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International Arbitration Case Law

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OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/14)

Decision on the proposal to disqualify Professor Philippe Sands, Arbitrator, May 5, 2011[†]

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[†] See the decision at: http://italaw.com/documents/OPICKarimumDisqualificationDecision.pdf

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Digest

This case concerns the rejection of a challenge to an arbitrator, Professor Phillipe Sands, proposed by Respondent, the Bolivarian Republic of Venezuela. The challenge was made by Claimant on the basis that the arbitrator had been appointed previously by Respondent and also by Respondent's counsel as arbitrator in ISCID and non-ICSID cases and these appointments create not only a potential for undue influence and unfair advantage but also suggest an on-going professional and business relationship between the arbitrator and Respondent and Respondent's counsel so as to create a manifest lack of independence and impartiality. The Two members of the Tribunal denied the Claimant's request for disqualification. In doing so, however, they confirmed the need for arbitrator impartiality and independence applies also in investor-state disputes. They held that there is a "relatively high burden" in challenging an ICSID arbitrator, that only a small number of cases were based upon multiple appointments, and that a manifest lack of independence must be established clearly and objectively. In this context, multiple appointments by counsel or a party of an arbitrator are not a neutral factor but constitute a consideration that must be carefully considered in the context of a challenge and this consideration must be considered objectively as such multiple appointments may lead to the conclusion that the arbitrator cannot be relied upon to exercise independent judgment.

I. FACTS OF THE CASE AND PROCEDURAL HISTORY

On May 28, 2010, OPIC Karimum Corporation (Panama) ("OPIC" or "Claimant") filed a Request for Arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("Convention") against the Bolivarian Republic of Venezuela ("Venezuela" or "Respondent").

Absent agreement between the parties with respect to a method of arbitrator appointment, the Claimant, by letter of August 17, 2010 invoked Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings and appointed Professor Guido Santiago Tawil, an Argentine national, as arbitrator. Professor Tawil accepted his appointment on August 18, 2010. On September 14, 2010, the Respondent appointed Professor Philippe Sands, a national of the United Kingdom and France, as arbitrator. Professor Sands accepted his appointment on September 23, 2010.

By letter of October 4, 2010, Claimant sought clarification of two points contained in Professor Sands' Arbitration Rule 6(2) declaration regarding his appointments by the Respondent's counsel, and his appointments by the Respondent itself.

In response, Professor Sands disclosed his links with the parties and their counsels. He disclosed that over the past three years he had been appointed as an arbitrator twice in ICSID cases by a party represented by Respondent's counsel, which cases were pending. He also disclosed that he had been appointed as an arbitrator by Venezuela twice in non-ICSID cases which were not pending. He assessed that, to the extent of his best knowledge, he was "not aware of any circumstance that might cause my reliability for independent judgment to be questioned by a party."

Claimant nevertheless, requested the disqualification of Professor Sands because of his past relations with the Respondent and the Respondent's counsel, both of which it asserted "taint his independence in this matter and indicate a manifest lack of…ability to

be relied on for independent judgment".[‡] Professor Sands refuted Claimant's allegations of partiality or dependence, as did Respondent.

II. THE PARTIES' SUBMISSIONS

A. *The Claimant's Submissions*

Claimant asserted that it was not necessary to prove actual bias or conflict of interest, rather, "[w]hat matters is that the *appearance* of bias or of a conflict is sufficient in the eyes of a reasonable, informed third person that is in the position of the party challenging the arbitrator.[§] Reasonable doubt is sufficient to meet the manifest lack of independence and impartiality standard.[**]

Claimant argued that the IBA Orange list threshold[††] was exceeded because the arbitrator was appointed in five arbitration proceedings within the last three years by either Respondent's counsel, the Curtis Mallet law firm, or by Respondent. These multiple appointments violated Sections 3.1.3 and 3.3.7 of the International Bar Association guidelines.[‡‡] According to the Claimant, "[t]hese appointments suggest that there is, at a minimum, an ongoing professional and business relationship between Professor Sands and the Curtis Mallet firm as well as a prior relationship between Professor Sands and the Respondent." (Decision p.7, ¶21).

Using the four criteria from the *Suez case*, the Claimant argued that there was a direct connection between the arbitrator and the Respondent. Professor Sands appeared to rely on the Respondent or its counsel for a substantial amount of his arbitration appointments and that, by virtue of his appointments by the Respondent or its counsel, "Professor Sands derived a direct and financial benefit or advantage from, and appears to be dependent on Respondent or its counsel as a result of the alleged connections". (Decision p.8,¶22). The connections were material to, and significantly affected, the compensation that Professor Sands earned as an arbitrator.

Further, taking into account the arbitrator's appointment by Bolivia, the Claimant argued that the substantial financial support provided by Venezuela to Bolivia and the considerable influence of the Venezuelan government on Bolivia created the appearance of a very close connection and affiliation between Bolivia and Venezuela.

B. *The Respondent's Submissions*

The Respondent responded that Professor Sands was appointed in no more than three cases. There was no doubt regarding his independence and impartiality because the Claimant failed to offer objective evidence of bias. Claimant's allegations were based

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‡ Decision p.5 ¶11.

§ Decision p. 5 ¶16 citing Claimant's Further Observations, p. 4 ; *See also* Amended PTD, p. 3; Claimant's Further Observations, p. 12

** Claimant's Further Observations, p. 5.

†† The Orange List refers to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, May 22, 2004 which set out a "traffic light" green, orange and red, system of conflicts and disclosures.

‡‡ Section 3.1.3 provides justifiable doubts about an arbitrator's impartiality or independence may arise where an arbitrator has been appointed by a party in two or more instances within the last three years. Section 3.3.7 provides such doubts may also arise when an arbitrator has received more than three appointments by the same counsel in the past three years. Decision p.5-6, ¶17.

only on pure speculations, and it was clear that Professor Sands was not dependent financially on the Respondent or its counsel.

Regarding the *Suez* criteria, the Respondent argued that the connection was limited to his appointment to act as a judge in disputes against third parties, that the interactions were not intense, that there was no objective evidence of the financial dependence of the arbitrator, and that the arbitrator's participation in two cases could not be seen as material.[§§] The financial dependence issue was further taken up in the explanation provided by Professor Sands himself in which he set out his sources of income and concluded that less than 5.89% of his total income came from sitting as an arbitrator. (Decision p. 15, ¶¶39-40).

III.ANALYSIS AND DECISION BY THE ARBITRAL TRIBUNAL

The two other members of the Tribunal, the Chairman, Professor Doug Jones, and Professor Tawil unanimously rejected the request for disqualification. In so doing, the Tribunal noted the "relatively high burden" involving in successfully challenging ICSID arbitrators and that "The Convention's requirement that the lack of independence be "manifest" necessitates that this lack be clearly and objectively established. Accordingly, it is not sufficient to show an appearance of a lack of impartiality or independence." (Decision p.16,¶45).

The Tribunal disagreed with the suggestion in *Tidewater v. Bolivarian Republic of Venezuela* that multiple appointments as arbitrator by the same party in unrelated cases were a neutral factor in considerations relevant to a challenge. [***] Instead, the Tribunal considered that "multiple appointments of an arbitrator by a party or its counsel constitute a consideration that must be carefully considered in the context of a challenge' (Decision p. 17, ¶47). The Tribunal noted that "In a dispute resolution environment, a party's choice of arbitrator involves a forensic decision that is clearly related to a judgment by the appointing party and its counsel of its prospects of success in the dispute." (*Id.*). Multiple appointments are "an objective indication of the view of parties and their counsel that the outcome of the dispute is more likely to be successful with the multiple appointee as a member of the tribunal than would otherwise be the case." Multiple appointments of an arbitrator by a party or its counsel, therefore, may lead to the conclusion that it is manifest that the arbitrator cannot be relied upon to exercise independent judgment as required by the Convention. (Decision p. 18, ¶50).

Applying these criteria in this case, the Arbitral Tribunal noted that there were two appointments by Respondent. These were in two cases involving the same facts, in one of which the Tribunal was not constituted and the other rejected on jurisdiction. There were also two appointments by Respondent's counsel in "unrelated cases involving Turkmenistan". The Tribunal found that neither of these multiple appointments established the requisite manifest lack of independence by Professor Sands. The Trubunal also rejected Claimant's arguments on the *Suez* criteria, and concluded that the proposal for disqualification submitted by Claimant must be dismissed.

[§§] Professor Sands explained that these two cases were related to the same facts and so were the same case, that he never claimed any fee in relation to one and in the other, an UNCITRAL case, jurisdiction was rejected. (Decision pp.15-16, ¶41).

[***] *Tidewater v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimants Proposal to Disqualify Professor Brigitte Stern, Arbitrator, December 23, 2010 at ¶60.

I. LES FAITS DE L'AFFAIRE EN L'ESPÈCE ET UN RAPPEL DE LA PROCÉDURE

Le 28 Mai 2010, la société OPIC Karimum (Panama) (« OPIC » ou « le demandeur ») a déposé une demande d'arbitrage auprès du Tribunal Arbitral, conformément aux termes de la Convention sur la Résolution des Conflits liés aux Investissements entre les États et nationaux d'autres États (« la Convention ») à l'encontre de la République Bolivarienne du Venezuela.
En l'absence d'accord entre les parties, eu égard à la méthode de nomination des arbitres, le demandeur, dans une lettre du 17 Août 2010, a nommé comme arbitre le Professeur Guido Santiago Tawil, un ressortissant Argentin. Professeur Tawil a accepté sa nomination le 18 Août 2010. Le 14 Septembre 2010, le défendeur a nommé arbitre le Professeur Philippe Sands, un ressortissant du Royaume-Uni et de la France. Le Professeur Sands a accepté sa nomination le 23 Septembre 2010.
Par lettre du 4 Octobre 2010, le demandeur a sollicité une clarification de deux points de la règle 6(2) de la déclaration d'arbitrage du Professeur Sands, concernant ses nominations par les conseillers du défendeur et par le défendeur lui même, le Venezuela. En guise de réponse, le Professeur Sands a révélé tous liens qui pouvaient exister entre lui même et les parties et/ou leurs conseillers. Il a affirmé qu'à sa connaissance, il n'avait pas « conscience de circonstances qui pourraient être de nature à compromettre son indépendance et à provoquer dans l'esprit de l'une ou de l'autre des parties, un doute raisonnable sur ces qualités d'impartialité et d'indépendance. » Le demandeur a néanmoins demandé la récusation du Professeur Sands en raison de ces relations passées avec le défendeur et ses conseillers. Le Professeur Sands nie toutes allégations de partialité ou dépendance mises en avant par le demandeur.

II. LES ALLÉGATIONS DES PARTIES

A. *Les allégations du demandeur*

Selon le demandeur, « [c]e qui importe est que l'*apparence* de partialité ou d'un conflit soit suffisante aux yeux d'une tierce personne raisonnable et informée qui se trouve dans la même positions que la partie cherchant à mettre en cause l'arbitre.[†††] Un doute raisonnable suffit pour satisfaire le standard du manque manifeste d'indépendance et impartialité.[‡‡‡]

Le demandeur met en avant le fait que le seuil de la liste Orange n'as pas éteint atteint puisque l'arbitre a été nommé dans cinq affaires au cours des trois dernières années soit par le Cabinet Curtis Mallet soit par le défendeur, ce qui correspond à une violation de la Section 3.1.3 et la Section 3.3.7 des directives de l'Association Internationale du Barreau. Selon le demandeur, « [c]es nominations suggèrent qu'il y a au moins, une relation professionnelle ou d'affaires en cours entre le Professeur Sands et le cabinet Curtis Mallet, ainsi qu'une relation antérieure entre le Professeur Sands et le défendeur. » En utilisant les quatre critères développés dans l'affaire *Suez*, le demandeur met en avant le fait qu'il existe un lien direct entre l'arbitre et le défendeur, que le Professeur Sands semble dépendre du défendeur ou de ses conseillers pour un grand nombre de ses nominations en tant qu'arbitre, que, en vertu de ces nominations, le « Professeur Sands y trouve un intérêt et un bénéfice direct et financier et que les liens entre eux sont matériels

[†††] Observations complémentaires du demandeur, p. 4 ; *Voir aussi* PTD modifié, p. 3; Observations complémentaires du demandeur, p. 12

[‡‡‡] Observations complémentaires du demandeur, p. 5.

et ont affecté de façon significative les indemnités que le Professeur Sands a reçu en tant qu'arbitre.

Enfin, le demandeur met en avant le fait que le soutient financier du Venezuela envers la Bolivie et la considérable influence du gouvernement Vénézuélien sur la Bolivie a créé l'apparence d'un lien étroit et d'une attache entre la Bolivie et le Venezuela.

B. Les allégations du défendeur

Le défendeur allègue que le Professeur Sands a été désigné dans maximum trois affaires et qu'il n'existe aucun doute concernant son indépendance et son impartialité, dès lors que le demandeur n'a pas rapporté de preuve objective de partialité. Ses allégations ne sont fondées que sur des pures spéculations et il est clair que le Professeur ne dépendait pas financièrement du défendeur.
A nouveau, eu égard aux quatre critères, le défendeur avance que le lien entre eux était limité à sa désignation en tant que juges dans des différends à l'encontre de tiers, que les interactions n'étaient pas intense, qu'il n'y avait pas de preuve objective de dépendance financière de l'arbitre et que sa participation dans deux affaires ne saurait être vue comme substantielle.

III. L'ANALYSE DU TRIBUNAL ARBITRAL

Le Tribunal rappelle que la condition posée par la Convention selon laquelle un manque d'indépendance doit être « manifeste », exige que ce manque soit clairement et objectivement établi. Ainsi, il n'est pas suffisant de montrer une apparence d'un manque d'impartialité ou d'indépendance.

Dans l'affaire *Tidewater v. Bolivarian Republic of Venezuela*, du 23 décembre 2010, le Tribunal CIRDI a considéré que le fait qu'un arbitre soit nommé plusieurs fois par la même partie dans des affaires distinctes n'est pas un facteur déterminant mettant en doute l'impartialité de l'arbitre. Dans la présente affaire, le Tribunal Arbitral rejette cette conclusion. Au contraire, il a affirmé que le fait qu'un arbitre soit nommé plusieurs fois était un indice objectif aux yeux des parties et de leurs conseillers que le résultat du différend serait plus susceptible de leur être favorable s'il est désigné plusieurs fois comme membre du tribunal. Cela peut mener à la conclusion selon laquelle il est manifeste que l'on ne peut se fier au jugement indépendant de l'arbitre, comme exigé dans la Convention. Cependant, dans cette affaire, le Tribunal Arbitral a considéré que le demandeur n'a pas su établir le manque manifeste d'indépendance requis du Professeur Sands et a conclu que la demande de récusation soumise par le demandeur devait être rejetée.