

CORTE PERMANENTE DE ARBITRAJE



PERMANENT COURT OF ARBITRATION

PCA Case No. AA442

**IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE
UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING
THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT**

- and -

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW, 1976**

- between -

MERCK SHARP & DOHME (I.A.) CORPORATION

- and -

THE REPUBLIC OF ECUADOR

**DECISION ON CHALLENGE TO ARBITRATOR
JUDGE STEPHEN M. SCHWEBEL**

August 8, 2012

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I. PROCEDURAL HISTORY

1. This challenge arises out of an arbitration between Merck Sharp & Dohme (I.A.) Corporation (the “Claimant”) and the Republic of Ecuador (the “Respondent” or “Ecuador”) under the Arbitration Rules of the United Nations Commission on International Trade Law, December 15, 1976 (the “UNCITRAL Arbitration Rules” or “UNCITRAL Rules”) pursuant to the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on August 27, 1993 and entered into force on May 11, 1997 (the “Treaty”).
2. The Claimant is represented in this case by Mr. Gary B. Born, Mr. David W. Ogden, Ms. Rachael D. Kent, Mr. Charles S. Beene, and Mr. Claudio Salas of Wilmer Cutler Pickering Hale and Dorr LLP, as well as by Mary E. Bartkus of Merck Sharpe Dohme (I.A.) Corp. The Respondent is represented by Dr. Diego García Carrión, Dra. Christel Gaibor, Ms. Diana Terán, and Mr. Juan Francisco Martínez of the Procuraduría General del Estado of Ecuador, as well as by Mr. Paul Reichler, Mr. Mark Clodfelter, Mr. Ronald Goodman, Mr. Alberto Wray, Ms. Janis Brennan, Ms. Diana Tsutieva, and Mr. Constantinos Salonidis of Foley Hoag LLP.
3. By a Notice of Arbitration dated November 29, 2011 and received by the Respondent on December 2, 2011, the Claimant commenced an arbitration against the Respondent pursuant to Article VI(3)(a)(iii) of the Treaty and Article 3 of the UNCITRAL Arbitration Rules. The Claimant, a company incorporated under the laws of the state of Delaware in the United States, claims that Ecuador breached the Treaty with respect to the Claimant’s investment in the pharmaceutical industry. In its Notice of Arbitration, the Claimant appointed Judge Stephen M. Schwebel as arbitrator.
4. By letter dated December 30, 2011, the Respondent appointed Judge Bruno Simma as arbitrator.
5. By letters dated February 14, 2012, the Claimant and the Respondent jointly requested that the Secretary-General of the Permanent Court of Arbitration (“PCA”) act as appointing authority to appoint a presiding arbitrator.
6. By letter to the Claimant dated February 23, 2012, the Respondent subsequently challenged the Claimant’s appointment of Judge Schwebel under Article 10 of the UNCITRAL Rules on the basis of bias against counsel for the Respondent demonstrated in an article recently published by Judge Schwebel.
7. On the same date, the Respondent requested that the Secretary-General of the PCA suspend the process for the appointment of the presiding arbitrator until the challenge to Judge Schwebel had been resolved. The Claimant expressed its opposition to the Respondent’s request for a suspension by letter dated February 25, 2012.
8. By letter dated February 27, 2012, the Acting Secretary-General of the PCA suspended the appointment process until the resolution of the challenge.
9. By letter dated March 15, 2012, after Judge Schwebel declined to withdraw and the Claimant declined to agree to the challenge, the Respondent requested that the Secretary-General of the PCA decide its challenge to the Claimant’s appointment of Judge Schwebel.
10. By letter dated March 16, 2012, the PCA acknowledged receipt of the Respondent’s Request and established a schedule for further submissions on the challenge.

11. By his “Decision on the Challenge to Judge Stephen M. Schwebel” dated April 12, 2012, the Acting Secretary-General of the PCA rejected the challenge to Judge Schwebel.
12. On May 8, 2012, the Acting Secretary-General of the PCA appointed Sir Franklin Berman KCMG QC as presiding arbitrator.
13. By e-mail of May 22, 2012, the presiding arbitrator convened a telephone conference-call with the Parties and circulated a “Statement of disclosure by the Members of the Arbitral Tribunal” (the “Joint Disclosure Statement”), stating, *inter alia*, as follows:

3. Judge Schwebel has been previously appointed as arbitrator by the firm of Wilmer Cutler Pickering Hale and Dorr as follows:

- *Red Sea Islands Arbitration, Eritrea/Yemen, 1997;*
- *Abyei Arbitration, Sudan/Sudan People’s Liberation Movement, 2008.*

4. Judge Schwebel rendered an expert opinion at the request of Wilmer Cutler Pickering Hale and Dorr in *Shell Oil Company v. Sonia Eduardo Franco Franco et al., 2005.*

5. Judge Simma currently serves as an arbitrator in the case *Copper Mesa Mining Corporation (Canada) v. Republic of Ecuador (PCA Case No. 2012-2)* appointed by the Republic of Ecuador through the law firm of Lalive, Geneva.

Nothing in the above affects the impartiality of the Tribunal or any of its Members or their independence of the Parties to this Arbitration.¹

14. By e-mail of June 6, 2012, counsel for the Claimant informed counsel for the Respondent as follows:

Per your request on our call yesterday, I am attaching the expert opinion on Nicaraguan Special Law 364 submitted by Judge Schwebel in *Shell Oil v Sonia Eduarda Franco Franco et al.* (2005), where Wilmer was counsel for Shell. Judge Schwebel submitted the same opinion in a subsequent litigation, *Miguel Angel Sanchez Osorio v. Dole Food Co., et al* (2008), where he was retained by four co-defendants, including our client, Shell.²

15. By letter dated June 7, 2012, the Respondent notified the Claimant and Judge Schwebel of its second challenge to Judge Schwebel.
16. By letter dated June 8, 2012, the Claimant responded to the Respondent’s challenge of Judge Schwebel, declining to agree to his removal from the Tribunal.
17. On June 10, 2012, Judge Schwebel rejected the challenge and declined to withdraw as arbitrator.
18. By letter dated June 21, 2012, the Respondent requested that the PCA Secretary-General, in his capacity as the appointing authority in this case, decide its second challenge to Judge Schwebel (“Respondent’s Request”).
19. By letter dated June 22, 2012, the PCA acknowledged receipt of the Respondent’s Request and established a schedule for further submissions on the challenge.

¹ Joint Disclosure Statement, May 22, 2012 (RCE-4).

² E-mail from Mr. Charles S. Beene to Mr. Mark Clodfelter, June 6, 2012 (RCE-5).

20. By letter dated July 9, 2012, the Claimant submitted its Response to the Respondent's Request ("Claimant's Response").
21. By letter dated July 10, 2012, Judge Schwebel submitted his Comments on the second challenge ("Judge Schwebel's Comments").
22. By letter dated July 17, 2012, the Respondent submitted its Rebuttal to the Claimant's Response ("Respondent's Rebuttal").
23. By letter dated July 24, 2012, the Claimant submitted its Rejoinder to the Respondent's Response ("Claimant's Rejoinder").

II. THE CHALLENGE TO JUDGE SCHWEBEL

a. The Respondent's Position

24. The Respondent's challenge to Judge Schwebel's appointment arises out of his non-disclosure "for almost six months after his appointment" of two earlier appointments as arbitrator and one appointment as expert witness by parties represented by counsel for the Claimant, as well as his non-disclosure of another appointment as expert witness by a party represented by counsel for the Claimant.
25. According to the Respondent, Judge Schwebel did not make any disclosure upon his appointment by the Claimant on November 29, 2011 and until the presiding arbitrator transmitted the Joint Disclosure Statement on May 22, 2012. In the Joint Disclosure Statement, Judge Schwebel disclosed that he had been appointed through Claimant's counsel, Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"), as arbitrator in the *Red Sea Islands Arbitration (Eritrea/Yemen)* and in the *Abyei Arbitration (Sudan/Sudan People's Liberation Movement)* and had been retained to render an expert opinion in *Shell Oil Company v. Sonia Eduardo Franco Franco et al.*³ According to the Respondent, two weeks after receiving the Joint Disclosure Statement, and in the course of its assessment of Judge Schwebel's disclosures, the Respondent was informed by the Claimant that Judge Schwebel had also been retained through counsel for the Claimant in 2008 to render an expert opinion in *Miguel Angel Sanchez Osorio et al v. Dole Food Company, Inc., The Dow Chemical Company, Occidental Chemical Corporation and Shell Oil Company.*⁴
26. The Respondent asserts that "[e]ach of the foregoing circumstances and their accumulation – the substance of the now-revealed relationship between Judge Schwebel and Claimant's counsel and Judge Schwebel's late disclosure and failure to disclose those relationships – raise justifiable doubts as to his impartiality and independence to serve as an arbitrator in this case" under the applicable UNCITRAL standards, specifically, from the perspective of a "reasonable and informed third party."⁵

1. Judge Schwebel's late and incomplete disclosures

27. The Respondent first argues that Judge Schwebel's late and incomplete disclosure in itself gives rise to justifiable doubts concerning his independence and impartiality in this arbitration. The Respondent submits that under Article 9 of the UNCITRAL Arbitration Rules, Judge Schwebel

³ Respondent's Request, p. 9; Joint Disclosure Statement, May 22, 2012 (RCE-4).

⁴ Respondent's Request, p. 10; e-mail from Mr. Charles S. Beene to Mr. Mark Clodfelter, June 6, 2012 (RCE-5).

⁵ Respondent's Request, pp. 2, 9; Respondent's Rebuttal, p. 3.

had a duty to disclose “any circumstances likely to give rise to justifiable doubts as to his impartiality and independence” upon his appointment by the Claimant on November 29, 2011. The Respondent cites General Standard 3(c) of the IBA Guidelines on Conflicts of Interest in International Arbitration (“IBA Guidelines”) to the same effect and adds that these require that “[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favor of disclosure.”⁶

28. The Respondent further refers to international commentators and case law to argue that a failure to disclose circumstances that should have been disclosed may give rise to justifiable doubts. The Respondent quotes Article 4.1 of the IBA Rules of Ethics for International Arbitrators (“IBA Rules of Ethics”) to the effect that “[f]ailure to make [full] 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.”⁷ It submits that “[w]hether nondisclosure raises such doubts depends on 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 nondisclosure is an aberration on the part of a conscientious arbitrator *or part of a pattern of circumstances raising doubts as to impartiality*.”⁸
29. The Respondent also points to General Standard 3(a) of the IBA Guidelines to argue that “at the time of Respondent’s challenge, Judge Schwebel was no more justified in considering that his prior appointments by Claimant’s counsel would not corroborate or independently establish, *in the eyes of Respondent*, facts or circumstances giving rise to doubts as regards his impartiality or independence.”⁹ It stresses that Judge Schwebel’s assessment of his previous appointments as “few, [...] years ago and [...] unrelated to the instant case” do not “comport with the explanation to the General Standard 3,” which clarifies that with regard to disclosure “*the parties have an interest in being fully informed about any circumstances that may be relevant in their view*. [...] the Working Group in principle accepted [...] *a subjective approach for disclosure*.”¹⁰
30. The Respondent contends that the “fact that [Judge Schwebel] may have considered that his professional relationships with WilmerHale did not merit disclosure is irrelevant: he was required to reveal *any circumstances likely to give rise to justifiable doubts as to his impartiality and independence*.”¹¹ The Respondent disagrees with Judge Schwebel’s justification that it did not occur to him to make disclosures while the first challenge against him was pending, because by then Judge Schwebel “should have been *more not less* attuned to circumstances so obviously relevant to his appointment” and “his untimely and incomplete disclosure was deliberate and exposes an inclination [...] to suppress relevant circumstances that had the potential of further compounding circumstances at the time of the first challenge which [...] gave rise to justifiable doubts.”¹²

⁶ Respondent’s Request, pp. 4, 11, quoting *IBA Guidelines on Conflicts of Interest in International Arbitration*, General Standard 3(c), Disclosure by the Arbitrator, p. 9 (RCL-3); Respondent’s Rebuttal, p. 6.

⁷ Respondent’s Request, p. 5, quoting *IBA Rules of Ethics for International Arbitrators*, Article 4.1 (RCL-8).

⁸ Respondent’s Request, p. 15, quoting S.A. Baker & M. D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992), p. 50 (RCL-31). Emphasis added by the Respondent.

⁹ Respondent’s Rebuttal, p. 6.

¹⁰ Respondent’s Rebuttal, p. 6.

¹¹ Respondent’s Request, pp. 10-11. Emphasis added by the Respondent.

¹² Respondent’s Rebuttal, p. 5.

31. The Respondent also notes that Judge Schwebel's Comments do not address the lack of a disclosure in the "approximately twelve weeks" prior to the first challenge.¹³ In response to the Claimant's argument that the appointments were matters of public record, the Respondent cites *Tidewater v. Venezuela* for the proposition that "in considering the scope of [his] duty of disclosure, the arbitrator may not count on the due diligence of the parties' counsel."¹⁴ It further argues that an obligation to research the record of U.S. District Courts, as would be necessary in this case, would be "unreasonable" and that Judge Schwebel's engagement in *Shell Oil v. Franco* was "not a matter of public record at all."¹⁵
32. According to the Respondent, a "history of repeated selections constitutes precisely the kind of circumstances that are most relevant to the assessment of a party-appointed arbitrator's impartiality and independence" and their disclosure "promptly after an arbitrator's appointment is indispensable to afford the other party an opportunity to assess the suitability of an appointee and exercise of its procedural rights under the UNCITRAL Arbitration Rules in case it finds such appointee unsuitable."¹⁶ The Respondent emphasizes that by not making the disclosures "Judge Schwebel denied Respondent the opportunity to be fully informed, at the time of its first challenge, about any other circumstances that may be relevant in its view to the independence and impartiality of Judge Schwebel."¹⁷
33. The Respondent notes, further, that both of Judge Schwebel's expert engagements concern "issues of denial of justice, allegations which feature prominently in the instant case."¹⁸ The Respondent submits further that even if that were not the case, the "prior appointments evidenc[e] instances of close cooperation between [Judge Schwebel and the Claimant's counsel]."¹⁹ The Respondent rejects that the 2008 and 2005 Opinions may be conflated. It states that Judge Schwebel was "remunerated separately" for the engagements and that both opinions required "deliberate and conscious effort on his part, as is reflected in the specific differences between the [opinions]."²⁰ The Respondent argues that the non-disclosure of "this additional financial relationship" raises justifiable doubts "on its own right."²¹
34. The Respondent also argues that similar non-disclosures have been found to constitute grounds for the annulment of awards, and points in particular to two decisions of the French courts. In *Raoul Duval v. Markuria Sucden*, an award was set aside, because the arbitrator had not disclosed that "he would start working for the respondent one day after the award was rendered."²² In *J&P Avax SA v. Société Tecnimont*, an award was first annulled by the Paris Court of Appeal for lack of disclosure by the presiding arbitrator of the extent of his law firm's work for the respondent, which raised concerns with regard to his independence, although he had not personally been involved in the work for the respondent. Later, on remand from the Cour de Cassation, the Reims Court of Appeal agreed that the failure of full disclosure may serve as grounds for annulment of an award, even if the information revealed as such does not

¹³ Respondent's Rebuttal, p. 5.

¹⁴ Respondent's Rebuttal, p. 9, quoting *Tidewater v. Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010, para. 51 (CCL-7).

¹⁵ Respondent's Rebuttal, p. 9.

¹⁶ Respondent's Request, p. 10.

¹⁷ Respondent's Rebuttal, p. 8.

¹⁸ Respondent's Request, p. 11; Respondent's Rebuttal, pp. 8, 10.

¹⁹ Respondent's Request, p. 11.

²⁰ Respondent's Rebuttal, p. 8.

²¹ Respondent's Rebuttal, p. 8.

²² Respondent's Request, p. 12, citing P. Fouchard, *Note Cour d'appel de Paris (Ire Ch. C.) 12 octobre 1995, V. v. Société Raoul Duval*, *Revue de l'Arbitrage* (1999), p. 327-328 (RCL-23).

raise reasonable doubts as to the challenged arbitrator's impartiality and independence.²³ The Respondent notes that non-disclosure has also been considered grounds for annulment in the United States, the Claimant's country of nationality.

35. Finally, the Respondent stresses that enforcement by arbitral institutions of the duty of disclosure is important to "encourage private entities and States to have confidence in the integrity of the investor-State arbitration process," and to ensure "the finality of awards and in general the effectiveness of international arbitration," as well as the "credibility" of the system of investor-State arbitration.²⁴ In its Rebuttal, the Respondent emphasizes that this is particularly necessary in case involving "denial of justice due to judicial bias" and submits that in cases where the PCA is acting as both registry and appointing authority it "has a special duty to assure [its] reliability."²⁵

2. *Judge Schwebel's past appointments on behalf of parties represented by counsel for the Claimant*

36. The Respondent argues that the four earlier appointments of Judge Schwebel by parties represented by counsel for the Claimant, twice as arbitrator and twice as expert "on issues of denial of justice in a manner favorable to the Claimant's counsel and [...] to Claimant in this case fall outside of the normal *contacts* among professionals in the international arbitration arena."²⁶
37. The Respondent points to the IBA Guidelines' Orange List 3.3 and argues that "a close relationship between an arbitrator and counsel can raise justifiable doubts regarding the independence and impartiality of an arbitrator."²⁷ According to the Respondent, it is immaterial that the present situation is not expressly listed in the IBA Guidelines; the IBA Guidelines are "not exhaustive, and legal commentators have long recognized that the Red and Orange Lists do not cover all possible scenarios" and the Guidelines' drafters acknowledged that the three-year time limits of the IBA Guidelines "may be too long in certain circumstances and too short in others."²⁸ In this context, the Respondent also notes that Judge Schwebel's engagement in the *Abyei Arbitration* ended only in July 2009 and his engagement as expert in *Sanchez Osorio v. Dole et al.* continued until the U.S. District Court's judgment on July 7, 2010.²⁹
38. The Respondent argues that "the nature of the collaborative efforts that exist in counsel-expert relationships [...] may constitute circumstances giving rise to justifiable doubts [...], particularly when the legal opinions rendered by the arbitrator relate to the issues relevant to this arbitration," and that the "failure to disclose one of the expert opinions only aggravates the circumstances."³⁰ The Respondent rejects the Claimant's and Judge Schwebel's argument that the expert opinions are unrelated to the present case and contends that they reject a principle which "is central to Respondent's jurisdictional and merits defenses," namely "that a court decision, against which there remains further recourse through the judicial process, does not

²³ Respondent's Request, pp. 12-13, citing *S.A. J&P Avax S.A. v. Société Tecnimont SPA*, Paris Court of Appeal, February 12, 2009, *Revue de l'Arbitrage* (2009), p. 186 (RCL-24), *Société Tecnimont SPA v. Société J&P Avax*, Cour de Cassation, 1st Civil Chamber, November 4, 2010 (RCL-25), and Bertrand Derains & Yves Derains, Note on *S.A.J & P Avax v. Société Tecnimont SPA AS*, Reims Court of Appeal, Case No. 10/02888, November 2, 2011 (RCL-26).

²⁴ Respondent's Request, p. 14.

²⁵ Respondent's Rebuttal, p. 1.

²⁶ Respondent's Request, p. 15. Emphasis added by the Respondent.

²⁷ Respondent's Request, p. 15.

²⁸ Respondent's Request, p. 16; Respondent's Rebuttal, p. 12.

²⁹ Respondent's Rebuttal, pp. 12-13.

³⁰ Respondent's Request, p. 16.

amount to a denial of justice.”³¹ It also submits in response to the Claimant that while the expert-counsel relationship is not comparable to a client-counsel relationship, “the giving and receiving of [an expert opinion] assignment[] requires *trust between the parties*” and, in the present case, led to a “long-standing financial and professional ‘relationship of trust’ [which] gives rise to justifiable doubts.”³²

39. The Respondent draws a comparison with the facts of the challenge to Professor Gaillard in *Telekom Malaysia Berhad v. Ghana*, where The Hague District Court held that there were justifiable doubts as to Professor Gaillard’s ability to carry out his task as arbitrator impartially and independently due to his involvement as counsel in another arbitration, *RFCC v. Morocco*, which concerned the same BIT protection against expropriation.³³ The Respondent relies on the argument submitted by Ghana, which the court agreed with, that “Professor Gaillard, who in his capacity of counsel opposes a specific notion or approach, cannot be unbiased in his judgment of that same notion or approach in a case in which he acts as an arbitrator.”³⁴
40. According to the Respondent, “Judge Schwebel’s services as legal expert in two cases favoring the positions of Claimant’s counsel and Claimant’s stated and likely positions in this case *a fortiori* give rise to the appearance that it will not be possible for him, as arbitrator, to disengage fully from his preconceived opinions and his willingness to take the side advanced by Claimant and its counsel.”³⁵ The Respondent relies on LCIA Reference No. 5660 to argue that “the arbitrator’s partiality is established when there is a risk that he may favor one of the parties or the party’s counsel. There can be no question but that the risk of bias exists here, and accordingly, that Respondent’s challenge of Judge Schwebel should be sustained.”³⁶
41. Finally, the Respondent rejects the “test of ‘economic dependence’” relied upon by the Claimant, as it “fails to capture the circumstances that present themselves in [this] case” and sets too high a threshold. It further notes that the cases relied upon by the Claimant in this regard, *Universal Compression v. Venezuela* and *OPIC Karimum v. Venezuela*, are inapposite, as they were decided under Article 57 of the ICSID Convention, which by requiring a “*manifest* lack of the qualities required of an arbitrator” applies a stricter test than Article 10(1) of the UNCITRAL Rules.³⁷

3. *The circumstances considered in the aggregate*

42. In the alternative, the Respondent argues that “[w]hile each basis articulated above independently raises justifiable doubts as to the propriety of Judge Schwebel’s service as an arbitrator in this case, in the aggregate they evince a pattern that, *a fortiori*, gives rise to justifiable doubts as to his reliability to exercise independent and impartial judgment in this arbitration. [...] The relevant circumstances, viewed globally, confirm the existence of a close

³¹ Respondent’s Rebuttal, p. 11.

³² Respondent’s Rebuttal, p. 12, citing *Case KKO 2005:14*, Decision of the Finnish Supreme Court, discussed in: Bond and Bachand (eds.), *International Arbitration Court Decisions* (3rd ed., 2011), para. 24. Emphasis added by the Respondent (CCL-2).

³³ Respondent’s Request, p. 17.

³⁴ Respondent’s Request, p. 17, quoting *Republic of Ghana v. Telekom Malaysia Berhad*, District Court of The Hague, October 18, 2004, available in *ASA Bulletin* 2005(1), p. 186, 189 (RCL-35).

³⁵ Respondent’s Request, p. 19; Respondent’s Rebuttal, p. 11.

³⁶ Respondent’s Request, p. 19.

³⁷ Respondent’s Rebuttal, p. 10, citing *Universal Compression International Holdings, S.L.U. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on Claimant’s Proposal to Disqualify Professor Brigitte Stern and Professor Guido Tawil, May 20, 2011, para. 71 (RCL-6), *OPIC Karimum Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Decision on the Proposal to Disqualify Professor Philippe Sands, May 5, 2011, para. 45 (RCL-4).

professional relationship and combined efforts, including efforts on legal issues similar to those in this case, between Claimant's counsel and Judge Schwebel, on the basis of which any reasonable third party would conclude the he either is, or appears to be, partial and non-independent."³⁸

b. The Claimant's Position

43. According to the Claimant, the challenge is "without any credible factual or legal basis" and should be dismissed. Specifically, the Claimant argues that Judge Schwebel's previous appointments as arbitrator and expert witness by parties represented by WilmerHale do not exceed the "normal contacts among professionals in the international arbitration arena," and that the Respondent cannot rely on these grounds in the aggregate.³⁹

1. Judge Schwebel's past appointments on behalf of parties represented by counsel for the Claimant

44. The Claimant maintains that "WilmerHale's prior appointments of Judge Schwebel as arbitrator and expert witness cannot objectively give rise to justifiable doubts about his impartiality or independence" under any relevant standard.⁴⁰
45. With regard to Judge Schwebel's two earlier appointments as arbitrator, the Claimant argues that the appointment in the *Red Sea Islands Arbitration* occurred in 1997, approximately fifteen years ago, and the appointment in the *Abyei Arbitration* occurred in 2008, approximately four years ago. In sum, "[n]either case involved, in any conceivable fashion, either the Claimant MSDIA (or any Merck entity) or Ecuador; neither appointment was within the past three years; neither case was an investor-state arbitration; neither case involved issues similar to those raised in the present arbitration; both cases were matters of public record, well-known to counsel for Ecuador; and both cases involved only service as an independent and impartial arbitrator."⁴¹ The Claimant further notes that the *Red Sea Islands Arbitration* and the *Abyei Arbitration* differ significantly from the present arbitration. They were "territorial and boundary disputes governed by public international law," adjudicated by a five-member tribunal and unconnected to the parties or issues arising in the present arbitration.⁴²
46. The Claimant further asserts that the challenge is untimely, because both appointments were "matters of public record" and Ecuador's counsel must have been "fully aware" of them since the time of Judge Schwebel's appointment in this case.⁴³
47. With regard to Judge Schwebel's two engagements through WilmerHale as expert witness in two cases before U.S. federal courts, the Claimant notes that the cases were interconnected. Judge Schwebel was retained to consider the same question in both cases and submitted "substantively identical expert opinions." In addition, in the second case, WilmerHale's client was one of four defendants who jointly retained and remunerated Judge Schwebel.⁴⁴
48. The Claimant points to the IBA Guidelines Orange List 3.3.7 and argues that the present situation is not encompassed by the provision, because Judge Schwebel received only two and

³⁸ Respondent's Request, pp. 19-20.

³⁹ Claimant's Response, p. 1.

⁴⁰ Claimant's Response, p. 4.

⁴¹ Claimant's Response, p. 2.

⁴² Claimant's Response, pp. 2, 4.

⁴³ Claimant's Response, p. 4.

⁴⁴ Claimant's Response, p. 5.

not “more than three appointments by the same counsel” and neither is within the three year period stipulated by the IBA Guidelines. The Claimant points out that a similar challenge based on repeat appointments was rejected on the basis of this provision in *Universal Compression Holdings Inc. v. Venezuela*.⁴⁵ The Claimant argues that the date of the conclusion of the proceedings, relied upon by the Respondent, is irrelevant because the “IBA Guidelines clearly and intentionally focus on the appointment of the arbitrator.”⁴⁶ It also points out that the standard established by the IBA Guidelines would not be met even if “all four prior engagements and appointments should be treated the same, *i.e.*, as the equivalent of arbitrator appointments.”⁴⁷ Likewise, the Claimant notes that the Respondent fails to show why a different standard than that established by the IBA Guidelines should apply in this case and that the Respondent’s argument that the IBA Guidelines are non-exhaustive contradicts its arguments as the “situation here is directly addressed by the Guidelines.”⁴⁸

49. Based on arbitral case law, the Claimant contends that the “mere fact that an arbitrator was regularly nominated (by different arbitral parties) on the recommendation of the same Counsel or the same firm of solicitors ought not of itself to give rise to justifiable doubts as to his independence and impartiality.”⁴⁹ Further, the Claimant argues that repeat appointments are only relevant where they lead to a dependency of the arbitrator from counsel or to an “obvious professional importance to the arbitrator of his relationship with [counsel ... which] would reasonably suggest a real possibility of bias.”⁵⁰ Otherwise, it asserts that the “system of international arbitration would be unworkable.”⁵¹
50. The Claimant emphasizes that, in *OPIC Karimum Corp. v. Venezuela*, the tribunal rejected a challenge based on a significantly larger number of repeat appointments, both in absolute figures and in proportion of total appointments, of Professor Philippe Sands by Curtis Mallet-Prevost Colt & Mosle LLP. The tribunal rejected the challenge on the basis that the repeat appointments did not by themselves demonstrate a lack of independence and the claimants were unable to show that Professor Sands was financially dependent on the repeat appointments.⁵² The Claimant submits that, in the present case, there is no “relationship of dependence” between Judge Schwebel and WilmerHale, because the two earlier appointments as arbitrator constitute “barely three percent” of Judge Schwebel’s publicly known appointments as arbitrator in more than 60 cases, without even considering Judge Schwebel’s “serv[ice] as counsel or expert in countless other cases,” or his previous position at the International Court of Justice.⁵³
51. The Claimant adds that “[t]here is no legal basis for Respondent’s position that the standard here should be lower than potential dependence [...] Indeed, Respondent does not even attempt to articulate an alternative standard.”⁵⁴ In this context, the Claimant stresses the relevance of the ICSID decisions it relies upon, because the Respondent referred to them as well, and they “are matters in which challenges were evaluated considering the principles articulated in the IBA

⁴⁵ Claimant’s Response, p. 6, citing *Universal Compression v. Venezuela*, *supra* note 37, para. 86.

⁴⁶ Claimant’s Rejoinder, p. 6.

⁴⁷ Claimant’s Rejoinder, p. 5.

⁴⁸ Claimant’s Rejoinder, pp. 5-6.

⁴⁹ Claimant’s Rejoinder, p. 3, quoting *LCIA Reference No. 81160*, Decision Rendered August 28, 2009, in *Arbitration International, Special Edition On Arbitration Challenges*, Volume 27, Issue 3 (2011), p. 451, para. 4.6 (CCL-5).

⁵⁰ Claimant’s Response, p. 7, quoting *LCIA Reference No. 81160*, *ibid.*, para. 4.16.

⁵¹ Claimant’s Rejoinder, p. 7.

⁵² Claimant’s Response, pp. 7-8, citing *OPIC Karimum Corp. v. Venezuela*, *supra* note 37, para. 21 (RCL-4).

⁵³ Claimant’s Response, pp. 2, 8; Claimant’s Rejoinder, p. 3.

⁵⁴ Claimant’s Rejoinder, p. 3.

Guidelines, principles that Respondent seeks to apply to this case.”⁵⁵ The Claimant also points to the non-ICSID case law it relies upon to confirm the applicability of the test of economic dependence and claims that the Respondent fails to address or refute it.⁵⁶

52. According to the Claimant, Judge Schwebel’s services as expert for Shell Oil do not impact this assessment, because Judge Schwebel was retained as an “independent witness, with duties of honesty and integrity.”⁵⁷ Moreover, the engagements did not occur in the past three years and Judge Schwebel has received numerous other appointments as expert over this period.⁵⁸ The Claimant stresses that “Judge Schwebel has long been among the most sought-after and oft-appointed arbitrators and experts in public international law. It is not credible to allege that the past retention of Judge Schwebel to provide an expert witness opinion in two related matters on a single legal issue would affect impartiality or independence in this case today.”⁵⁹
53. The Claimant further rejects the allegation that there was a “pattern of joint efforts by Judge Schwebel and the Claimant’s counsel,” considering that “Judge Schwebel’s service as an arbitrator or expert witness involved independent roles that he performed with integrity.”⁶⁰
54. The Claimant argues that the *Ghana v. Telekom Malaysia* case “has no bearing on the present case,” because it “involved a situation in which an arbitrator was poised to take “*simultaneous*, arguably incompatible positions on a single treaty provision in separate proceedings.”⁶¹
55. The Claimant also contradicts the Respondent’s argument that the content of Judge Schwebel’s expert opinions bears any relevance upon the present case. It submits that the opinion concerned the legality of the Nicaraguan Special Law 364 under international standards of due process, and that Judge Schwebel’s opinion “principally provided an analysis of the law itself.”⁶² According to the Claimant, “[t]he opinion did not involve Ecuador or its courts, did not address the U.S.-Ecuador BIT, and did not involve issues of a lack of objectivity or bias by a judicial tribunal.”⁶³
56. In addition, the Claimant points to the challenges to Professor Stern in *Tidewater v. Venezuela* and to Professor Campbell McLachlan in *Urbaser S.A. v. Argentina* to argue that “even if Judge Schwebel had previously expressed opinions on issues relevant here, which he did not, that could not serve as a basis for disqualification.”⁶⁴ According to the Claimant, “prior legal opinions, even on a similar issue, cannot serve as a basis for disqualification.”⁶⁵

⁵⁵ Claimant’s Rejoinder, p. 4.

⁵⁶ Claimant’s Rejoinder, pp. 4-5, citing *LCIA Reference No. 81224*, Decision Rendered March 15, 2010, in *Arbitration International, Special Edition On Arbitration Challenges*, Volume 27, Issue 3 (2011), p. 467, para. 4.4 (CCL-6), *LCIA Reference No. 81160*, *supra* note 49, para. 87, *Suez and others v. Argentina*, ICSID Case No. ARB/03/19, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, May 12, 2008, para. 24 (RCL-11).

⁵⁷ Claimant’s Response, p. 8.

⁵⁸ Claimant’s Response, pp. 8-9, citing *LCIA Reference No. 97/X27*, Decision Rendered October 23, 1997 (CCL-4).

⁵⁹ Claimant’s Response, p. 8.

⁶⁰ Claimant’s Response, p. 9.

⁶¹ Claimant’s Response, p. 9, note 25; Claimant’s Rejoinder, p.8, note 17. Emphasis added by the Claimant.

⁶² Claimant’s Response, p. 5; Claimant’s Rejoinder, p. 6.

⁶³ Claimant’s Response, p. 9; Claimant’s Rejoinder, pp. 7-8.

⁶⁴ Claimant’s Response, p. 10, citing *Tidewater v. Venezuela*, *supra* note 14, para. 67, *Urbaser S.A. v. Argentina*, ICSID Case No. ARB/07/26, On Claimants’ Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, August 12, 2010, paras. 23, 41 (CCL-8).

⁶⁵ Claimant’s Rejoinder, p. 6.

2. *Judge Schwebel's late and incomplete disclosures*

57. The Claimant denies that the late and incomplete disclosure by Judge Schwebel in itself can sustain the Respondent's challenge or that it in any way aggravates the other grounds for the challenge.
58. According to the Claimant, a "failure to disclose is not itself a ground for challenge" under the UNCITRAL Arbitration Rules. Further, the Claimant points to commentary, arbitral case law, and the IBA Guidelines to argue that only the facts and circumstances that were not disclosed can raise doubts regarding the arbitrator's impartiality and independence, not the fact of the non-disclosure itself.⁶⁶ It submits that under the applicable standards of the UNCITRAL Rules Judge Schwebel was not obliged to disclose any of the circumstances and that, accordingly, the disclosures he made exceed his obligations under the UNCITRAL Rules.⁶⁷
59. The Claimant likewise dismisses the Respondent's reliance on the IBA Rules of Ethics in this regard. It contends that the IBA Rules of Ethics "were explicitly superseded by the later IBA Guidelines."⁶⁸
60. The Claimant further argues that "even if [the Respondent's] arguments about the governing legal standard had any merit, which they do not, Judge Schwebel in fact made timely disclosure in the Tribunal's Common Disclosure Statement circulated to the parties on 22 May 2012." It adds that the previous appointments as arbitrator and as expert witness were publicly known and easily discoverable.⁶⁹ In any event, the Claimant considers the omission of the second appointment by Judge Schwebel as expert witness "a mere oversight" given the substantive identity of the two expert opinions of 2005 and 2008.⁷⁰ The Claimant submits that the Respondent's "allegation that Judge Schwebel intentionally gamed the timing of his disclosures in an effort to deceive Respondent is no more than reckless conjecture" and "without any evidentiary support."⁷¹
61. The Claimant notes that the arbitrator appointed by the Respondent, Judge Bruno Simma, made an equally "late" disclosure of a previous appointment by Ecuador in a pending investment arbitration. While the Claimant emphasizes that it does not doubt Judge Simma's independence and impartiality, it "does note, however, the inconsistency of Ecuador's argument that Judge Schwebel's disclosure in the Common Disclosure Statement of contacts with counsel more than three years ago constitutes grounds for disqualification when its own appointed arbitrator disclosed a *concurrent* appointment by a *party* to this arbitration at the very same time."⁷²
62. Finally, the Claimant rejects the Respondent's reference to the model disclosure statement of the 2010 UNCITRAL Rules, because the rules are inapplicable in the present case and, because "Judge Schwebel has had no relationship with MSDIA or Respondent, and so even under the model disclosure statement of the 2010 Rules, his disclosure of his prior appointments by WilmerHale was not required."⁷³

⁶⁶ Claimant's Response, pp. 11-12; Claimant's Rejoinder, pp. 12-13, citing *LCIA Reference No. 81160, supra* note 49, para. 4.16 (CCL-5).

⁶⁷ Claimant's Response, p. 3. Claimant's Rejoinder, p. 10.

⁶⁸ Claimant's Response, p. 12.

⁶⁹ Claimant's Response, pp. 12-13.

⁷⁰ Claimant's Response, pp. 13-14.

⁷¹ Claimant's Rejoinder, p. 10.

⁷² Claimant's Response, pp. 3, 13; Claimant's Rejoinder, pp. 2, 9.

⁷³ Claimant's Rejoinder, p. 12.

3. *The circumstances considered in the aggregate*

63. Regarding the Respondent's argument that the facts and circumstances described above also give rise to justifiable doubts if considered in the aggregate, the Claimant argues that "[t]his is not a serious argument" and submits that the Respondent not only fails to "elaborate meaningfully" on it, but also does not provide "any authority whatsoever in support of it."⁷⁴ The Claimant adds that "it makes no sense that a challenge could succeed by aggregating allegations that are themselves of no weight" and stresses that the individual reasons relied upon by the Claimant have been rejected as basis for a challenge in earlier case law.⁷⁵
64. Finally, the Claimant refutes the Respondent's invocation of the grounds for its first challenge, stating that the grounds previously proffered to support an inference of bias against Respondent's counsel are completely irrelevant to the present challenge.⁷⁶ In this context, the Claimants also considers exaggerated and unfounded the Respondent's references to an alleged ridiculing of the Respondent by Judge Schwebel in a publication two years ago, and to an alleged "frequent ... academic collaboration between the Judge Schwebel and a member of Claimant's legal team."⁷⁷

c. **Judge Schwebel's Comments**

65. In his comments dated July 10, 2012, Judge Schwebel asserts that the challenge is groundless.⁷⁸
66. Judge Schwebel presents a summary of the facts of his earlier appointments by parties represented by counsel for the Claimant. First, he states that he was appointed in 1997 as arbitrator in the *Red Sea Islands Arbitration* (Eritrea/Yemen) by the Eritrean Government. He notes that Mr. Gary Born of WilmerHale (then Wilmer Cutler) only acted as co-counsel to lead counsel Professor Brilmayer and emphasizes that "Mr. Born and the firm of Wilmer Cutler did not act in the second phase of the case."⁷⁹
67. He then states that he was appointed in 2008 as arbitrator by the Sudan's People Liberation Movement (the "SPLM") in the *Abyei Arbitration* (Government of Sudan/Sudan People's Liberation Movement) and that Mr. Gary Born acted as the SPLM's lead counsel in the case.⁸⁰
68. Third, he states that, on January 14, 2005, upon request by WilmerHale on behalf of Shell Oil Company, he submitted a Declaration to a United States District Court in California in the case *Shell Oil Company v. Sonia Eduardo Franco Franco et al.* concerning the compatibility with Nicaragua's international legal obligations of the Nicaraguan Special Law 364 and a Nicaraguan court judgment against Shell Oil Company based thereon.⁸¹
69. Fourth, Judge Schwebel states that, in 2008, he was requested by the same counsel and on behalf of the same company "to give the very same opinion in the closely related case [...] *Miguel Angel Sanchez Osorio et al. v. Dole Food Company, The Dow Chemical Company,*

⁷⁴ Claimant's Response, p. 14.

⁷⁵ Claimant's Response, p. 14.

⁷⁶ Claimant's Response, p. 14.

⁷⁷ Claimant's Rejoinder, pp. 8-9.

⁷⁸ Judge Schwebel's Comments, p. 3.

⁷⁹ Judge Schwebel's Comments, p. 1.

⁸⁰ Judge Schwebel's Comments, p. 1.

⁸¹ Judge Schwebel's Comments, p. 2.

Occidental Chemical Company, and Shell Oil Company,” which he submitted to the Circuit Court in Miami-Dade County on June 6, 2008.⁸²

70. Judge Schwebel argues that due to the identity of the opinions submitted in 2005 and 2008, “[i]n substance, I had given a single opinion used twice by Shell in the course of litigation over the same Nicaraguan law, and did not think to list separately two opinions” in the Joint Disclosure Statement.⁸³ In his view, reliance on his accidental conflation of the two identical opinions as grounds for a challenge is “disproportionate.”⁸⁴
71. Judge Schwebel argues that the allegation of a late disclosure should take into account Respondent’s previous challenge of his appointment. According to Judge Schwebel, “[t]hat strongly pressed challenge naturally consumed my attention. I was preoccupied with it and, in view of it, it did not occur to me while it was pending to disclose prior appointments by WilmerHale, the moreso because those appointment were few, made years ago, and in matters unrelated to the instant case.”⁸⁵ He notes that Judge Simma also thought reasonable to withhold disclosure or inadvertently failed to disclose his earlier and current appointments by the Respondent until shortly after the rejection of the Respondent’s challenge when the Tribunal members issued their Joint Disclosure Statement.⁸⁶

III. REASONING

a. Legal Standard

72. The Parties agree that the applicable standards for the resolution of the Respondent’s challenge are found in Articles 9 and 10(1) of the UNCITRAL Rules.⁸⁷ Article 10(1) states that an “arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” Article 9 of the UNCITRAL Rules requires an arbitrator to disclose “any circumstances likely to give rise to justifiable doubts as to his impartiality or independence.” The disclosure shall be made to the parties at the time that the arbitrator is appointed or chosen, “unless they have already been informed by him of these circumstances.”
73. Both sides further recognize that the “justifiable doubts” standard established by Article 10(1) is an objective one: it requires that a reasonable and fair-minded third person, having knowledge of the relevant facts deems that “circumstances exist which give rise to justifiable doubts as to [the arbitrator’s] impartiality or independence.”⁸⁸
74. The Parties disagree, however, on the applicable standard and scope of disclosure required by Article 9. The Respondent argues that the standard is subjective and cites the test established by General Standard 3 of the IBA Guidelines that “[i]f 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 [...], prior to accepting his or her

⁸² Judge Schwebel’s Comments, p. 2.

⁸³ Judge Schwebel’s Comments, p. 2.

⁸⁴ Judge Schwebel’s Comments, p. 2.

⁸⁵ Judge Schwebel’s Comments, p. 3.

⁸⁶ Judge Schwebel’s Comments, pp. 2-3.

⁸⁷ Respondent’s Request, p. 6; Claimant’s Response, p. 4.

⁸⁸ Respondent’s Request, pp. 6-8; Respondent’s Rebuttal, p. 3, note 11; Claimant’s Response, p. 4. *National Grid PLC v. Republic of Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler, December 3, 2007.

appointment.”⁸⁹ According to the Respondent, an arbitrator must therefore disclose “any circumstances that are relevant to the parties’ evaluation of the arbitrator’s reliability to act with requisite impartiality and independence.”⁹⁰ The Claimant, meanwhile, argues that the test established by Article 9 is objective and “presents a higher threshold for disclosure than the IBA Guidelines which provide a subjective test.”⁹¹ The Claimant submits, in any event, that the IBA Guidelines “do not adopt a purely subjective test” as reflected in the Green List of situations that never give rise to justifiable doubts.⁹²

75. It should be noted that the IBA Guidelines and Rules of Ethics (i) are promulgated by a private body that cannot purport to legislate for international arbitration generally; and (ii) in the IBA Guidelines themselves, it is expressly recognized that they “are not legal provisions and do not override any applicable national law or arbitration rules chosen by the parties.”⁹³ In the absence of an agreement of the parties to a dispute on the application of the IBA Guidelines to a challenge, the IBA Guidelines represent only the non-binding views of one group of practitioners on arbitrator conflicts of interest.
76. While the IBA Guidelines look to the facts or circumstances that “may, in the eyes of the parties, give rise to doubts,” Article 9 of the UNCITRAL Rules requires that an arbitrator disclose “any circumstance likely to give rise to justifiable doubts concerning his impartiality or independence.” Any doubt should be resolved in favor of disclosure.
77. Non-disclosure nevertheless does not automatically give rise to justifiable doubts pursuant to Article 10(1) of the UNCITRAL Rules. As argued by the Respondent, this depends on the circumstances of the case, including “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 the impartiality and independence, and whether the nondisclosure is an aberration on the part of a conscientious arbitrator or part of a pattern of circumstances raising doubts as to impartiality.”⁹⁴
78. Lastly, expert appointments, although different in nature from arbitrator appointments, remain relevant to the consideration of arbitrator independence and impartiality. The direct financial relationship and interaction between the party or its counsel and the expert renders such relationships relevant for disclosure under Article 9 and for consideration in the event of a challenge.

b. The Respondent’s Challenge to Judge Schwebel

79. In evaluating this challenge, I have considered all the submissions of the Parties and the comments of Judge Schwebel. In ruling on the challenge, however, I will address only the issues that I consider necessary to arrive at my decision.
80. The Respondent challenges Judge Schwebel’s impartiality and independence on three grounds: first, late and incomplete disclosure by Judge Schwebel; second, multiple appointments of

⁸⁹ Respondent’s Request, p. 3, quoting *IBA Guidelines on Conflicts of Interest in International Arbitration*, General Standard 3(c), Disclosure by the Arbitrator, p. 9 (RCL-3). Emphasis added by the Respondent.

⁹⁰ Respondent’s Request, p. 3.

⁹¹ Claimant’s Response, p. 11, note 30.

⁹² Claimant’s Rejoinder, p. 11.

⁹³ *IBA Guidelines on Conflicts of Interest in International Arbitration*, Introduction, para. 6 (RCL-3).

⁹⁴ S.A. Baker & M. D. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (1992), p. 50 (RCL-31).

Judge Schwebel as arbitrator and expert on behalf of parties represented by counsel for the Claimant; and, third, an aggregate of the previous two grounds.

81. Judge Schwebel made disclosures on May 22, 2012 in the Joint Disclosure Statement and on June 6, 2012, the Respondent learned by correspondence from the Claimant's counsel of Judge Schwebel's additional engagement as expert witness in *Miguel Angel Sanchez Osorio et al. v. Dole Food Company, Inc. et al.*⁹⁵ Given that the Respondent gained knowledge of the additional expert engagement on June 6, 2012, the challenge, viewed on its face, meets the timeliness requirements of the UNCITRAL Arbitration Rules.

1. Judge Schwebel's late and incomplete disclosures

82. The Respondent asserts that Judge Schwebel's late and incomplete disclosure is in violation of the duty of disclosure under Article 9 and gives rise to justifiable doubts as to his impartiality and independence under Article 10(1).
83. Full disclosure by an arbitrator upon appointment is indispensable, not only to ensure the general legitimacy of arbitral proceedings, but also to allow the parties to assess whether they wish to exercise their rights to challenge an arbitrator under the UNCITRAL Rules if they are of the view that the arbitrator does not meet the requisite standard of independence and impartiality.⁹⁶ Judge Schwebel was appointed as arbitrator by the Claimant on November 29, 2011. Yet, it was only on May 22, 2012 that he disclosed two earlier appointments as arbitrator in boundary arbitrations involving States on behalf of parties represented by counsel for the Claimant, as well as an engagement as an expert witness on behalf of a party represented by counsel for the Claimant in a U.S. district court proceeding. In addition, on June 6, 2012, the Respondent learned that Judge Schwebel had acted as an expert on behalf of the same party represented again by counsel for the Claimant in another case in a U.S. district court.
84. Even if the Respondent and its counsel knew or should be presumed to have known of Judge Schwebel's appointments in two public and high-profile arbitrations, this would not exonerate Judge Schwebel from his duty to make prompt and full disclosure. Judge Schwebel should have disclosed all his recent appointments as arbitrator or expert on behalf of parties represented by counsel for the Claimant promptly upon his appointment in this case. These circumstances clearly fall within the scope of his disclosure obligation, which Judge Schwebel failed to meet in this case.
85. However, the circumstances of Judge Schwebel's late and incomplete disclosure do not support the inference that he lacks independence or impartiality. The precedents relied upon by the Respondent principally deal with non-disclosure, rather than the distinct situation of late disclosure. The disclosures made in the Joint Disclosure Statement, if late, were nonetheless of the Tribunal's own initiative. Judge Schwebel's non-disclosure of the second expert opinion also appears to be an inadvertent omission in an otherwise honest exercise of discretion, resulting from the connection between the two expert engagements and the nearly identical content of the two opinions. I therefore find this late and incomplete disclosure to be an aberration on the part of the arbitrator rather than part of a pattern of circumstances that could raise doubts about his impartiality.

⁹⁵ Respondent's Request, p. 10; E-mail from Charles S. Beene to Mr. Mark Clodfelter, June 6, 2012 (RCE-5).

⁹⁶ Gary Born, *International Commercial Arbitration* (2011), Vol. I, p. 1620.

2. *Judge Schwebel's past appointments on behalf of parties represented by counsel for the Claimant*

86. The Respondent further bases its challenge on the fact that Judge Schwebel was appointed as arbitrator and as expert by the Claimant's counsel in four earlier cases and argues that these establish "a pattern of joint efforts by Judge Schwebel and Claimant's counsel."⁹⁷
87. The issue of multiple appointments involves, but is not limited to, a consideration of financial dependence arising from the significance of the multiple appointments—and expectation of future appointments—to the arbitrator's income. The issue of multiple appointments also engages the question of an affinity developed by the arbitrator for the party or the counsel that has repeatedly appointed him or her. It should therefore not be limited to an examination of financial dependence arising from the arbitrator's income from the appointments. The question remains: do the number and significance of the appointments considered in context, and in light of the period of time over which the appointments were made, raise justifiable doubts in the eyes of a reasonable and fair-minded third person as to the arbitrator's independence or impartiality?
88. The previous appointments of Judge Schwebel as arbitrator on behalf of parties represented by counsel for the Claimant occurred in 1997 and 2008, and those as expert in 2005 and 2008, approximately fifteen, seven, and three and a half years prior to his appointment in this case.
89. Considered in the context of Judge Schwebel's total number of publicly known appointments as arbitrator or expert, the four prior appointments on behalf of parties represented by counsel for the Claimant do not give rise to justifiable doubts as to Judge Schwebel's financial independence. In terms of the potential effect that the appointments might hold for an appearance of bias on the part of Judge Schwebel, a closer look is warranted.
90. Judge Schwebel's appointment in the *Red Sea Islands Arbitration* is remote in time—the appointment being some fifteen years prior to the one under consideration. On the other hand, Judge Schwebel's appointment in the *Abyei Arbitration* is an important and relatively recent appointment. The retainer of Judge Schwebel as expert in the first Shell Oil matter is also significant. This potential conflict is however not significantly augmented by the second opinion. The submission of a nearly identical opinion in a related case involving the same party, counsel, and subject matter renders the second retainer akin to a continuation of the first.
91. The second opinion could, nonetheless, enhance an appearance of prejudgment to the extent that its contents are relevant to the present matter. However, beyond a general summary and analysis of the law on denial of justice at international law, the opinion focuses on the examination of a particular Nicaraguan law and judgments rendered pursuant thereto. It does not therefore express an opinion on any matter distinctly put in issue in the present arbitration. Nor does it demonstrate an unwillingness or apparent inability to consider alternative viewpoints and arguments that may be presented in the course of this arbitration. Indeed, the second opinion is almost identical to the first, except for the removal of a few paragraphs where Judge Schwebel had explicitly analyzed and drawn conclusions as to the compliance of the Nicaraguan law and proceedings with international due process. The second opinion therefore restricts itself more closely to a simple analysis of the relevant doctrine and jurisprudence on denial of justice, drawing principally on sources relied upon by the Respondent itself in these proceedings.
92. Taking all relevant circumstances into account, the prior appointments of Judge Schwebel—while relevant disclosure items—do not give rise to justifiable doubts in the eyes of a

⁹⁷ Respondent's Request, p. 15.

reasonable and fair-minded third person. The earlier appointments are limited in number and were spread over a significant period. They do not support the inference that Judge Schwebel has developed a particular affinity or close professional relationship with the counsel for the Claimant. Nor does the content of the expert opinions suggest that he has prejudged issues in the present case.

3. The circumstances considered in the aggregate

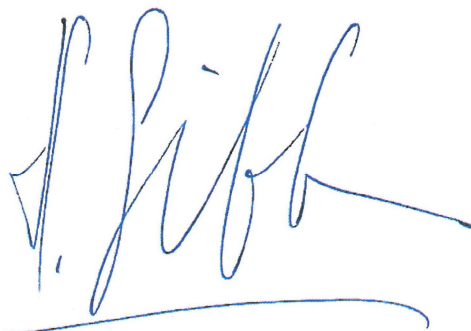
93. Third, the Respondent argues that the above-circumstances, if viewed in the aggregate, “confirm the existence of a close professional relationship and combined efforts [...] between Claimant’s counsel and Judge Schwebel, on the basis of which any reasonable third party would conclude the he either is, or appears to be, partial and non-independent.”⁹⁸
94. There is merit in the argument that several circumstances can, considered in the aggregate, give rise to justifiable doubts concerning an arbitrator’s independence and impartiality, even when each of the circumstances, if viewed separately, does not give rise to justifiable doubts. As previously discussed, neither the circumstances of Judge Schwebel’s late and incomplete disclosure, nor the circumstances of his previous appointments on behalf of parties represented by counsel for the Claimant, give rise to justifiable doubts on their own. This assessment does not, in this case, change when considered in the aggregate. The earlier appointments coupled with the inadvertent omission of a previous appointment as expert in a case before a U.S. district court to render an opinion which is largely identical to a voluntarily-disclosed prior appointment does not, in the eyes of a reasonable, objective, and informed third person amount to a “close professional relationship” giving rise to justifiable doubts as to Judge Schwebel’s impartiality or independence.

IV. DECISION

NOW THEREFORE, I, Hugo Hans Siblesz, Secretary-General of the Permanent Court of Arbitration, having considered the submissions of the Parties and the comments of Judge Stephen M. Schwebel, and having established to my satisfaction my competence to decide this challenge in accordance with the UNCITRAL Arbitration Rules,

HEREBY REJECT the challenge brought against Judge Stephen M. Schwebel under Article 10(1) of the UNCITRAL Arbitration Rules.

Done at The Hague on August 8, 2012.



Hugo Hans Siblesz

⁹⁸ Respondent’s Request, pp. 19-20.