

December 21, 2011

Permanent Court of Arbitration  
Mr. Christiaan M.J. Kröner  
Secretary General  
Peace Palace  
Carnegieplein 2  
2517 KJ The Hague  
The Netherlands  
E-mail: [bureau@pca-cpa.org](mailto:bureau@pca-cpa.org)

**Re: Request for Determination of Challenge of Mr. Guido Santiago Tawil  
as Arbitrator in Connection with the Notice of Arbitration under the  
UNCITRAL Arbitration Rules of Murphy Exploration & Production  
Company – International**

Dear Mr. Secretary General:

Pursuant to Article 12(1)(b) of the UNCITRAL Arbitration Rules, the Republic of Ecuador, the Respondent in the above-referenced arbitration, respectfully requests that in your capacity as the parties' jointly designated appointing authority, you sustain its challenge to the co-arbitrator appointed by Claimant, Mr. Guido Santiago Tawil.

On September 30, 2011, the Respondent received Claimant Murphy Exploration & Production Company – International's Notice of Arbitration (dated September 21) asserting claims premised on the Treaty between the United States and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment (the "Ecuador-U.S. BIT"). On October 12, the Respondent physically received a letter dated October 7 from Claimant's counsel, King & Spalding, appointing Mr. Tawil as a co-arbitrator.<sup>1</sup> In that same letter, King & Spalding proposed that the Permanent Court of Arbitration be designated as the appointing authority.<sup>2</sup> On October 22, Respondent

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<sup>1</sup> See Annex 1, Letter from King & Spalding to the Respondent (Oct. 7, 2011) (physically received on Oct. 12, 2011).

<sup>2</sup> *Id.*

notified Claimant and Mr. Tawil by letter of its challenge to the latter's appointment, in accordance with Articles 9, 10 and 11 of the UNCITRAL Arbitration Rules.<sup>3</sup>

The Respondent's challenge is based on the multiple disclosures made by Mr. Tawil in his October 13 letter,<sup>4</sup> as well as on other factors specified below, all of which constitute facts that give rise to justifiable doubts on Respondent's part as to the appointed arbitrator's impartiality and independence. The Respondent asked that Claimant agree to its challenge and/or that Mr. Tawil withdraw voluntarily from his office, in accordance with Article 11(3) of the UNCITRAL Arbitration Rules. By letter dated October 25, Mr. Tawil declined to withdraw.<sup>5</sup> And through King & Spalding's letter of November 4, Claimant declined to accede in the challenge.<sup>6</sup>

As already pointed out in Claimant's letter of December 16 addressed to your attention, on November 21, Respondent agreed with the proposal to designate the PCA as appointing authority.<sup>7</sup> Following said designation, the Respondent now hereby requests that the PCA resolve and sustain, under Article 12(1)(b) of the UNCITRAL Arbitration Rules, its challenge to Mr. Tawil's appointment. In light of the fact that Claimant launched with the PCA its challenge of the co-arbitrator appointed by Respondent, Professor Brigitte Stern, only late last week, Respondent also respectfully requests that the briefing schedule for the two challenges be synchronized. If the Permanent Court of Arbitration agreed with this approach, slight adjustments to the calendar announced in Mr. Doe's letter of December 18 might be helpful in order to allow the two challenges to proceed in parallel with one another.

## **I. The Applicable Standards under the UNCITRAL Rules**

It scarcely needs repeating that the impartiality and independence of arbitrators are fundamental requirements of the arbitral process.<sup>8</sup> Arbitrators necessarily must be impartial vis-à-vis the parties, and, crucially for the system of investor-State dispute resolution to remain credible in the eyes of the parties, "arbitrators . . . must not only be impartial, but must also clearly *appear* to be impartial."<sup>9</sup> In the UNCITRAL regime, as

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<sup>3</sup> See Annex 2, Letter from Foley Hoag LLP Regarding Notice of Challenge (Oct. 22, 2011) (physically received by King & Spalding (Houston) on Oct. 24, 2011 and by King & Spalding (Paris) on Oct. 26, 2011).

<sup>4</sup> See Annex 3, Letter from Mr. Tawil Accepting His Appointment as Arbitrator and Statement of Independence and Impartiality (Oct. 13, 2011).

<sup>5</sup> See Annex 4, Letter from Mr. Tawil Regarding Notice of Challenge (Oct. 25, 2011).

<sup>6</sup> See Annex 5, Letter from King & Spalding Regarding Notice of Challenge (Nov. 4, 2011).

<sup>7</sup> See Cl. Exhibit H, Respondent's Letter of Nov. 21, 2011.

<sup>8</sup> See Annex 6, G. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 1618-19 (2009).

<sup>9</sup> Annex 7, E. Cárdenas & D. W. Rivkin, *A Growing Challenge for Ethics in International Arbitration*, in LIBER AMICORUM IN HONOUR OF ROBERT BRINER, 191, 193 (G. Aksen, et al., eds. 2005); Annex 8, *Eureko BV v. Poland*, Brussels Tribunal de Première Instance, No. RG 2006/1542/A (Judgment on challenge to arbitrator, Dec. 22, 2006), available at [www.italaw.com](http://www.italaw.com).

in most leading modern sets of arbitration rules, these requirements apply without distinction to both party-appointed arbitrators and presiding arbitrators.<sup>10</sup>

The present proceedings are conducted under the 1976 version of the UNCITRAL Arbitration Rules.<sup>11</sup> Article 10(1) of those Rules confirms the relevance of the above-stated principles in the following succinct language:

Any arbitrator may be challenged *if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.* (emphasis added)

As summarized by a Division of the LCIA Court acting as appointing authority to consider a challenge in one UNCITRAL Arbitration Rules investor-State dispute, “[T]he test for whether ‘circumstances exist that give rise to justifiable doubts’ is an objective one, pursuant to which it has to be determined whether a reasonable, fair-minded and informed person has justifiable doubts as to the arbitrator’s impartiality.”<sup>12</sup> A prospective arbitrator’s own assurances as to his or her independence and impartiality, no matter how genuine, are thus not determinative, if at all relevant.<sup>13</sup> What matters is the challenging party’s point of view – and, more specifically, whether that point of view can be deemed equivalent to that of a reasonable third party.

This was explained in one UNCITRAL challenge decision in the following terms:

[T]he claimant here has to furnish adequate and solid grounds for its doubts. Those grounds must respond to reasonable criteria. In sum, *would a reasonably well informed person believe that the perceived apprehension – the doubt – is justifiable?* ... [O]ne might say that under the UNCITRAL Arbitration Rules,

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<sup>10</sup> Annex 9, *Country X v. Company Q*, UNCITRAL (Challenge Decision, Jan. 11, 1995), ¶ 8, available at XXII YEARBOOK COMM. ARB. 227 (1997) (“The criteria mandated by the UNCITRAL Arbitration Rules apply equally to all arbitrators. There is no lesser standard for party nominated arbitrators than for a neutral arbitrator.”).

<sup>11</sup> Article 1(2) of the revised (2010) UNCITRAL Arbitration Rules provides: “The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. That presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.” The Notice of Arbitration asserts jurisdiction on the basis of the offer to arbitrate certain disputes made by the Respondent before August 15, 2010, in Article VI of the Ecuador-U.S. BIT. See ¶ 19 of Annex 1, Notice of Arbitration. It is clear from the numbering of the UNCITRAL Rules provisions cited in Claimant’s Notice of Arbitration that the Parties agree on this point. See *id.*, ¶¶ 52-54. It should be noted that in his correspondence, Mr. Tawil appears to refer in error to the 2010 version of the Rules. See Annex III, Letter from Mr. Tawil Accepting His Appointment as Arbitrator and Statement of Independence and Impartiality (Oct. 13, 2011).

<sup>12</sup> Annex 10, *National Grid PLC v. Republic of Argentina*, LCIA Case No. UN 7949 (Decision on the Challenge to Mr. Judd L. Kessler, Dec. 3, 2007), ¶ 80; see also generally *id.* at ¶¶ 75-87; see also Annex 11, C. B. Rosenberg, *Challenging Arbitrators in Investment Treaty Arbitrations, A Comparative Law Approach*, 27(5) J. INT’L ARB. 505, 510 (2010).

<sup>13</sup> In *ICS Inspection and Control Services v. Argentina*, the Secretary General of the PCA decided that although there was “no reason to doubt Mr. Alexandrov’s personal intention to act impartially or independently, . . . it [was] prudent that another arbitrator be appointed” by ICS. Annex 12, *ICS Inspection and Control Services Limited v. Republic of Argentina*, UNCITRAL (Decision on Challenge to Arbitrator, Dec. 17, 2009), ¶ 5.

doubts are justifiable or serious if they give rise to an apprehension of bias that is, to the objective observer, reasonable. Actual bias or partiality need not be established. . . . Rather it is the reasonableness of the fear or apprehension of bias on the part of the claimant – its justifiable character – that is required to be established.<sup>14</sup>

Further guidance on these matters may be found in the International Bar Association’s Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”), which nonetheless are not binding here. General Standard 2 of the IBA Guidelines sets out the principle, similar to that expressed in Article 10(1) of the UNCITRAL Arbitration Rules, that “[a]n arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator . . . if facts or circumstances exist, or have arisen since appointment, that, **from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence**, unless the parties have accepted the arbitrator.”<sup>15</sup>

In sum, circumstances giving rise to an *appearance* of partiality (or lack of impartiality) form a sufficient basis for an arbitrator challenge to be effective.<sup>16</sup> In addition, for a challenge to prevail, it is *not* necessary that the challenging party’s subjective perception that the arbitrator lacks independence or impartiality be the *sole* conclusion that can follow from a reasonable review of the relevant facts. Even though other valid interpretations of the facts may be possible, the challenge must be sustained.<sup>17</sup>

General Standard 2(c) of the IBA Guidelines further elaborates upon the “justifiable doubts” standard by noting that the justifiable doubts that prevent an arbitrator from serving can arise from a party’s reasonably formed belief as to the “*likelihood*” that the arbitrator “*may be influenced*” by considerations other than the merits of the case:

Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a *likelihood* that the arbitrator *may be influenced* by factors other than the merits of the case as presented by the parties in reaching his or her decision.

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<sup>14</sup> Annex 9, *Country X v. Company Q*, *supra*, ¶¶ 23-24 (emphasis added).

<sup>15</sup> IBA Guidelines, General Standard 2(a, b) (emphasis added).

<sup>16</sup> Annex 13, *Perenco Ecuador Ltd. v. Republic of Ecuador*, PCA Case No. IR-2009/1 (Decision on Challenge to Arbitrator, Dec. 8, 2009), ¶ 44 (emphasis in original) (decision by the Secretary General of the Permanent Court of Arbitration upholding Ecuador’s challenge of Mr. Brower):

Accordingly, a finding that Judge Brower is *actually biased* against Ecuador or has actually prejudged the merits of the dispute is not necessary in order for the challenge to be sustained under the IBA Guidelines. Applying the *appearance of bias* test, Judge Brower would be disqualified if “circumstances . . . have arisen since the appointment, that, from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts” as to Judge Brower’s impartiality or independence.

<sup>17</sup> *Id.* ¶ 53:

The above interpretation is of course not the *only* interpretation of Judge Brower’s comments and it is not *in fact* what Judge Brower subjectively intended by his comments, as he explained in his Statement. But it is a reasonable interpretation of Judge Brower’s comments and, applying the IBA Guidelines, would give rise to justifiable doubts about his impartiality.

Proof of actual bias, partiality, or lack of independence is not a prerequisite to recusal, nor is a demonstration that any such shortcoming would necessarily, should it exist, influence the arbitrator's decision-making process. What is required, instead, is "some showing of risk, potential or appearance of bias."<sup>18</sup>

The need for impartiality assumes particularly acute importance in the international investment arbitration arena, given the public interests at stake and the careful public scrutiny of such cases.<sup>19</sup> It goes without saying that the Republic of Ecuador's ability to regulate its natural resources is of prime significance to its public interest and is at the center of the nation's attention and scrutiny.

## **II. Justifiable Doubts Exist as to Mr. Tawil's Impartiality and Independence**

As Mr. Tawil himself observed earlier this year in resolving an arbitrator challenge in the context of an ICSID case, "In a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute."<sup>20</sup> Respondent reasonably perceives that the forensics of Claimant's selection of its co-arbitrator designee have placed it in a situation of disadvantage for unfair and impermissible reasons.

As detailed below, having regard to the totality of circumstances and in view of the above standards, a reasonable and informed third party can easily find that justifiable doubts exist as to Mr. Tawil's independence and impartiality, warranting his disqualification. Respondent has indeed concluded, with regret, that ample circumstances exist to create doubts on its part as to the designee's ability to serve with independence and impartiality.

### **a. Mr. Tawil's Close Relationship with the Claimant's Counsel Gives Rise to the Appearance of a Lack of Impartiality and Independence**

It follows from Mr. Tawil's Statement of Independence and Impartiality that:<sup>21</sup>

1. Mr. Tawil served together with Claimant's counsel in this case as co-counsel to the claimant in two concluded ICSID arbitrations: *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, and *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3;

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<sup>18</sup> Annex 14, C. A. Rogers, *The Ethics of International Arbitration*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 621, 636 (2d ed., 2008).

<sup>19</sup> See Annex 15, C. Harris, *Arbitrator Challenges in International Investment Arbitration*, TDM Vol. 5, No. 4 (July 2008, updated July 2009), p. 1, nn.2-4 and accompanying text.

<sup>20</sup> Annex 16, *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14 (Decision on the Proposal to Disqualify Prof. P. Sands, May 5, 2011), ¶ 47.

<sup>21</sup> Annex 3, Letter from Mr. Tawil Accepting His Appointment as Arbitrator and Statement of Independence and Impartiality (Oct. 13, 2011).

2. He served together with Claimant's counsel in this case as co-counsel in the first session of the Arbitral Tribunal held on June 1, 2008 in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30;
3. One of King & Spalding's associates, Ms. Silvia Marchili, worked as a junior associate in the legal team at M. & M. Bomchil headed by Mr. Tawil, between May 24, 2003 and July 31, 2006; and
4. Last year, Claimant's counsel appointed Mr. Tawil as arbitrator in *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, a matter that is currently pending.

These disclosures and other information that Respondent presents below demonstrate that a deep relationship of cooperation and reciprocal trust has existed between Mr. Tawil and the firm King & Spalding for many years. That association has consisted of, *inter alia*, the protagonists' joint service as counsel for investors in multiple matters against Argentina, the firm's appointments of Mr. Tawil as arbitrator in matters against other States, and mutual cooperation in the fields of publishing and speaking engagements.

The Respondent judges that the totality of the facts gives rise to reasonable and justifiable doubts as to Mr. Tawil's impartiality and independence toward it. This disqualifies him from serving as an arbitrator in this case.

Mr. Tawil's joint representation with Claimant's counsel, King & Spalding, in the following three cases establishes a history of prolonged professional collaboration: (1) *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, registered in October 2001 and terminated some eight years later, in September 2009, (2) *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, registered in April 2001 and currently in its resubmission proceedings, and (3) *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30, registered in December 2003 and still pending. The collaboration between Mr. Tawil and King & Spalding thus dates back at least a decade and continues today uninterrupted.

Mr. Tawil was involved as co-counsel in the *Enron* matter during both the main arbitration proceedings and the annulment proceedings. Claimant seeks to attenuate this counsel alliance by asserting that Mr. Tawil's "last substantive involvement" in *Enron* dates to the post-hearing briefs filed in October 2009.<sup>22</sup> Whether Mr. Tawil has been, or intends to be, involved in the resubmission proceedings in any manner is not known.

Again in the first *Azurix* matter, Mr. Tawil was involved as co-counsel in both the main arbitration proceedings and the annulment proceedings. And again Claimant

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<sup>22</sup> See Annex 5, Letter from King & Spalding Regarding Notice of Challenge (Nov. 4, 2011).

attempts to minimize the relevance of this fact by observing that “[s]imilarly, the annulment hearing in the first *Azurix* case took place in September 2008.”

Mr. Tawil also served as counsel together with Claimant’s counsel in the first session of the Arbitral Tribunal, held on June 1, 2008, in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30. It was apparently due only to an inability of Mr. Tawil’s firm to agree to terms of representation with Azurix that this co-counsel relationship with King & Spalding did not continue.<sup>23</sup>

Based on the foregoing, Mr. Tawil was working as co-counsel with King & Spalding on three major international arbitrations just over two years ago.<sup>24</sup> The past joint representation by Mr. Tawil and the Claimant’s counsel equips the latter with privileged insight into the former’s view on relevant legal issues, thereby creating an imbalance from the very outset of the arbitration proceedings, a situation which is in conflict with the principle of procedural fairness.

In addition, prior to the appointment in this case, Claimant’s counsel appointed Mr. Tawil as an arbitrator in *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9), in August 2010. That matter is ongoing. Mr. Tawil’s appointment by King & Spalding as an arbitrator in *Universal Compression*, and now in this case, after so long-standing and intimate of a relationship, may be said to represent a continuation and expansion of the professional partnership cultivated during their work as co-counsel in the above-mentioned arbitrations and through their other professional associations. Mr. Tawil was challenged in *Universal Compression* under the ICSID Rules, based on the respondent State’s concerns over Mr. Tawil’s relationship with King & Spalding.

That a close relationship between an arbitrator and counsel can raise justifiable concerns regarding independence and impartiality is reflected in the IBA Guidelines. “Although the IBA Guidelines have no binding status in the [UNCITRAL] proceedings, they reflect international best practices and offer examples of situations that may give rise to objectively justifiable doubts as to an arbitrator’s impartiality or independence.”<sup>25</sup>

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<sup>23</sup> As stated in the challenge decision in the *Universal Compression* case, “[Mr. Tawil] explains that he joined the first session as a matter of courtesy as his firm and Azurix were discussing the terms of his firm’s possible engagement in the case; no such terms were agreed; accordingly, the firm did not represent Azurix further in the case.” Annex 17, *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9 (Decision on the Proposal to Disqualify Prof. Stern and Prof. Tawil, May 20, 2011), ¶ 63.

<sup>24</sup> In addition, one of King & Spalding’s associates, Ms. Silvia Marchili, worked as an associate in the legal team in M. & M. Bomchil headed by Mr. Tawil for over three years, between May 2003 and July 2006. Although Claimant’s counsel attempts to discount this connection between Mr. Tawil’s practice and King & Spalding, the fact that this attorney joined King & Spalding’s international arbitration team in Houston upon leaving Mr. Tawil’s team further suggests a high degree of closeness of Mr. Tawil to the Claimant’s counsel.

<sup>25</sup> Annex 12, *ICS Inspection and Control Services Limited, supra*, ¶ 2 (sustaining the challenge of Mr. Alexandrov, who was appointed by the claimant, on the basis of his law firm’s then-current representation of claimant in a case adverse to Argentina).

The Guidelines' Green List 4.4.2 refers to "*contacts*" between an arbitrator and a counsel when "[t]he arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel." The drafting and context of this provision suggest that it contemplates a single instance of acting as co-counsel, rather than the repeated and protracted collaboration that inevitably exists in the context of joint representation in complex and time-consuming ICSID cases. The Orange List 3.3.3, by contrast, refers to a "*relationship* between an arbitrator and another arbitrator or counsel," where "[t]he arbitrator was within the past three years a partner of, *or otherwise affiliated with*, another arbitrator or any of the counsel in the same arbitration." The IBA Guidelines' Orange List "provides a non-exhaustive enumeration of specific situations which – depending upon the facts of a particular case – may give rise to justifiable doubts as to the arbitrator's impartiality and independence."<sup>26</sup>

As pointed out by the Working Group responsible for the Guidelines, "[t]he borderline between the situations indicated is often thin. It can be debated whether a certain situation should be on one List instead of another."<sup>27</sup> With this in mind, the Working Group expressed confidence that the Guidelines would "be applied with robust common sense and without pedantic and unduly formalistic interpretation."<sup>28</sup>

When deciding whether an arbitrator and counsel have had merely occasional contacts in the past as opposed to a working relationship, one must consider the degree of involvement. Working as co-counsel on complex and long-lived investor-State cases by its nature inexorably leads to a close relationship rather than to simple, occasional "contacts" between co-counsel. Thus, while drawing the borderline between "contacts" and a "relationship" may undeniably be a difficult exercise in some instances, it certainly is not so under circumstances like those just described. Mr. Tawil was involved with King & Spalding in three major international arbitrations and worked with Claimant's counsel until at least October 2009, all on behalf of foreign investor claimants against a State under a BIT. Further, at least one attorney at King & Spalding worked under the tutelage of Mr. Tawil for three years and is thus highly likely to have unique insight into his approach to issues of law, and this can be shared with the rest of Claimant's counsel team in the present arbitration.

On the basis of just the facts laid out above, it is clear that there exists between Claimant's counsel and the co-arbitrator nominated by Claimant an especially close relationship aimed at mutual professional collaboration and advancement. But the facts set out above are not the only available corroborating indicia. One may also consider a number of other, more seemingly innocuous cues that, while appearing superficially more muted, nevertheless confirm the presence of an unduly close rapport.

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<sup>26</sup> Annex 16, *OPIC Karimum Corporation, supra*, ¶ 48; IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 3.

<sup>27</sup> IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 8.

<sup>28</sup> IBA Guidelines, Introduction, ¶ 6.



By way of example, one might note that Mr. Tawil was invited to submit a chapter in the widely-circulated 2004 treatise “The Art of Advocacy in International Arbitration” edited by Mr. R. Doak Bishop, the co-head of King & Spalding’s international arbitration practice. Later, Mr. Tawil was one of a select group of practitioners invited to submit a chapter on a different subject for the second volume of that treatise, which appeared in 2010 and which was again edited by Mr. Bishop and by his fellow co-head of King & Spalding’s arbitral practice, Mr. Edward G. Kehoe.

In the meantime, in February 2009, while serving as co-chair of the International Bar Association’s Arbitration Committee, Mr. Tawil moderated a panel discussion in Dubai at the 12<sup>th</sup> Annual IBA International Arbitration Day on “Equal Treatment – Should Arbitrators Level the Playing Field?” at which Mr. Bishop appeared as one of three invited speakers. Mr. Tawil’s was co-chair of the Arbitration Committee also when that Committee invited Mr. Bishop to join the IBA’s Task Force responsible for preparing the 2010 “Guidelines for Drafting International Arbitration Clauses.”

The bond between King & Spalding and the co-arbitrator continues today: Mr. Tawil and Mr. Bishop are currently scheduled to appear together as invited speakers at the 15<sup>th</sup> Annual IBA International Arbitration Day to be held in Stockholm in March 2012. The overall theme of the conference is, of all subjects, “Neutrality: Myth or Reality?” and Mr. Tawil and Mr. Bishop will be taking part in a debate on “The IBA Guidelines on Conflicts: Do they set the standard or is there now a need for revision?” Incidentally, the two-day IBA seminar will be followed by a one-day LCIA symposium. Mr. Tawil and a partner of King & Spalding serve together as members of the LCIA Court.

Admittedly, such professional dealings do not, standing alone, constitute a factor of decisive import. One scenario described on the Orange List concerns a “close personal friendship” between an arbitrator and counsel of one party.<sup>29</sup> Respondent is not in a position to affirm that such a situation exists here, and it notes that at least one author, Ioannis Vassardanis, commenting upon the IBA Guidelines shortly after their appearance, suggested that the notions of “contacts” should not be pushed to their extreme limits: “One should not be so extreme as to penalize relationships that exist among practitioners in the international arbitration arena. ... One must surely keep in mind that in the rather small world of international arbitration practitioners, bonds may be created that do not by themselves necessarily call into question an arbitrator’s independence and impartiality.” (Free translation)<sup>30</sup> Failure to factor this reality into the analysis would indeed be to ignore the realities of the relatively small arbitration world.

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<sup>29</sup> IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 3.3.6 (“A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.”).

<sup>30</sup> Annex 18, I. Vassardanis, *Les directives de l’International Bar Association sur l’impartialité, l’indépendance et la révélation en matière d’arbitrage international*, GAZETTE DU PALAIS, Dec. 3-4, 2004, at 42, 43 (“On ne doit pas aller jusqu’à l’extrême en pénalisant les relations entre praticiens de l’arbitrage international. ... Il faut certainement tenir compte du fait que, dans le cercle restreint de l’arbitrage

Respondent recognizes too that parties' proclivity to launch arbitrator challenges in the investment arena can sometimes go too far. An example that comes readily to mind is the risibly slight recusal ground of a "long-ago acquaintanceship at an educational institution" presented and rightly rejected in *Alpha Projectholding v. Ukraine*.<sup>31</sup>

But the matters relating to the invitations made or received by Mr. Tawil to speak and publish together with members of the King & Spalding firm, as well as the matters of their common membership and holding of leadership positions in various professional organizations, are of a nature far different from the obviously innocuous contacts referred to in the Vassardanis article or the *Alpha/Ukraine* matter. The matters presented here are thus worthy of consideration as perfectly relevant aspects in the Secretary General's overall analysis.

Indeed, when ones takes an unfiltered look at how professional contacts and collaborative relationships develop in the relatively restricted world of international arbitration, it is quite simply not credible to urge, as Claimant does in its November 4 letter, that reference to the close professional contacts between King & Spalding and Mr. Tawil represents an exercise in "grasping at straws."

The present recusal proceeding should not be the occasion to adopt a posture of blithe naïveté about how the arbitration community oftentimes functions. It would be vain indeed to ignore that the acts of choosing co-counsel, choosing replacement counsel in cases of conflict, selecting arbitrators, inviting speakers and the submission of papers, and any other number of everyday events, frequently tend to be organized around what is referred to in continental Europe as the hope that the beneficiary will "*renvoyer l'ascenseur*," which may best be understood in English as "return the favor." And, as noted already, Mr. Tawil himself posits that choosing a party-appointed arbitrator "involves a forensic decision that is clearly related" to a calculus by the appointing party as to "its prospects of success in the dispute."

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international, des liens peuvent se créer sans remettre pour autant en cause l'indépendance et l'impartialité d'un arbitre."); see also Annex 19, P. Pinsolle, *Note sous 9 septembre 2010, Cour d'appel de Paris*, 2011(1) ASA BULLETIN 197, 200-01 ("One of the characteristics of international arbitration ... is that the arbitrators and counsel know each other, as they see each other frequently, sometimes sit as arbitrator together and often plead against one another. This characteristic is well known and does not require, in our view, any particular disclosure. It is only when these links go beyond what is predictable for the parties ... that these specific links with the parties' counsel must be disclosed." (Free translation) ("Une des caractéristiques de l'arbitrage international ... est que les arbitres et les conseils se connaissent pour se rencontrer fréquemment, parfois siéger ensemble et souvent plaider les uns contre les autres. Cette caractéristique est notoire et ne nécessite pas, à notre sens, de révélation particulière. Ce n'est que lorsque les liens vont au-delà de ce qui peut être prévisible pour les parties ... que ces liens spécifiques avec les conseils des parties devront être révélés."))

<sup>31</sup> Annex 20, *Alpha Projectholding GmbH v. Ukraine*, ICSID Case ARB/07/16 (Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Y. Turbowicz, Mar. 19, 2010).

The circumstance that there may not exist a non-waivable Red List category corresponding to the present set of facts is far from dispositive of the challenge here. The IBA Guidelines may be a useful starting point when there is a *single* potentially controversial “issue” involving a prospective arbitrator. But the guidelines give no specific guidance when, as here, there is an *accumulation of many different points*, each of which is of a differing degree of “seriousness” and no one of which, standing alone, would be a valid ground for recusal – and some of which, standing alone, may not even require disclosure under the strict letter of the IBA Guidelines, as they fall under the Green List.<sup>32</sup> The Green List refers to matters such as a previous statement of opinion by an arbitrator “concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated),”<sup>33</sup> relationships between an arbitrator and counsel “through membership in the same professional association or social organization,”<sup>34</sup> and previous service together “as arbitrators or co-counsel.”<sup>35</sup>

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<sup>32</sup> Annex 18, Vassardanis, *supra*, at 45:

According to the Working Group, situations that do not fall within the Orange List should generally be considered to fall under the Green List, even if no specific reference is found there. Of course, an arbitrator is always free to disclose any situation whenever he or she deems it appropriate under the general standards. Our view ... in this regard is that the duty of disclosure should be general. An arbitrator should disclose everything that could give rise to a reasonable doubt in the eyes of the parties. The existence of the lists is thus, in our opinion, liable to create confusion, except for the Red List. ... In the ... explanatory notes, the Group concedes that the boundaries between the listed situations are oftentimes subtle. One or the other of them may, depending on the circumstances, be placed on one list or another. In light of this subjectivity, we believe that the arbitrator should disclose all facts which could be relevant to the case at hand. ***What should be done, for instance, in cases where multiple situations mentioned on the Green List are simultaneously present? Shouldn't the arbitrator thus disclose all of these facts?*** ... At least with regard to the Orange and Green Lists, our fear is that the IBA Guidelines will prove to be ineffective and thus ultimately harmful. (Free translation) (emphasis added). (Selon le groupe de travail, les situations qui ne rentrent pas dans le cadre de la liste orange doivent être généralement considérées comme tombant dans le cadre de la liste verte, même s'il n'y est pas fait de référence spécifique. Bien entendu, un arbitre peut toujours révéler n'importe quelle situation, s'il croit que cela est approprié selon les standards généraux. Notre avis ... est à cet égard que le devoir de révélation doit être général. Chaque arbitre doit révéler tout ce qui peut susciter un doute raisonnable aux yeux des parties. L'existence de listes est donc, à notre avis, de nature à créer la confusion, sauf pour ce qui concerne la liste rouge. ... Dans les ... notes explicatives, le groupe admet que la frontière entre les situations indiquées est souvent subtile. Telle ou telle d'entre elles peut, selon les circonstances, être reconduite à une liste ou à une autre. Compte tenu de cette subjectivité, l'arbitre doit à notre avis révéler tous les faits qui peuvent avoir une relation avec l'affaire en cause. ***Qu'en est-il, par exemple, en cas de cumul de plusieurs des situations mentionnées à la liste verte? L'arbitre ne doit-il pas alors révéler ces faits multiples?*** ... [N]ous craignons, du moins pour ce qui concerne les listes orange et verte, que les directives de l'IBA ne se révèlent inefficaces, et donc en définitive dangereuses.”)

<sup>33</sup> IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 4.1.1.

<sup>34</sup> IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 4.4.1.

<sup>35</sup> IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 4.4.2.

Any challenge to an arbitrator founded on relationships existing between opposing counsel and the arbitrator inherently turns on a question of the degree of the contacts.<sup>36</sup> In this particular application, all of the factors presented – the multiple appearances by the co-arbitrator and Claimant’s counsel as co-counsel in arbitrations against Argentina, the two designations of the arbitrator by Claimant’s counsel in arbitrations against States, their membership in the same professional organizations, the invitations to speak and write together, etc. – lead to the reasonable belief on the part of Respondent that what is at issue here is certainly something far different in quantity and quality from the occasional professional contact which the Guidelines and the UNCITRAL Rules would countenance. The links here must be said to “go beyond what is predictable for the parties,” in the words of Philippe Pinsolle,<sup>37</sup> and confirm that the doubts which Respondent harbors as to Mr. Tawil’s impartiality or independence are both justifiable and reasonable.

As the Paris Court of Appeals recently had occasion to recall, “it is an accepted principle that the arbitrator must disclose to the parties any circumstance that is of such nature as to affect his or her judgment and bring about in the parties’ minds a reasonable doubt as to his or her qualities of impartiality and independence, which are the very essence of the role of arbitrator.”<sup>38</sup> That same court remarked that “the lack of independence may follow not only from relations that the arbitrator maintains with one of the parties to the case but also from those with that party’s counsel, whenever such relations involve shared interests and are not of a purely occasional nature.”<sup>39</sup> The court went on to annul an arbitral award because the relations of interest which one of the arbitrators had with the law firm representing one of the parties were “neither occasional nor remote in time” and were hence “of such a nature as to reasonably cause [the party] to doubt the arbitrator’s independence and impartiality.”<sup>40</sup>

Respondent asks that the Secretary General reach a similar conclusion here and sustain its request that Mr. Tawil be recused.

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<sup>36</sup> Annex 21, *Nations Energy Inc. et al. v. Republic of Panama*, ICSID Case ARB/06/19 (Decision for the Disqualification of a Member of the Annulment Committee, Sept. 7, 2011), ¶¶ 63-69; Annex 22, *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Republic of Argentina*, ICSID Case No. ARB/97/3 (Decision on the Challenge to the President of the Committee, Oct. 3, 2001), ¶ 28.

<sup>37</sup> See Annex 19, Pinsolle, *supra* note 30. (Free translation)

<sup>38</sup> Annex 23, *Allaire v. S.A.S. SGS Holding France*, Paris Court of Appeals (Sept. 9, 2010), available in 2011(1) ASA BULLETIN 187, 191 (Free translation) (“il est de principe que l’arbitre doit révéler aux parties toute circonstance de nature à affecter son jugement et à provoquer dans l’esprit des parties un doute raisonnable sur ses qualités d’impartialité et d’indépendance, qui sont l’essence même de la fonction arbitrale”).

<sup>39</sup> *Id.* (Free translation) (“le défaut d’indépendance peut résulter des rapports qu’un arbitre entretient non seulement avec l’une des parties à l’instance, mais également avec son conseil, dès lors qu’il s’agit de relations d’intérêts et qu’elles ne revêtent pas un caractère purement occasionnel”).

<sup>40</sup> *Id.* (Free translation) (“ne sont ni occasionnelles ni éloignées dans le temps; qu’une telle circonstance est de nature à faire raisonnablement douter [à la partie] de l’indépendance et de l’impartialité de l’arbitre”).

**b. Mr. Tawil's Unvarying Representation of Claimants in Investor-State Cases Reinforces the Conclusion that Respondent's Doubts Are Justifiable**

In combination with the other factors considered, Mr. Tawil's consistent representation of claimants in investor-State arbitrations further buttresses the conclusion reached by a reasonable and informed third party that there is a likelihood that, as arbitrator, he could be influenced by factors other than the merits of the case.

Based on the publicly available information, it would seem that in investor-State arbitration and other work Mr. Tawil has exclusively represented domestic and multinational companies. In addition to the three ICSID cases involving King & Spalding mentioned by Mr. Tawil in his Statement of Independence, he has worked as counsel on two additional ICSID arbitrations advocating for claimants, major corporations: *Siemens AG v. Argentina*, ICSID Case No ARB/02/8, and *CMS Gas Transmission Company v. Argentina*, ICSID Case No ARB/01/8. In addition, Mr. Tawil's profile on M. & M. Bomchil's Web site states that he "has represented some of the *most important domestic and foreign companies*," "represented *bidders* during the *concession and privatization processes ... in Argentina*," and "continues advising the *companies* supplying such services *in all matters related to economic regulation, court and administrative processes*, and contractual negotiations."<sup>41</sup>

Mr. Tawil's work as legal counsel is sufficiently one-sided that in the eyes of an informed third party doubts arise as to his ability to consider objectively the interests of a State party without bias or impartiality. Mr. Tawil's professional history as counsel has effectively led Respondent to perceive that he may systematically be more favorably disposed and receptive towards investors and/or less receptive to States' views. Even if Respondent is in fact wrong about this, the mere circumstance that Respondent can reasonably have this perception compels the conclusion that Mr. Tawil must be excused from service in this case.

At least one court has recognized that service by an individual as an arbitrator in one investor-State dispute and service by that same individual as counsel to an investor in a second, unrelated investor-State arbitration involving unrelated parties can give rise to justifiable doubts by a party to the first arbitration as to the arbitrator's independence and impartiality. Specifically, in the *Telekom Malaysia Berhad v. Ghana* matter, Ghana argued before the District Court of The Hague, on an emergency challenge of the rejection by the Secretary General of the Permanent Court of Arbitration of its arbitrator challenge, that such could be the case when the arbitrator could be expected to adopt a vigorously pro-investor position on a generic BIT protection (protection against expropriation) in his counsel role, and yet should be expected to keep an open mind about that protection in his role as arbitrator.

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<sup>41</sup> Prof. Tawil's Biography, M. & M. Bomchil's website, available at <http://www.bomchil.com/cv.aspx?AbogadoID=462>.

Ghana's position, as summarized by the court, was that "Professor Gaillard, who in his capacity of counsel opposes a specific notion or approach, cannot be unbiased in his judgment of that same notion or approach in a case in which he acts as an arbitrator."<sup>42</sup> The Court agreed, and upheld the challenge in the following terms:

It is stated first and foremost, contrary to what is alleged by the respondent, that practice in this court shows that in context of a request for the reversal of an arbitral award all existing objections against the contested award are put forward and that these objections are included in the permitted grounds for the challenge. This will not be different in the present case. This means that account should be taken of the fact that the arbitrator in the capacity of attorney will regard it as his duty to put forward all possibly conceivable objections against the *RFCC/Morocco* award. This attitude is incompatible with the stance Prof. Gaillard has to take as an arbitrator in the present case, *i.e.* to be unbiased and open to all the merits of the *RFCC/Morocco* award and to be unbiased when examining these in the present case and consulting thereon in chambers with his fellow arbitrators. Even if this arbitrator were able to sufficiently distance himself in chambers from his role as attorney in the annulment proceedings against the *RFCC/Morocco* award, account should in any event be taken of the appearance of his not being able to observe said distance. Since he has to play these two parts, it is in any case impossible for him to avoid giving the appearance of not being able to keep these two parts strictly separated.

For this reason there will be justified doubts about his impartiality, if Prof. Gaillard does not resign as attorney in the *RFCC/Morocco* case. Consequently the motion to challenge will in that case be upheld. To avoid any uncertainty Prof. Gaillard should within ten days from this judgment have expressly and unreservedly notified the parties to this arbitration whether he will resign as attorney in the *RFCC/Morocco* case.<sup>43</sup>

Prof. Gaillard indeed resigned from his counsel role in the *RFCC/Morocco* case. In this case, Mr. Tawil's repeated service as a vigorous legal advocate to investors attacking States similarly gives rise to the appearance that it may not be possible for him, as arbitrator, to disengage fully from the job of counsel.

**c. There Exists a Potential Harm to the Confidence that Investors and States Have in the Institution of Investor-State Dispute Resolution**

The totality of the facts gives rise to justifiable doubts as to Mr. Tawil's ability to act independently and impartially in this matter. Encouraging appointments founded on the type of relationship seen in this recusal petition could ultimately vitiate the confidence that investors and States have in the institution of investor-State dispute resolution. Practices of this sort, if perpetuated, will ultimately lead to the propagation of

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<sup>42</sup> Annex 24, *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague (Oct. 18, 2004), available in 2005(1) ASA BULLETIN 186, 192-93.

<sup>43</sup> *Id.*

the perception that the investor-State dispute system is marked by cronyism and is not wholly based on international justice. And in cases such as this one, where national resources are at the heart of the matter and at the center of the nation's attention, such a vitiated system would be perceived as something less than full justice.

### III. Conclusion

The Respondent emphasizes that it does not in any way question Mr. Tawil's integrity or competence or detract from his qualifications to serve as an arbitrator in other cases, notwithstanding Claimant's suggestion to the contrary.<sup>44</sup> However, the facts set out herein raise an appearance of lack of independence and bias that undermines the confidence in the investor-State system. The relevant circumstances, viewed globally, confirm the existence of an unusually close relationship between the Claimant's counsel and Mr. Tawil, such that in the eyes of the public there is an appearance of a lack of impartiality and independence as well as an appearance of bias.

For these reasons, the Respondent respectfully requests that its challenge of Mr. Tawil be sustained by the Secretary General in accordance with Articles 12(1)(c) and 6(2) of the UNCITRAL Rules. The Respondent reserves its rights in connection with matters relating to the Notice of Arbitration referred to above.

Respectfully submitted,



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*See Annex 5, Letter from King & Spalding Regarding Notice of Challenge (Nov. 4, 2011).*

December 21, 2011

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