

ICSID CHAIRMAN DISQUALIFIES ARBITRATOR

Burlington Resources Inc. and the Republic of Ecuador (ICSID Case No. ARB/08/5)

Introduction

In a decision dated 13 December 2013 in the arbitration proceedings between Burlington Resources Inc. and the Republic of Ecuador, the Chairman of the Administrative Council, Dr. Jim Yong Kim, disqualified Arbitrator Francisco Orrego Vicuña following a challenge by Ecuador.

Background

On August 4, 2008, Burlington, represented by Freshfields Bruckhaus Deringer, appointed Professor Francisco Orrego Vicuña to serve as arbitrator in the case of Burlington Resources v Ecuador . The Arbitral Tribunal was constituted on 18 November 2008, and the proceedings began on that date. On 22 January 2010, the Tribunal held a hearing on jurisdiction, issuing its Decision on Jurisdiction on 2 June 2010. A dissenting opinion by Professor Orrego Vicuña was attached to the Decision on Jurisdiction. The Tribunal then held a hearing on liability in Paris from 8-11 March 2011, issuing a Decision on Liability on 14 December 2012. A dissenting opinion by Professor Orrego Vicuña was attached to the Decision on Liability.

Grounds for challenge

On 24 July 2013, Ecuador proposed the disqualification of Professor Orrego Vicuña. Ecuador's proposal was based on three grounds:

- Professor Orrego Vicuña had been appointed by Freshfields in an “unacceptably high number of cases” (namely, eight between 2007 and 2013)
- Professor Orrego Vicuña breached his continuing obligation to disclose any circumstance that might cause his reliability for independent judgment to be questioned; and
- Professor Orrego Vicuña had displayed “a blatant lack of impartiality to the detriment of Ecuador” during the course of this arbitration.

Decision

In his decision, the Chairman found that Ecuador had sufficient information to file its Proposal for Disqualification of Professor Orrego Vicuña on the basis of repeat appointments and non-disclosure of such appointments well before it did so on 24 July 2013; and similarly Ecuador knew about Professor Orrego Vicuña's conduct at the 2011 hearing on liability and his dissents attached to the 2010 Decision on Jurisdiction and 2012 Decision on Liability.

Accordingly, these challenges were not raised promptly and the proposal for disqualification was dismissed to the extent that it relied on these grounds of challenge.

However, in Professor Orrego Vicuña's explanations (dated 31 July 2013) in response to Ecuador's challenge, he included the following paragraph which included allegations about the conduct of Ecuador's counsel:

"[I]astly there are some ethical assertions that cannot be left unanswered. Dechert admonishes this arbitrator to resign on ethical grounds as if Dechert's views were proven correct. This is certainly not the case. Moreover, the real ethical question seems to lie with Dechert's submissions and the handling of confidential information. To the best of this arbitrator's knowledge the correspondence concerning disclosure and other matters in Pan American v. Bolivia is part of the confidential record of that case. Dechert is in the knowledge of such correspondence as counsel for Bolivia, but it does not seem appropriate or ethically justified that this information be now used to the advantage of a different client of Dechert, a use that in any event should be consented to by the other party to that case."

On the basis of that paragraph, the Chairman held that a third party undertaking a reasonable evaluation of Professor Orrego Vicuña's explanations would conclude that the paragraph quoted above manifestly evidenced an appearance of lack of impartiality with respect to Ecuador and its counsel. On that basis, he upheld Ecuador's proposal to disqualify Professor Francisco Orrego Vicuña.

Comment

This decision emphasises the importance attached to a lack of bias by arbitrators in arbitration proceedings, and also demonstrates the latitude the ICSID Chairman has in determining whether to disqualify an arbitrator – a Chairman may disqualify an arbitrator for grounds not necessarily advanced in the original disqualification process.

While this decision follows shortly after another ICSID decision in which an arbitrator was disqualified (see our previous [alert](#)), it should be noted that the ICSID Chairman will still take a tough approach in determining whether an arbitrator will be disqualified. In a decision also dated 13 December 2013 in *Respol.S.A. and Respol Butano S.A. v Argentina* (ICSID No. ARB/12/38), ICSID Chairman Dr. Jim Yong Kim dismissed two proposals for disqualification of arbitrators which were based on the arbitrators' other appointments, alleged bias based on previous decisions, and links with one of the law firms involved in the case.

Postscript

In a further decision dated 4 February 2014 in *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Dr. Jim Yong Kim rejected a proposal to disqualify the majority of the Tribunal, dismissing Argentina's contention that the procedural decisions by the majority of the Tribunal indicated that they did not meet the standard of being able to exercise "independent judgment" in accordance with Article 14(1) of the ICSID Convention.

ICSID Caseload statistics

ICSID has released its latest biannual summary of its caseload statistics. For historic ICSID caseload statistics, please see our previous [alert](#).

- 40 new cases were accepted by ICSID in 2013 (a decrease of 10 on the previous year)
- 63% of ICSID cases are based on bilateral investment treaties for jurisdiction
- 27% of cases concern South American state parties and 24% concern Eastern Europe/Central Asia state parties
- 26% of cases are in the oil, gas and mining sector, with 13% and 10% in the electrical power & energy and transportation sectors respectively
- 64% of cases lead to an award (36% of proceedings are discontinued).
- 75% of cases lead to an award on the merits. 25% of awards decline ICSID jurisdiction
- 69% of arbitrators in ICSID cases are from North America and Western Europe
- The top 3 nationalities for ICSID arbitrator appointments are US -163; French-155; and British-133.

(Statistics taken from The ICSID Caseload – Statistics (Issue 2014-1) available at <http://icsid.worldbank.org/>)

11th February 2014