INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

ALPHA PROJEKTHOLDING GMBH
(Claimant)

and

UKRAINE
(Respondent)

ICSID Case No. ARB/07/16

Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz

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Members of the Tribunal:

Hon. Davis R. Robinson, President

Dr. Stanimir A. Alexandrov

Secretary of the Tribunal: Ms. Eloïse M. Obadia

Representing Claimant:

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I. PROCEDURAL AND FACTUAL BACKGROUND

1. On June 5, 2007, the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received a Request for Arbitration dated June 1, 2007 (the "Request") from Alpha Projektholding GmbH ("Alpha" or "Claimant") against Ukraine ("Ukraine" or "Respondent") (Alpha and Ukraine, together, the "Parties"). Alpha, an Austrian limited liability company, submitted the Request pursuant to Article 9 of the 1996 Agreement for the Promotion and Reciprocal Protection of Investments between Ukraine and Austria.[1]

2. By letter of August 28, 2007, Claimant invited Respondent to reach an agreement concerning the number of arbitrators and the method of their appointment. Claimant offered to agree on the formula provided in Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"). Respondent did not reply to this offer, which was reiterated in a letter from Claimant of September 19, 2007. By letter of September 24, 2007, Claimant informed the Centre that it opted for the formula provided in Article 37(2)(b) of the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention").[2] By letter of the same date, Respondent agreed to this formula, pursuant to which the tribunal in this case (the "Tribunal") was to "consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."

3. By letter of October 22, 2007, Claimant appointed Dr. Yoram Turbowicz, a national of the State of Israel, as arbitrator in this proceeding. On October 25, 2007, the Secretariat of the Centre transmitted to the Parties a copy of a letter of the same date concerning Dr. Turbowicz that had been received from Dr. Leopold Specht of the law firm of Specht Rechtanswalt GmbH of Vienna, Austria (the "Specht Firm"), Counsel to Claimant. Dr. Specht's letter stated that it "attached the *curriculum vitae* of Dr. Yoram Turbowicz." The *curriculum vitae* of Dr. Turbowicz that was attached to both Dr. Specht's letter and the Secretariat's letter of October 25, 2007 records in pertinent part, under the heading "Educacion" [sic], the following

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[1] *See* Agreement for the Promotion and Reciprocal Protection of Investments between Ukraine and Austria (signed on November 8, 1996).

[2] *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States (October 14, 1966).

information: "1988-90 Harvard Law School, Doctor of Juridical Science (S.J.D.)" and "1987-8 Harvard Law School, Master of Laws (LL.M.)."

4. On November 10, 2007, Dr. Turbowicz submitted a declaration pursuant to ICSID Arbitration Rule 6(2) (the "Turbowicz Declaration"). The last paragraph of the Turbowicz Declaration, the language of which is in keeping with the text of Arbitration Rule 6(2), states in pertinent part: "Attached is a statement of (a) my past and present professional and other relationships (if any) with the parties and (b) any other circumstances that might cause my reliability for independent judgment to be questioned by a party."

5. By letter of November 22, 2007, Respondent appointed Dr. Stanimir A. Alexandrov, a national of Bulgaria, as arbitrator in this proceeding. By letter of November 23, 2007, Claimant informed the Centre that the Parties had not reached an agreement on the candidacy of the President of the Tribunal and requested the ICSID Secretary-General, pursuant to Rule 4(1) of the Arbitration Rules, to refer a request to designate the President of the Tribunal to the Chairman of the Administrative Council of ICSID. On February 4, 2008, the Chairman of the ICSID Administrative Council appointed Hon. Davis R. Robinson, a citizen of the United States of America, as third and presiding arbitrator in this proceeding.

6. By letter of February 8, 2008, the Secretariat of ICSID informed the Parties that, as of that date, the Tribunal was "deemed to have been constituted and the proceeding to have begun." The letter reported that "all the arbitrators" had accepted their appointments and attached copies of the declarations of each of the three arbitrators as required under Rule 6(2) of the Arbitration Rules.

7. The Tribunal held its First Session with the Parties on April 1, 2008, in Washington, D.C. (the "First Session"). The minutes of the First Session, as approved by the Parties (the "Minutes"), record the following at section 1, page 2: "The parties confirmed their agreement that the Tribunal had been properly constituted and that they had no objections to its members." In accordance with Article 44 of the ICSID Convention, it was agreed that the ICSID Arbitration Rules in force as of April 10, 2006 would apply to the proceeding.

8. Pursuant to a schedule agreed to by the Parties, on July 1, 2008, Claimant filed its Memorial and, on October 1, 2008, Respondent filed its Counter-Memorial. Following the submission of the latter, the Parties agreed to a second round of written pleadings. Accordingly, Claimant filed its Reply on November 26, 2008 and, on January 21, 2009, Respondent filed its Rejoinder. An oral hearing on jurisdiction and admissibility and on the merits took place in Paris, France from March 23 to March 27, 2009, at the conclusion of which the Parties agreed upon two rounds of written, simultaneous post-hearing submissions, the first on May 18, 2009 and the second on June 17, 2009.

9. On December 8, 2009, Counsel for Respondent sent an email message to the Secretary of the Tribunal, referring to ICSID's letter of February 8, 2008 that distributed to the Parties the respective declarations of the three members of the Tribunal, noting that Counsel for Respondent "cannot find a statement of Dr. Turbowicz, which is mentioned as attached" to the Turbowicz Declaration, and requesting a copy of the statement. On the same date of December 8, 2009, the Secretary of the Tribunal responded to Counsel for Respondent, attaching a copy of the Secretariat's letter of February 8, 2008 and pointing out: "As you will see, Mr. Turbowicz did not file a statement."

10. On December 23, 2009, Counsel for Respondent submitted a letter to the Secretariat of ICSID ("Respondent's December 23 Letter") stating: "The Respondent has recently been informed that the member of the Tribunal Dr. Yoram Turbowicz and Counsel for the Claimant Dr. Leopold Specht maintain personal relations, which have arisen in the course of their studies in the Harvard University, where Dr. Turbowicz and Dr. Specht were together enrolled in LLM (1987-1988) and SJD programs (Dr. Turbowicz in 1988-1990 and Dr. Specht in 1988-1992)" (hereinafter referred to as "Respondent's Assertion"). Respondent's December 23 Letter noted that Dr. Turbowicz "did not mention any of such facts" in any statement accompanying the Turbowicz Declaration and requested Dr. Turbowicz and Dr. Specht to comment.

11. Dr. Specht responded to Respondent's Assertion in a letter to the Secretary of the Tribunal dated December 30, 2009 ("Dr. Specht's December 30 Letter"), in which he contended that Respondent's December 23 Letter failed "to be specific" about Respondent's Assertion. Dr.

Specht also stated as follows: "As can be taken from Dr. Turbowicz and from my CV, we both studied at Harvard Law School. We know each other from this time. At no time have Mr. Turbowicz and I maintained business relations of any kind or have worked together on professional matters. Since our departure from Harvard Law School, we have maintained no social relationship."

12. By a letter dated January 25, 2010, Respondent proposed the disqualification of Dr. Yoram Turbowicz as a member of the Tribunal (hereinafter referred to as "Respondent's Proposal"). Respondent's Proposal referred to Article 14(1) of the ICSID Convention according to which a member of an ICSID tribunal "shall" be a person "who may be relied upon to exercise independent judgment." Respondent's Proposal made the following principal points:

(1) Dr. Turbowicz's shared matriculation with Dr. Specht at Harvard Law School was not disclosed as part of the Turbowicz Declaration;

(2) ICSID Arbitration Rule 6(2) requires a member of an ICSID tribunal to declare any "past and present . . . relationships with the parties and . . . any other circumstance that might cause . . . reliability for independent judgment to be questioned by a party;"

(3) The statement in Dr. Specht's December 30 Letter addressing whether a "social relationship" existed between Dr. Specht and Dr. Turbowicz was "neither sufficient nor, strictly speaking, entirely convincing;"

(4) "[P]ublicly available sources" did not provide "relevant information about Dr. Turbowicz's experience in transnational investment or commercial arbitration;" and

(5) "The fact that Dr. Specht has selected, as an arbitrator, for an obviously complicated investment arbitration case, a person without relevant professional experience, but his former co-student, may not have other reasonable explanation than that Dr. Specht relied on the person whom he personally knew."

Respondent's Proposal further contended that Dr. Turbowicz's silence in reaction to Respondent's December 23 Letter "obviously" gave rise to "justifiable doubts" as to his reliability for independent judgment.

13. Respondent also argued that its proposal should "not be considered as submitted belatedly" because Respondent could not have reasonably expected that "counsel for an opposing party [would] appoint the arbitrator from his co-students and/or verify such circumstance from the very outset of the case." Respondent contended that, once it became

aware of the school relationship between Dr. Turbowicz and Dr. Specht, Counsel for Respondent sent Respondent's December 23 Letter and thereafter expeditiously submitted Respondent's Proposal "within the time limits of the ICSID Arbitration Rule 9, i.e. 'before the proceeding [was] declared closed.'"

14. On February 6, 2010, the Secretary of the Tribunal informed the Parties by letter that ICSID had received on February 5, 2010 Respondent's Proposal pursuant to Article 57 of the ICSID Convention. The Secretary indicated that pursuant to ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken on Respondent's Proposal. The Secretary also invited Dr. Turbowicz "to furnish to the Tribunal any explanations that he may have, in accordance with ICSID Arbitration Rule 9(3)." On February 15, 2010, Dr. Turbowicz transmitted to the Secretary and to the two other members of the Tribunal (the "Two Other Members") a statement dated February 11, 2010 and entitled "Proposal for Disqualification – Arbitrator's Response" ("Dr. Turbowicz's Response").

15. Dr. Turbowicz's Response confirmed that Dr. Turbowicz and Dr. Specht "studied together at the Harvard Law School, some twenty years ago" and that this shared experience was how they "came about knowing of each other." Dr. Turbowicz insisted that he would not have accepted the assignment in the first place had he thought that he possessed the "slightest bias in the consideration of the case, objectively, seemingly or subjectively." Dr. Turbowicz explained that he did not attach any statement to the Turbowicz Declaration because he "deemed" that the relationships to which Arbitration Rule 6(2) refers, did not "exist" in this case and that, consequently, no statement was "warranted." In his response, Dr. Turbowicz attested that he had no "professional or business relationship" with either of the Parties. He argued that there was no "other relationship" which by its "nature, scope, intensity or character" fell within the "purview" of the kind of "other relationship" contemplated by Arbitration Rule 6(2) and thus no statement was "properly called for" as part of the Turbowicz Declaration. The fact that he and Dr. Specht studied together at Harvard Law School could, in Dr. Turbowicz's opinion, neither "objectively nor subjectively" constitute a relationship of the "sort" coming within the language of Arbitration Rule 6(2). Dr. Turbowicz stressed: "Since our studies we never had any business or other professional relations. Nor have I ever been involved in Dr. Specht's personal or professional life."

16. On February 16, 2010, the Secretary sent a letter to the Parties (the "February 16 Letter") that: (1) attached Dr. Turbowicz's Response; (2) invited Respondent and Claimant to provide comments by February 19, 2010; and (3) asked Respondent to provide more details regarding Respondent's Assertion about the maintenance of "personal relations" between Dr. Turbowicz and Dr. Specht, "including when and how Respondent was so informed."

17. On February 18, 2009, Dr. Specht responded to the February 16 Letter on behalf of Claimant ("Dr. Specht's February 18 Letter"). Dr. Specht's February 18 Letter stressed Respondent's failure to substantiate its charge of ongoing "personal relations" between Dr. Specht and Dr. Turbowicz. Dr. Specht reiterated that he and Dr. Turbowicz "have never worked together on professional matters and have not maintained a social relationship since departing from Harvard Law School." Dr. Specht's February 18 Letter emphasized that the *curriculum vitae* of Dr. Turbowicz that was transmitted to the Parties noted Dr. Turbowicz's education at Harvard Law School and cited both the dates attended and diplomas granted. Dr. Specht observed that his own *curriculum vitae* "has been posted on [his] firm's website at least since the inception of this proceeding."

18. Dr. Specht's February 18 Letter also noted Dr. Turbowicz's "experience as [a] legal practitioner, including service as an arbitrator" as well as Dr. Turbowicz's involvement "with arbitration matters under free trade agreements between Israel and other states." Dr. Specht objected to Respondent's description of Dr. Turbowicz as a "person without relevant professional experience" as being "ill advised." Dr. Specht's February 18 Letter characterized Respondent's Proposal as "belated" and, as a result, requested its dismissal. Dr. Specht argued that, if Respondent's Proposal was sustained at this late stage in the proceeding, its effect on Claimant would be "extremely prejudicial."

19. On February 19, 2010, Counsel for Respondent submitted its observations on Dr. Turbowicz's Response, on the February 16 Letter and on Dr. Specht's February 18 Letter ("Respondent's February 19 Letter"). Therein, Respondent noted that it was "undisputed" that the Turbowicz Declaration made no reference to the "established fact" of the "joint studies and personal acquaintance" of Dr. Turbowicz and Dr. Specht. Respondent asserted that it had "no duty" as a result of the October-November 2007 correspondence to review the "CVs of

arbitrators and counsel in order to calculate possible intersections of their biographies" because Respondent was "entitled to rely" upon prospective arbitrators exercising their duty of disclosure in a *bona fide* fashion. Respondent's February 19 Letter also took note of the "further subsequent contact" of Dr. Turbowicz with Dr. Specht mentioned in Dr. Turbowicz's Response – specifically, a "brief phone call" from Dr. Specht in 2007 inquiring as to whether Dr. Turbowicz was available to serve as an arbitrator in this proceeding. Respondent also criticized Counsel to Claimant for not having selected "from the universe of available arbitrators" a person "with no links" to Dr. Specht, rather than having chosen someone "whom he personally knew."

20. Additionally, in Respondent's February 19 Letter, Respondent declined to provide details explaining when and how Respondent was informed that Dr. Turbowicz and Dr. Specht maintained "personal relations," as requested in the February 16 Letter. Respondent declined to provide these details on the following basis: "Unfortunately, the source of this information . . . is unlikely to be accepted as evidence in this arbitration and therefore is not disclosed by Respondent." Respondent also challenged Claimant's contention that Respondent's Proposal was "time-barred." Respondent's February 19 Letter cited a number of scholarly works and judicial decisions in Canada and the United States as supporting Respondent's Proposal. Respondent's February 19 Letter stressed that the April 10, 2006 amendments to the Arbitration Rules placed an "additional duty" upon arbitrators by requiring the disclosure of "any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party." Respondent characterized the "nature of the relationship" between Dr. Turbowicz and Dr. Specht as "unquestionably" falling within this new portion of Arbitration Rule 6(2). Respondent's February 19 Letter concluded that the attendance by Dr. Turbowicz and Dr. Specht together at Harvard Law School, and the failure to disclose that relationship, were sufficient to show that Dr. Turbowicz was not a person who could be relied upon to exercise independent judgment.

21. On February 22, 2010, the Secretary of the Tribunal reiterated by letter to the Parties (the "February 22 Letter") the request of the Two Other Members for details about the source of Respondent's belief that Dr. Turbowicz and Dr. Specht maintained "personal relations" and the facts supporting this belief. The February 22 Letter recorded their "dissatisfaction" with the position adopted in Respondent's February 19 Letter on the basis that "it is the responsibility

of the Two Other Members to determine evidentiary matters in connection with Respondent's Proposal and not the Parties' responsibility." The February 22 Letter concluded: "If Respondent, as is its right, chooses not to provide such information, then the Two Other Members will have no choice but to disregard this aspect of Respondent's Proposal." On February 24, 2010, Counsel for Respondent replied to the February 22 Letter and stated, with respect to the reiterated request for information related to Respondent's Assertion, that Respondent "regretfully, is unable to provide additional evidence on the matter in question" (hereinafter referred to as "Respondent's Decision").

22. On February 25, 2010, at the behest of the Two Other Members, the Secretary of the Tribunal wrote to the Parties asking that Respondent (a) confirm the remaining grounds for Respondent's Proposal for the disqualification of Dr. Turbowicz and (b), in light of Respondent's Decision not to identify the source of or to substantiate Respondent's belief that Dr. Turbowicz and Dr. Specht maintained "personal relations," "inform the Tribunal when, and under what conditions, Respondent and Counsel for Respondent first became aware" of the contemporaneous attendance by Dr. Turbowicz and Dr. Specht at Harvard Law School.

23. On March 1, 2010, Counsel for Respondent replied by letter to the February 25 Letter ("Respondent's March 1 Letter"). Therein, Counsel for Respondent confirmed Respondent's "special emphasis" on the failure of Dr. Turbowicz to disclose his attendance at Harvard Law School with Dr. Specht as a part of the Turbowicz Declaration and reiterated points that Respondent had made in previous correspondence. As to when Respondent learned of the joint attendance, Respondent's March 1 Letter referred to (1) the information that Respondent received in November of 2009 (but that, because of Respondent's Decision, Respondent chose not to disclose) and (2) Dr. Specht's December 30 Letter. Respondent's March 1 Letter adopted the position that December 30, 2009 was the date that could "be correctly taken" by the Two Other Members for purposes of calculating the timeliness of Respondent's Proposal because December 30, 2009 was the "first moment in time" when the fact of the prior acquaintance between Dr. Turbowicz and Dr. Specht "was established by admissible evidence."

24. On March 1, 2010, the Secretary, at the request of the President, asked Dr. Turbowicz and Claimant to provide any additional comments or further information that each

deemed appropriate or necessary in reaction to Respondent's March 1 Letter. Neither Dr. Turbowicz nor Claimant submitted any additional comments or further information in response to this request.

II. GOVERNING LAW

25. Before analyzing Respondent's Proposal, the Two Other Members believe it first necessary to summarize the governing law in this matter.

A. Overview

26. The Two Other Members are acting subject to the ICSID Convention, as implemented by the Arbitration Rules in force as of April 10, 2006. The following are excerpts of provisions of the ICSID Convention and the Arbitration Rules that are of significance to Respondent's Proposal.

27. Article 14(1) of the ICSID Convention describes the necessary personal qualifications for service as an arbitrator in an ICSID proceeding and provides in pertinent part:

> Persons designated to serve . . . shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

28. Article 57 of the ICSID Convention addresses the subject of arbitrator challenge and stipulates:

> A party may propose to a . . . Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.

29. Article 58 of the ICSID Convention establishes the procedure for deciding a proposal for disqualification under Article 57:

> The decision on any proposal to disqualify a[n] . . . arbitrator shall be taken by the other members of the . . . Tribunal . . . ."

30. Rule 6 of the Arbitration Rules deals with the constitution of a tribunal. Rule 6(2) sets forth the language of a required arbitrator declaration and, as amended on April 10, 2006, states in pertinent part:

> Before or at the first session of the tribunal, each arbitrator shall sign a declaration in the following form:
>
> "To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal. . . . 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."

31. Rule 9 of the Arbitration Rules amplifies on the process for disqualification and accentuates the requirement of an objection being submitted on a timely basis:

> A party proposing the disqualification of an arbitrator pursuant to Article 57 of the ICSID Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor . . . . The arbitrator to whom the proposal relates, may, without delay, furnish explanations to the Tribunal . . . . [T]he other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned . . . . The proceeding shall be suspended until a decision has been taken on the proposal.

32. Finally, Rule 27 of the Arbitration Rules addresses the subject of waiver:

> A party which knows or should have known that a provision . . . of these Rules . . . has not been complied with and which fails to state promptly its objections thereto, shall be deemed . . . to have waived its right to object.

33. In discerning the meaning of these governing provisions as applied to the particular circumstances of Respondent's Proposal, the Two Other Members will follow the rules of interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"),[3] to which both Ukraine and Austria are parties and which is regarded as confirmatory of customary international law. The Two Other Members particularly recall Paragraph 1 of Article 31 of the Vienna Convention: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." To the extent that the ICSID Convention or the Arbitration Rules may be silent or ambiguous on a given point, the Two Other Members find

[3] *See* Vienna Convention on the Law of Treaties (May 23, 1969).

guidance in the preparatory papers, other decisions made under the ICSID Convention and decisions made pursuant to other international arbitral rules.[4]

B. The Standards of Disqualification under the ICSID Convention and the Arbitration Rules

34. The ICSID Convention's standard for challenge found in Article 57 embodies an objective criterion that imposes the stringent requirement of a "manifest" lack of the qualities set forth in Article 14(1) – namely the qualities of "high moral character," "recognized competence" and reliability "to exercise independent judgment." Respondent does not in any way seek to impugn Dr. Turbowicz's character, and Respondent does not raise any doubt as to his legal competence (although Respondent does question the extent of his arbitration background). Instead, Respondent focuses its attention on the last of the three qualifications: reliability "to exercise independent judgment."

35. The Two Other Members observe that, under Article 14(1) of the ICSID Convention, as interpreted by past ICSID decisions, an analysis of an arbitrator's reliability "to exercise independent judgment" entails two concepts: impartiality and independence.[5] Commentators have observed a distinction between impartiality and independence:

> It is generally considered that "[in]dependence" is concerned exclusively with questions arising out of the relationship between an arbitrator and one of the parties, whether financial or otherwise . . . . By contrast the concept of "impartiality" is considered to be connected with actual or apparent bias of an

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[4] *See* W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L. Q. 44 (1989) ("Tupman") (noting that arbitrators look "not only to the ICSID Convention and arbitration rules but also to other international conventions, rules of international arbitration established by other international bodies . . . [which] may be considered as a matter of comparison, and as embodying . . . the general principles governing international arbitration.") (quotation marks omitted).

[5] *See, e.g.*, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17 and *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007 ("*Suez Aguas* Decision"), at para. 28 (concluding, based on the different language employed in the English and Spanish versions of Article 14(1), that "the two standards of independence and impartiality" apply in disqualification decisions); *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case. No. ARB/08/17, Decision on Proposal for Disqualification of an Arbitrator, November 12, 2009 ("*PIP* Decision"), at para. 21 ("[L]a notion d'indépendance contenue à l'article 14(1) de la Convention CIRDI s'entend du devoir d'indépendance et d'impartialité . . . .").

> arbitrator – either in favour of one of the parties or in relation to the issues in dispute.[6]

36. Other ICSID tribunals have likewise recognized the need to "apply the two standards of independence and impartiality,"[7] noting that:

> [I]ndependence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.[8]

Accordingly, this decision addresses both concepts. [9]

37. Further, in keeping with the rules of interpretation of the Vienna Convention, the Two Other Members must perforce assign significance to the use of the adjective "manifest" in the language of Article 57 of the ICSID Convention describing the standard that a challenge must meet in order to prevail. According to Webster's Dictionary, the word "manifest" connotes something that is "obvious" to one's understanding and that is "readily perceived by the senses" and "easily understood or recognized by the mind."[10] The Shorter Oxford English Dictionary correspondingly defines the term "manifest" as something which is "[c]learly revealed to the eye, mind or judgement; open to view or comprehension; obvious."[11] Thus,

> An arbitrator cannot, under Article 57 of the [ICSID] Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences . . . . The facts established or undisputed must, in the circumstances of the particular case, be plainly capable of giving rise to the inference claimed to be derived from such facts. The inference resulting from the facts must be that, manifestly, that is, clearly, the person challenged is not to be relied upon for independent judgment, or that a readily apparent and reasonable doubt as to that person's reliability for independent judgment has arisen from the facts established or not disputed.[12]

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[6] Nigel Blackaby et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 267-68 (5th ed. 2009) ("Redfern"), at para. 4-77.

[7] *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19, and *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A.*, ICSID Case No. ARB/03/17, Second Decision on Disqualification, May 12, 2008 ("*Suez Aguas* Second Decision"), at para. 27.

[8] *Id.* at para. 28.

[9] *See also* "Remarks of the ICSID Secretary-General," *News from ICSID*, Winter 1989, at 5 ("The Convention contains a second condition related to the topic of independence and impartiality that parties must observe in the selection of arbitrators.").

[10] Merriam-Webster's Collegiate Dictionary (10th ed. 2002) ("Webster's Dictionary") at 706.

[11] Shorter Oxford English Dictionary (5th ed. 2002) at 1691.

[12] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator, December 19, 2002 ("*SGS* Decision"), reprinted in 8 ICSID Reports 402 (2005); *see also* Tupman at 44-45 (describing *Amco Asia Corporation and others v. Republic of*

In sum, "the term 'manifest' means 'obvious' or evident."[13] Accordingly, this decision will apply this standard.

III. TRIBUNAL'S ANALYSIS

38. Based upon the argumentation and evidence stemming from Respondent's Proposal, the Two Other Members must render a decision on either or both of two grounds: first, the merits of Respondent's Proposal and, second, the timeliness of Respondent's Proposal. The Two Other Members address these two grounds in that order.

A. The Merits of Respondent's Proposal

39. With Respondent's Decision not to divulge the source or other information regarding Respondent's Assertion that Dr. Turbowicz and Dr. Specht "maintain personal relations," the Two Other Members, as foretold in the February 22 Letter, have determined that they have "no choice but to disregard this aspect of Respondent's Proposal." They reach this conclusion because the burden of proof for such an assertion rests upon Respondent.[14] Indeed, "Article 57 places a heavy burden of proof on the Respondent to establish facts that make it obvious and highly probable, *not just* possible, that [the challenged arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment."[15] Respondent, for whatever reason, has chosen not to provide any evidence in support of Respondent's Assertion, thereby wiping clean the slate as far as this assertion is concerned.

40. Consequently, as most recently confirmed in Respondent's March 1 Letter, the sole remaining bases for Respondent's Proposal are: (1) the fact that Dr. Turbowicz and Dr. Specht attended Harvard Law School together some twenty years ago and came to know each

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Indonesia, ICSID Case No. ARB/81/1, Decision on Disqualification, June 24, 1982 (unreported) ("*Amco* Decision") ("The challenging party must prove not only facts indicating the lack of independence, but also that the lack is 'manifest' or 'highly probable', not just 'possible' or 'quasi-certain'.")).

[13] *Suez Aguas* Second Decision at para. 29.

[14] *See, e.g., SGS* Decision at 402 ("[T]he party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment"); Tupman at 49 (noting that "doubts in the mind of the challenging party alone are not sufficient").

[15] *Suez Aguas* Second Decision at para. 29.

other at that time; (2) the fact that Dr. Turbowicz did not disclose this shared educational experience as a part of the Turbowicz Declaration; (3) Dr. Turbowicz's purported lack of requisite arbitration experience, which suggests to Respondent that his selection was motivated by his lack of independence and impartiality; and (4) the fact that, some time earlier in 2007, Dr. Specht telephoned Dr. Turbowicz and inquired "in a brief phone call" as to Dr. Turbowicz's availability to serve as arbitrator in this proceeding. For their part, Dr. Turbowicz and Dr. Specht both deny that they have maintained any kind of relationship whatsoever since their days together at Harvard Law School, be it professional or business or social or personal or of any other sort.

41. These then are the facts and the inferences to which the Two Other Members must direct their attention in order to decide upon Respondent's Proposal. In determining whether Respondent has submitted adequate proof of a manifest lack of independence and impartiality, the Two Other Members agree with the *Suez Aguas* Decision that both concepts implicate states of mind that, on an objective basis, can "only be inferred from conduct."[16] The *Suez Aguas* Decision also properly observes that the bulk of the previously reported ICSID challenge decisions are "based on some alleged professional or business relation" between the challenged arbitrator and one of the parties.[17] There is no such relation in this case. Indeed, as explained below by reference to the remaining aspects of Respondent's Proposal, the meager facts identified by Respondent – either viewed in isolation or taken together – do not demonstrate a lack of independence or impartiality on the part of Dr. Turbowicz – much less a *manifest* lack of these qualities.

1. Shared Educational Experience

42. The Two Other Members first consider whether the shared educational experience of Dr. Specht and Dr. Turbowicz indicates a lack of independence and impartiality. As observed by Prof. Schreuer, "[a] relationship with a party affecting the eligibility as arbitrator may be of a personal, family or business nature . . . [however,] [n]ot every past contact, professional or personal, with a party would disqualify a person from being appointed as

[16] *Suez Aguas* Decision at para. 30.
[17] *Suez Aguas* Decision at para. 32.

arbitrator."[18] In particular, Prof. Schreuer observes that even "[p]rofessional contacts between an arbitrator and legal counsel representing one of the parties are not, as a rule, an obstacle to the exercise of independent judgment."[19] The Two Other Members are aware of no case and of no scholarly learning that holds, or even argues, that long-ago encounters at an educational institution, standing alone, provide objective grounds, either real or perceived, for justifying an obvious misgiving as to impartiality or for demonstrating an evident lack of reliability as to independence. Certainly, Respondent has cited no such authority.

43. There is, however, pertinent learning from a challenge decision that highlights the need for especially persuasive evidence in order to satisfy the dictates of Articles 14(1) and 57 of the ICSID Convention. The dismissal in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic* emphasizes that a challenging party must rely on established facts rather than on "mere speculation or inference" because "the application of a subjective, self-judging standard instead of an objective one would enable any party in arbitration who becomes discontented with the process for any reason to end it at any time at its sole discretion simply by claiming that an arbitrator is not independent or impartial . . . ."[20] The tribunal further observed that "[a]ll the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator . . . to render a decision freely and independently."[21]

44. In the opinion of the Two Other Members, the factual footing for this aspect of Respondent's Proposal is particularly insufficient because, in order to establish a real or apparent conflict within the express terms of the ICSID Convention, Respondent's Proposal requires the creation of the very inferences that the common definition of the term "manifest" does not in its ordinary meaning permit.

45. In sum, the Two Other Members see no grounds or authority on which to determine that the shared educational experience and resulting acquaintance between Dr.

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[18] Christoph H. Schreuer, THE ICSID CONVENTION: A COMMENTARY 513 (2nd ed. 2009) ("Schreuer COMMENTARY"), at para. 22-23.

[19] Schreuer COMMENTARY at 513, para. 23.

[20] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Challenge to the President of the Committee, September 24, 2001, at para. 25.

[21] *Id.* at para. 28.

Turbowicz and Dr. Specht in and of themselves evidence either a relationship that might influence Dr. Turbowicz's freedom of decision-making or the presence of any predisposition toward the positions of one party over those of the other.

2. Non-Disclosure of Shared Educational Experience

46. The Two Other Members next consider the implications of the fact that Dr. Turbowicz did not disclose in his Declaration of November 10, 2007 his shared educational experience with Dr. Specht. The Two Other Members must decide whether this fact of non-disclosure provides an underpinning to Respondent's Proposal of such a proportion that the non-disclosure, in and of itself, indicates a manifest lack of the qualities required of arbitrators under Article 14(1) of the ICSID Convention.

47. A determination of whether a transitory and long-ago schooling acquaintance between an arbitrator and a counsel to a party is a fact requiring disclosure under the terms of Arbitration Rule 6(2) is a question that requires the Two Other Members to review the language of that rule, as amended through 2006, in some detail. The relationship between the requirements for disqualification under Articles 14(1) and 57 of the ICSID Convention and the disclosure parameters of Arbitration Rule 6(2) is not a perfect match. The scope of the disclosure declaration is considerably broader than the requirements that must be met in order to achieve disqualification. On the one hand, the discrepancy between the two makes common sense because it encourages the very disclosure of facts upon which a decision to disqualify, or not to disqualify, can only be founded; but, on the other hand, this discrepancy leaves a hole to be filled where, as here, the very fact upon which the challenging party relies in seeking to disqualify an arbitrator is not disclosed as a part of the relevant Arbitration Rule 6(2) declaration and, according to the challenging party, only came to its actual knowledge late in the arbitration process.

48. The preparatory work papers behind Arbitration Rule 6 do not provide meaningful guidance on the intended consequence of this discrepancy under the provisions of Articles 14(1) and 57 of the ICSID Convention. Furthermore, the Parties have cited no case or scholarly reference that might help to enlighten the meaning of this gap. As a result, the Two

Other Members have to take the language of those two Articles and of Arbitration Rule 6(2), along with whatever preparatory history does exist, and then apply the Vienna Convention's rules of interpretation so as to garner the meaning of that language in its "context" and "in the light of its object and purpose." Thus, it is left to the Two Other Members to square the circle, so to speak, and they will now proceed to do so within the confines of the particular facts of this case.

a. Arbitration Rule 6(2)

49. The last paragraph of Arbitration Rule 6(2) was added in two parts. Amendments to the rule in 1984 contributed the following new language to the text of the required declaration: "Attached is a statement of my past and present professional, business and other relationships with the parties." According to a description of the 1984 amendments prepared by Antonio R. Parra, Counsel at ICSID at the time, the addition to Arbitration Rule 6(2) was intended as a "reflection of current practice . . . that arbitrators include in their declarations . . . a statement of any past or present relationship they may have with the parties."[22] The Two Other Members note the explicit limitation of the language of this 1984 amendment, and of the description of its intention, to relationships with the "parties," without any reference to relationships with counsel to the parties.

50. Then, on April 10, 2006, Arbitration Rule 6(2) was amended again, with "(a)" placed before the phrase "of my past and present professional, business and other relationships (if any) with the parties" that was added in 1984 ("6(2)(a)") and with the following new clause: "and (b) any other circumstance that might cause my reliability for independent judgment to be questioned by a party" ("6(2)(b)"). The text of Arbitration Rule 6(2), as amended, does not provide a fixed form of wording to cover the contingency where a declarant considers that there is no basis on which to attach such a statement; that is, there are no separate words supplied in the text of Arbitration Rule 6(2) to the effect that, as far as the declarant is concerned, there are no relationships or other circumstances that fall within the form of declaration found in

[22] "Revised Regulations and Rules," *News from ICSID*, Winter 1985, at 6.

Arbitration Rule 6(2) (*e.g.*, there is no provision allowing a declarant to place a checkmark in favor of an assertion akin to: "There are no such relationships or circumstances.").

51. The October 22, 2004 Discussion Paper of the ICSID Secretariat on Possible Improvements of the Framework for ICSID Arbitration (the "Discussion Paper") is instructive in understanding the import of the new 6(2)(b) that was ultimately adopted in 2006. The Discussion Paper states:

> With the large number of new cases, the disclosure requirements for ICSID arbitrators might usefully be expanded. Under the UNCITRAL Arbitration Rules, an arbitrator is required to disclose to the parties any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. The relevant ICSID provisions . . . could be amended similarly to require the arbitrator to disclose, not only past and present relationships with the parties, but more generally any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment. This might in particular be helpful in addressing perceptions of issue conflicts among arbitrators.[23]

The Two Other Members observe that Respondent's Proposal does not in any way involve the question of "issue conflicts," thereby leaving only the more general comment of the Discussion Paper for the Two Other Members to ponder as to drift and meaning.

52. Subsequently, a May 12, 2005 Working Paper of the ICSID Secretariat on Suggested Changes to the ICSID Rules and Regulations (the "Working Paper") attached drafts of suggested changes that took account of "comments received on the Discussion Paper."[24] Among these attached drafts was the language proposed to be added to Arbitration Rule 6(2), along with an accompanying "Note" that states in part:

> As pointed out in the Discussion Paper . . . , the suggested changes expand the scope of disclosures of arbitrators to include any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment.[25]

Beyond these observations by the ICSID Secretariat, the Two Other Members are unaware of any other pertinent drafting history that might shed further light on the intended meaning and

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[23] Discussion Paper of the ICSID Secretariat on Possible Improvements of the Framework for ICSID Arbitration, October 22, 2004, at para. 17.

[24] Working Paper of the ICSID Secretariat on Suggested Changes to the ICSID Rules and Regulations, May 12, 2005, at para. 7.

[25] Working Paper of the ICSID Secretariat on Suggested Changes to the ICSID Rules and Regulations, May 12, 2005, at p. 12.

scope of the language that, as proposed in the Working Paper, later became 6(2)(b) in 2006. And the Schreuer COMMENTARY has the following to say on the topic: "[N]o further specification of the type of circumstances envisaged by this Rule is provided."[26]

53. Taking all these factors into account, the Two Other Members conclude that 6(2)(a) by its plain verbiage only addresses relationships with parties whereas 6(2)(b) is not similarly or unambiguously constricted in its reach. Further, 6(2)(b) is broader than 6(2)(a) in another significant feature through its use of the word "circumstance" rather than of the word "relationship." According to Webster's Dictionary, "relationship" connotes the "state of being related or interrelated,"[27] thereby requiring in this instance a personal connection of some sort, whereas "circumstance," again according to Webster's Dictionary, connotes a "condition, fact or event accompanying, conditioning, or determining another,"[28] thereby referencing certain facts or situations that are attendant to, or are surrounding, certain other facts or situations. In effect, a circumstance is more inclusive than is a relationship.

54. But, whereas 6(2)(b) is in these enumerated respects more expansive than 6(2)(a), 6(2)(b) is in certain other respects narrower than 6(2)(a). For example, the text of 6(2)(b) does not include the words "past and present" or the words "(if any)" that appear in 6(2)(a). Thus, 6(2)(b) appears to be intended as less encompassing than 6(2)(a) in terms of both the time period that is covered and the kinds of connections that are covered. That 6(2)(b) is less inclusive than 6(2)(a) in these respects is bolstered by the fact that the "Note" contained in the Working Paper speaks of the additional language of 6(2)(b) as meant "to include any circumstances likely to give rise to justifiable doubts as to the arbitrator's reliability for independent judgment."[29] The Two Other Members read this Note as indicating the intention of the drafters that the words "might cause" that appear in 6(2)(b) (*i.e.*, "any other circumstance that might cause my reliability for independent judgment to be questioned by a party") are to be interpreted in the manner explicated in the Note; that is, that 6(2)(b) calls for the disclosure of facts, in time and in kind, signifying an unspecified degree of likelihood of impairment to impartiality or independence

[26] Schreuer COMMENTARY at 512, para. 20.
[27] Webster's Dictionary at 984.
[28] Webster's Dictionary at 207.
[29] Working Paper of the ICSID Secretariat on Suggested Changes to the ICSID Rules and Regulations, May 12, 2005, at p. 12.

whereas 6(2)(a) calls for total disclosure of any and all relationships with the parties, even those that are ancient in age or subjectively minor in character.

55. In sum, in order to accomplish the dual goal of a comprehensive disclosure of the relationships defined in 6(2)(a), but of a more flexible and limited level of disclosure of any other circumstance based on likelihood, the drafters chose, for the purposes of 6(2)(b), to adopt a "justifiable doubts" test such as that encapsulated in Article 9 of the UNCITRAL Arbitration Rules rather than to follow the much higher "manifest" threshold that must be met in order to sustain a challenge under the ICSID Convention. The difficulty lies in the lack of detailed guidance as to what facts need to be disclosed, and as to what facts do not need to be disclosed, under the more elastic scope of 6(2)(b).

b. The IBA Guidelines

56. To ascertain the facts requiring disclosure under 6(2)(b), the Two Other Members seek guidance from the 2004 International Bar Association Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines").[30] The Two Other Members find the IBA Guidelines to be instructive because they relate to the UNCITRAL "justifiable doubts" standard that is referenced in the Discussion Paper and in the Working Paper that led to the adoption of 6(2)(b). Further, since their adoption in 2004, the IBA Guidelines have been widely used as a catalogue of the bases for challenge as well as for the parameters of an arbitrator's duty of disclosure.[31] Multiple tribunals applying the ICSID Convention have recognized the persuasive authority of the IBA Guidelines.[32]

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[30] *See* International Bar Association Guidelines on Conflicts of Interest in International Arbitration (May 22, 2004), at 4 (noting that the IBA Guidelines reflect their drafters' understanding of "best current international practice").

[31] *See, e.g.*, *PIP* Decision at para. 24 (noting that the IBA Guidelines provide "une indication utile" of the standards for determining the independence and impartiality of an arbitrator); Gary R. Born, INTERNATIONAL COMMERCIAL ARBITRATION 1391 (2009) ("The IBA's Guidelines address the appropriate scope of contacts between a party and potential co-arbitrators.").

[32] *See, e.g.*, *Hrvatska Electroprivreda, d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on Disqualification, May 6, 2008, at para. 12; *EDF Int'l S.A., SAUR Int'l S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB 03/23, Decision on Disqualification, June 25, 2008, at paras. 25, 34, 50, 60; *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009, at para. 263; *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on Disqualification, November 12, 2009, at para. 15; *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Participation of Counsel, January 14, 2010, at note 3.

57. General Standard (3) of the IBA Guidelines deals specifically with the subject of facts requiring disclosure. General Standard (3) stipulates in subparagraphs (a) and (c):

> (a) If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances . . . prior to accepting his or her appointment . . . .
>
> (b) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.[33]

58. The IBA Guidelines outline a series of examples in the practical application of General Standard (3) for the purpose of drawing a line between what the IBA Guidelines regard as necessary disclosure, on the one hand, and as unnecessary disclosure, on the other hand. The IBA Guidelines thus aim to strike a reasonable balance between those facts and circumstances that ought to be disclosed and those that ought not to be disclosed.

59. Facts requiring disclosure are further elucidated by Part II of the IBA Guidelines, entitled "Practical Application of the General Standards." This Part describes four different categories of fact patterns: (1) a "non-waivable red list" of certain relationships that not only must be disclosed in every case but are also so problematic that the parties to the arbitration do not have the power to waive them, meaning that in every such instance the arbitrator is ineligible for appointment; (2) a "waivable red list" of relationships that must be disclosed in every instance but which the parties can affirmatively agree to waive; (3) an "orange list" of relationships which must be disclosed but which are deemed accepted if no objection is raised within a specified time period; and (4) a "green list" of relationships that an arbitrator need not disclose at all.[34] The comments to the IBA Guidelines stress that the presence of the "green list" is intended to place a limit to disclosure "based on reasonableness."[35]

c. Analysis

60. The Two Other Members now turn to the application of Arbitration Rule 6(2), as informed by the IBA Guidelines, to the facts of this proceeding – namely, the non-disclosure of

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[33] IBA Guidelines at 9.
[34] IBA Guidelines at 17-25.
[35] IBA Guidelines at 19.

the shared educational experience and the resulting acquaintance between Dr. Turbowicz and Dr. Specht.

61. What is striking to the Two Other Members is that long-ago acquaintanceship at an educational institution was not perceived by the drafters of the IBA Guidelines as the kind of relationship that was deemed worthy of any mention even in the "green list" of fact patterns, much less the "orange list" or the "red list." Further, among the types of "green list" connections not requiring disclosure is a category entitled "contacts with another arbitrator or with counsel for one of the parties" that include (i) "membership in the same professional association or social organization" and (ii) previous service "together as arbitrators or as co-counsel."[36] In this proceeding, there is no evidence of even this minimal level of connection between Dr. Turbowicz and Dr. Specht. Long-ago acquaintanceship at school, the Two Other Members note, has neither the currency of co-membership in some professional or social group nor the professional intimacy of prior service as co-arbitrator or as co-counsel. Presumably, an acquaintanceship of this attenuated nature carries not even the level of connection justifying its inclusion on the IBA Guidelines' "green list." In the view of the Two Other Members, this strongly suggests that the existence of such an acquaintanceship does not require disclosure.

62. Respondent's February 19 Letter refers to a number of case precedents from courts in the United States and Canada that purportedly diverge from the conclusion suggested by the IBA Guidelines, in that they advocate disclosure to dispel even the slightest reason to question the independence and impartiality of an arbitrator. Respondent cites this case law for the proposition that proactive and full disclosure by prospective arbitrators is necessary to avoid placing parties in the awkward position of being perceived as challenging a sitting arbitrator's integrity. However, these citations are inapposite because the underlying constituent documents have material differences from the language of the ICSID Convention and the Arbitration Rules and the relationships described in these cases are not those of academic classmates but are rather of a professional or business nature not present here. Furthermore, the standards that the Two Other Members are to apply are those recognized by international law and not by States with no involvement in this case. Certainly, the citations in Respondent's February 19 Letter are facts to be taken into account, but the Two Other Members are persuaded that the state of international

[36] IBA Guidelines at 22.

law as to the duty of disclosure is best evidenced by the IBA Guidelines and not by the American and Canadian domestic law precedents cited by Respondent.

63. The Two Other Members also pay heed to Respondent's point that in a given case, the very failure to disclose relevant and material circumstances might evidence partiality, regardless of whether actual bias is established. But here there is no professional, business, personal, social or other relationship of any kind between Dr. Turbowicz and Dr. Specht that is of a reasonably recent date, such as within the past three years as specified as the relevant period for disclosure of certain connections appearing on the IBA Guidelines' "orange list." Rather, here there is only an antiquated and attenuated academic affiliation of two decades ago that the Two Other Members regard as trivial as compared to the relationships involved in the various cases cited in Respondent's February 19 Letter. The Two Other Members therefore conclude that the IBA Guidelines, as well as the examples set forth therein, can only reasonably be read as indicating that the circumstance of being classmates at Harvard Law School, without more, is not something calling for disclosure under General Standard (3) as a fact that, on an objective basis, "may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence."

64. Despite this conclusion, the Two Other Members must, as promised, still seek to square the circle between the disclosure standards of Arbitration Rule 6(2) and the disqualification dictates of Articles 14(1) and 57 of the ICSID Convention. In this regard, the Two Other Members cannot agree with the suggestion, found in Respondent's Proposal, that reconciliation is best achieved by simply imputing the "justifiable doubts" standard inherent in Arbitration Rule 6(2) into Articles 14(1) and 57 of the ICSID Convention. Rather, there is a clear distinction between the parameters of the duty to disclose and the standards required to uphold the merits of a particular challenge. Two pertinent comments to the IBA Guidelines state in this regard: "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;"[37] and "no presumption regarding disqualification should arise from a disclosure."[38] The Two Other Members agree with both of these propositions, but, in addition, are of the view that certain facts or circumstances are

[37] IBA Guidelines at 18.
[38] IBA Guidelines at 18.

of such a magnitude that failure to disclose them either (1) would thereby in and of itself indicate a manifest lack of reliability of a person to exercise independent and impartial judgment or (2) would be sufficient in conjunction with the non-disclosed facts or circumstances to tip the balance in the direction of that result. However, neither of these conditions is present in this case due to the *de minimis* character of the facts and circumstances presented by the Respondent.

65. Whether or not Dr. Turbowicz would in hindsight have been wise to disclose the fact that he and Dr. Specht were students together is subject to debate. Certainly, had Dr. Turbowicz done so, the imbroglio stemming from Respondent's Proposal this late in the proceedings would have been avoided. Further, the Two Other Members are the first to acknowledge that the integrity of the international arbitration process requires that prospective arbitrators disclose at the outset relevant and material facts that to a reasonable third-person arguably might call into doubt that candidate's impartiality or independence. This is especially so in light of the limited appeal mechanisms that adhere to international arbitration in contrast to those of domestic law systems.

66. Nonetheless, the Two Other Members believe that the IBA Guidelines, while not determinative in any sense, affirmatively discourage the disclosure of the shared educational experience of Dr. Turbowicz and Dr. Specht. Further, the Two Other Members view the position taken in the IBA Guidelines as reflective of the legitimate concern that a requirement to disclose trivial or superficial facts will prove burdensome to parties and arbitrators, will unnecessarily circumscribe the freedom of choice in the selection of party-appointed arbitrators and will encourage frivolous challenges. In sum, based on their analysis of the IBA Guidelines, the Two Other Members agree with the conclusion reached in the *Suez Aguas* Second Decision that "[a] reasonable interpretation of ICSID Arbitration Rule 6 is that an arbitrator is required to disclose a fact only if he or she reasonably believes that such fact would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person."[39] Such a "reasonable person" test is not, in the opinion of the Two Other Members, met under the facts before them. Finally, whether disclosed or not, the affiliation stemming from such a shared educational experience does not implicate the standards for disqualification set forth in the ICSID Convention.

[39] *Suez Aguas* Second Decision at para. 46.

3. The Purported Lack of Arbitral Experience and Its Alleged Implications

67. The Two Other Members turn next to Respondent's suggestion that Dr. Turbowicz lacked the kind of arbitration experience that would be expected of a person appointed to serve in such an "obviously complicated investment arbitration case" and Respondent's corresponding speculation that the "personal relations" between Dr. Turbowicz and Dr. Specht motivated Claimant's appointment. Respondent's February 19 Letter points out that "it was open to . . . Dr. Specht to choose, from the universe of available arbitrators, an arbitrator with no links to him" but that he instead chose someone "whom he personally knew," thereby implying that Dr. Turbowicz was selected because he would be partial to Claimant's case.

68. First, the Two Other Members, based on their professional experience, believe that some previous association of a party or its counsel with the person whom a party chooses to appoint as arbitrator is not an unusual circumstance. As stated in the *SGS* Decision:

> It is commonplace knowledge that in the universe of international commercial arbitration, the community of active arbitrators and the community of active litigators are both small and that, not infrequently, the two communities may overlap, sequentially if not simultaneously. It is widely accepted that such an overlap is not, by itself, sufficient ground for disqualifying an arbitrator.[40]

69. It seems not unreasonable to expect that where a party-appointed arbitrator is involved, as is the case with Dr. Turbowicz, and as specifically contemplated by the arbitral process that the ICSID Convention establishes, the party making the selection will, in many instances, have some form of acquaintance with that person.[41] Indeed, the decision on disqualification in *Amco Asia Corporation and others v. Republic of Indonesia* concluded that a party-appointment system inherently presumes some form of acquaintance between the designee and the party making the selection.[42] Thus, the Two Other Members are of the view that it is the nature and the extent of the acquaintance that have significance for Articles 14(1) and 57 of the ICSID Convention and for Arbitration Rule 6(2), and not the fact of acquaintance without more.

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[40] *SGS* Decision at 404.

[41] *See* Schreuer COMMENTARY at 509, para. 5 (noting that "the principle of freedom of choice for the parties in the constitution of the tribunal . . . enables them . . . to select persons who enjoy their special confidence").

[42] *See* Tupman at 44-45 (describing the *Amco* Decision).

70. Second, the Two Other Members observe that prior arbitral experience in an ICSID case is not a *sine qua non* to appointment as an ICSID arbitrator because, if it were, there would never be a first time for anyone, obviously an impossibility. The ICSID Convention does not place this or any comparable limitation upon the freedom of parties to nominate whom they choose, so long as the necessary qualifications of Article 14(1) are fulfilled. To that end, the *curriculum vitae* of Dr. Turbowicz that the Secretary of the Tribunal sent to the Parties on October 25, 2007 lists under the heading "Work Experience" the following: "01-06 Lawyer, . . . International trade law, Investments, Director of Companies and Arbitrator," which suggests that Dr. Turbowicz possesses competence in the field of law as required by Article 14(1).

71. Throughout the pleading process, Respondent never expressed any hesitation about Dr. Turbowicz's "recognized competence" in the field of law, and the Two Other Members are unaware of any basis on which Respondent could have done so. Absent such a showing, the Two Other Members decline to second-guess Dr. Turbowicz's *curriculum vitae* or to assign hidden agendas to Claimant on the basis of Respondent's speculation or conjecture.

4. The "Brief Phone Call"

72. The final aspect of the merits of Respondent's Proposal which the Two Other Members must consider is the telephone call that Dr. Specht made to Dr. Turbowicz in 2007 to determine his availability to serve as arbitrator. There is nothing in the record to indicate that this "brief phone call" dealt with any issue other than the question of Dr. Turbowicz's availability. Nonetheless, in Respondent's view, the fact of this telephone call should have been disclosed as a part of the Turbowicz Declaration, even though Respondent's March 1 Letter acknowledges the event as of "minor importance."

73. First, the Two Other Members believe that such inquiries are not out of the ordinary as a matter of practice. For example, the Schreuer COMMENTARY specifically notes that "[t]he appointment of arbitrators involves preliminary consultation with prospective appointees . . . ."[43] Indeed, it is common to nominate an arbitrator after discussing whether he or

[43] Schreuer COMMENTARY at 492, para. 8; *see also* Gary R. Born, INTERNATIONAL COMMERCIAL ARBITRATION 1391 (2009) ("It is common and ordinarily unobjectionable practice for parties, or their counsel, to

she is in a position to accept the assignment. In short, Respondent has produced no evidence supporting a finding of impropriety in the holding of the "brief phone call," and the Two Other Members are unaware of any rule that either forbids or discourages such an inquiry.

74. Second, with regard to the issue of Dr. Turbowicz's purported duty as a part of the Turbowicz Declaration to disclose this "brief phone call" with Dr. Specht, the Two Other Members remark that a circumstance that appears on the IBA Guidelines "green list" of contacts *not* requiring disclosure deals with the situation where the "arbitrator has had an initial contact with the appointing party . . . (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve . . . ."[44] This exact circumstance is present here, as there is nothing in the record that would indicate that the "brief phone call" exceeded a discussion of Dr. Turbowicz's availability and qualifications.

75. Accordingly, the Two Other Members conclude that Dr. Turbowicz was not obliged to disclose the "brief phone call" with Dr. Specht, and they further conclude that the fact of this telephone call does not give cause for any doubt about the independence and impartiality of Dr. Turbowicz.

B. Timeliness of Respondent's Proposal

76. Having addressed the substance of Respondent's Proposal, the Two Other Members now express their views as to its timeliness. For prudential reasons, as hereinafter explained, the Two Other Members dismiss Respondent's Proposal on the merits but nonetheless believe it warranted that they appraise the promptness with which Respondent did, or did not, make its objection known.

77. Rule 9(1) of the Arbitration Rules requires that a "party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall *promptly*, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor" (emphasis added). Under Arbitration Rule 27, a party's failure

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contact potential choices for a co-arbitrator, to ascertain their suitability, availability and interest . . . ."); Redfern at 269, para. 4-82 ("In practice, a person approached by a party to act as a party-nominated arbitrator usually discloses any relevant facts informally to the prospective appointing party in the first instance.").

[44] IBA Guidelines at 24.

promptly to state its objections and promptly to propose disqualification of an arbitrator results in the waiver of the right to object.

78. A number of ICSID challenge decisions have wrestled with the temporal dimension of this mandate of promptness. For example, the *Suez Aguas* Decision posited that, in the absence of an objective quantification of what is intended by the word "promptly," the interests of an "orderly and fair arbitration proceeding" require that any disqualification proposal must be lodged "in a timely fashion"[45] and "without delay."[46] The *Suez Aguas* Decision held that a delay of fifty-three days in filing a challenge failed to satisfy these demands.[47] A challenge decision of more recent vintage is the November 6, 2009 decision on disqualification in *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, where the observation was made:

> It is on a case by case basis that tribunals must decide whether or not a proposal for disqualification has been filed in a timely manner . . . . The sanction for the failure to object promptly is waiver of the right to make objection."[48]

The *Cemex* Decision cites *Azurix Corp v. Argentine Republic* as considering a "delay of eight months as obviously too long" and *CDC Group PLC v. Republic of Seychelles* as "arriving at the same conclusion for a delay of 147 days."[49] The Schreuer COMMENTARY devises a formula for determining promptness in the following fashion: "Promptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification."[50]

79. Here, the Two Other Members are confronted with a proposal for disqualification which, on the one hand, was lodged more than two years after the distribution of Dr. Turbowicz's *curriculum vitae* but, on the other hand, was allegedly filed within weeks of the Respondent gaining actual knowledge of the overlap in the education of Dr. Turbowicz and Dr.

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45 *Suez Aguas* Decision at para. 18.

46 *Suez Aguas* Decision at para. 22.

47 *Suez Aguas* Decision at para. 26.

48 *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case. No. ARB/08/15, Decision on Proposal for Disqualification of an Arbitrator, November 6, 2009 ("*Cemex* Decision"), at para. 36.

49 *Cemex* Decision at para. 37 (citing *Azurix Corp v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Challenge to the President of the Tribunal, 25 February 2005 (unpublished) (reported in the Decision on Annulment, September 1, 2009, at para. 35) and *CDC Group PLC v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005, at para. 53).

50 Schreuer COMMENTARY at 1200, para. 11.

Specht. The question before the Two Other Members is whether Respondent, in the absence of proof of actual knowledge, should be deemed to have had constructive knowledge of the shared educational experience at a much earlier time for purposes of the promptness analysis required under Rule 9(1).

80. Certainly, in the experience of the Two Other Members, it is standard practice to perform some investigation into the background and connections of an opposing party and its counsel in the early stages of an international arbitration.[51] With the advent of the Internet and such applications as "Google" and "Wikipedia," an inquiry of this nature has become simple and easy, and the electronic response is nearly instantaneous. Dr. Specht's February 18 Letter, in a stance that Respondent has not contested, assures that his personal *curriculum vitae*, including a reference to his years of education at Harvard Law School, has been available at all relevant times under the website of the law firm that carries his name. There is nothing in the record to indicate that Respondent or Counsel to Respondent undertook any foray into the Internet to inspect his background or to compare it to Dr. Turbowicz's background. In a case in which related correspondence is generally conducted via email and CD-ROMs are utilized to convey documentary evidence, the Two Other Members do find credulity strained if Respondent and Counsel to Respondent insist that over these many months, no referral was made, or should have been made, to the Internet to ascertain publicly available information about Dr. Specht and his background.

81. Nonetheless, as appealing as such a construct may appear, the Two Other Members think it preferable not to divine some carefully crafted, modern-day duty to perform a routine examination into the background of a party and its counsel at an early date, failing which a party may be found to have not promptly objected, resulting in a waiver under Arbitration Rule 27. The Two Other Members recall in this regard that Respondent's Proposal expressly contends that Respondent as an opposing party could not "reasonably" have been expected "to verify such circumstance [of the common attendance at Harvard Law School] from the very outset of the case." While the global realities of this computerized, digitized age might reasonably lead to the

[51] *See* Tupman at 51 (noting as early as 1989 that "[a]lthough the burden of disclosing facts is primarily on an arbitrator, a party also has some duty to conduct at least a minimal background check to confirm or expand on the facts disclosed, or uncover additional facts. Far from hindering the arbitral process, such a check is not all that time-consuming or expensive.").

opposite conclusion (that is, to a recognition of a constructive duty to perform basic Internet research in the early stages of a proceeding), the Two Other Members conclude that they need not determine this issue in order to reach a decision in this case.

82. Accordingly, the Two Other Members choose to rely for their decision upon their analysis of the merits of Respondent's Proposal rather than upon an analysis of the proposal's timing. The Two Other Members thus decline to rule on the question whether Respondent's Proposal is time barred, although other arbitrators charged with resolving only this issue might reasonably reach the conclusion that it is.

IV. CONCLUSION

83. On the basis of the record before them, the Two Other Members decide that, in accordance with the ICSID Convention and the Arbitration Rules, Respondent's Proposal must be dismissed for failure to prove any fact that would indicate a manifest lack of impartiality or independence on the part of Dr. Turbowicz. The Two Other Members further conclude as a part of this decision that, under the terms of Arbitration Rule 6(2), Dr. Turbowicz had no duty to disclose in the Turbowicz Declaration the remaining facts cited in Respondent's Proposal.

84. The Two Other Members reserve the right to award costs in connection with this decision as part of the Award.

85. As from the date hereof, the state of suspension of the proceedings under Arbitration Rule 9(6) is hereby terminated.

/signed/

Hon. Davis R. Robinson
President

/signed/

Dr. Stanimir A. Alexandrov
Arbitrator

DATED: March 19, 2010