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December 10, 2019

VIA EMAIL

Meg Kinnear
ICSID Secretary General
1818 H Street, NW, MSN C3-300
Washington, DC 20433
USA
mkinnear@worldbank.org

Re: Petroceltic Holdings Limited and Petroceltic Resources Limited v. Arab Republic of Egypt (ICSID No. ARB/19/7)

Dear Ms. Kinnear:

Claimants request for Brigitte Stern to be disqualified under ICSID Arbitration Rule 9 and Article 57 of the ICSID Convention because of: (1) her failure to meet her disclosure obligations, (2) her repeated appointments by States, and (3) her repeated appointments by Egypt.

There are ample reasons for Claimants to question Ms. Stern's reliability for independent and impartial judgment. Ms. Stern's initial disclosures required under ICSID Arbitration Rule 6 did not provide sufficient information to allow Claimants to determine whether she can render a decision in this arbitration independently and without bias. As a result, Claimants twice tried to ascertain additional facts about her professional, business, and other relationships that might raise questions about her reliability for independent judgment. Each time Ms. Stern declined to reveal non-public information and her other relevant, undisclosed relationships, both of which affect her ability to provide independent judgment.

ICSID emphasizes that appointed arbitrators should avoid actual or apparent conflicts and assure they can render decisions independently and without bias:¹

[E]nsuring that investment arbitrators are independent and impartial is among the most fundamental requirements if arbitration is to be perceived as a legitimate means to resolve investor-state disputes. . . . In this context, high standards to avoid actual or apparent conflicts of

¹ Summary Comments to the Proposals for Amendment of the ICSID Arbitration Rules at p. 9, *available at*, <https://icsid.worldbank.org/en/Documents/IISD.pdf>.

interest of arbitrators, and ensuring that they can render decisions independently and without bias is critical.

Claimants asked Ms. Stern to make additional disclosures to assuage their concern about (1) possible conflicts with her professional, business, and other relationships which would benefit her financially as well as (2) her record of being an arbitrator of choice for States. Ms. Stern refused to comply with her duty under ICSID Arbitration Rule 6, withholding critical information, including the fact that she has her own personal company “Brigitte Stern” (registration no. 411413990) and that company’s clientele.

Ms. Stern further refused to disclose other direct connections with Egypt. Such connections include those through her employer, the University of Pantheon–Sorbonne, which has a branch located at the Cairo University law school (the “IDAI”). Moreover, she has ties to the Alexandrina Library as a “Member of the Scientific Board of the Centre René-Jean Dupuy for law and development, University of Alexandria.” Both the IDAI and Alexandrina Library receive substantial funding from Egypt. At a minimum, Ms. Stern should have elaborated about such financial connections because they understandably raise doubts about her independence and impartiality. This is particularly true when Egypt has repeatedly appointed her — six times now.

Ultimately, Ms. Stern chose to keep certain information secret that would have given Claimants a reasonable opportunity to further explore her connections to Egypt and assess whether she is independent and without bias. For the reasons further explained below, Claimants invoke ICSID Arbitration Rule 9 and Article 57 of the ICSID Convention and ask for the removal of Ms. Stern because, at a minimum, she appears to lack the independence and impartiality required to be an arbitrator under ICSID Arbitration Rule 6 and Article 14 of the ICSID Convention.

I. FACTS

On September 5, 2019, Ms. Stern accepted her nomination and disclosed that Egypt had previously appointed her **five** times as its party-appointed arbitrator.² **Twice** in ICSID arbitrations, Ms. Stern ruled in favor of Egypt.³ One PCA arbitration is pending.⁴ Five (now six) appointments by Egypt establishes a pattern. This pattern is particularly troubling given Ms. Stern’s professional connections to Egypt, including the IDAI and the Alexandrina Library.

² B. Stern Statement of Past and Present Involvement with Parties and Counsel (September 5, 2019) (citing *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13; *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7; *Ossama Al Sharif v. Arab Republic of Egypt*, ICSID Case No. ARB/13/3; *ArcelorMittal S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/15/47; *Nile Douma Holding Co. WLL V. Arab Republic of Egypt*, PCA Case 17-09).

³ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award at p. 87 (November 6, 2008), available at, <https://www.italaw.com/cases/587>; *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award at p. 56 (April 3, 2014), available at, <https://www.italaw.com/cases/2494>. The other two arbitrations were discontinued.

⁴ B. Stern Statement of Past and Present Involvement with Parties and Counsel (September 5, 2019) (citing *Nile Douma Holding Co. WLL V. Arab Republic of Egypt*, PCA Case 17-09). Claimants were unable to find documents about this arbitration on the website of the Permanent Court of Arbitration.

Egypt, however, is not the only country who routinely appoints Ms. Stern as an arbitrator. According to Ms. Stern's profile page on ICSID's website, States have appointed Ms. Stern **66** times.⁵ Actually, a search of ICSID's case database reveals that States have appointed her **84** times.⁶ Apart from an incorrect notation on her ICSID profile page, it does not appear that an investor in an ICSID arbitration has ever appointed Ms. Stern. Similarly, Jus Mundi reports that she has had **no** investor appointments out of the 128 arbitrations listed there.⁷

Indeed, Ms. Stern's repeated State appointments have earned her a reputation in the arbitration community of being "pro-State." A decade ago, she was questioned about why a majority of her appointments were by States.⁸ She sought to justify her record because of her background in "public international law." If that were the case, investors would be equally appointing Ms. Stern. She also explained there was only a "small group" of arbitrators with such experience. Respectfully, ICSID would not list the nearly two-hundred arbitrators as part of its database if they were unqualified.

In the decade since her interview above, States continued to appoint Ms. Stern. Based on ICSID's database alone, States have appointed her **61** times.⁹ During this time, the number of arbitrators versed in public international law has undoubtedly increased. Yet with all of these options, States continue to favor Ms. Stern, averaging six appointments per year.

Others have complained about Ms. Stern's frequent appointments by States. According to a 2017 article, investors had challenged her appointment at least eight times.¹⁰ These challenges involved her repeated appointments by States, repeated appointments by the same party, repeated appointments by the same counsel, pre-judging issues, and sitting on another arbitration with the same parties involving related issues.¹¹ As best Claimants can discern, no State has challenged Ms. Stern's appointment, which likely coincides with her not having any appointments from investors.

⁵ ICSID Profile for B. Stern, available at, <https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=91>. Ms. Stern's profile page appears to be incorrect in stating that the Claimant in the following arbitration appointed her: *BP America Production Company and others v. Argentine Republic*, ICSID Case No. ARB/04/8, available at, <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/04/8>.

⁶ ICSID Case Database, available at, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.

⁷ Jus Mundi Profile for B. Stern, available at, <https://jusmundi.com/en/p/brigitte-stern>.

⁸ See Ross, Alison, *Brigitte in Brazil*, Global Arbitration Review, Volume 5, Issue 3 at 3 (July 5, 2010).

⁹ ICSID Case Database, available at, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>.

¹⁰ See, e.g., "Challenge to Brigitte Stern Is Rejected in Greece Arbitration; Effort was Latest of At Least Eight Attempts By Claimants to Dislodge Her from Tribunals," IAI Reporter (March 8, 2017), available at, <https://www.iareporter.com/articles/challenge-to-brigitte-stern-is-rejected-in-greece-arbitration/>.

¹¹ See, e.g., "Challenge against Stern fails in Greek Shipyard Case," All About Shipping, March 10, 2017 (apparently because of Ms. Stern's repeated appointments by States), available at, <http://www.allaboutshipping.co.uk/2017/03/10/challenge-against-stern-fails-in-greek-shipyard-case/>; *Murphy Exploration & Production Company - International v. the Republic of Ecuador*, UNCITRAL Arbitration, Claimant's Challenge to B. Stern at pp. 2-5, 7 (November 28, 2011), available at, <https://www.italaw.com/cases/1198>; *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/09, Decision on the Proposal to Disqualify B. Stern and G. Santiago Tawil ¶¶ 20-28 (May 20, 2011), available at, <https://www.italaw.com/cases/1141>; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants' Proposal to Disqualify B. Stern ¶ 9 (December 23, 2010), available at, <https://www.italaw.com/cases/1096>; *Elitech B.V. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Decision on the Proposal to Disqualify B. Stern ¶¶ 15 et seq. (March 23, 2018), available at, <https://www.italaw.com/cases/6623>.

On occasion Ms. Stern has voluntarily resigned when investors have questioned her independence and impartiality.¹² Other times, however, Ms. Stern has avoided formal removal. Those decisions suggest that investors need to show something more than her routine and repeated State appointments — for example, a financial connection — for her to be disqualified.

Although Claimants believe Ms. Stern's 84 State appointments should suffice, they inquired on September 11 and again on October 3, 2019, about her professional activities with Egypt, her repeated appointments by States, and her pro-State reputation.¹³ Ms. Stern responded to Claimants' September 11, 2019 inquiries. However, she dismissed Claimants' October 3, 2019 inquiries, explaining that they "do not require, at this stage, any further disclosure."¹⁴ This was concerning. Her response ignores the plain reading of ICSID Arbitration Rule 6, which obligates Ms. Stern to disclose "any other circumstance that might cause [her] reliability for independent judgment to be questioned by a party."

On October 9, 2019, Claimants again asked Ms. Stern to respond to their October 3, 2019 inquiries.¹⁵ To avoid doubt, Claimants made specific financial inquiries of Ms. Stern because of the ICSID decisions that suggest a need to show a financial nexus to Ms. Stern's frequent State appointments. Ms. Stern did not respond promptly. For example, Claimants asked Ms. Stern to disclose the clients of her company, "Brigitte Stern" (Registration No. 411413990). It is unknown whether this company has a financial relationship with any State actor, including Egypt. Claimants also asked her for the percentage of her income derived from work performed for States or as a State-appointed arbitrator.

Hearing nothing, on October 18, 2019, Claimants asked ICSID when it anticipated Ms. Stern's response. ICSID confirmed that Ms. Stern had not responded and offered to follow up with her.¹⁶ On October 22, 2019, ICSID informed, "Professor Brigitte Stern confirms her message of [October 7, 2019], and considers that she has fulfilled her duty of disclosure."¹⁷ On October 23, 2019, Ms. Stern affirmed in writing that she did not believe that she had anything else to disclose.¹⁸ As a result, Ms. Stern was controlling the information Claimants could have to allow them to assess her independence and impartiality.

Ms. Stern's refusal to comply with her disclosure obligations and provide certain basic information (such as the portion of her income attributable to work for States) should be an absolute disqualifier. This denied Claimants the information needed to contextualize the financial connection she has because of the overwhelming number and frequency of Ms. Stern's State appointments, her lack of appointments by investors, and her reputation as being pro-State. Respectfully, these routine appointments should automatically disqualify her under ICSID's standard without Claimants having to show more. At bottom, Ms. Stern should not be allowed to refuse disclosing how important her

¹² *Murphy Exploration & Production Company - International v. the Republic of Ecuador*, Letter from B. Stern (February 20, 2012), available at, <https://www.italaw.com/cases/1198>.

¹³ Letter from Claimants to ICSID Requesting Information from B. Stern (September 11, 2019); Letter from Claimants to ICSID Requesting Information from B. Stern (October 3, 2019).

¹⁴ Letter from ICSID Transmitting Message from B. Stern (October 7, 2019).

¹⁵ Letter from Claimants to ICSID Requesting Information from B. Stern (October 9, 2019).

¹⁶ Email from Claimants to ICSID Regarding Requests to B. Stern (October 18, 2019).

¹⁷ Email from ICSID to Claimants Regarding Requests to B. Stern (October 22, 2019).

¹⁸ Letter from B. Stern to Claimants (October 23, 2019).

repeated State appointments are to her livelihood; such information is central in determining whether Ms. Stern is and can be impartial and independent in assessing Claimants' claims.

Accordingly, as explained below, Claimants respectfully ask that Ms. Stern be disqualified because of: (1) her failure to meet her disclosure obligations, (2) her repeated appointments by States, and (3) her repeated appointments by Egypt. Each of these three independent reasons is sufficient to disqualify Ms. Stern; however, taken together, there is no question that she should be disqualified.

II. LEGAL STANDARD: APPEARANCE OF BIAS

Articles 57 and 14 of the ICSID Convention require arbitrators to be independent and impartial.¹⁹ However, "Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather it is sufficient to establish the *appearance* of dependence or bias."²⁰ As such, the analysis is whether a reasonable person in Claimants' position would view Ms. Stern as lacking independence or impartiality or otherwise appearing to be biased.

Despite this clear language, certain ICSID tribunals have invented a disqualification standard that some have described as "notorious."²¹ These tribunals improperly elevated the burden on the challenging party beyond what the plain language of Articles 57 and 14 require. Moreover, it is inconsistent with ICSID's perceived purpose "to provide host States and investors with an international device to settle their disputes in an arena which offers the highest possible guarantees of legality, fairness, and impartiality."²²

ICSID appreciates that tribunals have misapplied its standard. In response to concerns about arbitrator independence and impartiality, ICSID intends to clarify its arbitrator declaration form to require that an arbitrator disclose "[o]ther circumstances that **might reasonably cause my independence or impartiality to be questioned**."²³ This will reinforce ICSID's standing

¹⁹ Article 57 of the ICSID Convention provides, "A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV." Article 14(1) provides "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field 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." Under these rules, "Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control." *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20 59, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal ¶ 59 (November 12, 2013), available at, <https://www.italaw.com/cases/1513>.

²⁰ *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal ¶ 59 (November 12, 2013) (emphasis added), available at, <https://www.italaw.com/cases/1513>; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of F. Orrego Vicuña ¶ 66 (December 13, 2013), available at, <https://www.italaw.com/cases/181>; *Caratube International Oil Company llp and Devincci Salab Hourani v. Republic of Kazakhstan (Caratube)*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of B. Boesch ¶ 57 (Mar. 20, 2014), available at, <https://www.italaw.com/cases/2131>.

²¹ Baiju Vasani, Shaun Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, ICSID REVIEW, at 2 (2014).

²² Baiju Vasani, Shaun Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, ICSID REVIEW, at 5 (2014).

²³ Proposals for Amendment of the ICSID Rules, Working Paper #3 at p. 236 (August 2019) (emphasis added), available at, https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf. ("A Member State suggested

requirement that arbitrators disclose circumstances that reasonably call into question their independence or impartiality — as clearly exist in the case at hand. They will also clarify that ICSID’s standard with respect to independence and impartiality has not been any different from what the IBA Guidelines espouse.²⁴ Those guidelines are based on based on best practices in terms of conflicts of interest in international arbitration and explain:²⁵

Doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

ICSID’s clarification will also affirm Dr. Jim Yong Kim’s proper application of ICSID’s standard in *Blue Bank*. There, Dr. Kim explained that Article 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias, but rather, it is sufficient to establish the *appearance* of such. He found that ICSID’s standard was an objective standard based on a reasonable evaluation of the evidence by a third party. Finally, he found that Article 57’s use of “manifest” means “evident” or “obvious,” disagreeing with prior tribunals that incorrectly interpreted “manifest” as “quasi-certain” to impose an artificially high evidentiary burden.²⁶

As explained below, correctly applying ICSID’s standard — that of a reasonable third person with knowledge of the relevant facts and circumstances (or lack thereof because Ms. Stern refuses to disclose them) — leads to the conclusion that, at a minimum, Ms. Stern appears to depend on State appointments. Consequently, Ms. Stern should be disqualified from participating in this arbitration.

States have appointed Ms. Stern **84** times in ICSID arbitrations. This is unprecedented, particularly considering States and State-owned entities undoubtedly have appointed her in other arbitrations. By definition, Ms. Stern’s routine State appointments create justifiable doubts about her independence and impartiality. Given the vast number of qualified candidates, States remain committed to appointing Ms. Stern, presumably because they perceive a certain outcome.

Claimants asked Ms. Stern to quantify her appointments during the past five years overall and then by a State or State-owned entity. This would test whether others besides States or State-owned entities equally saw Ms. Stern as a qualified candidate to appoint as an arbitrator. Ms. Stern refused to provide this information.

Relatedly, Claimants asked Ms. Stern to disclose information that some tribunals have considered when reviewing a repeat-appointee like Ms. Stern. For example, the tribunal in *Tidewater v.*

incorporating detailed requirements in this rule concerning arbitrator independence, impartiality, credibility, legitimacy, experience and availability . . . many of these concerns expressed are addressed in the proposed Arbitrator Declaration.”)

²⁴ See, e.g., *Alpha Projekt Holding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent’s Proposal to Disqualify Arbitrator Y. Turbowicz ¶ 56 (noting the persuasive authority of the IBA Guidelines for ICSID tribunals) (March 19, 2010), available at, <https://www.italaw.com/cases/71>.

²⁵ IBA Guidelines, Part I, General Standard 2(c), available at, https://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx.

²⁶ *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20, Decision on the Parties’ Proposals to Disqualify a Majority of the Tribunal ¶ 60 (November 12, 2013), available at, <https://www.italaw.com/cases/1513>; see also Baiju Vasani, Shaun Palmer, *Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?*, ICSID REVIEW, at 7 (2014).

Venezuela noted, “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.”²⁷ IBA Guidelines — which provides that a direct financial interest in the outcome violates the “Non-Waivable Red List” — appears to have been an influence.²⁸

To understand Ms. Stern’s financial interest, Claimants asked Ms. Stern to disclose the percentage of her total annual income derived from work originated from States (including State-owned entities). This includes both as a consultant personally or through her consulting firm or as an arbitrator. There is an appearance of bias if a significant portion of Ms. Stern’s annual income is derived from State-related work. Regrettably, Ms. Stern refused to provide this information.

In summary, Claimants asked Ms. Stern to disclose information that would affirm her independence and impartiality. She refused to do. Her refusal should be grounds for her disqualification. This assumes that Ms. Stern’s **84** appointments by States in ICSID arbitrations (and the unknown other arbitrations where she had been appointed by States) do not automatically disqualify her altogether. This alone suffices to create an appearance of bias or lack of independence. Simply put, States appoint Ms. Stern for a reason. For this reason alone, Ms. Stern should be disqualified as an arbitrator.

III. MS. STERN FAILED TO MEET HER DISCLOSURE OBLIGATIONS UNDER ICSID ARBITRATION RULE 6(2)

ICSID Arbitration Rule 6(2) requires an arbitrator to disclose (1) her past and present professional, business, and other relationships (if any) with the parties and (2) any other circumstance that might cause Claimants to question her reliability for independent judgment. The former Chairman of ICSID’s Administrative Council properly noted:²⁹

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

Similarly, the IBA Guidelines mandate, “[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.”³⁰

Ms. Stern’s initial statement disclosed five other arbitrations for which Egypt appointed her as an arbitrator. Ms. Stern attested that despite these repeated appointments, she was unaware of any “circumstance that could cause my reliability for independent and impartial judgement.” Notably, Ms.

²⁷ *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants’ Proposal to Disqualify B. Stern ¶ 62 (December 23, 2010), available at, <https://www.italaw.com/cases/1096>; see also *Elitech B.V. v. Republic of Croatia*, ICSID Case No. ARB/17/32, Decision on the Proposal to Disqualify B. Stern ¶ 50 (March 23, 2018), available at, <https://www.italaw.com/cases/6623>.

²⁸ IBA Guidelines, Part II, Non-Waivable Red List § 1.3, available at, https://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx.

²⁹ *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/09, Decision on the Proposal to Disqualify B. Stern and G. Santiago Tawil ¶ 90 (May 20, 2011) (emphasis added), available at, <https://www.italaw.com/cases/1141>.

³⁰ IBA Guidelines, Part I, § (3)(d).

Stern omitted the most important aspect about her disclosure: such circumstances should be made from the viewpoint of Claimants, not Ms. Stern's viewpoint.

Ms. Stern's initial statement failed to provide Claimants with sufficient information to evaluate properly her independence and impartiality. As such, Claimants twice requested for Ms. Stern to disclose additional information about her relationships that — from the viewpoint of someone in Claimants' position — could reasonably influence her ability to be independent and impartial. Claimants asked Ms. Stern, among other things:³¹

- To quantify her total appointments in arbitrations and her State (and State-owned entity) appointments for the past five years. This information is essential to understand the financial benefit that Ms. Stern receives from her State appointments.
- To quantify the number of times that her appointment was challenged over the past ten years, and to the extent possible, provide a brief description of why. This information is helpful to understand whether similarly situated claimants have had concerns about Ms. Stern's repeated and routine State appointments. Indeed, Claimants suspect that they are not alone in challenging Ms. Stern.
- To clarify her work experience that she had described in February 2019 as “act[ing] as expert and international legal advisor for States and various organisations.” This information is essential to understand the financial benefits that Ms. Stern receives from States and whether Ms. Stern has any preconceived notions related to issues in this arbitration.
- To disclose any entity in which she has an interest that provides advice to States (including State-owned entities) and whether such entity has been engaged by Egypt or any of its State-owned entities. This information is essential to understand the financial benefits that Ms. Stern receives from States, particularly Egypt, and whether such a relationship affects her independence and impartiality towards Egypt. Claimants are entitled to know whether Ms. Stern has an interest in an entity that provides advice to States and whether she has provided advice directly or indirectly to Egypt or any of its State-owned entities.
- Relatedly, to disclose the clients of her company, “Brigitte Stern” (Registration No. 411413990), if any, that are affiliated or otherwise connected to Egypt or its State-owned entities and a brief description of work performed for such clients. This information is essential for the reasons stated directly above.
- To provide the percentage of her total annual income derived from work originated from States (including State-owned entities), both as a consultant personally or through her firm or as an arbitrator appointed by a State. This information is essential to understand the financial benefits that Ms. Stern receives from States.

³¹ Letter from Claimants to ICSID Requesting Information from B. Stern (September 11, 2019); Letter from Claimants to ICSID Requesting Information from B. Stern (October 3, 2019); Letter from Claimants to ICSID Requesting Information from B. Stern (October 9, 2019).

- Finally, to explain her involvement, if any, with the University of Pantheon–Sorbonne’s branch located at the Cairo University law school (the IDAI), and if none, her understanding of the relationship between her employer and the Cairo University law school. This information is helpful to understand the financial benefit, through her employer, that Ms. Stern receives from Egypt and whether Ms. Stern has any predetermined positions with respect to Egypt because of the relationship between her employer and Egypt.

Ms. Stern refused to provide this or any other additional information. Instead, she relied on her interpretation of ICSID Arbitration Rule 6(2) to claim that she had provided Claimants with sufficient information to assess her independence and impartiality. Respectfully, Rule 6(2) does not allow Ms. Stern to choose what to disclose. Rather, what Ms. Stern is required to disclose is determined by what a reasonable person in Claimants’ position would expect to be disclosed to assess if there is an appearance of bias or lack of independence or impartiality.

An arbitrator can be disqualified for failing to disclose information to determine whether an appearance of bias or lack of independence exists. Tribunals have developed certain factors to take into consideration:³²

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.

Similarly, the IBA Guidelines confirm, “[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.**”³³

There is no question that Ms. Stern intentionally disregarded Claimants’ repeated inquiries on October 3, 2019, and again on October 9, 2019. Ms. Stern’s silence was notable in light of *Universal Compression International Holdings, S.L.U.* There, the investor sought to disqualify Ms. Stern because she failed to disclose multiple appointments by Venezuela. Although Ms. Stern argued that disclosure was not required because these appointments were public, the Chairman of the Administrative Council explained that some parties to ICSID arbitrations expect disclosure of this information. However, at the time, the Chairman deemed Ms. Stern’s failure to disclose as an “honest exercise of discretion.”³⁴

³² *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/09, Decision on the Proposal to Disqualify B. Stern and G. Santiago Tawil ¶ 94 n.107 (May 20, 2011), *available at*, <https://www.italaw.com/cases/1141>.

³³ IBA Rules of Ethics for International Arbitrators, Article 4.1 (emphasis added).

³⁴ *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/09, Decision on the Proposal to Disqualify B. Stern and G. Santiago Tawil ¶ 93 (May 20, 2011), *available at*, <https://www.italaw.com/cases/1141>; see also *Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee ¶ 26 (October 3, 2001) (looking to whether the arbitrator in question was “maintaining full transparency”), *available at*, <https://www.italaw.com/cases/309>.

Similarly, Claimants expected Ms. Stern to disclose information about potential conflicts or what can reasonably be considered as such. Indeed, the information that Claimants requested will confirm any conflict or appearance of bias or lack of independence. And Claimants' requests are entirely reasonable considering that States have appointed Ms. Stern **84** times (for ICSID arbitrations alone), Ms. Stern has a pro-State reputation, and certain prior tribunals' erroneous requirement to show some financial benefit. Under the circumstances, one would expect that Ms. Stern would have favored robust disclosure as being both in her own interest and in the interest of investment arbitration generally. Instead, Ms. Stern's blanket refusal here cannot be dismissed as an "honest exercise of discretion." This is particularly true considering her decision not to disclose any information about her private company whose business with States or state actors remains entirely unknown.

Relatedly, it is worth noting that the limited supplemental information that Ms. Stern disclosed was not complete. For example, on September 11, 2019, Claimants asked Ms. Stern to disclose "professional activities (as advisor, expert, consultant, or otherwise), if any, with the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises."³⁵ Ms. Stern responded, "I have not had any professional activities with the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises."³⁶

Ms. Stern's response is problematic for two reasons. *First*, Ms. Stern has apparently been a "Member of the Scientific Board of the Centre René-Jean Dupuy for law and development, University of Alexandria." The Centre René-Jean Dupuy is located in the Alexandrina Library in Alexandria, Egypt. Ms. Stern likely knows that the Egyptian government primarily funds this library.³⁷ *Second*, Ms. Stern's employer, Université Paris 1 Panthéon-Sorbonne, has an offshore campus called the Institute of International Business Law (IDAI) based in the Cairo University law school, an Egyptian public university.³⁸ Ms. Stern likely knows that the Egyptian government provides the Cairo University law school with approximately 85% of its funding.³⁹ In addition to raising questions about her financial benefits associated with Egypt, both activities appear to be Ms. Stern's professional activities with Egypt. As such, Claimants reasonably expected Ms. Stern to disclose and explain these professional connections to Egypt — especially in light of her repeated appointments by Egypt. But she did not.

Ms. Stern's failure to respond to Claimants' reasonable inquiries and failure to disclose candidly other requested information violates ICSID Arbitration Rule 6(2). In turn, it demonstrates bias towards Claimants in violation of Articles 57 and 14 of the ICSID Convention. At a minimum, Ms. Stern has created an appearance of being dependent and partial not only for failing to disclose pertinent information, but also, because of her repeated State appointments (**84** ICSID arbitrations alone).

³⁵ Letter from Claimants to ICSID Requesting Information from B. Stern (September 11, 2019).

³⁶ Email from ICSID Transmitting Email from B. Stern (September 16, 2019).

³⁷ B. Stern CV, Appointment of Members of the United Nations Administrative Tribunal at p. 14, *available at*, <https://undocs.org/pdf?symbol=en/A/C.5/59/8>; *see also* "Frequently Asked Questions," Bibliotheca Alexandrina, *available at*, <https://www.bibalex.org/en/page/FAQ> (noting Egypt paid around US\$ 120 million to the library).

³⁸ *See* Institut de Droit des Affaires Internationales ("IDAI, located in the heart of the Faculty of Law of Cairo University . . ."), *available at*, <https://idai.univ-paris1.fr>; The World University Rankings, Cairo University, *available at*, <https://www.timeshighereducation.com/world-university-rankings/cairo-university> ("[T]he public university was founded in 1908 . . .").

³⁹ *See* Alshamy, "Funding Mechanisms and Quality Assurance Systems in Higher Education in Egypt in Comparative Perspective," The University of Birmingham, at p. 69 (2011), *available at*, <https://core.ac.uk/download/pdf/40016948.pdf>.

IV. EGYPT REGULARLY APPOINTS MS. STERN

Egypt is one of the States that regularly appoints Ms. Stern. Egypt has appointed Ms. Stern six times including this arbitration. Five times in the last eight years. Three are recent:

- 2016: *ArvelorMittal S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/15/47)
- 2017: *Nile Douma Holding Co. WLL V. Arab Republic of Egypt*, (PCA Case 17-09)
- 2019: the instant arbitration

Two of these arbitrations reached a decision. Ms. Stern sided with Egypt in both.

Such frequent appointments violate the “Orange List” of the IBA Guidelines. The “Orange List” provides circumstances serious enough to raise justifiable doubts about an arbitrator’s independence and impartiality. Similar to her other State appointments, Egypt’s frequent appointments of Ms. Stern raises a serious concern under the “Orange List” that “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.”

Similarly, it is worth noting that the ESLA represents Egypt in its ICISD arbitrations. Claimants assume that the ESLA represented Egypt either alone or in conjunction with outside counsel in these arbitrations. To date, the ESLA represents that no outside counsel is involved in this arbitration, such as Bredin Prat who has represented Egypt in three of the five arbitrations in which Ms. Stern was appointed. Indeed, Bredin Prat has also represented States that appointed Ms. Stern in at least three other recent arbitrations.⁴⁰ Claimants rely on ESLA’s representation that Bredin Prat is not involved whatsoever in this arbitration and Ms. Stern’s disclosure that she has no knowledge of such.⁴¹ Regardless, the ESLA’s frequent appointments of Ms. Stern also raises serious concerns under the “Orange List” that “the arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.”

Indeed, because of the public interests at issue in investment arbitrations, the above IBA Guidelines should be more rigorous. In fact, arbitrators have determined that the time parameters in the IBA Guidelines should be longer in investment treaty arbitration.⁴² In other words, the relevant time period for ICSID arbitrators should be well beyond three years. Applying that here — Egypt’s five appointments of Ms. Stern in eight years — could well be appropriately categorized in the “Red List.”

⁴⁰ ICSID Case Database, available at, <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx>. These include *Amyln Holding B.V. v. Republic of Croatia*, ICSID Case No. ARB/16/28, *B3 Croatian Courier Coöperatief U.A. v. Republic of Croatia*, ICSID Case No. ARB/15/5, *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, *International Quantum Resources Limited, Frontier SPRL and Compagnie Minière de Sakania SPRL v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/21. Notably, Bredin Prat arbitration partner, Raëd Fathallah, has recently served on two tribunals with Ms. Stern.

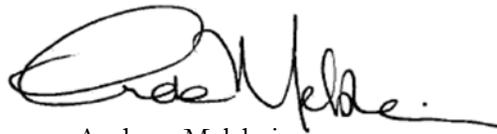
⁴¹ Should these facts change, Claimants expect ICSID to impose the appropriate sanctions.

⁴² See *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decision on the Proposal for Disqualification of B. Stern ¶¶ 84-85 (June 9, 2015), available at, <https://www.italaw.com/cases/2558>.

Accordingly, for this additional reason, Ms. Stern should be disqualified.

In conclusion, Claimants respectfully request that Egypt agree to the present challenge, or that Ms. Stern withdraw as arbitrator in this case. If not, Claimants request that the challenge to Ms. Stern be upheld and that Egypt appoint a replacement arbitrator. Claimants reserve their 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 and to reply to any response from Ms. Stern or Egypt, or both.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Melsheimer". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew Melsheimer

cc: Dr. Abdelhamid Elnagashy (by email to anagashy@sla.gov.eg)
Fatma Khalifa (by email to fkhalifa@sla.gov.eg)
Razan Abou Zaid (by email to rabouzaid@sla.gov.eg)
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Nada Elkashef (by email to nelkashef@sla.gov.eg)
Yousra Mohamed (by email to ymohamed@sla.gov.eg)
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