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January 25, 2012

Mr. Brooks W. Daly
Acting Secretary-General
Permanent Court of Arbitration
c/o Mr. Martin Doe
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
Email: mdoe@pca-cpa.org

VIA EMAIL

Re: PCA Case No. AA434
Murphy Exploration & Production Company – International v. Republic of Ecuador

Dear Mr. Daly:

Pursuant to the schedule set by the Permanent Court of Arbitration ("PCA") on December 22, 2011, Claimant Murphy Exploration & Production Company – International ("Murphy") hereby submits further comments in support of its challenge to the arbitrator appointed by Respondent the Republic of Ecuador ("Ecuador"), Professor Brigitte Stern.

I. Summary

Ecuador's appointment of Professor Stern raises an unprecedented and intolerable situation in the world of investment arbitration. Ecuador proposes to appoint as an "independent and impartial" arbitrator a person who has already decided in Ecuador's favor (and against Murphy's position) on critical and potentially-dispositive issues in a closely-related arbitration involving the same contract terms, the same treaty, the same investment structure, the same law, the same measures, and virtually the same legal claims and defenses. Incredibly, Ecuador makes this appointment (and rejects Murphy's challenge) even after having successfully petitioned the PCA to remove another arbitrator in a related case involving the same contract terms, law, measures, claims, and defenses, on far more tenuous grounds of "prejudgment" than are present here. This claim involves a law ("Law 42") that Ecuador alleges to be a tax, and a treaty that contains an exception providing for only narrow protection against tax measures. In the prior

case (*Burlington v. Ecuador*),[1] Professor Stern ruled that (1) Law 42 is a tax, (2) the tax-measures exception of the treaty applies, (3) Burlington (and therefore, Murphy) cannot invoke the "investment agreement" exception to the tax-measures provision because Burlington's contract (and therefore, Murphy's) is not an "investment agreement" under the treaty, (4) Burlington (and therefore Murphy) cannot rely on the "umbrella clause" in the treaty to invoke a clause in the contract obliging Ecuador to compensate for the effects of Law 42 because Burlington (and therefore, Murphy) is not a signatory to the contract, and (5) Burlington's (and therefore, Murphy's) claim fails unless it can establish that Law 42 is an expropriation. No arbitral system in the world allows an arbitrator to sit again after she has already acted as an arbitrator of the same dispute, which is in substance the situation here. Professor Stern argues that the import of Murphy's challenge is that only an arbitrator who will change her mind is an unbiased one. To the contrary, Murphy does not and would not expect Professor Stern to change her mind. It is precisely because she has already decided the dispute, and Murphy has no reasonable expectation (nor should it) that she will decide it differently the second time around—thus easily satisfying the standard of "justifiable doubts" as to her ability to decide Murphy's claim independently and impartially—that the PCA must disqualify her.

II. Procedural Background

After Ecuador's appointment of Professor Stern, Murphy sent its notice of challenge within the 15-day period provided for in Article 11 of the UNCITRAL Arbitration Rules.[2] In its December 16, 2011 letter to the PCA,[3] Murphy laid out an additional ground that, in accordance with Article 10(1) of the UNCITRAL Arbitration Rules, "give[s] rise to justifiable doubts as to the arbitrator's impartiality or independence."[4] The fact that gives rise to this additional ground was brought to Murphy's attention by Professor Stern in her letter of acceptance of December 3, 2011.[5]

Murphy hereby incorporates by reference the arguments made in its previous letters, and specifically addresses Ecuador's response submitted on January 11, 2012, and the comments submitted by Professor Stern on January 16, 2012. Murphy requests that the PCA, in its capacity as appointing authority designated by the parties, uphold Murphy's challenge to Professor Stern.

III. Murphy's Challenge to Professor Stern Meets the Applicable Standards

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[1] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010 (hereinafter the "*Burlington* Decision on Jurisdiction"), available at http://italaw.com/documents/BurlingtonResourcesInc_v_Ecuador_Jurisdiction_Eng.pdf (last visited Jan. 25, 2012).

[2] Murphy's Challenge to Prof. Stern, Nov. 28, 2011, Exhibit J. Ecuador had communicated its appointment of Professor Stern as the second arbitrator on November 14, 2011. *See* Ecuador's Appointment of Prof. Stern, Nov. 14, 2011, Exhibit G.

[3] Murphy's Letter to the PCA, Dec. 16, 2011.

[4] UNCITRAL Arbitration Rules, art. 10(1). *See also* IBA Guidelines on Conflicts of Interest in International Arbitration (hereinafter "IBA Guidelines"), Part I, § (2)(b).

[5] Prof. Stern's Letter of Dec. 3, 2011, Exhibit K.

Murphy reiterates that its challenge to Professor Stern meets the relevant standard provided for in Article 10(1) of the UNCITRAL Arbitration Rules. In Murphy's view, and in the view of any reasonable and fully-informed third party, the facts and circumstances surrounding Professor Stern's appointment do "give rise to justifiable doubts as to the arbitrator's impartiality or independence."[6]

Both parties and Professor Stern agree that the impartiality and independence of arbitrators constitute essential requirements in international arbitration,[7] which is also confirmed by abundant case law and legal literature.[8] Briefly, independence implies the absence of any relationship that, from an objective standpoint, might influence the arbitrator's decision,[9] and impartiality implies the absence of actual or apparent bias toward one of the parties.[10] Similarly, a decision of an LCIA Division stated that "the impartiality of an arbitrator may be defined as 'the absence of risk of bias on the part of the arbitrator towards one of the parties,'"[11] and further added that "'the concept of partiality may be concerned with the bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute.'"[12]

It is also well known that the test provided for in Article 10(1) is objective in nature, meaning that any reasonable and informed observer would reach the same conclusion regarding a specific challenge.[13] Regarding the objective nature of the test in Article 10(1), one commentator observes:

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[6] UNCITRAL Arbitration Rules, art. 10(1).

[7] Professor Stern also mentions among "the deontological requirements of an international arbitrator" his or her availability. Prof. Stern Letter of Jan. 16, 2012, at 1. Murphy agrees.

[8] *See, e.g.*, Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REVIEW 341, 341 (2008-2009) (citing Jan Paulsson, *Ethics, Elitism, Eligibility*, 14 J. of Int'l Arb. 13, 13 (1997), Exhibit J (attached as Exhibit C-20 thereto).

[9] In the context of ICSID arbitration, *see, e.g.*, *Alpha Projektholding Gmbh v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Challenge to Arbitrator, March 19, 2010, ¶¶ 35-36, available at http://italaw.com/documents/AlphaDisqualificationDecision.pdf (last visited Jan. 25, 2012) (hereinafter "*Alpha v. Ukraine*"); *see also Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, May 12, 2008, ¶ 28, available at http://italaw.com/documents/Suez-VivendiChallenge2.pdf (last visited Jan. 25, 2012) (hereinafter "*Suez v. Argentina*").

[10] *See, e.g.*, *Alpha v. Ukraine* ¶¶ 35-36; *Suez v. Argentina* ¶ 28.

[11] LCIA Reference No. 5660, Decision Rendered 5 August 2005 (Lévy, Sachs, Rowley), in *Arbitration International*, Special Edition on Arbitrator Challenges, Volume 27 Issue 3 (2011), at 372 (citing E. Gaillard and J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration (Kluwer Law International*, The Hague/Boston/London, 1999), ¶ 1033, p. 567), Exhibit M.

[12] *Id.* (citing A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration* (3rd edn., Sweet & Maxwell, London, 1999), ¶¶ 4-51, p. 212) (emphasis added).

[13] *See, e.g.*, Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REVIEW 341, 345 (2008-2009) (footnotes omitted), Exhibit J (attached as Exhibit C-20 thereto).

> It is generally contended that this provision establishes an objective test—to be applied in accordance with the view of a "reasonable, fair-minded and informed person"—even though the article does not provide expressly for such third-person approach.[14]

The same commentator goes on to say:

> In any event, such "objective standard" has been coupled with the rejection of the requirement of actual bias, and the adoption of the standard of "apprehension of bias" or "appearance of bias" in the following words:
>
> One might say that under the UNCITRAL Arbitration Rules 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 […] In sum the test to be applied is that the doubts existing on the part of the claimant here must be 'justifiable' on some objective basis. Are they reasonable doubts as tested by the standard of a fair minded, rational, objective observer? Could that observer say, on the basis of the facts as we know them, that the claimant has a reasonable apprehension of partiality on the part of the respondent's arbitrator.[15]

In view of the foregoing, a challenged arbitrator's own opinion of her ability to act independently and impartially is immaterial.[16] Neither Ecuador's letter nor Professor Stern's appears to question or contradict these standards. Thus, the question is not whether a particular arbitrator subjectively believes she can act impartially (or whether that party's counsel is confident she will genuinely attempt to do so),[17] but whether the other party should have to bear

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[14] *See, e.g.*, Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REVIEW 341, 345 (2008-2009) (footnotes omitted), Exhibit J (attached as Exhibit C-20 thereto).

[15] *Id.* 345-346 (citing *National Grid PLC v. the Republic of Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd. L. Kessler, Dec. 3, 2007, ¶ 85, available at http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf (last visited Jan. 25, 2012)) (footnotes omitted). Similarly, the PCA granted Ecuador's challenge to Judge Charles N. Brower, pointing out that "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 fact, give rise to justifiable doubts' as to Judge Brower's impartiality or independence." *Perenco Ecuador Ltd. v. The Republic of Ecuador et al.*, PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator, Dec. 8, 2009, ¶ 44, available at http://italaw.com/documents/PerencovEcuador-Challenge.pdf (last visited Jan. 25, 2012) (emphasis in original) (hereinafter *Perenco v. Ecuador*).

[16] *Alpha v. Ukraine* ¶ 35.

[17] In her December 3, 2011 letter, Professor Stern indicated that "there is, in my view, no objective basis to impugn my impartiality and/or independence." Prof. Stern's Letter of Dec. 3, 2011, Exhibit K. Professor Stern further "reiterate[d] [her] full commitment to the deontological requirements for an arbitrator, that is to be both independent

that risk in light of objective facts indicating potential (even subconscious) bias on the arbitrator's part. The relevant rules and authorities make clear that the answer is no.

In its letters of November 28 and December 16, 2011, Murphy has relied on the well-known IBA Guidelines. Murphy has also relied on the IBA Rules of Ethics for International Arbitrators.[18] And although none of these rules are strictly binding on either the PCA or the parties, they constitute a very valuable source to determine what the leading organization of the international legal profession considers to be the best practices in terms of conflicts of interest in international arbitration.[19]

Indeed, the IBA Guidelines present a list of situations that objectively create (to varying degrees specified in the Guidelines) the appearance of bias or lack of independence in an arbitrator. The international arbitration community has developed this list in order to guide parties (and arbitrators) in determining which facts would indicate such impartiality and/or lack of independence. Thus, the grounds on which Murphy bases its challenge to Professor Stern are agreed and well-founded scenarios reflecting the collective judgment of the international arbitration community of specific instances that give rise to actual or apparent conflict.

Both Ecuador and Professor Stern attempt to minimize the authority of the IBA Guidelines with respect to situations that may serve as grounds for arbitrator disqualification. In this respect, Ecuador states that "the IBA Guidelines, initially developed for international commercial arbitration, do not constitute provisions of law and are not … binding … As a matter of law … the Guidelines are not conclusive for deciding challenges to arbitrators, be it generally or in this case in particular, and they may be viewed, at most, as advisory."[20] Professor Stern

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and impartial." Prof. Stern's Letter of Jan. 16, 2012, at 7. In light of the objective test, however, her subjective beliefs, no matter how heartfelt, are of no relevance.

[18] Ecuador argues that the IBA Rules on Ethics have been superseded by the IBA Guidelines as to the matters treated by them. *See* Ecuador's Letter to the PCA, Jan. 11, 2012, at 12, n.58. This assertion, however, does not affect the validity of Murphy's arguments at all. Both the IBA Guidelines and the IBA Rules on Ethics for International Arbitrators are valuable sources to evaluate the conduct of arbitrators.

[19] This conclusion has also been reached by several ICSID tribunals dealing with similar issues. *See, e.g.*, *Alpha v. Ukraine* ¶ 56 (noting the persuasive authority of the IBA Guidelines for ICSID tribunals); *EDF Int'l S.A., SAUR Int'l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB 03/23, Decision on Disqualification, June 25, 2008, ¶¶ 69, available at http://italaw.com/documents/EDFChallengeDecision.pdf (last visited Jan. 25, 2012); *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, Sept. 1, 2009, ¶ 263, available at http://italaw.com/documents/Azurix-Annulment.pdf (last visited Jan. 25, 2012); *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on Disqualification, Nov. 12, 2009, ¶ 15, available at http://italaw.com/documents/DecisiononProposalforDisqualificationofanArbitrator_002.pdf (last visited Jan. 25, 2012); *Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Participation of Counsel, Jan. 14, 2010, n.3, available at http://italaw.com/documents/RompetrolParticipation_000.pdf (last visited Jan. 25, 2012). Also, in *Urbaser v. Argentina*, the Tribunal similarly recognized that the IBA Guidelines "constitute a most valuable source of inspiration." *Urbaser S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimant's Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, Aug. 12, 2010, ¶ 37, available at http://italaw.com/documents/UrbaserArbitratorChallenge.pdf (last visited Jan. 25, 2012).

[20] Ecuador's Letter to the PCA, Jan. 11, 2012, at 4.

goes even further and asserts that "the Guidelines fundamentally deal with international commercial arbitration, which greatly differ from ICSID [sic] investment arbitration."[21]

That argument is unfounded and countered by the plain text in the Introduction to the IBA Guidelines, which states that although the Guidelines were originally developed for international commercial arbitration, they "should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations)."[22] Moreover, the IBA Working Group tasked with drafting the Guidelines was composed primarily of prominent investor-state arbitrators and practitioners.[23] For this very reason, Ecuador's reading of the explanatory note accompanying Orange List Section 3.1.3 followed by its conclusion that "in certain circumstances the guideline must be considered inapplicable" is simply untenable.[24]

Additionally, the assertion that the IBA Guidelines should only be applied to commercial arbitrations is contradicted by common practice, as tribunals in investment arbitration cases routinely turn to the Guidelines as persuasive authority in resolving challenges to arbitrators. The Tribunal in *Alpha v. Ukraine*, for example, noted the importance of the IBA Guidelines in

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[21] Prof. Stern's Letter of Jan. 16, 2012, at 2-3 (under the heading "1. A distinction has to be made between issues of fact and issues of law: the IBA Rules are not adapted to investor-State arbitration" (emphasis added)). Professor Stern's mention of ICSID arbitration appears to be simply an error.

[22] IBA Guidelines, Introduction ¶ 5 (emphasis added). In fact, one scholar contends that "[t]he field in which the influence of the IBA Guidelines is strongest is certainly investor-state arbitration." Sam Luttrell, *Rules of Bias in the* Lex Mercatoria, in BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 195, Annex 15 to Ecuador's Letter to the PCA, Jan. 11, 2012.

[23] The IBA Working Group consisted primarily of practitioners with experience in investment treaty arbitration, including some of the most prominent arbitrators in that field (*e.g.*, Henri Alvarez, Emmanuel Gaillard, Bernard Hanotiau, Michael Hwang, Albert Jan van den Berg, Gabrielle Kaufmann-Kohler, David Rivkin, David Williams, *etc.*). *See* IBA Guidelines, Introduction ¶ 3, n.1.

[24] Ecuador's Letter to the PCA, Jan. 11, 2012, at 6. The exception reads: "It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice." IBA Guidelines, Part II, Practical Application of the General Standards, § 3.1.3, n.6. First, investment treaty arbitration is not listed as an example of the type of specialized arbitration to which the exception would apply. This absence is telling given that the IBA Working Group consisted, as already stated, primarily of practitioners with experience in investment treaty arbitration, including some of the most prominent arbitrators in the field. *See* IBA Guidelines, Introduction ¶ 3, n.1. Second, by way of example, the ICSID list of "Members of the Panels of Conciliators and Arbitrators" contains several hundred names, which belies any suggestion that the pool of qualified candidates from which Ecuador may choose is small. And this list is supplemented by several other lists maintained by other arbitral institutions. Third, Ecuador has already appointed at least nine other arbitrators in its multiple other investment arbitrations, besides Professor Stern (including Professor Albert Jan van den Berg, J. Christopher Thomas, Q.C., Dr. Raúl E. Vinuesa, Dr. Bernardo M. Cremades, and Professor Vaughan Lowe). And even if it were true, as Ecuador argues, that "[t]here exists only a limited pool of world-renowned public international law experts capable of and willing to serve as arbitrator – the pool of such candidates certainly does not exceed a couple of dozen names," *see* Ecuador's Letter to the PCA, Jan. 11, 2012, at 7, it is surely no coincidence that out of this "suitable" number of as many as 24 arbitrators, Ecuador appointed Professor Stern to act in this case that is nearly identical to *Burlington* in which she already decided several issues in Ecuador's favor.

ICSID arbitration, stating that, "since their adoption in 2004, the IBA Guidelines have been widely used as a catalogue of the bases for challenge as well as for the parameters of an arbitrator's duty of disclosure."[25]

In fact, there is no material distinction between international commercial arbitration and international investment arbitration that would necessitate different standards for challenges to arbitrators. General principles of fairness and due process require that parties in both types of arbitrations have their dispute settled by objectively impartial and independent arbitrators. Professor Stern attempts to note some differences between the two types of arbitrations, but her examples prove unhelpful. First, she suggests that because the Orange List of the IBA Guidelines include a reference to "an affiliate of one of the parties" as well as "the parties" when discussing multiple appointments of an arbitrator, the Guidelines were meant to apply solely in commercial disputes.[26] The basis of this argument seems to be Professor Stern's belief that sovereign States cannot have affiliates (and indeed, that only a party to a commercial dispute can) and that the wording of the phrase must exclude those entities that do not have affiliates. There is no support for that argument. Sovereign States certainly have many agencies and political subdivisions that would qualify under the plain meaning of the term "affiliate" as used in the Guidelines. Simply put, sovereign States that are parties to an arbitration (whether or not there is an affiliate) are covered by the Guidelines.

Second, Professor Stern, purporting to "have some experience in this field,"[27] argues that "the reference to 'the issue' has to be a reference to a concrete issue, a factual issue involving one of the private parties, and cannot apply to legal issues, lest that would be the end of investment arbitration, each arbitrator being only able to sit in one case, as the legal issues are always similar."[28] Apparently, this *non sequitur* also convinces Professor Stern that the IBA Guidelines must be meant to apply only to commercial arbitrations. Murphy finds Professor Stern's argument difficult to follow. In any event, Professor Stern provides no authority in support of her arbitrary conclusions, and Murphy sees no point in rebutting them, as the facts plainly demonstrate that Professor Stern has prejudged multiple issues in this case, however they are characterized.

In sum, none of Ecuador's or Professor Stern's arguments support the assertion that the PCA should not apply the IBA Guidelines to its decision on Murphy's challenge to Professor Stern.

IV. Professor Stern Has Prejudged the Subject-Matter of this Arbitration

Oddly enough, in its January 11, 2012 letter, Ecuador starts by addressing a number of additional circumstances that, in its view, do not warrant the disqualification of Professor Stern,

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[25] *Alpha v. Ukraine* at ¶ 56 (emphasis added) (citing several other ICSID cases).

[26] Prof. Stern's Letter of Jan. 16, 2012, at 3.

[27] *Id.*

[28] *Id.*

leaving to the last section of its letter the central issue of Murphy's challenge.[29] Murphy wishes to emphasize that what makes this case unprecedented is the fact that Professor Stern has prejudged (*i.e.*, already adjudicated) the subject-matter of this arbitration through a decision issued in her capacity as a member of another international arbitration tribunal.[30] In other words, the key issue here is that Professor Stern has prejudged the very subject matter of this arbitration. While additional circumstances corroborate Murphy's contention that Professor Stern is not suited to adjudge this arbitration, those circumstances do not divert from the focus of Murphy's challenge. At any rate, Ecuador is unsuccessful in its defense of Professor Stern's appointment.

This case is unique in the history of investment arbitration. Indeed, Murphy is not aware of any other investment case where (i) the same Respondent State has appointed (ii) the same arbitrator (iii) to hear a second case involving the same factual pattern, *i.e.*, (iv) production-sharing contracts with virtually identical terms and conditions, (v) the same governmental measures complained of, (vi) dealing with the same BIT, and (iv) alleging the same violations under the BIT and international law, where (vii) that arbitrator had already decided in the prior case several issues favorably to the Respondent State which are certain to recur in (and in fact are central to and potentially-dispositive of) the second case.[31] Neither Ecuador nor Professor Stern does or can point to any past case bearing the same characteristics of the case at hand, let alone a case where a comparable challenge was unsuccessful.

On the contrary, the finding of mere *apparent* prejudgment of *one* of the issues involved in an arbitration has led the Secretary-General of the PCA to sustain the challenge of a party-appointed arbitrator. Notably, Ecuador carefully fails to even mention the paradigmatic case in which Ecuador itself was the challenging party. Although the circumstances of that case and the instant one are not identical, that decision is significant if not dispositive given the critical considerations made by the Secretary-General of the PCA regarding prejudgment as a ground for challenge.[32]

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[29] Ecuador's Letter to the PCA, Jan. 11, 2011, at 8-12.

[30] Murphy's Challenge to Prof. Stern, Nov. 28, 2011, at 2, Exhibit J.

[31] Ecuador has not denied any of these assertions. In its January 11, 2012 letter, Ecuador argues that "[w]hile *Burlington* and the present arbitration include claims referring to Ecuadorian Law 42, the two arbitrations involve unrelated claimants, different production-sharing agreements, and, importantly and as pointed out by Claimant, different arguments relating to Law 42." Ecuador's Letter to the PCA, Jan. 11, 2012, at 10. Murphy does not deny the obvious, *i.e.*, that both the claimants and the production-sharing contracts are not exactly the same. But the terms and conditions of the production-sharing contracts (the so-called "participation contracts" under the Ecuadorian Hydrocarbons Law) are virtually identical. Moreover, Ecuadorian Law 42 and subsequent measures equally affected all participation contracts executed by foreign investors. Depending on the nationality of the investor, those measures violated different investment treaties executed by Ecuador, but in this case, both Burlington and Murphy are US companies that allege violations of the same investment treaty, *i.e.*, the US-Ecuador BIT. In addition, in both instances the claimants Burlington and Murphy are the US shareholders of companies incorporated in third countries, where the third-country subsidiaries were the actual signatories to the contracts. That fact was of particular relevance to Professor Stern's decisions in *Burlington* regarding the "umbrella clause" and the "investment agreement" exception to the tax-measures exclusion in the BIT. In short, the overwhelming similarities in the cases swamp any minor differences.

[32] *See Perenco v. Ecuador*.

In the *Perenco v. Ecuador* ICSID case, Ecuador challenged the arbitrator appointed by the claimant, the Honorable Judge Charles N. Brower, after becoming aware of a published interview given by Judge Brower in which he discussed a wide variety of topics, including his then-current docket of appointments.[33] During the interview, Judge Brower made a comment regarding "recalcitrant host countries" in connection with investors that had been expropriated in Libya, right after referring to the fact that Ecuador was declining to comply with the interim measures orders issued in the pending *Perenco v. Ecuador* arbitration.[34] Based on these assertions, Ecuador argued that Judge Brower's comments were in fact referring to Ecuador itself, and suggested that he had already prejudged the question of whether Ecuador's actions constituted an expropriation.[35]

The Secretary-General of the PCA pointed out:

> By invoking the example of "those who were expropriated in Libya" immediately after a reference to Ecuador's attitude to investment arbitration generally, and its conduct in this ICSID case in particular, it is reasonable to infer that Judge Brower is drawing an analogy between Ecuador and Libya in the famous nationalizations of oil companies in the 1970s. While Judge Brower explains his belief that the sentences are unrelated and the Libya example is given as a general hypothesis only, a reasonable reader would nevertheless view the sentences, in response to the same question, as related.[36]

The Secretary-General of the PCA concluded that "the above does not amount to a finding that Judge Brower has *actually* prejudged the issue of expropriation. However, from a reasonable third person's point of view, the comments do give rise to an *appearance* that Judge Brower has prejudged the issue."[37]

Here, the circumstances of the challenge are even more flagrant. As noted in Murphy's November 28, 2011 letter, in the *Burlington v. Ecuador* case, Professor Stern has already decided key, potentially-dispositive issues of the instant arbitration. And she has done so acting in her capacity as arbitrator and in no uncertain terms.[38] Again, Professor Stern's jurisdictional decision in the *Burlington* case is not a mere comment made in an interview; it is the final

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[33] *Perenco v. Ecuador* ¶ 25.

[34] *Id.* ¶ 27.

[35] *Id.* ¶ 56.

[36] *Id.* ¶ 56.

[37] *Id.* ¶ 58 (emphasis in original).

[38] Murphy's Challenge to Prof. Stern, Nov. 28, 2011, at 2-3, Exhibit J. And even though Professor Stern argues that some of the issues in the *Burlington* Decision on Jurisdiction are "views *prima facie*, which can be modified at the merits level," Prof. Stern's Letter of Jan. 16, 2012, at 4, the decision itself is no less definitive and binding.

decision adopted by the *Burlington* Tribunal in connection with the jurisdictional elements of that case, which are essentially identical to those here.

Moreover, Professor Stern may have (and likely already has) made her decision on the merits of the *Burlington* case, since the hearing on liability in that case took place almost a year ago.[39] In fact, Murphy understands from discussions with counsel that an award on liability is imminent, and could be issued as soon as in the next two months. This means that, by now, Professor Stern has likely already adjudicated not only the jurisdictional aspects of the *Burlington* case, but also whether Law 42 and related measures violate the standards of protection in the US-Ecuador BIT and international law. In the end, Ecuador's liability in the present arbitration will almost surely hinge on that same, likely-already-made determination.

In its November 28, 2011 letter, Murphy has shown the "close interrelationship between the facts and the parties" and that it is "such that it effectively precludes [Professor Stern] from departing from the solution reached in the earlier case."[40] And unlike the claimant in the *Tidewater v. Venezuela* case cited by Ecuador, Murphy here does allege (and in fact, it is undisputed) "that there is an overlap in the underlying facts between [*Burlington*] and the present case, so that Professor Stern would benefit from knowledge of facts on the record in [*Burlington*] which may not be available in the present case."[41] Needless to say, the fact that the claimants in the *Burlington* case and the present arbitration are not the same may be largely irrelevant for purposes of determining whether Law 42 and related measures violate the US-Ecuador BIT. In any event, the decision in the *Tidewater v. Venezuela* is not directly applicable to this arbitration, since the standard of review in the ICSID Convention appears to be more stringent than the standard established in the UNCITRAL Arbitration Rules.[42]

As regards Ecuador's contention that Murphy "will, consequently, present to the tribunal arguments that differ substantively from those of Burlington,"[43] that proposition is illogical. Murphy has specifically addressed in its November 28, 2011 letter several identical aspects that both the *Burlington* Tribunal and the tribunal in this case will need to deal with in order to reach a conclusion on Ecuador's international responsibility. In view of all the similarities in both cases (identical participation contract terms, same measures complained of, same BIT, *etc.*), it is

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[39] According to the ICSID web site, the *Burlington* Tribunal held a hearing on liability in Paris on March 8-11, 2011. Procedural details of the case are available at http://icsid.worldbank.org/ICSID/FrontServlet (last visited Jan. 25, 2012).

[40] *See* Ecuador's Letter to the PCA, Jan. 11, 2012, at 9.

[41] *See Tidewater Inc. et al. v. the Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, Dec. 23, 2010, ¶ 66, available at http://italaw.com/documents/Tidewater_v_Venezuela_Disqualification.pdf (last visited Jan. 25, 2012).

[42] Article 57 of the ICSID Convention reads: "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" (emphasis added). Under the UNCITRAL rules, however, and as stated by the Secretary-General of the PCA in the *Perenco v. Ecuador* case, a mere appearance of bias may "give rise to justifiable doubts as to the arbitrator's impartiality or independence." UNCITRAL Arbitration Rules, art. 10(1).

[43] Ecuador's Letter to the PCA, Jan. 11, 2012, at 11 (emphasis added).

nonsensical to hypothesize that Murphy's arguments will differ substantially from those of Burlington.[44] Moreover, Murphy is not in a position—as both Ecuador and Professor Stern are—to assess to what extent the arguments made by Burlington in the *Burlington* case may differ from Murphy's arguments in the present arbitration. This constitutes a huge disadvantage between the parties that violates basic principles of due process.

In fact, that disadvantage provides further grounds for Professor Stern's recusal. Under Article 15(1) of the UNCITRAL Arbitration Rules, the tribunal must treat the parties with equality.[45] Under proper circumstances, *i.e.*, where all arbitrators are hearing the case for the first time, both parties begin from equal starting points in relation to the tribunal. The right of the parties to have impartial and independent arbitrators is clearly violated if one of the arbitrators has already had access to the arguments made in another arbitration on virtually the same case.[46] The case here is even more egregious, considering that Professor Stern has not only had access to the arguments made in the *Burlington* case, but she has already prejudged the subject-matter of this arbitration, in terms of both jurisdictional and—most probably—merits aspects on which Murphy's claim relies.

A similar—albeit not identical—situation was faced by the *EnCana v. Ecuador* Tribunal[47] when dealing with the parallel arbitration in *Occidental v. Ecuador*.[48] Both arbitrations were brought roughly contemporaneously under the UNCITRAL Arbitration Rules, with both claimants asserting that Ecuador was denying certain value-added-tax relief to oil companies allegedly due under their respective participation contracts. Although the factual pattern regarding the complained-of measures was identical, EnCana, a Canadian investor, brought its claim under the Canada-Ecuador BIT, whereas Occidental, a US company, initiated arbitration under the US-Ecuador BIT. Ecuador appointed the same arbitrator, Dr. Patrick Barrera Sweeney, in both proceedings. A question of confidentiality of the pleadings and documents submitted in the *Occidental* case arose, and the *EnCana* Tribunal acknowledged that

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[44] Murphy's Challenge to Prof. Stern, Nov. 28, 2011, at 3-5, Exhibit J. As explained, one apparent difference between Murphy's arguments and Burlington's is that Murphy argues that Ecuador is estopped from claiming that Law 42 is a tax, which apparently was not a theory that Burlington set forth. But Murphy cannot be asked to put its faith in Professor Stern's ability to reach an independent and impartial decision different from *Burlington* on the mere basis of an estoppel doctrine that is not well developed in international law. In any event, this minor potential difference in advocacy hardly alters the fact that the cases are in substance nearly identical.

[45] Article 15(1) of the UNCITRAL Arbitration Rules reads: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

[46] In this respect, and despite the unmeritorious challenge to Murphy's appointed arbitrator, Ecuador has never argued that Professor Guido S. Tawil has previous access to arguments that may be made in the present arbitration.

[47] *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Partial Award on Jurisdiction, Feb. 27, 2004, available at http://italaw.com/documents/Encana-PartialAwardonJurisdiction.pdf (last visited Jan. 25, 2012) (hereinafter "*EnCana v. Ecuador*").

[48] *See Occidental Exploration and Production Company v. the Republic of Ecuador*, LCIA Case No. UN3467, Final Award, July 1, 2004, available at http://italaw.com/documents/Oxy-EcuadorFinalAward_001.pdf (last visited Jan. 25, 2012).

a problem of procedural inequality between the parties needed to be addressed.[49] After indicating that the "[p]leadings or information provided by Ecuador to Dr. Barrera in his capacity as a member of the other Tribunal are not thereby provided to this Tribunal,"[50] the *EnCana* Tribunal went on to point out that, "as soon as Dr. Barrera uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties. Furthermore Dr. Barrera cannot reasonably be asked to maintain a 'Chinese wall' in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration."[51]

The approach of the members of the *EnCana* Tribunal[52] stands in stark contrast to Professor Stern's repetitive statement, according to which she "willfully forget[s] the cases when they are decided, or when [she is] not specifically working on them, in order to consecrate [her] thinking to the new facts submitted to [her] decision."[53] It is simply not plausible to argue that, "when an arbitrator sits in a case, he or she concentrates on the case, and the arguments of the parties, and only on those, regardless of his or her other current duties … isolating each case from the other ones."[54] Frankly, the *EnCana* Tribunal's approach appears to be more reasonable than Professor Stern's position.

For these reasons, and in order to avoid any concerns regarding an arbitrator's impartiality, the ICSID Rules of Procedure for Arbitration Proceedings (by way of example) unequivocally provide that "[n]o person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute may be appointed as a member of the Tribunal."[55] The explanatory note specifies that "this Rule is based on the general principle that no person should twice take part in an impartial investigation of the same dispute."[56] This

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[49] *EnCana v. Ecuador* ¶ 44.

[50] *Id.*

[51] *Id.* Murphy is not aware of any challenge against Dr. Barrera that may have been brought by either EnCana or Occidental in their respective arbitrations. Although the *EnCana* Tribunal indicates that "the fact of holding a joint appointment in related disputes would not, in and of itself, be grounds for challenge under Article 10(1)" (emphasis added), it is clear that additional considerations could have rendered a potential challenge successful. Here, the problem is not the mere existence of joint appointments in related cases (which is not unprecedented), but the fact that Professor Stern had already issued potentially-dispositive rulings in the prior, virtually-identical *Burlington* case before Ecuador appointed her in this case (which is unprecedented). In any event, Dr. Barrera resigned from one case (*EnCana*) before issuing any decision in either case that would have prejudged the issues in the other. In the present case, given Professor Stern's regrettable refusal to resign, the only option to achieve the same result is for the PCA to disqualify her.

[52] At that stage of the proceedings, the *EnCana* Tribunal was composed of Professor James Crawford (President), Dr. Horacio Grigera Naón and Dr. Patrick Barrera Sweeney.

[53] Prof. Stern's Letter of Jan. 16, 2012, at 4.

[54] *Id.* at 4-5.

[55] ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), Rule 1(4), available at http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (last visited Jan. 25, 2012).

[56] Note I to ICSID Arbitration Rule 1, ICSID Regulations and Rules, ICSID/4/Rev. 1, reprinted May 1975 (emphasis added), Exhibit N.

"general principle" is so straightforward and bedrock that ICSID did not even deem it worthy of any further explanation or justification. Neither Ecuador nor Professor Stern can escape from this bedrock and general principle by arguing that the "disputes" in *Burlington* and here are technically not the same merely because the claimants are different from otherwise identical contracts, treaties, and claims and defenses. In any event, the Burgh House Principles on the Independence of the International Judiciary provide that "Judges shall not serve on a case in which they have previously served … as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute."[57] That is exactly the situation here. Accordingly, Professor Stern "should not serve."

Further, as stated above, when deciding the present challenge, the PCA should be aware that, at this point, Professor Stern has likely already adjudged the merits of the *Burlington* arbitration, since an award on liability is imminent and is expected to be issued this very quarter.

Murphy reiterates that this is an unprecedented case in the history of investment arbitration. To recap, after the enactment of Law 42 and related measures, virtually identical disputes arose between Ecuador and foreign oil investors, who were forced to file multiple ICSID claims to protect their investments in Ecuador. All of those claims involve the same governmental measures, and deal with participation contracts crafted in almost identical terms. In the case of Burlington and Murphy, the disputes with Ecuador also involve the same BIT. In the *Burlington* case, Ecuador appointed Professor Stern, who ruled for Ecuador on many key, potentially-dispositive issues through a jurisdictional decision. Ecuador then re-appointed her in this case, arguing that "no justifiable foundation exists for Claimant's alleged reservations concerning Professor Stern's designation."[58] Ecuador even dares to argue that "Claimant has not demonstrated sufficient relatedness of the parties and issues in *Burlington* and this case,"[59] which is demonstrably false. Murphy is aware of no such case (and Ecuador has cited none) where Ecuador's tactic has even been tried, let alone found acceptable.

Murphy is also concerned that, by its actions, Ecuador may well be trying to have the best of both worlds: either, as expected, Professor Stern will reach the same decision as in *Burlington*; or, alternatively, in the highly unlikely scenario where Professor Stern changes her mind, Ecuador may be paving the way for an eventual *vacatur* petition against the award based on Professor Stern's contradictory decisions in *Burlington* and here.[60] In fact, this possibility is far

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[57] The Burgh House Principles On The Independence Of The International Judiciary § 9.1, available at http://www.ila-hq.org/en/committees/study_groups.cfm/cid/1012 (last visited Jan. 25, 2012) (emphasis added). It goes on to state: "Judges shall not serve in a case with the subject-matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality." *Id.* § 9.2 (emphasis added).

[58] Ecuador's Letter to the PCA, Jan. 11, 2012, at 12.

[59] *Id.* Similarly, and without providing any reasoning whatsoever, Professor Stern asserts that "the positions taken by the [*Burlington*] Tribunal, as a whole, in this case, have no relevance to the position another tribunal might take in *Murphy*." Prof. Stern's Letter of Jan. 16, 2012, at 3. It is difficult to understand how Professor Stern can make such assertion since she has said she has not reviewed the entirety of Murphy's arguments in this arbitration.

[60] Professor Stern argues that "[a]s a consequence of the Claimant's view of the issue-conflict, only an arbitrator that changes its analysis of the rules of law depending on the specific facts of a case would be 'impartial', meaning in

from remote. Another Respondent State, Argentina, did exactly this. In 2008, Argentina moved in the US District Court for the District of Columbia to vacate an arbitral award rendered in favor of the claimant BG Group, based on Professor Albert Jan van den Berg's "capricious stance in treating Argentina's necessity defense" in previous rulings, and that "the ICC Court exceeded its power in rejecting Argentina's challenge in the circumstances of the case."[61] According to Argentina, this situation "evidence[d] partiality against Argentina."[62] Professor van den Berg had issued previous rulings in the *LG&E v. Argentina* and *Enron v. Argentina* cases where the "state of necessity" defense was accepted for a 17-month period in the former yet rejected altogether in the latter. Argentina alleged that these findings were contradictory and, absent a dissenting opinion by Professor van den Berg, challenged him in the *BG Group v. Argentina* arbitration before the ICC, alleging that his "abrupt change of mind" in the time between these two decisions was "arbitrary" and "capricious."[63] The ICC Court dismissed the challenge.[64] In its motion to vacate the award before the US District Court for the District of Columbia, Argentina contended that "[t]he impartiality and objectivity required of [Professor van den] Berg were fatally compromised by his prejudice and bias against Argentina."[65]

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fact 'unpredictable.'" Prof. Stern's Letter of Jan. 16, 2012, at 3. Professor Stern entirely misses the point. Murphy's objection to Professor Stern's appointment in this arbitration is not that the arbitrator should change her mind in a second case; Murphy's position s that Professor Stern is precluded from being appointed in the second after having already rendered a decision on the virtually-identical set of facts and circumstances in the earlier case. Simply put, Murphy cannot reasonably expect that Professor Stern will act impartially towards its case, nor could any reasonable third person, which is the relevant standard.

[61] *The Republic of Argentina v. BG Group PLC*, Case No. 08-0485 (RBW) (D.D.C.), Petition to Vacate or Modify Arbitration Award filed on March 21, 2008, ¶ 76, available at http://italaw.com/documents/BGvArgentina.pdf (last visited Jan. 25, 2012). Argentina argued that Professor van den Berg had "decided the very same issues he had earlier ruled on based on nearly identical facts (the only principal difference being that the BIT was with the U.K., not the U.S.)." *Id.* ¶ 72.

[62] *Id.* ¶ 76.

[63] *Id.* ¶ 71, 75.

[64] *See* Caline Mouawad, *Issue Conflicts in Investment Treaty Arbitration*, Transnational Dispute Management, Vol. 5, Issue 4, July 2008, at 9, Exhibit O.

[65] *The Republic of Argentina v. BG Group PLC*, Case No. 08-0485 (RBW) (D.D.C.), Petition to Vacate or Modify Arbitration Award filed on March 21, 2008, ¶ 69, available at http://italaw.com/documents/BGvArgentina.pdf (last visited Jan. 25, 2012). On June 7, 2010, Argentina's motion to vacate the award was rejected by the District Court. *See The Republic of Argentina v. BG Group PLC*, Case No. 08-0485 (RBW), Memorandum Opinion, June 7, 2010, available at http://italaw.com/documents/BG_Group_v_Argentina_USDistrictCourtReview_7June2010.pdf (last visited Jan. 25, 2012). Citing a precedent, the opinion indicates that "the Court in this circumstance does not sit like 'an appellate court does in reviewing the decisions of lower courts.'" *Id.* at 23. The court, however, also pointed out that "under a more searching, appellate-style review, the arguments presented by Argentina in its Petition could very well carry the day." *Id.* On January 21, 2011, the same court granted BG Group's cross-motion to confirm the award against Argentina. *See The Republic of Argentina v. BG Group PLC*, Case No. 08-0485 (RBW), Memorandum Opinion, Jan. 21, 2011, available at http://italaw.com/documents/BGGroupPLC_USDistrictCourt_MemorandumOpinion_21Jan2011.pdf (last visited Jan. 25, 2012). A few days ago, however, the US Court of Appeals for the District of Columbia Circuit vacated the award against Argentina on other grounds. *See The Republic of Argentina v. BG Group PLC*, Case No. 11-7021, Jan. 17, 2012, available at http://italaw.com/documents/BGvArgentinaUSCAOpinion.pdf (last visited Jan. 25, 2012).

As one commentator put it:

> Although this further challenge by Argentina arises in a narrow factual context (same measures, same industry, same time period), it crystallizes the tension that arises when arbitrators sit in multiple disputes: to what extent are arbitrators bound by their previous awards on recurring issues? In a context where arbitral awards have no precedential value (as tirelessly stated by numerous tribunals before a thorough examination of the jurisprudence), should arbitrators nonetheless be bound by their own precedents, that is, by the decisions that they have authored? What are the outer limits of such a practice when some of the findings in an award may be the result of consensus or even compromise?[66]

Of course, the possibility that Professor Stern will rule against Ecuador in Murphy's case is indeed remote. In fact, Professor Stern has already made clear that she will rule in the same manner as in the *Burlington* case because an arbitrator cannot have two views when presented with the same issues, at the risk of being considered "unpredictable."[67] Moreover, Professor Stern has also unambiguously stated:

> I couldn't put my name to a ruling which meant that I said one thing in one case, and the opposite in another case with the exact same factual background. As an academic, it's a logical impossibility for me.[68]

It is obvious that Ecuador believes that Professor Stern will follow her *Burlington* rulings in Murphy's case. That is almost surely why it appointed her.

To conclude, the situation faced by the PCA in this challenge is not one in which an arbitrator who has a general disposition to rule in a certain way has been appointed by the party that expects to obtain a favorable ruling; instead, the arbitrator in this case had already decided virtually the same claim in a way favorable to the party appointing it, prior to the party's appointment.[69] This situation is unprecedented and beyond the pale, and the PCA should reject it.

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[66] Caline Mouawad, *Issue Conflicts in Investment Treaty Arbitration*, Transnational Dispute Management, Vol. 5, Issue 4, July 2008, at 9 (footnote omitted), Exhibit O.

[67] Prof. Stern's Letter of Jan. 16, 2012, at 3.

[68] *See Brigitte in Brazil*, Global Arbitration Review, Volume 5, Issue 3 (2010), at 3, Exhibit J (attached as Exhibit C-22 thereto).

[69] Very recently, one practitioner expressed great concern regarding "arbitrators who have built up a 'portfolio' of decisions on a frequently occurring issue – and are therefore biased on the substance of the case." *See Freshfields Lecture 2011: Saving Investment Arbitration from Itself*, Global Arbitration Review, Dec. 6, 2011 (reporting on the lecture that Tobi Landau QC delivered at Queen Mary, University of London, on Nov. 30, 2011) (emphasis added), Exhibit P.

V. Additional Circumstances Give Rise to Justifiable Doubts as to Professor Stern's Impartiality and Independence

Murphy is of the view that the foregoing sufficiently demonstrates the existence of "justifiable doubts as to [Professor Stern]'s impartiality or independence"[70] to sustain Murphy's challenge. There are, however, additional circumstances that also make Professor Stern's appointment in this arbitration unacceptable.

Those circumstances have already been addressed in Murphy's November 28 and December 16, 2011 letters. In their recent submissions, both Ecuador and Professor Stern provide several comments that merit the following rebuttal.

a. Professor Stern Neither Timely Accepted her Appointment Nor Did She Make Appropriate Disclosures

Ecuador argues that "by the time Claimant submitted its challenge to the PCA on December 16, Professor Stern had timely accepted her appointment and made disclosures. This challenge ground would thus appear now to be moot."[71] It further argues that "this preliminary branch of Claimant's challenge argument can be easily set aside."[72]

Murphy strongly disagrees. A "timely" acceptance and disclosure should allow the challenging party to send its notice of challenge within the period required by Article 11 of the UNCITRAL Arbitration Rules. Even Professor Stern, perhaps based on Murphy's rationale, "observe[s] that the UNCITRAL Rules do set a time limit for acceptance."[73] For this reason, "an unusually busy period in [Professor Stern's] work," as Ecuador puts it, is hardly a valid excuse for not even sending a short reply email of acceptance.[74]

On the other hand, Murphy is puzzled by Professor Stern's somewhat veiled protest that "the challenge was launched before I had even formally accepted my appointment."[75] This aspect, however, does not deserve additional comments.

As Murphy already noted in its November 28, 2011 letter:

> Under the UNCITRAL Rules, it is generally recognized that failure to disclose a circumstance that should have been disclosed may give rise to justifiable doubts as to independence and impartiality

[70] UNCITRAL Arbitration Rules, art. 10(1).

[71] Ecuador's Letter to the PCA, Jan. 11, 2012, at 1 (emphasis added).

[72] *Id.* at 2.

[73] Prof. Stern's Letter of Dec. 3, 2011, Exhibit K.

[74] Ecuador's Letter to the PCA, Jan. 11, 2012, at 2.

[75] Prof. Stern's Letter of Jan. 16, 2012, at 5. Professor Stern had already expressed the same concern on page 1 of her January 16, 2012 letter. *Id.* at 1.

> … Disclosure of circumstances that may appear to affect independence or impartiality is so fundamental for the legitimacy of international arbitration, that failure to comply with the duty to disclose should weigh heavily in the consideration of a challenge against an arbitrator.[76]

Similarly, the IBA Rules of Ethics for International Arbitrators provide that "[t]he appearance of bias is best overcome by full disclosure as described in Article 4 below."[77] Article 4, in turn, provides that "[f]ailure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification."[78]

Additionally, in its December 16, 2011 letter, Murphy referred to the additional fact brought to its attention in Professor Stern's December 3, 2011 letter regarding her appointment by Ecuador in yet another UNCITRAL proceeding that started two years ago. Since Professor Stern did not specify in her letter which proceeding it might be, Murphy suggested that Professor Stern may had been referring to the arbitration brought in 2009 by Ulysseas, Inc. against Ecuador for alleged breaches of the US-Ecuador BIT.[79]

Based on that assumption, Murphy also suggested that the other pending Ecuador arbitrations on which Professor Stern is currently serving as arbitrator may also fall within the provisions of Part II of the IBA Guidelines, which address the situation where "[t]he arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties."[80] Unfortunately, Professor Stern failed to further disclose the details of that arbitration and Murphy is thus regrettably unable to elaborate on this specific ground of challenge.

Murphy also disagrees with Ecuador's contention that "Claimant has not (and could not have) asserted that Prof. Stern has previously during the three years preceding her appointment in this case been appointed by the Republic 'on two or more occasions.'"[81] The "Orange List" of the IBA Guidelines provides as an example of bias the fact that "[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties."[82] Based on the caption of this provision, Ecuador argues that "this

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[76] Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REVIEW 341, 345 (2008-2009) (footnote omitted) (emphasis added), Exhibit J (attached as Exhibit C-20 thereto).

[77] IBA Rules of Ethics for International Arbitrators, Article 3.2.

[78] *Id.* Article 4.1.

[79] *See Tribunal Finalized in Arbitration Over Ecuadorian Power-Barges*, Investment Arbitration Reporter, Jan. 17, 2010, Exhibit L.

[80] IBA Guidelines, Part II, § 3.1.5 (emphasis added).

[81] Ecuador's Letter to the PCA, Jan. 11, 2012, at 3.

[82] IBA Guidelines, Part II, § 3.1.3.

section … is limited to examples of "***[p]revious*** services for one of the parties."[83] But Ecuador's conclusion that "the reference to "two or more occasions" means two or more occasions previous to the appointment under consideration" is totally unsupported.[84] Thus, Murphy's concern regarding Professor Stern's impartiality or independence based on this circumstance is not only legitimate, but also supported by express provisions in the IBA Guidelines.

b. Professor Stern's History of Repeated Appointments by Respondent States

Regarding this ground for challenge, Murphy feels obliged to set the record straight as briefly as possible.

First, Murphy has never "suggest[ed] that Professor Stern ought to have disclosed details about all investment cases in which she has ever served as arbitrator."[85] Ecuador's proposition is simply preposterous and totally unwarranted. Murphy does contend, however, that Professor Stern should have made proper disclosures regarding the cases in which she is currently serving in which Ecuador is a party, because such disclosures may give rise to justifiable doubts as to her impartiality or independence. In this respect, Murphy's view remains unchanged. Again, Professor Stern's disclosures fall short of meeting this standard.

Second, Ecuador's mention of the *Occidental v. Ecuador* case at page 3 of its January 11, 2012 letter is totally misplaced.[86] Indeed, Murphy expressly excluded that case from the 36 cases listed in the ICSID web site showing Professor Stern as a member of the tribunal. After careful assessment, in its November 28, 2011 letter, Murphy asserted that of 36 cases listed in the ICSID web site, it appears that Professor Stern has been appointed by the Respondent State in at least, i.e., only, 31 cases.[87]

Third, as regards Ecuador and Professor Stern's concern that the ICSID web site does "not disclose which arbitrators were appointed by which party or even whether they were appointed by a party at all,"[88] Murphy notes that this assessment can be easily made by reading the procedural background that the majority of ICSID decisions contain. Again, through this careful assessment, Murphy was able to conclude that Professor Stern was designated as arbitrator by the Respondent State in at least 31 ICSID cases.[89]

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[83] Ecuador's Letter to the PCA, Jan. 11, 2012, at 3 (emphasis in original).

[84] *Id.*

[85] *Id.* at 2.

[86] *Id.* at 3.

[87] Murphy's Challenge to Prof. Stern, Nov. 28, 2011, at 7 (footnote omitted), Exhibit J.

[88] Ecuador's Letter to the PCA, Jan. 11, 2012, at 3. *See also* Prof. Stern's Letter of Jan. 16, 2012, at 6.

[89] Murphy assumes that Professor Stern does know the number of cases in which she has been appointed by the Respondent State. Regrettably, this piece of information is lacking in her January 16, 2012 letter.

For the sake of brevity, Murphy considers that Ecuador and Professor Stern's additional arguments do not warrant further rebuttal.

VI. Request to the PCA

In view of the foregoing, Murphy hereby requests that the PCA, acting in its capacity as appointing authority designated by the parties, uphold the challenge to Professor Stern based on the grounds described by Murphy and/or any other additional grounds that may be discovered in the future. Murphy also requests that a new arbitrator be appointed in accordance with the UNCITRAL Arbitration Rules. Once the briefing schedule is concluded, Murphy requests that the PCA then reach a decision on Murphy's s challenge as quickly as possible.

We thank you for your attention to these matters.

Very truly yours,

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