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**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**ELITECH B.V. AND RAZVOJ GOLF D.O.O.**

Claimants

and

**REPUBLIC OF CROATIA**

Respondent

**ICSID Case No. ARB/17/32**

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**DECISION ON THE PROPOSAL TO DISQUALIFY  
PROFESSOR BRIGITTE STERN**

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*Chairman of the Administrative Council*

Dr. Jim Yong Kim

*Secretary of the Tribunal*

Ms. Anna Holloway

*Date of dispatch to the Parties: April 23, 2018*

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**TABLE OF CONTENTS**

<b>I.</b>	<b>PROCEDURAL HISTORY</b> .....	1
<b>II.</b>	<b>PARTIES’ ARGUMENTS</b> .....	2
	<b>A.</b> Claimants’ Proposal .....	2
	<b>(1)</b> Relevant legal standards .....	2
	<b>(2)</b> Factual basis for Claimants’ proposal.....	3
	<b>B.</b> Respondent’s Reply.....	6
	<b>(1)</b> Relevant legal standards .....	6
	<b>(2)</b> Response to the Claimants’ proposal on the facts .....	7
	<b>C.</b> Arbitrator’s Explanations .....	9
<b>III.</b>	<b>DECISION BY THE CHAIRMAN</b> .....	12
	<b>A.</b> Timeliness .....	12
	<b>B.</b> The Applicable Legal Standard.....	13
	<b>C.</b> Merits .....	15
	<b>(1)</b> Multiple Appointments by the Same Party.....	15
	<b>(2)</b> Multiple Arbitrations Allegedly Concerning the Same Legal and/or Factual Issues .....	16
	<b>(3)</b> Conclusion .....	17
<b>IV.</b>	<b>DECISION</b> .....	18

## I. PROCEDURAL HISTORY

1. On August 25, 2017, Elitech B.V. and Razvoj Golf D.O.O. (“**Claimants**”) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against the Republic of Croatia (“**Croatia**” or “**Respondent**”).
2. On September 6, 2017, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”).
3. The Tribunal is composed of Professor Gabrielle Kaufmann-Kohler, a national of Switzerland, President, appointed by agreement of the parties; Professor John Y. Gotanda, a national of the United States of America, appointed by the Claimants; and Professor Brigitte Stern, a national of France, appointed by the Respondent. Professor Stern was appointed by the Respondent following the resignation of Professor Donald McRae, a national of Canada. Ms. Anna Holloway, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
4. On January 31, 2018, the Secretary-General notified the parties that Professor Stern had accepted her appointment and that the Tribunal was deemed to have been reconstituted on that date, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”). Professor Stern provided a declaration with accompanying statement, dated January 31, 2018, which was sent to the parties the same day.
5. On February 16, 2018, the Claimants proposed the disqualification of Professor Stern, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (“**Proposal**”). On that date, the Centre informed the parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6).
6. The parties were also informed that the Proposal would be decided by the other Members of the Tribunal in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

7. On February 19, 2018, Professors Kaufmann-Kohler and Gotanda established a procedural calendar for the parties' submissions on the Proposal. In compliance with that procedural calendar, the Respondent submitted its response to the Proposal on February 26, 2018.
8. Professor Stern furnished her explanations on March 8, 2018, as envisaged by ICSID Arbitration Rule 9(3).
9. The parties were also permitted, in accordance with the briefing schedule, to file a simultaneous round of comments by March 12, 2018. Only the Claimants elected to do so.
10. On March 19, 2018, the parties were notified that Professors Kaufmann-Kohler and Gotanda were equally divided and that the Proposal would be decided by the Chairman of the Administrative Council ("**Chairman**"), in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

## **II. PARTIES' ARGUMENTS**

### **A. CLAIMANTS' PROPOSAL**

11. The Claimants' arguments on the proposal to disqualify Professor Stern were set forth in their submissions of February 16, and March 12, 2018. These arguments are summarized below.
12. The Claimants base their proposal to disqualify Professor Stern on the proposition that her "repeat appointments by the Respondent and Respondent's counsel in similar investor-State arbitrations in the recent past would raise doubts in the mind of a reasonable observer as to her reliability to exercise independent judgment and act impartially in this arbitration."<sup>1</sup>

#### **(1) Relevant legal standards**

13. With respect to the legal standards to be applied, the Claimants argue that to establish that an arbitrator manifestly lacks reliability, it is "sufficient to show that a reasonable third

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<sup>1</sup> Claimants' February 16, 2018 letter, para. 2.

party would conclude upon a reasonable evaluation of the facts, with little effort or analysis, that the arbitrator cannot be relied upon to exercise independent judgment.”<sup>2</sup> In terms of specific facts that might give rise to such a showing, the Claimants rely on the fact that the IBA Guidelines on Conflicts of Interest in International Arbitration (the “IBA Guidelines”) include the following matters within the “Orange List” as circumstances which “depending on the facts of a given case, may give rise to doubts as to the arbitrator’s impartiality or independence”:<sup>3</sup>

*3.1.3 The 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.*

*3.1.5 The 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 an affiliate of one of the parties.*<sup>4</sup>

14. The Claimants argue, relying on *Highbury International v. Venezuela*, that it is also sometimes appropriate in investment arbitrations to consider the period beyond the three years specified in these IBA Guidelines.<sup>5</sup> In considering whether a disqualification is warranted by repeat appointments, relevant factors include the date on which the prior appointments were made, and the commonality of factual and legal issues between the various proceedings.<sup>6</sup>

## **(2) Factual basis for Claimants’ proposal**

15. The Claimants assert that an objective observer would have reasonable doubts that Professor Stern could be relied upon to exercise independent judgement raised by the number of appointments Professor Stern has accepted in the recent past to act as the Respondent’s party appointed arbitrator. Specifically, prior to accepting her appointment

<sup>2</sup> Claimants’ February 16, 2018 letter, paras. 3-4.

<sup>3</sup> Claimants’ February 16, 2018 letter, paras. 5-7.

<sup>4</sup> IBA Guidelines on Conflicts of Interest in International Arbitration 2004, revised on 23 October 2014, Annex 6, Orange List (part II, section 3), clauses 3.1.3 and 3.1.5.

<sup>5</sup> Claimants’ February 16, 2018 letter, para. 6 (citing to *Highbury International AVV, Compañía Minera de Bajo Caroní AVV and Ramstein Trading Inc v Bolivarian Republic of Venezuela* (ICSID Case No ARB/14/10), Decision on the Proposal to Disqualify Professor Brigitte Stern, 9 June 2015, para. 84).

<sup>6</sup> Claimants’ February 16, 2018 letter, para. 8.

in this case, Professor Stern was nominated by Croatia in three other investor-State arbitrations, in February 2014, June 2015 and November 2016, all of which are ongoing.<sup>7</sup> As a result, Professor Stern is now a party-appointed arbitrator in four of the seven known investor-State proceedings brought against Croatia (and the only repeat appointee).<sup>8</sup>

16. The Claimants argue that these circumstances fall “squarely within the admonished circumstances set out in clause 3.1.3 of the IBA Guidelines,” and constitute a strong “‘objective indication of the view of [Croatia]’ that ‘the outcome of the dispute is more likely to be successful with [Professor Stern] as a member of the tribunal than would otherwise be the case.’”<sup>9</sup> In this regard, the Claimants reject the Respondent’s suggestion that the IBA Guidelines are inapposite in the investor-State arbitration context, citing to *Highbury v. Venezuela* for the proposition that the Guidelines enjoy a high level of acceptance in investment arbitration.<sup>10</sup>
17. Similarly, the Claimants reject the Respondent’s arguments (detailed in Section B.2 below) why Professor Stern’s repeat appointments by Croatia do not meet the threshold for a successful challenge. The Claimants therefore argue: (1) the fact that Professor Stern was Croatia’s second appointee in this case (following the resignation of Professor McRae) does not alter the fact she was ultimately appointed; (2) the alleged subjective basis for Professor Stern’s appointment (her expertise), and the outcome of previous challenges against Professor Stern, have no bearing on how the circumstances are to be considered from the perspective of a reasonable person in this case; (3) the suggestion that disqualification based on repeat appointments is only appropriate in circumstances of repeat appointments where the arbitrator is financially dependent upon the appointing party is unfounded; and (4) the suggestion that the relatively small pool of investment treaty

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<sup>7</sup> Claimants’ February 16, 2018 letter, para. 10. These other arbitrations are *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia*, ICSID Case No. ARB/13/32 (in February 2014); *B3 Croatian Courier Cooperatif U.A v Republic of Croatia*, ICSID Case No. ARB/15/5 (in June 2015); and *Amlyn Holding BV v Republic of Croatia*, ICSID Case No. ARB/16/28 (in November 2016).

<sup>8</sup> Claimants’ February 16, 2018 letter, para. 11. *See also* Claimants’ March 12, 2018 letter, at para. 2 (emphasizing that the Claimants’ arguments are *objectively* sustainable).

<sup>9</sup> Claimants’ February 16, 2018 letter, para. 11 (citing *OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela* (ICSID Case No ARB/10/14), Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator, 5 May 2011, Annex 8, para. 47). *See also* Claimants’ March 12, 2018 letter, at paras. 7-15.

<sup>10</sup> Claimants’ March 12, 2018 letter, at paras. 3-6 (citing *Highbury v Venezuela supra* footnote 5 at para. 79).

arbitrators explains the repeat appointments is specious, and belied by the fact that there are thousands of recognized arbitrators around the world, hundreds of whom have served on investment treaty tribunals.<sup>11</sup>

18. In addition, the Claimants argue that the other cases in which Professor Stern was appointed by Croatia concern factual and legal issues for decision that are “substantially similar to those that will be decided in the current proceedings, and as such she ‘currently serves ... in another arbitration on a related issue involving [Croatia]’”.<sup>12</sup> Specifically the Claimants note that:

- i. one of the other cases (*B3 Croatian Courier Cooperatif U.A v Republic of Croatia*) was also brought under the Netherlands-Croatia BIT, and common issues of treaty interpretation would need to be considered by Professor Stern in both arbitrations<sup>13</sup>;
- ii. two of the other cases (*Amlyn Holding BV v Republic of Croatia* and *MOL Hungarian Oil and Gas Company plc v Republic of Croatia*) also involve claims concerning the issuance and subsequent loss of government permits and “will unquestionably raise common issues of Croatian law and practice concerning the relationship between local and municipal emanations of the Croatian state.”<sup>14</sup> One of these cases may potentially raise issues regarding actions taken by the former Prime Minister also relevant to this proceeding; indeed, this individual could, the Claimants say, be witness in both proceedings. Moreover, the Claimants allege that there is some commonality between the cases with respect to timing of the investment contracts at issue as well as the alleged violations.<sup>15</sup>

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<sup>11</sup> Claimants’ March 12, 2018 letter, at paras. 7-15.

<sup>12</sup> Claimants’ February 16, 2018 letter, para. 12.

<sup>13</sup> Initially, the Claimants asserted that *Amlyn Holding* was also pursued under the Netherlands-Croatia BIT, but accepted in its March 12, 2018 letter that this case is in fact brought under the Energy Charter Treaty. *See* Claimants’ February 16, 2018 letter, para. 13; Respondent’s February 26, 2018 letter, paras. 34; Claimants’ March 12, 2018 letter, para. 19.

<sup>14</sup> Claimants’ February 16, 2018 letter, paras. 13-14.

<sup>15</sup> Claimants’ February 16, 2018 letter, paras. 13-14; Claimants’ March 12, 2018 letter, paras. 19-20.



19. The Claimants rely on *Electrabel v. Hungary* for the proposition that similar factual circumstances could create “reasonable or clear doubt or real risk in regard to the exercise of independent judgment” and therefore serve as a ground for disqualification.<sup>16</sup> The Claimants relatedly argue that “it is not an unreasonable fetter on party autonomy to prevent the appointment of a single arbitrator four times in a short span, particularly where there is bound to be overlap of facts and law between the arbitrations in question.”<sup>17</sup>
20. Finally, the Claimants assert that “the objective impression of the absence of reliability to exercise independent judgment in this case is further supported ... by Professor Stern’s repeated appointments (two in the last six years) by Croatia’s counsel, Latham & Watkins LLP.”<sup>18</sup>

## **B. RESPONDENT’S REPLY**

21. The Respondent’s arguments on the proposal to disqualify Professor Stern were set forth in its submission of February 26, 2018. These arguments made in support of the Respondent’s request that the Claimants’ proposal be rejected are summarized below.

### **(1) Relevant legal standards**

22. The Respondent argues that Article 57 ICSID Convention “imposes a relatively heavy burden of proof on the party making the proposal” such that the established facts must make it objectively “obvious and highly probable” that the arbitrator cannot be relied upon to exercise independent judgment.<sup>19</sup>
23. The Respondent takes issue with the reliance placed by the Claimants on the IBA Guidelines in their proposal. The IBA Guidelines are not binding, as the Claimants acknowledge, and the Respondent argues they were drafted with international commercial arbitration in mind (and therefore set a lower threshold for challenges to arbitrators than in

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<sup>16</sup> Claimants’ March 12, 2018 letter, at paras. 16-17 (citing to *Electrabel SA v Republic of Hungary*, ICSID Case No ARB/07/19, Decision on the Claimant’s Proposal to Disqualify a Member of the Tribunal, 25 February 2008, para 40).

<sup>17</sup> Claimants’ March 12, 2018 letter, para. 21.

<sup>18</sup> Claimants’ February 16, 2018 letter, para. 16.

<sup>19</sup> Respondent’s February 26, 2018 letter, paras. 5-8.

the standard in the ICSID Convention and adopt an appearance test).<sup>20</sup> In the Respondent's view, the different nature of investor-State and commercial arbitration is particularly notable where there is a challenge on the basis of repeat appointments. It argues that repeat appointments in investment arbitrations are much more likely given the smaller pool of arbitrators, and investment arbitrations also often raise similar or related issues. Given this, the fact that related issues arise in several cases is a regular feature of, and not a ground to challenge an appointed arbitrator in, an ICSID arbitration. In the Respondent's view, "repeat appointments and the existence of related issues therefore cannot suffice to establish a manifest lack of the qualities required of an ICSID arbitrator."<sup>21</sup>

## (2) Response to the Claimants' proposal on the facts

24. With respect to the Claimants' arguments grounded in Professor Stern's multiple appointments by the Respondent, the Respondent notes that the matters complained of were all disclosed by Professor Stern. Moreover, the Respondent has not engaged in "systematic appointments" of Professor Stern (as demonstrated by the Respondent's initial selection of Professor McRae as arbitrator. Rather, the Respondent selected Professor Stern to replace Professor McRae because of her status as preeminent expert in public international law.<sup>22</sup>
25. Moreover, the Respondent notes that the repeat appointments complained of "only barely" qualify for the "Orange List" of the IBA Guidelines as a matter of timing. In addition, "Orange List" circumstances merely require disclosure, and do not create any presumption or appearance of a conflict of interest.<sup>23</sup>
26. The Respondent further argues that previous challenges of Professor Stern based on repeat appointments have been unsuccessful. As prior challenges show, multiple arbitral appointments can only potentially establish a conflict of interest if the prospect of continued and regular appointment might create a relationship of dependence or otherwise influence the arbitrator's judgment. Accordingly, in *Universal Compression v. Venezuela*

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<sup>20</sup> Respondent's February 26, 2018 letter, paras. 9-11.

<sup>21</sup> Respondent's February 26, 2018 letter, para. 12.

<sup>22</sup> Respondent's February 26, 2018 letter, paras. 15-21.

<sup>23</sup> Respondent's February 26, 2018 letter, paras. 22-23.

it was held that the number of Professor Stern's appointments (20 at that time) alone would evidence her (economical) independence for her appointments from Venezuela, who had appointed her four times.<sup>24</sup>

27. With respect to the Claimants' argument that that the other arbitrations involving Croatia will require determinations on related issues, the Respondent argues that Professor Stern is not currently serving in another arbitration on related issues within the meaning of Section 3.1.5 of the IBA Guidelines.<sup>25</sup> In other words, there is no "close interrelationship between the facts and the parties in the two cases," such that "the arbitrator has in effect prejudged the liability of one of the parties in the context of the specific factual matrix."<sup>26</sup>
28. In this regard, the Respondent emphasizes the comment in *Universal Compression v. Venezuela* that "[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."<sup>27</sup>
29. The Respondent also rejects the notion that there are problematic similarities between the cases in question. First, the fact that the former Prime Minister signed a resolution relied on this case and was also acting Prime Minister at the time of the dispute in another case "cannot establish any risk of prejudgment of issues by Professor Stern."<sup>28</sup> Second, the Respondent asserts that the Claimants are wrong in arguing that two of the other cases also involve the issuance and subsequent loss of permits. Third, the fact that the same treaty (the Netherlands-Croatia BIT) is also the basis of the claims in *B3 v. Croatia* is irrelevant. Investment disputes frequently arise under the same or materially similar treaties and are usually brought under the ICSID Convention, and the mere application of the same legal

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<sup>24</sup> Respondent's February 26, 2018 letter, paras. 24-26 (referencing *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, 20 May 2011, para. 77).

<sup>25</sup> Respondent's February 26, 2018 letter, paras. 29-31 (citing *Tidewater Inc et al v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, 23 December 2010, para. 67).

<sup>26</sup> Respondent's February 26, 2018 letter, para. 30.

<sup>27</sup> Respondent's February 26, 2018 letter, paras. 32-33 (referencing *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, 20 May 2011, para. 83).

<sup>28</sup> Respondent's February 26, 2018 letter, para. 34.

instruments does not create a risk of prejudgment (or arbitrators would routinely be disqualified).<sup>29</sup>

30. Finally, the Respondent notes the emphasis placed in *Universal Compression v. Venezuela* on the fact that “the claimants in each case are different and also operate in different industries.” The Respondent asserts that there is no commonality in either claimants or subject matter of the dispute as between the various cases.<sup>30</sup>

### C. ARBITRATOR’S EXPLANATIONS

31. Professor Stern provided her explanations on March 8, 2018.

32. At the beginning of her comments, Professor Stern stated that:

*when I sit as an arbitrator, I consider my duty to follow the deontological requirements of an arbitrator, that is to be both independent and impartial, as well as available, and that I consider that I have always complied with such duties in the numerous arbitrations in which I have been sitting, and that I will continue to act in this manner in all arbitral tribunals in which I will be called to sit.*<sup>31</sup>

33. Professor Stern also suggests that the Claimants’ use of the wording “reasonable doubts” in its submissions goes beyond the legal standard applicable, and that the “manifest lack” standard under Article 57 of the ICSID Convention is more adequately described in *Société Générale de Surveillance SA v. Pakistan*.<sup>32</sup>

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<sup>29</sup> Respondent’s February 26, 2018 letter, paras. 34-35.

<sup>30</sup> Respondent’s February 26, 2018 letter, para. 36 (citing *Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Professor Brigitte Stern and Professor Guido Santiago Tawil, 20 May 2011, para. 82).

<sup>31</sup> Professor Stern’s Letter of March 8, 2018, p. 2.

<sup>32</sup> Professor Stern’s Letter of March 8, 2018, p. 3 (citing to *Société Générale de Surveillance SA v. Pakistan*, ICSID Case Arb/01/13, Decision on Claimant’s Proposal to Disqualify Arbitrator, 19 December 2002, paras. 21-22).

34. In Professor Stern’s view, “the Challenge is neither justified under the ICSID Convention, nor, if applicable, under the IBA Rules on conflicts of interest.”<sup>33</sup> In this regard, Professor Stern:

- i. notes that Orange List circumstances do not imply an automatic recusal, but rather impose a duty of disclosure by the arbitrator, a duty with which Professor Stern complied.<sup>34</sup>
- ii. emphasizes that the three previous nominations by Croatia involved two different law firms (neither of which are the Respondent’s counsel in this arbitration, Latham & Watkins LLP). Moreover, the Claimants’ reference to multiple nominations by “Respondent and Respondent’s counsel” and its suggestion that Professor Stern has been appointed twice in the last six years by Latham & Watkins LLP are misplaced – Professor Stern has been nominated by that firm only in two now closed cases, in 2007 and 2009.<sup>35</sup>
- iii. observes, with respect to the Claimants’ argument that repeat nominations are a strong “objective indication of the view of [Croatia]” that “the outcome of the dispute is more likely to be successful with [Professor Stern] as a member of the tribunal than would otherwise be the case,” that she was not in fact Croatia’s first choice in this case.<sup>36</sup> Professor Stern also notes that, given the quite small specialized pool of investor-State arbitrators, “it is quite unavoidable that there are multiple appointments.”<sup>37</sup>
- iv. comments that the mere existence of some professional relationship with a party is not an automatic basis for disqualification, and, in any event, no such relationship exists in this case:

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<sup>33</sup> Professor Stern’s Letter of March 8, 2018, p. 4.

<sup>34</sup> *Ibid.*

<sup>35</sup> Professor Stern’s Letter of March 8, 2018, p. 5.

<sup>36</sup> Professor Stern’s Letter of March 8, 2018, p. 6.

<sup>37</sup> *Ibid.*

*I do not believe that the fact that I am appointed by a State in several cases can be described as creating by itself common interests or a professional relationship that could endanger my independence. I am an academic with a tradition of full independence and my independence is supported by the fact that I have had no business relations with any specific law firm during my whole [career].*

*The “multiple” nominations are the only occurrences where I was nominated by Croatia, in an 18 years long [career] in arbitration, in which I have served in more than 130 cases. This amounts in total to 3% of my arbitration cases (ICSID and non-ICSID) and it seems objectively evident that this can hardly be described as a relationship that could endanger my independence.<sup>38</sup>*

- v. observes that, while she does not know whether the present case presents similarities of facts and law with the other cases where she sits and where Croatia is a party, the similarities identified by the Claimants appear to be very general. In Professor Stern’s view, the alleged similarities could, *mutatis mutandis*, describe any two disputes arising in the same State more or less at the same time, or even many international arbitration cases. Even if there are some similarities, each case is fact specific and Professor Stern “cannot imagine” that a decision in one case could not be different than a decision in another case, because of prejudgment. To the contrary, Professor Stern states she has “always insisted on the freedom of arbitrators to decide each case on its own merits.” In this regard, Professor Stern points to her dissenting opinion, emphasizing this very point, in *Burlington v. Ecuador*. She also notes that the outcomes in two cases against Hungary were quite different (despite quite similar factual and legal issues between the two cases).<sup>39</sup>

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<sup>38</sup> Professor Stern’s Letter of March 8, 2018, pp. 6-7. (relying on *Aguas del Aquonquija v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, October 3, 2001, para. 28).

<sup>39</sup> Professor Stern’s Letter of March 8, 2018, pp. 7-9.

### III. DECISION BY THE CHAIRMAN

#### A. TIMELINESS

35. Arbitration Rule 9(1) reads as follows:

*A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.*

36. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.<sup>40</sup>

37. In *Urbaser v. Argentina*, the tribunal decided that filing a challenge within 10 days of learning the underlying facts fulfilled the promptness requirement.<sup>41</sup> In *Suez v. Argentina*, a challenge filed 53 days after learning the relevant facts was held to be too long.<sup>42</sup> In *Burlington v. Ecuador*, two grounds for challenge were dismissed because they related to facts which had been public for more than 4 months prior to filing the challenge.<sup>43</sup> The tribunal in *Azurix v. Argentina* found that a delay of 8 months was not prompt filing.<sup>44</sup> In

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<sup>40</sup> See *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) ¶73 (“**Burlington**”); *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal (May 05, 2014) ¶39 (“**Conoco**”); *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 04, 2014) ¶68 (“**Abaclat**”).

<sup>41</sup> *Urbaser S.A. and others v. Argentine Republic*, Decision on Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ARB/07/26, August 12, 2010, ¶ 19.

<sup>42</sup> *Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic*, ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, ¶¶ 22-26.

<sup>43</sup> *Burlington v. Ecuador*, *supra* note 19, ¶¶ 71-76.

<sup>44</sup> *Azurix Corp. v. Argentine Republic*, ARB/01/12, Decision on the Challenge to the President of the Tribunal, February 25, 2005, as reported in the Decision on Annulment, September 1, 2009, ¶¶ 33-36, 268-269.

*CDC v. Seychelles*, a filing after 147 days was deemed untimely,<sup>45</sup> and in *Cemex v. Venezuela*, 6 months was considered too long.<sup>46</sup>

38. In this case, the Claimants filed the Proposal on February 16, 2018, 16 days after receiving notification of Professor Stern’s appointment and Professor Stern’s declaration with accompanying statement setting forth the matters which the Claimants rely on in the Proposal. The time period between the facts relied on in the Proposal and the filing of the Proposal falls within an acceptable range. Therefore, this disqualification proposal is considered to have been filed promptly for the purposes of Arbitration Rule 9(1).

## **B. THE APPLICABLE LEGAL STANDARD**

39. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

*A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.*

40. In this regard, a number of decisions have concluded that the word “manifest” in Article 57 of the Convention means “evident” or “obvious,”<sup>47</sup> and that it relates to the ease with which the alleged lack of the required qualities can be perceived.<sup>48</sup>

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<sup>45</sup> *CDC Group PLC v. Republic of Seychelles*, ARB/02/14, Decision on Annulment, June 29, 2005, ¶ 53, reported in Schreuer, Christoph, *supra* note 15, 1201.

<sup>46</sup> *Cemex Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*. ARB/08/15, Decision on the Respondent’s Proposal to Disqualify a Member of the Tribunal, November 6, 2009, ¶ 41.

<sup>47</sup> *Burlington*, *supra* note 40 ¶68, footnote 83; *Abaclat* *supra* note ¶71 footnote 25; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20) ¶61, footnote 43 (“**Blue Bank**”); *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (December 13, 2013) ¶73, footnote 58 (“**Repsol**”); *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) Decision on the Proposal to Disqualify a Majority of the Tribunal (May 05, 2014) ¶39 (“**Conoco**”).

<sup>48</sup> C. Schreuer, *The ICSID Convention*, Second Edition (2009), page 1202 ¶¶134-154.



41. The disqualification proposed in this case alleges that Professor Stern manifestly lacks the qualities required by Article 14(1) of the ICSID Convention, which provides:

*Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.*

42. Specifically, the Proposal alleges a manifest lack of the quality that an arbitrator “may be relied upon to exercise independent judgment.”
43. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*” (guaranteed independence in exercising their functions), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is accepted that pursuant to Article 14(1) arbitrators must be both impartial and independent.<sup>49</sup>
44. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both “protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”<sup>50</sup>
45. Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias.<sup>51</sup>
46. The legal standard applied to a proposal to disqualify an arbitrator is an “objective standard based on a reasonable evaluation of the evidence by a third party.” As a consequence, the

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<sup>49</sup> The parties agree on this point: *see* Claimants’ February 16, 2018 letter, ¶ 3; Respondent’s February 26, 2018 letter, ¶ 5. So does ICSID jurisprudence: Burlington *supra* note 40 ¶65, Abaclat *supra* note ¶74, Blue Bank *supra* note 47 ¶58, Repsol *supra* note 47 ¶70, Conoco *supra* note 47 ¶50.

<sup>50</sup> Burlington *supra* note 40 ¶66, Abaclat *supra* note ¶75, Blue Bank *supra* note 47 ¶59, Repsol *supra* note 47 ¶71, Conoco *supra* note 47 ¶51.

<sup>51</sup> Burlington *supra* note 40 ¶66, Abaclat *supra* note ¶76, Blue Bank *supra* note 47 ¶59, Repsol *supra* note 47 ¶71, Conoco *supra* note 47 ¶52.

subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.<sup>52</sup>

47. The Claimants have referred to the IBA Guidelines on Conflicts of Interest in International Arbitration in its arguments. While other rules or guidelines such as these may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

### C. MERITS

48. As indicated above, the basis for the Claimants' proposal is Professor Stern's prior nomination by Croatia in three other investor-State arbitrations in the period February 2014 to November 2016. All four cases are currently pending. The Claimants further argue that these other matters concern factual and legal issues for decision on the merits that are "substantially similar to those that will be decided in the current proceedings..." (a proposition which the Respondent disputes on the facts). Each of these matters are addressed separately below.

#### (1) Multiple Appointments by the Same Party

49. With respect to Professor Stern's prior nominations by Croatia in other investor-state arbitrations, reference can be made to the *Tidewater* decision. In that case, it was held that "the question of whether multiple appointments to arbitral tribunals may impugn the independence or impartiality of an arbitrator is a matter of substance, not of mere mathematical calculation."<sup>53</sup> Furthermore, the "starting-point is that multiple appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function."<sup>54</sup>

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<sup>52</sup> Burlington *supra* note 40 ¶67, Abaclat *supra* note ¶77, Blue Bank *supra* note 47 ¶60, Repsol *supra* note 47 ¶72, Conoco *supra* note 47 ¶53.

<sup>53</sup> Tidewater, ¶ 59.

<sup>54</sup> Tidewater, ¶ 60.

50. In this case, the Claimants have not pointed to any circumstance related to Professor Stern's other appointments by the Respondent that would call into question her impartiality or independence. First, as explained below, the Claimants have not established that a problematic overlap in terms of factual or legal issues of the cases exists at this time. Second, no evidence has been presented to show that a relationship of dependence, financial or otherwise, exists between Professor Stern and the Respondent or its counsel. Third, no evidence has been presented which could give rise to the inference that Professor Stern's decisions would be influenced in any way by the fact of such multiple appointments by one party; the evidence on the record would tend to support the opposite inference. Finally, the Chairman notes that the facts underlying the Claimants' proposal are not dissimilar to those underlying the challenge to Professor Stern in *Universal Compression*, in which the challenge in question was also rejected.
51. In the Chairman's view, a third party undertaking a reasonable evaluation of Professor Stern's appointments by Croatia would not conclude that this evidences a manifest lack of the qualities required under Article 14(1) of the ICSID Convention at this time.

**(2) Multiple Arbitrations Allegedly Concerning the Same Legal and/or Factual Issues**

52. A significant overlap of issues in concurrent cases can be relevant in assessing the appearance of dependence or bias on the part of an arbitrator sitting on the tribunals in these cases. However, for a proposal to disqualify an arbitrator to be upheld on this basis, the challenging party must establish the presence of common issues sufficient to give rise, objectively, to the appearance of dependence or bias.<sup>55</sup>
53. In this case, the Claimants have not met that burden.
54. In the Chairman's view, the Claimants have not been able to identify with specificity or certainty actual legal questions or factual issues which in fact fall to be determined in multiple cases, or to provide sufficient proof to demonstrate that, at this time, a disqualifying overlap exists between the cases. In this regard, it is noteworthy that the

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<sup>55</sup> See *Universal*, ¶ 72; *Caratube*, ¶ 57.

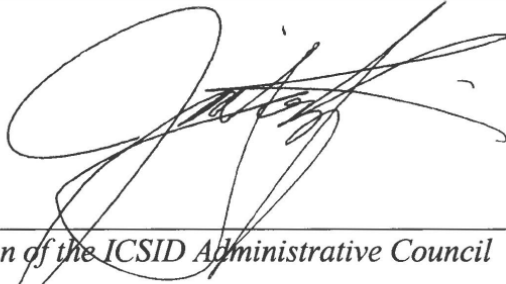
other cases in which Professor Stern is arbitrator do not arise in the same industry as at issue in the present case, and do not appear to arise out of the same State conduct. Moreover, the mere fact that an arbitrator is sitting in another case arising out of the same treaty is not, on its own, sufficient to give rise to any presumption regarding the existence of bias.

**(3) Conclusion**

55. In the Chairman's view, a third party undertaking a reasonable evaluation of the facts alleged and the arguments submitted by the parties would not conclude that they evidence a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

**IV. DECISION**

56. Having considered all the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chairman rejects the Claimants' Proposal to Disqualify Professor Stern.

A handwritten signature in black ink, appearing to read 'J. Kim', is written over a horizontal line. The signature is stylized and somewhat cursive.

*Chairman of the ICSID Administrative Council*

Dr. Jim Yong Kim