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The Secretary-General
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Attn: Mr. Brooks W. Daly

Re: ***PCA Case No. AA442: Merck Sharp & Dohme (I.A.) Corp. (U.S.A.) vs. The Republic of Ecuador***

Dear Sir:

Respondent Ecuador's April 3, 2012 letter adds nothing instructive to its March 15, 2012 challenge to Judge Schwebel. As set out in Claimant's March 26, 2012 letter responding to that challenge, no objective observer could conclude that reasonable doubts exist about Judge Schwebel's ability to decide the current dispute between Claimant and Ecuador impartially. For the reasons set forth in Claimant's March 26, 2012 letter, Judge Schwebel's March 27, 2012 letter, and below, Claimant respectfully requests that the PCA deny Ecuador's challenge and resume the process of appointing a presiding arbitrator.

A. Respondent Has Failed to Establish That Judge Schwebel's Editorial Gives Rise to Justifiable Doubts as to His Impartiality in This Arbitration

The central premise of Ecuador's challenge remains unchanged. Ecuador asserts that Judge Schwebel's editorial discussing *Nicaragua vs. United States of America*, decided by the International Court of Justice in 1986, gives rise to an inference that, while not stated or implied in the text of the editorial itself, Judge Schwebel believes Mr. Reichler, one of Ecuador's nine named counsel in this arbitration, was responsible for fraud on the Court in that case. Ecuador's reading of Judge Schwebel's editorial is objectively unreasonable.

As an initial matter, Ecuador has cited no authority to support its contention that an arbitrator's alleged negative view of a party's counsel, even if proven, would sustain a challenge to the arbitrator. Ecuador contends that Claimant does not dispute that this would be a sufficient ground for a challenge. This is not true.

In its March 26 letter, Claimant discussed the lack of authority supporting Ecuador's challenge and distinguished the principal cases on which Ecuador relies. In both of those cases, *Perenco* and *Canfor*, the challenged arbitrator was removed because he was found to have made critical

comments about one of the *parties* (not the *counsel*) in the arbitration and to have prejudged the merits of the arbitration.[1] Ecuador appears to argue that these essential elements of those cases are "irrelevant."[2] That is wrong; those elements were central to the analysis in each case. In contrast, there is no suggestion here, nor could there be, that Judge Schwebel holds a negative view of Ecuador or has prejudged the merits of this case. For those reasons alone this challenge must be dismissed. Indeed, allowing a challenge on this basis would create dangerous precedent and perverse incentives for parties and counsel in international arbitration proceedings.

But even if an arbitrator's view of a party's counsel, without more, could undermine an arbitrator's independence and impartiality, there is no evidence to suggest that Judge Schwebel has a negative view of Mr. Reichler. Ecuador acknowledges that Judge Schwebel has not made any statements, much less any negative statements, regarding Mr. Reichler or his role in the *Nicaragua* case.[3] Judge Schwebel's editorial does not in any way assert that Nicaragua's legal team, or particularly Mr. Reichler, was involved in or responsible for fraud on the ICJ.[4]

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[1] *See* Claimant's Letter to the PCA of March 26, 2012, at pages 7-8.

[2] *See* Ecuador's Letter to the PCA of April 3, 2012, at pages 3 (asserting that it is "irrelevant," that, among other things, Judge Schwebel's editorial "does not relate in any way to the present arbitration, the parties in this arbitration, or any issue that could conceivably arise in this arbitration," and "says nothing whatever about the performance, beliefs or qualifications of counsel in the *Nicaragua* case").

[3] Ecuador goes to great lengths to try to show that Judge Schwebel "singled out" Mr. Reichler for his role in the presentation of Nicaragua's case and therefore implied that Mr. Reichler was responsible for fraud on the Court. *See, e.g.*, Ecuador's Letter to the PCA of April 3, 2012, at page 2. Ecuador's argument is based on a mischaracterization of the footnote reference to Mr. Reichler in Judge Schwebel's editorial. Judge Schwebel's editorial does not refer to Mr. Reichler's role in the Nicaragua case at all; it simply cites to Mr. Reichler's 2001 article, which details the history of the *Nicaragua* case and the roles played by many of the individuals on Nicaragua's legal team, including Mr. Reichler, Professor Chayes, Professor Brownlie and Professor Pellet. Judge Schwebel's citation to Mr. Reichler's article does not indicate or imply that Judge Schwebel has any particular view of Mr. Reichler or of his role in the *Nicaragua* case, much less a negative view of the members of Nicaragua's legal team. Judge Schwebel recounted in his March 27 letter that Professor Chayes, Professor Brownlie and Professor Pellet all appeared before Judge Schwebel as counsel, or sat together with him as arbitrator, on many occasions following the *Nicaragua* case, and none ever suggested that Judge Schwebel could not be impartial, notwithstanding his conclusion in his 1986 dissent that Nicaragua's witnesses had deliberately misled the Court in that case. Ecuador has offered no reason why Mr. Reichler would be in any different position.

[4] Stephen M. Schwebel's Letter to the PCA of March 27, 2012, at page 4. Ecuador also argues that Judge Schwebel "singled out" Mr. Reichler for his role in arranging the conference, and therefore insinuates that Mr. Reichler was personally responsible for "celebrating" a fraud on the Court. This is equally unavailing. Judge Schwebel's editorial does not identify Mr. Reichler as an "organizer" of the conference, but simply notes that the conference "was arranged with the participation of individuals involved in the formulation and presentation of Nicaragua's case." Stephen M. Schwebel, Editorial Comment, *Celebrating a Fraud on the Court*, 106 (1) AM. J. INT'L L. 102 (2012) (RCE-3). Indeed, Mr. Reichler was not the only member of Nicaragua's legal team who participated in the conference. In any event, even if Judge Schwebel were critical of the conference itself, this would not provide justifiable doubts about his impartiality towards the dozens of speakers and participants at the conference or towards the four organizations that sponsored the conference. It is obvious that professional disagreements—even strongly held disagreements—regarding the outcome of a particular case cannot be grounds for finding a lack of impartiality among members of the international arbitration community, where academic debate is a hallmark and cherished value of the system.

Moreover, as explained in Claimant's March 26 letter, Judge Schwebel's view that Nicaragua's Agent and officials had deliberately submitted false evidence to the ICJ and that this had materially affected the Court's decision was set out in great detail in his 1986 dissent.[5] Ecuador was thus on notice of Judge Schwebel's views at the time it instructed Mr. Reichler as counsel in this arbitration.

Ecuador claims that Judge Schwebel's editorial goes beyond his 1986 dissent in "insinuating" a negative view of Nicaragua's counsel because the editorial uses the word "fraud."[6] This is unavailing. In his 1986 dissent, Judge Schwebel expressly concluded that Nicaragua's Agent and officials engaged in "calculated, reiterated misrepresentation,"[7] that statements made by the Government of Nicaragua in testimony were "untrue" and "demonstrably false,"[8] and that the Court "adopt[ed] the false testimony of representatives of the Government of the Republic of Nicaragua."[9] Judge Schwebel's characterization of Ecuador's evidence in his 1986 dissent fits squarely within Ecuador's own operative definition of "fraud."[10]

As set out in Claimant's March 26 letter, it was Ecuador's prerogative to engage Mr. Reichler as counsel knowing Judge Schwebel's views of the *Nicaragua* case, and Claimant has no objection to Mr. Reichler continuing to serve as counsel in this arbitration. But it is not acceptable for Ecuador, knowing of the views expressed in Judge Schwebel's 1986 dissent, to appoint Mr. Reichler as counsel and then use Mr. Reichler's involvement as the basis for challenging Judge Schwebel's appointment. Sustaining a challenge based solely on an arbitrator's alleged views of a party's counsel would be unprecedented. Doing so where the counsel in question was instructed *after* the arbitrator was appointed would open the door to parties manufacturing conflicts through the appointment of counsel and would have serious implications for the fair administration of future international disputes.

Ecuador argues that Claimant is ignoring the overall context and import of Judge Schwebel's editorial "in the manner of the proverbial blind men examining an elephant."[11] But in truth, it is Ecuador that is ignoring the context of Judge Schwebel's editorial.

Judge Schwebel's editorial is not about Mr. Reichler or Nicaragua's legal team. It is about the evidence submitted by Nicaragua's witnesses, which Judge Schwebel concluded in his 1986

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[5] Claimant's Letter to the PCA of March 26, 2012, at pages 3, 9-10.
[6] Ecuador's Letter to the PCA of April 3, 2012, at page 7 ("the term 'fraud' does not appear even once, in any form, in his dissenting opinion").
[7] *Nicaragua vs. United States of America*, Dissent of Judge Schwebel, 27 June 1986, at para. 266 (RCE-9).
[8] *Id.* at para. 25 (RCE-9).
[9] *Id.* at para. 1 (RCE-9).
[10] In its April 3 letter, Ecuador offers a definition of "fraud" that includes, among other things, "anything calculated to deceive another to his prejudice and accomplishing the purpose." Ecuador's Letter to the PCA of April 3, 2012, at page 8 n.22.
[11] Ecuador's Letter to the PCA of April 3, 2012, at page 3.

dissent was untrue (and which Mr. Reichler's own 2001 article confirms was untrue).[12] It is clear from the context that Judge Schwebel's editorial was meant to remind readers, on the twenty-fifth anniversary of the *Nicaragua* case—when members of the international legal community were congregating to reflect on the significance of the case to international law, and amidst reports that Nicaragua is considering seeking reparations against the United States[13]—of his conclusion that the case was wrongly decided based on false evidence, and his view that this was confirmed by the subsequent explosion in Managua in 1993 of a weapons cache belonging to Salvadoran guerrillas. Judge Schwebel's editorial is plainly directed towards these issues, not towards the conduct of members of Nicaragua's legal team.

B. Judge Schwebel's Conclusions Regarding the Nicaragua Case Are Correct

Ecuador asserts that Judge Schwebel's conclusions regarding the affidavit of the Nicaraguan Foreign Minister are "patently unjustified" and "disconnected from the evidence" and therefore evidence Judge Schwebel's bias.[14] As set forth in Claimant's March 26 letter, Judge Schwebel's assertions regarding the testimony offered by Nicaragua in the *Nicaragua vs. United States* case are correct, are consistent with the conclusions Judge Schwebel articulated in his 1986 dissent, and are corroborated by Mr. Reichler's own 2001 article.[15]

The affidavit of Nicaragua's Foreign Minister declared that U.S. allegations that the Nicaraguan government "is sending arms, ammunition, communications equipment and medical supplies to rebels conducting a civil war against the Government of El Salvador, are false. . . . In truth, my government is not engaged, *and has not been engaged,* in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador."[16] Ecuador places heavy reliance on the Foreign Minister's use of the phrase "has not been engaged" and suggests that the Foreign Minister's testimony could have been read to suggest that Nicaragua may have engaged in sending arms to El Salvador at some point in the past but that such activity had ceased by the time of the Foreign Minister's testimony. Ecuador argues that the Foreign Minister's testimony was therefore truthful.[17]

This is not a plausible reading of the Foreign Minister's affidavit. The Foreign Minister stated first that Nicaragua "is not engaged" in providing arms to the rebels in El Salvador, which

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[12] Claimant's Letter to the PCA of March 26, 2012, at page 6 (*quoting* Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 HARVARD J. INT'L L. 15, 18-19 (2001) (RCE-8)).
[13] Schwebel, *supra* note 4, at 105 (RCE-3).
[14] Ecuador's Letter to the PCA of April 3, 2012, at page 8.
[15] Claimant's Letter to the PCA of March 26, 2012, at page 6.
[16] Schwebel, *supra* note 4, at 102-103 (RCE-3) (quoting *Nicaragua vs. United States*, Judgment of 27 June 1986, at para. 147). Ecuador's April 3 letter correctly points out that Claimant's quotation of the Foreign Minister's affidavit in its March 26 letter omitted the word "been" from the italicized passage above. Claimant's omission was unintentional; it is also inconsequential.
[17] Ecuador's Letter to the PCA of April 3, 2012, at page 9 n.27.

addressed Nicaragua's present actions. He then added "and has not been engaged," which plainly addressed Nicaragua's past actions. If the Foreign Minister had intended to convey that Nicaragua had in the past supplied arms to rebels in El Salvador, but was no longer doing so, he would have made that point expressly by referring to some point in the past, after which Nicaragua had no longer engaged in sending arms to the Salvadoran rebels. In the absence of any temporal limitation, the statement "has not been engaged" can only be understood as denying engagement at any time in the past.

Moreover, other evidence submitted by Nicaragua fully reinforced that understanding of the Foreign Minister's affidavit, unequivocally stating that Nicaragua had *never* supplied arms to the rebels in El Salvador. For example, Nicaragua's Agent submitted a letter to the Court in November 1985 stating: "As the Government of Nicaragua has consistently stated, it has never supplied arms or other material assistance to insurgents in El Salvador or sanctioned the use of its territory for such purpose.... "[18] Similarly Nicaragua's Vice Minister of the Interior, Commander Luis Carrión, testified before the Court that "[m]y Government has never had a policy of sending arms to opposition forces in Central America."[19] Judge Schwebel's understanding of the Foreign Minister's affidavit as contending that Nicaragua had never been engaged in supplying arms to the insurgents in El Salvador is persuasive and certainly affords no basis to suggest bias on his part, against Mr. Reichler or anyone else.

Ecuador also contends that, even if the statements submitted by Nicaraguan government officials were false, they could not constitute "fraud," because (Ecuador asserts) the Court did not rely on them.[20] This is not right. The Court said only that it would "treat ... with great reserve" statements made by government officials that were in the interest of the government, not that it would disregard those statements altogether.[21] And the Court expressly reached precisely the conclusion the Foreign Minister's affidavit falsely contended for, finding that the flow of arms from Nicaragua to the Salvadoran rebels before early 1981 "could [] have been carried on unbeknown to the Government of Nicaragua, ***as that Government claims.***"[22] Moreover, the Court expressly *did* rely on statements by government officials that were *against the interests of their government.*[23] If the Nicaraguan government witnesses had testified *truthfully* that Nicaragua had been responsible for providing arms to rebels in El Salvador until at least early

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[18] *Nicaragua*, Dissent of Judge Schwebel, at para. 24 (RCE-9).
[19] *Nicaragua*, Dissent of Judge Schwebel, Factual Appx, at para. 27 (RCE-9).
[20] Ecuador's Letter to the PCA of April 3, 2012, at page 8.
[21] *Nicaragua* Judgment at para. 70 ("The Court thus considers that it can certainly retain such parts of the evidence given by Ministers, orally or in writing, as may be regarded as contrary to the interests or contentions of the State to which the witness owes allegiance, or as relating to matters not controverted. For the rest, while in no way impugning the honour or veracity of the Ministers of either Party who have given evidence, the Court considers that the special circumstances of this case require it to treat such evidence with great reserve.") (RCE-7).
[22] *Nicaragua,* Judgment at para 156 (RCE-7).
[23] *Id,* at para. 70 (RCE-7).

1981,[24] the Court would have attributed evidentiary value to those "statements against interest," and the Court could not have concluded that the evidence failed to establish the Nicaraguan government's responsibility "for any flow of arms at either period."[25]

C. The Stage of the Proceedings Is Not Relevant to Consideration of Ecuador's Challenge

Finally, Ecuador suggests that "where matters are evenly balanced, it may be advisable to err on the side of admission of a challenge brought early in the arbitral proceedings."[26] This is not right. The stage of the proceedings when a challenge is brought cannot and should not be taken into account when deciding the challenge.

As Ecuador concedes, the UNCITRAL standard of impartiality "does not vary according to the stage of the proceedings."[27] Under the UNCITRAL Rules, the only question for the appointing authority deciding a challenge is whether there are justifiable doubts as to an arbitrator's impartiality or independence. Whether a challenge is brought early or late in an arbitration has no bearing on that question. Moreover, lowering the bar for challenges brought at the outset of the arbitration would simply encourage parties to assert more challenges—an outcome that would be detrimental to the international arbitration system as a whole.

It is worth noting that Ecuador first invited Claimant to withdraw its appointment of Judge Schwebel before it submitted its challenge for determination by the PCA. If a party whose appointed arbitrator has been challenged is particularly concerned about the effect the challenge might have on the enforceability of the arbitral award, that party may withdraw the appointment. Where the party decides to resist the challenge, however, it would be manifestly inappropriate for the appointing authority under the UNCITRAL Rules to interpose a theoretical concern about

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[24] It is axiomatic that fraud can result either from an affirmative misrepresentation or the omission of a material fact. Black's Law Dictionary (9th ed. 2009) (CCL-6) (defining fraud as "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

[25] Schwebel, *supra* note 4, at 103 (RCE-3) (quoting *Nicaragua,* Judgment at para. 160) ("On the basis of the foregoing, the Court is satisfied that, between July 1979, the date of the fall of the Somoza régime in Nicaragua, and the early months of 1981, an intermittent flow of arms was routed via the territory of Nicaragua to the armed opposition in El Salvador. On the other hand, the evidence is insufficient to satisfy the Court that, since the early months of 1981, assistance has continued to reach the Salvadorian armed opposition from the territory of Nicaragua on any significant scale, or that the Government of Nicaragua was responsible for any flow of arms at either period.").

[26] Ecuador's Letter to the PCA of April 3, 2012, at page 7 (citing *Country X vs. Company Q*, Challenge Decision, Jan. 11, 1995, ¶ 10, XXII YB COMM. ARB. 227 (1997) (RCL-1)). Notably, in the decision Ecuador cites in support of its position, the tribunal did not sustain the challenge at issue. *Country X vs. Company Q*, Challenge Decision, Jan. 11, 1995, ¶ 10, XXII YB COMM. ARB. 227, 240 (1997) (RCL-1) (concluding that "the nexus in terms of the record between the doubts harboured by Country X and the facts against which they must be tested is simply too insubstantial for a fair minded and reasonable observer to find that circumstances exist that make those doubts justifiable").

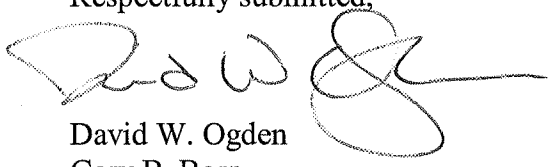
[27] Ecuador's Letter to the PCA of April 3, 2012, at page 7.

enforcement in order to uphold a challenge that does not meet the standard set out in the UNCITRAL Rules to which the parties have agreed.

D. Conclusion

For the reasons set out above and in the prior submissions from Claimant and Judge Schwebel, we respectfully request that the PCA deny Ecuador's challenge and resume the process of appointing the presiding arbitrator.

Respectfully submitted,



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