

**THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON D.C.**

In the Proceeding Between:

**ELECTRABEL S.A.**  
*(Claimant)*

v.

**REPUBLIC OF HUNGARY**  
*(Respondent)*

(ICSID Case No ARB/07/19)

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***DECISION ON THE CLAIMANT'S PROPOSAL  
TO DISQUALIFY A MEMBER OF THE TRIBUNAL***

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*Dated 25 February 2008*

*(A) Introduction*

- (1) The two undersigned members of the Tribunal refer to the proposal by the Claimant to disqualify the third member of the Tribunal appointed by the Respondent, Professor Brigitte Stern, under Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules, made by letter dated 21<sup>st</sup> December 2007 to ICSID's Secretary-General from the Claimant's legal representative, Clifford Chance LLP (London).
- (2) The Claimant's proposal was transmitted to the Tribunal and the Respondent by the Secretary-General under Rule 9(2) of the ICSID Arbitration Rules. The proposal was (and remains) contested by the Respondent; and Professor Stern has not accepted the Claimant's unilateral invitation to resign as a member of this Tribunal. Accordingly, upon receipt of the Claimant's proposal, these arbitration proceedings were suspended pursuant to Rule 9(6) of the ICSID Arbitration Rules; and the first session previously fixed for 7<sup>th</sup> January 2008 was cancelled.

- (3) We are now required to decide, under Article 58 of the ICSID Convention and Rule 9(4) of the ICSID Arbitration Rules, whether the Claimant's contested proposal is well-founded under the ICSID Convention and Arbitration Rules.
- (4) To that end, we have also considered the letter dated 28<sup>th</sup> December 2007 from the Respondent's legal representative, Arnold & Porter LLP (Washington D.C.), the letter dated 8<sup>th</sup> January 2008 from the Claimant's legal representative and the letter dated 14<sup>th</sup> January 2008 from the Respondent's legal representative. We have also received the letter dated 28<sup>th</sup> December 2007 from Professor Stern, upon which both the Claimant and the Respondent commented in their subsequent letters of 8<sup>th</sup> and 14<sup>th</sup> January 2008 respectively.
- (5) We record our thanks and appreciation for the work and scholarship expended by both Parties in making their extensive written submissions to us on the Claimant's proposal.
- (6) For reasons which appear below, we have not found it necessary to refer to Professor Stern's letter, save to record her statement in these words: " ... I consider that it is my duty when acting as an arbitrator to be both independent and impartial, that I consider that I have always complied with such duty in the numerous arbitrations in which I have been sitting and that I will continue to act independently and impartially in all the arbitral tribunals in which I will be called to sit."<sup>1</sup>

*(B) Article 57 and Rule 6*

- (7) It is appropriate to start with the relevant legal texts to be applied in deciding the Claimant's proposal. The proposal addresses two linked provisions: Article 57 of the ICSID Convention as to the exercise of an arbitrator's independent judgment and Rule 6 of the ICSID Arbitration Rules as to the declaration of independence by an arbitrator.
- (8) *Independent Judgment:* Article 57 of the ICSID Convention provides for the disqualification of a tribunal member (inter alia) "on account of any fact indicating a manifest lack of the qualities" required by Article 14(1) of the ICSID Convention, namely "high moral character and recognised competence in the fields of law, commerce industry or finance, who may be relied upon to exercise independent judgment." As indicated in the Report of the Executive Directors on the Convention, Article 14(1) "seeks to ensure that Panel members will possess a high degree of competence and be capable of exercising independent judgment. In keeping with the essentially flexible character of the proceedings, the Convention permits the parties to

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<sup>1</sup> Professor Stern's letter of 28.12.2007, p. 1.

appoint ... arbitrators from outside the Panels but requires (Article ... 40(2)) that such appointees possess the qualities stated in Article 14(1)": see paragraph 21 of the Report. Accordingly, the standard required for independent judgment is the same for all tribunal members whether appointed by a party from within or without the Panel of Arbitrators maintained by ICSID under Article 3 of the Convention.

- (9) As regards the effect of Article 57, the Claimant contends that the legal standard can be interpreted narrowly: it is never satisfied if, from established facts, there is "some reasonable doubt as to the impartiality of the arbitrator."<sup>2</sup> The Claimant cites a passage from the ICSID Decision in *Aguas del Aconquija*:<sup>3</sup>

*"[T]he question seems to us to be whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party. If (and only if) the answer is yes can it be said that the arbitrator may not be relied on to exercise independent judgment. That is to say, the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality. If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld."*

- (10) The Claimant also refers to Rules 3.2, 3.3, 4.1 and 4.2 of the 1987 IBA Rules of Ethics for International Arbitrators, to the 2004 IBA Guidelines on Conflicts of Interest in International Arbitration, Orange List (3.1.3, 5 and Pt II, # 3) and, principally, to the ICSID Decisions in *Suez*<sup>4</sup> and *SGS v Pakistan*<sup>5</sup> and the UNCITRAL awards in *EnCana*.<sup>6</sup> The Claimant acknowledges that the IBA Rules and Guidelines are not "legally binding in this case"<sup>7</sup> (being private documentation issued by a non-governmental institution not specifically directed at investor-state arbitration, still less ICSID arbitration).
- (11) *Declaration*: Rule 6 of the ICSID Arbitration Rules requires each tribunal member, before or at the first session, to sign a written declaration in the prescribed form. Any member failing to sign such declaration by the end of the first session "shall be deemed to be discharged". The form requires the member to declare: "To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by [ICSID with respect to the parties' dispute] ... I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction .... with regard to the proceeding from any source except as provided in

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<sup>2</sup> Claimant's letter of 21.12.2007, # 21.

<sup>3</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic* ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee, 3<sup>rd</sup> October 2001, p.180.

<sup>4</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v Argentina* ICSID Case No ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22<sup>nd</sup> October 2007.

<sup>5</sup> *SGS Société Générale de Surveillance S.A. v Pakistan*, ICSID Case No. ARB/01/13, Decision on the Claimant's Proposal to Disqualify Arbitrator, 19<sup>th</sup> December 2002, (2005) 8 *ICSID Rep* 398.

<sup>6</sup> *Encana Corporation v Republic of Ecuador*, Partial Award on Jurisdiction, 27<sup>th</sup> February 2004, # 44-45, and Award, 3<sup>rd</sup> February 2006, # 10.

<sup>7</sup> Claimant's letter of 08.01.2008, footnote 19.

[the ICSID Convention, Regulations and Rules].” There follows a passage permitting the member to attach a statement of (a) his or her “past and present professional, business and other relationships (if any) with the parties” and (b) “any other circumstance that might cause my reliability for independent judgment to be questioned by a party.” The form concludes: “I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding.”

- (12) As regards Rule 6, the Claimant also refers to Paragraph 3.1.5 and General Standard 3(a) of the IBA Guidelines .
- (13) We note Paragraph 5 of Part II of the IBA Guidelines: “... a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in ... later disqualification. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.”

*(C) The Factual Grounds for the Claimant’s Proposal*

- (14) On 26<sup>th</sup> September 2007, the Claimant appointed Professor Kaufmann-Kohler as its party-appointed Arbitrator in these arbitration proceedings. On 12<sup>th</sup> November 2007, the Respondent appointed Professor Stern as its party-appointed Arbitrator. On 30<sup>th</sup> November 2007, the Parties were informed by ICSID that Mr V. V. Veeder had been appointed as President of the Tribunal by agreement of the two party-appointed Arbitrators.
- (15) On 13<sup>th</sup> November 2007, ICSID forwarded to the Parties the two Declarations of Independence signed by Professor Kaufmann-Kohler dated 5<sup>th</sup> October 2007 and Professor Stern dated 13<sup>th</sup> November 2007. On 6<sup>th</sup> December 2007, ICSID forwarded to the Parties the Declaration of Independence signed by Mr Veeder dated 5<sup>th</sup> December 2007.
- (16) Professor Stern’s Declaration contained no separate attachment stating any matter under paragraphs (a) or (b) listed under Rule 6 of the ICSID Arbitration Rules.
- (17) On 5<sup>th</sup> December 2007, ICSID confirmed to the Parties that the Tribunal had been formally constituted under the ICSID Convention and Arbitration Rules. Thereafter, the first session was fixed to take place on 7<sup>th</sup> January 2008 in London.
- (18) By email dated 11<sup>th</sup> December 2007, the Claimant’s legal representative enquired of the Respondent’s legal representative whether Professor Stern or Mr Veeder were serving as arbitrators in other ICSID arbitration proceedings which (so the Claimant

understood) were pending between the Respondent and another claimant, AES, i.e., AES Summit Generation Limited and AES-Tisza Eromu Kft, ICSID Case No. ARB/07/22 (for ease of reference, here called the "AES arbitration").

- (19) The Respondent in these proceedings is legally represented by Arnold & Porter LLP. The Respondent in the AES arbitration is also represented by Arnold & Porter LLP. Hence, the Claimant's inquiry was naturally addressed to the Respondent's legal representative in its twin roles, being necessarily privy to the appointment of the Respondent's party-appointed arbitrators in the two arbitrations. Moreover, the relevant individuals in the two law firms (Clifford Chance and Arnold & Porter) are senior arbitration specialists who are evidently well-known to each other and are on friendly, first-name terms.
- (20) By email dated 11<sup>th</sup> December 2007 (the same day), the Respondent's legal representative confirmed that Professor Stern served on the ICSID tribunal in the AES arbitration as the arbitrator appointed by the Respondent, but that Mr Veeder did not.
- (21) As was later confirmed by the Respondent, the AES tribunal was constituted on 5<sup>th</sup> November 2007, with Professor Stern's appointment notified to ICSID on 12<sup>th</sup> October 2007. Hence, the Claimant rightly contends that Professor Stern would have known of her appointment in the AES arbitration by the time she signed her written declaration in these proceedings on 13<sup>th</sup> November 2007. However, Professor Stern could reasonably have assumed at that time that her earlier appointment as arbitrator in the AES arbitration was or would soon become public knowledge from ICSID's open website. She therefore had no reason to hide that appointment from the Claimant in these proceedings: it was bound to be or to become common knowledge long before this arbitration's first session on 7<sup>th</sup> January 2008, being the deadline for declarations under Rule 6.
- (22) By email dated 12<sup>th</sup> December 2007, the Claimant's legal representative expressed concerns over the appointment of Professor Stern as a party-appointed arbitrator by the Respondent in both these arbitration proceedings and the AES arbitration. The Claimant understood that both arbitrations arose from long-term Power Purchase Agreements with disputes over the fixing of tariffs and issues arising under the Energy Charter Treaty. The Claimant also understood that the two arbitrations had been registered by ICSID on the same date (13<sup>th</sup> August 2007) and that it was very likely that the two arbitrations would run in parallel.
- (23) By email dated 13<sup>th</sup> December 2007, the Respondent's legal representative replied (inter alia): "... The two cases are quite distinct from one another, and we believe Professor Stern would be fully capable of performing her duties in one case without prejudice to the other. The overlap regarding the relevant facts or legal issues is likely to be no greater (and perhaps significantly less) than in the various ICSID cases initiated against Argentina in the wake of its financial crisis.<sup>8</sup> As you are no doubt

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<sup>8</sup> Respondent's letter of 28.12.2007, # 35 lists six arbitrators appointed by Argentina to multiple ICSID tribunals concurrently deciding disputes arising from the Argentinean financial crisis of 2000-2001; and

aware, your appointed arbitrator, Professor Kaufmann-Kohler, sits as an arbitrator in several of those cases ... We believe that Professor Stern is no less capable than Professor Kaufmann-Kohler of exercising independent judgment in each case, or separating the evidence and arguments presented in another. Yet that appears to be the sole basis for your objection ....”

- (24) Later, the Respondent’s legal representative added: “... Hungary readily acknowledges that both cases have been brought by electricity generators with long-term Power Purchase Agreements (PPAs) with a Hungarian state-owned company, and are based on alleged violations of the Energy Charter Treaty (“ECT”). Nevertheless, the two proceedings do not fit the classical notion of related cases. They do not involve the same contract or even contracts that are in any way dependent on one another; they do not involve the same investment nor the same physical facilities or operations; and they do not concern related parties (apart from Hungary itself). AES Summit Generation Ltd (UK) and AES Tisza Eromu Kft (Hungary) are subsidiaries of US-based AES Corp., while Electrabel is a Belgian company and part of the Suez Group.”<sup>9</sup>
- (25) The Claimant’s legal representative replied by letter dated 18<sup>th</sup> December 2007, to which the Respondent’s legal representative responded by letter on 19<sup>th</sup> December 2007.
- (26) With the matter left unresolved by these private exchanges between the Parties, the Claimant made its proposal to disqualify Professor Stern by its letter dated 21<sup>st</sup> December 2007 to ICSID’s Secretary-General.
- (27) It should be noted that these written exchanges were all made courteously and professionally, as might have been expected from their authors; and that the Claimant raised its concerns at the earliest opportunity, first privately with the Respondent and then formally with the ICSID Secretary-General. This was no tactical device by a party acting in bad faith to thwart or delay the arbitral process. To the contrary, as the Claimant party with the first session imminent on 7<sup>th</sup> January 2008, it was not in the Claimant’s interest to impede these arbitration proceedings unnecessarily. Further, the Claimant’s proposal has carefully eschewed any personal attack on Professor Stern. As recorded in the Claimant’s concluding submissions: “Electrabel does not seek to embarrass Professor Stern or force her to resign. However, Electrabel does maintain that the situation in which it has now been placed does require Professor Stern’s disqualification.”<sup>10</sup>

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# 37 lists four arbitrators appointed by different claimants in multiple ICSID tribunals against Argentina concurrently hearing similar disputes.

<sup>9</sup> Respondent’s letter of 28.12.2007, # 17.

<sup>10</sup> Claimants’ letter of 08.01.2008, # 68.

*(D) The Grounds for the Claimant's Proposal*

- (28) The Claimant accepts that our decision “must be made on the basis of an objective review of the established facts.”<sup>11</sup>
- (29) The Claimant contends that Professor Stern (i) does not meet the legal standard for the exercise of independent judgment under Article 57 as a member of the Tribunal in these arbitration proceedings and (ii) failed to make appropriate disclosures in her written declaration, as required by Rule 6. The two complaints are inextricably linked, in the Claimant’s own words: its reservations “about Professor Stern’s continuing service as a member of the Tribunal in [this arbitration] turn *solely* upon the issue of her ability to exercise independent judgment in [this arbitration] in light of her appointment by [Hungary] in the AES case.”<sup>12</sup> (emphasis supplied).
- (30) It is important to record what the Claimant is *not* alleging against Professor Stern in its proposal. The Claimant has expressly stated that it “does not suggest that there is evidence of actual bias on Professor Stern's part.”<sup>13</sup> Moreover, the Claimant “does not suggest that Professor Stern could not, in general, be relied upon to exercise independent judgment”; and “Her qualifications, experience and eminence are readily acknowledged” by the Claimant.<sup>14</sup>
- (31) It is also important to record what the Claimant is *not* invoking, expressly, as a factual basis for its complaint regarding the exercise of independent judgment by Professor Stern:
- (a) It is not suggested by the Claimant “that Professor Stern manifestly lacks independence solely because she was appointed by [Hungary] in the AES case ....”<sup>15</sup>
- (b) It is not contended by the Claimant that its proposal hinges on the single fact of Professor Stern’s concurrent appointment by Hungary to serve on the AES tribunal.<sup>16</sup>
- (c) It is not contended by the Claimant that the mere existence of some professional relationship with a party is an automatic basis for disqualification of an arbitrator.<sup>17</sup>

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<sup>11</sup> Claimant’s letter of 08.01.2008, # 9.

<sup>12</sup> Claimant’s letter of 21.12.2007, # 10.

<sup>13</sup> Claimant’s letter of 21.12.2007, # 13.

<sup>14</sup> Claimant’s letter of 08.01.2008, # 21.

<sup>15</sup> Claimants’ letter of 08.01.2008, # 2.

<sup>16</sup> Claimant’s letter of 08.01.2008, # 22.

<sup>17</sup> Claimants’ letter of 08.01.2008. # 22.

- (d) It is not suggested by the Claimant "... that Professor Stern manifestly lacks independence, solely because both the Electrabel and the AES case are brought under the same treaty, the Energy Charter Treaty ...."<sup>18</sup>
- (e) No reliance is placed by the Claimant "solely on the proposition that the two cases appear to arise out of similar factual circumstances ...."<sup>19</sup>
- (f) No reliance is placed by the Claimant "... solely on the fact that [Hungary] is represented by the same law firm, Arnold & Porter LLP, in both cases."<sup>20</sup>
- (g) The Claimant "does not question the importance of the right of a party, including a State party, to appoint its arbitrator ...."<sup>21</sup>

*(E) Professor Stern*

- (32) Professor Stern is highly qualified and experienced as an international arbitrator, from France. Her legal qualifications and career speak for themselves, as the Claimant readily acknowledges. Her name is listed on the Panel of Arbitrators maintained by ICSID under Article 3 of the ICSID Convention. She is, undoubtedly, one of the world's most able arbitrators in the specialised fields of foreign investment law and foreign investment arbitration.
- (33) Professor Stern is not a Hungarian national. Prior to her two appointments currently at issue, Professor Stern had no relationship with the Respondent. As regards the Respondent's legal representative, Professor Stern had not been previously appointed by that legal representative in any other arbitration on behalf of any other client. The only previous relationship with the Respondent's legal representative was an ICSID *ad hoc* annulment committee where (ironically) Professor Stern's decision was adverse to the client then represented by that representative and favourable to the (then) client of the legal representative now representing the claimant in the AES arbitration, opposed to the Respondent and the Respondent's legal representative.<sup>22</sup>

(It is undisputed that Professor Stern is a person "of high moral character and recognized competence in the field ... of law" within the meaning of Article 14(1) of the ICSID Convention.)

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<sup>18</sup> Claimants' letter of 08.01.2008, # 2  
<sup>19</sup> Claimants' letter of 08.01.2008, # 2.  
<sup>20</sup> Claimants' letter of 08.01.2008, # 2.  
<sup>21</sup> Claimant's letter of 08.01.2008, # 5.  
<sup>22</sup> Respondent's letter of 28.12.2007, footnote 18.



- (34) The only issue is whether Professor Stern can be relied upon, in this case, to exercise independent judgment as required by Article 14(1) of the Convention.

*(F) Reasons, Decision and Costs*

- (35) *Reasons*: The test is high for a complainant to establish under Article 57 an arbitrator's "manifest lack" in the quality required to exercise independent judgment. As explained by Professor Schreuer, Article 57 imposes "a relatively heavy burden of proof on the party making the proposal."<sup>23</sup> Reed *et al* concur: "Article 57 of the Convention sets an extremely high bar for challenging an arbitrator ... A party must base a challenge on facts, rather than inference, proving the arbitrator's manifest lack of ... ability to exercise independent judgment."<sup>24</sup> The word "manifest" is here an important qualification, being wording used to similar effect in Articles 36(3) and 52(1)(b) of the ICSID Convention.
- (36) By reference to decisions on Article 52(2)(b) of the ICSID Convention (providing for annulment of an award where the tribunal has "manifestly" exceeded its powers"), the word "manifest" can be interpreted to mean "self-evident", "clear", "plain on its face" or even "certain", rather than "the product of elaborate interpretations one way or the other" or "susceptible of argument one way or the other" or "... being ... necessary to engage in elaborate analyses."<sup>25</sup> In Schreuer's commentary, the word manifest "may be defined as easily understood or recognised by the mind ... It relates to the ease with which it is perceived ... [and] ... to the cognitive process that makes it apparent. An excess of power is manifest if it can be discerned with little effort and without deeper analysis."<sup>26</sup>
- (37) The Claimant, in its last submissions, helpfully listed the several factors comprising its complaint as to Professor Stern's "manifest" incapability of exercising independent judgment in these arbitration proceedings:
- (a) Professor Stern has been appointed by the same party, Hungary, in the AES case;
  - (b) Hungary is represented by the same law firm, Arnold & Porter, in the AES case;
  - (c) Both arbitrations arise out similar factual circumstances relating to the generation of electricity in Hungary;

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<sup>23</sup> Schreuer, *The ICSID Convention: A Commentary* (2001), p.1200, #16.

<sup>24</sup> Reed, Paulsson & Blackaby, *Guide to ICSID Arbitration* (2004), p. 80.

<sup>25</sup> These phrases are collected from the decisions in *Wena Hotels v Arab Republic of Egypt*, ICSID Case No. ARB/98/4. Decision on Annulment, 5<sup>th</sup> February 2005, # 25; *CDC Group Plc v The Republic of Seychelles*, ICSID Case No. ARB/02/04, Decision on Annulment, 29<sup>th</sup> June 2005, #41; and *Mitchell v The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, 1<sup>st</sup> November 2006, # 20.

<sup>26</sup> Schreuer, *ibid*, pp. 932-033, # 138.

- (d) Both arbitrations arise out of similar long-term Power Purchase Agreements (PPAs);
- (e) Both arbitrations concern, among other disputes, the same governmental decree;
- (f) Both arbitrations relate to the same treaty, the ECT; and
- (g) Both arbitrations were registered on the same day, 13<sup>th</sup> August 2007, and the two proceedings will likely run more or less in parallel.<sup>27</sup>
- (38) If we were to consider separately these individual factors (a) to (g) , there would in our view be nothing left to the Claimant’s complaint. Rightly, the Claimant almost concedes as much: see the several concessions listed above in paragraph (31). However, that is not the way the Claimant advances its proposal: it seeks to put together these individual factors and then complain of their “combination.”<sup>28</sup>
- (39) On the established facts of this case, we consider that the combination of factors (a), (b), (d), (e), (f) and (g) do not impugn the independent judgment to be exercised by Professor Stern. Nor do we consider, in this case, that it can make any difference when the Claimant packages all these factors together. In our view, the Claimant’s own methodology brings about its own demise: 0 + 7 remains 0 and not 7. Two or more factors which do not satisfy the test required under Article 57 cannot, by mere “combination,” meet that test.
- (40) We recognise that factor (c) could potentially fall into a different category . However, by itself at this very early stage of these proceedings, it is not possible for us to know enough about any relevant issue in these proceedings, still less any such issue overlapping between this arbitration and the AES arbitration. On the materials we have seen so far, we do not consider that the Claimant has provided sufficient proof of factor (c) as a relevant matter under Article 57, whether assessed separately or in combination with any other factor(s). In our view, it does not, at present, give rise to any reasonable or clear doubt or real risk in regard to the exercise of independent judgment by Professor Stern in this case.
- (41) Moreover, the Claimant’s combination of factors (c)-(f) not only assumes the end-result desired by the Claimant but it proves far too much. Investment and even commercial arbitration would become unworkable if an arbitrator were automatically disqualified on the ground only that he or she was exposed to similar legal or factual issues in concurrent or consecutive arbitrations. For example, every ICSID arbitration

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<sup>27</sup> Claimant’s letter of 08.01.2008, # 23.

<sup>28</sup> Claimant’s letter of 08.01.2008, #3.

relates to the same ICSID Convention, just as many treaty arbitrations relate to the same Vienna Convention. As for governmental decrees and contractual wording, it is commonplace for arbitrators to review the same legislation or standard form of contract, such as FIDIC, the NYPE form of time charterparty or the Bermuda excess insurance form. We do not consider that Article 57 can now be interpreted, after more than forty years, effectively to outlaw widespread practices so long accepted by users and practitioners generally, particularly when such practices have helped to establish a growing body of specialist and experienced international arbitrators, so long desired by users.

- (42) Finally, we note that the Claimant has taken over thirty pages of detailed written submissions (excluding all appendices) to explain and analyse this allegedly malign combination of otherwise benign factors to impugn the independent judgment of Professor Stern. Such an elaborate analysis cannot be “manifest” on the established facts of this case. In our view, its proposal to disqualify Professor Stern is neither self-evident, clear, plain on its face, nor certain; and it is not easily understood or discerned, even with a good deal of effort.
- (43) For all these reasons, we reject the Claimant’s submission that it has established any relevant deficiency under Article 57. We also reject any criticism by the Claimant of Professor Stern for her declaration under Rule 6. Moreover, we do not interpret Rule 6 as providing, by itself, a relevant deficiency under Article 57 where there would otherwise be no such deficiency under Article 57 by itself. In this regard, we note the Claimant’s candid acknowledgement that even the IBA Guidelines conflict with its case.<sup>29</sup>
- (44) We do not, however, exclude the theoretical possibility of factor (c) becoming a procedural problem in the future: one or more factual issues might possibly overlap between the two arbitrations; and, if it did, that overlap might possibly embarrass Professor Stern and the other two members of the Tribunal; and it might possibly also cause difficulties for the Claimant. Investment arbitration requires procedural vigilance at all times for many reasons; and these theoretical possibilities may provide a further reason for vigilance in this case. However, we are all now alerted to these possibilities; the Claimant is also represented by experienced arbitration practitioners; there can now be no material waiver or acquiescence asserted against the Claimant; and there is no present reason to think that any procedural problem cannot be addressed at the time to the mutual satisfaction of both Parties and the Tribunal.

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<sup>29</sup> Claimant’s letter of 08.01.2008. # 64.

- (45) In this regard, it is worthwhile recalling Professor Stern’s statement from her letter cited at the beginning of this document, together with the concluding terms of her signed declaration: see paragraphs (6) and (12) above. We are therefore confident that if there were ever a problem, we would learn of it promptly from Professor Stern herself.
- (46) *Decision:* For these reasons, we decide that the Claimant’s proposal to disqualify Professor Stern is not well-founded under Article 58 of the ICSID Convention and Rule 9(4) of the ICSID Arbitration Rules.
- (47) *Costs:* The Respondent has requested that we order the Claimant to bear all the costs of this procedure, including “full ICSID costs” and the reimbursement of the legal fees incurred by the Respondent<sup>30</sup>. The Claimant has requested us to reject this claim and, in turn, asked that it be allowed its costs against the Respondent.<sup>31</sup>
- (48) It is far from clear to us that we have any power under the ICSID Convention or Arbitration Rules to make any decision, still less any order or award, regarding the liability, allocation or amount of legal and arbitration costs incurred by this procedure. In any event, if we were to have any such power, we would chose as a matter of discretion not to exercise it for or against either Party in the particular circumstances of this case. We consider that this particular procedure resulting in this decision may have usefully cleared the air to the benefit of both Parties and the Tribunal as a whole, so as to permit these arbitration proceedings to continue without any sense of grievance anywhere.
- (49) Accordingly, for the time being at least, the Parties’ legal costs must lie where they fall, subject to any further application at the end of these arbitration proceedings, when the general issue of arbitration and legal costs may be addressed by the full Tribunal in further consultation with the Parties.

[Signed]

Gabrielle Kaufmann-Kohler

[Signed]

V.V.Veeder

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<sup>30</sup> Respondent’s letter of 28.12.2007, #48.

<sup>31</sup> Claimant’s letter of 08.01.2008, # 75.