

March 26, 2012

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Attn: Mr. Brooks W. Daly

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

Dear Sir:

We write in response to Ecuador's letter of March 15, 2012 challenging Judge Schwebel as arbitrator in the above-referenced arbitration.

Judge Schwebel's editorial, discussing the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, decided by the International Court of Justice in 1986, does not relate in any way to the present arbitration, the parties in this arbitration, Ecuador and Merck Sharp & Dohme (I.A.) Corp ("MSDIA"), or any issue that could conceivably arise in this arbitration. As Ecuador itself concedes, "there is no nexus between the subject matter of this case and that of [Judge Schwebel's] Editorial."¹ Nor does the editorial "evidence[] a negative view of Respondent's counsel's representation of a previous client."² Contrary to Ecuador's claim, Judge Schwebel's editorial expresses no view about Mr. Paul Reichler, much less about Mr. Reichler's role or suitability as counsel in this arbitration. And it takes no position—express or implied—on Mr. Reichler's role or conduct in connection with the long-ago *Nicaragua* case. No objective observer could conclude on the basis of the editorial that there exist reasonable doubts about Judge Schwebel's ability to decide the current dispute between MSDIA and Ecuador impartially and independently.

Moreover, Ecuador has manufactured this challenge—a tactic which cannot be permitted to succeed. Ecuador concedes that it retained Mr. Reichler in this case *after* MSDIA appointed Judge Schwebel as an arbitrator.³ And at the time Ecuador selected Mr. Reichler as counsel, the views about the *Nicaragua* case Judge Schwebel articulated in the editorial were well known to Mr. Reichler and were in the public domain, because they are fully reflected in Judge Schwebel's dissent in that case.

¹ Ecuador's Letter to the PCA of March 15, 2012, at page 9.

² *Id.* at page 2.

³ *Id.* at page 13 n.59.

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In short, Ecuador has not asserted a credible basis for challenging Judge Schwebel's appointment to the Tribunal in this arbitration. He is an international jurist of unimpeachable integrity, and nothing in Ecuador's submission casts any doubt on his impartiality. We therefore respectfully request that the PCA deny Ecuador's challenge and resume the process of appointing a presiding arbitrator.

A. Judge Schwebel's Editorial Does Not Give Rise to Justifiable Doubts as to His Impartiality or Independence in This Arbitration

The parties are in agreement as to the applicable standard for arbitrator challenges under the UNCITRAL Rules. Under those Rules, a challenge may be sustained only if "circumstances exist that give rise to *justifiable* doubts as to the arbitrator's impartiality or independence."⁴ This is an objective standard. Doubts are "justifiable" only if they are reasonable to an objective observer.⁵ Impartiality "means that an arbitrator will not favor one party more than the other."⁶

The standard under the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), which are not binding in this arbitration but provide useful guidance, is similar: "Every arbitrator shall be impartial and independent of the parties."⁷ The IBA Guidelines provide that doubts concerning impartiality "are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision."⁸

Nothing in Ecuador's challenge gives rise to justifiable doubts about Judge Schwebel's impartiality or independence. There is nothing to suggest that Judge Schwebel would "favor one party more than the other" or that he "may be influenced by factors other than the merits of the case as presented by the parties." As noted above, Ecuador acknowledges that "there is no nexus" between the subject matter of this arbitration and the issues discussed in Judge

⁴ 1976 UNCITRAL Arbitration Rules, Article 10 (emphasis added).

⁵ *Vito G. Gallo v. Government of Canada*, NAFTA/UNCTIRAL, Decision on the Challenge of Mr. J. Christopher Thomas, QC (October 14, 2009), at para. 19 (Claimant's Challenge Legal Authority ("CCL") 1); *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (12 May 2008), at para. 22 (CCL-2); *National Grid PLC v. Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler (December 3, 2007) at para. 87 (Respondent's Challenge Legal Authority ("RCL") 2); *Country X v. Company Q*, Challenge Decision of January 11, 1995, *XXII Yearbook Commercial Arbitration* 227, 234 (1997) (RCL-1).

⁶ Caron, Caplan & Pellonpää, THE UNCITRAL ARBITRATION RULES, at p. 215 (CCL-3). See also *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (March 19, 2010), at paras. 35-36 (RCL-11).

⁷ IBA Guidelines, General Standards (1) (RCL-3).

⁸ IBA Guidelines, General Standards (2)(c) (RCL-3).

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Schwebel's editorial.⁹ Nor does Ecuador suggest that Judge Schwebel is biased in any way against Ecuador or in favor of MSDIA.

Ecuador's challenge rests entirely on the allegation that Judge Schwebel's editorial implicitly conveys a negative view of *Mr. Reichler*, one of the nine lawyers now identified as Ecuador's counsel in this arbitration.¹⁰ Even as to this one lawyer, Ecuador concedes that Judge Schwebel's editorial does not make any explicit criticism. As Ecuador must accept, the only reference in Judge Schwebel's editorial to Mr. Reichler is a footnote citation to an article authored by Mr. Reichler. And Judge Schwebel says nothing whatever about the performance, beliefs or qualifications of counsel in the *Nicaragua* case.

In the first paragraph of his editorial, Judge Schwebel notes that a "public discussion to mark the twenty-fifth anniversary" of the *Nicaragua v. United States of America* case "took place in The Hague on June 27, 2011."¹¹ He then states that the conference "was arranged with the participation of individuals involved in the formulation and presentation of Nicaragua's case."¹² In the footnote accompanying that sentence, Judge Schwebel cites a 2001 article authored by Mr. Reichler, in which Mr. Reichler described the roles of various members of Nicaragua's legal team in proposing, developing, and arguing Nicaragua's case. These two sentences and the accompanying footnote are entirely factual, entirely true, and entirely devoid of any criticism, express or implied, of Mr. Reichler.

The balance of Judge Schwebel's editorial also is devoid of criticism of Nicaragua's legal team or Mr. Reichler. Rather, Judge Schwebel's editorial discusses the witness evidence given by key Nicaraguan government officials in the *Nicaragua* case. Judge Schwebel asserts that there was "a fraud on the Court" because Nicaragua's Foreign Minister made false statements in an affidavit. Judge Schwebel had expressed the same view in his dissent in that case twenty-five years earlier, in which he devoted fifty pages to a detailed discussion of the evidence and concluded that the evidence of the Nicaraguan Foreign Minister was "untrue [and] demonstrably false."¹³

⁹ Ecuador's Letter to the PCA of March 15, 2012, at page 9.

¹⁰ *Id.* at page 2.

¹¹ Stephen M. Schwebel, Editorial Comment, *Celebrating a Fraud on the Court*, 106 (1) AM. J. INT'L L. 102 (2012) (Respondent's Challenge Exhibit ("RCE") 3).

¹² *Id.*

¹³ *Nicaragua v. United States of America*, Dissent of Judge Schwebel, 27 June 1986, at para. 25 (RCE-9).

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Neither Judge Schwebel's 1986 dissent nor his recent editorial suggest or imply that anyone on Nicaragua's legal team was involved in any fraudulent or unethical conduct.¹⁴ As Judge Schwebel confirmed in his letter to the parties dated 29 February 2012:

My editorial in the January 2012 issue of the American Journal of International Law does not concern the case between Merck and the Republic of Ecuador. It rather addresses the character of the affidavit submitted by the then Foreign Minister of Nicaragua to the International Court of Justice in the case of Military and Paramilitary Activities in and against Nicaragua. Nothing in my editorial refers to any action or knowledge of Mr. Paul S. Reichler bearing on the contents of the affidavit of the Foreign Minister.¹⁵

Ecuador acknowledges, as it must, that Judge Schwebel's editorial contains no "frontal" criticism of Mr. Reichler. Ecuador argues, however, that Judge Schwebel's editorial "insinuate[s] that Respondent's counsel was directly or indirectly associated with a fraud on the ICJ, through his role as a leading force behind the case in which it was supposedly perpetrated."¹⁶ This is a non sequitur. Simply because Judge Schwebel believes that the Nicaraguan Foreign Minister submitted false testimony does not "insinuate" that Nicaragua's counsel was "directly or indirectly associated with the fraud on the ICJ." Judges and arbitrators understand that witnesses who testify falsely are responsible for their misconduct and that lawyers are not guarantors of the truthfulness of testimony nor typically responsible for any untruths.

Ecuador suggests that Judge Schwebel's citation of Mr. Reichler's 2001 article "single[s] out" Mr. Reichler and therefore "suggest[s] a connection ... of some sort" between Mr. Reichler and the Foreign Minister's affidavit.¹⁷ This again does not follow. On its face, Judge Schwebel's citation of Mr. Reichler's article does not "single out" Mr. Reichler for any purpose; it merely relies upon it as a source reflecting the identities and roles of the members of Nicaragua's legal team. Nor was Mr. Reichler the only member of Nicaragua's legal team who participated in the conference. Mr. Alain Pellet, who is identified in Mr. Reichler's article, also spoke at the Hague conference and was a member of Nicaragua's legal team.¹⁸ Judge Schwebel's reliance on Mr. Reichler's article in no way indicates any personal view on the part of Judge Schwebel about the members of that team or specifically about Mr. Reichler.

¹⁴ To the contrary, Judge Schwebel discusses revelations from 1993—seven years after the decision of the ICJ in *Nicaragua v. United States*—as evidence that the affidavit of the Foreign Minister was false. Schwebel, *supra* note 11, at 102 (RCE-3). See also Letter from Ecuador to MSDIA, dated February 23, 2012, (noting that Judge Schwebel claimed "that facts emerging after the issuance of the ICJ's judgment 'proved that the affidavit of the Nicaraguan foreign minister [submitted in the case] was false.'") (RCE-4).

¹⁵ Judge Schwebel's Letter to Ecuador of February 29, 2012 (RCE-5).

¹⁶ Ecuador's Letter to the PCA of March 15, 2012, at page. 5.

¹⁷ *Id.* at pages 6-7.

¹⁸ 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, 27 (2001) (RCE-8).

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Ecuador asserts that Judge Schwebel's editorial implicitly criticizes the organizers and participants in the Hague conference marking the anniversary of the Nicaragua case and therefore raises justifiable doubts about Judge Schwebel's impartiality to decide a case involving Mr. Reichler or his law firm, who were among the organizers of that event.¹⁹ Judge Schwebel's editorial contains no such criticism. Judge Schwebel simply notes that the conference occurred and that the mood of the conference was "celebratory." This is in no way "denigrating," as Ecuador suggests. It is simply a matter of fact. A blog posted on the Peace Palace Library website reported on the event as follows:

In 1986, the International Court of Justice issued its judgment on the merits in a dispute between Nicaragua and the United States of America. It was one of the most notorious and influential judgments the Court has ever issued. Twenty-five years later, on a very sunny and hot day in The Hague, members of the legal teams of both Nicaragua and the United States faced each other once again in the Peace Palace, to *celebrate* the 25th anniversary of this landmark decision, and to assess its lasting impact on international law.²⁰

Judge Schwebel's similar description is unexceptional and entirely reasonable.

Moreover, as Ecuador acknowledges, the conference was sponsored by four organizations—The Grotius Centre of the Leiden Law School, the Centre on International Courts and Tribunals at University College London, the Netherlands Society of International Law, and the law firm of Foley Hoag LLP. Judge Schwebel's editorial in no way denigrates or criticizes any of these institutions. Indeed, Mr. Reichler was not affiliated with Foley Hoag in 1986, and so far as counsel for MSDIA are aware, that firm played no role whatsoever in *Nicaragua v. United States*. The Hague conference also included a number of prominent international lawyers as speakers, in addition to Mr. Reichler, and Judge Schwebel's editorial cannot be read as criticizing or denigrating any of those individuals.

Finally, Ecuador makes the claim that "The Arbitrariness of Judge Schwebel's Conclusions Corroborates His Bias Towards Respondent's Counsel."²¹ The notion is that Judge Schwebel's claims about the falsity of Nicaragua's witness testimony are so plainly wrong that he obviously must be biased against Nicaragua's (and therefore Ecuador's) counsel.

But the testimony in question was indisputably false in precisely the way Judge Schwebel says. In his editorial, and in his dissent, Judge Schwebel pointed to the affidavit of Nicaragua's

¹⁹ Ecuador's Letter to the PCA of March 15, 2012, at page 8.

²⁰ "Conference about ICJ's judgment in the case between Nicaragua and the USA," Peace Palace Library Blog (June 28, 2011), available at <http://peacepalacelibrary-weekly.blogspot.com/2011/06/conference-about-icjs-judgment-in-case.html> (last visited February 29, 2012) (emphasis added) (Claimant's Challenge Exhibit ("CCB") 1).

²¹ Ecuador's Letter to the PCA of March 15, 2012, at pages 10-13.

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Foreign Minister. That affidavit averred 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 engaged*, in the provision of arms or other supplies to either of the factions engaged in the civil war in El Salvador.”²² In this challenge to Judge Schwebel, Ecuador now claims that “other evidence confirmed [the] veracity” of the Foreign Minister’s claim, that the ICJ’s reasoning reaching the conclusion that there was no evidence that the Nicaraguan government had been involved in arms trafficking was “compelling,” and that Judge Schwebel’s arguments that the affidavit was false and the ICJ’s opinion wrong are therefore “obviously disconnected from evidence.”²³

It is puzzling, to say the least, that Mr. Reichler’s co-counsel has made such an argument. In the very article attached to the challenge, RCE-8, Mr. Reichler repeatedly stated that in the period prior to President Reagan’s inauguration in January 1981 the Nicaraguan government in fact supplied arms and war materials to the Salvadoran rebels. For example, Mr. Reichler stated in his article that “[t]he Sandinistas . . . felt it impossible to abandon [their Salvadoran counterparts], *and supplied them with the war materials they required* (which the Sandinistas received from Cuba).”²⁴ In fact, Mr. Reichler states in that article that “*the Sandinistas were caught red-handed trafficking arms to the Salvadoran rebels.*”²⁵ Mr. Reichler’s article is replete with similar statements. Those statements obviously cannot be squared with the Nicaraguan Foreign Minister’s affidavit, and thus the falsity of that affidavit should be common ground here. Ecuador’s defense of the affidavit in the face of Mr. Reichler’s article, far from “corroborating” Ecuador’s claims that Judge Schwebel is biased, only corroborates the speciousness of and lack of factual basis for this challenge.

Moreover, Mr. Reichler’s 2001 article also demolishes the other principal factual assertion Ecuador advances in its effort to impugn Judge Schwebel’s impartiality. Attacking Judge Schwebel’s editorial on a second (though related) ground, Ecuador argues that Judge Schwebel’s editorial misleadingly characterized the testimony of “CIA witness” MacMichael to the effect “that at least in late 1980 or early 1981 the Nicaraguan Government was involved in the supply of arms to the Salvadoran insurgency.”²⁶ Ecuador claims in its challenge that this testimony “was not ‘fact’ but his ‘opinion,’” and that Judge Schwebel’s presentation of it as “fact” somehow reveals his bias against Mr. Reichler.²⁷ But the truth is that Mr. Reichler himself, again in his 2001 article, characterized MacMichael’s testimony in precisely the same way Judge Schwebel does: “At one point,” Mr. Reichler wrote, “Schwebel got MacMichael to volunteer

²² Schwebel, *supra* note 11, at 103 (RCE-3) (quoting *Nicaragua v. United States*, Judgment of 27 June 1986, at para. 147).

²³ Ecuador’s Letter to the PCA of March 15, 2012, at page 13.

²⁴ Reichler, *supra* note 18, at 18-19 (emphasis added) (RCE-8).

²⁵ *Id.* at 19 (emphasis added) (RCE-8).

²⁶ Ecuador’s Letter to the PCA of March 15, 2012, at pages 11-12.

²⁷ *Id.* at page 12.

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that the Sandinistas had supplied arms to the FMLN prior to the January 1981 ‘final offensive.’”²⁸ Mr. Reichler’s co-counsel cannot now claim that Judge Schwebel misrepresented this testimony or that his description, indistinguishable from Mr. Reichler’s own, somehow demonstrates bias against Mr. Reichler.

In the end, one can only conclude that Judge Schwebel has been careful and judicious in his description of the events at issue in the *Nicaragua* case, and that it is Ecuador’s attack on his impartiality that (to put it kindly) is “disconnected from evidence.” Indeed, Ecuador’s attack is “disconnected” from Mr. Reichler’s own prior public pronouncements about these matters. Accordingly, this challenge must be rejected.

B. The Authorities Ecuador Relies on Do Not Support a Finding that There Are Justifiable Doubts Regarding Judge Schwebel’s Impartiality

Ecuador has not identified any legal support for its contention that there are justifiable doubts as to Judge Schwebel’s impartiality. Ecuador relies on two cases, *Perenco Ecuador Ltd. v. Republic of Ecuador* and *Canfor Corporation v. United States*, in support of the general proposition that “comments made publicly by an arbitrator (such as in a speech or article) and not intended by the arbitrator to have bearing on the proceedings in issue may give rise to a valid challenge based on partiality.”²⁹ While this general proposition is uncontroversial, it does not lend support to Ecuador’s position.

In both *Perenco* and *Canfor*, the challenged arbitrator was found to have (i) made critical comments about one of the *parties* in the arbitration and (ii) *arguably prejudged the merits of the arbitration*. In both cases, the public comments of the challenged arbitrator therefore were held to raise justifiable doubts as to whether the arbitrator would “favor one party more than the other” or “may be influenced by factors other than the merits of the case as presented by the parties.”

In *Perenco*, the challenged arbitrator had given an interview while the arbitration was ongoing, in which he referred to the respondent state, Ecuador, as “recalcitrant” and arguably implied that it had expropriated foreign investments, which was an issue yet to be decided with respect to the claimant’s investment in the pending arbitration.³⁰ In *Canfor*, the challenged arbitrator gave a

²⁸ Reichler, *supra* note 18, at 41 (RCE-8).

²⁹ Ecuador’s Letter to the PCA of March 15, 2012, at page 5 (citing *Perenco Ecuador Ltd. v. Republic of Ecuador* and *Canfor Corporation v. United States*).

³⁰ The arbitrator’s statements in *Perenco* were:

“Editor: Tell us what you see as the most pressing issues in international arbitration.

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speech prior to the arbitration, in which he referred to U.S. actions regarding softwood lumber—actions that were later directly at issue in the arbitration—as “harassment” and arguably implied that they were wrongful.³¹ In both cases, the public comments at issue therefore concerned both the specific parties and specific issues that were before the Tribunal in the pending arbitration.

In contrast, as Ecuador itself concedes, Judge Schwebel’s editorial makes no comments whatsoever about the parties or about any issue that could conceivably arise in this arbitration. Nothing in the editorial can be read as giving rise to justifiable doubts as to whether he might “favor one party more than the other” or “may be influenced by factors other than the merits of the case as presented by the parties.”

Ecuador cites five other challenge decisions in its letter, none of which supports its position. It is notable that in four of those five decisions, the challenge to the arbitrator was rejected.³² In the only other case in which the challenge was upheld, *ICS Inspection & Control Services v. Republic of Argentina*, the challenged arbitrator was simultaneously serving as counsel in an ICSID case against the same state respondent, which led the appointing authority to conclude that there were justifiable doubts as to whether he would favor the claimant over that state respondent.³³ Those facts are a far cry indeed from the facts here.

Brower: There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don’t make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.” *Perenco Ecuador Ltd. v. Republic of Ecuador*, PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator Brower (Dec. 8, 2009), at para. 27 (RCL-4).

³¹ The arbitrator’s statements in *Canfor* were: “Aside from agricultural subsidies, there are other issues that we have with the US. Take the softwood lumber dispute, for example. This will be the fourth time we have been challenged. We have won every single challenge on softwood lumber, and yet they continue to challenge us with respect to those issues. Because they know the harassment is just as bad as the process.” Quoted in Barton Legum, *Investor-State Arbitrator Disqualified for Pre-Appointment Statements on Challenged Measures*, *Arbitration International*, (Kluwer Law International 2005 Volume 21 Issue 2) pp. 241–245 (CCL-4).

³² *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands (May 5, 2011) (arbitrator’s repeat appointments by same counsel and party were insufficient to sustain a challenge) (RCL-9); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (March 19, 2010) (arbitrator and counsel having studied together at university could not sustain a challenge) (RCL-11); *National Grid PLC v. Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler (December 3, 2007) (arbitrator’s statement at a hearing that the facts showed “major harm or major change in the expectations of the investment” was insufficient to show that he had prejudged the case) (RCL-2); *Country X v. Company Q*, Challenge Decision of January 11, 1995, *XXII Yearbook Commercial Arbitration* 227, 234 (1997) (arbitrator’s prior service as counsel in the ministry of a country with historically hostile relations to the claimant country did not give rise to justifiable doubts about the arbitrator himself being hostile to the claimant) (RCL-1).

³³ *ICS Inspection & Control Services. Ltd. v. Republic of Argentina*, UNCITRAL, Decision on Challenge to Arbitrator (Dec. 17, 2009) (RCL-6).

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Ecuador also relies on the IBA Guidelines on Conflicts of Interest in International Arbitration. The Guidelines include on their “Orange List” of situations an arbitrator should ordinarily disclose that “[a] close personal friendship exists between an arbitrator and a counsel of one party.” Ecuador argues that “*a fortiori*, publicly expressed ill will on the part of an arbitrator towards the counsel of a party will give rise even more clearly to justifiable doubts as to the arbitrator’s impartiality.”³⁴

But as set out above, Judge Schwebel has *not* publicly expressed “ill will” towards Mr. Reichler or other counsel for Ecuador. That claim is a construct of Ecuador’s own, and cannot give rise to removal here.³⁵

Moreover, Ecuador fails to note that the IBA Guidelines do not include disagreements (as distinguished from close personal friendships) on the Orange List. Nothing in the IBA Guidelines suggests that disagreements, including robust and strongly held disagreements, between counsel and an arbitrator are grounds for challenging an arbitrator’s independence or impartiality. Again, Ecuador’s challenge is entirely a construct of its own making.

C. The Subsequent Appointment of Mr. Reichler Cannot Create a Conflict for the Prior-Appointed Judge Schwebel Because the Circumstances of the Alleged Conflict Were Known When Mr. Reichler Was Instructed

Ecuador suggests that the grounds on which its challenge is based first arose in February 2012, when it learned of Judge Schwebel’s editorial. The position Judge Schwebel took in his editorial, however, adds nothing of relevance here to his published dissent in the *Nicaragua* case twenty-five years earlier. Ecuador and its counsel were necessarily on notice of Judge Schwebel’s views of that case at the time they appointed Mr. Reichler as counsel, and thus cannot subsequently complain that those views give rise to a conflict that disqualifies him in this case.

In his dissent in the *Nicaragua* case, Judge Schwebel directly called into question the truthfulness of the testimony offered by Nicaragua’s Foreign Minister. An entire section of his dissent was titled: “Before this Court, Representatives of Nicaragua Have Falsely Maintained that the Nicaraguan Government Has ‘Never’ Supplied Arms or Other Material Assistance to

³⁴ Ecuador’s Letter to the PCA of March 15, 2012, at page 9.

³⁵ Moreover, even if he had done so, and even if the expression of “ill will” were on the Orange List, the IBA Guidelines clarify that the existence of circumstances listed on the Orange List does not necessarily give rise to justifiable doubts about an arbitrator’s impartiality or independence and “should not automatically result in disqualification” of an arbitrator. IBA Guidelines, Practical Application of General Standards (4). Rather, circumstances included on the Orange List are those that parties “may wish to explore further in order to determine whether objectively—i.e., from a reasonable third person’s point of view having knowledge of the relevant facts—there is a justifiable doubt as to the arbitrator’s impartiality or independence.” IBA Guidelines, Practical Application of General Standards (4). As set out above, an objective view of the facts does not give rise to justifiable doubts about Judge Schwebel’s impartiality in this arbitration.

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Insurgents in El Salvador.”³⁶ Judge Schwebel concluded that Nicaragua’s Foreign Minister’s statement that Nicaragua had “never supplied arms . . . to insurgents in El Salvador” was “untrue [and] demonstrably false.”³⁷ Judge Schwebel also opined that the ICJ had lent “its good name to Nicaragua’s misrepresentation of the facts.”³⁸ Like his editorial, Judge Schwebel’s dissent did not criticize the conduct of Nicaragua’s counsel. His point was that Nicaragua’s *witness* had deceived the tribunal.

Thus, Ecuador and its counsel were plainly on notice of Judge Schwebel’s views at the time Ecuador instructed Mr. Reichler as its counsel.³⁹ Specifically, it is clear that Ecuador retained Mr. Reichler to represent it in this case *after* MSDIA appointed Judge Schwebel as its arbitrator in its Notice of Arbitration, and that at the time Ecuador selected Mr. Reichler to serve as counsel in this matter, Judge Schwebel’s views about *Nicaragua v. United States* had long been public and known to Mr. Reichler because Judge Schwebel had made them clear in his dissent in that case twenty-five years ago.

It is also significant that while the power of attorney Ecuador presented to the PCA on February 9, 2012 lists seven lawyers as Ecuador’s counsel, Mr. Reichler is not among them. Ecuador did not identify Mr. Reichler to the PCA as counsel in this arbitration until February 16, 2012, the day *after* it became aware of Judge Schwebel’s editorial.⁴⁰

It was of course Ecuador’s prerogative to instruct Mr. Reichler to represent it in this arbitration, knowing of Judge Schwebel’s appointment to the Tribunal and the views Judge Schwebel clearly articulated in dissent in *Nicaragua v. United States* in 1986. But if Ecuador harbored genuine concerns about Judge Schwebel’s views of Mr. Reichler’s role in that case, those concerns could have been fully addressed from the outset, and can be fully addressed now, by Ecuador relying on the seven lawyers it has identified in its Power of Attorney to represent it in this arbitration (none of whom is Mr. Reichler).

Ecuador argues that its right to representation by counsel of its choosing is “inalienable” and is expressly guaranteed under Article 4 of the UNCITRAL Rules. Of course, MSDIA’s right to appoint an arbitrator of its choosing is at least equally fundamental and is also expressly

³⁶ *Nicaragua v. United States of America*, Dissent of Judge Schwebel, 27 June 1986, Heading G (RCE-9).

³⁷ *Id.* at paras. 24-25 (RCE-9).

³⁸ *Id.* at para. 16 (RCE-9).

³⁹ And if Ecuador was not on notice, Mr. Reichler was and—if he thought those views significant—presumably disclosed the circumstances to his client.

⁴⁰ Ecuador asserts that any doubts about its decision to have Mr. Reichler represent it in this arbitration “cannot be taken seriously,” in light of Mr. Reichler’s participation in various communications between the parties and the co-arbitrators beginning on January 9, 2012. But Mr. Reichler’s role in those early and informal communications on behalf of Ecuador only makes Ecuador’s decision to leave him unnamed on its February 9, 2012 Power of Attorney more conspicuous. Plainly, on February 9, Ecuador did not view Mr. Reichler as sufficiently central to its team going forward to grant him a power of attorney. Ecuador identified him to the PCA only after publication of the editorial, apparently as a step toward filing this challenge.

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guaranteed under the UNCITRAL Rules, at Article 7. Ecuador cannot rely on its rights under Article 4 of the UNCITRAL Rules to manufacture a conflict that would deprive MSDIA of its rights under Article 7. In this case, where Ecuador designated seven attorneys as counsel in its Power of Attorney, it cannot be allowed to instruct Mr. Reichler as an eighth lawyer in this case, and on that basis allege that Judge Schwebel—an experienced international jurist of the highest stature and reputation who had already been appointed as an arbitrator in this case—must step down based on unsubstantiated assertions that he has a negative view of Mr. Reichler. Such a result would badly undermine the functioning of the international arbitration system.

D. Judge Schwebel’s Non-Disclosure of his Editorial Does Not Give Rise to Justifiable Doubts Regarding His Impartiality

Finally, Ecuador argues that the fact that Judge Schwebel did not disclose his editorial or “his personal views towards Respondent’s counsel” independently gives rise to justifiable doubts as to his impartiality. This argument has no merit.

As discussed above, Judge Schwebel’s editorial has nothing to do with the parties or issues involved in the present arbitration. Nor does his editorial reflect any “personal views towards Respondent’s counsel.” In short, there was nothing in his editorial that could possibly give rise to justifiable doubts regarding Judge Schwebel’s impartiality, and therefore there was nothing to disclose. It is obvious that no implications can be drawn by the failure to disclose something which one had no duty to disclose.

This is confirmed by relevant legal authorities setting out the factors to be considered when determining whether an arbitrator’s failure to disclose gives rise to justifiable doubts about the arbitrator’s impartiality:

[W]hether 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 the conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality. This balancing is for the deciding authority...in each particular case.⁴¹

The facts that were allegedly not disclosed here—i.e., that Judge Schwebel had authored an editorial discussing a different case, involving different parties, decided by a different tribunal twenty-five years ago—do not raise “obvious questions” about Judge Schwebel’s impartiality.

⁴¹ S. Baker, M Davis, *THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1992) 50 (CCL-5); Caron, *THE UNCITRAL ARBITRATION RULES*, at p. 226-227 (quoting Baker) (CCL-3); *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal (May, 12 2008), at para. 22 (quoting Baker) (CCL-2).

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There is therefore no reason that Judge Schwebel's non-disclosure of those facts could possibly give rise to justifiable doubts about his impartiality.

The IBA Guidelines, on which Ecuador relies, also confirm that non-disclosure "should not result automatically in either non-appointment, later disqualification or a successful challenge to any award." "In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so."⁴²

E. Conclusion

In short, Ecuador's challenge of Judge Schwebel's appointment has no merit. Judge Schwebel's integrity and impartiality are unimpeachable, and Ecuador has not asserted a credible basis for challenging his service in this arbitration. We therefore respectfully request that Ecuador's challenge be denied and that the PCA resume the process of appointing the presiding arbitrator.

Respectfully submitted,



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⁴² IBA Guidelines, Practical Application of General Standards (5).