



**PCA Case No. AA861**

**IN THE MATTER OF AN ARBITRATION UNDER  
THE ENERGY CHARTER TREATY**

**-and-**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW 1976**

**-between-**

**RSE HOLDINGS AG**

**The Claimant**

**- and -**

**REPUBLIC OF LATVIA**

**The Respondent**

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**DECISION ON THE CHALLENGE TO MS. AMY FREY**

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24 June 2022

## I. PROCEDURAL HISTORY

1. By Notice of Arbitration dated 22 December 2021, RSE Holdings AG (the “**Claimant**”) commenced arbitration proceedings pursuant to Article 26 of the Energy Charter Treaty (the “**ECT**”) and the UNCITRAL Arbitration Rules 1976 (the “**UNCITRAL Rules**”) against the Republic of Latvia (the “**Respondent**”, and together with the Claimant, the “**Parties**”). In its Notice of Arbitration, the Claimant proposed, *inter alia*, to designate the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) as appointing authority under Article 7(2) of the UNCITRAL Rules in this arbitration.
2. By letter dated 1 February 2022, the Respondent rejected the Claimant’s proposals to apply the 2010 version of the UNCITRAL Rules and to designate the Secretary-General of the PCA as appointing authority in this arbitration.
3. By letter dated 24 February 2022, the Claimant appointed Ms. Amy Frey as arbitrator.
4. On 11 March 2022, the Respondent filed a Notice of Challenge to Ms. Frey (the “**Challenge**”) pursuant to Article 11 of the UNCITRAL Rules by reason of lack of impartiality, requesting that Ms. Frey (i) submit a written disclosure in accordance with Article 9 of the UNCITRAL Rules; and (ii) step down as arbitrator.
5. By letter dated 17 March 2022, Ms. Frey responded to the Respondent’s Challenge and declined to withdraw as arbitrator. Ms. Frey also attached a list of the ECT arbitration cases in which she acts or acted as counsel and which involve a State’s modifications of its renewable energy incentives programs.
6. By letter dated 28 March 2022, the Respondent appointed Ms. Sabina Sacco as arbitrator. In addition, in light of the Ms. Frey’s letter, the Respondent indicated that it would supplement its Challenge in the coming days.
7. By letter dated 8 April 2022, the Respondent submitted a supplement to its Challenge (the “**Supplement**”).
8. By e-mail dated 14 April 2022, the Claimant advised the Respondent that it did not agree to the Challenge.
9. On 19 April 2022, following an exchange of further correspondence, the Parties agreed that the Secretary-General of the PCA act as appointing authority in accordance with the UNCITRAL Rules.
10. On 26 April 2022, the Respondent requested that the Secretary-General of the PCA decide the Challenge pursuant to Article 12 of the UNCITRAL Rules.
11. On 10 May 2022, the Claimant submitted its comments on the Challenge (the “**Response**”). In its Response, the Claimant requested that the Secretary-General of the PCA (i) reject the Supplement as untimely, alternatively (ii) dismiss the Supplement, and in any event, (iii) dismiss the Challenge, and (iv) order the Respondent to reimburse the Claimant for the fees and expenses of counsel in these challenge proceedings.<sup>1</sup>

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<sup>1</sup> Response, ¶ 78.

12. On 18 May 2022, Ms. Frey submitted her comments with respect to the Parties' submissions (the "**Ms. Frey's Comments**").
13. On 25 May 2022, the Respondent submitted its further comments on the Challenge (the "**Reply**").
14. On 1 June 2022, the Claimant submitted its further comments on the Challenge (the "**Rejoinder**").

## II. THE RESPONDENT'S CHALLENGE TO MS. AMY FREY

### A. Respondent's Position

15. The Respondent argues that Ms. Frey's counsel work for investors in ongoing ECT arbitrations dealing with legal issues similar to those at stake in this arbitration raise justifiable doubts as to Ms. Frey's ability to approach these issues with an open mind as arbitrator.<sup>2</sup>

#### 1. *Timeliness of the Supplement*

16. The Respondent asserts that its Supplement is timely and admissible.<sup>3</sup> The Respondent notes that its Supplement does not set forth any additional grounds for challenging Ms. Frey; rather, it merely expands on the existing grounds as expressly reserved in its Challenge.<sup>4</sup> In this respect, the Respondent asserts that Article 11 of the UNCITRAL Rules provides no specific deadlines to file such a supplement.<sup>5</sup> The Respondent adds that it was free to supplement its Challenge because it was "not yet subject to the decision of any appointing authority".<sup>6</sup> In any event, the Respondent argues that the Claimant lost its right to challenge the timeliness of the Supplement because it failed to do so in its e-mail correspondence of 14 April 2022.<sup>7</sup>

#### 2. *Grounds for the Challenge*

17. In the Respondent's view, an objective observer would consider that justifiable doubts exist as to Ms. Frey's impartiality within the meaning of Article 10 of the UNCITRAL Rules, given her practice as counsel in past and pending ECT arbitrations.<sup>8</sup> Specifically, the Respondent submits that Ms. Frey's counsel work for investors in 13 pending ECT arbitrations overlaps with issues of fact and law on which she is called to deliberate in the present case, namely the effects of the State's alleged modification of its energy regulatory framework.<sup>9</sup> Considering that Ms. Frey has taken a "partisan position" on these issues in other arbitrations, the Respondent contends that an objective observer would find that there exists a risk of bias and predisposition towards one of the Parties to this arbitration.<sup>10</sup>
18. According to the Respondent, for the purposes of establishing the existence of an issue conflict, it is irrelevant whether Ms. Frey perceives herself to be unbiased or whether she publicly expressed her views on any relevant legal issues which may arise in the present case.<sup>11</sup> Nor is it

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<sup>2</sup> Notice of Challenge, p. 6.

<sup>3</sup> Reply, p. 2.

<sup>4</sup> Reply, p. 2.

<sup>5</sup> Reply, p. 2.

<sup>6</sup> Reply, p. 2.

<sup>7</sup> Reply, p. 2.

<sup>8</sup> Notice of Challenge, pp. 3-4.

<sup>9</sup> Supplement, pp. 10-12; Reply, p. 3.

<sup>10</sup> Supplement, p. 12; Reply, p. 8.

<sup>11</sup> Notice of Challenge, pp. 3-4; Reply, pp. 3, 5.

required to establish any actual bias or impartiality.<sup>12</sup> Instead, the Respondent emphasizes that it only needs to show “an appearance of pre-judgment of an issue likely to be relevant to the dispute”.<sup>13</sup> As such, the Respondent takes the view that a “hypothetical future conflict” between Ms. Frey’s position as counsel and arbitrator is sufficient for its Challenge to be successful.<sup>14</sup>

19. As to the Claimant’s contention that no overlap of issues exists because Ms. Frey’s pending ECT arbitrations concern different parties, different sub-sectors of renewable energy, as well as different measures, the Respondent does not consider these criteria as prerequisites for the Challenge to be successful, arguing that the majority of challenges that were upheld based on issue conflict and double-hatting concerned unrelated arbitrations.<sup>15</sup> For the Respondent, despite the factual differences between the cases, what matters is the “similarity of issues likely to be discussed”.<sup>16</sup> In this respect, the Respondent underscores that the key issues in this arbitration, just like in Ms. Frey’s pending ECT arbitrations, will concern the application and interpretation of the fair and equitable treatment standard and the impairment standard under the ECT in the context of the State’s right to establish its energy regulatory framework.<sup>17</sup>
20. The Respondent argues that the risk of an arbitrator’s prejudgment due to the arbitrator’s concurrent work as counsel on similar legal matters is covered under the Orange List of the IBA Guidelines on Conflict of Interest in International Arbitrations (the “**IBA Guidelines**”),<sup>18</sup> and has been repeatedly recognized in practice,<sup>19</sup> and in background papers.<sup>20</sup> Therefore, these developments, the Respondent asserts, demonstrate that an arbitrator enjoys no presumption that her impartiality cannot be impaired by double-hatting.<sup>21</sup>
21. In the Respondent’s view, Ms. Frey “will not take a position at variance with the interests of her client base” constituted by energy investors because any different position as arbitrator would undermine her credibility as counsel.<sup>22</sup> Accordingly, the Respondent concludes that a reasonable

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<sup>12</sup> Notice of Challenge, pp. 3-4; Supplement, p. 2.

<sup>13</sup> Reply, p. 8, citing *CC/Devas (Mauritius) Ltd. v. India*, PCA Case No. 2013/09, Decision on the Respondent’s Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña, 30 September 2013, ¶ 18.

<sup>14</sup> Reply, p. 9.

<sup>15</sup> Reply, p. 7.

<sup>16</sup> Reply, pp. 7-8, citing *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶¶ 68-69 (**RL-5**).

<sup>17</sup> Notice of Challenge, p. 6; Supplement, p. 12.

<sup>18</sup> Notice of Challenge, p. 2; Supplement, p. 2; Reply, p. 2.

<sup>19</sup> Notice of Challenge, pp. 5-6, referring to *Republic of Ghana v. Telekom Malaysia Berhard*, Decision of the Court of The Hague (Civil Law Section), 18 October 2004, p. 6 (**RL-6**); Supplement, pp. 2-4, referring to *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment, 11 June 2020, ¶ 213 (**RL-13**); *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Claimant’s Proposal to Disqualify Mr. Bottini from the Tribunal under Article 57 of the ICSID Convention (English), 27 February 2013, ¶ 84 (**RL-18**); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal, 12 November 2013, ¶ 59 (**RL-5**).

<sup>20</sup> Reply, p. 6, referring to ICSID, Code of Conduct – Background Papers: Double-Hatting, 25 February 2021, ¶ 24 *et seq.*, (**CLA-12**); ICSID & UNCITRAL, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Version 3 (September 2021) (**RL-31**).

<sup>21</sup> Reply, p. 6.

<sup>22</sup> Notice of Challenge, p. 7; Supplement, p. 13.

observer would have justifiable doubts as to Ms. Frey's ability to approach these issues with an open mind as arbitrator and separate herself from the legal positions advanced as counsel.<sup>23</sup>

22. Finally, the Respondent submits that Ms. Frey's lack of impartiality is further evidenced in her failure to disclose the circumstances relating to her involvement in the ECT arbitrations as counsel.<sup>24</sup> According to the Respondent, Ms. Frey should have disclosed the circumstances within the meaning of Article 9 of the UNCITRAL Rules and/or Orange List of the IBA Guidelines that are objectively likely to cause doubts as to her impartiality even if she did not deem herself to be biased.<sup>25</sup> Further, the Respondent posits that Ms. Frey failed to carry out the required due diligence by admitting that she has not been informed of the issues in dispute in the present case.<sup>26</sup>

## **B. Claimant's Position**

23. The Claimant rejects the Challenge as baseless, which in its view, rests on a "general abstract assumption" that Ms. Frey's impartiality is likely to be tainted because of her interest in representing investors in arbitrations conducted under the ECT.<sup>27</sup>

### *1. Timeliness of the Supplement*

24. According to the Claimant, the Supplement is untimely and thus inadmissible because it was filed (i) more than six weeks after the appointment of Ms. Frey had been notified to the Respondent; and (ii) more than fifteen days after Ms. Frey provided her comments in her letter of 17 March 2022.<sup>28</sup> The Claimant argues that the "strict" 15-day time deadline imposed in Article 11(2) of the UNCITRAL Rules apply to all submissions challenging an arbitrator based on particular facts or circumstances after they became known to the challenging party irrespective of the nature of the underlying grounds for challenge.<sup>29</sup> Therefore, in the present case, the Claimant takes the view that the Supplement should have been filed by 1 April at the latest.<sup>30</sup> The Claimant adds that nothing in the UNCITRAL Rules precludes it from objecting to the timeliness of the Supplement.<sup>31</sup>

### *2. Grounds for the Challenge*

25. In maintaining that the Challenge is without foundation, the Claimant submits that none of the circumstances alleged by the Respondent give rise to justifiable doubts as to Ms. Frey's impartiality as an arbitrator.<sup>32</sup>
26. First, relying on *CC/Devas v. India*, the Claimant denies that Ms. Frey is subject to any issue conflict, given that Ms. Frey has never expressed her views on any issue in dispute between the Parties as an arbitrator, a scholar, or in any other capacity.<sup>33</sup> Contrary to the Respondent's

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<sup>23</sup> Supplement, p. 12.

<sup>24</sup> Notice of Challenge, pp. 7-8; Supplement, pp. 13-14.

<sup>25</sup> Notice of Challenge, pp. 2, 7; Supplement, p. 14.

<sup>26</sup> Supplement, p. 14.

<sup>27</sup> Response, ¶ 12.

<sup>28</sup> Response, ¶¶ 5-6; Rejoinder, ¶¶ 7, 10.

<sup>29</sup> Rejoinder, ¶ 10.

<sup>30</sup> Response, ¶ 6.

<sup>31</sup> Rejoinder, ¶ 11.

<sup>32</sup> Response, ¶ 13; Rejoinder, ¶ 16.

<sup>33</sup> Response, ¶¶ 28-38, referring to *CC/Devas (Mauritius) Ltd et al. v. Republic of India* (PCA Case No. 2013/09), Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña, 30 September 2013, ¶ 64 (**RL-8**); Rejoinder ¶¶ 42-43.

assertion that an appearance of conflict is sufficient for its Challenge to succeed, the Claimant argues that Ms. Frey must be “proven, on the evidence presented by the [Respondent], to be unable to change [her] views” on certain legal and factual issues.<sup>34</sup> However, the Claimant contends that the Respondent failed to specify the issues on which Ms. Frey is alleged to have adopted “partisan positions” and how they might affect her decision-making in this arbitration.<sup>35</sup> In any event, the Claimant posits that Ms. Frey has had no prior exposure to any facts pertaining to the Claimant’s investment or the regulations of the Latvian energy market.<sup>36</sup>

27. For the Claimant, certain interpretations of legal standards that Ms. Frey advanced as counsel cannot be equated with her own views.<sup>37</sup> Instead, it takes the view that Ms. Frey’s prior experience and knowledge in the European energy market makes her a particularly suitable arbitrator for this arbitration.<sup>38</sup>
28. Second, the Claimant argues that Ms. Frey’s simultaneous roles as arbitrator and counsel in unrelated arbitrations are not prohibited under the UNCITRAL Rules.<sup>39</sup> Noting that double-hatting is indeed prevalent in investor-State cases, the Claimant underlines the presumption enjoyed by an arbitrator that her impartiality would not be impaired in any way by double-hatting.<sup>40</sup> The Claimant posits that the Respondent, however, failed to establish the specific circumstances that give rise to Ms. Frey’s lack of impartiality, including a situation that falls under the Orange List of the IBA Guidelines, and has, therefore, failed to rebut this presumption.<sup>41</sup>
29. According to the Claimant, arbitrators have been disqualified for double-hatting only in rare cases, which are not relevant for or similar to the present situation: none of the ongoing ECT arbitrations in which Ms. Frey acts as counsel involve the same or related Parties;<sup>42</sup> Ms. Frey is not called upon to decide on legal questions in the present case that are both controversial and critical to the success of a party in a pending arbitration;<sup>43</sup> and there is no suggestion that either Party would rely on a decision that she is simultaneously challenging as counsel.<sup>44</sup>
30. As to the alleged similarity of measures, the Claimant reiterates that no specifics have been given beyond the general references to the “State’s right to establish its energy regulatory framework”.<sup>45</sup> In any event, the Claimant explains that the investors represented by Ms. Frey are involved in a different subsector of the energy industry as the Claimant and that the Latvian regulatory framework, which created certain legitimate expectations to the Claimant, is fundamentally different from those that are at issue in cases in which Ms. Frey acts as counsel.<sup>46</sup>
31. Finally, the Claimant disputes that there has been any failure to disclose by Ms. Frey.<sup>47</sup> In this respect, the Claimant refers to Ms. Frey’s confirmation that she is not subject to any conflict of interest, has no pre-existing relationship with the Parties, and has not formed any views on the

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<sup>34</sup> Rejoinder, ¶¶ 36-37.

<sup>35</sup> Rejoinder, ¶ 43.

<sup>36</sup> Response, ¶¶ 34, 70

<sup>37</sup> Response, ¶ 39; Rejoinder, ¶ 42.

<sup>38</sup> Response, ¶¶ 40-42; Rejoinder ¶¶ 44-45, 65-66, 69.

<sup>39</sup> Response, ¶¶ 13, 45; Rejoinder ¶¶ 48-51.

<sup>40</sup> Response, ¶ 47; Rejoinder ¶¶ 52, 55.

<sup>41</sup> Response, ¶¶ 17-21, 47; Rejoinder ¶¶ 22-27.

<sup>42</sup> Response, ¶¶ 50, 55, 62, 72; Rejoinder, ¶¶ 58-59.

<sup>43</sup> Response, ¶ 57; Rejoinder, ¶¶ 60-61.

<sup>44</sup> Response, ¶¶ 51-54, 63-66; Rejoinder, ¶¶ 56, 59.

<sup>45</sup> Response, ¶¶ 67-68; Rejoinder, ¶¶ 63-64.

<sup>46</sup> Response, ¶¶ 73-74; Rejoinder, ¶¶ 20, 65.

<sup>47</sup> Response, ¶¶ 15-16.

present case.<sup>48</sup> The Claimant also highlights that Ms. Frey voluntarily provided and later updated a list of the ECT arbitrations in which she is or was involved as counsel and which involve a State's modifications of its renewable energy incentives programs.<sup>49</sup>

32. In light of the above, the Claimant argues that the Respondent's Challenge is based on "hypothetical future conflicts arising from the hypothetical interests of hypothetical clients".<sup>50</sup> Accordingly, the Claimant submits that the Respondent has failed to advance any evidence of Ms. Frey's prejudice or predisposition towards any of the Parties nor that Ms. Frey would be unable to approach an issue that is relevant to the dispute with an open mind.<sup>51</sup>

### C. Ms. Frey's Comments

33. Ms. Frey states that, in her view, there are no circumstances that would give rise to justifiable doubts as to her impartiality or independence.<sup>52</sup> She writes in her letter of 17 March 2022 that:

I act as counsel for investors in several arbitration disputes arising under the Energy Charter Treaty. This work is disclosed in my publicly available biography on my firm's website, as Respondent also noted, and it is among the first items that will result from a broader web search of my name. None of these cases involve the Parties to this arbitration or concern the type of investment that I understand to be at issue in this dispute. Unlike some of the situations leading to the disqualification of an arbitrator on which the Respondent relies, I have no personal or professional connection with either Party to this dispute, and no issue listed on the IBA Red or Orange lists applies. Thus, no justifiable doubt as to my impartiality or independence exists, and no disclosure was required or warranted.

The fact that I act as counsel in cases unrelated to the Parties to this dispute does not give rise to justifiable doubts as to my impartiality or independence. As counsel, I am retained to advance legal arguments on behalf of a client. Those legal arguments do not necessarily reflect my personal views on any particular issue of law [...].

I have never advanced my personal views on any of the ECT's provisions. I do not consider my views (to the extent that I were to have any) fully formed, much less incapable of reconsideration. This also means that no issue listed on the IBA Green list applies. For avoidance of doubt, I have not yet formed any views with respect to the present proceeding, which I expect to turn not only on my understanding of the relevant legal provisions as informed and advocated by both Parties, but also on the specific facts of the dispute, of which I am completely unaware [...].

I do not already hold views concerning the issues that will arise in this dispute, and my counsel work is not limited to a "client constituency of energy investors." Throughout my career, I have advised a wide-ranging sector of private investors, as well as government entities. While the majority of my current clients have made investments in the renewable energy sector, their various interests wildly diverge even among each other, and – to my knowledge – they have no interests in any issue that could have arisen between RSE Holdings, which apparently invested in combined heat and power operations, and Latvia [...].

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<sup>48</sup> Response, ¶ 14; Rejoinder ¶ 20.

<sup>49</sup> Response, ¶ 15; Rejoinder ¶ 21.

<sup>50</sup> Response, ¶ 75.

<sup>51</sup> Response, ¶¶ 26, 75-77.

<sup>52</sup> Letter from Ms. Frey dated 17 March 2022, p. 1; Ms. Frey's Comments, p. 2.

I come to the dispute with no preconceived notions regarding Claimant's claims or Respondent's defences.<sup>53</sup>

34. With reference to the Respondent's assertion that the measures at issue are similar to those in cases where she acts as counsel, Ms. Frey notes that:

Notwithstanding the fact that the positions I have advocated as counsel do not reflect my personal views, I do not believe that my exposure to energy regulations in other ECT cases predisposes me to take a view one way or another with respect to issues that may arise in the present arbitration. This is because (in addition to the points mentioned in my March 17 letter), the ECT arbitrations in which I act as counsel concern the regulations of Spain, Italy, Romania, and Bulgaria, respectively, in the solar, wind, and hydroelectric sectors. I understand that different regulations in each of these countries apply to cogeneration and CHP investments, and thus the energy regulations with which I am familiar as a result of my casework are not the same as those that would apply to the sector at issue in this case (even assuming that cogeneration/CHP regulations could be said to be substantially similar across different countries, which seems unlikely). Thus, even if I had formed a personal view on, for example, Spanish solar regulations, that view would have no impact whatsoever on my ability to independently and impartially assess the relevant Latvian regulations at issue in this case.<sup>54</sup>

35. Lastly, Ms. Frey rejects the Respondent's allegation that she has failed to carry out the required due diligence to assess whether any issue conflict exists, given that "neither of the Parties' arbitrators is currently in a position to know or lean of all issues that will be in dispute in this arbitration – Respondent itself naturally has not yet even presented its case [...]".<sup>55</sup>

### III. ANALYSIS

36. The Parties agree that the legal standard applicable to the Challenge is set forth in Article 10(1) of the UNCITRAL Rules, according to which an arbitrator may be challenged if "justifiable doubts" exist as to the arbitrator's impartiality or independence. However, beyond disagreeing on the application of this standard to the present Challenge, the Parties disagree on whether the Supplement is timely. I turn first to this issue. However, as a preliminary matter, I note that I have considered all of the submissions of the Parties and the comments of Ms. Frey, even if I address below only those issues that I consider necessary to reach my decision.

#### 1. *Timeliness of the Supplement*

37. Article 11(1) of the UNCITRAL Rules requires that:

A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in Articles 9 and 10 became known to that party.

38. The Claimant asserts that the Supplement should have been filed by 1 April 2022, within 15 days of Ms. Frey's letter of 17 March 2022. The Respondent, however, contends that it was free to supplement its Challenge until the same was subject to a decision of the appointing authority, so long as it did not set forth any additional grounds for challenging Ms. Frey.

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<sup>53</sup> Letter from Ms. Frey dated 17 March 2022, pp. 1-3. See also Ms. Frey's Comments, pp. 1-2.

<sup>54</sup> Ms. Frey's Comments, p. 2.

<sup>55</sup> Ms. Frey's Comments, p. 2.



39. It is undisputed that the Notice of Challenge was submitted in accordance with the 15-day time limit. It is also undisputed that the Supplement does not set forth any additional grounds for the Challenge.
40. The UNCITRAL Rules do not specify a particular time limit for a party to supplement a challenge to an arbitrator after notice of its challenge is sent in accordance with the 15-day time limit in Article 11(1). Rather, the UNCITRAL Rules leave the procedure to be followed to decide on a challenge to the discretion of the appointing authority, who may often invite further comments from the challenging party in response to the arbitrator's or the other party's comments, in particular where these disclose relevant new information regarding the circumstances forming the basis for the challenge. As long as such comments do not raise wholly independent grounds for challenge separate from the circumstances invoked previously, Article 11(1) does not create a time bar to a party elaborating on the circumstances underlying a pending challenge. Accordingly, I find no reason to exclude consideration of the Supplement in deciding on the Challenge, much less when the exchange in question occurred prior to my being seised of the Challenge and where the Claimant has enjoyed a full opportunity to respond to the Supplement.

## 2. *Analysis of the Challenge*

41. It is common ground that the "justifiable doubts" standard is an objective one. This means that, while the perspective of the challenging party is part of the context of the challenge, it is not decisive. Rather, the doubts as to the arbitrator's impartiality or independence must be justifiable pursuant to an analysis of all relevant circumstances from the perspective of an objective, reasonable, and informed third party.<sup>56</sup> Further, a challenge may succeed on the basis of an appearance of bias rather than a demonstration of actual bias.<sup>57</sup>
42. The Respondent challenges Ms. Frey's impartiality and independence essentially based on her work as counsel in a number of past and 13 pending ECT arbitrations. In support thereof, the Respondent cites to Ms. Frey's biography on the King & Spalding website, which states that she "primarily represents clients with claims against foreign states arising from bilateral investment treaties and the [ECT]".<sup>58</sup> In the Respondent's view, there is an inherent conflict of interest in the duality of Ms. Frey's professional roles as arbitrator and counsel to investors when the subject matter of the disputes is the same or similar.
43. On the other hand, the Claimant asserts that Ms. Frey's practice as both counsel and arbitrator does not give rise to any doubts about her independence and impartiality because no issue conflict exists. According to the Claimant, the Respondent has failed to establish the specific circumstances that give rise to Ms. Frey's lack of impartiality.
44. The inference underlying the Respondent's Challenge is that Ms. Frey's assessment of the merits of the present case will be affected by her counsel work in other ECT arbitrations. It is common ground that the ECT cases in which Ms. Frey acted or acts as counsel do not involve the same Parties and do not specifically concern the impact of the modifications to the Latvian regulations on cogeneration power plants, which forms the principal subject matter of the present dispute.

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<sup>56</sup> *Vito G. Gallo v. The Government of Canada*, UNCITRAL, PCA Case No. 2008-03, Decision on the Challenge to Mr. J. Christopher Thomas, QC, 14 October 2009, ¶ 19 (RL-4).

<sup>57</sup> *Country X v. Company Q*, Challenge Decision, UNCITRAL, 11 January 1995 (1997) 22 YCA 234, ¶¶ 23-24 (RL-3).

<sup>58</sup> King & Spalding Website, People, Amy Frey, <http://www.kslaw.com/people/amy-frey> (last accessed 10 March 2022) (R-1).

45. At the same time, the interpretation and application of the same treaty—the ECT—is at issue in this case as in the other arbitrations in which Ms. Frey acts or has acted as counsel. Ms. Frey’s biography on the King & Spalding website also indicates that she “primarily” represents investors with claims against foreign states arising from the ECT. This includes eight arbitrations that have now concluded and, more importantly, 13 ECT arbitrations that remain pending. This is a significant number of cases all arising under a single multilateral treaty.
46. In this particular context, the sheer number of cases generates a serious risk that overlapping questions of interpretation and application of the ECT will arise in this case as in those other arbitrations under the same treaty, notwithstanding the difference in factual matrix as between the cases. This would, in turn, seed justifiable doubts in the mind of a reasonable and informed third person as to whether Ms. Frey’s consideration of the present case will be influenced by her duty to defend the interests of her investor claimant clients in disputes arising under the ECT.
47. In my view, such doubts cannot be resolved by Ms. Frey’s simple assertion that she has no preconceived notions regarding the Claimant’s claims. Without fulsome disclosure and consideration of detailed information regarding all of her other ECT arbitrations, it cannot be said with any certainty that Ms. Frey will not be called upon to decide issues in the present case that are material to the claims in another pending arbitration in which she is involved.
48. I wish to emphasise that I have found no reason to impugn Ms. Frey’s professional integrity or to doubt her intention to act with independence or impartiality. Nevertheless, I consider that, from the perspective of an objective, reasonable, and informed third party, Ms. Frey’s role as counsel in other arbitrations under the ECT gives rise to justifiable doubts as to her impartiality and independence in the present arbitration under Article 10(1) of the UNCITRAL Rules.
49. As to the Claimant’s request for costs incurred in these challenge proceedings, I note that the power to fix and apportion costs, including the fees and expenses of the appointing authority and other costs associated with a challenge, is reserved to the arbitral tribunal in accordance with Articles 38 and 40 of the UNCITRAL Rules. Claims for costs thus fall beyond my competence as appointing authority.

#### IV. DECISION

**NOW THEREFORE**, I, Marcin Czepelak, Secretary-General of the PCA, having established to my satisfaction my competence to decide this challenge in accordance with the UNCITRAL Rules, and having considered the submissions of the Parties and the comments of Ms. Frey;

**HEREBY ACCEPT** the Challenge brought by the Respondent against Ms. Frey.

Done in The Hague on 24 June 2022,



Marcin Czepelak  
Secretary-General  
Permanent Court of Arbitration