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24 July 2012

Permanent Court of Arbitration
H.E. Hugo Hans Siblesz
Secretary-General Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
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Re: Respondent's Challenge of Judge Stephen M. Schwebel as Arbitrator in Connection with *Merck Sharp & Dohme (I.A.) Corp. v. The Republic of Ecuador - UNCITRAL Arbitration*

Dear Secretary-General:

We write on behalf of Claimant Merck Sharp & Dohme (I.A.) Corp. ("MSDIA") in response to Respondent Ecuador's Rebuttal dated 17 July 2012.

Introduction

Respondent's Rebuttal serves to reconfirm the frivolous nature of this second challenge to Judge Schwebel. It is clear that this challenge should never have been made.

Respondent's challenge rests on the demonstrably mistaken proposition that any relationship or fact that a party ***might subjectively view*** as relevant must be disclosed, even if that view would be unreasonable. That is manifestly not the governing standard under the UNCITRAL Rules, as is clear from both the language of the Rules and uniform authority and commentary on the Rules.

Under Article 10(1) of the UNCITRAL Rules, the correct standard governing a challenge is whether circumstances "give rise to ***justifiable*** doubts as to the arbitrator's impartiality or independence." Similarly, under Article 9, an arbitrator is obligated to disclose only "circumstances likely to give rise to ***justifiable*** doubts as to his impartiality or independence." Authority on the issue uniformly holds that "doubts are justifiable … if they give rise to an apprehension of bias ***that is, to the objective observer, reasonable.***"[1] Under this standard, Respondent's purported subjective doubts—even if they genuinely existed—are plainly irrelevant to the analysis under Articles 9 and 10 of the UNCITRAL Rules. The question is whether the facts at issue give rise to "justifiable doubts." They plainly do not.

[1] *See, e.g., Country X v. Company Q*, UNCITRAL (Challenge Decision, Jan. 11, 1995), at para 24 (RCL-17) (emphasis added); *National Grid PLC v. the Republic of Argentina*, LCIA Case No. UN 7949, Decicion on the Challenge to Mr. Judd L. Kessler (3 December 2007), at para. 85 (RCL 18) (same).

Respondent's challenge also rests on the untenable argument that Judge Schwebel's disclosures were untimely. But in this case, consistent with good practice, ***all three arbitrators*** made a joint disclosure statement shortly after the Tribunal was constituted in May 2012. In that statement, Judge Simma, the arbitrator appointed by Respondent, disclosed for the first time that he had been appointed by Respondent in another investor-state arbitration within the past year. This disclosure was no more timely or untimely than Judge Schwebel's disclosures, which Respondent puts at issue. Respondent argues that the timing of Judge Simma's disclosure is irrelevant because MSDIA has not challenged Judge Simma. That is a non sequitur. Our point is not that Judge Simma's disclosures were ***untimely;*** *instead*, it is that all three arbitrators' disclosures, including Judge Simma's and Judge Schwebel's, were ***timely***, and further that Respondent's contentions with respect to Judge Schwebel, if credited, would condemn the conduct of Respondent's own choice for service in this matter. The truth is that neither Judge Simma nor Judge Schwebel is to be faulted on this score, and that Respondent's position to the contrary is frivolous.

In short, nothing in either of Respondent's submissions casts any doubt on Judge Schwebel's impartiality or independence. We respectfully request that the PCA deny Respondent's challenge.

Argument

A. Respondent Fails to Show that Circumstances Exist that "Give Rise to Justifiable Doubts" about Judge Schwebel's Impartiality or Independence

1. Judge Schwebel's arbitral appointments and engagements as an expert witness have not created a situation of dependence with WilmerHale

Respondent has not even begun to demonstrate justifiable doubts regarding Judge Schwebel's impartiality or independence. On the contrary, Respondent's Rebuttal confirms that there is no conceivable basis for raising any objective, reasonable question regarding Judge Schwebel's independence and impartiality.

Central to Respondent's purported concerns are two prior arbitral appointments. As shown in MSDIA's Opposition dated 9 July 2012, the underlying concern reflected in the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") with respect to prior arbitral appointments is the possibility that the arbitrator is dependent on a party or the party's counsel, a "relationship of dependence [with counsel], which could endanger

[the] independence or impartiality" of an arbitrator.[2] Prior arbitral appointments that do not create such dependence are not considered to be grounds for a challenge. Critically for present purposes, the "mere fact that an arbitrator was regularly nominated (by different arbitral parties) on the recommendation of the same Counsel or the same firm of solicitors ought not of itself to give rise to justifiable doubts as to his independence and impartiality."[3]

Respondent has provided no basis—and there is none—for concluding that Judge Schwebel is in any way dependent on WilmerHale. Judge Schwebel has been appointed as an arbitrator by WilmerHale only twice out of his 63 publicly-reported arbitral appointments (just over 3 percent); undoubtedly Judge Schwebel has served as an expert witness in countless other matters, and thus the true percentage is actually far lower.[4] WilmerHale's two appointments of Judge Schwebel, whether assessed individually or together, do not come close to establishing a relationship of dependence; on the contrary, those appointments are significantly more modest than routinely occurs in international arbitral practice.

Respondent argues that the standard of "economic dependence" (to use Respondent's phrase) sets the bar too high, but in so contending, Respondent reveals only its recognition that it cannot possibly satisfy the applicable test. There is no legal basis for Respondent's position that the standard here should be lower than potential dependence. Respondent does not cite a single decision that supports this position.[5] Nor does Respondent provide any argument why some other standard than dependence should be adopted.

Indeed, Respondent does not even attempt to articulate an alternative standard. Instead, it simply asserts—without providing any connection to existing authority—that the circumstances here should be deemed sufficient to sustain a challenge.

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[2] *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on Claimants' Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators (20 May 2011), at para. 87 (RCL-6); see also LCIA Reference No. 81224, Decision Rendered 15 March 2010, in Arbitration International, Special Edition On Arbitration Challenges, Volume 27 Issue 3 (2011), at p. 467 para. 4.4 (Claimant's Challenge Legal Exhibit ("CCL") 6) (noting that an arbitrator's "relations with Counsel are relevant only if the arbitrator draws an important part of his or her revenues from an ongoing relationship with the Counsel of the appointing party" and dismissing a challenge where there was nothing to indicate that the "Co-Arbitrator [has] drawn any significant revenue from a relationship with [counsel]").

[3] LCIA Reference No. 81160, Decision Rendered 28 August 2009, in Arbitration International, Special Edition On Arbitration Challenges, Volume 27 Issue 3 (2011), at p. 451 para. 4.6 (CCL-5).

[4] *See* Biography of Judge Stephen M. Schwebel, available at http://www.londonarbitrators.net/cvs/sschw.pdf (last visited 25 June 2012) (CCE-1).

[5] There is likewise no support whatsoever for Respondent's novel standard of a "longstanding financial and professional 'relationship of trust,'" Respondent's Rebuttal at p. 9, but even if such a standard existed, Respondent could not satisfy it.

Respondent also fails entirely to respond to the authorities applying the dependence test set forth in Claimant's Opposition. Instead, Respondent dismisses those cases on the grounds that they applied the ICSID Convention, which, according to Respondent, has a higher burden of proof for disqualifying an arbitrator.

But Respondent's effort to distinguish these cases is wholly mistaken. The two ICSID cases on which Claimant relied in its Opposition are matters in which challenges were evaluated considering the principles articulated in the IBA Guidelines, principles that Respondent seeks to apply to this case. Indeed, Respondent itself previously cited both of the ICSID decisions it now dismisses as irrelevant in its opening submission for the proposition that the IBA Guidelines should be deemed advisory here.[6] Those decisions explain how to apply the factors of the IBA Guidelines—specifically, how to evaluate whether past appointments by counsel affect the arbitrator's independence or impartiality—and in both cases the challenges were dismissed despite facts far more favorable to a challenge than those at issue here.[7]

Moreover, Respondent's suggestion that all of the cases relied upon in the Claimant's Opposition "were decided under ... the ICSID Convention"[8] is simply false—as Respondent must certainly know. Respondent's Rebuttal ignores the LCIA cases cited by the Claimant that stand for the identical proposition that "relations with Counsel are relevant only if the arbitrator draws an important part of his or her revenues from an ongoing relationship with the Counsel of the appointing party."[9] Respondent's Rebuttal also ignores the *Suez v. Argentina* case, in which the tribunal conducted an analysis under the UNCITRAL Rules and again articulated the same dependence test that Respondent tries here to disavow. The *Suez* tribunal explained that circumstances giving rise to justifiable doubts "must be significant and direct, ***such as an economic relationship causing an arbitrator to be dependent in some way on a party.***"[10]

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[6] Respondent's Challenge, at p. 3 n.7 (citing to *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/14 (Decision on the Proposal to Disqualify Professor Philippe Sands, 5 May 2011)), (RCL-4), and *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/9 (Decision on the Proposal to Disqualify Prof. Stern and Prof. Tawil, 20 May 2011) (RCL-6), among other cases.

[7] In *OPIC Karimum Corp.*, for example, a challenge to Professor Philippe Sands was rejected despite the fact that he had been appointed by the party Venezuela or its counsel in five of the eight treaty arbitrations he had sat on in the prior three years (and five of the nine treaty arbitrations total to which he had been appointed). *OPIC Karimum Corp. v. Venezuela*, ICSID Case No. ARB/10/14 (Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, 5 May 2011), at para. 18 (RCL-4).

[8] Respondent's Rebuttal at p. 10.

[9] LCIA Reference No. 81224, Decision Rendered 15 March 2010, in Arbitration International, Special Edition On Arbitration Challenges, Volume 27 Issue 3 (2011), at p. 467 para. 4.4 (CCL-6); see also LCIA Reference No. 81160, Decision Rendered 28 August 2009, in Arbitration International, Special Edition On Arbitration Challenges, Volume 27 Issue 3 (2011), at para. 87 (CCL-5).

[10] *Suez and others v. Argentina,* ICSID Case No. ARB/03/19 (Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, 12 May 2008), at para. 24 (RCL-11).

Nowhere does Respondent's Rebuttal address any of these decisions, nor explain how they can be reconciled with its claim that the standard relied upon by the Claimant is specific to the ICSID Convention. Nor does Respondent cite to any authority that contradicts any of these cases on the issue of dependence.[11]

Respondent's Rebuttal argues the prior engagements and appointments of Judge Schwebel by WilmerHale ***on their face*** raise justifiable doubts because they are "instances of close cooperation between them."[12] That makes no sense.

Even assuming, *arguendo*, that all four prior engagements and appointments should be treated the same, *i.e.*, as the equivalent of arbitrator appointments, they still would not begin to rise to the level that, under the IBA Guidelines, could raise justifiable doubts about Judge Schwebel's independence or impartiality. On the contrary, the IBA Guidelines require disclosure only of more than ***three arbitral appointments*** in the ***prior three years***. In this case, Judge Schwebel has had ***no appointments or other engagements from WilmerHale in the past three years***. That does not remotely approach the level required even for disclosure—much less justifiable doubts permitting a legitimate challenge.

Respondent's repeated observation that the guidance the IBA Guidelines provides on multiple appointments should be subject to the specific circumstances of the case does not advance its argument, because it cites nothing in the present circumstances justifying application of some different rule. There is nothing in Judge Schwebel's appointments by WilmerHale—counting expert witness appointments, just four appointments over a fifteen year period, representing a

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[11] Respondent's only support for its rejection of the widely-accepted dependence standard is an article by Gabriel Bottini, the Coordinator of the Department of International Affairs of the Department of the Treasury Attorney General's Office of Argentina. *See* G. Bottini, *Should Arbitrators Live on Mars*, 32 SUFFOLK TRANSNAT'L R. 341, p. 341 (2008-2009) (RCL-9). Mr. Bottini's article is a direct criticism of several decisions on particular arbitrator challenges (in some of which his office was on the losing side), including ICSID and UNCITRAL decisions. For example, Mr. Bottini criticizes the standards under the UNCITRAL Rules as applied in the *Suez* case as presenting "quite a high threshold for challenging an arbitrator" and making the "duty of disclosure … not seem to be very demanding," but he only offers his own opinion that the standard should be different and does not cite any authority. *See id*, at p. 359 (RCL-9). Mr. Bottini is surely entitled to his opinion as to what the standards for arbitrator challenges should be, but his opinion is just that; it does not reflect what those standards actually are.

[12] Respondent's Rebuttal at p. 12. Respondent calls the relationship between Judge Schwebel and WilmerHale a "relationship of trust." *Id.* Respondent takes this phrase from a case decided by the Finnish Supreme Court in which an arbitrator had not previously been engaged as an expert witness by counsel for one of the parties, but rather had been hired by ***one of the parties in the arbitration*** to provide expert legal opinions that would inform business decisions ***while the arbitration was ongoing***; these expert opinions were in the nature of "legal advice" and were "given in consideration of a significant financial compensation." Case KKO 2005:14 of the Finnish Supreme Court, in Bond and Bachand (eds.), International Arbitration Court Decisions (3rd Ed. 2011), at para. 25 (CCL-2). There is no basis for Respondent's efforts to equate an arbitrator's providing ongoing expert opinions to one of the parties in the case he is arbitrating with Judge Schwebel's past engagements by WilmerHale to provide legal expert opinions to a court in completely unrelated cases involving completely unrelated parties.

minute fraction of Judge Schwebel's appointments during that time—that creates a special concern as compared to any other arbitrator appointment.

Nor does Respondent's observation that the situations described in the Guidelines are not exhaustive bolster its case. The situation here is directly addressed by the Guidelines, which find that, generally speaking, multiple prior appointments of an arbitrator by counsel raise justifiable doubts only when there have been more than three such appointments in the prior three years. That is not the case here.

Thus, Respondent simply cannot establish that the prior appointments of Judge Schwebel by WilmerHale give rise to justifiable doubts.[13]

2. *Judge Schwebel's expert opinion in the Shell Oil cases does not address issues relevant to this case, and would not bar Judge Schwebel's service in this case even if it did*

Respondent argues alternatively that Judge Schwebel opined on issues related to those likely to arise in this arbitration in the two almost identical expert opinions Judge Schwebel provided on behalf of WilmerHale's client Shell Oil Company, among other defendants, in two related federal court litigations. That argument is also baseless: Respondent fails to identify a single issue addressed in Judge Schwebel's Shell Oil opinion that might feature in the present matter. The issues Judge Schwebel addressed in the *Shell Oil* cases are simply not relevant to this arbitration, and Respondent nowhere shows anything to the contrary.

First, as explained in MSDIA's Opposition, treaty tribunals have consistently rejected the same argument Respondent advances here, concluding that prior legal opinions, even on a similar issue, cannot serve as a basis for disqualification.[14] Respondent makes little attempt to distinguish these cases, arguing in a footnote that the cases did not address the non-disclosure of expert opinions, and that they were decided under the ICSID Convention. That argument is plainly incorrect.

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[13] That two of the cases in which Judge Schwebel was appointed or retained ended less than three years ago is of no moment. The IBA Guidelines clearly and intentionally focus on the appointment of the arbitrator, not when service on a case ends. *Compare* IBA Guidelines, Orange List, at p. 21 para. 3.1.3 (RCL-3) ("The arbitrator has within the past three years been ***appointed as arbitrator*** on two or more occasions by one of the parties …"), with *id.* at p. 21 para. 3.1.2 (The arbitrator has within the past three years ***served as counsel*** against one of the parties or an affiliate of one of the parties in an unrelated matter.) (emphasis added). This is for good reason; arbitrations, especially treaty arbitrations, often last many years, and a conflicts rule that focused on when an arbitrator's service on a case ended would unreasonably burden arbitrators' ability to serve as arbitrators. Of course, even if the IBA Guidelines did not focus on the act of appointment, and focused instead on the end of a proceeding, the facts alleged by Respondent here ***still*** would not require disclosure under the Guidelines since only two of Judge Schwebel's appointments would fall within the three-year window.

[14] Claimant's Opposition at p. 10.

The facts upon which Respondent tries to distinguish these cases are irrelevant. The critical point of these cases is that the system of international arbitration would be unworkable if an arbitrator could be successfully challenged merely because he or she had previously encountered the same legal issue in another case. This is particularly true in the field of investment arbitration, where arbitrators are often confronted with the same treaty language and legal issues in multiple cases. And it is true whether the ICSID or UNCITRAL Rules apply, and whether or not the arbitrator had previously considered a similar issue in the role of arbitrator, academic or expert witness.

Second, and in any event, Judge Schwebel's expert opinion did not address any issues conceivably relevant to this arbitration. The *Shell Oil* cases involved the enforceability in the United States of Nicaraguan judgments issued pursuant to Nicaraguan Special Law 364. Judge Schwebel's opinion in those cases focused on the question whether an act of the Nicaraguan legislature that codified the judicial process for a particular set of cases, and which applied only to certain defendants singled out by the law, was inconsistent with international norms such that judgments rendered pursuant to the law failed to comport with due process. The opinion did not involve Respondent or its courts, did not address the U.S.-Ecuador BIT, and did not involve issues of a lack of objectivity or bias by a judicial tribunal.[15]

Respondent argues for the first time in its Rebuttal that Judge Schwebel's opinion in the *Shell Oil* cases demonstrates that he "appears to reject the principle that a court decision, against which there remains further recourse through the judicial process, does not amount to a denial of justice."[16] Again, that is off target and plainly grasping at straws.

Judge Schwebel's opinion in the *Shell Oil* cases does not reach such a conclusion or even address the issue, and Respondent cites to nothing in Judge Schwebel's opinion that would suggest anything of the sort. The cases in which Judge Schwebel offered his opinion arose in the context of efforts to execute the underlying Nicaraguan judgments against Shell Oil and other defendants in U.S. courts. The question of the "finality" of those judgments was of no moment whatsoever

[15] Respondent suggests that Judge Schwebel's opinion implicated the conduct of particular courts in issuing judgments, based entirely on Judge Schwebel's own description of his opinion as relating to the "compatibility of Special Law 364 of the Republic of Nicaragua and of a judgment against Shell Oil Company issued by a Nicaraguan court in pursuance of that law, with the obligations of Nicaragua under public international law." Respondent's Rebuttal at p. 11 (quoting Judge Schwebel's Comments dated 10 July 2012, at pp. 2-3). While Respondent interprets Judge Schwebel's general statement as indicating that his opinion independently analyzed the discretionary acts of the Nicaraguan courts' in arriving at its conclusion, it cannot point to anything of substance in Judge Schwebel's actual opinion in support of that position. In fact, Judge Schwebel's opinion did not turn on particular courts' application of Special Law 364. The "procedures" applied by the Nicaraguan courts, which Judge Schwebel concluded failed to comply with due process, were applied by the courts as dictated by the strict provisions of the law itself.

[16] Respondent's Rebuttal at p. 11.

and Judge Schwebel did not address it. And, in any event, as discussed above, even if he had, this would not be a basis for challenging his independence in this arbitration.[17]

3. None of the other issues belatedly raised in Respondent's Rebuttal has any merit

Respondent's Rebuttal asserts a number of other arguments, many in passing, most of which are entirely unrelated to the allegations in its 21 June 2012 submission and none of which conceivably gives rise to justifiable doubts as to Judge Schwebel's impartiality or independence. They can be dismissed briefly:

- Respondent invokes again its previously-rejected supposition that Judge Schwebel has exhibited a "prejudicial animus toward a member of Respondent's counsel team."[18] But this was the central issue of its first challenge, and was rejected by the PCA because it found insufficient grounds to support the view that Judge Schwebel expressed any view on the conduct of Respondent's counsel.[19]

- Respondent claims that Judge Schwebel "ridiculed" Respondent "sarcastic[ally]" in brief remarks published two years ago concerning the withdrawal from ICSID of two unnamed South American countries.[20] Respondent's characterization of Judge Schwebel's remarks is grossly overstated and finds no support in the language of Judge Schwebel's comments. Nor does Respondent even attempt to link the substance of these unrelated remarks to the present challenge.

- Respondent alleges for the first time a "frequent …academic collaboration" between Judge Schwebel and a member of Claimant's legal team.[21] It bases this charge on a

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[17] Respondent again seeks to analogize the present case to the *Republic of Ghana v. Telekom Malaysia Berhad* arbitration. Respondent concedes that "contrary to the *Telekom* case, Judge Schwebel is not required to simultaneously adopt arguably inconsistent positions," but it argues that this fact is somehow "irrelevant." Respondent's Rebuttal at p. 11. In fact, the contrast between the present facts and *Telekom* could not be more stark: in the latter case, Professor Gaillard was in a position in which he would be obligated to simultaneously take irreconcilable positions on an ***identical treaty provision*** in two matters, one in which he had been appointed counsel and one in which he was serving as an arbitrator. There is no comparison between that case and the present situation.

[18] Respondent's Rebuttal at p. 1.

[19] *Id.* at pp. 1-2, and n.2; Decision on Challenge to Arbitrator Stephen M. Schwebel, 12 April 2012, at para. 61 (RCL-38)

[20] Respondent's Rebuttal at pp. 1-2, and n.3.

[21] *Id.* at p. 12 n.57.

single note of appreciation contained in a single article.[22] Again, Respondent does not offer any argument as to how this could be relevant to the present challenge.

Respondent makes virtually no attempt either to substantiate any these allegations, or to tie them to its challenge.

B. Nothing About the Timing or Content of Judge Schwebel's Disclosure Raises Justifiable Doubts As to His Independence or Impartiality

Presumably recognizing that it is unable even to begin to establish that Judge Schwebel's prior contacts with WilmerHale raise justifiable doubts as to his independence or impartiality, Respondent, as it did in its first letter, focuses on Judge Schwebel's alleged improper disclosure of these contacts. Respondent's approach is misguided because the timing of Judge Schwebel's disclosure was appropriate, the content of his disclosure exceeded what was required, and even if his disclosure had been insufficient, the non-disclosure of facts cannot itself give rise to justifiable doubts.

1. Judge Schwebel's disclosure was timely

Respondent claims Judge Schwebel's disclosure was untimely. But Respondent has no answer for the fact that ***all three arbitrators***—exercising their authority over the arbitral procedures—considered it proper simultaneously to provide disclosure at the time that they did. If Judge Simma's disclosure of his appointment as arbitrator by Respondent in a prior investor-state arbitration during the past year was proper, then so was Judge Schwebel's disclosure of a much more distant relationship with counsel to Claimant.

Respondent misses the point entirely here, asserting only that Claimant has not challenged Judge Simma, and should have done so if it believed a challenge was warranted.[23] The material point, however, is not that Judge Simma's disclosure was untimely; it was not. The point is that Respondent cannot impugn Judge Schwebel on this score without also impugning its own distinguished appointee, and that both Judge Schwebel's and Judge Simma's disclosures were entirely proper and timely. Three highly respected international arbitrators believed it to be proper practice to make a common disclosure statement upon the constitution of the Tribunal, and that decision was entirely proper.

Respondent suggests that Judge Schwebel made a "deliberate" choice to delay his disclosures, in order to "suppress relevant circumstances" and "conceal his contacts" with counsel, which,

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[22] *Id.*

[23] *Id.* at p. 9 n.39.

according to Respondent, would have strengthened its ***first*** challenge.[24] That contention is indefensible. Such a serious charge of improper intent should not be leveled cavalierly without any evidentiary support. Yet Respondent provides no support. Its allegation that Judge Schwebel intentionally gamed the timing of his disclosures in an effort to deceive Respondent is no more than reckless conjecture that is beneath the dignity of these proceedings. It should be rejected out of hand.

2. Judge Schwebel's disclosure exceeded what was required under the applicable UNCITRAL Rules

Judge Schwebel's disclosures far exceeded his obligations under the UNCITRAL Rules. In the Tribunal's joint-disclosure statement, Judge Schwebel disclosed two prior appointments as arbitrator, and one of two inter-connected (and substantively identical) prior appointments as an expert witness, none of which had taken place in the past three years, and one of which was fifteen years ago. ***None of these appointments or engagements needed to be disclosed***, and neither the UNCITRAL Rules nor any other standard of which we are aware would impose an obligation to disclose beyond what Judge Schwebel disclosed here.

The parties agree that the test for a successful challenge under Article 10(1) of the UNCITRAL Rules is objective.[25] However, Respondent argues, without support from any authority, that Judge Schwebel was required under Article 9 to disclose any circumstance that Respondent subjectively believed could give rise to justifiable doubt.[26] Respondent bases its argument on the fact that "Article 9 speaks of the duty to disclose 'any circumstances ***likely*** to give rise to justifiable doubts'" whereas "Article 10's formulation omits the qualification 'likely.'"[27]

Respondent's interpretation of Article 9 is obviously wrong. The plain language of both Articles 9 and 10(1) make clear that the relevant question under either standard is whether any doubts raised by a party as to an arbitrator's impartiality or independence are ***justifiable***. Whether in the context of Article 10(1) or Article 9, "doubts are justifiable or serious if they give rise to an apprehension of bias that is, ***to the objective observer, reasonable***."[28]

The PCA has already rejected Respondent's interpretation of Article 9 in this very proceeding. In rejecting Respondent's first challenge to Judge Schwebel, the Acting Secretary-General

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[24] *Id.* at p. 5.

[25] *Id.* at p. 3 n.11.

[26] *Id.* at p. 7 (stating that it "is not true" that "the test under Article 9 of the UNCITRAL Arbitration Rules is an 'objective' one.").

[27] *Id.*

[28] *Country X v. Company Q*, UNCITRAL, Challenge Decision (11 January 1995), at paras. 23-24 (RCL-17).

concluded (correctly) that "[i]n evaluating a challenge to an arbitrator arising under Articles 9 and 10 of the Rules, the appointing authority must determine whether a ***reasonable, fair-minded and informed person*** would have justifiable doubts about the arbitrator's independence or impartiality."[29]

Indeed, "[i]f the doubt had merely to arise in the mind of a party contesting the impartiality of an arbitrator, 'justifiable' would have been almost redundant."[30] Were the standard for disclosure to turn on what a particular party ***might view*** as relevant, without reference to how unreasonable that belief might be, arbitrators would be provided with no guidance on how to fashion disclosures, and the result would be entirely unworkable. Respondent's argument regarding the significance of the inclusion of the word "likely" in Article 9 would render the entire standard meaningless as a practical matter.

Because Article 9 does not support Respondent's position on disclosure, Respondent chooses to rely instead on the IBA Guidelines' acceptance of a "subjective approach for disclosure" that "reflect[s] the perspectives of the parties."[31] But the IBA Guidelines do not adopt a purely subjective test. They expressly note that "[b]ecause some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties' perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required."[32] As noted above, those circumstances that should never lead to disqualification include fewer than three prior appointments by counsel within the past three years.

Moreover, the IBA Guidelines' more subjective approach is inapplicable here. As one prominent commentator noted in discussing Article 11 of the 2010 UNCITRAL Rules, while "Principle 3 of the IBA Guidelines provides for a subjective standard for disclosure (in the eyes of the parties)..., the IBA Working Group stated, ***the UNCITRAL Model Law standard [like the UNCITRAL Rules standard] is an objective one.***"[33] Thus, regardless of the IBA Guidelines' perspective on disclosure, "the better view of the test under Art. 11 of the Rules is that the test is an objective test."[34] This same observation applies to Article 9 of the 1976 UNCITRAL Rules, as its language does not materially differ from that of Article 11 of the 2010 Rules.

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[29] Decision on Challenge to Arbitrator Stephen M. Schwebel, 12 April 2012, at para. 52 (RCL-38) (citing *National Grid PLC v. Republic of Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler (3 December 2007)) (emphasis added).

[30] *Country X v. Company Q*, UNCITRAL, Challenge Decision (11 January 1995), at paras. 23-24 (RCL-17).

[31] Respondent's Rebuttal at p. 6.

[32] IBA Guidelines, Explanation to General Standard 3, at p. 10 (RCL-3).

[33] Thomas H. Webster, Handbook of UNCITRAL Arbitration (2010), at pp. 159-160 (CCL-9) (emphasis added).

[34] *Id.*

Respondent seeks to support its argument that Judge Schwebel failed to comply with his disclosure obligations by referencing the model disclosure statement associated with Article 11 of the 2010 UNCITRAL Rules. The 2010 Rules do not apply to this arbitration.[35] But even if they did, Ecuador's argument would find no support in them.

The model disclosure statement includes (a) "past and present professional, business and other relationships ***with the parties*** and (b) any other ***relevant*** circumstances" (emphasis added). It is clear that the focus of this disclosure statement is the arbitrator's relationships with the parties. Judge Schwebel has had no relationship with MSDIA or Respondent, and so even under the model disclosure statement of the 2010 Rules, his disclosure of his prior appointments by WilmerHale was not required.[36] Moreover, the phrase "relevant circumstances" in the model disclosure statement also does not support Respondent's argument since the circumstances which are "relevant" for disclosure under the 2010 Rules are those defined in Article 11: "circumstances likely to give rise to justifiable doubts," just as in Article 9 of the 1976 UNCITRAL Rules. Thus, Respondent's reliance on the model disclosure statement does not advance its argument.

In sum, because Judge Schwebel's past appointments and engagements by WilmerHale are not "likely to give rise to justifiable doubts as to his impartiality or independence,"[37] Judge Schwebel was under no obligation to disclose them. The content of Judge Schwebel's disclosure plainly exceeded what was required under the applicable rules.[38]

3. Even if Judge Schwebel's disclosure had been insufficient, non-disclosure of facts, by itself, cannot give rise to justifiable doubts

Respondent argues that non-disclosure can be considered when determining if justifiable doubts exist. But the IBA Guidelines make clear that "***non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose***

[35] The parties have agreed, at Respondent's urging, that the 1976 UNCITRAL Rules apply to this dispute. Minutes, Telephone Conference between the Tribunal, PCA, Claimant and Respondent (29 May 2012), at 2 (CCE-7) ("The Respondent stated that the treaty called for the application of the 1976 UNCITRAL Rules and it had not agreed otherwise. The Parties and Tribunal agreed that the 1976 UNCITRAL Rules would be applicable to the arbitration.").

[36] Whether the model disclosure statement "formalizes a de minimis test" with regard to a relationship with a party, as Respondent argues, is irrelevant since Judge Schwebel's prior relationship are not with MSDIA.

[37] The UNCITRAL Arbitration Rules (1976), Art. 9.

[38] Respondent argues that Judge Schwebel's unintentional conflation of the two substantively identical Shell Oil cases denied it "pertinent information concerning a much more recent remunerative relationship between Judge Schwebel and Claimant's counsel." Respondent's Rebuttal at p. 8. But Respondent is not entitled to all information it may view as "pertinent." It is entitled to information likely to give rise to justifiable doubts.

can do so."[39] One of the LCIA cases on which Respondent relies makes the same point: "***the absence of disclosure or incomplete disclosure [does] not, as such, constitute sufficient grounds for removal.***"[40] That case further explains that "such failures may ***in some cases*** be taken into account in assessing whether there is apparent bias,"[41] but in that case non-disclosure was taken into account because the facts not disclosed showed a pervasive and substantial financial relationship between the arbitrator and a party, as well as the party's counsel, that had existed for the prior five years including the past year. That pervasive financial relationship was the key consideration that drove the result in that case.[42] The contacts between Judge Schwebel and WilmerHale in this case do not come close to suggesting that Judge Schwebel is dependent on WilmerHale, and thus the non-disclosure of these contacts in no way supports Respondent's challenge of Judge Schwebel.

* * * * * *

Judge Schwebel is a highly respected jurist whose long career has been above reproach. Respondent in this second challenge has offered no more justification for questioning Judge Schwebel's impartiality than it offered in its first. We respectfully request that the PCA deny Respondent's challenge.

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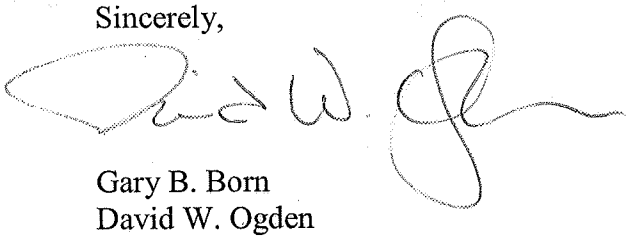
[39] IBA Guidelines, Practical Application of the General Standards, at p. 18 para. 5 (RCL-3). The Guidelines also make clear that the fact of non-disclosure "should not result automatically in either non-appointment, later disqualification or a successful challenge to any award." *Id.*

[40] LCIA Reference No. 81160, Decision Rendered 28 August 2009, in Arbitration International, Special Edition On Arbitration Challenges, Volume 27 Issue 3 (2011), at p. 452 para. 4.16 (CCL-5); *see also* Respondent's Rebuttal at p. 4 n.16.

[41] LCIA Reference No. 81160, Decision Rendered 28 August 2009, in Arbitration International, Special Edition On Arbitration Challenges, Volume 27 Issue 3 (2011), at p. 452 para. 4.16 (CCL-5).

[42] *Id.* at p. 451 para. 4.6 (CCL-5) (the "obvious professional importance to the arbitrator of his relationship with Respondents' Counsel, combined with his barrister/client relationship with one of the Respondents, would reasonably suggest a real possibility of bias.").

Sincerely,



Gary B. Born
David W. Ogden
Rachael D. Kent

cc: Sir Franklin Berman KCMG QC
Judge Stephen M. Schwebel
Judge Bruno Simma
Mr. Martin Doe
Mr. Mark Clodfelter
Ms. Janis Brennan
Ms. Diana Tsutieva
Mr. Ronald Goodman
Mr. Alberto Wray
Mr. Constantinos Salonidis
Dr. Diego Garcia Carrion
Dra. Christel Gaibor
Ab. Diana Terán
Ab. Juan Francisco Martínez