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January 11, 2012

Permanent Court of Arbitration
Mr. Brooks W. Daly
Acting Secretary-General
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
E-mail: bureau@pca-cpa.org

BY COURIER AND EMAIL

Re: Response to Challenge of Prof. Brigitte Stern in *Murphy Exploration & Production Company – International v. Republic of Ecuador,* UNCITRAL Arbitration Pursuant to the Ecuador-United States BIT

Dear Mr. Daly:

We thank you for this opportunity provided in Mr. Martin Doe's letter to the parties of December 22, 2011, to set out the comprehensive disagreement of Respondent, Republic of Ecuador, with the premises and reasoning underlying Claimant's December 16, 2011 request that the PCA decide its challenge of Professor Brigitte Stern, the co-arbitrator appointed by the Republic in the above-referenced UNCITRAL arbitration. Because the grounds articulated by Claimant do not give rise to justifiable doubts as to Professor Stern's impartiality and independence within the meaning of Article 10 of the UNCITRAL Arbitration Rules, the challenge should be rejected as unmeritorious.[1]

1. Professor Stern Accepted Her Appointment in a Timely Manner

In its letter of November 28, 2011,[2] Claimant maintained that Professor Stern had not "duly accept[ed] her appointment" and had not made her disclosures. However, by the time Claimant submitted its challenge to the PCA on December 16, Professor Stern had timely accepted her appointment and made disclosures. This challenge ground

[1] Article 10(1) reads, "Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."
[2] Exhibit J to Claimant's Letter to the PCA (Dec. 16, 2011), Letter from King & Spalding LLP Regarding Challenge of Prof. Stern (Nov. 28, 2011).

would thus appear now to be moot.[3] For the sake of good order, Respondent nevertheless recalls that the UNCITRAL Rules do not impose upon an arbitrator a requirement that he or she formally accept his or her appointment, much less a time limit for doing so.

In any event, after Respondent designated Professor Stern on November 11, she did in fact formally announce her acceptance and made disclosures on December 3.[4] In doing so, Professor Stern explained to the parties that the reason for the short lapse of time between her appointment and her written acceptance was that she was in the midst of an unusually busy period in her work, which included extended overseas travel.

Whether considered in light of these specific circumstances or in general, this preliminary branch of Claimant's challenge argument can be easily set aside.

2. Professor Stern's History of Appointments in Investor-State Arbitration Provides No Basis for a Valid Challenge

Claimant next alleges that Professor Stern's history of appointments in investment cases by itself gives rise to justifiable doubts as to her independence and impartiality. Subsidiarily, Claimant suggests that Professor Stern ought to have disclosed details about all investment cases in which she has ever served as arbitrator.

Respondent reacts, first, to the subsidiary argument, by pointing out that Professor Stern already disclosed relevant information regarding her appointment in her December 3, 2011 letter accepting her designation in this case. She indicated, moreover, that she intends to present further particulars in response specifically to Claimant's challenge.[5] Under the PCA's December 22 procedural calendar, the designee will have an opportunity to do so on January 18, after which date the parties will be permitted to make any additional observations about the challenge. Information about Professor Stern's appointments in investment cases is, in any event, readily and publicly available, including on ICSID's Web site[6] and in various specialized online publications. The Claimant has obviously pored over this information in preparing its challenge, including notably in attempting to calculate the percentage of the investor-State arbitrations in which Professor Stern has sat in which she was appointed by a respondent State. Indeed, it has itself specifically highlighted a public report of Prof. Stern's appointment in the UNCITRAL Rules arbitration, *Ulysseas, Inc. v. Republic of Ecuador*.[7]

Turning to Claimant's principal allegations concerning Professor Stern's designation record, although Respondent cannot independently verify the accuracy of the different facts and figures advanced by Claimant, it should be observed that their

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[3] Yet Claimant's December 16 challenge filed with the PCA integrates by cross reference without distinction Claimant's November 28 letter "set[ting] forth the grounds for [Claimant's] challenge to Prof. Stern." *See* Claimant's Letter to the PCA (Dec. 16, 2011), p. 4.
[4] Exhibit K to Claimant's Letter to the PCA (Dec. 16, 2011), Prof. Stern's Letter of Dec. 3, 2011.
[5] *Id.*
[6] *See* Annex 1, *Tidewater Inc.* et al. *v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5 (Decision on Claimants' Proposal to Disqualify Prof. Stern, Dec. 23, 2010), ¶ 54.
[7] *See* Exhibit L to Claimant's Letter to the PCA (Dec. 16, 2011).

accuracy is impugned by even Claimant's own evidence. For instance, Claimant asserted that it "is not aware of any investment treaty arbitration in which Professor Stern has been appointed by the foreign investor;"[8] yet in the *Global Arbitration Review* article entitled "Brigitte in Brazil" submitted by Claimant as an exhibit, Professor Stern refers to the case of *Booker v. Guyana*, in which she was appointed by the claimant.[9] As another instance, Claimant is incorrect in asserting that "of 36 cases listed in the ICSID web site showing Prof. Stern as a member of the tribunal, it appears that she has been appointed by the Respondent State in at least 31 cases."[10] In fact, the searchable records on the ICSID Web site do not disclose which arbitrators were appointed by which party or even whether they were appointed by a party at all. In *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), for example, Prof Stern was appointed by the Chairman of the ICSID Administrative Council, not by Ecuador, as shown by publicly available reports.[11]

Claimant also focuses its challenge on Professor Stern's prior service as arbitrator in cases involving the Republic of Ecuador. In her December 3 letter accepting Respondent's appointment, Professor Stern disclosed two ICSID cases involving the Republic of Ecuador (*Occidental* and *Burlington*) as well as one UNCITRAL case, in which she was nominated by Respondent two years ago. As just noted, in the *Occidental* case she was appointed by ICSID rather than by the Republic of Ecuador. Moreover, her appointment by the Republic in *Burlington* dates to September 2008.

In its December 16 submission to the PCA, Claimant contends that Professor Stern's disclosure of the UNCITRAL case constitutes an additional ground that gives rise to justifiable doubts under Article 10 of the UNCITRAL Rules.[12] To support its position, Claimant relies in particular on Section 3.1.3 of Part II of the IBA Guidelines ("Orange List"), which refers to situations in which "[t]he arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties."[13]

First, Claimant misreads the provisions of this section, which is limited to examples of "***[p]revious*** services for one of the parties."[14] Thus the reference to "two or more occasions" means two or more occasions *previous* to the appointment under consideration. Claimant has not (and could not have) asserted that Prof. Stern has previously during the three years preceding her appointment in this case been appointed by the Republic "on two or more occasions."[15]

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[8] Exhibit J to Claimant's Letter to the PCA (Dec. 16, 2011), Letter from King & Spalding LLP Regarding Challenge of Prof. Stern (Nov. 28, 2011), p. 7.
[9] Cl. Exhibit C-22, *Brigitte in Brazil*, 5(3) GLOBAL ARB. REV. (2010), p. 2.
[10] Exhibit J to Claimant's Letter to the PCA (Dec. 16, 2011), Letter from King & Spalding LLP Regarding Challenge of Prof. Stern (Nov. 28, 2011), p.3 (footnotes omitted).
[11] Annex 2, *Oxy Tribunal Constituted*, 2(2) GLOBAL ARB. REV. (Apr. 2007).
[12] Claimant's Letter to the PCA (Dec. 16, 2011), p. 4.
[13] IBA Guidelines, Orange List Section 3.1.3.
[14] *Id.*, Orange List Section 3.1.
[15] *Id.*, Orange List Section 3.1.3.

Moreover, it should be recalled that the IBA Guidelines, initially developed for international commercial arbitration, do not constitute provisions of law and are not (and do not purport by their terms to be) binding, either on the PCA or in UNCITRAL arbitration generally.[16] As a matter of law, of course, the Guidelines are not conclusive for deciding challenges to arbitrators, be it generally or in this case in particular, and they may be viewed, at most, as advisory.[17] The IBA Guidelines' Orange List is said to represent a non-exhaustive and non-binding list of situations determined by the IBA Working Group *to require disclosure* because of the possibility that such situations might objectively give rise to justifiable doubts in the eyes of a reasonable and informed third person.[18] Once disclosed, as here, it must be considered whether the situation that "might" give rise to such doubts may be said actually to do so. The additional appointment disclosed here most certainly cannot be said to give rise to such doubts.

It has been held repeatedly that the mere fact of an arbitrator's appointment by a party on more than one occasion is not a factor that by itself has any bearing on whether that arbitrator can fulfill his or her role with the requisite independence and impartiality.[19] As observed by Craig, Park and Paulsson:

> A challenge will not ordinarily succeed simply because an arbitrator has served in the same capacity in prior proceedings involving one of the parties. Such a claim for recusal would not lie against a judge, and it is hard to see why the rule should be different in arbitral proceedings.[20]

Independence "requires that there should be no actual or past dependent relationship between the parties that may, or at least appear, to affect the arbitrator's freedom of judgment."[21] The consensus in various jurisdictions is that for an arbitrator's

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[16] *Id.*, Introduction, ¶¶ 5, 6.

[17] Annex 3, *OPIC Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14 (Decision on the Proposal to Disqualify Professor Philippe Sands, May 5, 2011), ¶ 48; Annex 4, *ICS Inspection & Control Servs. Ltd v. Republic of Argentina*, UNCITRAL (Decision on Challenge to Arbitrator, Dec. 17, 2009), ¶ 2; Annex 5, *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, May 20, 2011), ¶ 76 ("[T]he IBA Guidelines are indicative and not mandatory.").

[18] IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 3; *see also* Annex 3, *OPIC Karimum*, ¶ 48.

[19] Annex 6, T. W. Walsh and R. Teitelbaum, *The LCIA Court Decisions on Challenges to Arbitrators: An Introduction*, 27(3) ARB. INT'L 283, 300 (2011).

[20] Annex 7, W. L. Craig, W. W. Park & J. Paulsson, *International Chamber of Commerce Arbitration* (2001), p. 231; *see also* Annex 8, J. Paulsson, *Ethics, Elitism, Eligibility*, 14(4) J. INT'L ARB. 13, 15 (1997) ("[A] litigant will be certain to address perfectly open minds only if he is prepared to be judged by very young children. Ordinary judges are burdened with a host of preconceived notions which inhabit them as a *déformation professionnelle*; yet ***in most courts a lawyer will not have a ghost of a chance if he seeks recusal of a judge on the grounds that the latter is known to be skeptical of a legal theory on which the lawyer bases his case***. In reality, a predisposition is disqualifying only if it relates directly to the relevant case." (emphasis added)).

[21] Annex 9, P. S. Uva, *A Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*, 20 AM. REV. INT'L ARB. 479, 485 (2009).

independence to be "tainted by the wish to receive future appointments," the income derived by that arbitrator through repeat appointments by a single appointing party must represent a significant proportion of the arbitrator's overall income.[22] Thus, the potential relevance of an arbitrator's multiple appointments can be evaluated only in terms of "the economic significance of the appointments to the arbitrator."[23]

The three ICSID decisions appearing to date that have addressed multiple appointments by a party as a possible ground for an arbitrator's recusal from service have all declined to dismiss the challenged arbitrators.[24] These decisions focused on the significance to the arbitrator, from an economic point of view, of the appointments in question.[25] The appointments of Professor Sands and Professor Stern that were placed in issue by the objecting parties in these three ICSID matters were not found to be economically significant, because Professor Stern had then been appointed in more than twenty ICSID cases,[26] and Professor Sands enjoyed extensive income from sources that were unrelated to the fees he received from serving as arbitrator in ICSID cases.[27] The arbitrators could thus not be considered as being in a situation of dependence or declared not apt to sit on the relevant tribunals.[28]

Specifically, in *Tidewater,* the two arbitrators resolving the challenge to Professor Stern explained:

> In the view of the Two Members, there would be a rationale for the potential conflict of interest which may arise from multiple arbitral appointments by the same party if either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that

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[22] Annex 10, F. Slaoui, *The Rising Issue of "Repeat Arbitrators": A Call for Clarification*, 25(1) ARB. INT'L 103, 114 (2009).
[23] Annex 6, Walsh and Teitelbaum, *supra*, at p. 300.
[24] *See* Annex 1, *Tidewater*; Annex 5, *Universal Compression*; Annex 3, *OPIC Karimum*.
[25] Annex 6, Walsh & Teitelbaum, *supra*, at p. 300.
[26] Annex 1, *Tidewater*, ¶ 64
[27] Annex 3, *OPIC Karimum,* ¶ 55 ("[W]e are unpersuaded by Claimant's 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. Even assuming that this criterion could be helpful in making a judgment regarding his independence, the material provided does not establish any significant dependence by him upon income derived from those appointments.").
[28] Annex 6, Walsh & Teitelbaum, *supra*, at p. 300. The authors cite one LCIA challenge involving repeat appointments in which the Division applied similar reasoning. *See id.* at 298-99 (citing LCIA Reference 81160 (Aug. 28, 2009)). In relevant part, the Division concluded that "mere fact that an arbitrator is regularly nominated (by different arbitral parties) on the recommendation of the same counsel or the same firm of solicitors ought not of itself, give rise to justifiable doubts as to his independence and impartiality." Annex 11, LCIA Court Decisions on Challenges to Arbitrators Reference No. 81160, August 28, 2009, 27(3) ARB. INT'L 442-454, ¶ 4.6 (2011). The Division focused on the economic importance of the appointments to the arbitrator, rather than taking into account the number of appointments by the same party. *Id.* ¶¶ 4.7-4.9.

> the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.[29]

They concluded that Professor Stern was not dependent on Venezuela and that, as such, her judgment was not influenced by the prospect of future appointments:

> The Two Members take notice from the Register of Cases publicly maintained by ICSID on its website that Professor Stern has held or currently holds arbitral appointments in many ICSID cases and so cannot be said to be dependent on any one party for her extensive practice as an arbitrator in investment cases. Moreover, in each of the two cases in which she was appointed by Venezuela, and where she has to date rendered decisions, *Vannessa* and *Brandes*, Professor Stern has joined unanimous preliminary decisions rejecting applications made by Venezuela. ***This fact tends to indicate that Professor Stern has been appointed on subsequent occasions because of her independence, rather than the reverse***.[30]

Subsequently, in *Universal Compression*, the challenge to Professor Stern based on her three prior appointments by Venezuela was rejected because "no objective fact [was] presented that would suggest that Professor Stern's independence or impartiality would be manifestly impacted by the multiple appointments by Respondent. Professor Stern has been appointed in more than twenty ICSID cases, evidencing that she is not dependent – economically or otherwise – upon Respondent for her appointments in these cases."[31] "Repeat appointments may," as articulated by the two arbitrators in *Tidewater*, "be as much the result of the arbitrator's independence and impartiality as an indication of justifiable doubts about it."[32]

In addition, an explanatory note accompanying Orange List Section 3.1.3 relied upon by Claimant instructs that in certain circumstances the guideline must be considered inapplicable. That note points out, in particular, that "[i]t may be the practice in certain specific kinds or arbitration, such as maritime or commodities arbitration, ***to draw arbitrators from a small, specialized pool***."[33] This note assumes particular relevance in the present case. Indeed, given the importance of public international law principles in investor-State BIT disputes, States have a natural interest in ensuring that the arbitral tribunals constituted in such matters include sufficient expertise in the specialized area of public international law. This often means, in practice, that the State will make use of its right to appoint one member of the tribunal to ensure that at least one arbitrator is seated who is fully at ease with the types of legal arguments to be presented regarding State

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[29] Annex 1, *Tidewater*, ¶ 62. The risk that the arbitrator might be influenced by factors outside the record in the case was addressed by the two arbitrators in *Tidewater* within the discussion of the IBA Guidelines, Section 3.1.5. Respondent likewise addresses the possibility of decision on related legal issues in the section addressing the application of the IBA Guidelines Section 3.1.5 below.

[30] Annex 1, *Tidewater*, ¶ 64 (emphasis added).

[31] Annex 5, *Universal Compression*, ¶ 77.

[32] Annex 1, *Tidewater*, ¶ 61.

[33] IBA Guidelines, Section 3.1.3, note 6. The note also refers to "fields [in which] it is the custom and practice for parties frequently to appoint the same arbitrator in different cases."

conduct and who will be available to assist the other members of the tribunal as necessary in analyzing such arguments.

Professor Andreas F. Lowenfeld described this role of the party-appointed co-arbitrator as follows: "[I]n an international case a party-appointed arbitrator serves as a translator. I do not mean just of language, though occasionally that is required as well [...]. I mean rather the translation of legal culture, and not infrequently of the law itself, when matters that are self-evident to lawyers from one country are puzzling to lawyers from another."[34] Another set of lawyers well versed in BIT practice has expressed a similar view:

> It is also generally recognized that the party-appointed arbitrators may "serve" the appointing party in the limited sense – consistent with deciding the case impartially – of ensuring that the presiding arbitrator selected will not be inimical to the party's case, ***ensuring that the party's case is understood and carefully considered by the panel, "translating" the party's legal and cultural system*** (and occasionally the language) ***for the benefit and understanding of the other arbitrators***, and ensuring that the procedure adopted will not unfairly disadvantage the appointing party.[35]

There exists only a limited pool of world-renowned public international law experts capable of and willing to serve as arbitrator – the pool of such candidates certainly does not exceed a couple dozen names. For this reason, the appearance of a respected academic like Professor Stern as arbitrator in a certain number of cases should not come as a surprise, and it cannot *per se* give rise to justifiable doubts as to her impartiality or independence.

Any consideration of a challenge based on multiple appointments should bear these points in mind. One esteemed academic observer has recently nuanced the issue of "repeat" appointments in the following terms:

> [W]hat is insidious in this regard are repeated appointments of the same arbitrator ***by one and the same party in a manner that generates a steady flow of business between them***; in the hope of being able to continue in the role of arbitrator, this person could be led to favor the designating party ***in the expectation of further appointments***. ***Diversity in an arbitrator's sources of nomination is an indication of independence***.[36] (Free translation)

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[34] Annex 12, A. F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEXAS INT'L L.J. 59, 65 (1995).

[35] Annex 13, R. D. Bishop & L. Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14(4) ARB. INT'L 395, 404 (1998) (emphasis added).

[36] Annex 14, S. Manciaux, *Chronique des sentences arbitrales*, 2011(2) J. DU DROIT INT'L 565 (emphasis added) (citations omitted) ("En la matière, ce qui est dangereux, ce sont les désignations répétées d'une même personne *par une seule et même partie et générant donc un courant d'affaires entre elles* : pour espérer continuer sa fonction d'arbitre, cette personne pourrait être conduite à favoriser cette partie dans l'espoir de futures nominations. La diversité d'origine des nominations est facteur d'indépendance.").

Considered in the context of her appointments by many different States, Professor Stern's appointment by Respondent in this matter cannot properly be construed as a sign of dependency on Respondent, be it financial in nature or otherwise.[37] As a quick search of publicly available sources confirms, Professor Stern has been appointed as arbitrator in BIT cases by a large number of States other than Ecuador, including Venezuela, Bolivia, Kazakhstan, Romania, El Salvador, Hungary, Tunisia, Egypt, and the Democratic Republic of Congo.

Finally, Professor Stern's independence and impartiality can be seen in her arbitral decisions themselves. By way of example, it can be noted that she has served as co-arbitrator on tribunals that upheld jurisdiction in favor of claimants[38] or that granted claimant's requests for provisional measures.[39]

Claimant cannot, in sum, demonstrate any basis that allows it reasonably to believe that Professor Stern lacks the requisite independence and impartiality. Its challenge should therefore be rejected.

3. Claimant's Assertion that Professor Stern Has Prejudged "Related Issues" Is Equally Without Merit

Claimant seeks, finally, to cast doubt on Professor Stern's independence and impartiality based on her ongoing service as co-arbitrator in *Burlington* and on an alleged similarity between the legal issues in the present case and those in *Burlington* (Claimant has in mind specifically the *Burlington* tribunal's June 2, 2010 Decision on Jurisdiction). Claimant invokes IBA Guidelines, Orange List Section 3.1.5 to support this aspect of its objection. Once again, Respondent points out before proceeding further that the IBA Guidelines Orange List relied upon by Claimant does not establish situations which *per se* constitute adequate grounds for challenge, as opposed to requiring disclosure.[40]

It is axiomatic that parties seek to appoint arbitrators who have superior knowledge of international law and experience with a diverse range of potentially relevant legal issues. That an arbitrator has already considered a legal issue through a

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[37] *See* Annex 3, *OPIC Karimum*, ¶ 55.
[38] *E.g.*, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 (Decision on Jurisdiction, Sept. 9, 2008), *available at* http://italaw.com; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6 (Decision on Jurisdiction, Aug. 22, 2008), *available at* http://italaw.com.
[39] *E.g., Quiborax S.A., Non-Metallic Minerals S.A. & Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (Decision on Provisions Measures, Feb. 26, 2010), *available at* http://italaw.com.
[40] IBA Guidelines, Part II: Practical Application of the General Standards, ¶ 3; *see also* Annex 3, *OPIC Karimum*, ¶ 48. The IBA Guidelines are not binding and are not conclusive for deciding challenges to arbitrators. *Id.*; Annex 4, *ICS Inspection*, ¶ 2.
[40] Annex 1, *Tidewater*, ¶ 67 (emphasis added).

prior decision is not a basis for his or her recusal.[41] Indeed, "[t]he international investment arbitration framework would cease to be viable if an arbitrator was disqualified simply for having faced similar factual or legal issues in other arbitrations."[42]

If the PCA elected to take the IBA Guidelines into consideration in the present recusal proceeding, it will no doubt easily conclude the *Burlington* case is not sufficiently "related" to the present case and does not involve "related issues" within the meaning of the cited Orange List Section 3.1.5. [43] Orange List Section 3.1.5 is categorized in the IBA Guidelines under the heading "Previous services for one of the parties or other involvement in the case"; it refers to the situation in which "[t]he arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration ***on a related issue involving one of the parties or affiliate of one of the parties***." (emphasis added).

Arbitrators who have considered the application of the Section 3.1.5 scenario have concluded that a mere similarity of legal issues is not a sufficient ground for disqualifying an arbitrator. Rather, it is necessary to establish a "close interrelationship between the facts and the parties" that is such that it effectively precludes an arbitrator from departing from the solution reached in the earlier case:

> In the opinion of the Two Members, the rationale behind the potential for the conflict of interest identified in Section 3.1.5 relates to cases where, by reason of the ***close interrelationship between the facts and the parties*** in the two cases, the arbitrator has ***in effect prejudged the liability of one of the parties in the context of the specific factual matrix***. They agree with the formulation of the French court, cited with approval in Poudret and Besson, that there is "*neither bias not 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.*"[44]

In the absence of such a "close interrelationship between the facts and the parties," "the fact that an arbitrator made a finding of fact or a legal determination in one case does not preclude that arbitrator from deciding the law and the facts impartially" – or indeed differently – in another case. [45] Or, as reasoned by the two arbitrators in *Tidewater*, "the

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[41] *See e.g.,* Annex 1, *Tidewater*, ¶ 63 (citing N. G. Ziadé, "*Recent Developments at ICSID*" 25 (2) NEWS FROM ICSID 3, 4-5 (2008)).
[42] Annex 5, *Universal Compression*, ¶ 83.
[43] Specifically, Claimant argues that the present arbitration and *Burlington* share the following characteristics: 1) the same U.S.-Ecuador BIT, 2) involvement of U.S. claimants and production-sharing contracts, and 3) legal claims based on the enactment of Law 42 and its related measures. The question is whether these factors are sufficient to allow the conclusion that Professor Stern has "prejudged" certain "related issues" in this case, such that her impartiality can be cast into doubt.
[44] Annex 1, *Tidewater,* ¶ 67 (emphasis added).
[45] Annex 5, *Universal Compression*, ¶ 83 (citing *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 (Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, Oct. 22, 2007), ¶ 36)) (concluding "It is evident

mere fact that an arbitrator sat in two different cases brought against the same respondent State did not warrant disqualification 'absent any *other objective circumstances demonstrating that these two cases are related in such a manner that the arbitrator's determination in one case would* ***manifestly affect the challenged arbitrator's reliability*** *to exercise independent judgment in the other case.*'"[46]

The genesis of Orange List 3.1.5 can be traced to commercial arbitration cases involving especially close relationships between legal issues and parties.[47] In *Qatar v. Creighton*, an arbitrator was challenged on the ground that he had previously served as an arbitrator in a case between the prime contractor, the claimant Creighton, and its subcontractors, and then was appointed in the arbitration between that prime contractor and Qatar, the principal.[48] The French *Cour de cassation* rejected the challenge, finding that the first arbitration was not sufficiently related to the second. In another case, *ASM Shipping Ltd of India v. TTMI Ltd of England*, it was alleged that an arbitrator could not serve with impartiality due to his recent involvement as an advocate in legal proceedings in which serious allegations had been made against a key witness in the arbitration proceedings.[49] The English Commercial Court rejected the challenge.

Even Claimant recognizes that there are "factual differences"[50] between *Burlington* and this case. While *Burlington* and the present arbitration include claims referring to Ecuadorian Law 42, the two arbitrations involve unrelated claimants, different production-sharing agreements, and, importantly and as pointed out by Claimant, different arguments relating to Law 42.[51]

More specifically on this last point, Claimant explains that Burlington "took for granted from the outset that Law 42 was a tax under Ecuadorian law."[52] The Republic consequently argued in that case that Burlington's claim had "disappeared," because Burlington argued both that "measures deemed to be taxes within the internal law of the state issuing the tax" should be treated as "matters of taxation" within the meaning of Article X [the tax carve-out provision] of the Ecuador-U.S. BIT, and that "Law 42 is a tax as a matter of Ecuadorian law."[53] Claimant in the present case, by contrast, purports to have never operated under the same assumption that Law 42 is a tax law under

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that neither Professor Stern nor her co-arbitrators will be bound in this case by any factual or legal decision reached in any of the three other cases.").

[46] Annex 1, *Tidewater*, ¶ 63 (emphasis added) (citing Ziadé, *supra*, at 4-5).

[47] Annex 15, S. Luttrell, Bias Challenges in International Commercial Arbitration: The Need for a "Real Danger" Test, (Kluwer Law International 2009), pp. 201, 204.

[48] Annex 16, Decision of Court of Cassation, March 16, 1999, *Qatar v. Creighton* 1999(2) REV. ARB. 308.

[49] Annex 17, *ASM Shipping Ltd of India v. TTMI Ltd of England* (Comm. Court, 2005), APP. L.R. 10/119, ¶¶ 1, 12.

[50] Exhibit J to Claimant's Letter to the PCA (Dec. 16, 2011), Letter from King & Spalding LLP Regarding Challenge of Prof. Stern (Nov. 28, 2011), p. 3.

[51] *Id.*, p. 4.

[52] *Id.*, p. 4, fn. 8.

[53] Annex 18, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/05 (Decision on Jurisdiction, June 2, 2010), ¶ 134. The *Burlington* tribunal expressly reserved for the merits phase the question of whether Law 42 was a tax under Ecuadorian law. *Id.* ¶ 163.

Ecuadorian law,[54] and it indicates that it will, consequently, present to the tribunal arguments that differ substantively from those of Burlington. In sum, Claimant here has announced that both the fact pattern and the legal arguments will differ from those present in *Burlington*.

Further, whatever may have been decided regarding Law 42 in the *Burlington* Decision on Jurisdiction, the tribunal in the present case remains free to make its own determinations, as there is no concept of precedent in international arbitration. As observed by Professor Bjoklund, "[a]lmost everyone agrees that investment tribunals are not making precedent as understood in the common law sense of a system of *stare decisis*, in which decisions of higher courts must be followed by those lower in the hierarchy."[55]

It is noteworthy that Professor Stern has, on multiple occasions and in quite unambiguous terms, confirmed her view that earlier similar cases do not pre-judge determinations to be made in later cases. For example, she wrote the following in her Concurring and Dissenting Opinion in *Impregilo S.p.A. v. Argentine Republic* (in discussing her co-arbitrator's reliance on earlier cases to support their application of the MFN clause): "In any case, it does not appear to me to be a legally convincing argument to rely on former cases as if they were binding precedents."[56] Similarly, in the Decision on Jurisdiction in *Burlington*, Professor Stern expressly disassociated herself from the views of her co-arbitrators regarding the effect to be given to earlier decisions of international tribunals:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. ***Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her***

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[54] Exhibit J to Claimant's Letter to the PCA (Dec. 16, 2011), Letter from King & Spalding LLP Regarding Challenge of Prof. Stern (Nov. 28, 2011), p. 4 & fn. 8.

[55] Annex 19, A. K. Bjorklund, *The Promise and Peril of Arbitration Precedent: The Case of* Amici Curiae*, in* A. K. HOFFMAN, PROTECTION OF FOREIGN INVESTMENTS THROUGH MODERN TREATY ARBITRATION, 165 (2010). Similarly, in Professor Stern's tradition, the notions of precedent and *stare decisis* do not exist in the French civil law system as they do in common law countries. Article 5 of the French Civil Code provides: "Judges are forbidden to decide cases submitted to them by way of rulings having a general and regulatory nature." ("*Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises*."). Annex 20, French Civil Code, Art. 5. Thus, if in one case the judge has decided on an issue in one manner, the same judge is free to decide the same issue differently in another case.

[56] Annex 21, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case ARB/07/17 (Concurring and Dissenting Opinion of Professor Brigitte Stern, June 21, 2011), ¶ 5.

> ***duty to decide each case on its own merits, independently of any apparent jurisprudential trend.***"[57]

In short, Claimant has not demonstrated sufficient relatedness of the parties and issues in *Burlington* and this case, nor has it established why the views expressed by the *Burlington* panel have any effect on Professor Stern's freedom to judge the issues that will be presented in this case without constraint.[58]

4. Conclusion

In her letter of December 3, Professor Stern indicated that she was declining to withdraw her acceptance of her appointment, writing, "[T]here is, in my view, no objective basis to impugn my impartiality and/or independence." Indeed, the UNCITRAL Arbitration Rules foresee that a challenge to an arbitrator may validly be made only when the challenging party harbors objectively justifiable doubts about an arbitrator's impartiality or independence. Because no justifiable foundation exists for Claimant's alleged reservations concerning Professor Stern's designation, Respondent opposes the challenge and requests that the Appointing Authority decline to sustain it.

Respectfully submitted,

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[57] Annex 18, *Burlington*, ¶ 100 (footnote omitted) (emphasis added).

[58] Claimant also cites to Article 3 of the IBA Rules of Ethics for International Arbitrators, but fails to point to any language in that provision that would apply in this case. In any event, the IBA Rules on Ethics have been superseded by the IBA Guidelines "as to the matters treated" by them. IBA Guidelines, Introduction, ¶ 8.

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