KING & SPALDING

1100 Louisiana Street
Suite 4000
Houston, Texas 77002-5213
www.kslaw.com

November 28, 2011

VIA EMAIL AND HAND DELIVERY

Prof. Brigitte Stern
7, rue Pierre Nicole
75005 Paris
France
Email: stern@univ-paris1.fr

Mr. Guido Santiago Tawil
M. & M. Bomchil
Suipacha 268, Piso 12
C1008AAF Ciudad de Buenos Aires
Argentina
Email: guido.tawil@bomchil.com

Dr. Diego García Carrión
Procuraduría General del Estado
de la República del Ecuador
Robles 731 y Avenida Amazonas
Quito - Ecuador
Email: dgarcia@pge.gob.ec

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

Dear Mme. and Messrs.:

On behalf of Murphy Exploration & Production Company – International ("Claimant"), we hereby give notice of Claimant's challenge to Ecuador's appointment of Prof. Brigitte Stern as the second arbitrator in this arbitration.

Claimant received Respondent's notice of Prof. Stern's appointment as arbitrator on November 14, 2011. Pursuant to Article 11 of the UNCITRAL Arbitration Rules, Claimant hereby challenges Prof. Stern based on relevant circumstances that give rise to justifiable doubts as to Prof. Stern's impartiality or independence to sit as a member of the tribunal in the above-referenced matter.

As stated in Article 10 of the UNCITRAL Arbitration Rules, "[a]ny arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." Claimant maintains that that is the case here. Indeed, because Prof. Stern (1) has already prejudged key issues that constitute the very subject-matter of this dispute, (2) has further failed to accept her appointment and disclose relevant facts and circumstances, and (3) has a consistent record of appointments by Respondent States that justifiably give rise to doubts regarding her impartiality and independence, Claimant hereby request that Respondent agree to her challenge or that Prof. Stern refuse to accept her appointment (or that she withdraw if acceptance ensues).

1. Prof. Stern Has Already Prejudged Several Issues that Constitute the Very Subject-Matter of this Arbitration

Prof. Stern is currently serving as a member of the ICSID tribunal in the case captioned *Burlington Resources, Inc. v. Republic of Ecuador*,[1] where many of the same legal and factual issues in this arbitration are under consideration. In accordance with the well-known IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"),[2] this sole circumstance may suffice to sustain a challenge to Prof. Stern's appointment in this arbitration.

Indeed, one of the grounds stated in the so-called "orange list" of the IBA Guidelines is the fact that "[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."[3] The *Burlington* case not only involves one of the parties to this arbitration—the Republic of Ecuador—it also involves (1) the same type of production-sharing contracts at issue in the *Burlington* case, (2) the same bilateral investment treaty, and (3) the main complained-of governmental measure, *i.e.*, Law 42, that gave rise to this arbitration. Thus, the present case goes beyond the situation described in the IBA Guidelines insofar as the *Burlington* case deals not just with "a related issue involving one of the parties," but rather the very subject-matter of this arbitration.

Further, Prof. Stern has already signed a decision in the *Burlington* case that will directly affect her analysis of Claimant's case in this arbitration. In that decision, the *Burlington* Tribunal has already decided several of the same key issues that the tribunal in this arbitration

---

[1] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5. Details of this arbitration are available at http://icsid.worldbank.org/ICSID/FrontServlet (last visited Nov. 23, 2011). Claimant also notes that Prof. Stern is serving as a member of the tribunal in another pending ICSID arbitration against the Republic of Ecuador: *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11. Details of the arbitration are available at the ICSID web site. Claimant, however, is not privy to all merits issues involved in that arbitration, and, specifically, to the relevance, if any, of Law 42.

[2] IBA Guidelines on Conflicts of Interest in International Arbitration, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited Nov. 25, 2011).

[3] IBA Guidelines, Part II, § 3.1.5 (emphasis added).

will need to address to reach a final award.[4] Thus, Prof. Stern has already taken a position with respect to several relevant issues that constitute the subject-matter of this arbitration.[5]

In this respect, the IBA Rules of Ethics for International Arbitrators address the requirement that international arbitrators be impartial and independent, and under the heading "Elements of Bias," Article 3 states:

> The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute … Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it.[6]

Setting aside some factual differences between the *Burlington* case and the present one, both arbitrations concern the alleged violation of rights and obligations provided for in the US-Ecuador BIT. Claimants in both arbitrations are US investors whose investments were carried out through subsidiaries executing the production-sharing contract model, the so-called "participation contract" established in the Ecuadorian Hydrocarbons Law. Also, as stated above, claimants in both arbitrations brought claims for violations of the BIT based on the enactment of Law 42, which amended the Ecuadorian Hydrocarbons Law, and its related measures.[7]

Claimant does not purport to engage here in a thorough analysis of Law 42 and its related measures. Suffice it to say that, through those measures, the Ecuadorian government imposed on foreign oil companies, like Claimant and Burlington, an "additional participation" of at least 50% of the difference between the price of oil per barrel at the time the participation contract was executed and the current market price. Notably, Law 42 is an amendment to the Ecuadorian

---

[4] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, June 2, 2010 (hereinafter the "*Burlington* Decision on Jurisdiction"), available at http://icsid.worldbank.org/ICSID/FrontServlet (last visited Nov. 23, 2011).

[5] Compared with the challenges made in other arbitrations, the situation of Prof. Stern here can be considered unique because her appointment by Ecuador comes at a stage where she has already decided several key issues of the instant case in another arbitration that deals with those same issues. The situation is also distinguishable from cases where the challenge to the arbitrator was based on opinions or comments made in a character other than as arbitrator. *See, i.e.*, *Urbaser S.A. et al. v. Argentina*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, Aug. 12, 2010 (challenge to arbitrator based on views expressed in the arbitrator's publications as a legal scholar), available at http://icsid.worldbank.org/ICSID/FrontServlet (last visited Nov. 25, 2011). Prof. Stern acted in her capacity as arbitrator when issuing the *Burlington* Decision on Jurisdiction—not as a legal scholar.

[6] IBA Rules of Ethics for International Arbitrators, Article 3 (emphasis added), available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited Nov. 25, 2011).

[7] *See* Claimant's Notice of Arbitration ¶¶ 7-12; *see also Burlington* Decision on Jurisdiction ¶¶ 38-52.

Hydrocarbons Law, and was not included in the Ecuadorian tax regime. Claimant has treated Law 42 accordingly, *i.e.*, under the assumption that Law 42 is not a tax.[8]

The *Burlington* Tribunal, however, has reached the conclusion that Law 42 is a tax for purposes of the US-Ecuador BIT. As a result, the *Burlington* Tribunal concluded that any claim that challenges the validity or efficacy of Law 42 necessarily falls under the express prohibition of Article X of the BIT, which excludes tax measures from the scope of the BIT except under limited exceptions. Accordingly, the *Burlington* Tribunal concluded that it only has jurisdiction over such claims to the extent they fall within one of the exceptions in Article X to the tax carve-out provision of the BIT.

Further, with regard to one of the exceptions just mentioned, Prof. Stern has already taken a distinct position in the *Burlington* Decision on Jurisdiction. Briefly, Burlington alleged that its claims relate to the observance and enforcement of an "investment agreement" as provided for in Article X(2)(c) of the BIT,[9] rendering them exempted from the tax carve-out provision of the Treaty. The *Burlington* Tribunal concluded, however, that Burlington and Ecuador had not entered into an investment agreement. Hence Burlington's claims did not relate to the observance and enforcement of the terms of an investment agreement within the meaning of Article X(2)(c) of the BIT. Consequently, the *Burlington* Tribunal found that it had no jurisdiction over Burlington's claims that raise matters of taxation because the exception in Article X(2)(c) does not apply to those claims.[10]

In this arbitration, Claimant also argues that it has entered into an investment agreement within the meaning of Article X(2)(c) of the BIT. Although the arguments raised by Claimant may not be identical to Burlington's, the conclusion reached by the *Burlington* Tribunal clearly constitutes, at least, a position taken in another arbitration on a related issue, as provided for in the IBA Guidelines.

Additionally, there is, at least, another position taken by the *Burlington* Tribunal and, particularly, by Prof. Stern that concerns this arbitration. That position involves the so-called "umbrella clause" established in Article II(3)(c) of the BIT and its relation to claims like the ones raised by Burlington and other foreign oil companies like Claimant. Even though the *Burlington* Tribunal has decided to join to the merits award—not yet issued—its final determination on the issue of the scope of the umbrella clause and the question of whether that clause requires privity of contract between Burlington and Ecuador,[11] Prof. Stern, without further elaboration, has taken exception to the majority of the Burlington's analysis of this issue.[12] Although it is not possible

[8] Apparently, Burlington, along with its French partner Perenco, took for granted from the outset that Law 42 was a tax under Ecuadorian law, and addressed it under this assumption in its dealings with Ecuador. As stated above, Claimant did not make the same assumption regarding the legal nature of Law 42.

[9] *See Burlington* Decision on Jurisdiction ¶ 224.

[10] *See Burlington* Decision on Jurisdiction ¶ 249.

[11] *See Burlington* Decision on Jurisdiction ¶¶ 197-199.

[12] *See Burlington* Decision on Jurisdiction ¶ 196.

to ascertain the exact reasoning behind Prof. Stern's conclusion, she appears to believe that Burlington cannot invoke the umbrella clause to enforce the obligations owed by Ecuador to Burlington's local subsidiary. It bears mentioning that this was also the position taken by Prof. Stern as a member of the *Impregilo* Tribunal.[13]

Here, Claimant's claim also partly relies on the umbrella clause of the BIT. Based on the foregoing, Claimant concludes that Prof. Stern has already prejudged this part of its claim against Ecuador as well. At the very least, it can be argued that Prof. Stern has taken a position in relation to several relevant aspects of Claimant's dispute, as provided for in the IBA Rules on Ethics for International Arbitrators.[14]

Furthermore, it should be noted that Claimant is not a party to the *Burlington* arbitration and has not, therefore, been exposed to all of the issues and elements that may have influenced the decision in that case. Claimant is accordingly at a disadvantage compared with both Prof. Stern and Ecuador, who are privy to all aspects of the *Burlington* arbitration.

2. Prof. Stern Has Failed to Accept her Appointment and Disclose All Relevant Facts and Circumstances

Prof. Stern was not only required to duly accept her appointment;[15] she was also required to disclose any and all circumstances that may give rise to doubts regarding her impartiality of independence. Two weeks after Ecuador's communication of her appointment, Prof. Stern has failed so far to send her acceptance, let alone disclose all facts and circumstances "that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence."[16]

It must be emphasized that it is not for the appointed arbitrator to determine whether those circumstances do in fact affect its impartiality or independence. Normally, disclosure is made because the arbitrator "considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset."[17]

---

[13] *See Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, June 21, 2011, ¶ 185, available at http://icsid.worldbank.org/ICSID/FrontServlet (last visited Nov. 26, 2011).

[14] IBA Rules of Ethics for International Arbitrators, Article 3.2.

[15] Article 13 of the UNCITRAL Arbitration Rules states that "[i]n the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply." UNCITRAL Arbitration Rules, art. 13(2) (emphasis added).

[16] IBA Guidelines, Part I, § (3)(a) (emphasis added).

[17] IBA Guidelines, Part I, § (3)(b).

In any event "[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure."[18] In this respect, it has been maintained that

> Under the UNCITRAL Rules, it is generally recognized that failure to disclose a circumstance that should have been disclosed may give rise to justifiable doubts as to independence and impartiality … Disclosure of circumstances that may appear to affect independence or impartiality is so fundamental for the legitimacy of international arbitration, that failure to comply with the duty to disclose should weigh heavily in the consideration of a challenge against an arbitrator.[19]

Similarly, the IBA Rules on Ethics for International Arbitrators provide that "[t]he appearance of bias is best overcome by full disclosure as described in Article 4 below."[20] Article 4, in turn, provides that "[f]ailure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification."[21]

According to the foregoing, "actual bias" is not the standard that must be met for a challenge to succeed. An appearance of bias is sufficient. Adopting the test of another challenge decision, an LCIA panel has reached this conclusion in the following words:

> One might say that under the UNCITRAL Arbitration Rules doubts are justifiable or serious if they give rise to an apprehension of bias that is, to the objective observer, reasonable. Actual bias or partiality need not be established […] In sum the test to be applied is that the doubts existing on the part of the claimant here must be 'justifiable' on some objective basis. Are they reasonable doubts as tested by the standard of a fair minded, rational, objective observer? Could that observer say, on the basis of the facts as we know them, that the claimant has a reasonable apprehension of partiality on the part of the respondent's arbitrator.[22]

Claimant wish to make clear, however, that Prof. Stern's bias in this case is met here not only because she has failed to disclose all relevant facts and circumstances that may give rise to

---

[18] IBA Guidelines, Part I, § (3)(c).

[19] Gabriel Bottini, *Should Arbitrators Live on Mars? Challenge of Arbitrators in Investment Arbitration*, 32 SUFFOLK TRANSNAT'L L. REVIEW 341, 345 (2008-2009) (footnote omitted) (emphasis added), Exhibit C-20.

[20] IBA Rules of Ethics for International Arbitrators, Article 3.2.

[21] IBA Rules of Ethics for International Arbitrators, Article 4.1.

[22] *National Grid PLC v. the Republic of Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd. L. Kessler, Dec. 3, 2007, ¶ 85, available at http://www.iisd.org/pdf/2008/itn_lcia_rulling_kessler_challenge.pdf (last visited Nov. 23, 2011) (emphasis added).

justifiable doubts as to her impartiality, but mainly because she has already prejudged key issues that constitute the subject-matter of Claimant's dispute with Ecuador. Therefore, disclosure of these circumstances would not have cured Prof. Stern's lack of impartiality towards Claimant's case.

Faced with the same issues under a similar pattern of facts like the one described above, it is only natural to expect that Prof. Stern will seek not to contradict herself with the factual and legal conclusions she has already reached in the *Burlington* case. Additionally, it is not feasible to require Prof. Stern to compartmentalize her specific knowledge of that case, in order to analyze Claimant's claims based only on the merits of the present arbitration, without recourse to extraneous elements that may have a direct bearing on the key issues to be resolved.

3. Prof. Stern Has Been Consistently Appointed by Respondent States

To further strengthen the appearance of bias towards Claimant's case, it must be noted that Prof. Stern has a remarkable record of being appointed mostly by Respondent Sates in investor-State arbitrations. Indeed, of 36 cases listed in the ICSID web site showing Prof. Stern as a member of the tribunal,[23] it appears that she has been appointed by the Respondent State in at least 31 cases, *i.e.*, over 86% of those cases.[24] To Claimant's knowledge, Prof. Stern has also been appointed by at least one respondent State in an UNCITRAL arbitration.[25] Claimant is not aware of any investment treaty arbitration in which Prof. Stern has been appointed by the foreign investor.

Last year, Prof. Stern confirmed this circumstance in an interview that she gave in Brazil.[26] To the question posed by the interviewer ("The majority of your appointments seem to be by state parties. Why do you think this is, and is it a concern?"), Prof. Stern responds: "Statistically, you are completely right. It's not a concern for me at all …"[27] The fact that this may not be a concern for Prof. Stern "at all," however, does not mean that it is not a concern for Claimant, particularly under the circumstances described in the preceding headings. And in any event, whether a circumstance may giver rise to justifiable doubts as to the arbitrator's impartiality or independence is not for the arbitrator to decide. Hence the need for full disclosure provided for in the IBA Guidelines and the IBA Rules of Ethics for International Arbitrators.

---

[23] ICSID List of Cases (search term "Stern"), available at http://icsid.worldbank.org/ICSID/FrontServlet (last visited Nov. 21, 2011), Exhibit C-21.

[24] In the other 5 cases, Prof. Stern appears as the sole arbitrator, the president of the tribunal or a member appointed by ICSID, or a member of the annulment committee also appointed by ICSID.

[25] *See, i.e.*, *Paushok et al. v. Mongolia*, UNCITRAL Case, Award on Jurisdiction and Liability, April 28, 2011, ¶ 14, available at http://italaw.com/alphabetical_list.htm (last visited Nov. 25, 2011).

[26] *See Brigitte in Brazil*, Global Arbitration Review, Volume 5, Issue 3 (2010), at 3, Exhibit C-22.

[27] *Id.*. During the same interview, Prof. Stern also asserts that "[a]rbitrators have to make choices to resolve the disputes, which are of course informed by their political standpoint." *Id.* In Claimant's opinion, Prof. Stern's comment is, at the very least, unfortunate. In the worst scenario, that comment provides a basis to conclude that Prof. Stern's decisions are strongly influenced by her political opinions, not strictly by the merits of the case.

In view of the foregoing, Claimant respectfully requests that Respondent agree to the present challenge, or that Prof. Stern refuse to accept her office (or withdraw from her office if acceptance ensues). If none of these events occur, Claimant requests that the appointing authority uphold the challenge to Prof. Stern and that a new arbitrator be appointed in accordance with the UNCITRAL Arbitration Rules. Claimant reserves its right to elaborate on the grounds for challenge herein described, and to amend, supplement or expand this motion in the future as it sees fit.

We thank you for your attention to these matters.

Very truly yours,

Craig S. Miles
Roberto Aguirre Luzi
Kenneth R. Fleuriet
King & Spalding
Counsel for Claimant

cc: Dr. Francisco Grijalva Muñoz (by email to fgrijalva@pge.gob.ec)
Dra. Christel Gaibor (by email to cgaibor@pge.gob.ec)
Dra. Gianina Osejo (by email to gosejo@pge.gob.ec)
Dr. Luis Felipe Aguilar (by email to laguilar@pge.gob.ec)
Mark Clodfelter (by email to mclodfelter@foleyhoag.com)
Ronald Goodman (by email to rgoodman@foleyhoag.com)
Alberto Wray (by email to awray@foleyhoag.com)
Bruno Leurent (by email to bleureunt@foleyhoag.com)