

ICSID Case No ARB/10/5

**TIDEWATER INC.
TIDEWATER INVESTMENT SRL
TIDEWATER CARIBE, C.A.
TWENTY GRAND OFFSHORE, L.L.C.
POINT MARINE, L.L.C.
TWENTY GRAND MARINE SERVICE, L.L.C.
JACKSON MARINE, L.L.C.
ZAPATA GULF MARINE OPERATORS, L.L.C.**

Claimants

and

THE BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

**DECISION ON CLAIMANTS' PROPOSAL TO DISQUALIFY
PROFESSOR BRIGITTE STERN, ARBITRATOR**

issued by

**Professor Campbell McLachlan QC, President
Dr Andrés Rigo Sureda, Arbitrator**

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Date: **December 23, 2010**

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I. Introduction

A. *Request for Arbitration and Constitution of the Tribunal*

1. On February 16, 2010, Tidewater Inc, Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. (together ‘**Tidewater**’) filed a Request for Arbitration under the ICSID Convention against the Bolivarian Republic of Venezuela (‘**Venezuela**’).
2. On March 5, 2010, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the ICSID Convention.
3. On March 9, 2010, Tidewater proposed a method for appointment of the Tribunal by agreement with Venezuela pursuant to ICSID Arbitration Rule 2(1). On June 25, 2010, in the absence of agreement and pursuant to Rule 2(3), Tidewater invoked the appointment procedure provided in Article 37(2)(b) of the ICSID Convention. It appointed Dr Andrés Rigo Sureda, a national of Spain, as arbitrator. On July 13, 2010, the Secretariat informed the parties that Dr Rigo Sureda had accepted his appointment

and circulated a copy of his signed declaration. On July 14, 2010, Venezuela appointed Professor Brigitte Stern, a national of France, as arbitrator. On August 4, 2010, the Secretariat informed the parties that Professor Stern had accepted her appointment and circulated a copy of her signed declaration.

4. In the same letter of August 4, 2010, the Secretary-General invited the parties to agree on a President of the Tribunal. As no agreement was reached, on August 12, 2010, the Secretary-General informed the parties that she intended to propose to the Chairman of the Administrative Council that he appoint Professor Campbell McLachlan QC, a national of New Zealand, as President of the Tribunal, pursuant to Article 38 of the ICSID Convention and ICSID Arbitration Rule 4 as invoked by Claimants. On August 19 and 20, 2010 respectively, each of Tidewater and Venezuela informed the Secretary-General that they had no objection to the appointment of Professor McLachlan. Accordingly, on August 23, 2010, the Secretariat informed the parties that the Chairman had proceeded with his appointment.
5. The parties were informed on August 31, 2010 that all three arbitrators had accepted their appointments and that therefore, pursuant to ICSID Arbitration Rule 6, the Arbitral Tribunal was deemed to have been constituted, and the proceeding to have begun, as of that date.

B. Professor Stern's Declaration

6. In her declaration signed on July 30, 2010, (and forwarded to the parties first on August 4, 2010 and again on August 31, 2010) Professor Stern had crossed out by hand the first sentence of the fourth paragraph of the form prescribed by ICSID Arbitration Rule 6(2), so that the text read:

To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted with respect to a dispute between Tidewater Inc. and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/5)

I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal.

I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any

source except as provided in the Administrative and Financial Regulations of the Centre.

~~Attached is a statement of (a) my past and present professional business and other relationships (if any) with the parties and (b) any other circumstances that might cause my reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.~~

7. On September 10, 2010, Tidewater made a request to the Secretary of the Tribunal that Professor Stern be asked to provide a complete declaration in accordance with ICSID Arbitration Rule 6(2), since, in Tidewater's submission, that Rule does not contemplate deletions or alternative texts.
8. On September 13, 2010 (the next business day), Professor Stern filed a revised declaration in the prescribed form, without deletion or amendment. In an accompanying document, she gave the following explanation for her original deletion of these two sentences:

First, I consider that there is no circumstance that could cause my reliability for independent judgment, which explains that I deleted the (b) in order to indicate that I will not attach a document containing such information, as there was none.

Moreover, I deleted also (a), as I always thought that there was a necessity to disclose only unknown facts, not facts in the public domain, that can be seen by anyone on the ICSID webpage.

However, as the Claimant so requests, I confirm what is on the ICSID webpage. I have been nominated by Venezuela in two other cases, in the last 6 years, for which the Tribunal is constituted:

Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/04/6), in the year 2004.¹

Brandes Investment Partners LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, in the year 2008.²

¹ 'Vannessa'.

² 'Brandes'.

Also, I have accepted a nomination in a new case, this year, for which the tribunal is not yet constituted, as the president has not been designated:

Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/9).

I hope this clarifies the matter. I enclose a declaration with the two sentences not deleted, although the second one should probably be.

C. Tidewater's Proposal to Disqualify Professor Stern

9. On September 28, 2010, Tidewater proposed the disqualification of Professor Stern upon the ground that her multiple appointments by the same party and the same counsel, not disclosed in her original declaration, give rise to objective and justifiable doubts regarding her independence and impartiality.
10. On October 4, 2010, the President of the Tribunal, after consulting with the other arbitrator, fixed the following time limits: October 15, 2010, for Venezuela to file a reply; October 27, 2010, for Professor Stern to file her explanations; and November 3, 2010, for the parties to file further observations including comments arising from Professor Stern's explanations.
11. Each of the parties and Professor Stern filed their comments within the time limits fixed by the President.
12. Article 58 of the ICSID Convention provides that the decision on any proposal to disqualify an arbitrator shall be taken by the other members of the Tribunal (save where they are equally divided, in which event the decision is to be taken by the Chairman of the Administrative Council). The two other members of this Tribunal, Professor Campbell McLachlan QC (President) and Dr Andrés Rigo Sureda (Arbitrator), (together '**the Two Members**') have deliberated by various means of communication, and have reached an agreed Decision on the Proposal. The submissions of the parties, the reasons of the Two Members, and their Decision are set out herein.

II. The Parties' Submissions

A. Tidewater

13. Tidewater argues that ICSID Arbitration Rule 6(2) and the *IBA Guidelines on Conflicts in International Arbitration* ('**IBA Guidelines**') require an objective standard to be applied in determining whether disclosure is required. It submits that Professor Stern had been appointed by the same party double the number of times that would give justifiable doubts according to Section 3.1.3 of the Orange List of the IBA Guidelines.³ Tidewater further argues that multiple appointments by the same party create a potential for undue influence or at least the appearance of undue influence and for an unfair advantage for the appointing party. As explained by Tidewater, the arbitrator may hear the appointing party's position multiple times while the opposing party has only one opportunity and it may be too late by then for the opposing party to persuade the arbitrator in question.
14. Additionally Tidewater observes that Professor Stern has been appointed three times by the same law firm, Curtis, Mallet-Prevost, Colt & Mosle LLP ('**Curtis**'), and four by Venezuela's Attorney General, Dra. Gladys María Gutiérrez Alvarado. This, Tidewater submits, also gives rise to justifiable doubts as to Professor Stern's impartiality, being the scenario contemplated in Section 3.3.7 of the Orange List.⁴ Tidewater submits that, in the *ICS Inspection* case, the Appointing Authority ruled that, when the relevant facts are reflected in more than one scenario on the Orange List of the IBA Guidelines, '*the conflict in question is sufficiently serious to give rise to objectively justifiable doubts as to [an arbitrator's] impartiality and independence*'.⁵
15. Tidewater further submits that an arbitrator may be disqualified even if that arbitrator has the personal intention to act impartially and independently. For this purpose, the level of experience and standing of an arbitrator are not relevant to the determination of 'justifiable doubts.'
16. Tidewater argues that the objective doubts about Professor Stern's independence and impartiality have been compounded by her failure to disclose the multiple appointments

³ IBA Guidelines (May 22, 2004), Section 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.'

⁴ Section 3.3.7: 'The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.'

⁵ *ICS Inspection and Control Services Ltd v Argentina* (Decision on Challenge to Arbitrator, UNCITRAL, December 17, 2009) IIC 406 (2009), [2].

in her first statement and the fact that not all the circumstances related to these appointments are publicly known. Tidewater notes that the ICSID website does not disclose which party appointed each co-arbitrator and Professor Stern's appointment in *Universal Compression* did not show on that website at the time that the declaration was made because the tribunal was not then yet constituted. In any case, Tidewater observes that, where there is an objective cause for doubt, arbitrators are obliged to err on the side of disclosure.

17. Tidewater observes that, although the IBA Guidelines were originally developed for international commercial arbitration, their Introduction states that they should '*equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations)*'.⁶ Tidewater further observes that investment arbitration tribunals have turned routinely to the IBA Guidelines as persuasive authority in resolving challenges to arbitrators. As to the duty of disclosure, Tidewater notes that ICSID Arbitration Rule 6 does not have any exception in respect of the duty to disclose publicly available information. This is necessarily so, since otherwise, submits Tidewater, the parties would need to conduct intrusive investigations and rely on indirect and not always reliable sources. Arbitrators will always be in '*the best position to gather, evaluate, and disclose accurate information relevant to their potential conflicts*'.⁷
18. Tidewater draws attention to a new fact pattern resulting from the information filed with Venezuela's Reply which it submits falls under Section 3.1.5⁸ of the IBA Guidelines on cases involving related issues. According to Tidewater, the *Brandes* case⁹ raises a dispositive issue identical to an issue raised in this proceeding, namely the question whether the Venezuelan Law on the Promotion and Protection of Investments expresses a basis for Venezuela's consent to ICSID arbitration.¹⁰ Tidewater contends that, unless Venezuela gives an assurance that it will not contest jurisdiction on that basis in the present case, Professor Stern will need to rule on this issue in *Brandes* before the issue is reached in *Tidewater*. It submits that this will amount to prejudging the identical issue

⁶ *Supra* n 3, Introduction, [5].

⁷ Tidewater's Further Observations, November 3, 2010, 5.

⁸ Section 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.'

⁹ *Supra* n 2.

¹⁰ Tidewater relies for this purpose on a news report from *Latin Lawyer* dated September 11, 2009 at Ex R-6, 2, which states, inter alia: '*As no BIT exists between Venezuela and the US, Brandes is relying on Venezuela's foreign investment law, which refers to ICSID arbitration.*'

presented in the present case without Tidewater having an opportunity to argue the issue before Professor Stern has made up her mind.

19. On the question of multiple appointments by Venezuela, Tidewater disputes whether *Vanessa* should be excluded because the appointment of Professor Stern to this Tribunal was made three years and three weeks after the appointment to the *Vanessa* tribunal. Tidewater submits that, if Professor Stern's explanation in respect of her appointment to the *Universal Compression* tribunal to the effect that an offer to appoint is only perfected when accepted and the tribunal constituted is applied to *Vanessa*, the appointment in the latter case falls within the three years stipulated in the IBA Guidelines.
20. In any case, argues Tidewater, a strict three-year time line would give the parties an incentive to adopt dilatory tactics to avoid Section 3.1.3, and the IBA Guidelines explicitly warn against a formalistic approach to their application. Tidewater also argues against excluding the *Universal Compression* appointment since later appointments create the risk that an arbitrator's judgment be skewed in favour of the appointing party as much as earlier appointments.
21. Tidewater observes that the freedom of States to choose their arbitrator is not absolute but limited by Articles 14(1) and 57 of the Convention, Arbitration Rule 6(2) and the persuasive force of the IBA Guidelines. It submits that States should not have greater leeway than claimants in making serial appointments which would be contrary to the principle of equality of arms between a claimant and a State.

B. Venezuela

22. Venezuela contests the disqualification proposal on the grounds that it is based on the wrong facts and the wrong law. Venezuela argues that the information not revealed by Professor Stern is publicly known:
 - (a) At the time she signed her first declaration on July 30, 2010, her appointments in *Vanessa* and *Brandes* were available on the ICSID website, and the decision on jurisdiction in the case of *Vanessa* was also in the public domain;
 - (b) Her appointment in the case of *Universal Compression* took place in August 2010;

- (c) She confirmed in her second declaration on September 13, 2010 the available public information in the cases of *Vanessa* and *Brandes*, and added her recent appointment in *Universal Compression*;
 - (d) It was equally public that Curtis represented Venezuela in the cases of *Brandes* and *Universal Compression*; and,
 - (e) Curtis has confirmed that Professor Stern has not been appointed as arbitrator in any other proceeding by a client of that firm.
23. Venezuela argues that the facts and legal arguments of Tidewater in respect of the IBA Guidelines are also incorrect:
- (a) Professor Stern fulfilled the requirement of ICSID Arbitration Rule 6 by making her declaration before the first session of the Tribunal;
 - (b) The IBA Guidelines are applicable to commercial arbitration where the need to reveal appointments by the parties is greater because such information is not publicly available;
 - (c) At the time of Professor Stern's appointment to the *Tidewater* tribunal, she had been appointed by Venezuela only in one case, *Brandes*, within the three preceding years of Section 3.1.3 of the IBA Guidelines. She was appointed in *Vanessa* in June 2007;
 - (d) Section 3.3.7 of the IBA Guidelines is not applicable because Curtis does not act as counsel in more than three cases, and the attempt to include within the scope of this section appointments made by the Attorney General should fail since the Attorney General by law represents Venezuela in all of its cases. In any case, the appointment in *Vanessa* is older than the three years specified in Section 3.1.3; and
 - (e) The *ICS* precedent is irrelevant because in the instant case the factual circumstances for two Orange List cases do not exist.
24. Venezuela notes that the argument that multiple appointments may give an arbitrator a potential advantage in respect of co-arbitrators has been rejected in three instances.¹¹ Venezuela concludes by pleading that the other members of the Tribunal reject the disqualification proposal and award the related costs to Venezuela.

¹¹ *Participaciones Inversiones Portuarias Sàrl v Gabonese Republic* (Decision on Proposal for Disqualification of an Arbitrator) ICSID Case No ARB/08/17 (November 12, 2009); *Saba Fakes v Turkey* (Decision on Disqualification of Arbitrator) ICSID Case No ARB/07/20 (April 28, 2008); *Electrabel SA v Hungary* (Decision on Disqualification of Arbitrator) ICSID Case No ARB/07/19 (February 25, 2008).

III. Professor Stern's Explanation

25. In her Explanation of October 25, 2010,¹² Professor Stern states that she believes that she has always complied with the duty of an arbitrator to be independent and impartial in the numerous arbitrations in which she has been a member of the tribunal and will continue to act independently and impartially in all the arbitral tribunals in which she may be called to serve.
26. In respect of the argument that, by being appointed multiple times by the same party she may be unduly influenced by hearing the same argument repeatedly, Professor Stern explains that she is not convinced by the number of times she hears an argument but by the intrinsic value of the argument. She points out that she knows nothing about the *Tidewater* or *Universal Compression* cases and whether there will be positions pleaded several times. In the other two cases with the same respondent – *Vanessa* and *Brandes* – where she has participated in preliminary decisions, the issues raised were quite different.
27. She adds that the number of States and of most experienced arbitrators is limited. If a State cannot nominate the same arbitrator in several cases, it '*would undermine the freedom of States to choose their arbitrator*'.¹³
28. As to multiple appointments by the same counsel, Professor Stern points out that she has been appointed three or more times by several law firms and does not consider this fact a professional business relationship which could endanger her independence. Professor Stern explains that she has been an academic with '*a tradition of full independence and no business relations with any specific law firm*'¹⁴ during the length of her career. She clarifies that in the case of *Vanessa* she was actually nominated by another law firm, Foley Hoag LLP, and not by Curtis.¹⁵
29. Professor Stern explains that, in her view, her duty to disclose is limited to facts that are undisclosed or unknown. She explains that this has been her practice in other ICSID

¹² As supplemented by Professor Stern's Clarification of November 7, 2010.

¹³ Professor Stern's Explanation, October 25, 2010, 2.

¹⁴ *Ibid*, 3.

¹⁵ Professor Stern had originally stated in her Explanation of October 25, 2010 that Curtis had been instructed in *Vannessa* at a later stage. But she subsequently corrected this statement in her Clarification of November 7, 2010 in which she stated that, on checking her file in that matter, counsel signing the most recent pleading for Venezuela were Foley Hoag and Arnold & Porter with no involvement by Curtis.

cases where she has been appointed multiple times by the same party and the practice of other tribunal members. Professor Stern affirms that the parties' lawyers in those cases did not consider that this disclosure practice could raise reasonable doubts regarding her independence or impartiality. She adds that, since she signed her declaration in July, she has been appointed in the case of *Universal Compression* as she informed the Secretary-General in September 2010.

IV. Analysis of the Two Members

30. Tidewater's Proposal raises three interrelated issues as to potential grounds for the disqualification of Professor Stern:

- (a) What is the effect of Professor Stern's alleged failure initially to disclose her appointments by Venezuela as arbitrator in three other ICSID cases?
- (b) Does the holding of those three other arbitral appointments itself indicate a manifest lack of the qualities required to serve as an arbitrator in this case?
- (c) Is the answer to (b) affected by the fact that Professor Stern may be required, as a member of an arbitral tribunal in another case also involving Venezuela, to decide certain issues of law which may overlap with issues of law she may be called upon to decide in the present case?

31. The Two Members propose to deal with each of these questions in turn. But first it is necessary to set forth the legal standards applicable generally to the disqualification of an arbitrator under the ICSID Convention.

A. Applicable law

32. This part of the Decision deals with:

- (a) The applicable legal standards;
- (b) The relationship between the duty of disclosure and the requirement of independence; and
- (c) The relevance of the IBA Guidelines.

1. *Applicable legal standards*

33. The applicable legal standards are set out in Articles 14(1) and 57 of the ICSID Convention and ICSID Arbitration Rule 6(2).

34. 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.

35. Article 57 adds, in relevant part:

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.

36. ICSID Arbitration Rule 6(2) sets out the form of the declaration currently required of arbitrators who accept to serve on a tribunal.¹⁶ Sub-paragraph (b) and the last sentence of Arbitration Rule 6(2) were added as part of the amendment of the Arbitration Rules in 2006. The ICSID Working Paper which proposed this amendment states that its purpose is to ‘*expand the scope of disclosures of arbitrators to include any circumstance likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment*’.¹⁷

37. The Two Members find themselves in general agreement with the approach to the construction of Articles 14(1) and 57 of the Convention taken in *Suez v Argentina*:¹⁸

[T]he Spanish language version of the Convention Article 14(1) appears to be slightly different from that of the English language version. The Spanish version of Article 14(1) refers to a person who “...inspira[r] plena confianza en su imparcialidad de juicio. (i.e. who inspires full confidence in his impartiality of judgement.) Since the treaty by its terms makes both language versions equally authentic, we will apply the two standards of independence and impartiality in making our decisions. Such an

¹⁶ This form of words is that set out at [6] *supra*, including the words struck through by Professor Stern.

¹⁷ ICSID Working Paper “Suggested Changes to the ICSID Rules and Regulations” (May 12, 2005), 12.

¹⁸ *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina* (Decision on Proposal for Disqualification) ICSID Case No ARB/03/17 (October 22, 2007), [28] – [30], citations omitted.

approach accords with that found in many arbitration rules which require arbitrators to be both independent and impartial.

The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp. Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties. Thus Webster's Unabridged Dictionary defines 'impartiality' as "freedom from favoritism, not biased in favor of one party more than another." Thus it is possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial.

2. Relationship between disclosure and independence

38. The standard of disclosure under Arbitration Rule 6(2) and the standard under Article 57 of the Convention to determine whether there is a '*manifest lack of the qualities required*' under Article 14(1) are different.
39. The standard of '*likely to give rise to justifiable doubts*', referred to in the ICSID Secretariat Note on the new text of Arbitration Rule 6(2)(b),¹⁹ is taken from the standard of disclosure required by the UNCITRAL Arbitration Rules, which is also the standard applicable in those Rules to arbitration challenges.²⁰ This standard is stricter than the '*manifest lack of qualities*' of Article 57 of the ICSID Convention. Article 57 '*imposes a relatively heavy burden of proof on the party making the proposal*'²¹ Thus, as it was put in the Second Disqualification Proposal in the *Suez* case:²²

It is important to emphasize that the language of Article 57 places a heavy burden of proof ... to establish facts that make it obvious and highly probable, *not just possible*, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment.

¹⁹ *Supra* [32] & n 17.

²⁰ Arts11(1) &12(1) UNCITRAL Arbitration Rules (2010 version).

²¹ Schreuer et al *The ICSID Convention: A Commentary* (2nd edn, 2009) , 1202, [57.19].

²² *Suez, Sociedad General de Aguas de Barcelona S.A. v Argentina* (Decision on Second Proposal for Disqualification) ICSID Cases Nos ARB/03/17 and ARB/03/19 (May 12, 2008), [29], emphasis in original.

40. There is a clear distinction between the disclosure standards of Arbitration Rule 6(2) and the disqualification dictates of Articles 14(1) and 57 of the ICSID Convention. Reconciliation between these two standards is not to be achieved by simply imputing the justifiable doubts standard into Articles 14(1) and 57 of the Convention.²³ Thus, in the view of the Two Members, non-disclosure would itself indicate manifest lack of impartiality only if the facts or circumstances surrounding such non-disclosure are of such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment.²⁴

3. *Relevance of the IBA Guidelines*

41. The IBA Guidelines have been referred to extensively by the parties. Venezuela has questioned their relevance in ICSID arbitrations, while Tidewater has pointed out that in the introduction it is clearly stated that they are also intended for other arbitrations, including investment arbitrations. As their title indicates, they are guidelines and not a binding instrument. Nevertheless, it has been held by the ICSID Secretary-General that, though these guidelines have an indicative value only, they may furnish a useful indication.²⁵ Arbitrators dealing with disqualification proposals have frequently been guided by them.²⁶

42. The Two Members do consider it useful to refer to the Guidelines for their indicative value. But they must ultimately apply the legal standard laid down in the Convention itself, and, in so doing, consider the Proposal for Disqualification in the context of the facts of this particular case. They note in any event that the Explanatory Note to the Guidelines states:²⁷

These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties....The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation.

43. These qualifications are important. The ICSID Convention mandates a general standard for disqualification which differs from the ‘justifiable doubts’ test formulated in the IBA

²³ *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Decision on Challenge to Arbitrator (March 19, 2010), [64].

²⁴ The same view was taken in *Alpha Projektholding ibid.*

²⁵ *Participaciones Inversiones Portuarias supra* n 11 [24].

²⁶ See, e.g., *ICS supra* n 5, [2]; *Alpha Projektholding supra* n 23, [56].

²⁷ *Supra* n 3, 5, [6]

Guidelines.²⁸ Further, and in any event, the circumstances relied upon in the Proposal for Disqualification all fall within the 'Orange List' in the IBA Guidelines, to the extent that they fall within the Guidelines at all. By contrast with the Red List, these are not situations in which, depending upon the facts of a given case, an objective conflict of interest exists. Rather, they are situations which the Working Group considered ought to be disclosed, because they *may* give rise to an objective doubt as to the arbitrator's independence or impartiality. It added '*non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.*'²⁹ By the same token, '*no presumption regarding disqualification should arise from a disclosure.*'³⁰ The Working Group characterised the time limits set out in the Orange List as '*an appropriate general criterion, subject to the special circumstances of any case.*'³¹

44. With these observations in mind, it is now possible to consider in turn each of the grounds on which Tidewater relies in its Proposal for Disqualification of Professor Stern, dealing first with the effect of Professor Stern's initial non-disclosure.

B. Non-disclosure of other ICSID arbitral appointments by the same party

45. In the first place, Tidewater contends that Professor Stern ought to have disclosed at the outset the other cases in which Venezuela, its Attorney General or Curtis, had appointed her as arbitrator. It submits that: '*[i]f there is any doubt regarding the inferences to be drawn from the common issues or the repeat appointments in question, the initial non-disclosure would be, in the words of one decision "sufficient in conjunction with the non-disclosed facts or circumstances to tip the balance in the direction" of disqualification.*'³²

46. The parties are not in agreement as to whether information in the public domain as to an arbitrator's appointments to other ICSID tribunals by the same party needs to be disclosed. Arbitration Rule 6(2) does not limit disclosure to circumstances which would not be known in the public domain. The wording of this rule is all encompassing without distinguishing among categories of circumstances to be disclosed.

²⁸ *Ibid* 7-8.

²⁹ *Ibid*, 18.

³⁰ *Idem*.

³¹ *Ibid* 19.

³² Tidewater's Further Observations, 11, citing *Alpha Projektholding supra* n 23, 11.

47. The question for the Two Members is whether the non-disclosed circumstances, whether alone or in combination with other elements, would justify reaching the conclusion that Professor Stern manifestly lacked independence or impartiality. The answer to this question will depend on a number of factors. The two arbitrators in the Second Disqualification Proposal in the *Suez* cases listed the following factors to structure their considerations:³³

[W]hether the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed raised obvious questions about impartiality and independence, and whether the non-disclosure is an aberration on the part of the conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality. This balancing is for the deciding authority...in each particular case.

Before considering these factors, several issues of fact and law on which the parties disagree need to be addressed.

48. First, should or should not the appointment of Professor Stern as arbitrator in the case of *Vannessa* be included as one of the appointments in considering the number of multiple appointments by a single party? The fact that the IBA Guidelines are just guidelines would favour a flexible interpretation of the time limits – as argued by Tidewater and foreseen in the Guidelines themselves. Therefore, an appointment accepted shortly after the cut-off period of three years, leading to the constitution of the tribunal within the three year period in a case which is still pending should be included in considering the number of multiple subsequent appointments.

49. Second, should the Attorney General of Venezuela be considered as counsel or as party for the purposes of applying the IBA Guidelines? The Attorney General is by law the sole and exclusive representative of Venezuela in legal proceedings.³⁴ The office of the Attorney-General should therefore be considered an officer of the State of Venezuela. Adopting a ‘*robust common sense*’ interpretation of the IBA Guidelines, the Two Members are in no doubt that, in considering multiple appointments by the same counsel for the purpose of Section 3.3.7, it would not be right to require a separate

³³ *Supra* n 22, [44], citing Baker & Davis *The UNCITRAL Arbitration Rules in Practice: the Experience of the Iran-US Claims Tribunal*. (1992) 50.

³⁴ Art.247 Constitution of the Bolivarian Republic of Venezuela; Art. 2 *Decreto con Rango, Valor y Fuerza de Ley de Reforma Parcial del Decreto con Fuerza de Ley Orgánica de la Procuraduría General de la República*, cited in Venezuela’s Reply Observations, 4.

disclosure of multiple appointments by the Attorney General. The purpose of Section 3.3.7 is to require an arbitrator to disclose cases of excessive patronage by the same counsel or law firm, which may give rise to a concern that a relationship of dependence has arisen which may affect the arbitrator's independence or impartiality. In the case of a State, which is required by law to act through its Attorney General, no additional dependence could be said to arise simply because the arbitrator's appointment was made formally through the Attorney General's office.

50. As a result of the clarification made by Professor Stern, this case was, at the time of her appointment, only the second time she had been appointed as arbitrator by the outside counsel appointed by Venezuela in this matter, Curtis – the other being *Brandes*.³⁵ Thus, no further consideration need be given to disclosure of multiple appointments by the same counsel on the facts of this case.
51. This leaves only the non-disclosure of the circumstance that, at the time of Professor Stern's first declaration, the appointment as arbitrator in this case was the third appointment by Venezuela. The Two Members consider that, as a general rule, arbitrators appointed to ICSID tribunals ought to disclose appointments to other arbitral tribunals by one of the parties or an affiliate within the previous three years. Even in the case of investment arbitration, not all of these appointments will necessarily be in the public domain, and they may require consideration in assessing the arbitrator's independence and impartiality. The Two Members agree with Tidewater that in general, in considering the scope of her duty of disclosure, the arbitrator may not count on the due diligence of the parties' counsel. As pointed out by Tidewater, arbitrators will always be in *'the best position to gather, evaluate, and disclose accurate information relevant to their potential conflicts'*.
52. However, one of the distinctive aspects of ICSID arbitration (as compared with the procedures commonly applied in other types of commercial and investment arbitration) is the transparency of the arbitral process. Regulation 22(1) of the ICSID Administrative and Financial Regulations provides:

The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.

³⁵ Professor Stern's Explanation, 2.

53. Further, Regulation 23 provides for the maintenance of Registers, inter alia, for requests for arbitration:

(1) The Secretary-General shall maintain, in accordance with rules to be promulgated by him, separate Registers for requests for conciliation and requests for arbitration. In these he shall enter all significant data concerning the institution, conduct and disposition of each proceeding, including in particular the method of constitution and the membership of each Commission, Tribunal and Committee. On the Arbitration Register he shall also enter, with respect to each award, all significant data concerning any request for the supplementation, rectification, interpretation, revision or annulment of the award, and any stay of enforcement.

(2) The Registers shall be open for inspection by any person. The Secretary-General shall promulgate rules concerning access to the Registers, and a schedule of charges for the provision of certified and uncertified extracts therefrom.

54. As a matter of practice, details of all appointments to arbitral tribunals are published on the ICSID website, icsid.worldbank.org, once the relevant tribunal has been constituted, along with the dates and development of other procedural details of each case. Thus, in the present case, the fact of Professor Stern's appointment in each of *Vannessa* and *Brandes* was readily accessible on the ICSID website. It is correct that, as pointed out by Tidewater, the website does not explicitly show who appointed each arbitrator. But the name of the appointing party in each case is available for inspection on the ICSID Register of Requests for Arbitration. While the Two Members consider that an arbitrator's disclosure statement ought to include even publicly available arbitral appointments, in the case of ICSID appointments, this must be out of an abundance of caution, given the ready accessibility of this information in the records of the very Centre with which the parties are dealing. In any event, the Two Members consider that the fact that this information is publicly available can and should be taken into account by them in determining the separate question of whether that non-disclosure may itself amount to a manifest lack of independence or impartiality.

55. Returning to the list of factors identified in *Suez*,³⁶ the Two Members consider that Professor Stern's failure to disclose was an honest exercise of judgment on her part in the belief that publicly available information did not require specific disclosure. How

³⁶ *Supra* [47].

could it be said that she was intent on hiding the circumstances surrounding her appointments if those are publicly available on the Register of ICSID itself? It has been Professor Stern's practice in other similar situations without her independence or impartiality being questioned by counsel.³⁷

56. Thus, in the view of the Two Members, no adverse inference can be drawn from her deletion of the two paragraphs from her Declaration. When this deletion was queried by Tidewater, Professor Stern immediately filed a supplementary explanation with her revised Declaration dated September 13, 2010. In that statement, she disclosed all three of her other arbitral appointments by Venezuela.
57. The Two Members therefore conclude that the non-disclosure at the time of the first declaration of two previous appointments by Venezuela which are in the public domain is not sufficient to sustain a finding that Professor Stern manifestly lacks the qualities required under Article 14(1) of the ICSID Convention.

C. Multiple arbitral appointments

58. Beyond the issue of non-disclosure, the next question is whether the existence of multiple appointments by the same party would itself lead an objective observer to conclude that the Article 57 standard has been breached. In addition to *Vannessa* and *Brandes*, Professor Stern has again been appointed by the same party and the same counsel to another arbitral tribunal, in the case *Universal Compression*, as disclosed in her Second Declaration.
59. The Two Members begin their analysis of this question by observing that the question 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. Whilst it is useful to have the guidance provided by Section 3.1.3 of the IBA Guidelines, this can be no more than a rule of thumb. Depending on the particular circumstances of the case, either fewer or more appointments might, in combination with other factors, be needed to call into question an arbitrator's impartiality. There is perforce an arbitrary character about the limitation to two appointments within three years. Moreover, it is inherent in such a guideline that more than one appointment by the same party is not necessarily suggestive of a conflict.

³⁷ Professor Stern's Explanation, 3.

60. Considering the matter as one of principle, the conflict which may potentially arise from multiple arbitral appointments by the same party is of a different character from other connections to one of the parties, including service as counsel or other professional capacity.³⁸ 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. As Craig, Park and Paulsson observe:³⁹

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

61. Repeat appointments may be as much the *result* of the arbitrator's independence and impartiality as an indication of justifiable doubts about it.⁴⁰ This is reflected in the fact that national courts called upon to consider proposals for disqualification on such a ground normally reject them in the absence of aggravating circumstances.⁴¹

62. In the view of the Two Members, there would be a rationale for the potential conflict of interest which may arise from multiple arbitral appointments by the same party if either (a) the prospect of continued and regular appointment, with the attendant financial benefits, might create a relationship of dependence or otherwise influence the arbitrator's judgment; or (b) there is a material risk that the arbitrator may be influenced by factors outside the record in the case as a result of his or her knowledge derived from other cases.⁴² The Two Members deal with factor (b) in Section D *infra*. In the remainder of this Section, they deal with whether, on the facts of this case, it can be said that the three appointments of Professor Stern by Venezuela *ipso facto* call into question her independence or impartiality.

63. Such practice within ICSID as is publicly available supports a cautious approach to a finding of disqualification on this ground. There have been a number of recent

³⁸ Connections as counsel to one of the parties (or to a third party with a right of intervention) were a material factor in a number of the recent reported investment cases where a proposal for disqualification was upheld, e.g., *ICS supra* n 5 ; *Gallo v. Canada*, PCA, Decision on Challenge to Arbitrator (October 14, 2009) ; *Ghana v Telecom Malaysia Bhd* (Dist Ct The Hague, October 18, 2004).

³⁹ Craig, Park & Paulsson *International Chamber of Commerce Arbitration* (3rd edn, 2001), 231, [13.05].

⁴⁰ Born *International Commercial Arbitration* (2009) 1524.

⁴¹ The American authorities are cited in Born *ibid* 1525, nn 856 & 857; and on the French practice to like effect see Poudret & Besson *Comparative Law of International Arbitration* (2nd edn, trans Berti & Ponti, 2007), [421].

⁴² See Craig, Park & Paulsson *supra* n 39, *idem*.

unsuccessful challenges to arbitrators in investment arbitration cases on this ground, both within and outside the ICSID system in which the results are known, but the decision is not fully reported.⁴³ In one case, where the reasoning only is excerpted, the two arbitrators concluded that the mere fact that an arbitrator sat in two different cases brought against the same respondent State did not warrant disqualification ‘*absent any other objective circumstances demonstrating that these two cases are related in such a manner that the arbitrator’s determination in one case would manifestly affect the challenged arbitrator’s reliability to exercise independent judgment in the other case.*’⁴⁴ So, too, in the course of a Decision on Jurisdiction in an UNCITRAL case, the Tribunal, observing that the Respondent State had chosen the same arbitrator in two cases, held that ‘*the fact of holding a joint appointment would not, in and of itself, be grounds for a challenge.*’⁴⁵

64. In the view of the Two Members, the mere fact of holding three other arbitral appointments by the same party does not, without more, indicate a manifest lack of independence or impartiality on the part of Professor Stern. Indeed, the Two Members find no basis to infer that Professor Stern would be influenced in her decision in any way by the fact of such multiple appointments by one party. On the contrary, her conduct has been demonstrably independent of such influence. The Two Members take notice from the Register of Cases publicly maintained by ICSID on its website that Professor Stern has held or currently holds arbitral appointments in many ICSID cases and so cannot be said to be dependent on any one party for her extensive practice as an arbitrator in investment cases. Moreover, in each of the two cases in which she was appointed by Venezuela, and where she has to date rendered decisions, *Vannessa* and *Brandes*, Professor Stern has joined unanimous preliminary decisions rejecting applications made by Venezuela.⁴⁶ This fact tends to indicate that Professor Stern has been appointed on subsequent occasions because of her independence, rather than the reverse. Thus, the Two Members conclude that the appointment of Professor Stern on two prior occasions by Venezuela does not demonstrate a manifest lack on her part of

⁴³ See the references in Sheppard “Arbitrator independence in ICSID arbitration” in Binder (ed) *International Investment Law for the 21st Century. Essays in honour of Christopher Schreuer* (2009) 131, 154-5; and Ziadé “Recent developments at ICSID” (2008) 25 No 2 *News from ICSID* 3, 4-5. One such Proposal concerned Professor Stern: *Electrabel SA v Hungary supra* n 11.

⁴⁴ Ziadé *idem*.

⁴⁵ *Encana Corp v Ecuador* (Partial Award on Jurisdiction) UNCITRAL (February 27, 2004), [43].

⁴⁶ *Vannessa* (Decision on Jurisdiction) (August 22, 2008); *Brandes* (Decision on Preliminary Objection) (February 2, 2009), both available at: http://ita.law.uvic.ca/alphabetical_list.htm, and referred to in Venezuela’s Observations, 2.

the quality of independent and impartial judgment required of an arbitrator under the ICSID Convention.

D. Possibility of decision on related legal issues

65. It remains finally to consider whether this conclusion is affected by the additional factor, raised in Tidewater's Further Observations, that one of the prior cases, *Brandes*, may raise a related issue of law, namely the question whether the Venezuelan Law on the Promotion and Protection of Investments expresses a basis for Venezuela's consent to ICSID arbitration.⁴⁷ This, claims Tidewater, invokes Section 3.1.5 of the IBA Guidelines as Professor Stern is currently serving as 'arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.'
66. Tidewater does not allege that there is an overlap in the underlying facts between *Brandes* and the present case, so that Professor Stern would benefit from knowledge of facts on the record in *Brandes* which may not be available in the present case.⁴⁸ Rather, it alleges a lack of impartiality based upon an overlap between the issues of law raised in the two cases. Specifically, it states, based upon a news report filed with Venezuela's observations,⁴⁹ that, in *Brandes*, the sole basis for invoking ICSID jurisdiction is the Venezuelan law. It states that some of Tidewater's claims in the present arbitration also rely upon that law as the basis for ICSID jurisdiction, and that '*[i]t is public knowledge that the Republic of Venezuela takes the position that the Investment Law does not express consent to ICSID jurisdiction.*'⁵⁰ Since the *Brandes* Tribunal will have to rule on its jurisdiction first, Tidewater claims that ruling '*will amount to prejudging the identical issue presented in this case, without the Claimants having an opportunity to argue the issue before Professor Stern has made up her mind.*'⁵¹ Venezuela observes that a similar argument has been rejected in other recent ICSID cases.⁵²
67. In the opinion of the Two Members, the rationale behind the potential for the conflict of interest identified in Section 3.1.5 relates to cases where, by reason of the close interrelationship between the facts and the parties in the two cases, the arbitrator has in

⁴⁷ *Supra* [18].

⁴⁸ An issue which could give rise to a problem of procedural equality discussed in *Encana supra* n 45, [44] - [45].

⁴⁹ *Supra* n 10.

⁵⁰ Tidewater's Further Observations, 5.

⁵¹ *Ibid* 6.

⁵² Venezuela's Observations, 5.

effect prejudged the liability of one of the parties in the context of the specific factual matrix. They agree with the formulation of the French court, cited with approval in Poudret and Besson, that there is *'neither bias nor partiality where the arbitrator is called upon to decide circumstances of fact close to those examined previously, but between different parties, and even less so when he is called upon to determine a question of law upon which he has previously made a decision.'*⁵³

68. The Two Members note that this view has also been adopted in decisions on recent proposals for disqualification within ICSID, in which the outcome and some of the reasons are available on the public record, but the full text of which is available neither publicly nor to the Two Members.⁵⁴ The Two Members agree with the observation made in one such case, and reported in an official ICSID publication, that: *'[i]nvestment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations.'*⁵⁵
69. Neither Professor Stern, still less the present Tribunal as a whole, will be bound in the present case by any finding which the *Brandes* Tribunal may arrive at as to the issue of Venezuelan law referred to. Indeed, at this stage in the present proceeding, it would be premature to make any judgment as to what issues of law may be pleaded by the parties (and thus as to the similarities or differences between the context for the issues of law to be determined in the two cases), since no pleadings other than the Request for Arbitration have yet been filed.
70. The Two Members do not consider in this regard that there is a material difference between prior consideration of issues of international law and issues of host state law which may arise in for determination in the course of the proceedings. Thus, the Two Members do not accept the distinction drawn by Tidewater in its Further Observations between issues of international law as being *'generically similar and recurrent in*

⁵³ Paris, *Ben Nasser*, Rev arb 1994, 380 note Bellet, cited in Poudret & Besson *supra* n 41 *idem*.

⁵⁴ Two of the decisions, noted in the sources at *supra* n 43, are *Electrabel SA v Hungary* and *Saba Fakes v Turkey* *supra* n 11.

⁵⁵ Ziadé *supra* n 43, 5; and, to like effect, *Suez* n 18, [36]; *Urbaser SA and other v Argentina* (Decision on Disqualification of Arbitrator) ICSID Case No ARB/07/26 (August 12, 2010), [47] – [48]. In *Republic of Argentina v BG Group plc* Civ Action No 08-485 (US DC, June 7, 2010), the Court heard a motion to vacate an investment arbitration award rendered under UNCITRAL Rules, inter alia on the ground that one of the arbitrators lacked impartiality because he had sat on four cases under the same Bilateral Investment Treaty each raising the “state of necessity” doctrine and reached different decisions in each. The Respondent State claimed that the *inconsistent* decisions were evidence of bias. The Court dismissed this argument, and the motion as a whole. It noted (at 21) that *'there could be a number of innocuous reasons to explain why [the arbitrator] reached a different conclusion.'*

investment arbitration’ and issues of host state law.⁵⁶ In the case of each, the Tribunal is legally bound to arrive at its decision according to the applicable law as it finds it to be. In determining its jurisdiction, the Tribunal is bound by Article 25 of the ICSID Convention to determine whether *‘the parties to the dispute consent in writing to submit to the Centre.’* In determining the merits of the dispute, the Tribunal is bound by Article 42 of the ICSID Convention to *‘decide a dispute in accordance with such rules of law as may be agreed between the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.’*

71. So far as concerns Professor Stern’s position, the Two Members have no reason to doubt Professor Stern’s statement that *‘the fact of whether I am convinced or not convinced by a pleading depends upon the intrinsic value of the legal arguments and not on the number of times I hear the pleading.’*⁵⁷
72. Accordingly, the Two Members find that this third ground upon which Tidewater’s Proposal for Disqualification is premised is not well founded and must be rejected.

V. Decision

73. **For the reasons given above, the Two Members decide that:**

- (1) Tidewater’s Proposal to disqualify Professor Brigitte Stern as Arbitrator and member of this Tribunal is dismissed.**
- (2) The determination and attribution of costs in connection with this Decision is reserved to a later stage of this proceeding.**
- (3) As from the date hereof, the suspension of the proceeding according to Arbitration Rule 9(6) is terminated.**

⁵⁶ *Supra* n 8.

⁵⁷ Professor Stern’s Explanation, 2.

[SIGNED]

Professor Campbell McLachlan QC
President
Date:

[SIGNED]

Dr Andrés Rigo Sureda
Arbitrator
Date: