be taken as a minor sum. In any case, Argentina refers to disqualification decisions that confirmed that when considering a conflict of interest, whether the link involves payment or not and whether or not it makes an impact on the arbitrator's income is irrelevant.²⁹
41. Contrary to what Claimant states, the link between an arbitrator and the counsel of one of the parties has been considered a link that affects the arbitrator's independence, or at least its appearance. In this regard, Argentina refers, inter alia, to the case of *Blue Bank v. Venezuela*, where the proposal for disqualification of an arbitrator was admitted because of the latter's links with the counsel of a party to an arbitration against Venezuela and to the *Grand River v. United States* where the disqualification proposal was admitted based on advice that did not concern a dispute between an investor and a State.³⁰
42. Finally, Respondent refers to Ms. Cheng's modification of the declaration made when accepting her appointment as a member of this Annulment Committee, since she did not include the names of the law firms representing the parties, as she had done before when accepting other appointments to committees in matters involving Argentina as a party.³¹
43. According to Argentina these facts and the past links considered together leave no doubt that it is impossible to trust Ms. Cheng's independence and impartiality of judgment.³²

²⁷ *Ibid.*, ¶¶22-24.

²⁸ *Ibid.*, ¶26.

²⁹ Argentine Republic's Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶¶38-43.

³⁰ *Ibid.*, ¶¶44-50.

³¹ *Ibid.*, ¶51.

³² *Ibid.*, ¶¶50-55.

ii. Breaches of the Duty of Disclosure and Lack of Transparency

44. Argentina considers that Ms. Cheng's relationship with Freshfields, her breaches of the duty of disclosure, and her lack of transparency require that she be removed from the *ad hoc* Committee. According to Argentina, Ms. Cheng should have disclosed the acceptance of instructions from Freshfields in the course of the annulment proceeding and by not doing so, she precluded the Respondent from objecting to such relationship.³³
45. For Respondent, it is unacceptable that a member of an ICSID annulment committee states that she was not obliged to reveal that she had been engaged by the law firm representing one of the parties during the course of the annulment proceedings, and that this had only been revealed because of a potential appointment as arbitrator.³⁴ This situation is aggravated by the fact that Freshfields represents interests against Argentina in nine other arbitrations.³⁵
46. Concerning the statement made by Ms. Cheng on Article 3.3.9 of the IBA Guidelines, the Respondent considers that these guidelines are not applicable, but notes that they do not make a distinction between the office to which lawyers of a law firm belong to for the purposes of establishing the duty to reveal and the existence of conflicts of interest.³⁶ In any case, such a distinction would be at odds with the standard set forth in the ICSID Convention. According to Argentina, if the criteria of the IBA Guidelines were to be applied, the situation of Ms. Cheng would fall within Article 2.3.2 of the waivable red list which covers situations in which the arbitrator currently advises the law firm acting as counsel for one of the parties. This situation could only be expressly waived by the parties, after they become aware of the conflict. By not informing of this situation, Ms. Cheng deprived the parties of their right to provide their views on the matter.³⁷
47. In addition, the information provided by Ms. Cheng was ambiguous and incomplete.³⁸ In fact, it was only until August 5th and at the request of Argentina that Ms. Cheng disclosed other relationships with Freshfields,³⁹ including one in which she acted as lawyer in a matter that ended in 2008.
48. Argentina disagrees with Ms. Cheng that there is no obligation to disclose information dating more than three years ago. This period results from the IBA Guidelines, which are merely indicative for this arbitration and were not the rule that Ms. Cheng herself had in mind at the time of accepting her appointment as a member of this *ad hoc* Committee.⁴⁰ This information, as well as the fact that her own son had participated in an internship at Freshfields' Paris office, was not revealed by Ms.

³³ Grounds for the Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶¶33-35.

³⁴ *Ibid.*, ¶36.

³⁵ *Ibid.*, ¶35.

³⁶ *Ibid.*, ¶¶37-39.

³⁷ *Ibid.*, ¶¶40-41.

³⁸ *Ibid.*, ¶¶42-43.

³⁹ *Ibid.*, ¶45.

⁴⁰ *Ibid.*, ¶¶47-52.

Cheng at the time of accepting other four appointments in cases involving the Argentine Republic.⁴¹

49. According to the Respondent, the timing of the declaration made by arbitrators and members of annulment committees is essential to the transparency and impartiality of the proceedings, to the extent that a contrary conduct constitutes a breach of Arbitration Rule 6(2).⁴² Ms. Cheng justifies her failure to disclose professional links with Freshfields by invoking “... *formal distinctions derived from specific domestic rules.*”⁴³ But in any case, from the text cited by Ms. Cheng in her observations to the Parties, it follows that the solicitor is personally liable as a matter of professional conduct for the payment of a barrister’s fees and the barrister only acts under the solicitor’s instructions.⁴⁴
50. Thus, Argentina concludes that “*even considering the applicable Hong Kong rules, Freshfields was Ms. Cheng’s professional client.*”⁴⁵ The arguments presented by Ms. Cheng and Total do not dispel the doubts about her lack of independent judgment; the grounds for her disqualification exist from the moment when Ms. Cheng decided to receive instructions from Freshfields and failed to disclose this information in a timely manner.⁴⁶

iii. Failure to inform about other relationships with Freshfields

51. The duty to disclose for persons appointed as arbitrators or members of annulment committees under Arbitration Rule 6(2) should include details of any professional relationships with counsel to a party in the case in which he/she has been appointed, including, out of an abundance of caution, public information.⁴⁷ This duty to disclose is a continuing obligation⁴⁸ and has no cut-off date.⁴⁹
52. Regarding the scope of the duty of disclosure, Argentina states that the purpose of Arbitration Rule 6(2)(b) is to expand the scope of the declarations of the arbitrators to include any circumstances that might give rise to justifiable doubts, taken from the standard for disclosure of the UNCITRAL Arbitration Rules. Thus, relying on the *Universal Compression v. Venezuela* decision, Argentina asserts that arbitrators and members of annulment committees have a duty to disclose any circumstance that can give rise to questions on their independence or impartiality, including any relationship with any of the law firms involved in the dispute in question.⁵⁰ The former allows

⁴¹ *Ibid.*, ¶¶52-53.

⁴² The Argentine Republic’s Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶59.

⁴³ *Ibid.*, ¶62.

⁴⁴ *Ibid.*, ¶¶ 64-75.

⁴⁵ *Ibid.*, ¶75.

⁴⁶ *Ibid.*, ¶¶78-79.

⁴⁷ Grounds for the Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng, dated August 12, ¶¶55-56.

⁴⁸ *Ibid.*, ¶58.

⁴⁹ *Ibid.*, ¶ 59.

⁵⁰ The Argentine Republic’s Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶¶82-84.

parties to have access to all relevant information concerning an arbitrator's appointment.⁵¹

53. The Respondent did not have the opportunity to submit its observations on the contractual relationship of Freshfields with Ms. Cheng, to which it would have emphatically objected.⁵² Likewise, Ms. Cheng failed to tell the truth in the declaration filed under Arbitration Rule 6(2) at the time she was appointed to this Committee.⁵³
54. Argentina concludes that Ms. Cheng should have disclosed all her links, both past and present, with the Claimant's counsel in a timely fashion.⁵⁴

B. Position of Total

55. Total asked the majority of the members of the Committee to reject the disqualification proposal formulated by the Argentine Republic because it had no basis on the ICSID Convention or to reject the disqualification proposal based on the merits. In addition, Total requested that Argentina be ordered to pay the costs in which it incurred because of this Disqualification Proposal.
56. Total is of the opinion that the Disqualification Proposal concerning Ms. Cheng is consistent with the conduct of the Respondent in other ICSID proceedings where it has sought to challenge a member of the panel based on the weakest of grounds.⁵⁵ Total is of the opinion that Argentina should not be allowed to derail the pending annulment hearing and therefore asks the other members of the Committee to decide this matter promptly.⁵⁶

a. The standard for disqualification according to Total

57. According to Total there is no basis in the ICSID Convention for seeking disqualification of annulment committee members. This is so because Arbitration Rule 9 applies only to Article 57 of the ICSID Convention, which does not appear in the provisions of the ICSID Convention applicable to the annulment proceeding through Article 52(4).⁵⁷
58. The fact that annulment committee members are appointed by the chairman of ICSID's Administrative Council, based on the qualifications of Article 52(3) of the Convention supports this conclusion.⁵⁸ Committee members only have the limited

⁵¹ Grounds for the Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶60.

⁵² *Ibid.*, ¶ 62.

⁵³ *Ibid.*, ¶63.

⁵⁴ Argentine Republic's Additional Observations on the Proposal to Disqualify Ms. Teresa Cheng, ¶87.

⁵⁵ In Opposition to Argentina's Disqualification Proposal, Total refers to "eleven...tactical... challenges" brought by Argentina against Mr. Andrés Rigo, Mr. Guido Tawil, Mr. Albert Jan van den Berg, Ms. Gabrielle Kaufmann-Kohler, Mr. Yves Fortier, Mr. Pierre Tercier, Mr. Stanimir Alexandrov, Mr. Judd Kessler, Mr. Claus von Wobeser, and Mr. Francisco Orrego Vicuña. None of these challenges was successful. See: Opposition to Argentina's Disqualification Proposal, dated August 17, 2015, ¶1 and footnote 1.

⁵⁶ Opposition to Argentina's Disqualification Proposal, dated August 17, 2015, ¶2.

⁵⁷ *Ibid.*, ¶16-19.

⁵⁸ *Ibid.*, ¶17.

task of reviewing the procedural propriety of the award.⁵⁹ The Articles of the Convention incorporated into annulment proceedings by Article 52(4) of the ICSID Convention, as well as the arbitral rules applicable to annulment proceedings through Arbitration Rule 53, apply *mutatis mutandis*, i.e., making all the changes that are necessary in view of the differences between arbitration and annulment proceedings.⁶⁰

59. In the event the remaining members of the Committee conclude that the rules on disqualification do apply to annulment proceedings, the Claimant sets out its position on this matter.

60. Total agrees with Argentina that the standards for disqualification of a member of an annulment committee, which provide that disqualification may be sought when there is a *manifest* lack of the qualities required by Article 14(1) of the ICSID Convention, are applicable, which, as generally accepted, includes the qualities of impartiality and independence.⁶¹ The *manifest* standard implies that it does not suffice to prove the appearance of dependence or bias, but instead the existence of bias or dependence must be evident or obvious, in the sense that it can be discerned with little effort and without deeper analysis.⁶² This burden is high and must be based on objective facts: “Article 57 imposes an “objective standard based on a reasonable evaluation of the evidence by a third party.” The subjective perceptions or suppositions of the party requesting disqualification are irrelevant.”⁶³

61. As regards to the IBA Guidelines, Total acknowledges that they reflect international standards on conflict of interest⁶⁴ and states that even Argentina recognizes that they are not binding.⁶⁵ However, in its letter of August 24, 2015, it pointed out that such Guidelines refer to situations in which “justifiable doubts” may exist about an arbitrator’s independence or impartiality, and not to the standard provided for in the ICSID Convention concerning a manifest lack of either quality.⁶⁶

b. Opposition to the grounds for the Disqualification Proposal

62. Total replies to the grounds of Argentina’s Disqualification Proposal with two main arguments: (i) Ms. Cheng’s advice to a third party in an unrelated matter does not warrant disqualification and (ii) the timing of Ms. Cheng’s declaration does not warrant disqualification.

⁵⁹ *Ibid.*, ¶17.

⁶⁰ *Ibid.*, ¶¶ 20-21.

⁶¹ *Ibid.*, ¶23

⁶² *Ibid.*, ¶¶24-25.

⁶³ *Ibid.*, ¶24.

⁶⁴ Letter from Total dated August 24, 2015, p. 1.

⁶⁵ Opposition to Argentina’s Disqualification Proposal, dated August 17, 2015, ¶47; Letter from Total dated August 24, 2015, p. 1.

⁶⁶ Letter from Total dated August 24, 2015, p. 1.

i. Ms. Cheng’s advice to a third party in an unrelated matter does not warrant disqualification

63. Total indicates that Ms. Cheng’s profession is as a barrister in Hong Kong and in view of her knowledge and experience of procedures applicable in the courts she is available for consultation on complex issues by clients through solicitors. Such consultation is for the benefit of the client and not the solicitor’s law firm, and the cost of such consultation is passed through as a disbursement to the client.⁶⁷
64. According to Total, Argentina has mischaracterized two facts. The first is that the client that consulted Ms. Cheng—the Chinese Company—is not a party to this arbitration and neither is the law firm Freshfields, thus she was not obliged under Arbitration Rule 6 to reveal her contact with them. The second fact is that Ms. Cheng and Freshfields have not acted as co-counsel in the matter in question.⁶⁸
65. Total argues that Argentina cannot find a single case in which an arbitrator has been disqualified on analogous facts.⁶⁹ In the case of *Grand River Enterprises v. United States*, to which the less stringent standards under the UNCITRAL Arbitration Rules applied, the disqualification of the arbitrator was accepted because he was then engaged in separate legal proceedings against the respondent State where the underlying issue was found to be similar to the one in the arbitration.⁷⁰ In addition, Argentina refers to the cases of *Favianca v. Venezuela* and *Nations Energy v. Panama*, which relate to different factual situations and that involved the resignation of the arbitrators challenged.⁷¹
66. Total notes that Argentina neglects to discuss the conclusions of the challenge in the *Vivendi I* case, where the majority of the committee found that mere professional relationships between an arbitrator’s law firm and a party is not sufficient to sustain a challenge.⁷² There is far less basis for the approach taken by Argentina here than there was in the *Vivendi v. Argentina* case. There is no kind of relationship between Ms. Cheng and the Claimant—Total—and the advice she gave the Chinese Company implied around US\$5,000. Her relationship with Freshfields was “*de minimis*” and her links with Total non-existent.⁷³
67. Finally, Total disputes the application of Article 2.3.2 of the IBA Guidelines invoked by Argentina, because in its opinion, this provision covers situations in which there is an attorney-client relationship between the arbitrator and the law firm acting as counsel for one of the parties. Since Ms. Cheng has never represented or advised Freshfields this provision is not applicable to the case in question.⁷⁴

⁶⁷ Opposition to Argentina’s Disqualification Proposal, dated August 17, 2015, ¶¶ 6-7.

⁶⁸ *Ibid.*, ¶8.

⁶⁹ *Ibid.*, ¶26.

⁷⁰ *Ibid.*, ¶27.

⁷¹ *Ibid.*, ¶¶ 28-33.

⁷² *Ibid.*, ¶33.

⁷³ *Ibid.*, ¶¶33-34.

⁷⁴ *Ibid.*, ¶35.

68. According to Total, Articles 2.3.2 and 3.3.9 of the IBA Guidelines do not apply to the facts of this case, since Ms. Cheng confirmed that she did not have a co-counsel nor an attorney-client relationship with Freshfields.⁷⁵

ii. The timing of the Declaration

69. Total argues that the obligation to disclose under ICSID Arbitration Rule 6(2) arises out of relationships with the parties to the dispute and not *de minimis* indirect work for a client of one of the counsel to one of the parties to the dispute.⁷⁶ There was therefore no duty on Ms. Cheng to disclose the instruction for the Chinese Company and she did so only *ex abundante cautela*.⁷⁷ Furthermore, Ms. Cheng's failure to distinguish between Argentina's counsel and the State as a party at the time of the disclosures is explained by the fact that Argentina's *Procurador del Tesoro* is not only an agent of the State but also acts as its representative.⁷⁸

70. Argentina cites no authority for the proposition that the duty to disclose is without any time limits. This proposition is at odds with common sense and the respective time limitation set by the IBA Guidelines following consultation with all stakeholders in the arbitral process as a sensible cut-off date.⁷⁹ On the contrary, the authority Argentina cites represents the position of a single commentator whose views run counter to the proposition that the standard against which disqualification proposals are to be assessed in ICSID arbitration is an objective one and states that the disclosure of any relationship with the parties should be made out of an abundance of caution.⁸⁰

71. Total distinguishes this case from the case presented in *Universal Compression v. Venezuela*, where the arbitrator was appointed by the claimant and failed to disclose that he had acted as co-counsel with the claimant's counsel in a separate investment arbitration. The challenge was rejected because Venezuela did not demonstrate that this situation would give the claimant a privileged position and because the arbitrator's failure to disclose was deemed an "honest exercise of discretion" by the arbitrator that did not impact his independence or impartiality.⁸¹

72. The Chairman of the Administrative Council of ICSID reached the same conclusion, rejecting the proposal for disqualification of the arbitrator appointed by Venezuela for having failed to disclose repeat appointments by said State. In his decision he expressed the opinion that these appointments were in the public domain, that the Venezuelan appointments represented only a fraction of the arbitrator's income and

⁷⁵ *Ibid.*, ¶35.

⁷⁶ Letter from Total dated August 24, 2015, p. 2.

⁷⁷ Opposition to Argentina's Disqualification Proposal, dated August 17, 2015, ¶38.

⁷⁸ Letter from Total dated August 24, 2015, p. 2.

⁷⁹ Opposition to Argentina's Disqualification Proposal, dated August 17, 2015, ¶39.

⁸⁰ Opposition to Argentina's Disqualification Proposal, dated August 17, 2015, ¶39.

⁸¹ *Ibid.*, ¶¶40-41.

therefore the arbitrator's decision not to disclose in advance was deemed an "honest exercise of discretion."⁸²

73. According to Total, the case of Ms. Cheng is still more benign. Her only relationship with Freshfields was as an advisor to a third party in an unrelated matter in which she was briefly involved.⁸³ This relationship is not as relevant as that which existed in the case of *Universal Compression v. Venezuela*, because in advising the Chinese Company Ms. Cheng's work would represent a fraction of less than one quarter of one percent of her income.⁸⁴ As in that case, the decision of Ms. Cheng not to disclose brief and remote relations with third parties also represented by Freshfields deserves the same characterization as an honest exercise of discretion.⁸⁵
74. Specifically, Total has five arguments to contest the reasons given by Argentina to disqualify Ms. Cheng from this Committee because of the advice she gave to the Chinese Company: (i) the contention that Ms. Cheng chose not to disclose the engagement because of her role in this proceeding is mere speculation and as such cannot give rise to a finding of manifest partiality or dependence;⁸⁶ (ii) Ms. Cheng was not obliged to disclose *de minimis* advice given to a third party and only did so out of an abundance of caution;⁸⁷ (iii) even if the standard of Article 3.3.9 of the IBA Guidelines were applicable, Ms. Cheng would not be obliged to disclose her advice to a third party because she did not act as co-counsel to a law firm representing one of the Parties;⁸⁸ (iv) Section 2.3.2 of the IBA Guidelines is not applicable;⁸⁹ and (v) Argentina is speculating on the possible relationship between the object of the advice rendered by Ms. Cheng and this annulment proceeding.⁹⁰
75. Finally, Total refers to the reasons why the new disclosures made by Ms. Cheng in the letter dated August 5, 2015 do not warrant disqualification: (i) Argentina does not explain in what way the information provided by Ms. Cheng in such letter was ambiguous and incomplete;⁹¹ (ii) Ms. Cheng revealed facts prior to the last three years in an exercise of honest discretion, prompted by the Defendant's persistent questioning;⁹² and (iii) contrary to what Argentina has suggested, there was no reason to reveal that Ms. Cheng's son interned at Freshfields.⁹³ These disclosures do not imply the recognition by Ms. Cheng of a prior omission, but were the result of questions from Argentina and demonstrate the efforts she has made to ensure transparency amidst concerns about her independence and impartiality.⁹⁴

⁸² *Ibid.*, ¶42.

⁸³ *Ibid.*, ¶41.

⁸⁴ *Ibid.*, ¶43.

⁸⁵ *Ibid.*, ¶43.

⁸⁶ *Ibid.*, ¶45.

⁸⁷ *Ibid.*, ¶46.

⁸⁸ *Ibid.*, ¶47.

⁸⁹ *Ibid.*, ¶48.

⁹⁰ *Ibid.*, ¶¶ 49-50.

⁹¹ *Ibid.*, ¶¶ 51-52.

⁹² *Ibid.*, ¶53.

⁹³ *Ibid.*, ¶55.

⁹⁴ Letter from Total dated August 24, 2015, p. 2.

III. TERESA CHENG'S RESPONSE

76. On August 18, 2015, Ms. Cheng responded to the comments of the Parties on the Disqualification Proposal made by Argentina. Ms. Cheng stated that she would not comment on the merits of the challenge, and made a number of clarifications on the allegations of the Parties.
77. First, Ms. Cheng stated that in accordance with the Rules of the Hong Kong Bar Association, as a barrister she has no contractual relationship with the instructing lawyer (solicitor) or his firm. Because her advice is not addressed to the instructing solicitor but to the lay client and it is the lay client who pays for her services, Article 2.3.2 of the IBA Guidelines is not applicable.⁹⁵
78. In addition, Ms. Cheng stated that under Arbitration Rule 6(2)(a) there is no requirement to disclose any relationship with the parties' legal representatives, but in her declaration of May 22, 2014 she mentioned Argentina's *Procuradora del Tesoro* because the latter is one of the official representatives of Argentina and may be seen as equivalent to the state party.⁹⁶
79. Ms. Cheng indicated that only when she received the written submissions on the Disqualification Proposal did she learn that Freshfields has been acting on behalf of a party against Argentina in nine (9) cases. Ms. Cheng also stated that the information contained in the letter dated August 5, 2015 was submitted in response to the broad question raised by Argentina and that when accepting the appointment in this case she did not consider that these issues would affect her independent judgment. As a result, they were not disclosed.
80. On the IBA Guidelines, Ms. Cheng stated that she adopted the guidance of such Guidelines in compliance with the period of three years referred to in her letter dated August 5 and from Articles 3.3.8 and 3.3.9. In addition, Ms. Cheng explained that Article 3.3.9 does not apply as she has not represented a party in a legal matter; she had only provided independent advice to the lay client.⁹⁷
81. In response to another letter from Argentina dated August 19, 2015 requesting further information, Ms. Cheng stated as follows:
- a. The oral advice related to an overview of Hong Kong court procedures dealing with interlocutory applications relating to the appointment of interim receiver;
 - b. Regarding the possible appointment as an arbitrator in a case that gave rise to her note dated July 27, 2015, she had already confirmed that no appointment was made;

⁹⁵ Teresa Cheng's Letter dated August 18, 2015, Courtesy Translation, p. 1-2 of 4.

⁹⁶ *Ibid.*, p. 3 of 4.

⁹⁷ *Ibid.*, p. 4 of 4.

- c. Regarding designations or acting with former Freshfields partners she highlighted the word “former” in Argentina’s communication. These professional relationships have nothing to do with Freshfields; and
- d. She had nothing further to add.⁹⁸

IV. ANALYSIS OF THE MAJORITY OF THE COMMITTEE

A. On the disqualification procedure applicable to members of ICSID annulment committee

82. First, the majority of the Committee must consider Total’s argument on the lack of grounds for seeking disqualification in annulment proceedings under the ICSID Convention. This proposition is based, first, on the fact that Article 52(4) of the ICSID Convention, which lists the provisions applicable to annulment proceedings, did not incorporate standards for disqualification, and second, on the way in which annulment committee members are appointed, without the intervention of the parties.⁹⁹ Argentina disagreed with this conclusion, because, in its view, the disqualification of a member of an annulment committee proceeds to the extent that Article 52 of the ICSID Convention incorporates Rule 9 of the Arbitration Rules into the annulment procedure.¹⁰⁰
83. The majority of the Committee shares the position of Argentina and considers that in the ICSID Convention there is a basis on which to seek the disqualification of a member of an *ad hoc* Committee.
84. Indeed, Article 52(4) of the ICSID Convention does not refer to Chapter V of the Convention in which the rules for Replacement and Disqualification of Conciliators and Arbitrators are included. The absence of express incorporation of these provisions within Article 52(4) of the Convention may raise doubts and controversies about the application of the rules for the disqualification of arbitrators to annulment committee members.¹⁰¹
85. However, even if one accepts that there were doubts in the ICSID Convention, these were dispelled by the Administrative Council through the Arbitration Rules. As the majority of the Committee explained in the challenge to the President in the *Vivendi I* case, the ICSID Administrative Council is empowered to adopt the rules of procedure for conciliation and arbitration proceedings (Articles 6(1)(c) and 6(3) of the Convention).¹⁰² In exercising these powers, the Administrative Council incorporated Rule 53 in the Arbitration Rules:

⁹⁸ Email from the ICSID Secretariat to the Parties sending Ms. Teresa Cheng’s message, dated August 20, 2015.

⁹⁹ Opposition to Argentina’s Disqualification Proposal, dated August 17, 2015, ¶¶ 16-21.

¹⁰⁰ Grounds for the Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶10.

¹⁰¹ *Compañía de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, Decision on the Challenge to the President of the Committee, (ICSID Case No. ARB/97/3), October 3, 2001, ¶¶5-7.

¹⁰² *Ibid.*, ¶¶7-9.

“...these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.”

86. The incorporation of the Arbitration Rules to annulment proceedings via Rule 53 extends to Arbitration Rule 9, which contains the procedure for disqualification. For this reason, the procedure for disqualification provided for in Arbitration Rule 9 is also applicable to members of ICSID annulment committees.¹⁰³
87. As regards to Arbitration Rule 53, Total highlights the expression *mutatis mutandis* (all necessary changes having been made) because there are important differences between arbitration proceedings and annulment proceedings that warrant the exclusion of some of the Arbitration Rules in the context of annulment of ICSID awards. One such difference is that members of *ad hoc* Committees are appointed by an independent third party (i.e. the Chairman of the Administrative Council) subject to the restrictions of Article 52(3) of the Convention.¹⁰⁴
88. The majority of the Committee disagrees with this interpretation with regard to annulment proceedings. First, both arbitrators and annulment committee members must comply with the qualities of independence and impartiality. Indeed, annulment committee members must be appointed by the Chairman of the Administrative Council based on the Panel of Arbitrators,¹⁰⁵ comprising only those who comply with the characteristics set forth in Article 14(1).¹⁰⁶ These qualities are not replaced because of the mode of appointment of committee members. The fact that on one occasion it is the parties and on another it is a third party that appoints persons who will be part of the committee or of the tribunal does not eliminate or decrease the need for them to comply with these characteristics.
89. Second, it must be remembered that the procedure for disqualification is intended to ensure that arbitrators preserve the qualities of independence and impartiality not only at the time of appointment but throughout the proceeding.
90. Article 57 of the ICSID Convention is clear in stating that disqualification may be proposed when there is a manifest lack of the qualities required by paragraph (1) of Article 14. Therefore, it could not be argued that the drafters of the Convention only wanted to allow the procedure to be applicable to the disqualification of arbitrators and not annulment committee members, insofar as the latter must meet the same

¹⁰³ *Ibid.*, ¶¶7-9.

¹⁰⁴ Opposition to Argentina’s Disqualification Proposal, dated August 17, 2015, ¶¶ 20-21.

¹⁰⁵ Article 52(3) of the ICSID Convention.

¹⁰⁶ Article 12 and Article 14(1) of the ICSID Convention. See also: “*Consistently with this Code of Ethics, Arbitration Rule 6 of the ICSID Arbitration Rules, which is directly applicable here, imposes the obligation to declare “past and present professional, business and other relationships (if any) with the parties”. The fundamental principle is that arbitrators shall be and remain independent and impartial; in terms of Article 14(1) of the Convention, they must be able to be “relied on to exercise independent judgment”. Exactly the same principle applies to the members of ad hoc Committees. The role of the other members of this Committee is to determine whether there is “a manifest lack of the qualities required by paragraph (1) of Article 14.” “Compañía de Aguas del Aconquija and Vivendi Universal v. The Argentine Republic, Decision on the Challenge to the President of the Committee, (ICSID Case No. ARB/97/3), October 3, 2001, ¶18.*”

qualifications that the disqualification process seeks to protect.¹⁰⁷ The majority of the Committee also notes that because there are no other proceedings in the ICSID system to disqualify annulment committees members,¹⁰⁸ the existing procedure referred to in Articles 57, 58 and 14(1) of the ICSID Convention and Arbitration Rule 9 should apply.

91. Based on the above reasons, the majority of the Committee considers that there is indeed a procedure in the ICSID Convention that allows it to consider and decide the Disqualification Proposal filed by Argentina against Teresa Cheng and that the procedure is the same one as specified for the disqualification of arbitrators.

B. The Legal Standard for Disqualification under the ICSID Convention

92. The Parties agree that the relevant provisions for assessing the disqualification requested by Argentina are in Articles 57 and 14(1) of the ICSID Convention and Arbitration Rules 6 and 9.

93. Article 57 of the ICSID Convention states:

“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.”

94. Also, Article 14(1) of the ICSID Convention incorporates the qualities that persons designated to serve on the Panels should have:

“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.”

95. Rules 6 and 9 refer to declarations by the arbitrator and the disqualification procedure. Rule 6(2) refers to the declaration that each arbitrator must sign. In the declaration the arbitrator must state that he shall judge fairly and declare (a) his “past and present professional, business and other relationships (if any) with the parties” and (b) any other circumstance that might cause his reliability for independent judgment to be questioned by a party.
96. Rule 9, meanwhile, requires the challenged arbitrator to “without delay” furnish explanations and the majority of the Tribunal or Committee to “promptly” consider and vote on the proposal.

¹⁰⁷ *Compañía de Aguas del Aconquija and Vivendi Universal v. The Argentine Republic*, Decision on the Challenge to the President of the Committee, (ICSID Case No. ARB/97/3), October 3, 2001, ¶¶9-10.

¹⁰⁸ *Ibid.*, ¶11.

97. In its pleadings, the Parties and Ms. Cheng referred to the IBA Guidelines on Conflicts of Interest in International Arbitration, although they differ in the extent of its application to this disqualification proposal.
98. The majority of the Committee considers that the IBA Guidelines are a very useful tool, insofar as they reflect a transnational consensus on their subject-matter, and therefore have been used as reference for handling issues related to conflicts of interest in international arbitration. However, as has been repeatedly stated in previous decisions concerning disqualification in ICSID cases, these Guidelines are merely indicative and not binding.¹⁰⁹ In addition, the IBA Guidelines relate mainly to standards applicable to the duty to disclose and not to the standards applicable to a disqualification proposal. Indeed, the IBA Guidelines themselves clarify that the fact of requiring disclosure by an arbitrator does not imply doubt about the latter's impartiality and independence, as the standard of disclosure is different from the standard for disqualification.¹¹⁰
99. Accordingly, this decision is taken within the framework of the ICSID Convention and the Arbitration Rules and especially Articles 14(1) and 57 of the ICSID Convention and Arbitration Rules 6 and 9.
100. Under the ICSID Convention, the general rule is that the arbitrators or annulment committee members must have the qualities of independence and impartiality. The parties agree with this proposition. Previous decisions on the disqualification of arbitrators and annulment committee members have clarified the meaning of these two qualities as well:

*“Impartiality refers to the absence of bias or predisposition toward a party. Independence is characterized by the absence of external control. Independence and impartiality both “protect parties against the arbitrators being influenced by factors other than those related to the merits of the case.”*¹¹¹ [Original text in English]

¹⁰⁹ See for example: *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Kazakhstan*, Decision on the proposal to disqualify a member of the Tribunal (ICSID Case No. ARB/13/13), March 20, 2014, ¶59 *Nations Energy Corporation, Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama*, Decision on the Proposal for the Disqualification of a Member of the Annulment Committee (ICSID Case No. ARB/06/19), September 7, 2011, ¶¶57-58; *Blue International Bank & Trust (Barbados) v. Bolivarian Republic of Venezuela*, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/12/20), November 12, 2013, ¶62; *Burlington Resources Inc. v. Republic of Ecuador*, Decision on the Proposal for Disqualification of a Member of the Tribunal (ICSID Case No. ARB/08/5), December 13, 2013, ¶69; *Universal Compression International Holdings v. The Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify Arbitrators (ICSID Case No. ARB/10/9), May 20, 2011, ¶¶73-74.

¹¹⁰ “It is also essential to reaffirm that the fact of requiring disclosure—or of an arbitrator making a disclosure—does not imply the existence of doubts as to the impartiality or independence of the arbitrator. Indeed, the standard for disclosure differs from the standard for challenge.” IBA Guidelines, 2014, Introduction, p. iii.

¹¹¹ Original text [in English]: “*Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both “protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”* *Burlington Resources Inc. v. Republic of Ecuador*, Decision on the Proposal for Disqualification of a Member of the Tribunal (ICSID Case No. ARB/08/5), December 13, 2013, ¶66; See also: *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Kazakhstan*, Decision on the proposal to disqualify a member of the Tribunal (ICSID Case No. ARB/13/13), March 20, 2014, ¶53.

101. Article 57 of the ICSID Convention specifies that the disqualification proposal must be on account of any “manifest lack” of the qualities required by Article 14(1) of the Convention. The parties to this dispute agree that the fact that said lack is *manifest* refers to the ease with which it can be detected, so that it is clear or obvious and can be discerned with little effort and without deep analysis.¹¹²

102. The majority of the Committee considers that in order to determine whether there is a manifest lack of impartiality and independence an objective standard must be applied, based on the reasonable evaluation that a third party would make of the available evidence, should apply. Although, as stated by Argentina, it is not the discretion of the arbitrator or the committee member that determines the existence of impartiality and independence for purposes of deciding the issue of disqualification, the mere subjective criterion of the party requesting the disqualification is neither sufficient to meet the standard of the ICSID Convention:

*“The applicable legal standard is an “objective standard based on a reasonable evaluation of the evidence by a third party.” As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.”*¹¹³ [Original text in English]

103. If the standard were to be based solely on the perception of the party requesting the disqualification, this would mean that any challenge would have to be accepted with the only requirement being that the party making the claim affirm that his perception is that the challenged arbitrator lacks impartiality or independence.

104. The standard for assessing the disqualification under Article 57 of the ICSID Convention is also a strict and relatively high standard and has two constituent elements: (a) there must be a fact or set of facts (b) of such a nature or kind that a third party can conclude after a reasonable assessment of the evidence, that there is a manifest lack of the qualities required by Article 14(1).¹¹⁴

105. The party requesting the disqualification must therefore demonstrate (a) the facts that give rise to the challenge; and (b) that such facts reasonably assessed by a third party

¹¹² *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Kazakhstan*, Decision on the proposal to disqualify a member of the Tribunal (ICSID Case No. ARB/13/13), March 20, 2014, ¶55; *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/07/30), July 1, 2015, ¶82; *59 Nations Energy Corporation, Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama*, Decision on the Proposal for the Disqualification of a Member of the Annulment Committee (ICSID Case No. ARB/06/19), September 7, 2011, ¶56; *Compañía de Aguas del Aconquija and Vivendi Universal v. The Argentine Republic*, Decision on the Challenge to the President of the Committee (ICSID Case No. ARB/97/3, October 3, 2011, ¶18; *Blue International Bank & Trust (Barbados) v. Bolivarian Republic of Venezuela*, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/12/20), November 12, 2013, ¶61; *Burlington Resources Inc. v. Republic of Ecuador*, Decision on the Proposal for Disqualification of a Member of the Tribunal (ICSID Case No. ARB/08/5), December 13, 2013, ¶71.

¹¹³ Original text [in English]: “*The applicable legal standard is an “objective standard based on a reasonable evaluation of the evidence by a third party”. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention”*. *Blue International Bank & Trust (Barbados) v. Bolivarian Republic of Venezuela*, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/12/20), November 12, 2013, ¶60.

¹¹⁴ See for example: *SGS Société Générale de Surveillance v. Pakistan*, Decision on Claimant’s Proposal to Disqualify Arbitrator (ICSID Case No. ARB/01/13), December 19, 2002, 8 ICSID Reports 398, 402.

in the light of the available evidence, have the character, nature or importance that may lead to the inference that it is manifest, obvious, that the person challenged cannot exercise independent judgment in the particular proceeding in which the disqualification was requested.

106. Finally, Arbitration Rule 9 states that the proposal for disqualification of an arbitrator must be filed promptly.¹¹⁵ Since neither the Convention nor the Arbitration Rules set a specific timeframe in which the disqualification proposal has to be filed, the timeliness of the proposal must be assessed on a case-by-case basis. According to Article 58 of the ICSID Convention, there is no remedy or mechanism for review of the decision on a disqualification proposal rendered by the majority of the tribunal or the committee or by the Chairman of the Administrative Council.

C. Decision on the disqualification of Ms. Cheng

a. Ms. Cheng's relationship with Freshfields

107. It is undisputed that the disclosures made by Ms. Cheng giving rise to the challenge made by Argentina do not refer to the Parties in this annulment proceeding. None of Ms. Cheng's disclosures and none of the arguments put forward by the Parties refer to relationships between Ms. Cheng and Total or between Ms. Cheng and the Argentine Republic.

108. Ms. Cheng's declarations indicate that neither the services provided in 2015, that were the subject of disclosure in her letter dated July 27, 2015, nor her work in 2008, which is dealt with in her letter dated August 5, 2015, refer to this annulment proceeding, or the arbitration that gave rise to the award, whose annulment is now being sought, or matters or cases that somehow relate to the annulment proceeding or the arbitration. There is no disqualification proposal based on links with the parties or because of the subject-matters dealt with in those services provided by Ms. Cheng.

109. The relevant fact for purposes of deciding the disqualification is, therefore, the relationship that Argentina alleges exists between Ms. Cheng and the firm Freshfields that represents Total in these annulment proceedings.

110. Argentina considers that a remunerated contractual relationship exists between Freshfields and Ms. Cheng that, analyzed under the standards of the ICSID Convention and the Arbitration Rules, affects the independence and impartiality of Ms. Cheng.

¹¹⁵ *Fábrica de Vidrios de los Andes, C.A. and Owens-Illinois de Venezuela v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/12/21), June 16, 2015, ¶¶39-40; *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/07/30), July 1, 2015, ¶¶62-63; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizcaia, Bilbao Bizcaia Ur Partzuergona v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (ICSID Case No. ARB/07/26), August 12, 2010, ¶37; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (ICSID Case No. ARB/03/17, ARB/03/19), October 22, 2007, ¶¶22-24; *Blue International Bank & Trust (Barbados) v. Bolivarian Republic of Venezuela*, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/12/20), November 12, 2013, ¶¶63-65.

However, Argentina has not established the existence of that contractual relationship or a relationship of dependency between Ms. Cheng and Freshfields that meets the standards of the above-mentioned standards and the ICSID Convention.

111. Ms. Cheng stated that in 2015 she gave oral advice to the Chinese Company on an issue of Hong Kong domestic law, at the request of the lawyers of the Hong Kong office of Freshfields.¹¹⁶ She further notes that the request was made to her in her capacity as a barrister, that the total time spent on this matter was four hours, for which she received remuneration at a barrister's hourly rate.¹¹⁷
112. The majority does not find in the record evidence of the existence of a relationship of dependency of Ms. Cheng with respect to Freshfields of such importance as to make manifest her failure to comply with the qualifications required by Article 14(1) of the ICSID Convention.
113. The information provided by Ms. Cheng indicates that this was an isolated task for a company that has no relationship or connection with the Parties in this proceeding— Total and the Argentine Republic—and on an issue of Hong Kong domestic law, unrelated to this proceeding or to the arbitration that gave rise to the award whose annulment is now being sought.¹¹⁸
114. Argentina points out that Ms. Cheng's professional and economic link was with Freshfields and from that concludes that Ms. Cheng is not independent. Ms. Cheng states that her relationship was with the Chinese Company and Freshfields' intervention was merely to request service for that company and to process the payments that would be made by the aforementioned company as the entity responsible for them.
115. The information furnished by Ms. Cheng indicates that the service was provided to the Chinese Company and that it was this company that paid for the service provided by Ms. Cheng. Beyond her own interpretation of the role of barristers and solicitors or the rights and obligations of each one under the law of Hong Kong, the majority of the Committee does not find that Argentina has proved that there was a contractual relationship between Freshfields and Ms. Cheng in connection to those services, let alone that such a relationship -if it had existed- created a relationship of dependency between Freshfields and Ms. Cheng, or that it is manifest that it affected her independence.
116. It is undisputed that it was the Hong Kong office of Freshfields that asked Ms. Cheng to provide the service to the Chinese Company. But that fact alone is not sufficient to conclude that because Freshfields is the lawyer for the Claimant in this annulment proceeding, Ms. Cheng should automatically be disqualified. It is neither enough, as

¹¹⁶ Teresa Cheng's Letter to the Parties, dated July 27, 2015; Ms. Teresa Cheng's response to questions submitted by the Argentine Republic, dated August 4, 2015; Teresa Cheng's Letter dated August 18, Courtesy Translation.

¹¹⁷ Ms. Cheng's response to questions submitted by the Argentine Republic, dated August 4, 2015.

¹¹⁸ Teresa Cheng's Letter dated August 18, 2015, Courtesy Translation. pp. 1-2 of 4; Teresa Cheng's Letter to the Parties, dated July 27, 2015; Ms. Cheng response to questions submitted by the Argentine Republic, dated August 4, 2015.

argued by Total, to dismiss the disqualification to take into account that different offices within the same firm are involved. The majority of the Committee must assess all the circumstances of this specific case, not to set general parameters but to determine whether, in light of the facts established and a reasonable assessment of the evidence, Ms. Cheng's lack of independence is manifest.

117. An objective analysis of all the facts and circumstances that appear to have been demonstrated in this case, including the beneficiary of the service, the duration thereof, the amount involved, the non-intervention of any of the lawyers acting in this case or who acted in the arbitration, and the lack of link between the service provided and the Parties, or the issues raised in this case lead the majority of the Committee to conclude with respect to the advice provided by Ms. Cheng to the Chinese Company that neither the contractual relationship alleged by Argentina or a circumstance of enough relevance do not seem to have been established in any way, to consider that in the case of Ms. Cheng there is a manifest absence of the qualities required by Article 14(1).

118. Regarding the IBA Guidelines, nothing in the information provided in the request for disqualification and in Ms. Cheng's response even suggests that Ms. Cheng and Freshfields have "*acted together...as co-counsel*" as required by Rule 3.3.9. of the Guidelines cited.¹¹⁹ The premise of such Guideline refers generally to acting as co-counsel in the same case, although it could include joint action on issues that are not contentious. Neither premise appears to be proven in the case under consideration.

119. Regarding Guideline 2.3.2.,¹²⁰ it is not been alleged, let alone proved, that there has been any kind of representation of Freshfields by Ms. Cheng, nor that Ms. Cheng has advised Freshfields. The advice was provided to a third party, the Chinese Company, and the fact that Freshfields had requested the service does not render Ms. Cheng an advisor of Freshfields.

120. With regard to the service provided by Ms. Cheng in the case of *Hutchison Telephone Company Limited et al. v. The Telecommunications Authority, Commerce and Economic Development Bureau (Government of the Hong Kong Special Administrative Region)* on the Decision on Stay Application of the Hong Kong Telecommunications Appeal Board in 2008,¹²¹ the contractual relationship or dependence of Ms. Cheng regarding Freshfields, as alleged by Argentina, has not been proved. On the contrary, the available information indicates that Ms. Cheng acted at the request of Freshfields for the above-mentioned company and for the benefit of said company and her task concluded with the decision on appeal in 2008, i.e. seven years ago.

¹¹⁹ IBA Guidelines 3.3.9. "*The arbitrator and another arbitrator, or counsel for one of the parties in the arbitration, currently act or have acted together within the past three years as co-counsel.*"

¹²⁰ IBA Guidelines 2.3.2. "*The arbitrator currently represents or advises the lawyer or law firm acting as counsel for one of the Parties.*"

¹²¹ Ms. Cheng's response to questions submitted by the Argentine Republic, dated August 5, 2015; Teresa Cheng's Letter dated August 18, 2015, Courtesy Translation. p. 3-4 of 4.

121. This service, which should be subjected to the same analysis as above regarding the service provided in 2015, according to available information did not create a contractual relationship with Freshfields or a link resulting in a manifest impediment for Ms. Cheng to judge a matter fairly and render an independent and impartial judgment in this case.

122. In short, the contractual relationship that Argentina alleges exists between Ms. Cheng and Freshfields refers to two specific legal services, of short duration, provided by Ms. Cheng to different companies, which have nothing to do with this arbitration, on matters of Hong Kong Law, with a lapse of seven years between the two, and the common denominator of which is that in both cases the request for the service to the client was made by Freshfields through lawyers that have no involvement in this arbitration. Nothing in the record proves that these two services are the basis of or have resulted in a contractual relationship between Freshfields and Ms. Cheng or have generated a situation that complies with the standard required by the ICSID Convention for a successful challenge.

123. As noted in *Vivendi I*:

*“To summarise, we agree with earlier panels which have had to interpret and apply Article 57 that the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator or Committee member. All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently...”*¹²²

124. Similarly the decision on disqualification in *Nations Energy v. Panama* stated:

“(...)Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions.

*The mere existence of some professional relationship between Respondent’s counsel and an ICSID-appointed arbitrator is not an automatic basis for disqualification of an arbitrator based on lack of impartiality and independence as Article 57 states. “All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently (...)”*¹²³ [Free translation].

125. As for the other circumstances revealed by Ms. Cheng in response to questions from Argentina, over which Argentina alleges that when analyzed as a whole, they

¹²² *Compañía de Aguas del Aconquija and Vivendi Universal v. The Argentine Republic*, Decision on the Challenge to the President of the Committee (ICSID Case No. ARB/97/3), October 3, 2001, ¶28.

¹²³ *Nations Energy Corporation, Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama*, Decision on the Proposal for the Disqualification of a Member of the Annulment Committee (ICSID Case No. ARB/06/19), September 7, 2011, ¶¶66-67. [Citations omitted]

demonstrate the relationship between Freshfields and Ms. Cheng, the majority of the Committee finds that such circumstances, when considered in isolation or analyzed as a whole, do not lead to the conclusion that Ms. Cheng has a link with Freshfields and that in account of such a link she lacks the ability to give an independent and impartial judgment in this case.

126. Neither the participation of Ms. Cheng's son for two months in 2011 in an internship program at Freshfields, which did not result in a contract with Ms. Cheng's son; nor the participation of Ms. Cheng as arbitrator in a case involving Freshfields; nor the alleged relationships of Ms. Cheng with former Freshfields partners, which did not go beyond mere speculation as to their scope; let alone the participation of Ms. Cheng over several years in academic forums or institutions where she met Mr. Jan Paulsson, a former partner of Freshfields, are facts that show, as required by the ICSID Convention, a manifest lack of impartiality and independence on the part of Ms. Cheng.

127. These are isolated facts that occurred over many years, which have no connection with each other. Argentina had the burden to show the connection between these facts and how they affected the independence of Ms. Cheng. Neither the connection nor the result of such connection has been demonstrated in Argentina's disqualification proposal.

b. Ms. Cheng's failure to disclose

128. As noted above by the majority of the Committee, under the ICSID Convention and the Arbitration Rules (Rule 6(2)) the arbitrator is required to disclose his past and present professional, business and other relationships (if any) with the parties, and any other circumstance that might cause the arbitrator's reliability for independent judgment to be questioned by a party.

129. Argentina considers that the fact that Ms. Cheng did not reveal the services provided to the Chinese Company at the request of Freshfields, at the time of signing her declaration in this case, is a circumstance that shows a lack of transparency and also involves a breach of her disclosure obligation under the ICSID Convention, which makes it necessary that she be removed from this case.

130. Respondent also is of the opinion that the failure to disclose the other circumstances that she later disclosed after the several questions raised by Argentina, at the time of signing the declaration, also leads to the conclusion that Ms. Cheng was not transparent and failed to comply with her duty of disclosure, therefore the challenge must be accepted.

131. Argentina's request for disqualification appears to be based on two premises. First, the failure to disclose a relationship or circumstance that the party requesting the disqualification considers relevant constitutes *per se* a situation in which admittance of the challenge is warranted, as there would have been a breach of the duty of disclosure and lack of transparency that cast doubt on the impartiality and independence of the

arbitrator.¹²⁴ Second, it is not important how the arbitrator or the annulment committee member values the circumstance or relationship in question, for purposes of disclosure, but rather how such circumstance or relationship may be perceived by the parties.¹²⁵

132. The majority of the Committee does not agree with Argentina regarding the above-mentioned premises.

133. As has been recognized in several decisions on disqualification under the ICSID Convention when the arbitrators and annulment committee members make the declaration referred to in Rule 6(2) they are making an honest exercise of discretion.¹²⁶ The arbitrator or annulment committee member determines, in his sole discretion, that is, with a subjective criterion, if in his opinion a particular circumstance may be perceived by the parties as a circumstance that affects his ability to make an independent judgment.

134. In reviewing the circumstances disclosed by the arbitrator or the committee member, the party or parties to the arbitration or the annulment proceeding will make an evaluation of whether in their judgment, according to their perception—again a subjective criterion—such circumstance can affect the independence or impartiality of the arbitrator or annulment committee member.

135. The criterion for deciding the proposal for disqualification, as noted above¹²⁷ and as repeatedly stated in the decisions on disqualification under the ICSID Convention and the Arbitration Rules is an objective criterion. It is not the subjective judgment of the arbitrator or annulment committee member, i.e., one's perception for purposes of the declaration; nor is it the subjective judgment of the party, i.e., one's perception for purposes of submitting the challenge.

136. Not only is there no rule in the ICSID Convention or the Arbitration Rules from which one can conclude that the failure to disclose a circumstance *per se* implies the absence of the requirements of the oft-quoted Article 14(1) of the ICSID Convention but there is no basis whatsoever to conclude, as Argentina appears to be doing, that if the party considers that a circumstance should have been disclosed and the arbitrator or committee member did not disclose it, that is enough for the challenge to be successful.

137. In the present case, when submitting her disclosure declaration Ms. Cheng was of the opinion that the services provided to the Chinese Company did not warrant any disclosure. Apparently, as she had doubt about the interpretation of paragraph 3.3.9 of the IBA Guidelines, she then decided to disclose the provision of those services,

¹²⁴ Grounds for the Argentine Republic's Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶¶55-63.

¹²⁵ *Ibid.*, ¶16, ¶26.

¹²⁶ *Universal Compression International Holdings v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify a Majority of the Tribunal (ICSID Case No. ARB/10/9), 20 May 2011. ¶¶94-95, ¶104; *Nations Energy Corporation, Electric Machinery Enterprises Inc. and Jaime Jurado v. Republic of Panama*, Decision on the Proposal for the Disqualification of a Member of the Annulment Committee (ICSID Case No. ARB/06/19), September 7, 2011, ¶76.

¹²⁷ See *supra*, ¶102.

stating that she still was of the opinion that she had no obligation to disclose them but that she did so *ex abundante cautela*.¹²⁸

138. As for other disclosures, Ms. Cheng has explained that she made them in order to answer Argentina's several questions and not because she considered that they were matters subject to disclosure.¹²⁹
139. There is nothing in the record to suggest that Ms. Cheng tried to hide information that she should have disclosed. It is true that the timing of the disclosure, given the proximity of the hearings, might not have been the most convenient, but it cannot be derived from this circumstance that this is a malicious act or a breach of Ms. Cheng's duties as a member of this Committee.
140. Ms. Cheng explained that when she was filling out her Form of Acceptance for this case, she did not consider it necessary to disclose the matters Argentina questioned owing to the nature of the parties and of the dispute, the legal issues, and the identity of the lawyers involved in the matters. She also explained that sometime later when she had some doubts about the scope of above-mentioned Guideline 3.3.9, she decided *ex abundante cautela* and without changing her interpretation about the scope of this Guideline, to disclose the above-mentioned services.
141. The majority of the Committee is of the opinion that the non-disclosure or later disclosure of the services provided to the Chinese Company by Ms. Cheng, in an honest exercise of discretion, does not by itself necessarily involve a lack of independence or impartiality on the part of Ms. Cheng. Nor does merely failing to disclose facts that she disclosed in response to questions from Argentina affect Ms. Cheng's impartiality or independence.
142. Only an analysis of the facts disclosed, all together and in context, will help determine whether these facts are sufficient to demonstrate manifestly that Ms. Cheng is not independent or is not impartial. If that were the determination, the lack of disclosure of such facts would certainly constitute a serious breach by the arbitrator of her duty of disclosure but it would be the facts, not the lack of disclosure *per se*, that would allow the challenge to be admitted.
143. The majority of the Committee has already noted that neither the services provided by Ms. Cheng to third parties at the request of Freshfields nor the other circumstances disclosed in order to respond to questions from Argentina imply that Ms. Cheng lacks the requirements under Article 14(1) of the ICSID Convention. The mere fact of not having disclosed them does not change this analysis.
144. Finally, as to the dates on which the facts were disclosed by Ms. Cheng in response to Argentina's questions, the majority of the Committee agrees with Argentina that the three years covered by the IBA Guidelines, assuming that Guideline 3.3.9, is

¹²⁸ Teresa Cheng's Letter to the parties, dated July 27, 2015.

¹²⁹ Teresa Cheng's Letter dated August 18, 2015, Courtesy Translation. p. 3 of 4.

applicable, are indicative and not a time limit making it unnecessary to declare anything before three years ago. It is necessary to analyze each particular situation. But the majority of the Committee does not share the view about “*the duty to disclose any contractual or work relationship with any of the law firms involved in the dispute without any time limits, given that the relevant factor is not how such relationships are valued by the arbitrator or member of the Annulment Committee but rather how they may be perceived by the parties.*”¹³⁰ The time elapsed is one of several factors to be evaluated by both the arbitrator in her declaration and persons contemplating a possible challenge, and there is no general obligation that imposes upon the arbitrator the duty to submit a declaration without considering a time limit therein.

V. DECISION OF THE MAJORITY OF THE COMMITTEE

145. For the reasons stated, the majority of the Annulment Committee decides to:

- a. Reject the Argentine Republic’s proposal for disqualification of Ms. Teresa Cheng.
- b. Lift the stay of the annulment proceedings pursuant to Rule 9(6) of the Arbitration Rules, which shall continue in accordance with the procedural timetable.
- c. Leave the decision on costs for a later stage in these proceedings.

[Signed]

Eduardo Zuleta Jaramillo

[Signed]

Álvaro Castellanos Howell

¹³⁰ Grounds for the Argentine Republic’s Proposal to Disqualify Ms. Teresa Cheng, dated August 12, 2015, ¶16.