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June 8, 2012

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Re: Ecuador's Challenge of Judge Stephen M. Schwebel as Arbitrator in Connection with *Merck Sharp & Dohme (I.A.) Corp. v. The Republic of Ecuador - UNCITRAL Arbitration*

Dear Sirs:

We write in response to your letter of June 7, 2012 requesting that Merck Sharp & Dohme (I.A.) Corp. ("MSDIA") agree to Ecuador's most recent challenge of Judge Schwebel and/or that Judge Schwebel withdraw as arbitrator in the above-referenced arbitration. Judge Schwebel's integrity and impartiality are unimpeachable, and Ecuador has not asserted a credible basis for again challenging his service in this arbitration. We therefore reject your suggestion that we withdraw Judge Schwebel's appointment.

The standard under the UNCITRAL Rules for challenging an arbitrator – that "circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence" – is an objective standard. That is, doubts are "justifiable" if they are reasonable to an objective observer. Nothing in your letter of June 7 begins to establish that there are circumstances giving rise to justifiable doubts as to Judge Schwebel's independence or impartiality.

Your letter refers to the fact that Judge Schwebel was appointed by Claimant's counsel, Wilmer Cutler Pickering Hale and Dorr LLP ("Wilmer"), as an arbitrator in two prior arbitrations. Both of those appointments, *Red Sea Islands Arbitration*, Eritrea/Yemen (1997) and *Abyei Arbitration*, Sudan/Sudan People's Liberation Movement (2008), were made long before the present arbitration and do not indicate "a long-standing and remunerative relationship with Claimant's counsel." (June 7 letter, p. 2)

Judge Schewbel is widely regarded as one of the world's leading public international lawyers and international arbitrators, and he has served as arbitrator in numerous cases.[1] The fact that Wilmer was counsel in two of those arbitrations does not indicate "a long-standing and remunerative relationship with Claimant's counsel." To the contrary, it confirms that Wilmer has been involved in only a very small fraction of the cases in which Judge Schwebel has acted as an arbitrator.

Your letter cites the IBA Guidelines on Conflicts of Interest in International Arbitration. As you know, those Guidelines include an "Orange List" which lists "specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence," and should therefore be disclosed. The Orange List includes as one of these circumstances that "the arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm." (IBA Guidelines, Orange List, 3.3.7) At the time this arbitration was commenced, Judge Schwebel had not received more than three appointments by Wilmer in the past three years. In fact, at the time this arbitration was commenced, Judge Schwebel had not received *any* appointments as an arbitrator by Wilmer in the past three years. There was therefore no conceivable basis on which a reasonable party could have had justifiable doubts as to his impartiality and independence, and there was no requirement for Judge Schwebel to disclose his prior appointments.

Your letter also refers to the fact that Judge Schwebel submitted an expert opinion in two U.S. litigations in which Wilmer was counsel. Those two cases, which were closely related, also took place long before the present arbitration. In the first of those cases, *Shell Oil Company v. Sonia Eduarda Franco Franco* et al. (2005), Judge Schwebel submitted a declaration to the United States District Court for the Southern District of Florida, on behalf of Shell Oil, which was represented by Wilmer in that case. In the second of those cases, *Miguel Angel Sanchez Osorio et al v. Dole Food Company, Inc., The Dow Chemical Company, Occidental Chemical Corporation and Shell Oil Company* (2008), Judge Schwebel submitted essentially the same declaration to the United States District Court for the Central District of California, on behalf of four corporate defendants, only one of which was represented by Wilmer. In both cases, Judge

[1] A public website includes a biography of Judge Schwebel that reports that Judge Schwebel has been appointed as an arbitrator in 63 international arbitrations, and has also acted as counsel or as an expert witness in many more proceedings. http://www.londonarbitrators.net/cvs/sschw.pdf.

Schwebel was retained to provide testimony to the court as an expert in public international law.[2] He was not acting as counsel or an arbitrator, but as a witness, with duties of honesty and integrity to the courts. Notably, the IBA Guidelines do not include past service as an expert witness among the circumstances that might give rise to justifiable doubts about an arbitrator's independence or impartiality. Judge Schwebel's service as an expert witness in those cases also does not give rise to justifiable doubts as to his independence and impartiality.

Your letter suggests that Judge Schwebel should have disclosed his prior service as arbitrator and expert witness at an earlier stage of this arbitration. We note, preliminarily, that all three members of the Tribunal chose to make a "Common Disclosure Statement" at the time the Tribunal was fully constituted, in which each of them – including the arbitrator appointed by Ecuador – disclosed matters that they had not previously disclosed. The timing of the Common Disclosure Statement was at a preliminary stage of the arbitration and was both entirely ordinary and entirely reasonable.

Moreover, the Common Disclosure Statement included, specifically, a statement that "Nothing in the above [statement] affects the impartiality of the Tribunal or any of its Members or their independence of the Parties to this Arbitration." Under Article 9 of the UNCITRAL Rules, arbitrators are instructed to disclose "circumstances likely to give rise to justifiable doubts as to [their] impartiality or independence." None of the matters included in the Common Disclosure Statement is likely to give rise to such justifiable doubts, and none was therefore required to be disclosed under the UNCITRAL Rules. The fact that the arbitrators chose, for the sake of transparency and completeness, to disclose these matters upon constitution of the Tribunal does not establish that the non-disclosure of the matters at an earlier stage of the arbitration was improper or give rise to any justifiable doubts regarding the impartiality or independence of any of the members of the Tribunal.

In short, Ecuador's challenge of Judge Schwebel's appointment has no merit, and we therefore request that Ecuador withdraw it forthwith.

As you know, MSDIA intends to file very shortly an application seeking interim measures of relief from the Tribunal in this arbitration. Under these circumstances, Ecuador's most recent challenge of Judge Schwebel must not be allowed to delay the arbitral proceedings or to prevent the Tribunal from considering MSDIA's request for interim relief in a timely manner. We therefore request that Ecuador either withdraw its challenge or submit it immediately to the PCA for an expedited decision.

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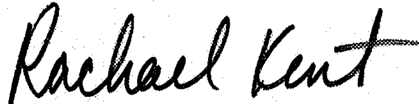
[2] Your letter suggests, in passing, that the issues in those two cases "are similar to" the issues in the present arbitration. That is not true. Judge Schwebel's opinions in those two cases involved his expert opinion regarding a specific Nicaraguan statute, Law 364, which is not, and could not conceivably be, at issue in this arbitration.

Sincerely,



Gary B. Born
David W. Ogden
Rachael D. Kent

cc: Sir Franklin Berman KCMG QC
Judge Stephen M. Schwebel
Judge Bruno Simma
Martin Doe