

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

In the arbitration proceeding between

BURLINGTON RESOURCES, INC.

Claimant

and

REPUBLIC OF ECUADOR

Respondent

ICSID Case No. ARB/08/5

**DECISION ON THE PROPOSAL FOR DISQUALIFICATION OF
PROFESSOR FRANCISCO ORREGO VICUÑA**

Chairman of the Administrative Council
Dr. Jim Yong Kim

Secretary of the Tribunal
Mr. Marco Tulio Montañés-Rumayor

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Date: December 13, 2013

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A. THE PARTIES

1. The Claimant is Burlington Resources Inc. (“**Burlington**”), a company incorporated under the laws of the state of Delaware. The Respondent is the Republic of Ecuador (“**Ecuador**”).

B. PROCEDURAL HISTORY

2. On August 4, 2008, Burlington, represented by the law firm Freshfields Bruckhaus Deringer (“**Freshfields**”), appointed Professor Francisco Orrego Vicuña to serve as arbitrator in this case. The Arbitral Tribunal was constituted on November 18, 2008, and the proceedings began on that date.
3. On January 20, 2009, the Tribunal and the Parties held a first session in Paris, France. On April 17, 2009, the Tribunal held a hearing on provisional measures in Washington D.C. On January 22, 2010, the Tribunal held a hearing on jurisdiction in Paris, issuing its Decision on Jurisdiction on June 2, 2010. A dissenting opinion by Professor Orrego Vicuña was attached to the Decision on Jurisdiction. The Tribunal then held a hearing on liability in Paris from March 8 through 11, 2011, issuing a Decision on Liability on December 14, 2012. A dissenting opinion by Professor Orrego Vicuña was attached to the Decision on Liability.
4. On July 8, 2013, Dechert (Paris) LLP (“**Dechert**”), counsel representing Ecuador, sent an unsigned letter (the “**July 8 letter**”) to Professor Orrego Vicuña regarding news reports stating that he had been appointed as arbitrator multiple times (“**repeat appointments**”) by Freshfields. In this context, Ecuador asked Professor Orrego Vicuña to disclose all of his appointments in cases in which Freshfields acted or acts as counsel, and in particular any cases accepted after signing his Declaration pursuant to ICSID Arbitration Rule 6 on August 11, 2008 (the “**2008 Declaration**”). Ecuador also asked for disclosure of the compensation paid in these proceedings.
5. On July 11, 2013, the Tribunal and the Parties held a telephone conference to discuss organizational matters (“**the July 11 conference**”). At the end of the conference, Professor Orrego Vicuña enquired as to the origin of the July 8 letter, mentioning that it was not signed. Counsel for Ecuador apologized for having sent the letter unsigned, indicating that this had been an administrative mistake.
6. On July 12, 2013, Professor Orrego Vicuña answered the July 8 letter (the “**July 12 response**”), providing the list of cases requested by Ecuador.
7. On July 24, 2013, Ecuador proposed the disqualification of Professor Orrego Vicuña (the “**Proposal**”).
8. On July 25, 2013, the ICSID Secretariat notified the Parties that the proceedings were suspended until the Proposal was decided, pursuant to Rule 9(6) of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”). Professors Gabrielle Kaufmann-Kohler and Brigitte Stern (“**the unchallenged arbitrators**”) were seized of

the challenge pursuant to Article 58 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**the ICSID Convention**”).

9. On July 27, 2013, Burlington filed a Response to the Proposal (the “**Response**”), in which it proposed a briefing schedule for the disqualification procedure that would ensure the hearing scheduled to be held in August 2013 could take place. Burlington also invited the unchallenged arbitrators to issue a summary decision on the disqualification proposal, which could be supplemented at a later date.
10. On July 28, 2013, the unchallenged arbitrators invited Ecuador to comment on Burlington’s proposed schedule.
11. On July 29, 2013, Ecuador submitted its comments on Burlington’s proposed schedule. Besides raising arguments related to the merits of the Proposal, Ecuador acknowledged its duty to pursue its counterclaims as rapidly as possible, but stated that this duty had to “be balanced by the need to conduct this arbitration in a fair and cost and time effective manner”. Accordingly, Ecuador proposed an alternative schedule.
12. Also on July 29, 2013, the unchallenged arbitrators fixed a calendar for the next steps in the disqualification procedure: Professor Orrego Vicuña would furnish explanations pursuant to Arbitration Rule 9(3) at his earliest convenience; Ecuador would submit a reply within 5 calendar days of receipt of Professor Orrego Vicuña’s explanations; the Claimant would submit a rejoinder within 5 calendar days of receipt of the reply; and the unchallenged arbitrators would advise the Parties on further steps, including an estimated date of issuance of their decision, within 5 calendar days of receipt of the rejoinder.
13. On July 31, 2013, Professor Orrego Vicuña furnished his explanations. On the same day, the unchallenged arbitrators and the Parties held a telephone conference to address the calendar for the Parties’ outstanding submissions on the Proposal, and the possibility of maintaining the August hearing.
14. During the telephone conference, the Parties agreed, and the unchallenged arbitrators confirmed in a subsequent letter, that Ecuador would submit its reply by August 5, 2013, and that Burlington would file its rejoinder by August 7, 2013. At the end of the conference, the President of the Tribunal asked the Parties to address two questions in their submissions:
 - (1) What are the applicable standards for disclosure in an ICSID arbitration and what are the consequences of a breach of the duty to disclose?
 - (2) Do parties to an ICSID arbitration have a duty to inquire about facts that may give rise to doubts as to an arbitrator’s independence and impartiality? If such a duty exists, what is its source and scope?
15. On August 5, 2013, Ecuador filed a Reply to the Proposal (the “**Reply**”) and on August 7, 2013, Burlington filed a Rejoinder on the Proposal (the “**Rejoinder**”).

16. On October 15, 2013, Professors Kaufmann-Kohler and Stern advised the Secretary-General of ICSID that they had failed to reach a decision on the proposal to disqualify Professor Orrego Vicuña. On the same date, the Secretary-General informed the Parties that the decision on the Respondent's Proposal would now be taken by the Chairman of the Administrative Council ("**Chairman**"), in accordance with Article 58 of the ICSID Convention.
17. On October 21, 2013, Ecuador sent a letter to ICSID noting an LCIA Decision on Challenge of Arbitrator (LCIA Reference No. 1303). On October 24, 2013, Burlington objected to Ecuador's letter of October 21 and stated that the LCIA decision did not establish any governing principles of law as it was grounded on the specific facts of that case.

C. POSITION OF THE PARTIES

I. Ecuador's Position

18. On July 8, 2013, Ecuador asked Professor Orrego Vicuña to disclose "all cases that [he] accepted [as arbitrator] in which Freshfields acts as counsel", including the amount of fees received on account of those cases.¹ It stated that it had become aware of repeat appointments of Professor Orrego Vicuña by Freshfields through an article published in an arbitration newsletter on June 20, 2013.² This article addressed a decision on a proposal to disqualify Professor Orrego Vicuña in *Rusoro v. Venezuela*.³ Ecuador stressed that Professor Orrego Vicuña had not disclosed in this proceeding any appointment in cases in which Freshfields acted or acts as counsel since his appointment and declaration in 2008.
19. Ecuador noted that its concern was even greater since it learned at the same time that in the *Rusoro* case Professor Orrego Vicuña had disclosed his appointment in *Repsol v. Argentina*.⁴ Ecuador stated that it was unaware of this second appointment and argued that such disclosure should have been made in the present case.⁵
20. Ecuador's Proposal was based on three grounds:
- (i) Professor Orrego Vicuña had been appointed by Freshfields in an "unacceptably high number of cases";⁶
 - (ii) Professor Orrego Vicuña breached his continuing obligation to disclose any circumstance that might cause his reliability for independent judgment to be questioned;⁷ and

¹Ecuador's Proposal For Disqualification of Professor Francisco Orrego Vicuña of July 24, 2013 (the "**Proposal**"), ¶3.

²Global Arbitration Review, *Arbitrator survives challenge over Freshfields appointments*, published on June 20, 2013 (**Exh. E-381**).

³*Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB(AF)/12/5), Decision of June 20, 2013.

⁴*Repsol S.A. and Repsol Butano S.A. v. Argentine Republic* (ICSID Case No.ARB/12/38).

⁵Proposal, ¶ 6, footnote 2.

⁶*Id.*, ¶¶ 5, 41, 42-57.

⁷*Id.*, ¶¶ 5, 41, 58-70.

- (iii) Professor Orrego Vicuña had displayed “a blatant lack of impartiality to the detriment of Ecuador” during the course of this arbitration.⁸
21. Regarding the first ground, Ecuador noted that Professor Orrego Vicuña has been appointed in eight ICSID cases by the same law firm between 2007 and 2013. It considers this an “excessively high number of appointments by the same law firm during such a limited period of time”.⁹
22. The eight cases referred to in Ecuador’s Proposal¹⁰ are:
- i. *Eni Dacion B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/04);
 - ii. *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/05);
 - iii. *Itera International Energy LLC and Itera Group NV v. Georgia* (ICSID Case No. ARB/08/07);
 - iv. *EVN AG v. Macedonia, former Yugoslav Republic* (ICSID Case No. ARB/09/10);
 - v. *Pan American Energy LLC v. Plurinational State of Bolivia* (ICSID Case No. ARB/10/8);
 - vi. *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11);
 - vii. *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5);
 - viii. *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38).
23. Ecuador distinguished the *Rusoro* disqualification decision from the present case. According to published reports, the *Rusoro* tribunal rejected the challenge of Professor Orrego Vicuña because Venezuela had been aware of eight appointments since 2008, and a potential ninth, in cases where Freshfields acted or acts as counsel, and that the additional appointment in the *Repsol* case was not sufficient to disqualify Professor Orrego Vicuña. Ecuador noted the *Rusoro* tribunal’s recognition that “excessive dependence on one law firm can be seen as undermining an arbitrator’s independence, can require full disclosure, and may even lead to a successful challenge.”¹¹ Ecuador also asserted that “the number of acceptable appointments needs to be determined in each case based on the circumstances.”¹²
24. According to Ecuador, Professor Orrego Vicuña’s excessive dependence on Freshfields is shown by his eight appointments in ICSID cases since 2007, which undermines his independence in this case.¹³

⁸*Id.*, ¶¶ 5, 41, 71-76.

⁹*Id.*, ¶ 44.

¹⁰*Id.*, ¶ 42.

¹¹*Id.*, ¶ 54.

¹²*Id.*, ¶ 56.

¹³*Id.*, ¶ 57.

25. With respect to the second ground for disqualification, Ecuador contended that Professor Orrego Vicuña failed to fulfill his duty of disclosure “both prior to and after his appointment.”¹⁴ Ecuador argued that at the time Professor Orrego Vicuña was appointed in the present case, he did not disclose his prior or contemporaneous appointments by Freshfields in the *ENI Dación BV v. Venezuela* and *Itera v. Georgia* ICSID cases. Ecuador noted that subsequently, Professor Orrego Vicuña failed to disclose his appointments by Freshfields in five additional ICSID cases, contrary to the obligation he had assumed in his 2008 Declaration.¹⁵
26. Ecuador argued that Professor Orrego Vicuña had adopted an inconsistent view of his duty of disclosure.¹⁶ To substantiate its allegation, Ecuador submitted Professor Orrego Vicuña’s declaration of June 6, 2011 in *Pan American Energy v. Bolivia*, a case in which Dechert acted as counsel for Bolivia and in which Professor Orrego Vicuña disclosed that he had been appointed as an arbitrator by Freshfields in *Itera*, *EVN*, and *Burlington*.¹⁷
27. Responding to Professor Orrego Vicuña’s explanation that all his appointments were readily accessible on the ICSID website, Ecuador noted three points:
- (i) The ICSID website only started identifying counsel at the end of 2010, over two years after the 2008 Declaration;¹⁸
 - (ii) The burden of disclosure lies on Professor Orrego Vicuña, who assumed a continuing obligation in his 2008 Declaration. Ecuador had no obligation to investigate an arbitrator’s appointments;¹⁹
 - (iii) Professor Orrego Vicuña’s conduct had been inconsistent since he disclosed his Freshfields appointments in the *Rusoro* case only upon request by one party, but made such disclosure *sua sponte* in the *Pan American* case in June 2011.²⁰
28. Ecuador cited decisions²¹ on the scope of the duty of disclosure to demonstrate that Professor Orrego Vicuña was obliged to inform Ecuador of all his appointments by Freshfields.²² It relied on the following factors identified in *Suez*: (1) whether the failure to disclose was inadvertent or intentional, (2) whether it was the result of an honest exercise of discretion, (3) whether the non-disclosed facts raise obvious questions about impartiality and independence, and (4) whether the non-disclosure is an

¹⁴*Id.*, ¶ 60.

¹⁵*Id.*, ¶ 60-61.

¹⁶*Id.*, ¶ 62.

¹⁷Signed Declaration of Professor Orrego Vicuña in the *Pan American* case, June 6, 2011 (**Exh.E-384**).

¹⁸Proposal, ¶ 64.

¹⁹*Id.*, ¶ 65.

²⁰*Id.*, ¶ 66.

²¹*Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5) (“**Tidewater**”); *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17) and *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), (together “**Suez**”).

²²Proposal, ¶ 67.

- aberration on the part of a conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality.²³
29. Ecuador noted that Professor Orrego Vicuña's ICSID appointments by Freshfields were not publicly known until after he signed his declaration on August 11, 2008, and that the failure to disclose these form part of a pattern of circumstances raising "obvious questions" as to Professor Orrego Vicuña's impartiality and independence, thus fulfilling the *Suez* test.²⁴
 30. With respect to the third ground for disqualification, Ecuador argued that Professor Orrego Vicuña demonstrated a manifest lack of independence and impartiality to the detriment of Ecuador in the conduct of the proceedings, including at the July 11, 2013 telephone conference.²⁵ Ecuador alleged that "the vast majority of questions" asked by Professor Orrego Vicuña during the hearings were favorable to the Claimant or attempted to undermine Ecuador's position and the credibility of some of its witnesses.²⁶
 31. Ecuador submitted that Professor Orrego Vicuña demonstrated "a pattern of consistently dissenting from the Arbitral Tribunal's majority on those points that were decided in Ecuador's favor."²⁷
 32. In Ecuador's Reply, it argued that Professor Orrego Vicuña's July 31 explanations show partiality and loss of neutrality, both in tone and content.²⁸ Ecuador stated that Professor Orrego Vicuña's *in personam* attacks directed at Dechert, which represents Ecuador in this case, demonstrate a strong bias against it.²⁹ In particular, the Respondent argued that these explanations are "shocking and unacceptable", demonstrating an "intolerable lack of impartiality", thus removing any possible doubts as to the need to remove Professor Orrego Vicuña from the Tribunal.³⁰
 33. Ecuador observed that Professor Orrego Vicuña "confuses the requirement to disclose a potential conflict of interest with the decision as to whether the number of appointments creates a conflict of interest".³¹ By stating that "in the circumstances of this case no such conflict of interest arises in my understanding", Professor Orrego Vicuña failed to account for the viewpoint of the Parties.
 34. Ecuador rebutted Professor Orrego Vicuña's statement that all information about his professional activities is public. For example, it noted that appointments in ICC or UNCITRAL cases are not always public, thus necessitating disclosure by the

²³*Id.*, ¶ 68.

²⁴*Id.*, ¶ 70.

²⁵*Id.*, ¶ 71.

²⁶*Id.*, ¶ 72.

²⁷*Id.*, ¶ 73.

²⁸Ecuador's Reply on the Proposal for Disqualification of Professor Francisco Orrego Vicuña of August 5, 2013 ("Reply"), ¶¶ 7-13.

²⁹*Id.*, ¶¶ 9-10.

³⁰*Id.*, ¶¶ 2-3.

³¹*Id.*, ¶ 15.

- arbitrator.³² In this context, Ecuador argued that the burden of providing information is on the arbitrator, and the Parties have no obligation to obtain such information.
35. Ecuador argued that it had no duty to continuously investigate arbitrators in the framework of an ICSID arbitration.³³ It recognized that it is standard practice to investigate arbitrators at the initial moment of their appointment, but that this practice does not create a positive duty to investigate an arbitrator throughout the proceeding.³⁴ Furthermore, it argued that practical reasons militate against the existence of such a duty.³⁵
36. Ecuador also argued that Professor Orrego Vicuña’s July 31 explanations were an attack on its counsel that demonstrated he had “stepped outside of his role as arbitrator” and could no longer be seen as a neutral decision maker.³⁶
37. Ecuador stated that Burlington failed to show that the proposal was not timely filed.³⁷ According to Ecuador, the word “promptly” in Arbitration Rule 9(1) refers to “the date of actual knowledge” of the event.³⁸ Ecuador argued that it only became aware of the full extent of Professor Orrego Vicuña’s appointments by Freshfields through his July 12 response. The proposal was filed on July 24, 2013, 13 days later, and hence was promptly filed.³⁹
38. Finally, Ecuador submitted that “Professor Orrego Vicuña’s bias has [...] become evident based on the Comments that he submitted in response to Ecuador’s Proposal for Disqualification. Such bias therefore also requires his disqualification.”⁴⁰

II. Burlington’s Position

39. Burlington responded that Ecuador’s Proposal was untimely and unfounded.⁴¹ It claimed that the proposal to disqualify represented “a transparent attempt to sabotage these proceedings”, most notably with regard to the August hearing.⁴²
40. Burlington argued that the Proposal was belated with respect to both repeat appointments and the alleged bias during the proceedings. A proposal for disqualification must be made “promptly” and a failure to do so amounts to a waiver.⁴³
41. Burlington submitted that all the information on which Ecuador relied had been public before or by February 19, 2013,⁴⁴ hence the trigger for Ecuador’s challenge was not

³²*Id.*, ¶ 18.

³³*Id.*, ¶¶ 78-94

³⁴*Id.*, ¶ 87.

³⁵*Id.*, ¶¶ 87-94.

³⁶*Id.*, ¶¶ 27 and 29.

³⁷*Id.*, ¶ 31.

³⁸*Id.*, ¶¶ 33-34.

³⁹*Id.*, ¶¶ 35-36.

⁴⁰*Id.*, ¶ 60.

⁴¹Burlington’s Response to Respondent’s Proposal to Disqualify Professor Francisco Orrego Vicuña (“**Response**”), ¶ 1.

⁴²*Id.*, ¶ 3.

⁴³*Id.*, ¶ 13.

⁴⁴*Id.*, ¶ 2.

June 20, 2013. It noted that Professor Orrego Vicuña was appointed to the *Rusoro* case on October 15, 2012, and this fact had been public since then.⁴⁵ The appointment in *Repsol*, on which Ecuador relies, was disclosed in the media on February 19, 2013, and was published on the ICSID website on or around March 6, 2013, “about 140 days, or almost three times the delay considered sufficient to warrant dismissal of a challenge in the *Suez* case”.⁴⁶ Relying on case law, and on Ecuador’s own pleadings in another case⁴⁷, Burlington argued that Ecuador waived its right to challenge Professor Orrego Vicuña on the basis of these repeat appointments because it waited more than four months after the relevant facts became public to make this challenge.⁴⁸

42. Burlington argued that the challenge based on Professor Orrego Vicuña’s conduct during the arbitration was not promptly filed. The hearing on liability took place over two years earlier and the dissent in the Decision on Liability was issued more than six months earlier, thus the Proposal “falls manifestly outside the scope of a “prompt” application for disqualification”.⁴⁹
43. Burlington submitted that Ecuador “misunderstands or chooses to misunderstand the party-driven nature of arbitral appointments”.⁵⁰ In the present case, different parties being advised by the same law firm appointed Professor Orrego Vicuña to the eight cases under scrutiny. As a result, it argued that Ecuador’s Proposal “implicitly threatens the due process right of all parties in investment arbitration to their choice of arbitrators under the ICSID Convention – and, indeed, to their choice of counsel”.⁵¹
44. Burlington submitted that the Proposal did not reach the high standard for disqualification in Article 57 of the ICSID Convention.⁵²
45. It argued that non-disclosure of the appointment in *Repsol* does not in itself support a challenge based on repeat appointments, but merely justifies enquiring into potential economic dependence between the appointed arbitrator and the law firm.⁵³ Professor Orrego Vicuña has been appointed in more than eighty cases over his career, and has held other important functions, thus he was not economically dependent on Freshfields nor did he derive a significant portion of his income from these appointments.⁵⁴ In the present case, Ecuador had made no attempt to prove such economic dependence.
46. Relying on prior decisions, in particular on *Tidewater*⁵⁵, Burlington argued that multiple appointments by the same party, *without more*, are not a valid ground for a challenge.⁵⁶

⁴⁵*Id.*, ¶ 15.

⁴⁶*Id.*, ¶ 13.

⁴⁷*Murphy Exploration and Production Company International v. Republic of Ecuador*, UNCITRAL Arbitration pursuant to the Ecuador-United States BIT.

⁴⁸Response, ¶¶ 17-18.

⁴⁹*Id.*, ¶ 20.

⁵⁰*Id.*, ¶ 25.

⁵¹*Id.*, ¶ 25.

⁵²*Id.*, ¶ 26.

⁵³*Id.*, ¶ 34.

⁵⁴*Id.*, ¶ 39.

⁵⁵*Tidewater supra* note 21, Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern (December 23, 2010) (**Exh. CL 299**).

47. Burlington argued that Ecuador’s allegations of bias in the conduct of the arbitration were without merit and “a vexatious attempt to improperly review ordinary arbitral discretion”.⁵⁷
48. In its Rejoinder, Burlington reiterated that Ecuador had not provided any facts that would lead an objective observer to discern a manifest lack of independence of Professor Orrego Vicuña.⁵⁸
49. Burlington stated that all the facts on which Ecuador relied were public for many months before Ecuador filed its Proposal. Furthermore, Burlington argued that counsel for Ecuador acknowledged that it was aware of five of the eight appointments of Professor Orrego Vicuña since June 2011. The sixth appointment in the *Ampal* case was published in the media on October 22, 2012; the seventh appointment in the *Rusoro* case was reported in the media on January 9, 2013; and the eighth appointment in the *Repsol* case was made public in media reports on February 19, 2013, and could be accessed on the ICSID website as of March 2013.⁵⁹ Additionally, Burlington argued that each of these appointments forming the basis of the challenge – including *Rusoro*, *Repsol* and *Ampal* - were disclosed on the ICSID website.⁶⁰
50. Burlington argued that knowledge of notorious facts should be imputed to Ecuador and its specialist counsel, and that Burlington could not be asked to prove that Ecuador had knowledge of public facts.⁶¹ Burlington noted that Ecuador acknowledged that certain domestic legal systems recognize a “should have known” standard, and submitted that this standard should apply in the present context.⁶² According to Burlington, Ecuador’s “willful blindness” is in breach of good faith.⁶³
51. Burlington argued that the standard to disqualify an ICSID arbitrator is very high, that the manifest lack of independence must be established by objective evidence, and that supposition or speculation cannot substitute for proof of facts.⁶⁴
52. Burlington further argued that Ecuador’s claims of bias on the basis of Professor Orrego Vicuña’s July 31 explanations were without merit, as he simply exercised his right to respond under the ICSID system.⁶⁵

⁵⁶Response, ¶ 37.

⁵⁷*Id.*, ¶ 42.

⁵⁸Burlington’s Rejoinder to Respondent’s Proposal to Disqualify Professor Francisco Orrego Vicuña (“**Rejoinder**”), ¶ 5.

⁵⁹*Id.*, ¶ 6.

⁶⁰*Id.*, ¶ 55.

⁶¹*Id.*, ¶ 7.

⁶²*Id.*, ¶¶ 7, 49 and 50.

⁶³*Ibid.*, ¶ 56.

⁶⁴Rejoinder, ¶¶ 16-17; *Opic Karimun Corporation v. Bolivarian Republic of Venezuela* (ICSID Case No.ARB/10/14) (“**OPIC**”), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (May 5, 2011) ¶ 45 (**Exh. CL-302**); *Participaciones Inversiones Portuarias SARL v. Gabonese Republic* (ICSID Case No.ARB/08/17), Decision on Proposal for Disqualification of an Arbitrator (November 12, 2009), ¶ 22 (**Exh. CL-310**); *S.G.S. Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No.ARB/01/13), Decision on Claimant’s Proposal to Disqualify Arbitrator (December 19, 2002) ¶ 26 (**Exh. CL-311**).

53. Burlington asserted that no challenge on the ground of repeat appointments had been successful.⁶⁶ It stated that repeat appointments give rise to concern only if they create a financial dependence. In the three relevant cases, repeat appointments by the same party, without more, did not constitute a valid ground for a challenge.⁶⁷ *A fortiori*, this should apply to cases where different parties appoint the same arbitrator, even if they are represented by the same law firm.⁶⁸
54. Additionally, Burlington argued that good faith requires parties to exercise at least minimal due diligence with respect to the relationship of arbitrators and opposing counsel. If there are facts that should have prompted a party to make further inquiry during an arbitral proceeding, the party may not later claim bias on the basis of those facts.⁶⁹ According to Burlington, this reasoning is especially relevant in this case because Professor Orrego Vicuña's appointments were public.⁷⁰ It also argued that Ecuador could easily have discovered the relevant appointments, for example by a "Google Alert", and thus Ecuador's challenge had not been brought in good faith.⁷¹
55. Finally, Burlington argued that upholding Ecuador's challenge on the basis of repeat appointment would have negative systemic effects for investment arbitration⁷² and that repeat appointments are "a necessary part of the practice for the foreseeable future".⁷³

D. PROFESSOR ORREGO VICUÑA'S EXPLANATIONS

56. On July 12, 2013, Professor Orrego Vicuña disclosed all of his Freshfields appointments, as requested by Ecuador.⁷⁴ Professor Orrego Vicuña also furnished explanations pursuant to ICSID Arbitration Rule 9(3) on July 31, 2013.⁷⁵
57. In his July 12 letter, Professor Orrego Vicuña acknowledged the duty to continuously disclose any circumstance that might raise doubts as to his independent judgment and stated that "none of the appointments made in any way interferes with the arbitrator's independence to judge impartially" in this case.
58. Professor Orrego Vicuña noted that all the information requested was posted on the ICSID website. Regarding *Repsol*, Professor Orrego Vicuña explained that he disclosed that appointment because a party in *Rusoro* requested a list of all his appointments, just as Dechert was doing now.

⁶⁵*Id.*, ¶ 21.

⁶⁶*Id.*, ¶ 33.

⁶⁷*Tidewater, supra* note 55; *OPIC supra* note 64; and *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/09), Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil (May 20, 2011) (**Exh. CL-301**).

⁶⁸Rejoinder, ¶ 36.

⁶⁹*Id.*, ¶ 49.

⁷⁰*Id.*, ¶ 50.

⁷¹*Id.*, ¶¶ 53 and 56.

⁷²*Id.*, ¶ 57.

⁷³*Id.*, ¶ 63.

⁷⁴See *supra* ¶ 6.

⁷⁵See *supra* ¶ 13.

59. Pursuant to Ecuador's request, Professor Orrego Vicuña disclosed having been appointed in seven other cases since 2007 where Freshfields acted or acts as counsel: *ENI Dación BV v. Venezuela* in 2007, *Itera International Energy LLC and Itera Group v. Georgia* in 2008, *EVN AG v. Macedonia* in 2009, *Pan American Energy v. Bolivia* in 2011, *Ampal-American Israel Corporation v. Egypt* in 2012, *Rusoro Mining Ltd v. Venezuela* in 2012, and *Repsol, S.A. and Repsol Butano, S.A. v. Argentina* in 2013. He noted that *ENI Dación* was settled in 2008 before the tribunal was constituted, and that *Itera* and *EVN* were discontinued in the early stages of the proceedings in 2010 and 2011 respectively. He also indicated that the remaining four cases were still in the early stages of the proceedings. Professor Orrego Vicuña noted that the appointments in *ENI*, *Itera*, *EVN* and *Burlington* were made more than three years ago.
60. With respect to fees earned in these arbitrations, Professor Orrego Vicuña did not disclose his remuneration in these cases and referred to any institutional policy which ICSID may have in respect of disclosure of fees.
61. In his July 31 explanations, Professor Orrego Vicuña stated as follows:

"I appreciate your invitation to comment on the proposal for disqualification that Dechert LL. P. has brought on behalf of the Government of Ecuador in respect of this arbitrator in *Burlington v. Ecuador*. I should state at the outset that I have had and continue to have the most harmonious and respectful relations with the government of Ecuador in many dispute settlement proceedings and other work in the field of international law and related subjects, and that at no point I have experienced the mistrust that Dechert now invokes as an over-dramatization of this challenge. The same hold true for counsel from Dechert.

These comments shall not deal with the applicable law as this aspect has already been discussed in detail by counsel for the parties. I shall restrict these comments to factual questions in respect of which I believe that counsel for Dechert is wrong.

The first such question is the alleged non-compliance with the continuing obligation to disclose potential conflicts of interest. I fully agree with this principle but, as held in many disqualification cases, the number of appointments does not per se create a conflict of interest and the circumstances of each case must be considered individually. In the circumstances of this case no such conflict of interest arises in my understanding as I have kept with my tradition of being fully independent from the parties, including financial aspects. It is thus an overstatement to argue, like Dechert does, that several appointments make highly probable that an arbitrator cannot be relied upon to exercise independent and impartial judgment.

All my professional activities are in any event in the public knowledge, not least fully reported in the ICSID webpage and on many occasions, like in Repsol, in the press. The editors for the *Global Arbitration Review* will no doubt be delighted to learn that it has become a source of information capable of triggering a challenge, but the fact of the matter is that the Repsol appointment has been reported in the press for many months, including the *Financial Times*, the *Wall Street Journal* and the press throughout Latin America.

Dechert further asserts that I would have continuously supported Freshfields position in the cases to which I have been appointed by the latter. One may

wonder on which information Dechert bases its conclusion in this respect, as not even I know that. In fact, the Eni case was settled before the tribunal was constituted and EVN was settled before proceedings started. The Itera case was settled during its early phase, and Pan American, Ampal, Rusoro and Repsol are also at the start-up period. That conclusion is rather based on speculation. The only case that has had a record of relevant time is Burlington.

Dechert also finds inconsistency in the fact that while no prior cases were reported at the time of the Burlington statement of independence made by this arbitrator in 2008, in other later cases complete listing of appointments were indicated. The reason appears to be simple. Before 2008 there were no cases, as the Eni case did not see a tribunal established in 2007 or at any time thereafter. In the following years the policy in respect of disclosing gradually changed, in part as a result of ICSID practice and in part because of the IBA Guidelines on conflicts of interest had become of common application. This is the very reason why all such information was later published in the ICSID webpage.

A second issue that needs to be commented on is why only ICSID cases have been disclosed by this arbitrator in recent correspondence. The reason is still more evident. There are no other appointments by Freshfields in any other forum at any other time. Dechert, like Holey Foag did in Rusoro, has come up with a new standard in respect of appointments of judges ad-hoc to the International Court of Justice, asserting that counsel for the appointing government in a given case before that Court have to be counted among the cases in respect of which disclosure is required under arbitration proceedings.

With respect, this new purported standard is utterly wrong. Judges ad-hoc are nominated by governments but confirmed by the Court and both under the Statute and Rules of the Court they have the same obligations of impartiality and independence as any other judge. Judges ad-hoc are indeed members of the Court like any other Judge. They do not represent the nominating government and have no links of dependency with that government, least of all with any counsel that governments decide to appoint. Moreover, the Court requests comments from the other party so as to ascertain whether there could be any objection to that appointment. This has been the procedure followed in the Peru-Chile maritime delimitation dispute before that Court, which Dechert brings up as a non-ICSID case that was not reported.

A third issue concerns Dechert's allegations in respect of the behavior of this arbitrator in the Burlington case, arguing that there is a blatant lack of impartiality to the detriment of Ecuador. Dechert indicates as examples of this behavior the fact that I partly dissented on the decision on jurisdiction and also partly dissented in the decision on liability. Those dissents are partial dissents and Dechert fails to note that in many other matters I concurred with the Tribunal. Neither is Dechert privy to the deliberations of the Tribunal where many other points of agreement are regularly reached.

More importantly, those dissents concern subjects on which I have long held publicly known views, in particular the interpretation of treaties, privity in international arbitration and questions concerning the umbrella clause. All of it has been addressed in scholarly publications that are well known and could hardly be regarded as views held in detriment of Ecuador. The very counsel for

Dechert have cited to some of these publications in the submissions before the Tribunal when convenient to their position.

Arbitrators are appointed by the parties not because they favor such party but because their previously held views are considered the right ones. It is then for the tribunal to decide on which party is right or wrong, taking into account both the law and the facts of the case. I have known of no party appointing an arbitrator that holds views contrary to that party's understanding of its rights. I can assume that this is also what Dechert does when requested by a client to propose the names of likely arbitrators for appointment.

Dechert also complains about this arbitrator's behavior in the hearing on liability and in a recent telephone conference on pre-hearing arrangements to the hearing that had been scheduled for August. For an arbitrator to ask questions at a hearing is a fundamental right that it is not to be suppressed as otherwise only questions of the like of one party could be asked either to the parties or to their witnesses. Both parties had the opportunity to answer such questions and no complaints were made in this respect. None of it could be attributed to an intention to cast Ecuador's position in an unfavorable light as argued by counsel for Dechert.

The telephone conference is not different. This arbitrator had the right to ask about the meaning of an unsigned *ex parte* letter he had received from Dechert. It was then explained that it was meant to be signed by counsel Eduardo Silva Romero and that the fact that it had not been signed was purely an administrative mistake, for which he apologized. Now it is argued that to ask such question is a reason for disqualification. Neither to ask about the implications of that letter for the programmed hearing is in any way a form of misbehavior, particularly when the implications asked about turned to be very real.

Lastly there are some ethical assertions that cannot be left unanswered. Dechert admonishes this arbitrator to resign on ethical grounds as if Dechert's views were proven correct. This is certainly not the case. Moreover, the real ethical question seems to lie with Dechert's submissions and the handling of confidential information. To the best of this arbitrator's knowledge the correspondence concerning disclosure and other matters in *Pan American v. Bolivia* is part of the confidential record of that case. Dechert is in the knowledge of such correspondence as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert, a use that in any event should be consented to by the other party to that case.

Thank you again for the invitation to comment."

62. In summary, Professor Orrego Vicuña rejected Ecuador's allegations of partiality in the course of the arbitration.

E. DECISION BY THE CHAIRMAN

I. Applicable Legal Standard

63. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:
- “A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.”*
64. Article 14(1) of the ICSID Convention provides:
- “Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators”.*
65. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment).⁷⁶ Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.⁷⁷
66. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control.⁷⁸ Independence and impartiality both “*protect parties against arbitrators being influenced by factors other than those related to the merits of the case*”.⁷⁹ Articles 57 and 14(1) of the ICSID

⁷⁶The French version refers to “*indépendance dans l’exercice de leurs fonctions*.”

⁷⁷*Suez*, *supra* note 21, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (October 22, 2007), ¶ 28 (**Exh. EL-202, CL-294**); *OPIC*, *supra* note 64, ¶ 44; *Getma International and others v. Republic of Guinea* (ICSID Case No. ARB/11/29), Decision on the Proposal for Disqualification of Arbitrator Bernardo M. Cremades (June 28, 2012), ¶ 59 (“*Getma*”) (**Exh. EL-220**); *ConocoPhillips Company et al. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (February 27, 2012), ¶ 54 (“*ConocoPhillips*”) (**Exh. EL-212**); *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, (March 19, 2010) ¶ 36 (“*Alpha*”) (**Exh. CL-296, EL-205**); *Tidewater supra* note 55, ¶ 37; *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant’s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention (February 27, 2013), ¶ 55 (“*Saint-Gobain*”) (**Exh. EL-201**).

⁷⁸*Suez*, *supra* note 21, ¶ 29; *Getma*, *supra* note 77, ¶ 59; *ConocoPhillips*, *supra* note 77, ¶ 54

⁷⁹*ConocoPhillips*, *supra* note 77, ¶ 55; *Universal supra* note 67 ¶ 70; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26), Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (August 12, 2010), ¶ 43 (“*Urbaser*”).

Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the appearance of dependence or bias.⁸⁰

67. The applicable legal standard is an “objective standard based on a reasonable evaluation of the evidence by a third party”.⁸¹ As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.⁸²
68. Regarding the meaning of the word “manifest” in Article 57 of the Convention, a number of decisions have concluded that it means “evident” or “obvious,”⁸³ and that it relates to the ease with which the alleged lack of the required qualities can be perceived.⁸⁴
69. The Chairman notes that the Parties in this case have relied in varying degrees on the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”).⁸⁵ The IBA Guidelines, which are not binding in an ICSID challenge, have been recognized as useful guidance in prior cases.⁸⁶ While it is true that these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

II. Analysis

70. Three grounds are invoked to disqualify Professor Orrego Vicuña:
- i. His repeat appointments as arbitrator by Freshfields;
 - ii. His non-disclosure of these appointments in this case; and
 - iii. His conduct in these proceedings, including his dissent from the Tribunal’s 2010 Decision on Jurisdiction and 2012 Decision on Liability; and his conduct during the pre-hearing telephone conference of July 11, 2013, in his July 12 response and July 31 explanations.
71. Arbitration Rule 9(1) reads as follows:

⁸⁰*Urbaser*, *supra* note 79, ¶ 43

⁸¹*Suez*, *supra* note 77, ¶¶ 39-40

⁸²*Idem*.

⁸³*Suez*, *supra* note 77, ¶ 34; *Alpha*, *supra* note 77, ¶ 37; *Universal*, *supra* note 67, ¶ 71.

⁸⁴C. Schreuer, *The ICSID Convention*, Second Edition (2009), p. 1202, ¶¶ 134-154; *Saint-Gobain*, *supra* note 77, ¶ 59.

⁸⁵Ecuador stated that “the IBA Guidelines do not apply in this case” (Proposal, note 17) and Burlington stated that “(t)he IBA Rules on Conflicts were primarily designed for commercial arbitrations where the pool of available experienced arbitrators and the pool of competent law firms is extremely broad. The same is not true for investment arbitrations, where the pool of arbitrators and law firms with real experience is very small” (Response, ¶ 29).

⁸⁶*Alpha*, *supra* note 77, ¶ 56; *Urbaser* *supra* note 79, ¶ 37.

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

72. As stated in *Suez*, “an orderly and fair arbitration proceeding while permitting challenges to arbitrators on specified grounds also normally requires that such challenges be made in a timely fashion.”⁸⁷
73. As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case by case basis. In *Urbaser*, the tribunal decided that filing a challenge within 10 days of learning of the underlying facts fulfilled the *promptness* requirement.⁸⁸ In *Suez*, the tribunal held that 53 days was too long.⁸⁹ In *Azurix*, the tribunal found that 8 months was too long.⁹⁰ In *CDC*, a filing after 147 days was deemed untimely⁹¹ and in *Cemex*, 6 months was considered too long.⁹²
74. In this case the Respondent acknowledges that it knew of four of the eight appointments of Professor Orrego Vicuña since June 2011 [*EVN, Itera, Burlington and Pan American*]. In addition, the appointment of Professor Orrego Vicuña by Freshfields became public in October 2012 in the *Ampal* case, in January 2013 in the *Rusoro* case, and in February 2013 in the *Repsol* case. There is no doubt that all relevant information concerning the *Repsol, Ampal* and *Rusoro* cases was publicly available on the ICSID website before, or by, March 7, 2013.
75. Taking all of these facts into consideration, the Chairman finds that the Respondent had sufficient information to file its Proposal for Disqualification of Professor Orrego Vicuña on the basis of repeat appointments and non-disclosure of such appointments well before it did so on July 24, 2013. Similarly, the Respondent knew about Professor Orrego Vicuña’s conduct at the 2011 hearing on liability and his dissents attached to the 2010 Decision on Jurisdiction and 2012 Decision on Liability, and these were not raised promptly. As a result, the Proposal is dismissed to the extent that it relies on these grounds of challenge.
76. The challenge based on Professor Orrego Vicuña’s conduct following the July 8 letter was raised in a timely manner. The Chairman addresses below the merits of these grounds for challenge.

⁸⁷*Suez*, *supra* note 77, ¶ 18.

⁸⁸*Urbaser supra* note 79 ¶ 19.

⁸⁹*Suez*, *supra* note 77, ¶ 26.

⁹⁰*Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Challenge to the President of the Tribunal (February 25, 2005) (unpublished) (reported in the Decision on Annulment, 1 September 2009, ¶¶ 35 and 269).

⁹¹*CDC Group PLC v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment (June 29, 2005) ¶ 53.

⁹²*CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on proposal for Disqualification of an Arbitrator (November 6, 2009) ¶ 41 (**Exh. CL-295**).

77. As to Professor Orrego Vicuña's conduct during the July 11, 2013 teleconference, the Chairman notes the right of arbitrators to ask questions and satisfy themselves of the legal merits of the arguments put forward by the parties. The record in this case does not provide objective evidence of bias in this regard.
78. Professor Orrego Vicuña's written comments in **his July 31 explanations** are fully set out in paragraph 61 of this decision. To the extent that these comments address circumstances related to the proposal for disqualification they are relevant and appropriate, and do not provide a basis for challenge.
79. However, in this instance, the challenged arbitrator concluded his explanations with allegations about the ethics of counsel for the Republic of Ecuador. He stated:
- “[I]astly there are some ethical assertions that cannot be left unanswered. Dechert admonishes this arbitrator to resign on ethical grounds as if Dechert's views were proven correct. This is certainly not the case. Moreover, the real ethical question seems to lie with Dechert's submissions and the handling of confidential information. To the best of this arbitrator's knowledge the correspondence concerning disclosure and other matters in *Pan American v. Bolivia* is part of the confidential record of that case. Dechert is in the knowledge of such correspondence as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert, a use that in any event should be consented to by the other party to that case.”
- Such comments do not serve any purpose in addressing the proposal for disqualification or explaining circumstances relevant to the allegations that the arbitrator manifestly lacks independence or impartiality.
80. In the Chairman's view, a third party undertaking a reasonable evaluation of the July 31, 2013 explanations would conclude that the paragraph quoted above manifestly evidences an appearance of lack of impartiality with respect to the Republic of Ecuador and its counsel. Therefore, on the facts of this case, the Chairman upholds the challenge.

F. DECISION

81. Having considered all of the facts alleged and the arguments submitted by the Parties, and for the above reasons, the Chairman decides that the Republic of Ecuador's proposal to disqualify Professor Francisco Orrego Vicuña is upheld.

[signed]

Chairman of the ICSID Administrative Council
Dr. Jim Yong Kim