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Paris, 8 January 2020

Dear colleagues,

I have been challenged as an arbitrator in the case *Petroceltic Holdings Limited and Petroceltic Resources Limited v. Arab Republic of Egypt*, ICSID No. ARB/19/7, by a challenge presented by Claimants' counsel, dated 10 December 2020. The bases for the challenge are the following:

> « Claimants respectfully ask that Ms. Stern be disqualified because of : (1) her failure to meet her disclosure obligations, (2) her repeated appointments by States, and (3) her repeated appointments by Egypt. Each of these three independent reasons is sufficient to disqualify Ms. Stern; however, taken together, there is no question that she should be disqualified. » (Letter of 10 December 2019 containing the Request of Disqualification, hereinafter RoD, p. 3)

Before presenting answers to these alleged reasons for my disqualification, I think it is useful to clarify the different steps in the chronology which have ended up in the RoD.

The chronology of the disclosure process

On 3 September 2019, I was informed by ICSID that Egypt has appointed me as an arbitrator on 1 September 2019 in the referred case and that they were seeking my acceptance of this nomination.

On 5 September 2019, I sent my declaration of acceptance accompanied by the following Statement :

« I was asked by ICSID to include a statement of my past and present involvement with the parties and counsel, which I do with the present statement. I consider that there is no circumstance that could cause my reliability for independent and impartial judgment.

First, I want to confirm my **availability** to deal with the mentioned case. My planned schedule perfectly allows me to fulfill the commitment that I have taken by accepting the present case.

Second, I consider that there is no circumstance that could cause my reliability for **independent and impartial judgment**. However, for full information and transparency, I provide the following information.

I have been previously nominated by Egypt in the following cases:

In **2004**, in *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egyp*t, ICSID Case No. ARB/04/13. The award was rendered on 6 November 2008.

In **2011**, in *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7. The award was rendered on 3 April 2014.

In **2013**, in *Ossama Al Sharif v. Arab Republic of Egypt*, ICSID Case No. ARB/13/3. The case was terminated by an Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) issued on May 27, 2015.

In **2016**, in *ArcelorMittal S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/15/47). The case was terminated by an Order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rule 43(1) issued on 5 December 2016.

In **2017,** in *Nile Douma Holding Co. WLL V. Arab Republic of Egypt*, (PCA Case 17-09). The case is pending.

I add that in am currently sitting in two other Arbitral Tribunals with Charles Poncet, appointed by the Claimant. »

On 11 September 2019, Claimants requested the following additional information :

« We acknowledge receipt of Ms. Brigitte Stern's declaration and statement of her past and present involvement with the parties and their counsel.

As an initial matter, Respondent has not identified its external counsel, if any, for this matter. We would ask Respondent to disclose this information without further delay. Likewise, we would ask Ms. Stern to update her statement to reflect any involvement with Respondent's external counsel.

Claimants currently have four inquiries regarding Ms. Stern's disclosures of five previous arbitrations where "Egypt" nominated her as arbitrator.

First, Ms. Stern's disclosures do not identify the attorneys and/or law firms representing "Egypt" in the five listed arbitrations. We kindly ask Ms. Stern to disclose this information for these arbitrations and the other arbitrations she discloses in response to the following requests.

Second, Ms. Stern's disclosures appear to be limited to investment arbitrations in which "Egypt" nominated her. We kindly ask Ms. Stern to disclose all of the arbitrations, including commercial arbitrations, where she was nominated as arbitrator by the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises.

Third, Ms. Stern's disclosures do not identify any arbitration where she served as President of the Tribunal involving the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises. We kindly ask Ms. Stern to disclose any such arbitrations and explain if the parties to any such arbitration played a role in her appointment.

Fourth, Ms. Stern is held out as an "expert and international legal advisor for States and various organisations". We kindly ask Ms. Stern to disclose her professional activities (as advisor,

expert, consultant, or otherwise), if any, with the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises.

We appreciate a prompt response to the above inquiries. »

On 16 September 2019, I promptly answered the five different questions, asking the ICSID Secretary to transmit the following answers to Claimants

« Dear Aïssatou

Pursuant to Claimant's letter dated 11 September 2019, please inform the Parties of my answers to the inquiries raised regarding my Statement.

« 1. I have not been informed of the appointment of an external counsel by Respondent. If this happens, I will, if necessary, update my Statement to reflect any involvement with Respondent's external counsel.

2. In the five cases mentioned in my Statement, where I have been previously nominated by Egypt, the external counsels of Egypt were as follows:

- in Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13): Bredin Prat.

- in National Gas S.A.E. v. Arab Republic of Egypt, ICSID Case No. ARB/11/7): Bredin Prat.

- in Ossama Al Sharif v. Arab Republic of Egypt, ICSID Case No. ARB/13/3): Eversheds.

- in ArcelorMittal S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/15/47): no external counsel.

- in Nile Douma Holding Co. WLL V. Arab Republic of Egypt, (PCA Case 17-09): Bredin Prat.

3. I have not been nominated as arbitrator by the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises, in any other case.

4. I have not served as President of a Tribunal involving the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises.

5. I have not had any professional activities with the Government of Egypt, any of its branches, or any of its state-owned or affiliated enterprises.

These informations are given to the best of my knowledge. »

On 17 September 2019, the Secretary of ICSID confirmed that she has transmitted these answers to Claimants.

On 4 September 2019, ICSID tranmitted to me a letter from Claimants dated 3 September, in which Claimants raised seven more inquiries in the following terms :

« Ms. Brigitte Stern's September 16, 2019 responses have raised additional inquiries. We kindly ask her to supplement her disclosures with the following:

(1) The number of arbitrations during the past five years (a) for which Ms. Stern was appointed as an arbitrator and (b) for which a State (including a state-owned entity) appointed her as an arbitrator.

(2) The number of times that Ms. Stern's appointment was challenged over the past ten years, and to the extent possible, a brief description of why.

(3) Clarification of the work that Ms. Stern has done to be publicly described as "act[ing] as expert and international legal advisor for States and various organisations" in a February 2019 seminar hosted by the Hong Kong International Arbitration Centre. In this regard, it would be helpful to have Ms. Stern explain why she is known as an expert/legal advisor for States (including state-owned entities).

(4) A list of conferences or professional events that Ms. Stern has attended in Egypt, including those at embassies and organized or sponsored by Egypt or its state-owned entities, over the past five years.

(5) An explanation of Ms. Stern's involvement, if any, with the University of Pantheon-Sorbonne's branch located at the Cairo University law school (the "IDAI"), and if none, her understanding of the relationship between her employer and the Cairo University law school.

(6) Disclosure of any entity in which Ms. Stern has an interest which provides advice to States (including state-owned entities) and whether such entity has been engaged by Egypt or any of its state-owned entities.

(7) Disclosure of those clients of Ms. Stern's company, "Brigitte Stern" (Registration No. 411413990), if any, that are affiliated or are otherwise connected to Egypt or its state-owned entities and a brief description of Ms. Stern's work for such clients. »

On 7 October 2019, I sent an e-mail to the Secretary of ICSID, asking her to transmit the following answer to the Claimant, which she did on the same day :

« I read carefully the letter sent by counsel for Claimant on 3 October 2019, in which he requested 7 further items of disclosure. After due consideration, I conclude that my declaration annexed to my acceptance to sit as an arbitrator transmitted on 5 September 2019 to ICSID, as well as the additionel e-mail to ICSID dated 16 September 2019 are made are in full conformity with my deontological duties of disclosure and that they do not require, at this stage, any further disclosure.

I confirm also that I have not been informed of the appointment of an external counsel by Respondent. If this happens, I will, if necessary, update my Statement to reflect any involvement with Respondent's external counsel. »

Claimants however came back to ICSID and asked an answer through a letter and not through e-mails forwarded by the Secretary of ICSID.

On 23 October 2019, therefore, I sent the following letter to Claimants, attaching as annexes my e-mails of respectively 16 September and 7 October 2019 :

« I have been informed by ICSID that, during a call with them, you indicated that you preferred that I answer to your letters by a formal letter rather than by e-mails, which I do through the present correspondence.

I have carefully read the letters of 11 September 2019 and 3 October 2019 adressed to me, as well as the letter addressed to ICSID on 9 October 2019 and forwarded to me.

As you know, ICSID seeked my acceptance as an arbitrator nominated by Egypt on 3 September 2019. I accepted this nomination and sent, on 5 September 2019, my Declaration, accompanied by a Statement of all the cases in which I have ever been nominated by Egypt, this information going back to 15 years.

On 11 September 2019, you requested some more information with 5 questions, to which I answered by an e-mail of 16 September 2019, transmitted to you by ICSID on the next day, which I reproduce at the end of this letter, for ease of reference.

On 3 October 2019, you asked for answers to 7 additional questions. I sent again an answer to your letter in an e-mail to ICSID, on 7 October 2019, which was transmitted to you on the same day. Again, I reproduce this e-mail at the end of this letter.

Two days later, you sent a letter to ICSID, in which you "encourage ICSID to join Claimants in having Ms Stern be more forthcoming in disclosing pertinent facts and circumstances." This letter has been forwarded to me by ICSID without any comment, and ICSID did not ask me to give more information than what had already been provided.

On 21 October 2019, ICSID asked me whether they can inform Claimants that I have answered their questions. As I agreed, they sent you the following message: "Professor Stern confirms her message of 7 September 2019 [sic] and considers that she has fulfilled her duty of disclosure."

This prompted your request that I write a letter myself, which is entirely justified, as the message forwarded by ICSID was not clear: it should have indeed said that I confirm my message of 7 October 2019 and not 7 September (reproduced below).

For full clarity, I therefore reiterate in this letter addressed to you, as counsel of Claimants, that I consider that at this stage – with no counsel for Respondent and no President – I have fully complied with my obligations of disclosure, provided for in Rule 6(2) of the ICSID Arbitration Rules and reproduced in the Declaration to be submitted by arbitrators, which states the following:

Attached is a statement of (a) my 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. 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.

I reiterate also that I have not been informed of the appointment of an external counsel by Respondent. If this happens, I will of course, if necessary, in line with my ongoing duty of disclosure all along the proceeding, update my Statement to reflect any involvement with

Respondent's external counsel, and the same is true when a President is chosen or if new elements would appear that require disclosure. »

On 6 December 2019, the Tribunal was constituted, with the acceptance by Ian Binnie of his nomination as President.

On 10 December 2019, Claimants sent their RoD.

On 13 December 2019, ICSID set the calendar for the proceedings on the challenge in the following manner :

«1. The Respondent is to file its response to the proposal on or before **Monday, December 30, 2019**.

2. Professor Stern may furnish such explanations as she considers appropriate on or before **Wednesday, January 15, 2020**.

3. The parties are invited to file simultaneously any further observations they might wish to make on the Disqualification Proposal and Professor Stern's explanations on or before **Thursday, January 30, 2020**. These observations should be filed with the Secretary of the Tribunal without a copy to the other party. Once the Secretary receives both submissions, she will circulate them to the parties simultaneously. »

An extension was granted to Respondent for the filing of its answer.

On 2 January 2020, Respondent submitted its reply to Claimants proposal to disqualify Professor Brigitte Stern (hereinafter, the Reply)

I read carefully the RoD, as well as the Reply of Respondent, in which it has presented arguments against the challenge, with which I am generally in agreement and which I will therefore not further develop.

However, I hereby provide my own observations on the request for disqualification presented by Claimant's counsel.

At the outset, I would like to say, as a general statement, that when I sit as an arbitrator, I consider my duty to follow the deontological requirements of an arbitrator, that is to be both independent and impartial, as well as available, and that I consider that I have always complied with such duties in the numerous arbitrations in which I have been sitting, and I confirm that I will continue to act in this manner in all arbitral tribunals in which I will be called to sit.

I will now share some comments on the three alleged bases for my disqualification.

Alleged failure to meet my disclosure obligations

I have been accused to « chose to keep certain information secret » (RoD, p. 2)

This alleged hidden information concerns three different facts :

- Allegedly « withholding critical information, including the fact that she has her own personal company "Brigitte Stern" (registration no. 411413990) and that company's clientele. » (RoD, p. 2) ;

- Alleged refusal to indicate direct connections with Egypt resulting from the fact that « her employer, the University of Pantheon–Sorbonne, … has a branch located at the Cairo University law school » (the "IDAI"). (RoD, p. 2) ;

- Alleged refusal to indicate direct connections with Egypt resulting from the fact that « she has ties to the Alexandrina Library as a "Member of the Scientific Board of the Centre René-Jean Dupuy for law and development, University of Alexandria." » (RoD, p. 2)

I must confess that these allegations of non-disclosure of so-called ties with Egypt came as an entire surprise to me.

My so-called «company »

To clarify things, the « registration » of « my company » is nothing more than a VAT number given to me, as an independant arbitrator. I am actually a self-employed individual and do not belong to any company.

Claimants complain that I refused to « provide certain basic information (such as the proportion of her income attributable to her work for States. » (RoD, p. 4).

Let me say first that when I sit in an arbitration, while nominated by a State, I do not consider that this is « work for States ». It is in my view, work for rendering justice, work for both parties in order to solve a dispute between them.

In other words, a very minor part of my income comes from « work for the States », for example when I was counsel of Bosnia in the *Genocide Case* before the International Court of Justice or as part of the legal team defending France in the *Rainbow Warrior* arbitration, or as expert before French Courts on the legal status of the Continental Shelf in the *Erika* case, or a a consultant for some international organisations on their retirement schemes.

This is the type of activities covered by what was mentioned in a Hong Kong conference, where I was described as «act[ing] as expert and international legal advisor for States and various organisations » besides of my academic work.

For the avoidance of doubt, I indicate that I have never acted as an expert or legal advisor for Egypt, and that I systematically refuse to act as an expert – although sometimes approched by parties – in arbitration cases.

The University of Paris 1 Panthéon-Sorbonne branch at Cairo University

Here also, things have to be clarified. First of all, the University of Paris A Panthéon-Sorbonne is not my employer, as I am retired from the University since 2009. Second, I can state in the strongest way, that I was not aware of the existence of this branch, I don't know when it was created. Universities might have more or less close relations with many other institutions and I do not see how this can create a problem of impartiality or independance for the professors of one University based on the existence of links with another University situated in a given State.

And more so, I could not be aware of the fact that this local institute was financed by Egypt, contrary to the statement of Claimants that « Ms. Stern likely knows that the Egyptian government provides the Cairo University law school with approximately 85% of its funding. » The fact that an academic institute in Cairo is financed by Egypt seems quite natural, but does not give any return to the Paris Univesity, nor to their professors and even less to their former professors. Moreover, I am at a loss to understand the relevance of such a knowledge – if it had existed, which is not the case – on my impartiality of independance.

The Centre-René-Jean Dupuy at the Alexandria Library in Alexandria

When I first read this alleged refusal of disclosure, I looked up on Internet in order to understand what this Center was. I could not find anything. Then, I made a search with the French title « Centre René-Jean Dupuy pour le droit et le développement » and found some information which reminded me of some past events. Indeed, René-Jean Dupuy was a well-know French Professor and a colleague and friend of mine. He died in 1997. The name of the Center was a tribute to his life and contribution to international law.

Here again, some clarification is needed. The Center was created in 1998 – more than 20 years ago – as part of the Alexandria Library situated in the University Senghor. This is not an Egyptian University, but a University created by the *Organisation Internationale de la Francophonie* (hereinafter « OIF ») which happens to be situated in Egypt.

This is how the University is described on the Internet[1] :

> « L'Organisation internationale de la Francophonie (OIF) est une institution fondée sur le partage d'une langue et de valeurs communes. Elle compte à ce jour 51 États et gouvernements membres et 5 États observateurs.
>
> – L'Université Senghor d'Alexandrie
>
> L'université internationale en langue française au service du développement africain, nommée Université Senghor d'Alexandrie, a été créée par le Sommet de Dakar (mai 1989) [de l'OIF] qui l'a reconnue d'utilité publique internationale. Cette institution de 3e cycle a pour vocation de former et de perfectionner des cadres et des formateurs de haut niveau et d'orienter leurs aptitudes vers l'action et l'exercice des responsabilités dans certains domaines prioritaires pour le développement : gestion de projets, gestion des institutions financières, gestion de l'environnement, nutrition-santé et gestion du patrimoine culturel.
>
> D'autre part, le Centre René-Jean Dupuy pour le droit et le développement, créé en novembre 1998, a pour mission d'étudier le rôle et les fonctions du droit, interne et international, dans le développement durable, économique, politique, social et environnemental des pays africains. »

Free translation :

« The International Organization of La Francophonie (OIF) is an institution founded on the sharing of a common language and values. 14

[1] https://www.cairn.info/revue-hermes-la-revue-2004-3-page-18.htm#.

- Senghor University of Alexandria

The French-language international university serving African development, named Senghor University of Alexandria, was created by the Dakar Summit (May 1989) [of the OIF] which recognized it as being of international public utility. The purpose of this 3rd cycle institution is to train and improve high-level executives and trainers and to orient their skills towards action and the exercise of responsibilities in certain priority areas for development: project management, management financial institutions, environmental management, nutrition-health and cultural heritage management.

On the other hand, the René-Jean Dupuy Center for Law and Development, created in November 1998, has the mission of studying the role and functions of law, internal and international, in sustainable, economic, political, social and environmental of African countries. »

From what I have understood, after inquiry with some of my colleagues, it is entirely financed by the OIF and therefore I am not sure I can agree with Claimants statement to the effect that « Ms. Stern likely knows that the Egyptian government primarily funds this library. » (RoD, p. 10).

Claimants refer indeed to a website https://www.bibalex.org/en/page/FAQ, where it is stated that « (d)uring the construction of the Library, the Egyptian Government paid more than 50% of the cost (around 120 million US dollars). The donations for the remaining 50% (around 100 million US dollars) were provided by countries from all over the world. »

This concerns the construction of the Library and does not means that the Centre René-Jean-Dupuy is funded by Egypt.

In any case, whoever finances the Center seems to me entirely irrelevant to my alleged lack of impartiality or independence.

It seems indeed that my name was put on the Scientific Council of the Center René-Jean Dupuy. It is indeed common that newly created institutions are looking for some prestigious names to comfort their new existence and their development.[2]

I can however attest that I never participated in a meeting of this Council, and even less have I received any funds for such formal participation. I add that even if I had participated in meetings of the Scientific Council, this would not imply any bias towards the Egyptian Government, as I consider Universities in general as independent institutions from the State, and this University in particular, as it has been created by an International Organisation comprising 51 Member States.

In conclusion, I did not disclose any of the facts that Claimants consider that I should have disclosed, because either I did not know them or did not remember them and because, in any case, they are entirely irrelevant for the appreciation of my independence from and my impartiality towards Egypt.

[2] See the annexed document, for the list of the members of the Scientific Council.

It should be recalled the non-disclosure can be a ground for disqualification only if the non-disclosed facts are such a ground. This was elaborated on in the case *EDF v. Argentina*:

> « Non-disclosure in itself cannot be a ground for disqualification, but must relate to facts that would be material to a reasonable likelihood of impartiality or lack of independence."[3]

In other words, I used my « honest exercise of discretion », cited in RoD (p. 9) when I made my disclosures and do not think that I did hide any relevant information.

Repeated appointments by States

It is true that I am most often nominated by States. Based on this, Claimants argue that « Ms. Stern's repeated State appointments have earned her a reputation in the arbitration community of being "pro-State." »

As I said in my recent Freshfields lecture[4], someone with a commercial background might better understand the working of a company, while a professor of international law might better understand the functioning of a State. But I truly believe arbitrators should simply be **pro-law**, and both **investor-aware** and **State-aware**, at the same time. This is precisely the approach I adopt in my arbitration cases.

To put the record straigth, I indicate that one of my early nomination was by an investor, and then the State accepted my name and I was sole arbitrator.[5]

Also, as mentioned by Respondent, I have acted sometimes as President : Respondent mentionned two cases in note 57 of the Reply,[6] to which an UNCITRAL case has to be added, *ST-AD v. Bulgaria*.[7]

Finally, a statement of Claimants needs to be corrected to the effect that « no State has challenged Ms. Stern's appointment » (RoD, p. 3). I am indeed one of the rare arbitrators who has been challenged by the State party that had earlier nominated me because of a strongly adverse decision taken against that State.[8]

Claimants also mention several challenges that were addressed to me. However, they do not mention the fact that never has a challenge against me be accepted. They only say: « On occasion Ms. Stern has voluntarily resigned when investors have questioned her independence and impartiality. » and they cite the *Murphy* case. I would like to point out that this was a very peculiar situation, where both co-arbitrators were challenged by a kind of cross-challenge. I

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[3] *EDF International S.A., SAUR International S.A. & León Participaciones Argentinas S.A. c/ República Argentina*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, 25 June 2008, § 123.
[4] London, 20 November 20
[5] *Booker plc v. Co-operative Republic of Guyana*, ICSID Case No. ARB/01/9. The case settled.
[6] *Phoenix Action, Ltd. vs. The Czech Republic*, ICSID Case No. ARB/06/5, *Gustav F W Hamester GmbH & Co KG vs. Republic of Ghana*, ICSID Case No. ARB/07/24.
[7] *ST-AD GmbH v. Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06.
[8] In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2

considered that this was not a good start for an effective and peaceful proceeding and I resigned, as did in fact my co-arbitrator.

Last, but not least, I refer to the remark made by Respondent to the effect that « Prof. Stern has been appointed by States in cases that ended unfavorably for the respective States » (Reply, § 39), with a mention of some of these cases in note 56.

In other words, I do not see the relevance of a general mention of « States », as each State has specific characteristic and thus there is no such global entity.

I might add that each case is different and that I have always insisted on the freedom of arbitrators to decide each case on its own merits. I cite here the position adopted by the majority in the decision on jurisdiction in *Burlington v. Ecuador* as well as my different approach.

For the majority:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law.

My position:

> Arbitrator Stern does not analyze the arbitrator's role in the same manner, as **she considers it her duty to decide each case on its own merits**, independently of any apparent jurisprudential trend.[9]

This means that I look at each case with a new eye, whether or not there is an apparent jurisdictional trend and whether or not I was confronted with similar issues of facts or law before. A decision concerning one State A does not raise any inference on the way I will decide another case implying another State B.

Repeated appointments by Egypt.

Also, at the outset, I would like to state that what distinguishes fundamentally arbitration from judicial settlement is precisely the fact that each party has a free choice for the nomination of one of the arbitrator. The freedom of the parties in that choice should be respected and this is indeed one of the goals of the establishment of the IBA Rules on conflict of interests, which underscore this aspect in the Introduction to the Rules:

[9] Both citations are in *Burlington v. Ecuador*, ICSID Case ARB/08/5, Decision on Jurisdiction, 29 May 2010, para. 100. Emphasis added.

> « There is a tension between, on the one hand, the parties' right to disclosure of circumstances that may call into question an arbitrator's impartiality or independence in order to protect the parties' right to a fair hearing, and, on the other hand, the need to avoid unnecessary challenges against arbitrators in order to protect the parties' ability to select arbitrators of their choosing. »

Although Claimants started to refer to ICSID Arbitration Rule 9 and ICSID Convention Article 57, they later invoked also the IBA Guidelines on Conflict of interests, as well as what they considered the IBA Guidelines should be. This being said, I consider that the challenge is neither justified under the ICSID Convention, nor, if applicable, by the IBA Rules on conflicts of interest, and even according to inexistent rules that Claimants would favor. Indeed, Claimants seem to try to evaluate the situation in accordance with some statements they would like to be applied as a legal rule :

> « Indeed, because of the public interests at issue in investment arbitrations, the above IBA Guidelines should be more rigorous. In fact, arbitrators have determined that the time parameters in the IBA Guidelines should be longer in investment treaty arbitration. In other words, the relevant time period for ICSID arbitrators should be well beyond three years. Applying that here – Egypt's five appointments of Ms. Stern in eight years – could well be appropriately categorized in the "Red List. » (RoD, p. 11)

Both Parties agree that the ICSID standard in Article 57 of the ICSID Convention refers to « any fact indicating a manifest lack of the qualities required by paragraph 1 of Article 14 » of the said Convention, which are commonly referred to as impartiality and independence.

Both Parties seem also to be in agreement with the meaning of manifest. Relying on the *Blue Bank* case, Claimants indicated that « "manifest" means "evident" or "obvious" » (RoD, p. 6) while Respondent asserts in the same way that « (t)he Convention's use of the word – "manifest" is significant: the complaining party must prove that bias is – "evident" or – "obvious", in the sense that it can be – discerned with little effort and without deeper analysis. » (Reply,

Before quoting the IBA Rules which are invoked by the Claimants' counsel, I think it is worth mentioning that nothing concerning my situation is covered by the Red List. The Orange List is a list of situations which require more inquiry, but do not imply an automatic recusation :

> The Orange List is a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), with the consequence **that the arbitrator has a duty to disclose such situations**. (IBA Rules. General Standards, para. 3. Emphasis added)

As far as the nomination by a party is concerned, the Orange List mentions 2 or more nominations by the same party in the span of the last three years (Rule 3.1.3), or the serving on two arbitrations involving the same party in the same span of three years (Rule 3.1.5).

> 3.1.3 The arbitrator has, within the past three years, been appointed as arbitrator on two or more occasions by one of the parties, or an affiliate of one of the parties.

> 3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties, or an affiliate of one of the parties.

It is on record that, as soon as I was nominated in the present case, I informed the Parties of my nominations by Egypt, going even further than the required disclosure of the nominations during the last three years indicated in the IBA Rules, if applicable. Indeed, I indicated **all my nominations by Egypt during all my arbitrator's life, *i.e.* during some 20 years.**

It cannot be contested therefore that I have respected the duty of disclosure required by the IBA Rules.

Based on this exhaustive disclosure, Claimants argued that « (f)ive (now six) appointments by Egypt establishes a pattern. » (RoD, p. 2).

It is difficult for me to see a pattern based on 6 cases among almost 150 cases during my whole carreer as arbitrator. This was indeed well explained in the Decision on Claimants' Proposal to Disqualify Professor Brigitte Stern, Arbitrator in the case of *Tidewater*[10] :

> In the view of the Two Members, the mere fact of holding three other arbitral appointments by the same party does not, without more, indicate a manifest lack of independence or impartiality on the part of Professor Stern. Indeed, the Two Members find no basis to infer that Professor Stern would be influenced in her decision in any way by the fact of such multiple appointments by one party. On the contrary, her conduct has been demonstrably independent of such influence. The Two Members take notice from the Register of Cases publicly maintained by ICSID on its website that Professor Stern has held or currently holds arbitral appointments in many ICSID cases and so cannot be said to be dependent on any one party for her extensive practice as an arbitrator in investment cases.

The same approach was adopted in *Elitech v. Croatia* where it was decided that the claimant had not met its burden of showing that my impartiality or independence had been called into question as a result of repeat appointments, in this case four appointments.

Besides of alleging an inexistent pattern, Claimants try to make a case of my partiality seen in favoring Egypt. They contend indeed that : « **Twice** in ICSID arbitrations, Ms. Stern ruled in favor of Egypt. » (RoD, p. 2).

A preliminary remark is in order here: the deliberations within a panel are deemed confidential. Thus, the individual contributions of each arbitrator to the shaping of the decision are under a veil of ignorance. This raises questions on the arguments developed by Claimants' counsel since it appears that the two awards mentioned where all investor claims were rejected in cases where I was sitting can only be attributed to the entire panel. It would be somehow surprising to my colleagues to find that I am a driving force of our joint decisions or that they were influenced by some form of lack of impartiality on my part that Claimants' counsel alleges. Again, the

[10] *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, 23 December 2010, § 64.

vision of how an arbitral tribunal is functioning is contrary to my experience as an arbitrator as well as, presumably, to the experience of my colleagues.

In other words, the statement that "**I**" ruled in favor of Egypt looks very strange to me, as I did not rule in favor of Egypt on my own, but two unanimous tribunals in which I was sitting did indeed rule in favor of Egypt. This important feature was underscored by Respondent in its Reply : « Those tribunals issued those awards unanimously, i.e., none of the members of those tribunals submitted a dissenting opinion or even a separate opinion. » (Reply, § 46). To be even more precise only one tribunal ruled in favor of Egypt on the merits, the other tribunal considering that it had no jurisdiction to rule on the merits because of reasons of *ratione personae* jurisdiction, as also mentionned by the Respondent. (Reply, § 45).

Conclusion

As a conclusion, I hope the above brings some clarification to the situation.

On the one hand, as explained, I fulfilled my **disclosure obligations**.

On the other hand, Claimants have not put forward any precise **fact** «indicating a manifest lack of the qualities required by paragraph 1 of Article 14» of the ICSID Convention. General considerations are not sufficient, some precise facts must be invoked, as quite well explained by my two co-arbitrators in a Decision on a challenge based on frequent nominations by States:

> « Whether a mere appearance of partiality is considered sufficient, or whether actual partiality must be proven, under Article 14(1) of the ICSID Convention the party proposing disqualification must, under either formulation of the applicable legal standard, in any event establish *facts* that indicate a manifest lack of impartiality. The extent of the facts which are necessary to be established may vary depending on which formulation of the test under Article 14(1) of the ICSID Convention is used (and we express no opinion on that debate), however, **those facts must be specific to the case at hand**. » [11] (Emphasis added)

A mere reference to **frequent nominations by States** is not a fact that by itself can indicate a manifest lack of impartiality or independence, as underscored in the same Decision :

> « In this connection, we note that the factual basis of the Claimants' Proposal is broad and relies on alleged facts that are not specific to this particular case. The Claimants do not allege that Professor Stern is biased or predisposed towards one of the Parties to this case, that is, the Respondent, based on specific evidence relating to this particular Party or the particular circumstances of this case; they argue that because the statistical evidence they rely on shows that Professor Stern generally favors States, she will also necessarily favor Greece, the Respondent in this arbitration. In other words, the Claimants' Proposal is based on inference derived from statistical evidence rather than facts directed to this particular case. »[12]

Finally, as far as the **frequent nominations by Egypt** are concerned, even if a reference is made to my whole carrier, the only alleged fact of a position on the merits of the case in favor

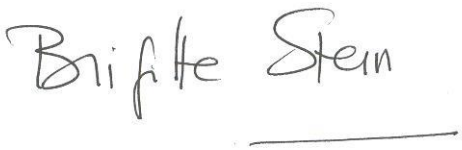
11 *Iskandar Safa and Akram Safa v. Hellenic Republic*, ICSID Case No. ARB/16/20, Decision on Disqualification of Arbitrator Brigitte Stern, 7 March 2017, § 84.
[12] *Idem*, § 85.

of Egypt is the single unanimous award in *Jan de Nul*. This can barely be a fact showing a manifest lack of independence or impartiality.

I also want to state in the clearest terms that, if the challenge is rejected, I will work with both parties in a spirit of good will, in order to have an orderly and efficient process of arbitration, in co-operation with my co-arbitrator and under the chairmanship of the President.

To end up, I reiterate my full commitment to the deontological requirements for an arbitrator, which is to be both independent and impartial.

Whatever the outcome is, I trust the judgment of my unchallenged co-arbitrators to take the best decision in the interest of international arbitration.



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ANNEX

Le centre René-Jean Dupuy pour le droit et le développement

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Le Centre René-Jean Dupuy pour le droit et le développement a été créé en novembre 1998 dans le cadre de l'Université Senghor, Université internationale de langue française au service du développement africain, à Alexandrie en Egypte. René-Jean Dupuy, longtemps Secrétaire Général de l'Académie de droit international de la Haye, puis Professeur de droit international au Collège de France, a été l'un des fondateurs de l'Université Senghor et son premier Président. A l'initiative de son successeur, le Président Ahmed S. El Kosheri, le centre René-Jean Dupuy a été institué dans le but d'étudier le rôle et les fonctions du droit, interne et international, dans le développement durable, économique, politique, social et environnemental des pays africains. Dans une telle perspective de recherche, prioritairement appliquée, **les activités du Centre René-Jean Dupuy** s'orientent, dans un premier temps, dans trois directions : l'encouragement à la recherche par l'attribution d'un prix de thèse René-Jean Dupuy, la constitution d'une base de données sur Internet sur le droit africain et international du développement, et l'organisation de colloques, conférences et séminaires.

Le Conseil Scientifique du centre se compose d'éminents professeurs et praticiens du droit originaires d'Afrique et d'Europe : Sameh Abdel Aziz, Professeur à l'Université de Hélouan, Le Caire, Ibrahim Ahmed Ibrahim, Professeur à l'Université d'Aïn-Shams, Le Caire, Hazem Atlam, Professeur à l'Université d'Aïn-Shams, Le Caire, Pierre-Marie Dupuy, Professeur à l'Université Panthéon-Assas (Paris II), Ahmed El Kosheri, Président du Conseil d'Administration de l'Université Senghor, Directeur du Centre René-Jean Dupuy, Philippe Fouchard, Professeur à l'Université Panthéon-Assas (Paris II) † ; Maurice Glele-ahanhanzo, Professeur à l'Institut des droits de l'homme et de promotion de la démocratie, Joseph Issa-sayegh, Professeur aux facultés de droit d'Abidjan et de Nice, Philippe Kahn, Directeur de recherche émérite, CNRS, Dijon, Charles Leben, Professeur à l'Université Panthéon-assas (Paris II), Philippe Leboulanger, Avocat au Barreau de Paris, Chargé d'enseignement à l'Université Panthéon-Assas (Paris II), Michel Levallois, Préfet, ENDA Tiers-Monde, Xavier Linant de Bellefonds, Professeur à l'Université de Paris XII, Ahmed Mahiou, Directeur de Recherche CNRS, Aix-en-Provence, Raymond Ranjeva, Juge à la Cour Internationale de Justice, La Haye, Denys Simon, Professeur à l'Université Robert Schuman, Strasbourg, Brigitte Stern, Professeur à l'Unversité Panthéon-Sorbonne (Paris I).