

**ICSID Case No. ARB/10/9**

**Universal Compression International Holdings, S.L.U.**

**Claimant**

v.

**The Bolivarian Republic of Venezuela**

**Respondent**

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**DECISION ON THE PROPOSAL TO DISQUALIFY PROF. BRIGITTE STERN  
AND PROF. GUIDO SANTIAGO TAWIL, ARBITRATORS**

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Issued by

**Chairman of the Administrative Council  
Mr. Robert B. Zoellick**

Secretary of the Tribunal  
Ms. Janet M. Whittaker

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Date: **May 20, 2011**

## **I. INTRODUCTION**

### **A. REQUEST FOR ARBITRATION AND CONSTITUTION OF THE TRIBUNAL**

1. On March 23, 2010, Universal Compression International Holdings, SLU (“Claimant”) filed a Request for Arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“Convention”) against the Bolivarian Republic of Venezuela (“Respondent”).

2. On April 12, 2010, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention.

3. Absent an agreement between the Parties with respect to a method of appointment, Claimant, by letter of August 4, 2010, informed the Centre that, under Arbitration Rule 2(3), it elected the formula provided for in Article 37(2)(b) of the Convention. In its letter, Claimant appointed Professor Guido Santiago Tawil, an Argentine national, as arbitrator.

4. On August 9, 2010, the Secretariat informed the Parties that Professor Tawil had accepted his appointment and circulated a copy of his signed Arbitration Rule 6(2) declaration and attached statement. On August 12, 2010, Respondent appointed Professor Brigitte Stern, a national of France, as arbitrator. On August 18, 2010, the Secretariat informed the Parties that Professor Stern had accepted her appointment and circulated a copy of her signed Arbitration Rule 6(2) declaration.

5. By email of August 18, 2010, Claimant informed the Secretariat that the Parties had agreed to attempt to reach agreement upon a candidate for president of the tribunal by September 5, 2010. By further email of September 7, 2010, Claimant informed the Secretariat that the Parties were unable to agree upon a candidate for president of the tribunal. Claimant also requested that the Chairman of the Administrative Council (“Chairman”) appoint the president of the tribunal in accordance with Article 38 of the Convention.

6. On October 13, 2010, the Secretary-General informed the Parties that she intended to propose to the Chairman that he appoint Mr. J. William Rowley, QC, a national of Canada and a member of the ICSID Panel of Arbitrators designated by Mongolia, as the president of the tribunal. Claimant and Respondent confirmed that they had no

compelling objection to the appointment of Mr. Rowley on October 20, 2010, and October 25, 2010, respectively. On October 25, 2010, the Secretary-General confirmed that the Chairman would proceed with his appointment.

7. The Parties were informed on November 3, 2010, that the three arbitrators had accepted their appointments and that, therefore, pursuant to Arbitration Rule 6, the Tribunal was deemed to have been constituted and the proceeding to have begun as of that date. A copy of Mr. Rowley's Arbitration Rule 6(2) declaration was circulated to the Parties.

#### **B. PROFESSOR TAWIL'S ARBITRATION RULE 6(2) DECLARATION**

8. Professor Tawil attached a statement to his Arbitration Rule 6(2) declaration signed on August 6, 2010, confirming that he had "no relationship with any of the parties." In that statement, Professor Tawil disclosed facts and relationships with counsel for Claimant, as follows:

"1. I have acted as co-counsel of Claimant's counsel in two ICSID arbitrations (Azurix Corp. v. Argentine Republic [ICSID Case No. ARB/01/12]) and Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic [ICSID Case No. ARB/01/3]). Both arbitrations have concluded.

2. One of King & Spalding's associates, Ms. Silvia Marchili worked as a junior associate in the legal team that I lead in M. & M. Bomchil between 3/24/2003 and 7/31/2006.

3. Together with other authors, I have contributed to the first and second editions of the book 'The Art of Advocacy in International Arbitration', in which Mr. Bishop is one of the editors."

Professor Tawil also confirmed that he does "not consider that such circumstances affect in any way my ability to serve in this Tribunal or the reliance on my independent judgment."

### **C. PROFESSOR STERN'S ARBITRATION RULE 6(2) DECLARATION**

9. In her Arbitration Rule 6(2) declaration of August 20, 2010, Professor Stern crossed out the first sentence of the fourth paragraph, which stated as follows:

Attached is a statement of (a) my past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party.

10. On October 1, 2010, Professor Stern submitted a letter to the Centre, stating the following:

“I was faced recently with a situation from which it appears that some parties to ICSID arbitration want not only that private information be disclosed, but also that public information be released by an arbitrator at the time of making the declaration of independence.

I therefore, for the avoidance of doubt, would like to release the following information, which is available on the ICSID website, as a precision of my declaration of independence and impartiality sent to ICSID on August 17, 2010.

I have been nominated by Venezuela in the following three cases, respectively in the years 2007, 2008 and 2010:

Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/04/6), in the year 2007.

Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, in the year 2008.

Tidewater, Inc. et al. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5).

I reconfirm here that I see no reason why I should not serve on the Arbitral Tribunal to be constituted with respect of the dispute between Universal and Venezuela.”

#### **D. REQUEST TO DISQUALIFY PROFESSOR STERN AND PROFESSOR TAWIL**

11. By letter of September 9, 2010, Respondent indicated its intention to propose the disqualification of Professor Tawil as arbitrator in this case following the constitution of the tribunal. Respondent stated that its intention to seek Professor Tawil's disqualification was based on the relationship between Professor Tawil and counsel for Claimant—King & Spalding LLP—purportedly resulting from their having acted as co-counsel in proceedings that allegedly had recently concluded or were pending.

12. By letter of September 15, 2010, Claimant reserved its right to seek the recusal of Professor Stern as arbitrator once the tribunal had been constituted. Claimant's reservation was based on an allegation of repeated appointments of Professor Stern by Venezuela and Venezuela's counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP, and her alleged non-disclosure of this fact.

13. On November 4, 2010, Claimant proposed the disqualification of Professor Stern upon the basis that her multiple appointments by Venezuela and Respondent's counsel, not disclosed in her original declaration, conflict with three situations on the "Orange List" of the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines") and give rise to justifiable doubts in Claimant's mind as to Professor Stern's ability to exercise independent and impartial judgment in this proceeding.

14. On November 5, 2010, the President of the Tribunal, having consulted with Professor Tawil, set a timetable for the Parties to submit observations and Professor Stern to furnish an explanation as provided for under Arbitration Rule 9, as follows:

- November 22, 2010—Respondent to submit a reply to Claimant's disqualification proposals;
- December 6, 2010—Professor Stern to furnish any explanation; and
- December 13, 2010—The Parties to submit any further observations, including comments arising from Professor Stern's explanation.

15. In its submission dated November 8, 2010 (received on November 12, 2010), Respondent proposed the disqualification of Professor Tawil on the grounds that: (i) Professor Tawil allegedly served as co-counsel with King & Spalding LLP to claimants in specified ICSID cases that purportedly had recently concluded or were pending; and (ii)

one of Claimant's counsel, Ms. Silvia M. Marchili, allegedly was an associate of and worked with Professor Tawil for four years in the law firm M. & M. Bomchil of which Professor Tawil is a partner.

16. Each of the Parties filed submissions and Professor Stern furnished an explanation regarding the proposal to disqualify her within the time limits established in the letter of November 5, 2010.

17. Claimant's submission of November 4, 2010 and Respondent's submission dated November 8, 2010 were deemed by the Parties to be a proposal relating to the majority of the members of the Tribunal and thus was required to be decided by the Chairman of the Administrative Council in accordance with Article 58 of the Convention and Arbitration Rule 9.

18. By letter of January 12, 2011, the Centre invited the Parties to submit their final observations on the proposed disqualification of Professor Stern by Wednesday, January 26, 2011, and Professor Stern was invited to submit any further explanation that she wished to make by the same date. The Centre also set a timetable for the Parties to submit observations on the proposal to disqualify Professor Tawil, and for Professor Tawil to furnish an explanation as provided for under Arbitration Rule 9, as follows:

- January 28, 2011—Claimant to submit observations;
- February 11, 2011—Professor Tawil to furnish any explanation; and
- February 18, 2011—The Parties to submit any further observations, including comments arising from Professor Tawil's explanation.

19. On January 26, 2011, the Parties submitted final observations on the proposal to disqualify Professor Stern. Claimant, having requested an extension of time, filed observations on the proposal to disqualify Professor Tawil on February 7, 2011. On February 18, 2011, having requested an extension of time for filing, Professor Tawil furnished an explanation. On February 25, 2011, Claimant confirmed that it did not intend to submit any further observations on the proposal to disqualify Professor Tawil, and Respondent submitted its final observations in this respect.

## II. THE PARTIES' SUBMISSIONS AND PROFESSOR STERN'S EXPLANATION REGARDING THE PROPOSAL TO DISQUALIFY PROFESSOR STERN

### A. CLAIMANT'S SUBMISSIONS

20. Claimant asserts that the standards under Articles 14 and 57 of the Convention require that arbitrators be both impartial and independent. In Claimant's view, the requirement of impartiality implies the absence of actual or apparent bias towards a party and must be judged from the perspective of a reasonable and informed observer.<sup>1</sup>

21. Claimant references the requirement in Article 57 of the Convention that disqualification of an arbitrator requires a manifest lack of the qualities in Article 14(1) of the Convention. Claimant submits that the "manifest" criterion merely means that an arbitrator's lack of Article 14(1) qualities is clear; it does not mean that a claimant must show that the arbitrator manifestly lacks these qualities."<sup>2</sup>

22. Claimant references several standards in the IBA Guidelines, and acknowledges that the IBA Guidelines are not binding, although in its submission they expressly apply to investment arbitrations.<sup>3</sup> Claimant asserts that conflicts arising with respect to standards on the IBA Guidelines' Orange List can give rise to justifiable doubts as to an arbitrator's impartiality and that "[t]he test to be applied to determine whether Claimant's doubts are in fact justifiable is an 'appearance test,' which is to be applied objectively."<sup>4</sup> Claimant asserts that "a single situation included on the Orange List may necessitate an arbitrator's disqualification. The three situations existing with respect to Professor Stern make her disqualification all the more necessary."<sup>5</sup> Claimant submits that an arbitrator may be disqualified in this situation, even if the arbitrator intends to act independently and impartially.

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<sup>1</sup> Claimant's Additional Observations Regarding Its Challenge to Professor Brigitte Stern as Arbitrator dated Dec. 13, 2010 ("Claimant's Additional Observations PTD Stern") ¶ 2.

<sup>2</sup> Claimant's Challenge to Professor Brigitte Stern as Arbitrator dated November 4, 2010 ("PTD Stern") ¶ 9; Claimant's Additional Observations PTD Stern ¶ 3.

<sup>3</sup> PTD Stern ¶ 5, fn. 4; Claimant's Additional Observations PTD Stern ¶¶ 5-9.

<sup>4</sup> PTD Stern ¶ 9.

<sup>5</sup> *Id.* ¶ 6.

23. Claimant asserts that Professor Stern’s appointment as arbitrator in this case is inconsistent with the IBA Guidelines “because it constitutes at least three situations giving rise to potential conflict found on the IBA ‘Orange List’.”<sup>6</sup>

### 1. Multiple Appointments by the Same Party

24. First, Claimant expresses doubt about Professor Stern’s “ability to inspire full confidence and offer every guarantee to exercise impartial and independent judgment while participating in this proceeding,”<sup>7</sup> on the basis that Professor Stern is acting as the party-appointed arbitrator for Venezuela in at least three additional pending ICSID proceedings, namely: (i) *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6) (“*Vannessa Ventures*”); (ii) *Brandes Investment Partners, L.P. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3) (“*Brandes*”); and (iii) *Tidewater Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No.1 ARB/10/5) (“*Tidewater*”).<sup>8</sup> Claimant submits that these multiple appointments conflict with Section 3.1.3 of the IBA Guidelines’ Orange List.<sup>9</sup> Claimant argues that multiple appointments by the same party give rise to a potential for, or appearance of, undue influence.<sup>10</sup> Claimant also argues that Professor Stern’s multiple appointments could place her “on unequal footing in her understanding of the proceeding,” as she may have heard Venezuela’s position several times previously while the other arbitrators and Claimant will not.<sup>11</sup> Claimant disputes Respondent’s assertion that *Vannessa Ventures* should be excluded from the count because the appointment of Professor Stern in this case was not precisely within the past three years.<sup>12</sup> Claimant submits that the relevant date is not the date of appointment but the date of constitution of the tribunal, which was within the relevant three-year period.<sup>13</sup> Claimant contends that, in any event, application of a

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<sup>6</sup> *Id.* ¶ 5.

<sup>7</sup> *Id.* ¶¶ 4, 7.

<sup>8</sup> *Id.* ¶¶ 4, 8; Claimant’s Additional Observations PTD Stern ¶ 12.

<sup>9</sup> PTD Stern ¶¶ 11–15 (citing Section 3.1.3 (“[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.”)).

<sup>10</sup> *Id.* ¶ 13.

<sup>11</sup> *Id.* ¶ 13.

<sup>12</sup> Claimant’s Additional Observations PTD Stern ¶¶ 13–19.

<sup>13</sup> *Id.* ¶ 14.



strict three-year bright line cut-off would give parties an incentive to avoid the application of Section 3.1.3 through dilatory tactics.<sup>14</sup>

## 2. Multiple Arbitrations Having Related Issues

25. Claimant also submits that a conflict arises with respect to Section 3.1.5 of the IBA Guidelines' Orange List.<sup>15</sup> In particular, Claimant asserts that “all four of these cases involve similar issues—the claimants in all four cases are foreign investors in service industries in Venezuela, who are alleging that Venezuela has seized property through expropriatory measures.”<sup>16</sup> Claimant notes alleged overlap between the factual and legal issues arising in the *Vannessa Ventures*, *Brandes*, and *Tidewater* cases and the case at hand. Claimant contends that “[t]he fact that she will not be learning of Venezuela’s actions and its defenses afresh in the present case—because she has already been exposed to them in the first two cases and will likely soon hear them in the *Tidewater* case—increases the probability that she is unable to judge the present case impartially and independently.”<sup>17</sup>

## 3. Multiple Appointments by the Same Counsel

26. Claimant notes that in two of these cases, Respondent is represented by its counsel in this case, Curtis, Mallet-Prevost, Colt & Mosle LLP, and is represented in all four cases by Venezuela’s Attorney General.<sup>18</sup> Claimant submits that this conflicts with Section 3.3.7 of the IBA Guidelines' Orange List and gives rise to doubts as to Professor Stern’s independence and impartiality.<sup>19</sup> Claimant also disputes the determination in the Decision on Claimants’ Proposal to Disqualify Professor Brigitte Stern, Arbitrator dated Dec. 23,

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<sup>14</sup> *Id.* ¶¶ 15–17.

<sup>15</sup> PTD Stern ¶¶ 16–22 (citing Section 3.1.5 (“[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 an affiliate of one of the parties.”)).

<sup>16</sup> *Id.* ¶¶ 5, 16. *See also* Claimant’s Additional Observations PTD Stern ¶¶ 25–26; Claimant’s Final Observations Regarding Its Challenge to Professor Brigitte Stern as Arbitrator dated Jan. 26, 2011 (“Claimant’s Final Observations PTD Stern”) ¶ 23.

<sup>17</sup> PTD Stern ¶ 21.

<sup>18</sup> *Id.* ¶¶ 4–5, 23; Claimant’s Additional Observations PTD Stern ¶¶ 20–21.

<sup>19</sup> PTD Stern ¶ 23 (citing Section 3.3.7 (“[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.”)).

2010 (“*Tidewater* Decision”) that the Attorney General of Venezuela is not “counsel” within the meaning of Section 3.3.7 of the IBA Guidelines.<sup>20</sup>

#### 4. Non-Disclosure of Other ICSID Appointments by Venezuela

27. Claimant submits that the IBA Guidelines explicitly require arbitrators to disclose situations appearing on the Orange List.<sup>21</sup> Accordingly, Claimant asserts that Professor Stern “was under an obligation to disclose her involvement in at least three other cases involving Venezuela when she was appointed.”<sup>22</sup> Claimant argues that the justifiable doubts as to Professor Stern’s independence and impartiality are increased by her “failure to immediately disclose these matters.”<sup>23</sup> Claimant states that “it is no defense to argue ... that no disclosure obligation exists whenever a party can ‘discover’ the arbitrator’s prior appointments on its own by searching through ‘public’ sources.” Claimant notes that Professor Stern’s appointment in *Tidewater* was not made public on the ICSID website at the time that Professor Stern made her declaration because the tribunal in that case was not yet constituted.<sup>24</sup>

28. Finally, Claimant notes that in the *Tidewater* Decision, submitted by Respondent, similar arguments to those advanced by Claimant here were rejected by the members authoring that decision. In Claimant’s Final Observations Regarding Its Challenge to Professor Brigitte Stern as Arbitrator dated January 26, 2011, Claimant outlines in detail its disagreement “with the reasoning and conclusions of the two members of the *Tidewater* Tribunal with regard to the substantive arguments raised.”<sup>25</sup>

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<sup>20</sup> Claimant’s Final Observations PTD Stern ¶¶ 12–15.

<sup>21</sup> PTD Stern ¶ 6; Claimant’s Additional Observations PTD Stern ¶ 10.

<sup>22</sup> PTD Stern ¶ 24.

<sup>23</sup> *Id.* See also Claimant’s Final Observations PTD Stern ¶ 10 (“there is no apparent justification for Professor Stern’s non-disclosure, except for her own, subjective belief that Universal or its counsel would discover the conflicts on their own, and/or that the conflicts were immaterial since Professor Stern herself did not believe her appointments would affect her impartiality and independence.”).

<sup>24</sup> PTD Stern ¶ 25.

<sup>25</sup> Claimant’s Final Observations PTD Stern ¶¶ 1–2.

## B. RESPONDENT'S SUBMISSIONS

29. Respondent asserts that under Articles 14 and 57 of the Convention, the applicable standard is the “manifest” lack of independence or impartiality. A challenge must be based on objective facts that, from the point of view of a reasonable and informed third person, evidently and clearly constitute a manifest lack of the qualities indicated above.<sup>26</sup>

30. Respondent contends that the IBA Guidelines “fundamentally deal with international commercial arbitrations,”<sup>27</sup> and “are only a guide, and are not mandatory in ICSID proceedings.”<sup>28</sup> Respondent also argues that, even if a situation falls within the Orange List, disqualification is not automatic,<sup>29</sup> but that it is also necessary to demonstrate the existence of objective elements “which, in the eyes of a reasonable and informed third party, evidently show that the arbitrator in question lacks independence or impartiality.”<sup>30</sup>

### 1. Multiple Appointments by the Same Party

31. Respondent asserts that the mere existence of a situation within Section 3.1.3 of the IBA Guidelines’ Orange List—in light of the appointment of Professor Stern in *Vannessa Ventures, Brandes, and Tidewater*—is not sufficient for an independent and informed third party objectively to conclude that it is obvious and clear that Professor Stern cannot be relied upon to exercise independent and impartial judgment in this case.<sup>31</sup> Specifically, there is no other objective fact or element that “might lead a reasonable and informed third party to conclude that it is clear, obvious and evident that as a result of Respondent’s appointment of Professor Stern, Professor Stern’s impartiality and independence to act in this case should be doubted.”<sup>32</sup>

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<sup>26</sup> Respondent’s Observations on the Proposal to Disqualify Professor Stern dated Nov. 22, 2010 (“Respondent’s Observations PTD Stern”), p. 2.

<sup>27</sup> *Id.*, p. 4.

<sup>28</sup> *Id.*, p. 3. *See also* Respondent’s Observations PTD, p. 9 fn. 20; Respondent’s Additional Observations on the Proposal to Disqualify Professor Stern dated Dec. 13, 2010 (“Respondent’s Additional Observations PTD Stern”), p. 2.

<sup>29</sup> Respondent’s Additional Observations PTD Stern, p. 2.

<sup>30</sup> *Id.*, p. 3. *See also* Respondent’s Additional Observations PTD Stern, p. 1; Respondent’s Final Observations on the Proposal to Disqualify Professor Stern dated Jan. 26, 2011 (“Respondent’s Final Observations PTD Stern”), p. 2.

<sup>31</sup> Respondent’s Observations PTD Stern, p. 7.

<sup>32</sup> *Id.*, p. 5. *See also* Respondent’s Final Observations PTD Stern, p. 2.

32. Respondent dismisses, as speculative and without foundation, the assertion made by Claimant that a conflict might arise because (i) Professor Stern’s decision in an earlier case may affect her later decisions, (ii) Professor Stern might be exposed to materials in an earlier case that are unknown to the arbitrators or parties in a later case, (iii) Professor Stern may have become dependent upon the repeated appointment by Venezuela and, therefore, be unlikely to reach a decision finding against Venezuela,<sup>33</sup> and (iv) Professor Stern’s three previous appointments could make her economically dependent upon appointments by Venezuela.<sup>34</sup>

33. Respondent also disputes Claimant’s argument that Respondent’s appointment of Professor Stern in other cases places her on an unequal footing in understanding this proceeding on the basis that she would already have heard relevant argument and seen evidence in those other cases, such that she would be unable to judge this case impartially and independently.<sup>35</sup>

34. Respondent observes that, in any event, Section 3.1.3 is not at issue because Professor Stern was appointed in *Vannessa Ventures* before the relevant three-year period began.

## **2. Multiple Arbitrations Having Related Issues**

35. Respondent observes that, if Claimant’s interpretation of Section 3.1.5 of the IBA Guidelines’ Orange List was accepted “it would mean that no party to a proceeding under an investment treaty could appoint in more than one occasion, within a three year period, an arbitrator it has already designated in another proceeding under an investment treaty.”<sup>36</sup>

36. Respondent observes that all ICSID cases deal with essentially the same issues—for example, fair and equitable treatment and expropriation—but that Claimant does not

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<sup>33</sup> Respondent’s Observations PTD Stern, p. 6.

<sup>34</sup> *Id.*, p. 6, fn. 13.

<sup>35</sup> *Id.*, pp. 6–7.

<sup>36</sup> *Id.*, p. 8. *See also* Respondent’s Final Observations PTD Stern, p. 4, fn. 9.

identify measures or arguments in common between *Vannessa Ventures*, *Brandes*, *Tidewater*, and *Universal*, but merely speculates that they exist.<sup>37</sup>

37. Respondent notes that there were repeat appointments of arbitrators in certain cases involving Argentina—concerning the same measures in the same sector and similar issues—but that it was not considered by King & Spalding LLP (or claimants or Argentina) in those cases that there was any objective reason to disqualify the relevant arbitrators.<sup>38</sup>

### **3. Multiple Appointments by the Same Counsel**

38. Respondent asserts that Section 3.3.7 of the IBA Guidelines' Orange List is not applicable because Curtis, Mallet-Prevost, Colt & Mosle LLP does not act as counsel in more than three cases in which Professor Stern serves as an arbitrator, namely, *Brandes*, *Tidewater*, and *Universal*. Further, that provision is not applicable to appointments made by the Attorney General of the Republic, which is part of the Republic as an internal organ of the State.<sup>39</sup>

### **4. Non-Disclosure of Other ICSID Appointments by Venezuela**

39. Respondent asserts that the non-disclosure by an arbitrator of the existence of an IBA Guidelines' Orange List situation does not lead to the arbitrator's automatic disqualification.<sup>40</sup> In any event, Respondent notes that, pursuant to Arbitration Rule 6, Professor Stern disclosed her appointment in *Vannessa Ventures*, *Brandes*, and *Tidewater* to the Parties prior to the constitution of the Tribunal. Further, this information was already publicly available via the ICSID website.<sup>41</sup>

## **C. PROFESSOR STERN'S EXPLANATION**

40. In her explanation of December 1, 2010, Professor Stern states that, when acting as arbitrator, she has always complied with her duty to be both independent and impartial,

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<sup>37</sup> Respondent's Additional Observations PTD Stern, p. 3; Respondent's Final Observations PTD Stern, p. 4.

<sup>38</sup> Respondent's Observations PTD Stern, pp. 8–9.

<sup>39</sup> Respondent's Additional Observations PTD Stern, p. 4.

<sup>40</sup> Respondent's Observations PTD Stern, p. 4 (citing the IBA Guidelines, Part II).

<sup>41</sup> *Id.*, pp. 4–5, fn. 9.

and will continue to act independently and impartially in all of the arbitral tribunals in which she will be called to sit.<sup>42</sup>

### **1. Multiple Appointments by the Same Party**

41. Professor Stern explains that she does not consider a nomination as arbitrator to create a professional relationship with the party making the nomination.<sup>43</sup>

42. As concerns the argument that multiple appointments by the same party might result in her being unduly influenced by repeatedly hearing the same arguments, Professor Stern explains that she is influenced by the intrinsic value of an argument and not the number of times that she hears it. She states that she knows nothing about this case or *Tidewater*, or whether similar arguments will be espoused. Additionally, in *Vannessa Ventures* and *Brandes*, in which she has participated in preliminary decisions, the issues raised were quite different.<sup>44</sup>

43. Professor Stern also references Claimant's assertion that there is a general need to minimize the relationships that a party-appointed arbitrator has with the appointing party. She states that the case on which Claimant relies on in support of this assertion—where an arbitrator was challenged in a NAFTA case because he was giving advice to a NAFTA State—is inapposite. She sits exclusively as an arbitrator and does not act as counsel to parties or as an expert.<sup>45</sup>

44. She remarks that the number of States and experienced arbitrators is limited and that if a State cannot nominate the same arbitrator in several cases, the freedom of States to choose an arbitrator would be undermined.<sup>46</sup>

### **2. Multiple Arbitrations Having Related Issues**

45. In response to the argument that each of the cases in which she has been appointed by Venezuela as an arbitrator involve similar issues, Professor Stern notes that she has

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<sup>42</sup> Stern Explanation of Dec. 1, 2010, p. 1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, p. 2.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

difficulty understanding how cases involving different claimants in different industries are related.<sup>47</sup> To the extent that each case involves similar types of claims—for example, for expropriation, violation of the fair and equitable treatment standard, and violation of the full protection and security standard—all investment arbitrations involve such claims.

### **3. Multiple Appointments by the Same Counsel**

46. As concerns multiple appointments by the same counsel, Professor Stern indicates that she has been appointed three or more times by various law firms, but that such appointments do not create a professional business relationship that could endanger her independence.<sup>48</sup>

### **4. Non-Disclosure of Other ICSID Appointments by Venezuela**

47. Professor Stern explains that it has always been her “understanding that only facts that are undisclosed or unknown must be disclosed: the participation in an ICSID arbitral tribunal is public knowledge available on ICSID web pages ....”<sup>49</sup> She notes that this has been her practice and that of her co-arbitrators in cases where there were multiple appointments by the same party. Furthermore, the parties’ counsel in those cases did not consider that those appointments raised reasonable doubts regarding her independence or impartiality.<sup>50</sup> Professor Stern notes that she provided information about her publicly known appointments on October 1, 2010, for the avoidance of doubt only in light of concerns raised in *Tidewater*. She objects to the suggestion that the trigger to provide this information was Claimant’s letter notifying the Centre that it had learned of Professor Stern’s other appointments by Venezuela.<sup>51</sup>

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<sup>47</sup> See, *id.*, p. 3.

<sup>48</sup> Stern Explanation of Dec. 1, 2010, p. 3.

<sup>49</sup> *Id.*, p. 4.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

### III. THE PARTIES' SUBMISSIONS AND PROFESSOR TAWIL'S EXPLANATION REGARDING THE PROPOSAL TO DISQUALIFY PROFESSOR TAWIL

#### A. RESPONDENT'S SUBMISSIONS

48. Respondent submits that the standards applicable to the proposal to disqualify an arbitrator are as follows:

- a) "With respect to Article 14 of the Convention, ICSID tribunals have recognized that both impartiality and independence are fundamental requirements in arbitration proceedings under the Convention ....
- b) An appearance of bias in the eyes of a reasonable and informed third person is enough to sustain a challenge to an arbitrator.
- c) A challenge to an arbitrator should succeed when there is a reasonable doubt as to the arbitrator's impartiality ....
- d) Objective facts that give rise to a reasonable inference that the arbitrator may not be relied upon to exercise independent and impartial judgment are also enough to sustain a challenge.
- e) The appearance of impropriety is basis enough for a proposal to disqualify an arbitrator to succeed."<sup>52</sup>

49. Respondent contends that the IBA Guidelines cannot be more than a guide or reference for investor-State proceedings.<sup>53</sup> Additionally, Respondent submits that "although some of the scenarios included in the Guidelines are considered not to create a conflict in the context of international commercial arbitration, they do create a conflict in ICSID proceedings."<sup>54</sup>

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<sup>52</sup> Proposal for Disqualification of Dr. Guido Santiago Tawil Pursuant to Article 57 of the ICSID Convention dated Nov. 8, 2010 ("PTD Tawil") ¶ 10.

<sup>53</sup> Respondent's Final Observations to Respondent's Proposal for the Disqualification of Professor Guido Santiago Tawil dated Feb. 25, 2011 ("Respondent's Final Observations PTD Tawil") ¶ 5.

<sup>54</sup> *Id.* ¶ 5.



50. Respondent asserts that there is “a long professional relationship between Dr. Tawil and several members of the firm King & Spalding, counsel to the Claimant, which has lasted for at least ten years and which has basically consisted in joint representations in investor-state arbitrations, always arguing in favor of investors.”<sup>55</sup> The alleged facts underlying this relationship are as follows: (i) Professor Tawil served, along with Claimant’s counsel, as counsel to the claimants in *Enron Creditors Recovery Corporation and Ponderosa Assts, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 until at least July 30, 2010; (ii) Professor Tawil served, along with Claimant’s counsel, as counsel to the claimant in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 until at least September 1, 2009; (iii) Professor Tawil served, along with Claimant’s counsel, as counsel to the claimant in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30 (“Azurix II”); and (iv) Ms. Silvia M. Marchili of Claimant’s counsel worked with Professor Tawil for four years in the law firm of M. & M. Bomchil, where Professor Tawil is currently a partner.<sup>56</sup>

51. Respondent alleges that “all circumstances, including the nature, scope, length and recentness of the relationship lead to the conclusion that a very significant relationship exists between Dr. Tawil and Claimant’s counsel,”<sup>57</sup> and that “this relationship is more recent, protracted, and close than that indicated by Dr. Tawil in his declaration.”<sup>58</sup> In particular, Respondent asserts that “Professor Tawil’s declaration did not include his joint participation with King & Spalding in *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/03/30, however small that participation may have been.”<sup>59</sup>

52. Respondent submits that, by virtue of this relationship, Claimant’s counsel is in a privileged position to know Dr. Tawil’s stance on several relevant legal issues and that this

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<sup>55</sup> PTD Tawil ¶ 10. *See also* Respondent’s Final Observations PTD Tawil ¶¶ 2, 7.

<sup>56</sup> PTD Tawil ¶ 4.

<sup>57</sup> *Id.* ¶ 12.

<sup>58</sup> *Id.* ¶ 10; Respondent’s Final Observations PTD Tawil ¶¶ 4(iii)(b), 6(2)(b) (stating that the moment at which the relationship ends is relevant to whether there is a conflict of interest and an appearance of partiality and impropriety).

<sup>59</sup> Respondent’s Final Observations PTD Tawil ¶ 4(iii)(b).

creates “a clear disadvantage for Respondent and in favor of Claimant, in clear violation of procedural fairness.”<sup>60</sup>

53. In Respondent’s view “the importance of this relationship ... shows that Dr. Tawil’s participation as an arbitrator in this case creates an appearance of bias in the eyes of a reasonable and informed third person and gives rise to justifiable doubts with respect to his capacity to reach a free and independent decision – since he could be influenced by other factors unrelated to the merits of the case –, threatening the Respondent’s legal security.”<sup>61</sup> Additionally, Respondent alleges that it is “evident that a close relationship between an arbitrator and the lawyers of the party who appointed him to serve in such capacity creates an appearance of impropriety,”<sup>62</sup> and that there is an actual appearance of impropriety in relation to Professor Tawil’s appointment.<sup>63</sup>

## **B. CLAIMANT’S SUBMISSIONS**

54. Claimant asserts that the standards under Article 14 and 57 of the Convention require that arbitrators be impartial and independent.<sup>64</sup> In Claimant’s view, the requirements of impartiality and independence serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case.<sup>65</sup>

55. Claimant contends that the IBA Guidelines constitute a very valuable source to determine what most of the legal community understands are the best practices in terms of conflicts of interest, and that they have been relied upon by ICSID tribunals since their inception.<sup>66</sup>

56. Claimant submits that “Professor Tawil’s connections to Claimant’s legal team involve a normal and unobjectionable degree of overlap among participants in the

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<sup>60</sup> PTD Tawil ¶ 11.

<sup>61</sup> PTD Tawil ¶ 13.

<sup>62</sup> PTD Tawil ¶ 14; Respondent’s Further Observations on PTD Tawil ¶¶ 2, 5(vi).

<sup>63</sup> Respondent’s Further Observations on PTD Tawil ¶¶ 5(vii), 7.

<sup>64</sup> Claimant’s Observations Regarding Respondent’s Challenge to Professor Guido S. Tawil as Arbitrator dated Feb. 7, 2011 (“Claimant’s Observations PTD Tawil”) ¶ 20.

<sup>65</sup> *Id.* ¶ 20.

<sup>66</sup> *Id.* ¶ 25.

relatively small world of investment arbitration.”<sup>67</sup> Claimant contends that Respondent is incorrect regarding the facts allegedly proving that a recent, protracted, and close relationship with Claimant’s counsel exists. Claimant asserts that: (i) in *Azurix I* and *Enron*, Professor Tawil acted primarily as local counsel and King & Spalding LLP handled the international law issues; (ii) Professor Tawil last participated in *Azurix I* in September 2008 and in *Enron* in October 2009; (iii) Professor Tawil and his law firm had no substantial participation in *Azurix II*, that he had no participation in the drafting of the Memorial on the Merits or any subsequent submission and that, since June 2008, King & Spalding LLP has been the only firm representing Azurix Corp.;<sup>68</sup> and (iv) Ms. Marchili was a junior associate in Professor Tawil’s firm and left five years ago, no exchange program exists between that firm and King & Spalding LLP, and “at least two current associates of Respondent’s outside counsel (Curtis, Mallet-Prevost, Colt & Mosle) practiced at M. & M. Bomchil, and one of them worked on Professor Tawil’s team for at least two years.”<sup>69</sup>

57. Claimant notes that the IBA Guidelines’ “Green List” includes the situation described in the proposal to dismiss Professor Tawil; specifically, Section 4.4 includes the scenario where “[t]he arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.”<sup>70</sup> Claimant asserts that because the relationship between King & Spalding LLP and Professor Tawil falls within Section 4.4.2, no conflict arises and Professor Tawil was not required to disclose the facts on the basis of which he was challenged, notwithstanding that he did so at the time of accepting his appointment.<sup>71</sup>

58. Claimant asserts that “the fact that King & Spalding may be knowledgeable of Professor Tawil’s arguments (on Argentine law) as an advocate in two unrelated cases has no impact on Professor Tawil’s impartiality as an arbitrator and could never meet the standard under Article 57 of the ICSID Convention.”<sup>72</sup> Further, Claimant states that,

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<sup>67</sup> *Id.* ¶ 1.

<sup>68</sup> *Id.* ¶ 5.

<sup>69</sup> *Id.* ¶ 7.

<sup>70</sup> *Id.* ¶ 22 (citing IBA Guidelines, Green List, section 4.4.2).

<sup>71</sup> *Id.* ¶¶ 4, 22.

<sup>72</sup> *Id.* ¶ 20.

because the role of Professor Tawil’s firm in *Azurix I* and *Enron* was to focus on arguments relating to Argentine law, Claimant’s counsel does not have a special insight into, and is not in a “privileged position to anticipate[,] Professor Tawil’s views and mindset on general international law and investment arbitration.”<sup>73</sup>

59. Claimant submits that “it is Venezuela’s counsel who stands in this privileged position,”<sup>74</sup> because members of Respondent’s legal team have had access to Professor Tawil’s arguments and presentations in their role as ICSID Secretaries in *Azurix I* and *Enron*, as well as in cases in which Professor Tawil acted as sole lead counsel.<sup>75</sup> Members of Respondent’s legal team have also acted as Secretaries to ICSID Tribunals in which both Professors Tawil and Stern acted as arbitrator.<sup>76</sup>

### C. PROFESSOR TAWIL’S EXPLANATION

60. In his explanation of February 18, 2011, Professor Tawil states that throughout his career he has acted as counsel both for claimants and respondents, and for States, companies, and individuals. He has acted as chair and co-arbitrator in arbitrations under different rules and in none of those cases has his independence and impartiality been seriously doubted.<sup>77</sup>

#### 1. Service as Co-Counsel with Claimant’s Counsel in Other ICSID Cases

61. As concerns the argument that he served with Claimant’s counsel as co-counsel to a party in other matters, Professor Tawil states generally that “[h]aving served with one party’s counsel previously either as co-counsel or as co-arbitrator is not and has never seriously been considered as a valid argument for disqualification of an arbitrator. If that would have been the case, most of the prominent arbitrators that frequently act in international arbitration would be barred from being part of ICSID tribunals.”<sup>78</sup> Professor Tawil notes that “a relationship of this kind is considered to be part of the IBA Guidelines’ Green List, that is, those ‘*specific situations where no appearance of, and no actual,*

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<sup>73</sup> *Id.* ¶ 17.

<sup>74</sup> *Id.* ¶ 18.

<sup>75</sup> *Id.* ¶¶ 12–13.

<sup>76</sup> *Id.* ¶¶ 13–16.

<sup>77</sup> Tawil Explanation of Feb. 18, 2011, p. 5.

<sup>78</sup> *Id.*, p. 3.

*conflict of interest exists from the relevant objective point of view’ and, ‘thus, the arbitrator has no duty to disclose’.*<sup>79</sup>

*a. Service as Co-Counsel with Claimant’s Counsel in Enron and Azurix I*

62. Professor Tawil explains that “[a]s mentioned in my August 6, 2010 declaration, both the Azurix I and Enron cases concluded before my appointment in the present case.” Further, his “professional activity in those cases ended during 2008 and 2009 ....”<sup>80</sup>

*b. Service as Co-Counsel with Claimant’s Counsel in Azurix II*

63. As concerns his involvement in *Azurix II*, Professor Tawil explains that it “was limited to participating in the first session of the Arbitral Tribunal, held (by conference call) on June 1, 2008 and limited – as usual – to procedural matters.”<sup>81</sup> He explains that he joined the first session as a matter of courtesy as his firm and Azurix were discussing the terms of his firm’s possible engagement in the case; no such terms were agreed; accordingly, the firm did not represent Azurix further in the case. Professor Tawil states that neither he nor his firm participated in drafting the request for arbitration or other submissions in that arbitration.<sup>82</sup>

**2. Employment of Silvia M. Marchili at M. & M. Bomchil**

64. Professor Tawil explains that Ms. Marchili resigned from his firm and joined Claimant’s counsel almost five years prior. He states that it is normal for lawyers to move from one firm to another and from one country to another during their careers. Professor Tawil notes that “no special relationship or exchange programs exist between M. & M. Bomchil and King & Spalding or between M. & M. Bomchil and Curtis, Mallet-Prevost, Colt & Mosle.”<sup>83</sup> However, he does not believe that those contacts or those that he has had with members of other firms during his professional or academic career pose a conflict or affect in any way his independence or impartiality.

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*, p. 4.

65. Finally, as concerns the disclosures of facts in his statement attached to his Arbitration Rule 6(2) declaration, Professor Tawil states that he finds some difficulty in understanding how his disclosure of the relevant situations could give rise to a proposal of disqualification.<sup>84</sup> He explains that “while disclosure requires a subjective test for reflecting the possible perspective of the parties – i.e. the standard of ‘*likely giving rise of justifiable doubts*’ – , disqualification must meet an objective stricter test which ‘*imposes a relatively heavy burden of proof on the party making the proposal*’ to disqualify an arbitrator.”<sup>85</sup>

#### IV. THE CHAIRMAN’S DECISION ON THE PROPOSAL TO DISQUALIFY

##### A. APPLICABLE LEGAL STANDARDS

66. Articles 14(1) and 57 of the Convention and Arbitration Rule 6(2) set forth the applicable legal standards.

67. Article 14(1) of the Convention 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.

68. Article 57 states:

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.

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (citing Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge, 2nd. Ed. 2009) at 1202 and *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Cases Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, Oct. 22, 2007 (“*Suez*”) ¶ 29).

69. Arbitration Rule 6(2) provides the form of the declaration that each arbitrator must sign. The declaration states, in particular, that an arbitrator “shall judge fairly as between the parties,” and envisages that an arbitrator shall provide a statement of “(a) [his/her] past and present professional, business and other relationships (if any) with the parties and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party.”

70. The Parties agree that the concept of “independence” in Article 14(1) encompasses a duty to act with both independence and impartiality,<sup>86</sup> and that impartiality concerns the absence of a bias or predisposition towards one party.<sup>87</sup> These requirements of independence and impartiality “serve the purpose of protecting parties against arbitrators being influenced by factors other than those related to the merits of the case.”<sup>88</sup> The Parties further agree that the notion of impartiality is viewed objectively.

71. Article 57 of the Convention requires that there be a “manifest lack of the qualities required” of an arbitrator. It is generally acknowledged that the term “manifest” means “obvious” or “evident,” and that it imposes a “relatively heavy burden of proof on the party making the proposal.”<sup>89</sup> A manifest lack of the required qualities must be proved by objective evidence.<sup>90</sup> A simple belief that an arbitrator lacks independence or impartiality is not sufficient to disqualify an arbitrator.<sup>91</sup>

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<sup>86</sup> See also *Suez* ¶ 28; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants’ Proposal to Disqualify an Arbitrator, Aug. 12, 2010 (“*Urbaser*”) ¶ 38.

<sup>87</sup> *Suez* ¶ 29.

<sup>88</sup> *Urbaser* ¶ 43.

<sup>89</sup> See *Suez* ¶ 34; Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (Cambridge, 2nd. Ed. 2009) at 1202.

<sup>90</sup> *Suez* ¶ 40. See also *SGS Société Générale de Surveillance v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant’s Proposal to Disqualify Arbitrator, Dec. 19, 2001, p. 398 at p. 402 (“The standard of appraisal of a challenge set forth in Article 57 of the Convention may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such a nature or character as to ‘indicat[e] a manifest lack of the qualities required by’ Article 14(1). The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case in which the challenge is made.”).

<sup>91</sup> *Suez* ¶ 40 (“Implicit in Article 57 and its requirement for a challenger to allege a fact indicating a *manifest* lack of the qualities required of an arbitrator by Article 14, is the requirement that such lack be proven by objective evidence and that the mere belief by the

72. Accordingly, in order to succeed, a proposal to disqualify an arbitrator must (1) establish the facts underlying the proposal, and (2) demonstrate that these facts give rise to a manifest lack of the required qualities.

73. Both Parties have addressed the IBA Guidelines in their submissions. Claimant asserts that the IBA Guidelines are applicable to investment arbitrations, while Respondent contends that they are intended to apply to international commercial arbitrations and, in any event, at most provide guidance, not rules.

74. It is important to note that this decision is taken within the framework of the Convention and is made in light of the standards that it sets forth. The IBA Guidelines are widely recognized in international arbitration as the preeminent set of guidelines for assessing arbitrator conflicts. It is also universally recognized that the IBA Guidelines are indicative only—this is the case both in the context of international commercial and international investment arbitration.<sup>92</sup>

## **B. DECISION ON THE PROPOSAL TO DISQUALIFY PROFESSOR STERN**

### **1. Multiple Appointments by the Same Party**

75. As disclosed in her letter of October 1, 2010, Professor Stern has been appointed by Venezuela in three cases in addition to the case at hand, namely, *Vannessa Ventures*, *Brandes*, and *Tidewater*. The question arises whether such multiple appointments demonstrate that Professor Stern manifestly lacks independence or impartiality.

76. Claimant asserts that these multiple appointments conflict with Section 3.1.3 of the IBA Guidelines' Orange List, which covers a situation 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 ... ." As set forth above, the IBA Guidelines are indicative and not mandatory.

77. In this case, no objective fact has been presented that would suggest that Professor Stern's independence or impartiality would be manifestly impacted by the multiple

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challenge of the contest arbitrator's lack of independence or impartiality is not sufficient to disqualify the contested arbitrator.").

<sup>92</sup> *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17 ¶ 24.



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.<sup>93</sup>

78. Claimant also claims that Professor Stern “will not be learning of Venezuela’s actions and its defenses afresh in the present case—because she has already been exposed to them”<sup>94</sup> in the other three cases. Claimant’s assertions, however, are speculative and do not identify what evidence or arguments, if any, may be presented in those other arbitrations that would in Claimant’s view “unjustifiably influence Professor Stern, negating her ability to judge the present case independently and impartially.”<sup>95</sup>

79. In conclusion, the Chairman finds that the appointment of Professor Stern on three prior occasions by Venezuela does not indicate a manifest lack of the required qualities.

## **2. Multiple Arbitrations Having Related Issues**

80. The question has also been raised whether Professor Stern’s independence or impartiality may be affected by her appointment by Venezuela in four cases, which according to Claimant involve similar issues because they allegedly stem from allegations by claimants “each of whom operates in service industries and three of whom operate in the extractive services industry, that Venezuela’s expropriatory measures caused harm to their respective investments.”<sup>96</sup> Claimant contends that this situation falls under Section 3.1.5 of the IBA Guidelines’ Orange List as Professor Stern currently serves “as arbitrator in another arbitration on a related issue involving one of the parties ... .”

81. According to Claimant, overlap exists because three of the cases involve allegations of a direct and forceful takeover of assets and the fourth involves a taking due to alleged coercion, and Professor Stern will be required to decide whether the various measures Venezuela is asserted to have taken amount to unlawful expropriation of assets.

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<sup>93</sup> Professor Stern has stressed that she “do[es] not consider that a nomination creates a ‘professional relationship’ with the Party that effectuates this nomination. To the contrary, once nominated, I do not have the slightest relation with the Party that has nominated me.” See Stern Explanation of Dec. 1, 2010, p. 2.

<sup>94</sup> PTD Stern ¶ 21.

<sup>95</sup> *Id.* ¶ 13.

<sup>96</sup> *Id.* ¶ 16.

In Claimant’s view, this purported overlap “increases the probability that she is unable to judge the present case impartially and independently.”<sup>97</sup> In its Additional Observations, Claimant also asserts that “[i]t is simply impractical to believe that the jurisdictional issues raised in each of these cases will not be at all related.”<sup>98</sup> Claimant, however, acknowledges that these cases involve claimants from different industries and that the facts in them may differ.<sup>99</sup>

82. As an initial matter, because no pleadings other than the Request for Arbitration have been submitted, it is not possible to say with any precision what similarities in law or in fact may exist between this case and the three other matters. It appears, however, that the claimants in each case are distinct and also operate in different industries.

83. The 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. As was stated in *Suez Sociedad General de Aguas de Barcelona S.A. et al., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic, Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case Nos. ARB/03/17 and ARB/03/18 (“*Suez*”), 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 in another case.<sup>100</sup> It is evident 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.

84. Moreover, to the extent to which similarities among the arguments may exist, Professor Stern’s statement that “the fact of whether I am convinced or not convinced by a pleading depends on the intrinsic value of the legal arguments and not on the number of times I hear the pleading”<sup>101</sup> has not been put in question.

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<sup>97</sup> *Id.* ¶ 21. See also Claimant’s Additional Observations PTD Stern ¶¶ 22–24; Claimant’s Final Observations PTD Stern ¶ 23.

<sup>98</sup> See also Claimant’s Additional Observations PTD Stern ¶ 25.

<sup>99</sup> PTD Stern ¶ 22.

<sup>100</sup> *Suez* ¶ 36. See also *Urbaser* ¶ 47.

<sup>101</sup> Stern Explanation of Dec. 1, 2010, p. 2.

85. In conclusion, the Chairman finds that Claimant’s assertion that the cases may involve similar issues such that Professor Stern would not be able to judge impartially and independently lacks basis.

### **3. Multiple Appointments by the Same Counsel**

86. Professor Stern has been appointed in two other cases in which Venezuela is represented by Curtis, Mallet-Prevost, Colt & Mosle LLP, namely, *Brandes* and *Tidewater*. As an initial matter, Section 3.3.7 of the IBA Guidelines’ Orange List is not implicated because it envisages that “[t]he arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.”

87. It has not been shown that facts exist that could call into question Professor Stern’s independence or impartiality as a result of the three appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP. Professor Stern indicates that she has been appointed multiple times by various law firms, but that a relationship of dependence, which could endanger her independence or impartiality, does not exist here or elsewhere.<sup>102</sup>

88. In conclusion, the Chairman finds that the appointment of Professor Stern on two prior occasions by counsel does not indicate a manifest lack of the qualities required of her.

### **4. Non-Disclosure of Other ICSID Appointments by Venezuela**

89. On October 1, 2010, prior to the constitution of the Tribunal, Professor Stern submitted a letter by way of clarification of her Arbitration Rule 6(2) declaration of August 20, 2010, in which she provided information about the three other ICSID cases in which she had been appointed as arbitrator by Respondent. Professor Stern states that she provided this supplementary information—publicly available on the ICSID website—for the avoidance of doubt.<sup>103</sup>

90. As a general matter, parties to investment arbitrations have an interest in knowing any facts or circumstances that may exist that may give rise to doubts about an arbitrator’s

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<sup>102</sup> *Id.*, p. 3.

<sup>103</sup> Stern Statement of Oct. 1, 2010. *See also* Stern Explanation of Dec. 1, 2010, p. 4 (“It has always been my understanding that only facts that are undisclosed or unknown must be disclosed: the participation in an ICSID tribunal is public knowledge available on ICSID web pages and all over the Internet.”).

independence and impartiality. Indeed, as is reflected in Arbitration Rule 6(2), disclosure by arbitrators of any such facts or circumstances is required.

91. The question is whether justifiable doubts arise about Professor Stern's independence and impartiality because she did not at the time of accepting her appointment disclose those appointments in circumstances where this information was publicly available. In this respect, pursuant to ICSID Administrative and Financial Regulations 22 and 23, information about all appointments to an ICSID tribunal is published on the ICSID website upon constitution of that tribunal. Claimant notes that Professor Stern's appointment in *Tidewater* was not made public on the ICSID website at the time of her appointment in this case as the tribunal in *Tidewater* had not been constituted; however, this information was published on the ICSID website shortly thereafter on August 31, 2010.

92. In order to ensure that parties have complete information available to them, an arbitrator's Arbitration Rule 6(2) declaration should include details of prior appointments by an appointing party, including, out of an abundance of caution, information about publicly available cases.<sup>104</sup> However, in assessing whether an arbitrator's non-disclosure of such appointments results in a manifest lack of independence or impartiality, the public nature of that information must be taken into account.<sup>105</sup>

93. Professor Stern explains that she did not disclose information in her declaration about the relevant prior appointments because it was her understanding at that time that only facts that are undisclosed or unknown, and not publicly available information, must be disclosed. Professor Stern confirms that, in this respect, she followed her previous practice of not disclosing publicly available information about ICSID appointments when accepting a nomination; in those cases neither her independence nor impartiality was challenged.<sup>106</sup>

94. It is apparent that her initial omission of publicly available information about appointments in her Arbitration Rule 6(2) declaration was the product of "an honest

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<sup>104</sup> *Tidewater* Decision ¶ 54.

<sup>105</sup> *Id.*

<sup>106</sup> Stern Explanation of Dec. 1, 2010, p. 4.

exercise of discretion” by Professor Stern.<sup>107</sup> When Professor Stern was made aware that “some parties to ICSID arbitration want not only that private information be disclosed, but also that public information be released by an arbitrator at the time of making the declaration,”<sup>108</sup> she submitted a letter providing information about all other appointments by Venezuela.

95. In this light, Professor Stern’s non-disclosure in her Arbitration Rule 6(2) declaration of publicly available information about her previous appointments by Venezuela does not evidence a manifest lack on her part of independence or impartiality.

96. Having examined carefully the allegations underlying the proposal to disqualify Professor Stern, the Chairman finds no basis to indicate that there is a manifest lack of independence or impartiality on the part of Professor Stern in this case. Accordingly, the proposal to disqualify Professor Stern is rejected.

## **C. DECISION ON THE PROPOSAL TO DISQUALIFY PROFESSOR TAWIL**

### **1. Prior Joint Representations With Counsel for Claimant**

97. Respondent alleges that there is a long professional relationship between Professor Tawil and counsel for Claimant, King & Spalding LLP, that has “basically consisted in joint representations in investor-State arbitrations, always arguing in favour of investors.”<sup>109</sup> Respondent asserts that “this relationship is more recent, protracted, and close than that indicated by Professor Tawil in his declaration,”<sup>110</sup> which “did not include

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<sup>107</sup> *Tidewater Decision* ¶ 55 (citing *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Cases ARB/03/19 and ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal ¶ 44 (“Whether the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed raised obvious questions about impartiality and independence, and whether the non-disclosure is an aberration on the part of the conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality. The balancing is for the deciding authority ... in each case.”)).

<sup>108</sup> Stern Letter dated Oct. 1, 2010. *See also* Stern Explanation of Dec. 1, 2010, p. 4.

<sup>109</sup> PTD Tawil ¶ 10.

<sup>110</sup> *Id.*

his joint participation with King & Spalding in [*Azurix II*], however small that participation may have been.”<sup>111</sup>

98. Respondent asserts that this relationship puts Claimant’s counsel in a privileged position to know Professor Tawil’s stance on relevant legal issues, thereby creating a disadvantage for Respondent in violation of procedural fairness.<sup>112</sup> Respondent also argues that “a close relationship between an arbitrator and the lawyers of the party who appointed him to serve in such capacity creates an appearance of impropriety,”<sup>113</sup> and “gives rise to justifiable doubts with respect to his capacity to reach a free and independent decision.”<sup>114</sup>

99. The three cases referenced by Respondent in which Professor Tawil served as counsel jointly with King & Spalding LLP are *Azurix I*, *Enron*, and *Azurix II*. In his Arbitration Rule 6(2) declaration, Professor Tawil disclosed that he had acted as co-counsel with King & Spalding LLP in *Azurix I* and *Enron*.<sup>115</sup> In that declaration and in his explanation of February 18, 2011, Professor Tawil noted that *Azurix I* and *Enron* concluded before his appointment in this case.<sup>116</sup> Professor Tawil specifies that “[t]he last material professional work that [he] performed in *Azurix I* took place in September 2008 when I participated in the hearing on the merits on annulment. My last material work as counsel in *Enron* was in October 2009 upon filing the post-annulment-hearing brief.”<sup>117</sup>

100. Professor Tawil did not disclose his involvement in *Azurix II* in his Arbitration Rule 6(2) declaration. In his explanation of February 18, 2011, Professor Tawil states that his involvement in *Azurix II* was limited to participating in the first session of the Tribunal held by conference call on June 1, 2008; at the time his firm was discussing possible terms

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<sup>111</sup> Respondent’s Final Observations PTD Tawil ¶ 4(iii)(b).

<sup>112</sup> PTD Tawil ¶ 11.

<sup>113</sup> *Id.* ¶ 14. *See also* Respondent’s Final Observations PTD Tawil ¶¶ 2, 5(vi).

<sup>114</sup> PTD Tawil ¶ 13.

<sup>115</sup> *See* Statement attached to Tawil Arbitration Rule 6(2) declaration of August 6, 2010.

<sup>116</sup> *Id.* and Tawil Explanation of Feb. 18, 2011 ¶ 15 (Professor Tawil specifies that: “[i]n fact, as both cases were subject to annulment petitions, my professional activity in those cases ended during 2008 and 2009, pending in both cases only the annulment decisions.”).

<sup>117</sup> Tawil Explanation of Feb. 18, 2011 ¶ 15, fn. 7.

of engagement with Azurix, but no such agreement was reached and the firm did not represent Azurix further.<sup>118</sup>

101. In considering whether the relationship between Professor Tawil and King & Spalding LLP gives rise to a manifest lack of independence or impartiality on Professor Tawil's part, it is noted that there is no ongoing relationship between Professor Tawil and that firm. It appears that Professor Tawil and King & Spalding LLP do not currently act, and have not acted since October 2009, as co-counsel in an investor-state arbitration.<sup>119</sup> In this respect, it is acknowledged, as advanced by Professor Tawil and Claimant's counsel, that Section 4.4.2 of the IBA Guidelines' Green List includes the scenario in which "[t]he arbitrator and counsel for one of the parties ... have previously served together as arbitrators or as co-counsel."

102. It is undisputed between the parties that the previous relationship between counsel for Claimant and Professor Tawil was as joint representatives of different parties to those involved in this case and in cases involving different fact patterns. Additionally, it has not been demonstrated to what extent this case will involve similar legal issues to those arising in cases in which they were co-counsel. Therefore, it is not evident that Claimant will be in a privileged position to anticipate Professor Tawil's views on issues arising in this case.

103. The question arises whether justifiable doubts arise about Professor Tawil's independence and impartiality because he did not upon appointment disclose his involvement in *Azurix II*. To ensure that parties have full information relevant to an arbitrator's appointment available to them, and out of an abundance of caution, an arbitrator's Arbitration Rule 6(2) declaration should include details of any professional relationships with counsel to a party in the case in which he/she has been appointed.

104. Professor Tawil indicates that he did not disclose his involvement in *Azurix II*, both because that involvement was incidental and because it "should, at the most, be considered

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<sup>118</sup> *Id.* ¶¶ 16–17 ("my involvement in *Azurix II* was circumscribed to an isolated participation in a formal event at the early stage of the arbitration."). Ex. R-1 (Case Register *Azurix Corp. v. Argentine Republic*), ICSID Case No. ARB/03/30) reflects that M&M Bomchil has not acted as counsel to the claimant in *Azurix II* since January 2009.

<sup>119</sup> Accordingly, Respondent's assertion that "the joint collaboration between Claimant's counsel and Professor Tawil formally continued up until the filing of the Request for Arbitration in these proceedings" appears to be incorrect. *See* Respondent's Final Explanations PTD Tawil ¶ 6(ii)(c).

as a Green List situation,”<sup>120</sup> such that it did not require disclosure. It is clear that Professor Tawil’s decision not to include information about his involvement in *Azurix II* was the result of his “honest exercise of discretion.”<sup>121</sup> In this light, Professor Tawil’s non-disclosure does not evidence a manifest lack on his part of independence or impartiality.

## 2. Employment of Ms. Silvia M. Marchili at M. & M. Bomchil

105. In the statement attached to his Arbitration Rule 6(2) Declaration, Professor Tawil disclosed that “[o]ne of King & Spalding’s associates, Ms. Silvia Marchili worked as a junior associate in the legal team that he lead in M. & M. Bomchil between 3/24/2003 and 7/31/2006.” Respondent suggests that this relationship between Professor Tawil and Ms. Marchili, who is part of the team appointing Professor Tawil, increases the proximity of the relationship between Professor Tawil and Claimant’s counsel.<sup>122</sup>

106. Professor Tawil explains that “Ms. Marchili resigned to M. & M. Bomchil and joined Claimant’s law firm almost five years ago.”<sup>123</sup> Ms. Marchili was a junior associate and one of several lawyers in Professor Tawil’s team at that time. In these circumstances, it is difficult to envisage that Professor Tawil’s independence or impartiality might be affected by his prior relationship as Ms. Marchili’s employer.

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<sup>120</sup> Tawil Explanation of Feb. 18, 2011 ¶ 17.

<sup>121</sup> *See supra* footnote 107.

<sup>122</sup> Respondent also suggests Ms. Marchili is taking part in an exchange program between M. & M. Bomchil and King & Spalding LLP. *See* PTD Tawil ¶ 4(d) fn. 4. Professor Tawil indicates that no such exchange program exists. *See* Tawil Explanation of Feb. 18, 2011 ¶ 19.

<sup>123</sup> Tawil Explanation of Feb. 18, 2011 ¶ 19.



107. Having examined carefully the allegations underlying the proposal to disqualify Professor Tawil, the Chairman finds no basis to indicate that there is a manifest lack of independence or impartiality on the part of Professor Tawil in this case. Accordingly, the proposal to disqualify Professor Tawil is rejected.

*[SIGNED]*

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Mr. Robert B. Zoellick  
Chairman of the Administrative Council