RESPONDENT'S REPLY TO CLAIMANTS' PROPOSAL TO DISQUALIFY PROFESSOR BRIGITTE STERN

2 January 2020

Table of Contents

I. INTRODUCTION

1. Pursuant to the instructions communicated to the parties by the Secretary to the Tribunal on 13 December 2019,[1] Respondent presents its observations on Claimants' proposal to disqualify Professor Brigitte Stern.

2. As illustrated below, Claimants' challenge is meritless and abusive. The Two Members of the Tribunal shall dismiss it.

[1] Respondent has been granted an extension to submit its comments on the Disqualification Proposal till the 2nd of January 2020.

3. On the 1st of September 2019, Respondent appointed Prof. Stern as a party-appointed arbitrator in the dispute. Then, on the 5th of September 2019, according to Arbitration Rule 6(2) of the ICSID Arbitration Rules, Prof. Stern submitted her acceptance to serve as an arbitrator in the dispute. She attached a statement to her signed declaration. Prof. Stern stated her previous appointments by Egypt in ICSID dispute and other disputes.

4. Claimants, on the 11th of September 2019, sought a supplementary disclosure from Prof. Stern regarding the law firms that made the appointments on behalf of Egypt in the cases mentioned in her statement of the 5th of September 2019, even if this information is publicly available. In parallel, they addressed Respondent with an inquiry if it has appointed an external counsel. Likewise, they inquired if she has been appointed in commercial disputes by Egypt or any Egyptian State-Owned entity. Furthermore, Claimants referred to Prof. Stern qualification as an "expert and international law advisor for States and various organizations", and asked if Prof. Stern served as an expert or as a legal counsel to Egypt or any of its branches.

5. In response, on the 16th of September 2019, Prof. Stern delivered her response to the parties via ICSID where she named the miscellaneous law firms that appointed herself in the previous appointments. She underlined that she has not been appointed in other cases either by Egypt, its State-Owned entities, or any branch thereof. Further, she pointed up that she has never served as a presiding arbitrator in any arbitration involving the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises. Moreover, she indicated that she has no professional activity with Egypt or any of its constituents.[2]

6. Shortly, on the 3rd of October 2019, Claimants reiterated their inquiries on the 11th of September 2019. Additionally, they asked her to disclose any events that she might have attended in Egypt in the past five years, and seeking an explanation from Prof. Stern on the reason for being presented in an international event, in Hong-Kong, as an expert and international legal adviser for States and international organizations. Further, they stressed that Prof. Stern shall declare the number of times her appointment was challenged over the past ten years, and to provide a brief description of the reason.

[2] Prof. Stern email, via ICSID, on the 17th of September 2019.

7. On the 7th of October 2019, Prof. Stern recapped, succinctly, her reply by confirming that she has not been informed of the appointment of an external counsel for Egypt, she has fulfilled her duty of disclosure, and that there are no further disclosures is needed at this stage.[3]

8. Claimants, then, expressed their concern with Prof. Stern's responses and described her answer as a "refusal" to deliver information which they believed to be significant to estimate whether she can arbitrate this dispute impartiality and independently.[4] Responding to Claimants' letter, Prof. Stern reproduced her statements and declarations, jointly, in an official letter on 23rd October 2019, as Claimants, apparently, were discontented with Prof. Stern's communications via the ICSID Secretariat.[5] Furthermore, Prof. Stern ascertained that she has no further disclosures to make.[6]

9. On the 6th of December 2019, ICSID informed the parties that the Tribunal has been formally constituted.[7]

10. Four days later, Claimants filed their Disqualification Proposal.[8]

11. There can be no grounds for disqualification of Prof. Stern based on the three named reasons in the Claimants' Disqualification Proposal. Generally, arbitrators are disqualified on bases of either the scarcity of capacity, holding the nationality of one of the disputing parties, but mostly on the lack of impartiality or independence.[9]

12. The first reason, in this disqualification proposal, circulates on Claimants' repetitive and insisting paradox requests for disclosures. They tell that Prof. Stern failed to disclose information that they believe to be indispensable for "the fundamental fairness and due process of this arbitration".[10] It is firmly settled that a failure to disclose, if any, does not stand as a basis for the disqualification of an arbitrator. Secondly, Claimants rely on a mathematical calculation that Claimants have made of Prof. Stern's appointments by States in investment disputes.

---

[3] ICSID letter of the 7th of October 2019.
[4] Claimants letter of the 9th of October 2019.
[5] Prof. Stern letter of the 23rd of October 2019, page 2.
[6] Ibid.
[7] ICSID letter of the 6th of December 2019.
[8] Claimants Disqualification Proposal of the 10th of December 2019.
[9] Meg Kinnear, Challenge of Arbitrators at ICSID—An Overview, ASIL Proceedings, Vol. 108, 412-416, 412; https://icsid.worldbank.org/en/Pages/process/Disqualification-of Arbitrators.aspx; https://thelawreviews.co.uk/edition/the-investment-treaty-arbitration-review-edition-4/1193238/challenges-to-arbitrators-under-the-icsid-convention-and-rules (accessed on 31 December 2019)
[10] Claimants letter to ICSID of the 9th of October 2019.

13. In reality, an arbitrator may be disqualified if a party substantiates that the arbitrator, while considering the factual background of the dispute as intertwined with the legal issues at stake and the parties of the dispute, lacks impartiality or independence.[11]

14. The reasons for the disqualification of an arbitrator relate either to the subject matter of the dispute in question which might reflect a solid understanding by an arbitrator which reflects his/her firm beliefs of the respective principle of law in the alignment of the factual background of the dispute.[12] Have the applicant for a challenge proofed the existence of a predisposition mind of an arbitrator, then; there is a lack of impartiality at the side of the concerned arbitrator. Considering the peculiarity of each dispute, it is quite difficult to establish the existence of the lack of impartiality of an arbitrator.[13]

15. In the same vein, a disputing party may question an arbitrator's independence if it establishes the dependence of the respective arbitrator on the relevant party appointments or the existence of a professional intimacy in-between the arbitrator and one of the parties or its legal counsel.[14]

16. Noticeably, Claimants use impartiality and independence jointly without elaborating which purported incidents represent, independently, a lack of impartiality or independence. Still, both of them are designed to protect the disputing parties "against arbitrators being influenced by factors other than those related to the merits of the case."[15] However, impartiality is defined as

[11] Loretta Malintoppi and Alvin Yap, 'Challenges of Arbitrators In Investment Arbitration Still Work In Progress?', in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, (Oxford University Press, New York 2010) 175:178.

[12] E.g., *Urbaser; Universal; Tethyan Copper Co. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/12/1).

[13] Loretta Malintoppi and Alvin Yap, (n 11), 178.

[14] *Repsol, S.A. v. Argentine Republic*, (ICSID Case No. ARB/12/38); 6 E.g., *Amco Asia Corp.; Compan˜ía de Aguas del Aconquija S.A. v. Argentine Republic*, (ICSID Case No. ARB/97/3); *EDF Int'l S.A. v. Argentine Republic*, (ICSID Case No. ARB/03/23); *Suez v. Argentine Republic*, (ICSID Case No. ARB/03/17); *Suez v. Argentine Republic*, (ICSID Case No. ARB/03/19).

[15] *Blue Bank Int'l v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/12/20); *Urbaser S.A.; Burlington Resources, Inc.; ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/07⁄30); *Universal Compression Int'l Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/10/9).

"refers to the absence of bias or predisposition towards a party",[16] while independence "is characterized by the absence of external control."[17]

17. Recently, it is generally noted that there is an increasing number of challenges to arbitrators in investment disputes,[18] which mostly have been dismissed. Out of 58 disqualification proposals under the ICSID Convention, only three arbitrators have been disqualified.[19] The prevalence of dismissal reflects the randomness of challenges and the likeliness that they have been done for a tactical drive.

18. The remainder of this Reply is structured as follows. Section II sets out the standard for disqualification. Section III addresses the reasons for the challenge, demonstrating that they are baseless. Section IV is a brief conclusion.

II. APPLICABLE STANDARD

19. Article 57 of the ICSID Convention provides that disqualification of an arbitrator may be sought "on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14."[20] Though Article 14 does not say that plainly, but it is generally accepted that those qualities include impartiality and independence.[21]

20. The Convention's use of the word "manifest" is significant: the complaining party must prove that bias is "evident" or "obvious," in the sense that it can be "discerned with little effort

[16] *Conocophillips Petrozuata B.V. Conocophillips Hamaca B.V. Conocophillips Gulf of Paria B.V. vs Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/07/30), Decision on The Proposal To Disqualify A Majority of The Tribunal, 4 May 2014, para. 51; *Mobil Exploration and Development Argentina Inc., Suc. Argentina And Mobil Argentina S.A. vs Argentine Republic Respondent*, (ICSID Case No. ARB/04/16) Decision on The Proposal To Disqualify All Members of The Arbitral Tribunal, para. 35.

[17] *Conocophillips Petrozuata B.V. Conocophillips Hamaca B.V. Conocophillips Gulf of Paria B.V. vs Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/07/30), Decision on The Proposal To Disqualify A Majority of The Tribunal, 4 May 2014, para. 51; *Mobil Exploration and Development Argentina Inc., Suc. Argentina And Mobil Argentina S.A. vs Argentine Republic Respondent*, (ICSID Case No. ARB/04/16) Decision on The Proposal To Disqualify All Members of The Arbitral Tribunal, para. 35.

[18] M. Kinnear, (n 9), 412.

[19] Ibid, 416.

[20] ICSID Convention, Article 57 (emphasis added). Article 14(1), in turn, requires that arbitrators "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."

[21] *Abaclat and Others v. Argentina*, (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014, para. 74.

and without deeper analysis."[22] Article 57, moreover, imposes an "objective standard based on a reasonable evaluation of the evidence by a third party," as opposed to the subjective perceptions or suppositions of the party requesting disqualification.[23] In sum, the burden on the challenging party is a heavy one.

21. It is solidly established that the onus of proof rests on the claimant to affirmatively *prove* [24] as opposed to merely suggest or assert[25] that the elements required for a claim are satisfied.[26]

22. It has been held that:

> Indeed, the application of *a subjective, self-judging standard instead of an objective would enable any party* in arbitration who becomes discontented with the process *for any reason to end it* at any time *at its sole discretion simply by claiming that an arbitrator is not independent or impartial*, a result that would undermine and indeed destroy the system of investor-State arbitration that was so carefully established by the states that have agreed to the Convention.[27] [emphasis added]

---

[22] *Caratube v. Kazakhstan*, (ICSID Case No. ARB/13/13), Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014, para. 55 (citations omitted); see also *Blue Bank v. Venezuela*, (n 15), para. 61.

[23] *Blue Bank v. Venezuela*, (n 15), para. 60 (citing *Suez, Sociedad General de Aguas de Barcelona SA. vs Argentina*, (ICSID Cases Nos. ARB/03/17 and ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007, paras. 9–40.

[24] *Tradex Hellas SA (Greece) v. Republic of Albania*, (ICSID Case No ARB/94/2), Award dated April 29, 1999, paras. 73-75**,** *Middle East Cement Shipping and Handling Co SA v. Arab Republic of Egypt*, (ICSID Case No ARB/99/6), Award dated April 12, 2002, paras. 88-91; *Zhinvali Development Limited v. Republic of Georgia*, (ICSID Case No ARB/00/01), Award of January 24, 2003, paras. 309-312.

[25] *Oostergetel v. The Slovak Republic*, UNCITRAL Award dated April 23, 2012, para. 296: "The Claimants failed to provide sufficient proof of the alleged missteps of the bankruptcy proceedings. […] [M]ere suggestions of illegitimate conduct, general allegations of corruption and shortcomings of a judicial system do not constitute evidence of a treaty breach or a violation of international law. Neither did the Claimants explain the causal link between the alleged conduct by the relevant actors and the alleged damage. *The burden of proof cannot be simply shifted by attempting to create a general presumption of corruption in a given State*." *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Admissibility dated September 2, 2009, para. 114: "[w]ith respect to many of Claimant's claims, the Tribunal has found *the evidence to be too limited, circumstantial, unsubstantiated or insufficiently substantiated to permit the Tribunal to draw the factual conclusions advocated by Claimant*, even accepting Claimant's legal arguments."

[26] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006), p. 327 ("there exists a general principle of law placing the burden of proof upon the claimant"). Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility [1984] ICJ Reports 392, para. 101 ("ultimately (...) it is the litigant seeking to establish a fact who bears the burden of proving it").

[27] Decision On The Proposal For The Disqualification Of A Member Of The Arbitral Tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. and The Argentine Republic* (ICSID Case No. ARB/03/17) and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. and The Argentine Republic* (ICSID Case No. ARB/03/19), *AWG Group vs The Argentine Republic*, UNCITRAL, Award in 22 October 2007, para. 41.

23. As helpfully pointed out by the Unchallenged Arbitrators in *Suez case*,[28] Article 14(1) of the ICSID Convention requires both the standards of independence and impartiality to be applied when determining whether a member of a tribunal manifestly lacks the characteristics of a reliable person who can do an independent judgment.

24. The disqualification of an arbitrator requires a high threshold of proof. A party seeking to disqualify an arbitrator shall establish the "manifest" appearance of a lack of impartiality or independence.[29]

25. Claimants, to make their point, referred to the Decision on the proposals to disqualify the majority of the tribunal in the *Blue Bank v Venezuela*.[30] However, the ground for disqualification was totally different than the grounds raised in this request of disqualification,[31] and further, the tribunal stated that:

> Finally, regarding the meaning of the word "manifest" in Article 57 of the Convention, a number of decisions have concluded that it means "evident" or "obvious", and that it relates to the ease with which the alleged lack of the qualities can be perceived.[32] [emphasis added]

26. Although the practice of the Chairman of the Administrative Council with regard to the IBA Guidelines on Conflict of Interest in International Arbitration (2014) referred hereinafter as "IBA Guidelines", has been consistent that "While these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention"[33], Respondent will demonstrate below that even if Claimants rely on the IBA Guidelines, the Guidelines would support dismissal of the Disqualification Proposal.

27. In its request for disqualification, Claimant states that the frequent appointments of Prof. Stern by Egypt invoke the orange list of the IBA guidelines.[34] The Orange List, genuinely,

---

[28] *Suez, v. Argentine* (27), para. 28.

[29] *OPIC Karimum Corporation Claimant v. The Bolivarian Republic of Venezuela*, (ICSID Case No. ARB/10/14), Decision on The Proposal To Disqualify Professor Philippe Sands, Arbitrator. On the 5th of May 2011, para. 45; *Suez, v. Argentine* (27), *AWG Group and The Argentine Republic*, (n27), para. 43; *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, March 19, 2010, para. 37, which referred to the decision rendered by *SGS Society Generals de Surveillance v. Pakistan*.

[30] Disqualification Proposal, page 5.

[31] *Blue Bank v Venezuela*, (n 15) para. 22.

[32] Ibid, para. 61.

[33] *Abaclat v. Argentine* (n 22), para. 78**;** *See* also *Burlington v. Ecuador*, (n 15), para.69.

[34] Disqualification Proposal, page 11.

reveals situations that would fall under General Standard 3(a) of the General standards Regarding Impartiality, Independence and Disclosure, of the Guidelines with the consequence that the arbitrator has to disclose such situations. [35]

III. THE INAPPROPRITANCE OF CLAIMANTS' BASIS OF DISQUALIFICATION

28. Claimants make their proposal for the disqualification of Prof. Stern based on three grounds. The first and second grounds are clearly irrelevant to the disputing parties. They claim, under the first ground, that Prof. Stern failed to disclose information that they asked for repeatedly. Then, under the second ground, Claimants seek disqualification of Prof. Stern, in this dispute, as she has been appointed by States frequently. Finally, they contend that Egypt regularly appoints Prof. Stern in investor-State disputes.

29. Below, Respondent will refute each of these allegations separately.

A. <u>The Disclosure Obligation</u>

30. Firstly, Claimants propose the disqualification of Ms. Stern due to the alleged failure to disclose.[36] The exchanged correspondence in this respect reflects that this allegation is false.

31. Claimants counted Prof. Stern's appointments by States,[37] rather than Egypt, in the last five years. Then, they asked Prof. Stern to brief the reasons for any disqualification proposal submitted against her in other disputes.[38] Moreover, Claimants inquired about the annual income that Prof. Stern's boutique gains from doing business with States as an expert or in any professional mandate.[39]

32. Then, concerning Egypt, Claimants inquired about prof. Stern previous appointments by Egypt or any of its affiliations or State-Owned companies, and if she has an academic

[35] IBA Guidelines on Conflict of Interest Adopted by resolution of the IBA Council on Thursday 23 October 2014 page 18, 3.
[36] Disqualification Proposal, page 8.
[37] Ibid, page 3.
[38] Ibid, page 8;9.
[39] Ibid.

involvement in the branch of the University of Pantheon-Sorbonne in Egypt.[40] Relatively, they asked about whether she has an interest in any entity that is relevant to Egypt.[41] Both of two inquiries were about a financial nexus between Prof. Stern and Egypt. In the same manner, they inquired about the events that she might have attended in Egypt in the last five years.[42]

33. Prof. Stern in her multiple responses to Claimants' inquiries, Respondent believes, disclosed the information that she, as an experienced arbitrator, finds relevant and material to any potential conflict of interest. While it is not public information, Prof. Stern disclosed her appointment in the *Nile Douma* case, which Claimants have not found on the website of the Permanent Court of Arbitration.[43] The Deciding Authority, in *Alpha v. Ukraine* case, underscored that the general rule that a personal or social relationship does not need to be disclosed.[44] Respondent finds that Claimants seeking Prof. Stern to divulge, *inter alia*, a financial statement concerning her boutique law firm a paradox inquiry.

34. Claimants, falsely, emphasizes that an arbitrator is under an obligation to disclose information *that a party believes* to be essential and necessary.[45] By the book, an arbitrator shall examine whether the relevant information might raise a conflict of interest. The arbitrator entertains that authority based on its personal experience of the likelihood that the relevant information may raise doubts about his/her independence or impartiality. The tribunal in *Suez Aguas*, case, Second Decision stated that:

> [a] reasonable interpretation of ICSID Arbitration Rule 6 is that an arbitrator is required to *disclose a fact only if he or she reasonably believes that such fact* would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person.[46] [emphasis added]

35. By the same token, the IBA Guidelines accentuate the significance of the arbitrator's disclosure to be limited to the information that the concerned arbitrator estimates to be relevant to a potential challenge. The IBA Guidelines sets the parameters for arbitrator regarding

[40] Ibid.
[41] Ibid.
[42] Claimants letter of the 6th of October 2019.
[43] Disqualification Propsal, footnote, page 2.
[44] *Alpha v Ukraine*, (n 29), para. 63.
[45] Disqualification Proposal, pages 4:5.
[46] *Suez Aguas* Second Decision at para. 46.

disclosure by stating that "Disclosure of any *relationship*, no matter how minor or serious, *may lead to unwarranted or frivolous challenges*."[47] [emphasis added] Similarly, arbitral tribunals have the same appreciation regarding the respective ICSID arbitration rules.[48] Practically, the public information regarding arbitrators, especially in investment disputes, motivated some disputing parties filling tactical challenges, thus; nearly all of the challenges were dismissed.[49]

36. Claimants depend on the IBA Guidelines to support their disqualification. Yet, it is clearly stated; under IBA Rule 7(d) that the arbitrator has an obligation to declare any information that might raise a conflict of interest with one of the disputing parties in the respective dispute.[50] Claimants should have rationalized the connection between their inquiries and a purported dependence, a financial one, on Respondent. On the contrary, Claimants' inquiries, mostly, related to a potential dependence on sovereign States' relationship with Prof. Stern.[51]

37. Technically, if Claimants' alleged failure stands, the mere fact that an arbitrator failed to disclose does not stand as a reason for disqualification, which Claimants emphasized clearly by referring to the relevant IBA Guidelines.[52] Likewise, the party who is dubious regarding an arbitrator should make its duty to investigate the arbitrator's history. For instance, Claimants constantly asked Prof. Stern to disclose the law firms that appointed her in the previous cases involving Egypt, while this information is public information that could be obtained easily. Regarding *EDF International v. Argentina* case, the Deciding Authority dismissed the failure to disclose challenge by repeating the general rule that "[n] on-disclosure itself cannot be a ground for disqualification" and any disqualification must arise from the underlying facts of ethical conflict.[53]

38. Claimants stress on seeking disclosure of information relating to her appointments by States either as an arbitrator or as an expert, however; they failed to connect these investigations to this dispute. Claimants believe that the Two Members of the Tribunal shall uphold their disqualification proposal depending on an alleged failure to disclose information that they

[47] IBA Guidelines, page 1.
[48] E.g. *Alpha v Ukraine*, (n 29), para. 66.
[49] M. Kinnear, (n 9).
[50] IBA Guidelines Standard 7(d): "An arbitrator is under a duty to make reasonable inquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence. *Failure to disclose a conflict is not excused* (…)." [emphasis added]
[51] Disqualification Proposal, pages 9:10.
[52] Disqualification Proposal dated December 10, 2019, Page 9.
[53] *EDF v Argentine* (n 14) paras. 12,123.

consider essential. Yet, Claimants' confirm that the IBA Guidelines emphasis that a failure to disclose is not a reason for disqualification.[54] Claimants contend that Prof. Stern shall disclose the information that they consider essential. Meanwhile, they refer to the IBA Guidelines Standard which clearly stresses that the duty to disclose lies on the arbitrator who entertains, solely, the authority of estimating which information he/she is likely to raise doubts concerning his/her impartiality or independence.

B. <u>States Appointment of Professor Stern</u>

39. Secondly, Claimants asks the Two Members of the Tribunal to disqualify Prof. Stern for multiple appointments by States. Generally, Respondent believes that Claimants' statement raises a jurisprudential discussion rather than being relevant to this case. Indeed, an arbitrator shall be disqualified if the applicant for disqualification substantiates the lack of independence or impartiality in relation to either of the disputing parties, as illustrated above.[55]

40. Prof. Stern has been appointed by States in cases that ended unfavorably to the respective States,[56] and she served as a presiding arbitrator in other cases.[57] Further, Claimants failed to mention a single instant for the disqualification of an arbitrator for being appointed regularly by States or investors.

[54] Disqualification Proposal, page 9.
[55] Paras. 19:23
[56] E.g. *El Paso Energy International Company v. The Argentine Republic*, (ICSID Case No. ARB/03/15), Award of 31 October 2011; *Impregilo S.P.A. Vs. Argentine Republic*, (ICSID Case No. ARB/07/17), Award of 21 June 2011; *Ulysseas, INC. vs. The Republic of Ecuador*, UNCITRAL Rules, Interim Award, 28 September 2010; *Masdar Solar & Wind Cooperatief U.A. vs. Kingdom of Spain*, (ICSID Case No. ARB/14/1), Award on 16 May 2018; *Eskosol S.P.A. In Liquidazione vs. Italian Republic*, (ICSID Case No. ARB/15/50), Decision On Italy's Request For Immediate Termination And Italy's Jurisdictional Objection Based On Inapplicability Of The Energy Charter Treaty To Intra-Eu Disputes, 7 May 2019; *Tenaris S.A. And Talta - Trading E Marketing Sociedade Unipessoal Lda Vs. República Bolivariana De Venezuela*, (ICSID Case ARB/12/23), Award Of 12 December 2016; *Standard Chartered Bank (Hong Kong) Limited Vs. Tanzania Electric Supply Company Limited (TANESCO)*, (ICSID Case No. ARB/10/20), Award Of 12 September 2016; *Lao Holdings N.V. vs. The Lao People's Democratic Republic*, (ICSID Case No. ARB(AF)/12/6), Award 6 August 2019; *Tidewater Investment Srl and Tidewater Caribe, C.A. vs. The Bolivarian Republic of Venezuela*, (ICSID Case No ARB/10/5), Award on 13 March 2015; *Quiborax S.A. and Non Metallic Minerals S.A. vs. Plurinational State of Bolivia*, (ICSID Case No. ARB/06/2), Award in 16 September 2015; *Oxus Gold vs. The Republic of Uzbekistan*, UNCITRAL Rules, Award of 17 December 2015; *Deutsche Telekom AG vs The Republic of India*, Interim Award, PCA Case No. 2014-10, Award of 13 December 2017.
[57] E.g. *Phoenix Action, Ltd. vs. The Czech Republic*, (ICSID Case No. ARB/06/5), *Gustav F W Hamester GmbH & Co KG vs. Republic of Ghana*, (ICSID Case No. ARB/07/24).

41. Claimants stressing on Prof. Stern's appointment by States implies a contention of a lack of partiality. This does not stand as a reason for disqualification. As rightly Claimants apprehended: "*investors need to show something more than her routine and repeated State appointments*".[58]

42. Generally, a party may seek a disqualification of an arbitrator on the argument of the lack of partiality based on either a public statement by the arbitrator concerning a specific dispute,[59] or a written publication on a legal issue which is addressed, exactly, in a dispute involving that party.[60] However, the threshold for substantiating the existence of partiality is enormously high. Speculation regarding an arbitrator's impartiality that might be drawn from inferences or irrelevant background might unbutton frivolous challenges. The Two Members in *Urbaser vs. Argentina* case concluded that:

> If Claimants' challenge will be upheld on the basis of the challenged statements made by Prof. McLachlan, nearly all arbitrators who have ever expressed an opinion on an item specific to ICSID arbitration would be at risk of a challenge. *Such an approach would lead to the disqualification of as many arbitrators, including in particular those who have acquired the greatest experience,* thus leading to the paralysis of the ICSID arbitral process.[61] [emphasis added]

43. Claimants do not argue that Prof. Stern has firm assumptions towards this dispute or the respective legal issues. They, simply, flag that States appoint Prof. Stern frequently. It requires a high burden of proof to substantiate the lack of partiality; generally, as Claimants must proof that prof. Stern is incapable of exercising a more broad perspective, and in taking full account of the facts, circumstances, and arguments presented by the Parties in the present proceeding, and that she will be affected by factors other than those relevant to the specific dispute.

44. In *Suez/Vivendi v. Argentine Republic* cases, the Two Members of the Tribunal stated that the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case does not mean that such judge or arbitrator cannot decide the law and the facts impartially in another case.

---

[58] Disqualification Proposal, page 4.
[59] *Perenco Ecuador Ltd v. Republic of Ecuador and Petroecuador*. Decision on Challenge to Arbitrator by the Secretary-General of the Permanent Court of Arbitration (PCA) in (ICSID Case No. ARB/08/6),
[60] *Urbaser vs Argentine*, (n 12).
[61] ibid, para. 54.

C. The Myth of Egypt Multiple Appointments

45. Thirdly, Claimants contend that Egypt has appointed Prof. Stern several times, which raises doubts about her impartiality and independence. Claimants depend on Prof. Stern's disclosure that Egypt appointed her five times. Two cases were discontinued at an early stage without a single decision,[62] and there is a pending dispute.[63]

46. Claimants contend that Prof. Stern ruled in favor of Egypt in the two other cases.[64] This is a textbook misrepresentation. Claimants, intentionally, neglected to state that she was a member of tribunals including eminent scholars. Those tribunals issued those awards unanimously, i.e., none of the members of those tribunals submitted a dissenting opinion or even a separate opinion.[65] Noticeably, in one of these two cases, the Tribunal dismissed the claim based on the lack of *ratione personae*.[66] This fact leaves Claimants with the *Jan de Nul* case to prove the lack of impartiality or independence.

47. The deciding authority in *Suez vs. Argentina* found that:

> A finding of an arbitrator's or a judge's *lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party, in that case, is currently a party in a case now being heard by that arbitrator or judge*. To hold otherwise would have serious negative consequences for any adjudicatory system.[67] [emphasis added]

---

[62] *ArcelorMittal S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/15/47)*; Ossama Al Sharif v. Arab Republic of Egypt*,(ICSID Case No.ARB/13/3).
[63] *Nile Douma Holding Co. WLL V. Arab Republic of Egypt*, PCA Case 17-09.
[64] Disqualification Proposal, page 2.
[65] *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (November 6, 2008); *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, (April 3, 2014), available at, https://www.italaw.com/cases/2494.
[66] *National Gas v. Egypt*, (n 65) , paras. 142: 149.
[67] *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina*, Case ARB/03/17, para. 37 (ICSID Oct. 22, 2007), para. 36.

48. Egypt appointed Prof. Stern twice within the last three years.[68] The process of appointing an arbitrator is a tricky one, especially in a regime that it is argued that it cares for protecting investor's rights more than sovereign States.[69] The existence of a small pool of arbitrators in investment disputes is a fact.[70] Indeed, the IBA Guidelines consider it a practice in certain types of arbitrations.[71]

49. Appointing an arbitrator entails an analysis of the existence of skill, experience, and understanding of the arbitrator of the respective dispute. It is rightly stated that:

> [i]t is quite natural that a party and its counsel will wish to appoint the 'best' arbitrator available for a given case and that prior experiences with that potential arbitrator are of course adequate to give the assurance.[72]

50. Claimants try using the IBA Guidelines to make their point more than doing so by reference to Article 57 of the ICSID Convention. While it is not publicly known information, Prof. Stern disclosed that Egypt appointed her twice within the last three years. The IBA Guidelines, while they are not authoritative under the ICSID Convention, put the instance of appointment within the last three years under the "Orange List" where the arbitrator should disclose this information under General Standard 3(a),[73] and that if the arbitrator fails to disclose this information would not result in disqualification *per se*.[74]

---

[68] *Nile Douma vs. Egypt*, (n 63); *ArcelorMittal S.A. vs. Egypt*, (n 63).

[69] See William W. Park, Arbitrator Integrity: The Transient and the Permanent, 46 SAN DIEGO L. REV. 629, 651 (2009), 658 (citing Gus Van Harten, *Investment Treaty Arbitration and Public Law*, 175-84 (Oxford University Press, Oxford 2007); Nora Ciancio, The Implications of Recent ICSID Arbitrator Disqualifications for Latin America, 6 Y.B. Arb. & Mediation 440 (2014), 440-466, 465.

[70] Chiara Giorgetti, Who Decides Who Decides In International Investment Arbitration? 35 U. Pa. J. Int'l L. 431 (2013), 431-486, 454:455, 460; Daphna Kapeliuk, The Repeat Appointment Factor: Exploring Decisions Patterns of Elite Investment Arbitrators, 96 CORNELL L. REV. 47, 73 (2010); Margaret Moses, Reasoned Decisions in Arbitrator Challenges 6 (UNIV. OF CHI. SCH. OF L., Pub. L. & Legal Theory Research Paper, No. 2012-011), available at, http://ssrn.com/abstract=2114551; Aceris Law LLC, Choosing ICSID or UNCITRAL Arbitration for Investor-State Disputes, https://www.acerislaw.com/choosing-icsid-or-uncitral-arbitration-for-investor-state-disputes/ (accessed on 1 January 2020)

[71] "It may be the practice in certain types of arbitration, such as maritime, sports or commodities arbitration, to draw arbitrators from a smaller or specialized pool of individuals. If in such fields it is the custom and practice for parties to frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice." IBA Guidelines, pages 22:23.

[72] *Caratube v. Kazakhstan*, (n 22), para. 108.

[73] "(a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration

51. Having realized that Egypt's appointment of Prof. Stern within the last three years does not raise any conflict of interest, Claimants expressed their disappointment with the IBA Guidelines' time limits. They detailed that "*the relevant time period for ICSID arbitrators should be well beyond three years*."[75] [emphasis added]

52. Here again, while there are no multiple appointments in this dispute, but *in arguendo*, if there is, Claimants, shall establish compelling evidence of the lack of impartiality or independence resulting therefrom. In other words, multiple appointments, alone, do not stand as a reason for the disqualification of an arbitrator.[76]

53. As stated in the *Tidewater* case: "the question of whether multiple appointments to arbitral tribunals may impugn the independence or impartiality of an arbitrator *is a matter of substance, not of mere mathematical calculation*."[77] [emphasis added] It is claimed that repeat appointments are treated as neutral, as the concerned arbitrator, in each case, exercises "the same independent arbitral function".[78] In reality, the identically factual background does not necessarily secure a similar ending by parallel tribunals.[79]

54. Evidently, Claimants' proposal fabricates the existence of repetitive appointments by Egypt. Even though it is a myth, Claimants have not tried connecting the dots between the cases where Egypt appointed Prof. Stern and the current case.

IV. CONCLUSION

55. For the foregoing reasons, Respondent respectfully request that the Two Members of the Tribunal to dismiss Claimants disqualification proposal of the 10th of December 2019 to Prof. Stern.

---

institution or other appointing authority (if any, and if so required by the applicable institutional rules) and the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns of them."

[74] Part II: Practical Application of the General Standards, IBA Guidelines on Conflicts of Interest in International Arbitration, page 17:18.

[75] Disqualification Proposal, page 11.

[76] Meg Kinnear & F. Nitschke, 'Disqualification of Arbitrators under the ICSID Convention and Rules', in Chiara Giorgetti (ed.) *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Brill, Leiden 2015)57; Sarah Grimmer, 'The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration', in Chiara Giorgetti (ed.) ibid, 98.

[77] *Tidewaterv. Venezula*, (n 57) 59:60.

[78] Luke A. Sobota, '10. Repeat Arbitrator Appointments in International Investment Disputes', in C. Giorgetti (n 77), 294.

[79] *Ronald S. Lauder v. The Czech Republic*, Final Award. 3 Sep 2001, UNCITRAL Arbitration, *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration, Award on 14 March 2003.

56. Lastly, it remains to address the very last paragraph of Claimants' Submissions: Claimants reserve the right to submit such additional arguments as it may deem appropriate to complement or supplement this submission or to respond to any argument or observation submitted by Respondent.[80] Claimants have no "right" that it could reserve to "supplement or expand" its submission, let alone at any time or in any manner that "it sees fit".

Respectfully submitted,
2 January 2020

Amr Arafa Hasaan
Mohamed H. Negm
Yousra Mohamed
Ragda Roshdy
Ibtehal Ahmed

[80] Disqualification Proposal, page 12.