WHITE & CASE

28 October 2020

BY EMAIL

Secretariat of the ICC International Court of Arbitration
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France
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Re: ICC Case No. 20910/ASM/JPA (C-20911/ASM) – (1) Grupo Unidos por el Canal, S.A. ("GUPC" or "Claimant 1"), (2) Sacyr, S.A., (3) Webuild, S.p.A, (4) Jan De Nul, N.V. ("Claimants") v. Autoridad del Canal de Panamá ("Respondent" or "ACP") (together, the "Parties")

Dear Mr. Argentato and Ms. Pinton,

I. INTRODUCTION

1. Pursuant to Article 14 of the ICC Rules, Claimants hereby submit this challenge to the arbitral tribunal in ICC Case No. 20910/ASM/JPA (C-20911/ASM) ("**Panama 1**").[1]

2. On the same day, Claimants also submit a challenge in the related ICC Case No. 22466/ASM/JPA (C-22967/JPA) ("**Panama 2**") (together with Panama 1, the "**Arbitrations**").[2]

3. The arbitrators in both Arbitrations are Mr. Pierre-Yves Gunter (President), Mr. Claus von Wobeser (nominated by Claimants) and Dr. Robert Gaitskell QC (nominated by Respondent) (together the "**Tribunal**").

4. Claimants submit this challenge on this day so that there can be no suggestion that the challenge is inadmissible under Article 14 of the ICC Rules. As further explained below, however, this challenge is based on information disclosed only very recently by the Tribunal, which, in Claimants' view, should have been disclosed much earlier and raises serious concerns about the arbitrators' ongoing obligations of impartiality and independence set out in Article 11 of the ICC Rules. Claimants have sought further disclosures from the arbitrators on 26 October 2020, and are therefore not yet in possession of all relevant facts. Claimants reserve the right to supplement this challenge and will update the Secretariat as soon as practicable with any such amendments and/or further relevant facts and circumstances.

5. Until such update is provided, Claimants do not consider it necessary for the Secretariat to invite members of the Tribunal or Respondent to comment on the challenge. Claimants' rights are fully reserved.

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1 The Panama 1 and 2 Arbitrations are conducted pursuant to the 2012 ICC Rules.

2 Both challenges are based on the same grounds.

II. EXECUTIVE SUMMARY

6. Recent disclosures made by members of the Tribunal at Claimants' request have revealed that all three members of the Tribunal failed to disclose important connections between themselves, the arbitrators of the previous Cofferdam Tribunal, and counsel for Respondent. These circumstances are highly problematic and call into question the arbitrators' independence in the eyes of Claimants, and give rise to reasonable doubts as to their impartiality.

7. Accordingly, Claimants submit the present challenge, based on the content of the arbitrators' disclosures and information recently gathered by Claimants, pursuant to Article 14 of the ICC Rules.

8. Claimants have requested a number of clarifications from the arbitrators and should be given an opportunity to complement their challenge on the basis of the additional disclosures to be expected from the members of the Tribunal.

9. Claimants set out below in detail the content of the arbitrators' disclosures and the information that they have recently gathered. In so doing, Claimants also provide background elements relating to the previous and the current related arbitrations.

III. BACKGROUND TO THE CHALLENGE

10. The Arbitrations arise from the Contract for the Third Set of Locks, which is part of the project for the expansion of the Panama Canal. To this day, the Project has given rise to five related ICC arbitrations.[3]

11. In particular, and this is relevant background, the first of these arbitrations was ICC Case No. 19962 (the "**Cofferdam Arbitration**"), before an arbitral tribunal consisting of Prof. Bernard Hanotiau (President), Mr. Bernardo Cremades (nominated by Claimants) and Dr. Robert Gaitskell QC (nominated by Respondent) ("**Cofferdam Tribunal**"). A majority composed of Prof. Hanotiau and Dr. Gaitskell issued a Final Award on 25 July 2017 ("**Cofferdam Majority Award**"), rejecting Claimants' claims in what Claimants consider to be a poorly reasoned and substandard award. Mr. Cremades did not join the majority in the Cofferdam Arbitration and expressed his dissent in a detailed Separate Opinion dated 20 July 2017.

12. The Panama 1 and Panama 2 Arbitrations were then conducted by a different tribunal (see above), with one common arbitrator, Respondent's nominee (Dr. Gaitskell) who was nominated by Respondent on all three tribunals. Consistent with the obligations set out in Article 11 of the ICC Rules, Claimants expected that the Panama 1 Tribunal would review all issues and arguments *de novo*, without pollution from the Cofferdam Majority Award. The limited disclosures made by the members of the Tribunal upon their nomination in the Arbitrations contained no information that led Claimants to doubt their impartiality and independence. The arbitrators made no further disclosures during the proceedings, with the

[3] In addition to the Arbitrations and the Cofferdam Arbitration, the two other arbitrations in connection with the Project are: (i) ICC Case No. 22588/ASM/JPA) ("**Advance Payment Arbitration**"); and (ii) ICC Case No. 22465/ASM/JPA (C-22966/JPA) ("**Lock Gates Arbitration**"). The Advance Payment Arbitration was conducted before an arbitral tribunal consisting of Prof. Gabrielle Kaufmann-Kohler (President), Prof. Guido Santiago Tawil (co-arbitrator nominated by Claimants) and Stephen Furst QC (co-arbitrator nominated by Respondent), and resulted in a final award issued on 10 December 2018. The Lock Gates Arbitration is pending before an arbitral tribunal consisting of Prof. Bernard Audit (President), Bernardo Cremades (co-arbitrator nominated by Claimants) and Dr. Robert Gaitskell QC (co-arbitrator nominated by Respondent). Claimants' rights to submit a challenge in the Lock Gates Arbitration are fully reserved.

exception of an inconsequential disclosure when the law firm of Schellenberg Wittmer joined Claimants' counsel team.[4]

13. On 28 September 2020, the ICC Secretariat notified a partial award in Panama 1 ("**Partial Award**") to the Parties.

14. Having reviewed the Partial Award, Claimants noted a number of elements that gave rise to serious concerns as to the impartiality and independence of the Tribunal.

15. Claimants' analysis of the Partial Award has showed in particular that, for a number of key findings, the Tribunal based its reasoning on:

- arguments not raised by the Parties, on which the Tribunal did not invite comments;
- factual findings not based on evidence on the record (factual gap-filling); and
- statements contradicted by evidence on the record, which the Tribunal often did not acknowledge or discuss.

16. In addition, Claimants noted multiple instances where the Tribunal, while accepting that no issue preclusion was applicable and that disputed issues between the Parties were to be decided *de novo*,[5] in fact adopted the reasoning in the Cofferdam Majority Award on issues of central importance to the Parties' dispute in the Arbitrations.[6] Indeed, the Tribunal referred to the Cofferdam Award with approval on over 100 occasions. This had a profound impact on the Partial Award, since many of the fundamental differences between the Parties (on the Parties' duties at tender stage, allocations of risks, etc.) are common to the Cofferdam dispute and the claims covered by the Panama 1 and Panama 2 Arbitrations.

17. The above strongly suggested that the members of the Tribunal may have abdicated their obligation to remain independent in the eyes of the parties and free of reasonable doubts as to their impartiality, and had followed preconceived notions of industry practices that the Parties were not invited to address and/or the reasoning of the Cofferdam Majority Award.

18. This prompted Claimants to carry out targeted searches on the Internet and in particular on the ICC case database on the ICC website. These showed that the arbitrators had failed to disclose connections that Claimants consider important between the members of the Tribunal, with the president of the Cofferdam Tribunal, and with counsel for Respondent, both at the outset of the Arbitrations and during these proceedings (for instance when Respondent added a new counsel in 2018). However, the ICC database only provides limited information, and most connections in the world of arbitration remain private, if not confidential.

19. Claimants therefore wrote to each member of the Tribunal on 15 October 2020 in the context of the Panama 2 Arbitration. Claimants noted the arbitrators' "ongoing duty under Article 11(3) of the ICC Rules to disclose any facts or circumstances that may affect their independence in the eyes of any of the Parties or that could give rise to reasonable doubts as to their impartiality", and requested each Tribunal member to update his disclosures (the "**Disclosure Requests**").[7] Claimants referred in particular to § 23 of the ICC Note to Parties

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4 *See* Email from Pierre-Yves Gunter to the Parties dated 24 October 2018. *See also* Email from Robert Gaitskell QC to the Parties dated 30 October 2018.

5 Partial Award in ICC Case No. 20910/ASM/JPA (C-20911/ASM) dated 21 September 2020, p. 94, paras. 498-499.

6 Claimants reserve all of their rights regarding the above, which they consider valid grounds for vacatur of the Partial Award under U.S. law.

7 Letter from Claimants to Pierre-Yves Gunter dated 15 October 2020, p. 2; Letter from Claimants to Robert Gaitskell dated 15 October 2020; Letter from Claimants to Claus von Wobeser dated 15 October 2020.

and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration ("**ICC Note**"), and set out examples of relevant circumstances in respect of which Claimants requested disclosures from the Tribunal members.

20. Between 16 October and 19 October 2020, a number of emails were exchanged between the President of the Tribunal and Claimants' counsel, in order to clarify the scope of the Disclosure Requests, which the Tribunal considered too broad.[8]

21. On 19 October 2020, the President of the Tribunal took what Claimants consider to be the unordinary step to invite Respondent to "take position on" Claimants' Disclosure Requests by 22 October 2020.[9] Claimants responded on 20 October 2020 noting that "Claimants have raised questions as to which they have a legitimate interest in receiving prompt answers from each of the arbitrators" and that "[t]hese are not matters for submissions by either Party, at least not at this stage."[10]

22. On 21 October 2020, however, the members of the Tribunal confirmed that Respondent would be allowed to make submissions prior to their responding to the Disclosure Requests.[11] In addition, the Tribunal drew a distinction between a specific request "to one arbitrator only and based on issues of particular concern vis-à-vis that arbitrator" and "general requests to the arbitrators to update their disclosures,"[12] which Claimants consider to be irrelevant because the duty of disclosure of the arbitrators remains the same irrespective of whether a party has voiced a "particular concern vis-à-vis that arbitrator".

23. On the same day, Respondent provided its comments on Claimants' request for disclosure. While Respondent agreed with Claimants that the ICC Rules impose an ongoing duty of disclosure in relation to matters of "impartiality and independence",[13] they contended that Claimants' request went beyond this standard. This contention, which Claimants disagree with, is further addressed in Section IV below. Respondent's advocating for a narrow approach to the Tribunal's disclosure obligation reinforced Claimants' suspicion that certain undisclosed links between members of the Tribunal and counsel for Respondent may exist, and further undermined their confidence in the impartiality and independence of the Tribunal.

24. On 23 and 24 October 2020, the members of the Tribunal finally responded to Claimants' Disclosure Requests, over one week after they were made.[14] The responses (although incomplete – see below) confirmed that important connections between arbitrators and with counsel for Respondent, which should have been disclosed, had not been disclosed. In particular, these responses showed that:

- During the course of the Arbitrations, the President of the Tribunal, Mr. Gunter, was sitting with Prof. Hanotiau, the president of the Cofferdam Tribunal, in an unrelated but still ongoing LCIA case. Mr. Gunter did not disclose the process that led to his and Prof. Hanotiau's appointment in this case (*i.e.*, how each was nominated), as well as the date(s) on which the nominations were proposed and accepted/notified to the parties;

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8 Email from Pierre-Yves Gunter to Claimants dated 16 October 2020; Email from Pierre-Yves Gunter to Claimants dated 18 October 2020; Email from Claimants to Pierre-Yves Gunter dated 19 October 2020; Email from Pierre-Yves Gunter to Claimants dated 19 October 2020.

9 Email from Pierre-Yves Gunter to Claimants dated 19 October 2020.

10 Email from Claimants to Pierre-Yves Gunter dated 20 October 2020.

11 Email from Pierre-Yves Gunter to Claimants dated 21 October 2020.

12 Email from Pierre-Yves Gunter to Claimants dated 21 October 2020.

13 Letter from Respondent to Tribunal dated 21 October 2020.

14 Email from Pierre-Yves Gunter to the parties dated 23 October 2020; Email from Robert Gaitskell QC to the Parties dated 24 October 2020; Email from Claus von Wobeser to the Parties dated 24 October 2020.

- Mr. Gunter had been appointed as president sitting together with Dr. Gaitskell (together with Prof. Hanotiau, the author of the Cofferdam Majority Award) in an unrelated ICC case (No. 24400), which seems to be still ongoing. Neither Mr. Gunter nor Dr. Gaitskell explained the process that led to their appointments, as well as the date(s) on which the nominations were proposed and accepted/notified to the parties; and

- Mr. von Wobeser has been sitting with Andrés Jana, Counsel for Respondent in the Arbitrations, in an unrelated ICSID case, since July 2019.

25. Claimants' concerns were further heightened by the arbitrators' reluctance to make full disclosures. Notably:

- the President, Mr. Gunter, declined to extend his disclosures to other members of his law firm;[15]

- Dr. Gaitskell declined to extend his disclosures to other members of his Barristers' Chambers, and his response showed that he had not carried out any conflict checks extending to other members of his Barristers' Chambers when accepting his nomination in the Arbitrations;[16] and

- Both Messrs. Gunter and von Wobeser failed to disclose appointments involving Prof. Hanotiau (for Mr. Gunter) and counsel for Respondent (for Mr. von Wobeser), which Claimants had recently discovered on the ICC and ICSID databases.

26. On 26 October 2020, Claimants therefore sent further disclosure requests to each of the members of the Tribunal, asking them to provide clarifications and further details.[17]

27. Claimants have not yet received responses to their additional disclosure requests.[18]

IV. APPLICABLE STANDARDS

28. Claimants invite the ICC Court to apply its own standards to determine the merits of the challenge. Claimants also respectfully submit that the ICC Court must take into account the standards of impartiality and independence under the law of the seat of the Arbitrations (Miami, Florida, U.S.A.), insofar as they are relevant to the ICC Court's duty under Article 41 of the ICC Rules to ensure that awards are "enforceable at law". The multiple close relationships and lack of initial and ongoing material disclosures (which Claimants only discovered after review of the Partial Award) undermines Claimants' confidence in the arbitrators' declarations of impartiality and independence.

A. STANDARDS APPLICABLE UNDER THE ICC RULES

29. Article 11(1) of the ICC Rules provides: "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration." Article 11(2) of the ICC Rules requires arbitrators to disclose "facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality". In addition, Article 11(3) imposes a continuing duty on arbitrators to disclose any "facts or circumstances

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15 Email from Pierre-Yves Gunter to the Parties dated 23 October 2020, attachment, p. 5.

16 Email from Robert Gaitskell QC to the Parties dated 24 October 2020, attachment, p. 1.

17 Email from Claimants to Pierre-Yves Gunter dated 26 October 2020; Email from Claimants to Robert Gaitskell QC dated 26 October 2020; Email from Claimants to Claus von Wobeser dated 26 October 2020.

18 A clarification request was received from Mr. Gunter shortly before this submission, and has not been reviewed for purposes of this application.

of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence." Finally, Article 14 of the ICC Rules allows an arbitrator to be challenged "for an alleged lack of impartiality, or independence, or otherwise."[19]

30. When determining a challenge, the Court takes into account whether or not the challenged arbitrator has complied with his or her disclosure obligations under Article 11. A "failure to disclose will be considered by the Court when assessing whether" a challenge is "well founded" but may not *per se* constitute a ground for removal.[20] As further explained below, the position is stricter under the law of the seat, where a failure to disclose "information which would lead a reasonable person to believe that a potential conflict exists"[21] constitutes, *per se*, a ground for annulment (or vacatur) of an award.

31. While the ICC Rules do not expressly define the requirements of impartiality and independence, it is accepted that these are meant to ensure an arbitrator's "freedom of judgment", which is "often reflected in terms of economic interests".[22] The ICC Note also provides a non-exhaustive list of circumstances that arbitrators must consider when assessing whether to make a disclosure,[23] and specifies that "[f]or the scope of disclosures, an arbitrator will be considered as bearing the identity of his or her law firm".[24]

32. It is established that financial ties between arbitrators and with a party to the arbitration or counsel must be disclosed. The ICC Note for example provides that, when assessing whether to make a disclosure, arbitrators should consider circumstances in which an arbitrator or his or her law firm has a relationship, financial or otherwise, with one of the parties or its counsel, be it through business relationships or arbitral appointments.[25] The ICC Court has also accepted challenges on the basis of "financial ties between the arbitrator and [an] individual or entity linked to one of the parties".[26] For example, in one case, the ICC accepted a challenge based on the fact that a co-arbitrator appointed by the respondent stood to make a substantial financial gain from an appointment to the board of overseers of the respondent.[27]

33. When making their Disclosure Requests, Claimants were also mindful of comments made in a recent ICC publication that: (i) "[a] conflict of interest may arise when an individual performs a function or an appointment in one context and his or her actions have favourable consequences for himself/herself in another context"; and that (ii) the concepts of independence and impartiality are not "static or uniform" but "may vary in time and from one culture or legal system to another".[28] The circumstances which can properly give rise to doubts as to impartiality or independence of arbitrators can thus never be fully codified

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19 ICC Rules, Art 14. A challenging party is not required to "state whether the challenge is based on a lack of independence, impartiality or otherwise". *See* The Secretariat's Guide to ICC Arbitration, p. 23 [p. 172], para 3-562. When determining whether an arbitrator is independent and impartial, the Court's "primary resource is the experience of its members and the members of the Secretariat, together with the vast database of previous Court decisions on objections and challenges to arbitrator". *See* The Secretariat's Guide to ICC Arbitration, p. 6 [p. 118], 3-374. Of this vast database, only a limited number of Court decisions have been made available in the public domain.

20 Andrea Carlevaris & Rocio Digon, *Arbitrator Challenges under the ICC Rules and Practice*, *ICC Dispute Resolution Bulletin* (First Edition) (2016) ("**Carlevaris**"), p. 33, fn. 14.

21 *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.*, 146 F.3d 1309, 1312 (11th Cir. 1998), p. 6 [p. 12]; *Mendel v. Morgan Keegan & Co.*, 654 Fed. App'x 1001, 1004 (11th Cir. 2016), p. 5 [p. 6].

22 Guide to the ICC Rules of Arbitration (Second Edition) (Schwartz and Derains; Jan 2005), p. 117.

23 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, p. 5, para. 23.

24 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, p. 6, para. 28.

25 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, p. 5, para. 23.

26 Carlevaris, p. 25.

27 Carlevaris, p. 25.

28 Steffano Azzali, *Neutrality in International Arbitration: Too Many Shades of Grey?* In *International Arbitration Under Review: Essays in Honour of John Beechey,* ICC (2020), p. 3.

(whether in the ICC Note, the IBA Guidelines on Conflicts of Interest in Arbitration, or otherwise).

34. Therefore, when determining the merits of this challenge, the ICC Court should similarly take into account, not just its past decisions, but also the evolution of standards over time and the need to ensure the current and future integrity of the arbitral process.

35. While it may tacitly have been accepted, at one point in time, that serving members of an arbitral tribunal could appoint each other to potentially lucrative positions on tribunals in unrelated disputes without triggering the need for disclosure to the parties, that era does no credit to the international arbitral process and belongs firmly in the past. It cannot be ignored that arbitral appointments can generate significant fees, and, for disclosure purposes, there is no reason to treat them any differently than cases involving financial ties between the arbitrator and an individual or entity linked to one of the parties. Where such an arbitral appointment is made by (or on the recommendation of) a party-named co-arbitrator (particularly one who has himself been named by the same party on numerous occasions), it may be perceived by the other party as a "covert, but subtly effective, effort [by the co-arbitrator] to co-opt other members of the Tribunal."[29] In the absence of prompt disclosure, any subsequent ruling in favor of the relevant party will inevitably be open to question on the basis that it was, or could have been, a *quid pro quo* for the appointment.

36. Similarly, where the president of a tribunal accepts a nomination to serve on a separate tribunal with an arbitrator who was president of the tribunal in an earlier and related dispute between the same parties, that too can give rise to legitimate concerns that information from the prior arbitration will leak and compromise the impartiality or independence of the sitting president. Those concerns are only exacerbated in a situation where either of the arbitrators has a reputation for being "massively indiscreet and forgetful of the rules."[30] Again, the proper course of conduct for a sitting ICC tribunal president who wishes to accept such a nomination or appointment is to make prompt disclosures to the parties.

37. As one commentator has noted, situations in which arbitrators may repeatedly nominate or appoint each other, without disclosing it to the parties in the various arbitrations in which they sit, are "not tenable anymore" as they go "against the course of history and legitimate expectations of the parties." "[S]ooner or later, regardless of oppositions, they will disappear, just like, a few years ago, the will to conceal the sometimes incestuous relationships with counsel disappeared."[31]

38. Respondent thus is wrong to suggest that Claimants' Disclosure Requests went beyond the circumstances which might call into question the independence of the Tribunal members in the eyes of the Parties or give rise to reasonable doubts as to their impartiality. Professional or personal links between arbitrators (or between arbitrators and counsel) – including in unrelated proceedings – may, in certain circumstances, do just that. The ICC Note makes clear that "[r]elationships between arbitrators … should also be considered in the circumstances of each case."[32] Moreover, the failure to make prompt disclosure of any such links only gives rise to greater suspicions that the requisite obligations of impartiality and independence have not been met.

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29 Gary B. Born, *International Commercial Arbitration* (Second Edition, 2014) ("**Born**"), p. 69 [p. 1814].

30 *Challenge Decision of the Appointing Authority*, Sir Robert Jennings, on the Challenge of Judge Bengt Broms in IUSCT Case of 7 May 2001, 38 Iran-US C.T..R 286, 293 (2010), cited in Born, p. 94 [p. 1879]. Cited here for the memorable turn of phrase only.

31 Thomas Clay, "Le coarbitre", in *Mélanges en l'honneur du Professeur Pierre Mayer* (Lextenso, 2015) at 133 (Claimants' translation).

32 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, p. 6, para. 28.

39. Similarly, while the practice used to be that it was not necessary to disclose that an arbitrator and a counsel were members of the same barristers' chambers, this has changed. The ICC Note[33] and the IBA Guidelines[34] now encourage arbitrators to disclose relationships with another arbitrator or counsel who is a member of the same barristers' chambers. The ICC Court already has accepted challenges taking into account the fact that an arbitrator and the counsel for one of the parties were from the same barristers' chambers.[35] In line with this evolution, Claimants understand that a number of chambers now conduct conflict checks covering all of their members.

40. There is no reason to treat barristers' chambers differently from law firms for purposes of disclosure and conflict of interests:

- Barristers are formally self-employed, but the same is true for lawyers in many civil law jurisdictions;
- Barristers are paid on the basis of the fees that they generate themselves (minus the chambers' shared costs), but the same is true for partners in law firms following the so-called "eat what you kill" compensation scheme;
- Like law firms, barristers' chambers often share premises, staff, administration expenses and clerks.[36] They advertise themselves on the legal market as a single entity through a single website.[37] On the international arbitration market, they compete against law firms doing their own advocacy.

41. The distinction drawn between chambers and law firms for the purpose of Article 11 of the ICC Rules is therefore an artificial one, even more so in a case where none of the Parties to the dispute are from the United Kingdom and thus familiar with the peculiarities of the barristers' chambers system. This consideration is relevant to the extent that Article 11(2) of the ICC Rules refers to the necessity to disclose "any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties."

42. An arbitrator in an ICC arbitration should thus disclose any links between a member of his or her barristers' chambers and a party or a counsel to the arbitration, including that he/she or another member of his or her barristers' chambers has been repeatedly appointed by a party's counsel or his/her chambers, as these circumstances may be of such a nature as to call into question that arbitrator's independence in the eyes of the parties or give rise to reasonable doubts as to his or her impartiality.

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33 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, p. 6, para. 28.

34 IBA Guidelines on Conflicts of Interest in International Arbitration, Orange List, p. 32 [p. 23], para. 3.3.2 ("The arbitrator and another arbitrator, or the counsel for one of the parties, are members of the same barristers' chambers.").

35 Carlevaris, p. 19.

36 When barristers share the same working environment, this proximity may provide opportunities of sharing information.

37 *See*, *e.g.*, Keating Chambers' website (http://www.keatingchambers.com/).

B. STANDARDS APPLICABLE UNDER THE LAW OF THE SEAT

43. The Arbitrations have their seat in Miami, Florida. The law of the seat is therefore the U.S. Federal Arbitration Act ("**FAA**")[38] as applied in the Southern District of Florida, which is within the Eleventh Circuit.[39]

44. The FAA contains express provisions permitting annulment (or vacatur) of awards based on a lack of impartiality.[40] Indeed U.S. courts have vacated awards based on arbitrator bias even where such challenge has previously been rejected by the relevant arbitral institution.[41]

45. Under the FAA, an award may be vacated if an arbitrator fails to disclose any dealings that might create an "impression of possible bias".[42] This covers, in particular, an arbitrator's failure to disclose any "close" business relationship with one of the parties,[43] which may extend to such a relationship with the other arbitrators.[44]

46. Importantly, under the jurisprudence of the Eleventh Circuit, an award may be vacated where "(1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."[45] Put differently, "for an award to be vacated, the arbitrator must not have disclosed enough information for a reasonable person to realize that a potential conflict existed."[46] This standard, Claimants submit, is even higher than the standard currently set out in the ICC Note.

47. When assessing the merits of this challenge, the ICC Court should therefore take into account that any award issued by the Tribunal in either the Arbitrations is susceptible to annulment for a failure to disclose information which would lead a reasonable person to believe that a potential conflict exists.[47]

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48. In sum, under ICC practice and the law of the seat, the following circumstances, which are relevant in the present case, are valid grounds for challenges:

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38 The Conditions of Contract and the Joint and Several Guarantee also confirm that the FAA applies. *See* Conditions of Contract dated February 2009, p. 140, Sub-Clause 20.6(f); Joint and Several Guarantee in Respect of the Third Set of Locks Contract dated 31 May 2010, p. 8, Sub-Clause 9.2(f).

39 In addition to the FAA, awards rendered in the Arbitrations fall within the scope of application for the Florida International Commercial Arbitration Act ("**FICAA**"). The grounds for annulment (or vacatur) under FICAA are substantively similar to those articulated in Section 10 of the FAA, except that it adds an additional basis for vacatur if the "award is in conflict with the public policy of [Florida]." *See* FICAA, § 46.

40 Pursuant to Section 10(a)(2) of the FAA, an award may be vacated "where there is evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2).

41 *See, e.g.*, *Thomas Kinkade Co. v. Lighthouse Galleries,* 711 F.3d 719 (6th Cir. 2013) (vacating award for arbitrator bias after AAA has rejected challenge to arbitrator at outset of arbitration on identical grounds). *See generally*, Born § 12.06 B3, pp. 1928-31.

42 *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (plurality opinion).

43 *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 149 (1968) (plurality opinion).

44 *See e.g. Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F. Supp. 885 (D. Conn. 1991) (stating that undisclosed *ex parte* communications, including "efforts to discuss the case with the other party-appointed arbitrator prior to the selection of the third arbitrator" constitute evidence of evident partiality).

45 *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (emphasis added); *Mendel v. Morgan Keegan & Co.*, 654 Fed. App'x 1001, 1004 (11th Cir. 2016).

46 *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1341 (11th Cir. 2002).

47 Claimants reserve the right to raise further grounds for annulment, which are not directly relevant to this challenge under the ICC Rules, should they decide to seek the vacatur of the Partial Award before the Southern District of Florida.

- Financial ties between parties involved in the arbitral process (including arbitrators, counsel, parties, and including through repeat appointments); and

- Proximity, professional or otherwise, potentially leading to an exchange of views and information, between those involved in the arbitral process (including arbitrators, arbitrators in prior related proceedings, counsel, parties).

V. THE MEMBERS OF THE TRIBUNAL MUST BE REMOVED

49. As explained below, the Tribunal members failed to make prompt disclosures (as they should have) in the course of the Arbitrations, and made only limited disclosures in response to Claimants' Disclosure Requests. These limited disclosures (on which Claimants have sought further clarifications), together with the information recently gathered by Claimants following targeted searches, call into question the independence of the Tribunal members in the eyes of Claimants and give rise to reasonable doubts as to the Tribunal members' impartiality, such that Claimants have lost all confidence in the independence and impartiality of the arbitrators, who therefore must be removed.

A. MR. GUNTER (PRESIDENT)

50. The information obtained to date (including from Mr. Gunter himself) shows that Mr. Gunter sat on two occasions with the president of the Cofferdam Tribunal, without disclosing it to the Parties:

- As noted above, following Claimants' Disclosure Requests, Mr. Gunter disclosed that he is sitting with Prof. Hanotiau, the president of the Cofferdam Tribunal, in an unrelated, but still ongoing, LCIA case. Mr. Gunter did not explain the process that led to his and Prof. Hanotiau's appointment in this case (*i.e.*, how each was nominated and confirmed/appointed in that case), as well as the date(s) on which the nominations were proposed and accepted/notified to the parties. Claimants have sought clarifications in that regard and are waiting for Mr. Gunter's response.

- Claimants' own research shows that Mr. Gunter also acted as co-arbitrator on a panel where Prof. Hanotiau was president nominated by the co-arbitrators (including Mr. Gunter), which Mr. Gunter failed to disclose, even following Claimants' Disclosure Requests.[48]

51. In addition, Mr. Gunter belatedly disclosed that he is sitting with Dr. Gaitskell in an unrelated, but apparently still ongoing, ICC case (No. 24400).[49] Mr. Gunter did not explain the process that led to his and Dr. Gaitskell's nominations and appointment (despite Claimants' request). Claimants have sought clarifications in that regard and are waiting for Mr. Gunter's response.

52. In light of the above:

- Claimants cannot help but wonder whether Prof. Hanotiau has shared his views with Mr. Gunter, during the course of the two above-mentioned arbitrations in which they sat together, in relation to the issues that were considered in the Cofferdam Arbitration (which are closely related to issues that the Tribunal had to decide in Panama 1) and the conduct of the Parties;

48 ICC website - Information on ICC Case ID 00171.

49 Claimants do not know when this case started and sought clarification from Mr. Gunter about this.

- Mr. Gunter also spent time, outside the presence of the third arbitrator in the Arbitrations, with Dr. Gaitskell, who wrote the Cofferdam Majority Award with Prof. Hanotiau, and with whom Mr. Gunter formed a majority on certain issues in the Panama 1 Partial Award. Such circumstance creates a risk of asymmetrical and unbalanced information between the three arbitrators in the Arbitrations.

53. Claimants cannot know with certainty what was discussed behind closed doors, but these undisclosed appointments with Prof. Hanotiau and Dr. Gaitskell call into question Mr. Gunter's independence of judgment in the eyes of Claimants and create, at a minimum, an appearance of possible bias and prejudgment, and thus give rise to reasonable doubts as to Mr. Gunter's impartiality. Those relationships should have been disclosed at the time of Mr. Gunter's acceptance of the presidency in what is a significant arbitration for Claimants, for which they relied on his impartiality and independence. If these relationships arose after the start of the Arbitrations, they should have been disclosed at that point in time.

54. Claimants want to make it clear that, given the importance of the Arbitrations to them in both monetary and reputational terms, they would not have accepted to consider Mr. Gunter as president nominee in the Arbitrations if, at the time of his nomination, he had disclosed his recent dealings with Prof. Hanotiau in the LCIA or ICC arbitrations. Similarly, Claimants would certainly have opposed Mr. Gunter's other appointments (in cases with Prof. Hanotiau and Dr. Gaitskell) during the course of the Panama 1 and Panama 2 proceedings, if Mr. Gunter had disclosed the possibility of these appointments to Claimants before accepting them.

55. Finally, Mr. Gunter's express reluctance to investigate and disclose potential connections of other members of his law firm, which is inconsistent with § 28 of the ICC Note,[50] further undermines his independence and impartiality in the eyes of Claimants.

56. In light of the above, and subject to the additional disclosures requested from Mr. Gunter, Claimants consider that Mr. Gunter's independence and impartiality in the present proceedings have been compromised and that he can no longer continue to serve in the Arbitrations.

B. DR. GAITSKELL

57. To recall, Dr. Gaitskell has been nominated as arbitrator by Respondent in four out of the five ICC arbitrations arising from the Project, including Panama 1 and Panama 2. While this situation was initially accepted by Claimants on the basis of Dr. Gaitskell's assurance of impartiality and independence and his disclosures at the time, Claimants are now particularly concerned about circumstances that call into question Dr. Gaitskell's independence and give reasonable doubts as to his impartiality and his ability to influence other members of the Panama 1 and Panama 2 Tribunal, in light of his co-authoring of the Cofferdam Majority Award.

58. Upon his nomination in the Arbitrations, the only disclosures that Dr. Gaitskell made concerned his involvement in the parallel arbitrations concerning the Project.[51] Under the circumstances, Claimants did not oppose his confirmation by the ICC Court. The situation of

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50 *See also* IBA Guidelines on Conflicts of Interest in International Arbitration, p. 22 [p. 13], Standard 6(a), providing that, for the purpose of conflicts of interest, an arbitrator "is in principle considered to bear the identity of his or her law firm".

51 Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20910 dated 26 March 2015, p. 4; Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 20911 dated 15 May 2015, p. 2; Dr. Gaitskell's Statement of acceptance, availability, impartiality and independence in ICC Case No. 22466 dated 27 January 2017.

course would have been different, had Claimants known about the circumstances that have now emerged.

59. The information obtained to date (including from Dr. Gaitskell himself) shows that Dr. Gaitskell failed to disclose facts and circumstances calling into question his independence and giving rise to reasonable doubts about his impartiality.

60. First, as explained above, Dr. Gaitskell has now disclosed that he is sitting with Mr. Gunter on an unrelated and apparently still pending ICC case (No. 24400), but Dr. Gaitskell did not clarify the process of his and Mr. Gunter's nomination and appointment (Claimants have sought further disclosure on this point). Claimants already explained above[52] why this appointment is problematic, and Claimants would never have accepted it, had they been informed at the relevant time as should have been the case.

61. In response to Claimants' Disclosure Requests, Dr. Gaitskell also explained that Mr. Manus McMullan QC of Atkin Chambers (counsel for Respondent) is currently representing a party in an ICC arbitration in which Dr. Gaitskell is arbitrator. Dr. Gaitskell failed to provide information on the process that led to his appointment (*i.e.*, how he was nominated and appointed) in this case, and Claimants have sought clarifications in that regard.[53]

62. Second, Dr. Gaitskell has taken the position that he has "no knowledge of what other members of Keating Chambers do professionally" and has "no way of knowing" it.[54] This suggests that, when Dr. Gaitskell filled in his Statement of Acceptance, Availability, Impartiality and Independence in Panama 1 and Panama 2, he did not conduct any conflict checks extending to the members of his barristers' chambers, and that Dr. Gaitskell still has not done so. For reasons explained above,[55] Dr. Gaitskell's position is inconsistent with the evolution of the law and practice on disclosure. In particular, Claimants respectfully do not accept that Dr. Gaitskell has "no way of knowing" what his colleagues at Keating chambers "do professionally". Indeed, it is well known that clerks at chambers are able to gather the information needed for a conflict search, and indeed a number of chambers do this routinely for arbitration matters, precisely because of the evolution of the law and practice in international arbitration. For example, conducting a proper conflict check may reveal a constant flow of nominations/appointments and cross-nominations/appointments between Dr. Gaitskell or members of his chambers, and members of Atkin chambers, where Respondent's main advocate is a member.

63. Indeed, a recent search conducted by Claimants in the ICC database on the Internet shows that Dr. Gaitskell was named as president in at least two ICC cases by his co-arbitrators, where one of the co-arbitrators was Andrew White QC, a member of Atkin Chambers.[56]

64. What matters here is whether these facts and circumstances call into question Dr. Gaitskell's independence in the eyes of Claimants, which they do, and whether they give rise to reasonable doubts as to Dr. Gaitskell's impartiality, and they do.

65. In light of the above, and subject to the additional disclosures requested from Dr. Gaitskell, Claimants consider that Dr. Gaitskell's independence and impartiality in the present proceedings have been compromised and that he can no longer continue to serve in the Arbitrations.

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52 *See above* paras. 52-54.

53 Claimants also sought clarifications with respect to other information disclosed by Dr. Gaitskell.

54 Email from Robert Gaitskell QC to the Parties dated 24 October 2020, attachment, p. 1.

55 *See above* paras. 39-42.

56 ICC website - Information on ICC Case ID 00778; ICC website - Information on ICC Case ID 00729.

C. MR. VON WOBESER

66. Claimants submit that it would be proper to replace the entire Tribunal, including Mr. von Wobeser, since, having sat with Mr. Gunter and Dr. Gaitskell, Claimants consider that Mr. von Wobeser's impartiality and independence was indirectly, but necessarily, affected by the above-described circumstances.

67. Claimants are comforted in that approach by the fact that, in response to Claimants' Disclosure Requests, Mr. von Wobeser disclosed that he has been sitting with Mr. Andrés Jana, Counsel for Respondent in the Arbitrations, in an unrelated ICSID case, since July 2019.[57] That Mr. von Wobeser spent time sitting with counsel for Respondent, shortly before the oral closings in Panama 1 and during the course of Panama 2, is a real cause of concern for Claimants.[58]

68. Taken together, and subject to the additional disclosures requested from Mr. von Wobeser, these facts and circumstances call into question Mr. von Wobeser's independence in the eyes of Claimants and give rise to reasonable doubts as to his impartiality. Claimants consider that Mr. von Wobeser's independence and impartiality in the present proceedings have been compromised and that he can no longer continue to serve in the Arbitrations.

* * *

69. The facts and circumstances described above show that the members of the Tribunal failed to disclose important connections between themselves, the president of the Cofferdam Tribunal, and counsel for Respondent, both at the outset of the Panama 1 and Panama 2 Arbitrations and during these proceedings. Separately, and even more so cumulatively, these circumstances are highly problematic and call into question the independence and impartiality of the members of the Tribunal. Claimants have lost all faith that the Tribunal can properly discharge its mandate.

70. Claimants therefore respectfully request the ICC Court to accept this challenge of the members of the Tribunal. Claimants' challenge is particularly important for the Panama 2 Arbitration, which remains at a relatively early stage and will ultimately decide further claims and issues of fundamental importance to Claimants. Accordingly, Claimants submit that the challenge must be accepted in both the Panama 1 and Panama 2 Arbitrations.

VI. THE CHALLENGE IS TIMELY

71. Pursuant to Article 14(2) of the ICC Rules, a challenge must be made "within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based".

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57 Claimants asked Mr. von Wobeser to disclose the dates on which his appointment and Mr. Jana's appointment were proposed and accepted/notified to the Parties in ICSID ARB/18/26. Claimants are still awaiting Mr. von Wobeser's response.

58 Mr. von Wobeser further disclosed that he is acting as president of an ICC tribunal in which Mayer Brown, counsel to Respondent in the Arbitrations, appears as counsel to the respondent, and that he is currently sitting with arbitrators who were also members of the tribunal in related ICC cases arising from the Project, although not Prof. Hanotiau or Dr. Gaitskell. *See* Email from Claus von Wobeser to the Parties dated 24 October 2020. It also has come to Claimants' attention that Mr. von Wobeser is acting or has been acting in the *Vieira v. Chile* case (ICSID Case No. ARB/04/7) in which Mr. Jana is/was counsel for the respondent, and in the *Highbury International v. Venezuela* case (ICSID Case No. ARB/11/1), in which Mr. Carlos Arrue Montenegro (now in-house counsel to Respondent) is/was counsel for respondent. Mr. von Wobeser has not disclosed the existence of these cases or the method of appointment. Finally, Claimants note that Mr. von Wobeser and Mr. Jana are, respectively, part of the *Comité Ejecutivo* and *Consejo Directivo* of ALARB (http://www.alarb.org/esp/asociacion.php).

72. As explained above, this challenge is based on the information gathered by Claimants in October 2020, and the disclosures by members of the Tribunal received on 23 and 24 October 2020 (which remain to be completed at Claimants' request).

73. There can therefore be no doubt that the present challenge, submitted to the Secretariat in the format prescribed by Article 14(1) of the ICC Rules, is admissible. In fact, Claimants submit that they could have made it later, within 30 days from receipt of the arbitrators' upcoming additional disclosures.

74. The only reason why Claimants have decided to file this challenge on 28 October 2020 – 30 days after notification of the Partial Award in Panama 1 – is to avoid any argument of untimeliness on the (incorrect) basis that the relevant date under Article 14(1) of the ICC Rules should be 28 September 2020, since Claimants' concerns as to the Tribunal's independence and/or impartiality first arose from the holdings in the Partial Award as noted above.

VII. REQUEST FOR REASONS AND RESERVATION OF RIGHTS

75. In accordance with Section II.D of the ICC Note, Claimants request that the ICC Court communicate the reasons for its decision pursuant to Article 14 of the Rules.

76. As noted above, Claimants have only recently received disclosures from the members of the Tribunal that are of substantial importance to this challenge and have sought further clarifications from the arbitrators. Claimants therefore reserve their rights, including to supplement this challenge (and/or submit an additional challenge) following their detailed review of the Tribunal members' further disclosures.

Yours faithfully,

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