David W. Ogden

+1 202 663 6440(t)
+1 202 663 6363(f)
david.ogden@wilmerhale.com

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Permanent Court of Arbitration
H.E. Hugo Hans Siblesz
Secretary-General Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
E-mail: bureau@pca-cpa.org

Re: Ecuador'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 21 June 2012 challenge of Judge Stephen Schwebel as arbitrator in the above-referenced matter. This is Ecuador's second challenge to Judge Schwebel's service in this case. As with its unsuccessful first challenge, Ecuador's second challenge is without any credible factual or legal basis. We therefore respectfully request that you deny Ecuador's challenge.

Contrary to Ecuador's contention, Judge Schwebel's two prior appointments as arbitrator and two prior retentions as an expert witness by this law firm (Wilmer Cutler Pickering Hale and Dorr LLP or WilmerHale) plainly do not constitute a "protracted and consistent working relationship" that falls "outside of the normal contacts among professionals in the international arbitration arena." None of the appointments was within the past three years, none involved any of the parties to this case, and none bears any relationship to the present matter. Not surprisingly, none of these matters is even disclosable under the IBA Guidelines, much less even the shred of a basis for a challenge to Judge Schwebel's independence and impartiality. That is particularly true given Judge Schwebel's international stature as an arbitrator and expert on matters of public international law, and his frequent service in similar roles pursuant to the appointment of innumerable other law firms.

Background

Judge Schwebel has been appointed as an arbitrator by this firm on only two prior occasions. In the first, which dates back fifteen years to 1997, WilmerHale appointed Judge Schwebel as one of five arbitrators on a tribunal that decided a dispute between Eritrea and Yemen on questions of

territorial sovereignty and maritime boundaries in connection with certain islands in the Red Sea. In the second, which dates back four years to 2008, WilmerHale appointed Judge Schwebel as one of five arbitrators that decided a dispute arising from a 2005 peace agreement between Sudan and the Sudanese People's Liberation Movement. Neither case involved, in any conceivable fashion, either the Claimant MSDIA (or any Merck entity) or Ecuador; neither appointment was within the past three years; neither case was an investor-state arbitration; neither case involved issues similar to those raised in the present arbitration; both cases were matters of public record, well-known to counsel for Ecuador; and both cases involved only service as an independent and impartial arbitrator.

Nor does Judge Schwebel's service as an expert witness in two inter-connected U.S. litigation matters in which WilmerHale was among the various counsel even begin to establish a "protracted and consistent working relationship." Those engagements date back to 2005 and 2008, again more than three years prior to this one. Judge Schwebel was not WilmerHale's co-counsel. He served as an independent expert witness on issues of public international law. In that capacity, his responsibility was to submit his independent and impartial opinions on the questions presented, and because the issues in the two cases were identical to one another he submitted substantively identical legal opinions to the courts there. The issue he addressed in both cases was whether Nicaraguan Special Law 364, which created very unusual substantive and procedural rules in the context of the products liability litigation there at issue, comported with international standards of due process. That issue is not (and could not conceivably be) at issue here.

Argument

Judge Schwebel's public biography reports that he has served as an arbitrator in 63 arbitrations, in addition to serving as a Judge on the International Court of Justice and conducting an active practice as counsel and expert. Of those 63 arbitral appointments, Judge Schwebel has been appointed as an arbitrator by WilmerHale only twice (or 3.17% of his publicly-reported appointments). In addition, he has served as a legal expert in connection with a single legal issue that arose in two connected cases, in which WilmerHale was among the counsel for the party-proponent of his expert opinion.

It is clear, therefore, that Judge Schwebel does not have a "protracted and consistent working relationship" with WilmerHale that goes beyond normal contacts between counsel and arbitrators in the international arbitration community. To the contrary, by the standards of that community, and in particular, in contrast to the multiple, repeat appointments commonly seen in investor-state arbitrations, Judge Schwebel's relationship with WilmerHale has been very limited. Moreover, Judge Schwebel has had and continues to have a substantial and active professional career on the International Court of Justice and elsewhere, as to which there is no suggestion of any relationship or connection with WilmerHale.

Ecuador asserts that Judge Schwebel's removal is independently required by his inclusion of these matters in the joint disclosure submitted by all three arbitrators, instead of at the time of his appointment, and his omission of one of the two inter-connected cases in which he submitted his expert opinion. But Judge Schwebel's disclosures were entirely consistent with—and in fact, far exceeded—his obligations under the UNCITRAL Rules, and in any event, even an untimely disclosure—even a failure to disclose—cannot support a challenge where, as here, the facts that were not disclosed do not likely give rise to justifiable doubts as to the arbitrator's independence or impartiality. Ecuador's arguments regarding disclosure are therefore misplaced.

Specifically, with reference to the timing of Judge Schwebel's disclosure, the Tribunal was not fully constituted until 8 May 2012. All three appointed arbitrators, including Judge Schwebel, elected to make a joint disclosure statement shortly thereafter. In that statement, in addition to Judge Schwebel's disclosures, Judge Simma disclosed for the first time that he had been appointed by Ecuador in a prior investor-state arbitration ***within the past year***. We do not suggest that Judge Simma's disclosure was untimely, or that it gives rise to justifiable doubts as to his independence and impartiality. But Ecuador can hardly maintain that Judge Schwebel's disclosure was untimely if it also maintains that Judge Simma's disclosure was timely. And if Judge Simma's omission, for six months after his appointment, to disclose that he was appointed in another investor-state arbitration by the very same party as in this case, within the past year, does not give rise to justifiable doubts about his impartiality and independence, then *a fortiori*, Judge Schwebel's disclosures at the same time of these appointments more remote in time in cases involving different parties also cannot give rise to justifiable doubts.

Similarly, with reference to the second of the two inter-connected appointments as an expert witness, this engagement was substantively identical to the first, involved four different parties and four law firms, and was a matter of public record. This obviously inadvertent omission can hardly give rise to justifiable doubts.

The relevant issues in Ecuador's challenge application are straightforward, turn largely on the facts, and leave no doubt that Ecuador's challenge should be rejected. Indeed, as Ecuador's inconsistent positions with regard to Judge Schwebel and Judge Simma illustrate, its challenge is in reality nothing more than another questionable effort to obstruct these proceedings and obstruct objective consideration of the lawfulness of the actions of the Ecuadorean courts. The legal arguments and authorities raised by Ecuador add little to its challenge and are also addressed below.

A. Judge Schwebel's Past Service as an Arbitrator and Expert Witness in Matters Where WilmerHale Represented a Party Do Not Give Rise to Justifiable Doubts About His Impartiality or Independence

Under Article 10(1) of the UNCITRAL Rules, an "arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." This is an objective criterion: whether circumstances "give rise to justifiable doubts as to the arbitrator's impartiality or independence" is evaluated from the perspective of a reasonable third party.[1] WilmerHale's prior appointments of Judge Schwebel as arbitrator and expert witness cannot objectively give rise to justifiable doubts about his impartiality or independence.

1. Judge Schwebel's Appointments as Arbitrator

As set forth in the Tribunal's Joint Disclosure Statement, WilmerHale twice nominated Judge Schwebel as an arbitrator prior to nominating him in this case.[2] The first such appointment was in the *Red Sea Islands Arbitration, Eritrea/Yemen* in 1997—***fifteen years*** before Ecuador submitted the present challenge—and the second was in the *Abyei Arbitration, Sudan/Sudan People's Liberation Movement* in 2008, approximately four years ago.[3] Both appointments were matters of public record and widely publicized in the international law community;[4] there can be no serious question that Ecuador's counsel have been fully aware of these matters since the time of Judge Schwebel's nomination in this case.

In format, and especially in content, these arbitrations were very different than commercial or investment treaty arbitrations. Nor were they even remotely connected to the parties or issues in this arbitration. Instead, these two arbitrations were state-to-state territorial and boundary disputes governed by public international law. The tribunal in each case was comprised of five members, a chairman and two arbitrators nominated by each side. Given his long tenure at the

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[1] At one point Ecuador suggests that "[w]hat matters is the challenging party's point of view." *See* Respondent Ecuador's Request for Determination of Challenge of Judge Stephen Schwebel as Arbitrator, dated 21 June 2012 ("Respondent's Challenge"), at p. 7. But, as Ecuador admits, the standard under Article 10(1) is that "of a reasonable third party." *Id.* The cases upon which Ecuador relies for the standard make clear that the test under Article 10(1) is objective. *Id.* at pp. 6-7. *See e.g. Country X v. Company Q*, UNCITRAL, Challenge Decision (11 January 1995), at paras. 23-24 ("[U]nder 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.") (RCL-17) (emphasis added).

[2] Joint Disclosure Statement, attached to email from Sir. Franklin Berman to the Parties (22 May 2012) (RCE-4).

[3] *See id.*

[4] *See* Biography of Judge Stephen M. Schwebel, available at http://www.londonarbitrators.net/cvs/sschw.pdf (last visited 25 June 2012) (Claimant's Challenge Exhibit ("CCE") 1); Terms of Appointment, *The Government of Sudan v. The Sudan People's Liberation Movement/Army* (24 November 2008), at para. 3.4, available at http://www.pca-cpa.org/showpage.asp?pag_id=1306 (CCE-2); Award of the Arbitral Tribunal In The First Stage Of The Proceedings, *The Government of the State of Eritrea v. The Government of the Republic of Yemen* (9 October 1998), at para. 4, available at http://www.pca-cpa.org/showpage.asp?pag_id=1160 (CCE-3).

International Court of Justice, including his presidency of the Court, Judge Schwebel was uniquely qualified to serve on those two panels.

2. Judge Schwebel's Engagements as Expert Witness

WilmerHale also retained Judge Schwebel as an expert witness in two inter-connected cases adjudicated in United States federal courts. In 2005 and 2008, Judge Schwebel submitted substantively identical expert opinions in related cases in which WilmerHale was counsel to the Shell Oil Company. In the first of those cases, *Shell Oil Company v. Sonia Eduarda Franco Franco* et al. (2005) (hereinafter "*Shell Oil v. Franco*"), Judge Schwebel submitted a legal opinion to the United States District Court for the Central District of California regarding the question whether the provisions of a specific Nicaraguan law comported with international due process.[5] In the second case, Judge Schwebel submitted substantially the same legal opinion on the same question in connection with a parallel matter before the United States District Court for the Southern District of Florida.[6] In that case, *Miguel Angel Sanchez Osorio et al v. Dole Food Company, Inc., et al* (2008) (hereinafter "*Sanchez Osorio v. Dole*"), WilmerHale's client, Shell Oil, was but one of four named defendants, all four of whom jointly retained Judge Schwebel as an expert to submit his opinion,[7] and who divided Judge Schwebel's fees equally four ways.

Judge Schwebel's opinion in the Shell Oil cases involved the question whether a particular Nicaraguan law, Special Law 364, comported with international standards of due process. Nicaragua's Special Law 364 was enacted by Nicaragua's National Assembly in 2000, and it dictated the conduct of lawsuits filed by persons allegedly affected by the use of a particular pesticide. Judge Schwebel's opinion principally provided an analysis of the law itself. As part of that analysis, Judge Schwebel determined that the law did not comport with international standards of due process because, among other things the law (a) required deposits by the named defendants, as a condition to mounting a defense under the law, of more than $20 million; (b) included an "irrefutable presumption" of causation; (c) provided for a large minimum level of liquidated damages; (d) provided for accelerated trials that required the answer be submitted, hearings be held and evidence gathered, and a judgment issued within 14 days of the defendant's receipt of the complaint; and (e) expressly targeted foreign corporations under procedures that departed significantly from otherwise applicable Nicaraguan law.[8]

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[5] Declaration of Stephen M. Schwebel, *Shell Oil v. Franco* (C.D. Cal. March 10, 2005) (CCE-4).

[6] Declaration of Stephen M. Schwebel, *Miguel Angel Sanchez Osorio et al v. Dole Food Company, Inc., et. al.* (S.D. Fla. June 30, 2008) (CCE-5).

[7] *Id.* at p. 1.

[8] *See* Declaration of Stephen M. Schwebel, *Shell Oil v. Franco* (March 10, 2005) at pp. 5-6 (CCE-4).

3. Under All Relevant Standards Judge Schwebel's Prior Connections with WilmerHale Cannot Objectively Give Rise to Justifiable Doubts About His Independence and Impartiality

Ecuador characterizes these matters involving Judge Schwebel and WilmerHale since 1997 as constituting a "protracted and consistent working relationship" that falls "outside of the normal contacts among professionals in the international arbitration arena."[9] There is no support for Ecuador's position.

WilmerHale's appointments of Judge Schwebel as arbitrator fall far short of the circumstances described in the Orange List of the International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") as even possibly giving rise to justifiable doubts as to the arbitrator's impartiality or independence.[10] Prior arbitrator appointments by counsel are included in the Orange List ***only*** when "[t]he arbitrator has ***within the past three years received more than three appointments*** by the same counsel or the same law firm."[11] Here, there are just two prior appointments and neither is within the last three years.

The IBA Guidelines are often looked to by treaty tribunals determining whether justifiable doubts exist as to an arbitrator's fitness to serve. In *Universal Compression Holdings Inc. v. Venezuela*, for example, the chairman of the tribunal dismissed a challenge against a co-arbitrator based on multiple prior appointments, observing that "Section 3.3.7 of the IBA Guidelines' Orange List is not implicated because it envisages … 'more than three appointments by the same counsel'" within the past three years.[12] Judge Schwebel has received ***no*** appointments from WilmerHale in the past three years.

The number of prior appointments of an arbitrator by counsel is considered relevant to whether the arbitrator has "a relationship of dependence [with counsel], which could endanger her

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[9] Respondent's Challenge, at p. 15 (emphasis in original).

[10] As defined by the IBA guidelines, the Orange List comprises "specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence." IBA Guidelines, Practical Application of the General Standards, at p. 18 para. 3 (RCL-3). The circumstances described in the Orange List do not necessarily, but rather ***may***, give rise to justifiable doubt.

[11] IBA Guidelines, Orange List, at p. 23 para. 3.3.7 (RCL-3) (emphasis added).

[12] *Universal Compression International Holdings, S.L.U. v. 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. 86 (RCL-6).

independence or impartiality."[13] Thus, in the case LCIA Reference No. 81160, "[t]he Division stressed that 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."[14] In that case, what proved decisive in disqualifying the arbitrator was the "obvious professional importance to the arbitrator of his relationship with Respondents' Counsel, combined with his barrister/client relationship with one of the Respondents, [which] would reasonably suggest a real possibility of bias."[15]

OPIC Karimum Corp. v. Venezuela demonstrates that even far more arbitral appointments than at issue here—constituting a far higher percentage of all the arbitrator's appointments—do not suffice to disqualify an arbitrator absent a showing that the arbitrator is somehow dependent on a counsel or a party. In *OPIC Karimum Corp.*, Professor Philippe Sands was challenged because of his multiple appointments by Curtis Mallet-Prevost Colt & Mosle LLP ("Curtis Mallet") and Venezuela. The claimant in that case noted that: (i) Professor Sands had been appointed by Curtis Mallet in three of his six then-current treaty arbitrations, (ii) Professor Sands had been appointed by Curtis Mallet or by Venezuela in five of the eight treaty arbitrations he had sat on in the prior three years, and (iii) Professor Sands had sat on only nine treaty arbitrations total. Based on these facts, the claimant argued that Professor Sands could not "be relied upon to exercise independent judgment because he is beholden to the Respondent and the Respondent's law firm for a significant number of his arbitration appointments (and therefore presumably his compensation)."[16]

The two arbitrators reviewing the challenge rejected the claimant's arguments. They determined that the multiple appointments of Professor Sands by Curtis Mallet, despite the significant percentage of all his appointments those represented, did not "reach the level of multiple appointments that would by themselves demonstrate" the lack of independence necessary to

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[13] *Id.* at para. 87. A different Division of the LCIA has similarly noted 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." 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 (Claimants' Challenge Legal Exhibit ("CCL") 6). In that case, as is the case with Judge Schwebel, there was nothing to indicate that the "Co-Arbitrator [has] drawn any significant revenue from a relationship with [counsel]." *Id.*

[14] 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).

[15] *Id.* While the Division also took into account the fact that the arbitrator "had made five disclosures which were, by and large, general, selective and incomplete," the Division clarified that "the absence of disclosure or incomplete disclosure did not, as such, constitute sufficient grounds for removal." *Id.* at p. 452 para. 4.16.

[16] *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. 21 (RCL-4).

sustain a successful challenge.[17] The arbitrators added that they were "unpersuaded by Claimants' submissions regarding the alleged financial dependence of Professor Sands upon either Respondent or Respondent's counsel. It is clear that Professor Sands has extensive independent income sources unrelated to fees derived from his appointments as arbitrator in investment arbitrations."[18]

Ecuador correctly notes that the Working Group responsible for the IBA Guidelines expressed the view that the time limits described in the Orange List should be subject to the circumstances of particular cases.[19] But the circumstances relevant to this case only further magnify the weakness of Ecuador's challenge. Judge Schwebel's public biography reflects that he has been appointed in more than 60 arbitrations, and has served as counsel or an expert in countless other cases.[20] Only two of Judge Schwebel's arbitrations—or barely 3 percent—involved appointments by WilmerHale. Clearly Judge Schwebel does not have a "relationship of dependence" with WilmerHale "which could endanger [his] independence or impartiality."

That Judge Schwebel provided expert witness opinions in the Shell Oil cases does not bolster Ecuador's argument. In those cases, Judge Schwebel was retained to provide testimony to the court as an expert in international standards of due process. He was not acting as counsel or an arbitrator, but as an independent witness, with duties of honesty and integrity to the courts.[21] Moreover, like the two arbitral appointments, neither of these engagements of Judge Schwebel occurred within the past three years. Judge Schwebel has long been among the most sought-after and oft-appointed arbitrators and experts in public international law. It is not credible to allege that the past retention of Judge Schwebel to provide an expert witness opinion in two related matters on a single legal issue would affect his impartiality or independence in this case today.

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[17] *Id.* at para. 53.

[18] *Id.* at para. 55.

[19] Respondent's Challenge, at p. 16 (citing to the Working Group for the proposition that "the three-year period in Orange List 3.1 may be too long in certain circumstances and too short in others.").

[20] Biography of Judge Stephen M. Schwebel, available at http://www.londonarbitrators.net/cvs/sschw.pdf (last visited 25 June 2012) (CCE-1) (listing, among other things, 63 cases in which Judge Schwebel has served as arbitrator).

[21] In the case LCIA Reference No. 97/X27, a Division of the LCIA rejected the contention that an arbitrator's having several years earlier served as an expert witness for a third party at the instruction of one of the counsel in the case raised justifiable doubts about the arbitrator's impartiality or independence. The Division noted that "the relationship between an arbitrator as expert witness and solicitors for the party on whose behalf the expert was acting was less likely to put his independence or impartiality at risk, than the relationship between a barrister and a solicitor on the same side, as the expert's role was to express his own opinion regardless of whether it furthered the client's interests, and even if his services, his having given his opinion, were unlikely to be retained." LCIA Reference No. 97/X27, Decision Rendered 23 October 1997, in Arbitration International, Special Edition On Arbitration Challenges, Volume 27 Issue 3 (2011), at pp. 323-4 para. 4.3 (CCL-4).

Ecuador's related contention that Judge Schwebel's past connections with WilmerHale "establish a pattern of joint efforts by Judge Schwebel and Claimant's counsel that bear a high degree of similarity to the effort of Claimant in this case"[22] is flatly false. First, it is just not true that these matters involved "joint efforts." Judge Schwebel's service as an arbitrator or expert witness involved independent roles that he performed with integrity. Moreover, contrary to Ecuador's contention, Judge Schwebel's expert opinions in the Shell Oil cases did not involve issues that "feature prominently in the instant case."[23] Ecuador does not identify a single "issue" from the Shell Oil cases that features at all in the present matter, but the contention appears to boil down to Ecuador's claim that the Shell Oil cases broadly involved "issues of denial of justice."[24] The issues Judge Schwebel addressed in the Shell Oil cases, however, are not relevant to the present dispute.

Those cases involved the enforceability in the United States, of certain Nicaraguan judgments, and Judge Schwebel's opinion in those cases focused on the question whether an act of the Nicaraguan legislature under which those judgments were rendered comported with due process. The opinion did not involve Ecuador 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. Whether or not the Nicaraguan law in question there was consistent with international due process standards is simply not germane here, and there is for that reason no basis at all for Ecuador's suggestion that Judge Schwebel's opinion in the Shell Oil cases was somehow "favorable … to Claimant in this case."[25]

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[22] Respondent's Challenge, at p. 15.

[23] *See, e.g.*, Respondent's Challenge, at p. 11 (describing Judge Schwebel's expert opinions as "involv[ing] issues of denial of justice … which feature prominently in the instant case").

[24] *See* Respondent's Challenge, at p. 11.

[25] *Id.* at p. 15. Ecuador's attempt to draw a comparison between Judge Schwebel's past service as an expert in cases involving WilmerHale and the facts of *Republic of Ghana v. Telekom Malaysia Berhad* is strained and misleading. In the *Telekom* matter, Professor Gaillard disclosed that while simultaneously serving as a member of the arbitral tribunal, he had been instructed to serve as counsel in a separate action (*RFCC/Morocco*). In the *RFCC/Morocco* case, Professor Gaillard would be seeking the reversal of a prior judgment involving the identical treaty provision at issue in *Telekom*, and on which the petitioner in *Telekom* had relied in its arguments to the *Telekom* tribunal. Professor Gaillard was therefore in a position in which he would be obligated to simultaneously take positions in connection with his role as advocate in the *RFCC/Morocco* matter that were incompatible with his role as neutral arbitrator in *Telekom*. Ecuador misleadingly suggests that Professor Gaillard's advocacy in the *RFCC/Morocco* case was "earlier" than his appointment in *Telekom*, a suggestion undermined by the fact that the remedy in the *Telekom* challenge was to recommend that Professor Gaillard withdraw as counsel in *RFCC/Morocco*. In truth, *Telekom* involved a situation in which an arbitrator was poised to take *simultaneous,* arguably incompatible positions on a single treaty provision in separate proceedings. Here, Judge Schwebel prepared an expert opinion on a particular Nicaraguan law more than five years ago, and is now asked to preside over an arbitration raising entirely different questions arising out of litigation in Ecuador and governed by the U.S.-Ecuador BIT. *Telekom* thus has no bearing on the present case.

In any event, treaty tribunals have uniformly found that prior legal opinions, even on a similar issue, cannot serve as a basis for disqualification. The two arbitrators deciding a challenge to Professor Stern in *Tidewater v. Venezuela*, for example, determined that "there is neither bias [nor] partiality where the arbitrator is called upon to decide circumstances of fact close to those examined previously, but between different parties, and even less so when he is called upon to determine a question of law upon which he has previously made a decision."[26] As the two arbitrators correctly noted, "[i]nvestment and even commercial arbitration would become unworkable if an arbitrator was automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations."[27]

Similarly, in *Urbaser S.A. v. Argentina*, Professor Campbell McLachlan was challenged because he had expressed views regarding "most favored nation" clauses in a previously-published treatise, and the arbitration was to address such a clause in the Argentina-Spanish BIT. The claimant asserted that Professor MacLachlan had "already prejudged an essential element of the conflict that is the object of this arbitration" and could not "issue an opinion contrary to that which he [had] published."[28] The two arbitrators deciding the challenge rejected this argument, concluding that it would be "extremely strange … to accept Claimants' position that a view previously expressed on an item relevant in an arbitral proceeding should be qualified as a prejudgment that demonstrates a lack of independence or impartiality."[29]

Thus, even if Judge Schwebel had previously expressed opinions on issues relevant here, which he did not, that could not serve as a basis for disqualification. Given that there is, in fact, no meaningful connection between the issues on which he expressed opinions in the Shell Oil cases and those at issue here, the challenge on this ground is entirely frivolous.

B. The Timing of Judge Schwebel's Disclosure Cannot Sustain Ecuador's Challenge

Perhaps recognizing that there are no circumstances in this case that give rise to justifiable doubt as to Judge Schwebel's impartiality or independence, Ecuador focuses its fire principally on

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[26] *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, (23 December 2010), at para. 67 (internal quotation and citation omitted) (CCL-7).

[27] *Id.* at para. 68 (internal quotation and citation omitted).

[28] *Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26, On Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator (12 August 2010), at paras. 23, 41 (CCL-8).

[29] *Id.* at para. 48. The arbitrators' decision is in line with 4.1.1 of the IBA Guidelines' Green List, which includes: "The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated)." Thus, this is a situation that, according to the IBA Guidelines, does not give rise to justifiable doubts about an arbitrator's independence or impartiality. IBA Guidelines, Explanation to General Standard 3, at p. 10 (RCL-3).

Judge Schwebel's allegedly deficient disclosure, arguing that this in and of itself justifies Ecuador's challenge. This contention too is incorrect. An arbitrator's duty to disclose under the UNCITRAL Rules is closely tied to the standard of Article 10(1). Under Article 9 of the Rules, an arbitrator is obligated to disclose only "circumstances ***likely*** to give rise to justifiable doubts as to his impartiality or independence."[30] The circumstances in this case plainly did not meet this test, and Judge Schwebel had no duty to disclose any of them.[31]

Moreover, a "failure to disclose is not itself a ground for challenge in addition to those set forth expressly in Articles 10 and 13" of the UNCITRAL Rules,[32] and therefore "non-disclosure does not per se give rise to justifiable doubts as to arbitrator's impartiality and justify disqualification."[33] As commentators and tribunals have noted, whether an arbitrator's non-disclosure raises doubts regarding his independence depends on various factors including whether "***the facts that were not disclosed raised obvious questions about impartiality and independence.***"[34] The IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"), on which Ecuador purports to rely, are similarly clear, stating that "***non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or***

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[30] The UNCITRAL Arbitration Rules (1976), Art. 9 (emphasis added). This test, like the one of Article 10(1), is an objective one. Thus, it presents a higher threshold for disclosure than the IBA Guidelines which provide a subjective test—whether circumstances "in the eyes of the parties may give rise to justifiable doubts." The test under the IBA Guidelines is unusual since "[a] purely objective test for disclosure exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law." IBA Guidelines, Explanation to General Standard 3, at p. 10 (RCL-3).

[31] *See 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. 26 (RCL-11). As one commentator has observed, "although there can be many relationships between the arbitrator and the parties, the duty to disclose does not require disclosure of *all* circumstances which might support a challenge under Article 10. Rather, the duty extends only to those circumstances which more likely than not would support a challenge." Caron, Caplan & Pellonpää, The UNCITRAL Arbitration Rules 202 (2006) (emphasis in original) (CCL-1).

[32] Caron, Caplan & Pellonpää, The UNCITRAL Arbitration Rules 226 (2006) (CCL-1).

[33] Daele, Challenge and Disqualification of Arbitrators in International Arbitration 434-35 (2012) (CCL-3).

[34] Baker & Davis, The UNCITRAL Arbitration Rules in Practice 50 (1992) (Whether a failure to disclose "give[s] rise to doubts as to an arbitrator's impartiality … depends on whether the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed raised obvious questions about impartiality and independence, and whether the nondisclosure is an aberration on the part of a conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality.") (RCL-31). This articulation of the test with regard to non-disclosure has been followed by subsequent commentators and tribunals. *See e.g.* Daele, Challenge and Disqualification of Arbitrators in International Arbitration 434-35 (2012) (CCL-3); Caron, Caplan & Pellonpää, The UNCITRAL Arbitration Rules 226-227 (2006) (CCL-1); *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, (23 December 2010), at para. 47 (CCL-7); *Suez and others v. Argentina,* ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Tribunal (12 May 2008), at para. 44 (RCL-11).

circumstances that he or she did not disclose can do so."[35] It is therefore axiomatic that the non-disclosure of facts that do not raise genuine questions about impartiality or independence cannot form the basis of a successful challenge.[36]

Ecuador attempts to avoid the plain language of the IBA Guidelines on this issue by turning instead to the IBA Rules on Ethics for International Arbitrators to support its contention that "failure to disclose itself may be fatal to an arbitrator's qualification to serve."[37] But the IBA Rules on Ethics were explicitly superseded by the later IBA Guidelines, which state that "[the] Rules of Ethics for International Arbitrators ... remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here."[38] Ecuador's reliance on the IBA Rules on Ethics is therefore misleading at best.[39]

Even if Ecuador's arguments about the governing legal standard had any merit, which they do not, Judge Schwebel in fact made timely disclosure in the Tribunal's Common Disclosure Statement circulated to the parties on 22 May 2012, which also included disclosures made by the other two members of the Tribunal.[40] The prior appointments at issue were already publically known; before the Common Disclosure Statement was made, Judge Schwebel's two appointments as arbitrator by WilmerHale and his submission of an expert report in one of the

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

[36] The IBA Guidelines recognize that "some situations should never lead to disqualification under the objective test, [and thus] need not be disclosed, regardless of the parties' perspective." IBA Guidelines, Explanation to General Standard 3, at p. 10 (RCL-3).

[37] Respondent's Challenge, at p. 5.

[38] IBA Guidelines, Introduction, at p. 5 para 8 (RCL-3).

[39] Ecuador's reliance on decisions from the French, Finnish and U.S. courts is also unavailing. In the matter of *J&P Avax S.A. v. Société Tecnimohnt SPA*, the courts applied French law and ICC Rules in concluding that the Chairman of the Arbitral Tribunal had failed to disclose a financial relationship between his firm and a party to the arbitration (and its affiliated companies) that ran concurrently with the arbitral proceedings. *S.A. J&P Avax S.A. v. Société Tecnimohnt SPA*, Paris Court of Appeal (12 February 2009) (RCL-24). The Finnish Supreme Court decision upon which Ecuador relies concerned a case in which the chairman of the tribunal did not disclose that, both before *and during* the arbitration, he was engaged to provide expert opinions for entities related to parties in the arbitration for "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 paras. 24-25 (CCL-2). In *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, the U.S. federal courts vacated an arbitral award where an arbitrator failed to satisfy his disclosure obligations as expressly set forth in the Submission Agreement that governed the arbitration and failed to disclose an *ongoing* commercial relationship between his firm and one of the parties. 2006 U.S. Dist. LEXIS 44789, at *27 (S.D.N.Y., June 28, 2006) (RCL-29). In none of these cases was the court applying the standard that governs the present dispute. And in any event, these cases involved the nondisclosure by arbitrators of facts relating to *concurrent* financial interests or relationships between the arbitrator's firm and a party to the arbitration, obviously a far cry from the facts on which Ecuador rests the present challenge.

[40] Joint Disclosure Statement, attached to email from Sir. Franklin Berman to the Parties (22 May 2012) (RCE-4).

two *Shell Oil* matters were easily discoverable matters of public record.[41] Moreover, as the Common Disclosure Statement affirmed, nothing contained therein "affects the impartiality of the Tribunal or any of its Members or their independence of the Parties to this Arbitration."[42]

Insofar as the timeliness of the disclosure is concerned, it is noteworthy that Ecuador's appointed arbitrator here—Judge Simma—disclosed prior relationships with Ecuador in the same Common Disclosure Statement in which Judge Schwebel made his appointment. Although he had been appointed by Ecuador in this arbitration on 30 December 2011, Judge Simma disclosed for the first time that he had been appointed as an arbitrator by Ecuador ***within the past year*** in another investment arbitration. The Claimant does not assert that Judge Simma's recent appointment by Ecuador in another arbitration, nor his disclosure of such appointment six months after his appointment in this arbitration, raises questions about his independence or impartiality.[43] The Claimant does note, however, the inconsistency of Ecuador's argument that Judge Schwebel's disclosure in the Common Disclosure Statement of contacts with counsel more than three years ago constitutes grounds for disqualification when its own appointed arbitrator disclosed a ***concurrent*** appointment by a ***party*** to this arbitration at the very same time—a concurrent appointment undoubtedly fully known to Ecuador and its counsel at the time they named Judge Simma in this case.

Finally, contrary to Ecuador's claim, Judge Schwebel's omission of the second of two functionally identical expert opinions does not call into question Judge Schwebel's impartiality or independence.[44] We expect that the omission was a mere oversight, given that Judge Schwebel's expert opinion in *Shell Oil v. Franco* in 2005—which he fully disclosed—was substantively identical to and addressed precisely the same issues as his expert opinion in *Sanchez Osorio v. Dole* in 2008. As one of the counsel in that matter, we know that very little

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[41] WilmerHale's appointments of Judge Schwebel as arbitrator in the 1997 *Red Sea Island Arbitration, Eritrea/Yemen* and in the 2008 *Abyei Arbitration, Sudan/Sudan People's Liberation Movement* matter are easily ascertainable through even a cursory public search. *See* Terms of Appointment, *The Government of Sudan v. The Sudan People's Liberation Movement/Army* (24 November 2008), available at http://www.pca-cpa.org/showpage.asp?pag_id=1306 (CCE-2); Award of the Arbitral Tribunal In The First Stage Of The Proceedings, *The Government of the State of Eritrea V. The Government of the Republic of Yemen* (9 October 1998), available at http://www.pca-cpa.org/showpage.asp?pag_id=1160 (CCE-3). The United States District Court opinion in *Sanchez Osorio v. Dole*, published on October 20, 2009, cited explicitly to the expert opinion submitted by Judge Schwebel in those proceedings. 665 F. Supp. 2d 1307, 1342, 2009 U.S. Dist. LEXIS 99981, at *99 (S.D. Fl. 2009) (CCE-6) ("According to defense expert Stephen Schwebel, who served as a judge on the International Court in The Hague for 20 years, the unfair, discriminatory nature of Special Law 364 exceeds that of any law of which he is aware."); *see id.* at *4 (listing Wilmer as counsel for Shell Oil).

[42] *Id.*

[43] As noted above, under the IBA Guidelines, prior appointments by a party need only be disclosed when they are two or more in the previous three years. IBA Guidelines, Orange List, at p. 21 para. 3.1.3 (RCL-3).

[44] Respondent's Challenge, at p. 15.

additional work was required of Judge Schwebel in the second case because the opinion had already been prepared in 2005.

C. Conclusion

Ecuador's second challenge of Judge Schwebel, like its first challenge, lacks merit and appears to be little more than a thinly veiled attempt to delay the arbitration and deny the Claimant its right to appoint an arbitrator of its choice in accordance with Article 7 of the UNCITRAL Rules. Ecuador's suggestion that Judge Schwebel's disclosures would have somehow strengthened its first challenge is entirely spurious. None of Judge Schwebel's prior contacts with WilmerHale is even remotely connected to the *Nicaragua v. United States* case in the International Court of Justice twenty-five years ago or Ecuador's argument that Judge Schwebel's comments about that case somehow indicate bias against Ecuador's counsel.

Finally, Ecuador seeks to mask the overall weakness of its current challenge by alleging that not only did "each basis" it articulated raise "justifiable doubts as to the propriety of Judge Schwebel's service as an arbitrator in this case" but that these bases should be considered "in the aggregate" and that "the totality of the facts and circumstances" should lead to Judge Schwebel's disqualification.[45]

This is not a serious argument. Ecuador declines to elaborate meaningfully on its "totality of the circumstances" argument, and fails to provide any authority whatsoever in support of it. And indeed, it makes no sense that a challenge could succeed by aggregating allegations that are themselves of no weight. Past adjudicators have had little trouble dismissing challenges like Ecuador's that cited a variety of factors—including multiple appointments by counsel and non-disclosure of such appointments—allegedly giving rise to justifiable doubts about the arbitrator's independence or impartiality. In none of those cases did an adjudicator, having concluded that none of the individual allegations justified disqualification, nevertheless find that the totality of the allegations was sufficient to sustain the challenge.[46] The same result is warranted here.

For all of the above reasons, we respectfully request that you deny Ecuador's challenge.

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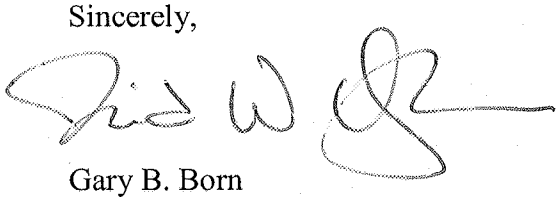
[45] Respondent's Challenge, at p. 19.

[46] *See e.g. Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator, (23 December 2010) (rejecting a challenge based on multiple appointments by party, multiple appointments by counsel, non-disclosure of multiple appointments, and the possibility of deciding on a legal issue related to one already considered) (CCL-7); *OPIC Karimum Corp. v. Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator (5 May 2011) (rejecting a challenge based on multiple appointments by party and multiple appointments by counsel) (RCL-4); *Universal Compression International Holdings, S.L.U. v. 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) (rejecting a challenge based on multiple appointments by party, multiple appointments by counsel, non-disclosure of multiple appointments, and the possibility of deciding on a legal issue related to one already considered) (RCL-6).

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