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International Arbitration Case Law

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NATIONS ENERGY CORPORATION, ELECTRIC MACHINERY ENTERPRISES INC., AND JAIME JURADO V. THE REPUBLIC OF PANAMA
(ICSID CASE NO. ARB/06/19)
ANNULMENT PROCEEDING

Case Report by María Lucila Marchini**
Edited by Ignacio Torterola ***

A Decision on the Proposal for the Disqualification of a Member of the Annulment Committee rendered on September 7, 2011, in accordance with the ICSID Convention and Arbitration Rules.

Tribunal: Professor Jaime Irarrázabal C., Dr. Enrique Gómez Pinzón.

Claimant's counsel: Mr. Charbel Moarbes, Mr. Christian de La Medina, Mr. David E. Cannella, MOARBES LLP / MOARBES LLP / CARLTON FIELDS, P.A.

Defendant's Counsel: Mr. David M. Orta, Mr. Frank de Lima, ARNOLD & PORTER LLP / VICE MINISTER OF ECONOMY (PANAMA)

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Digest

1. *Facts of the Case*

On March 21, 2011, Nations Energy Corporation, Electric Machinery Enterprises Inc., and Mr. Jaime Jurado ("Nations Energy" or "Claimants") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre"), an application requesting annulment and a continued stay of enforcement of the award rendered by the Tribunal in the arbitration proceeding between Nations Energy, Inc. and others v. Republic of Panama (ICSID Case No. ARB/06/19).

Once the Request was registered and notified to Nations Energy and the Republic of Panama (jointly referred to as "Parties"), on April 18, 2011, the Secretary-General of the ICSID informed them of its intention to recommend to the Chairman of the Administrative Council ICSID the appointment of Dr. Stanimir A. Alexandrov, a national of the Republic of Bulgaria; Mr. Fernando Mantilla-Serrano, a national of the Republic of Colombia; and Mr. Jaime Irarrázabal C., a national of the Republic of Chile, to become members of the *ad hoc* Committee.

The Parties were informed that all three members accepted their appointments, with Dr. Stanimir A. Alexandrov designated as President. Therefore the Annulment Committee was deemed to have been constituted and the proceeding to have begun on May 9, 2011.

On May 14, 2011, Claimants filed with the Centre a Proposal to disqualify Mr. Fernando Mantilla-Serrano and Dr. Stanimir A. Alexandrov as Arbitrators ("Proposal"). The Centre confirmed receipt of the Proposal and declared the proceedings were suspended until a decision on the request for disqualification was taken.

Nations Energy's Proposal for disqualification of Mr. Fernando Mantilla Serrano was based on the relationship that existed between the law firm where he worked –Shearman & Sterling LLP- and the Republic of Panama, since the former acted on behalf of the Panama Canal Authority, an entity that is part of Panama's Government.

With respect to Dr. Alexandrov, Claimants based its Proposal for disqualification on the professional relationship between him and Mr.

Patricio Grané, attorney at Arnold & Porter LLP, the same law firm that is acting on behalf of the Republic of Panama in the case at hand.

Mr. Fernando Mantilla-Serrano resigned his appointment. Consequently, the Chairman of the Administrative Council of ICSID appointed Mr. Enrique Gómez-Pinzón, a national of the Republic of Colombia, as a member of the Committee. However, the proceeding continued to be suspended until the vacancy created by Nations Energy's Proposal to disqualify Dr. Alexandrov was filled.

Mr. Jaime Irarrázabal and Mr. Enrique Gómez-Pinzón, after the Parties' observations and Dr. Alexandrov's explanations on the request for disqualification, considered and voted on the Proposal in the absence of the arbitrator concerned.

2. *Legal Issues Discussed in the Decision*

(a) Admissibility of the Proposal to Disqualify Dr. Stanimir A. Alexandrov (paras. 41-46)

Although the Parties did not raise the question about the admissibility of a request to disqualify an arbitrator in an Annulment Proceeding, the two members of the Committee agreed that they were required to decide this issue based on Claimants' Proposal.

On the one hand, Article 52 of the ICSID Convention deals with the annulment of an award. On the other, Chapter V of the Convention, entitled "Replacement and Disqualification of Conciliators and Arbitrators" deals with the procedure to be followed in case of a proposal to disqualify any member of a Tribunal, especially Articles 57 and 58. These Articles are complemented by Arbitration Rule 9 of the Rules of Procedure for Arbitration Proceedings, which deals with issues of disqualification of arbitrators in further detail.

Chapter V does not refer to disqualification of the members of *ad hoc* Committees, nor does Article 52 or Arbitration Rule 9. However, Article 52 (4) stipulates that: "The provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee." Although it does not mention Chapter V, Rule 53, which is part of Chapter VII entitled "Interpretation, Revision and Annulment of the

Award", states: "The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee." "The effect of Article 52 is to incorporate by reference the procedure referred to in the Arbitration Rules to the procedures relating to interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee."[1]

In the present case, Article 52 incorporates Arbitration Rule 9 ("Disqualification of Arbitrators") into the annulment proceeding in order to regulate Claimants' Proposal to disqualify Dr. Alexandrov. Therefore, the two members were called to decide on Claimants' Proposal.

(b) Competence of Members of the Committee to Decide on a Disqualification Proposal (paras. 47-50)

Although neither Party raised the issue of the two members' competence to decide on the Proposal, the Arbitrators agreed that according to Article 58 of the ICSID Convention and Arbitration Rule 9 (4) they were competent to decide on the matter.

Article 58 states that "[t]he decision on any proposal to disqualify … [an] arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision …."

Rule 9 (4) also provides that "[u]nless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned …."

Upon Claimants' Proposal to disqualify Mr. Fernando Mantilla-Serrano and Dr. Stanimir A. Alexandrov on May 14, 2011, the Chairman of the Administrative Council of the ICSID was in charge of taking the decision on the Proposal. However, after Mr. Mantilla-Serrano's resignation and the immediate appointment of Mr. Enrique Gómez-Pinzón on June 2, 2011, the two members were competent to consider and vote on the Proposal *according the abovementioned regulations.*

[1] Award ¶ 45.

(c) Applicable Law (paras. 51-58)

The Committee considered that the law applicable to the dispute was the ICSID Convention and the Rules of Procedure for Arbitration Proceedings. To the contrary, the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Rules") were not applicable.

In particular, Article 14 (1) and Article 57 of the ICSID Convention, and Arbitration Rule 6 governed the case at hand.

Article 14 (1) provides as follows: "[p]ersons designated to serve on the Panels 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 …."

The two members of the Committee agreed that Article 14 (1) of the Convention encompasses the obligation of the arbitrators to remain independent and impartial. "Generally speaking *independence* 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."[2]

Article 57 states that "[a] party may propose to a Commission or 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."

This Article requires a "manifest lack of the qualities required." The requirement that the lack of impartiality must be manifest imposes a relatively heavy and objective burden of proof on the party making the proposal.[3]

In addition, Arbitration Rule 6 (2) requires from each of the members a declaration that they "shall judge fairly as between the parties," and a statement of "(a) [his] past and present professional, business and other

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[2] *See Tidewater Inc. and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, December 23, 2010, (emphasis added).

[3] *See Suez, Sociedad General de Aguas Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentina Republic* (ICSID Cases Nos. ARB/03/17 and ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007.

relationships (if any) with the parties and (b) any other circumstance that might cause [his] reliability for independent judgment to be questioned by a party."

The IBA Rules are not applicable to the present case. Although it is true that they have been commonly used in international arbitration, they are just guidelines with an indicative value, and not a binding instrument.[4]

(d) The Question of Disqualification (paras. 59-62)

"The standard of appraisal of a challenge set forth in Article 57 of the Convention may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such nature or character as to indicat[e] a manifest lack of the qualities required by Article 14 (1)."[5]

The facts that raised the request for disqualification are the professional relationship between Dr. Alexandrov and Mr. Grané, and the ICSID-appointed arbitrator's failure to disclose it.

Concerning the second requisite, two issues must be taken into account: (i) whether the professional relationship between Dr. Alexandrov and Mr. Grané is of such nature or character as to indicate a manifest lack of the qualities required by Article 14 (1); and (ii) whether Dr. Alexandrov was obligated or not to disclose the professional relationship with Mr. Grané according to Article 14 (1) and Arbitration Rule 6 (2).

(i) Whether the professional relationship between Dr. Alexandrov and Mr. Grané is of such nature or character as to indicate a manifest lack of the qualities required by Article 14 (1) (paras. 63-69)

The question addressed by the Tribunal was whether the professional relationship between Dr. Alexandrov and Mr. Grané was of such nature or character as to indicate a manifest lack of the quality of being a person who can be relied upon to exercise independent judgment.

It is not a controversial fact that both Dr. Alexandrov and Mr. Grané worked in the same law firm –Sidley Austin LLP. The Tribunal also stated that the party making the proposal "has the burden of proof to establish the

[4] Award ¶ 57.
[5] Award ¶ 60.

existence of the required fact or facts, and to prove that such fact or facts indicate a 'manifest lack' of the quality required of an arbitrator, that is, that such arbitrator lacks the quality of being a person who can be relied upon to exercise independent judgment and impartiality of judgment."[6]

In other words, "the fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator's impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions."[7]

The mere existence of some professional relationship between Respondent's counsel and ICSID-appointed arbitrator is not an automatic basis for disqualification of an arbitrator based on lack of impartiality and independence as Article 57 states. "All 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 or member to render a decision freely and independently."[8] Also, it must be taken into account Dr. Alexandrov's years of professional experience.

Claimants neither furnished the Tribunal with information that suggest that the professional relationship could have an effect on that arbitrator's independence and impartiality, nor demonstrated the intensity or the extent of the alleged relationship, or the exclusive connection between them, or that there was a favorable prejudice towards the Republic of Panama.

Therefore, the Tribunal concluded that the alleged connection asserted by Claimants between Dr. Alexandrov and Mr. Grané did not create a fact

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[6] *See Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic* (ICSID Cases Nos. ARB/03/17 and ARB/03/19), Decision on a second proposal for the disqualification of a Member of the Arbitral Tribunal, May 12, 2008.

[7] *Id.*

[8] *See Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Republic of Argentina* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Committee of October 3, 2001, (emphasis added).

indicating a manifest lack of the quality of being a person of independent judgment and impartiality of judgment.

(ii) Whether Dr. Alexandrov was obligated or not to disclose the professional relationship with Mr. Grané according to Article 14 (1) and Arbitration Rule 6 (2) (paras. 70-77)

According to Article 14 (1), and as it was stated above, Claimants did not demonstrate to the Tribunal that the professional relationship between Dr. Alexandrov and Mr. Grané was of such nature or character as to indicate a manifest lack of the quality of being a person to exercise impartial and independent judgment. Therefore, there is no reason to conclude that Dr. Alexandrov's failure to disclose is a fact indicating a manifest lack of being a person of independent judgment.

Arbitration Rule 6 (2) imposes the obligation to declare "past and present professional, business and other relationships (if any) with the parties." "The fundamental principle is that arbitrators shall be and remain independent and impartial …."[9]

On May 2, 2011, Dr. Alexandrov submitted his declaration in accordance with the abovementioned rule. In addition, on June 16, 2011, he furnish explanations to the Committee in compliance with Arbitration Rule 9 (3), where he stated: "[w]hen I made that statement, I was aware that the law firm of Arnold & Porter was counsel to the Republic of Panama and that Mr. Patricio Grané had been a member of counsel's team in the proceeding before the tribunal. My view was then, and remains now, that Mr. Grané's former employment with Sidley Austin LLP is not a factor that can affect my ability to exercise independent judgment as required by Article 14 (1) of the Convention."[10]

The Committee ruled that the failure to disclose the relationship with Mr. Grané, although it would have been wise and advisable, was an honest exercise of judgment. Moreover, this information could be considered as public knowledge.

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[9] *Id.*

[10] Explanations furnished by Dr. Stanimir A. Alexandrov in regard to the proposal for disqualification on June 16, 2011.

In sum, the two members of the Committee agreed that Dr. Alexandrov's failure to disclose his professional relationship with Mr. Grané did not violate Article 14 (1) of the Convention nor Arbitration Rule 6 (2).

3. Decision

The Two Members of the Annulment Committee concluded that Claimants' Proposal to disqualify Dr. Stanimir Alexandrov must be dismissed, and therefore declared the state of suspension of the proceedings terminated.