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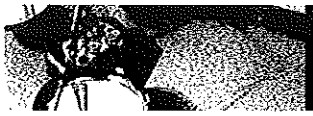

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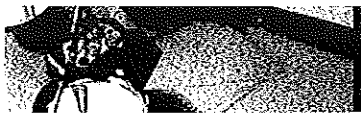

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Disqualification of a member of the arbitral tribunal, 'independence and impartiality': the current trend in ICSID arbitration proceedings

This article discusses the well-known increasing trend in ICSID arbitration for one of the parties to seek to disqualify a member of the arbitral tribunal. Such trend is evident in a number of recent cases, including *Participaciones Inversiones Portuarias SARL v Gabonese Republic* (ICSID Case No ARB/08/17), decision dated 12 November 2009 ('*Participaciones Portuarias*') and *CEMEX Caracas Investments B V and CEMEX Caracas II Investments B V v Bolivarian Republic of Venezuela* (ICSID Case No ARB/08/15), decision dated 6 November 2009 ('*Cemex Caracas*'). Also of interest in this context is the double challenge of the Republic of Argentina in *Suez, Sociedad General de Aguas de Barcelona S A and Vivendi Universal S A v Argentine Republic* ('*Suez Aguas I*') (ICSID Case No ARB/03/19) and *Suez, Sociedad General de Aguas de Barcelona S A and Interagua Servicios Integrales de Agua S A v Argentine Republic* (ICSID Case No ARB/03/17) ('*Suez Aguas II*'), decisions dated 22 October 2007 and 12 May 2008.

One of the most recent decisions, issued on 19 March 2010, in the case *Alpha Projektholding GmbH v Ukraine* (ICSID Case No ARB/07/16) ('*Alpha Projektholding*'), is of particular interest as it summarises the developing jurisprudence on the issue of disqualification of an arbitrator. Accordingly *Alpha Projektholding* is the focus of this article.

Proceedings

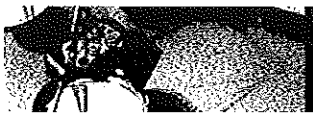
On 25 July 2007, the ICSID Secretary-General registered the request of the claimant/investor Alpha Projektholding for the institution of arbitration proceedings against Ukraine. The Tribunal was constituted on 8 February 2008. Its members were Hon Davis R Robinson (US), President; Dr Yoram A Turbowicz (Israeli), and Dr Stanimir A Alexandrov (Bulgarian).

In relation to the constitution of the Tribunal, it is important to emphasise two facts. First, on 22 October 2007, the claimant, represented by Dr Leopold Specht, appointed Dr Turbowicz as an arbitrator. Attached to the letter of appointment was the curriculum vitae of Dr Turbowicz, which stated the years of attendance of Dr Turbowicz at Harvard Law School in the 1980s.[1] Secondly, on 10 November 2007, in accordance with ICSID Arbitration Rule 6(2),[2] Dr Turbowicz submitted a letter declaring 'past and present ... relationships with the parties and ... any other circumstance that might cause ... reliability for independent judgment to be questioned by a party' (the '*Turbowicz Declaration*').[3] This declaration did not mention the fact that Dr Turbowicz attended Harvard Law School during the same years as Dr Specht, some 20 years ago.

After the arbitration proceedings continued in the normal course, including two hearings, on 5 February 2010, the respondent filed a proposal for the disqualification of Dr Turbowicz. The procedure was suspended, and the parties had two rounds of pleadings to explain their positions on the disqualification proposal. On 19 March 2010, the Tribunal, constituted by Hon Davis R Robinson, and Dr Stanimir A Alexandrov, rejected the respondent's proposal for disqualification.

Standards for disqualification of an arbitrator

According to the Tribunal's decision, issued pursuant to Articles 14(1) and 57 of the ICSID Convention, to disqualify an arbitrator,



the applicant must prove a 'manifest' lack of 'high moral character, recognized competence' and reliability 'to exercise independent judgment'.[4]

The respondent challenged only Dr Turbowicz's reliability 'to exercise independent judgment', based mainly on the 'Shared Educational Experience' and the 'Non-Disclosure of Shared Educational Experience' with counsel for Claimant.[5] The respondent also relied on secondary arguments identified by the Tribunal as 'The Purported Lack of Arbitral Experience' and 'The Brief Phone Call'.[6]

In determining whether there was a 'manifest' lack of ability 'to exercise independent judgment', the Tribunal identified two core concepts, impartiality and independence, and interpreted these concepts by reference to the *Suez Aguas* decisions.[7] Hence, the *Alpha Projektholding* Tribunal stated that 'independence' in this context must be understood as 'the lack of relations with a party that might influence an arbitrator's decision' and impartiality must be understood as 'the absence of a bias or predisposition toward one of the parties'. In relation to the meaning of 'manifest', the Tribunal concluded that this term meant something that is evident and not based on inferences.[8]

Application of standards

The *Alpha Projektholding* Tribunal stated that the respondent failed to prove a 'manifest' lack of ability 'to exercise independent judgment'. The Tribunal found that the fact that Dr Turbowicz and Dr Specht shared educational experience, being classmates at Harvard Law School at the LLM and SJD programmes 20 years ago, did not fall within the scope of Articles 14(1) and 57 of the ICSID Convention.

According to Article 57, the party applying for the disqualification of a member of an arbitral tribunal bears the burden of proof, and the Tribunal found that the respondent had failed to discharge this burden, insofar as most of the respondent's arguments rested on inferences and speculations.[9]

The Tribunal also found that the Turbowicz Declaration was sufficient to establish the impartiality and independence of the arbitrator in accordance with ICSID Rule 6(2). The Tribunal emphasised the difficulty of determining which information needs to be disclosed, and what need not be disclosed by an arbitrator, in the context of ICSID Rule 6(2). The Tribunal relied on the IBA Guidelines on Conflicts of Interest in International Arbitration, which describe in some detail the circumstances which are to be disclosed in order to maintain the impartiality and independence of an arbitrator.[10] The Tribunal concluded that the key test was that established in the *Suez Aguas II* decision, namely: '[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.'[11]

In determining the priority of international versus domestic law on the issue of disqualification of an arbitrator, the Tribunal relied upon international law as to the duty of disclosure, as evidenced by the IBA Guidelines, and not upon the US and Canadian domestic law precedents cited by respondent. The Tribunal found that international law had priority for two reasons. First, the respondent's reference to the US and Canadian domestic law had no connection with the present case, where each party was from a different jurisdiction. Secondly, the IBA Guidelines contained well-developed practical guidelines and classifications which were relevant in the present case.

Timeliness

In addition to dismissing the proposal for disqualification on the merits, the Tribunal also found that the proposal was not timely. In this context, the Tribunal noted that, under Rule 9(1) 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 therefore'. In determining the meaning of 'promptly' in this context, the Tribunal relied on the *Suez Aguas* and *Cemex Caracas* decisions, along with the Schreuer Commentary to the ICSID Convention, finding that '[p]romptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification'.[12]

The Tribunal emphasised that it is standard practice of the parties and the arbitrators to perform some general investigation when the Tribunal is being constituted, which is

reasonably easy nowadays through internet searches. In this regard, the Tribunal noted that the respondent should have been able to realise the coincidence of the years of attendance at Harvard Law School by Dr Turbowicz and Dr Specht, especially because the curriculum vita of Dr Specht had been posted on his law firm's website since before the arbitration began.

Future challenges

On the basis of the decision in *Alpha Projektholding* and similar cases, it is likely that the trend of parties attempting to disqualify tribunal members will continue if not increase in future years. For example, one pending challenge is in the case of *Quiborax S A, Non-Metallic Minerals S A & Allan Fosk Kaplún v Plurinational State of Bolivia* (ICSID Case No ARB/06/2) ('*Quiborax*'). In this case, on 7 April 2010, the respondent applied for disqualification of all three members of the arbitral tribunal. It remains to be seen whether the *Quiborax* Tribunal will follow the approach of the *Alpha Projektholding* Tribunal on this issue, but in any event it will provide further guidance on this delicate subject of the impartiality and independence of the arbitrator.

Also, it is evident from the decision in *Alpha Projektholding* that the arbitrator's declaration under ICSID Rule 6 leaves much room for a party to challenge a member of the Arbitral Tribunal. In this regard, the portion of Rule 6 requiring arbitrators to disclose so-called issue conflicts was amended in 2006 as part of the broader review of the ICSID Arbitration Rules.[13] Therefore, in the application of Rule 6 it should be noted that members of a Tribunal may pursue two possible courses: conservatively disclosing any possible connection, no matter that many of the issues will be irrelevant, or wisely taking into consideration the IBA Guidelines as a principle to apply Rule 6.

Notes

1 *Alpha Projektholding*, p 2 (referring to '1988-90 Harvard Law School, Doctor of Juridical Science (SJD)' and '1987-8 Harvard Law School, Master of Laws (LL M)').

2 ICSID Arbitration Rules, Rule 6(2) (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 constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between [__] and [__]. I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal. I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the [ICSID Convention] and in the Regulations and Rules made pursuant thereto. 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.' Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.).

3 *Alpha Projektholding*, p 2.

4 *Ibid*, p 11.

5 *Ibid*, pp 11, 14, 16.

6 *Ibid*, pp 25, 26.

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 SA*, ICSID Case No ARB/03/17, Second Decision on Disqualification, 12 May 2008 ('*Suez Second Disqualification Decision*'), at paragraph 27 ('[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 *See 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, 19 December 2002.

9 Audley Sheppard, 'Arbitrator Independence in ICSID Arbitration' in *International Investment Law for the 21st Century Essays in Honour of Christoph Schreuer*, Oxford University Press, 2009, Great Britain, pp 144-149 ('*Sheppard*'). Consistent with the *Amco Asia* case, Sheppard pointed out that a party challenging an arbitrator must present specific evidence of the facts alleged so the lack of independence is manifest.

10 IBA Guidelines, General Standard (3) ('(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 to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them. (b) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or

appointment at the outset or resigned. (c) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure. (d) When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.').

11 *Alpha Projektholding*, p 24, quoting *Suez Second Disqualification Decision*, at paragraph 46.
12 ICSID case no ARB/07/16, *Alpha Projektholding GmbH v Ukraine*, Decision issued on 19 March 2010, p 28.
13 Antonio R Parra, *The 2006 Amendments of the ICSID Arbitration Rules*, SchiedsVZ 2006, p 247.

Overview of recent developments in investment arbitration and the oil and gas industry in Venezuela

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Three years have passed since the Fifth Summit of the Bolivarian Alternative for the Americas (ALBA)[1] was held in April 2007, in Barquisimeto, Venezuela. During this Summit, the Presidents of the ALBA announced their intention to withdraw from the International Centre for Settlement of Investment Disputes (ICSID), claiming as the reason an alleged profound conflict of interest between the Centre and the World Bank. The ALBA declaration and the actions taken by some of the ALBA countries to dismantle the framework for the protection of foreign investment, and to prohibit or restrict recourse to international arbitration in oil and gas state contracts, was alarming to the international arbitration community.[2]

This concern was justified, particularly considering the partial failure of the Free Trade Area of the Americas initiative (FTAA); Argentina's experience with investment arbitration; the fact that Brazil (the most successful country in Latin America in attracting flows of FDI) is not a signatory to the ICSID Convention and has not ratified any of the BITs executed during the 1990s; that Mexico has been reluctant to enter into the ICSID system notwithstanding that it is a party to NAFTA; and that the Mercosur Colonia Protocol has not entered into force after more than 15 years since being enacted.

The ALBA countries' approach to investment arbitration: the cases of Bolivia and Ecuador

Notwithstanding the political alliances, each ALBA country has had a different approach to dealing with international arbitration and its existing BITs.[3]

One month after the ALBA summit, Bolivia withdrew from the ICSID Convention. A couple of months later, in December 2007, Ecuador notified the ICSID Secretary General that disputes over natural resources, in particular oil, gas and minerals, would no longer be submitted to the jurisdiction of the Centre. Then, in July 2009, Ecuador denounced the ICSID Convention.

Both Bolivia and Ecuador then embarked on a campaign to denounce certain existing BITs. While Bolivia took action with regard only to the BIT with the Netherlands, Ecuador announced its decision to denounce all BITs that did not attract new flows of FDI, and later on the Ecuadorian Government announced its decision to end its BIT programme entirely.[4]

Bolivia and Ecuador have also taken other measures to prohibit or restrict recourse to international arbitration. These measures have come into existence through amendments of their national constitutions. For example, both countries have enacted new national constitutions drafted by specific ad hoc Constituent Assemblies, following the example that took place in