

ICSID Case No. ARB/10/14

OPIC Karimum Corporation

Claimant

v.

The Bolivarian Republic of Venezuela

Respondent

**DECISION ON THE PROPOSAL TO DISQUALIFY
PROFESSOR PHILIPPE SANDS, ARBITRATOR**

Issued by

**Professor Doug Jones
Professor Guido Santiago Tawil**

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Date: May 5, 2011

I. INTRODUCTION

A. REQUEST FOR ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

1. 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.

2. On June 16, 2010, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention.

3. In its Request for Arbitration, Claimant proposed that the Tribunal be composed of three arbitrators pursuant to Article 37(2)(b) of the Convention, one appointed by Claimant, one appointed by Respondent, and the president of the tribunal appointed by the agreement of the parties.

4. Absent an agreement between the Parties with respect to a method of appointment, Claimant, by letter of August 17, 2010, informed the Centre that, under Rule 2(3) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”), it elected the formula provided for in Article 37(2)(b) of the Convention. In its letter, Claimant appointed Professor Guido Santiago Tawil, an Argentine national, as arbitrator.

5. On August 18, 2010, the Secretariat informed the Parties that Professor Guido Tawil had accepted his appointment and circulated a copy of his signed Arbitration Rule 6(2) declaration dated August 17, 2010.

6. On September 14, 2010, Respondent appointed Professor Philippe Sands, a national of the United Kingdom and France, as arbitrator. On September 23, 2010, the Secretariat informed the Parties that Professor Sands had accepted his appointment and circulated a copy of his signed Arbitration Rule 6(2) declaration and attached statement.

7. By letter of October 4, 2010, Claimant sought clarification of two points contained in Professor Sands’ Arbitration Rule 6(2) declaration regarding: (i) his appointments by Respondent’s counsel, Curtis Mallet-Prevost, Colt & Mosle LLP; and (ii) his appointments by Respondent, Venezuela. On October 5, 2010, Professor Sands responded to Claimant’s queries.

8. In the absence of an agreement between the parties about the president of the tribunal, on November 30, 2010, the Secretary-General informed the parties that she intended to propose to the Chairman that he appoint Professor Doug Jones, a national of Australia and a member of the ICSID Panel of Arbitrators designated by Australia, as the president of the tribunal. Neither party having indicated that it had a compelling objection to the appointment of Professor Jones, on December 29, 2010, the Secretary-General confirmed that the Chairman would proceed with his appointment.

9. The parties were informed on January 5, 2011, that the three arbitrators had accepted their appointments as arbitrators and that, therefore, pursuant to Arbitration Rule 6, as of that date, the Tribunal was deemed constituted and the proceeding to have begun. A copy of Professor Jones' Arbitration Rule 6(2) declaration was circulated to the Parties.

B. PROFESSOR SANDS' ARBITRATION RULE 6(2) DECLARATION

10. Professor Sands attached a statement to his Arbitration Rule 6(2) declaration of September 21, 2010. In that statement, Professor Sands disclosed the following:

“To the best of my knowledge I am not aware of any past or present professional, business or other relationship with the Claimant or Respondent.

Within the past three years I have been appointed to serve as arbitrator in two other ICSID cases by a party that is represented by the law firm Curtis Mallet-Prevost, Colt & Mosle LLP. Both cases are pending.

Within the past three years I have been appointed to serve as arbitrator by the Bolivarian Republic of Venezuela in two related cases, neither of which is currently pending: in the first case (under the arbitration rules of Nova Scotia) the tribunal has not been fully constituted and appears to be dormant, in the other (under the UNCITRAL Rules) the tribunal ruled by unanimous decision that it did not have jurisdiction.

Since first accepting appointment as arbitrator in an ICSID case, in 2007, I have declined to accept any new instructions to act as counsel in any new investment treaty arbitration brought under the ICSID Convention.

I am not aware of any circumstance that might cause my reliability for independent judgment to be questioned by a party.”

C. REQUEST TO DISQUALIFY PROFESSOR SANDS

11. On October 18, 2010, prior to the constitution of the Tribunal, Claimant requested the disqualification of Professor Sands pursuant to Arbitration Rule 9(1), on grounds that Professor Sands’ appointments by Curtis, Mallet-Prevost, Colt & Mosle LLP and Venezuela “taint his independence in this matter and indicate a manifest lack of Professor Sands’ ability to be relied on for independent judgement as required under Articles 14(1) and 57 of the ICSID Convention.”¹

12. By letter of January 5, 2011, following the constitution of the Tribunal, the Secretary-General invited Claimant to confirm whether it intended to pursue its proposal to disqualify Professor Sands. On January 17, 2011, Claimant confirmed its intention to pursue its proposal to disqualify Professor Sands and submitted an amended copy of its October 18, 2010 letter that was revised to reflect: (1) that information in the earlier letter “concerning the proposed unification of the Bolivarian Republic of Venezuela and the Republic of Bolivia was incorrect;” and (2) “to reflect additional information that has come to OPIC’s attention in the interim concerning the connection and affiliation between Bolivia and Venezuela.”

13. On January 20, 2011, the President of the Tribunal, having consulted with Professor Tawil, set a timetable for the parties to submit observations and Professor Sands to furnish an explanation as provided for under Arbitration Rule 9, as follows:

- February 4, 2011—Respondent to submit a reply to Claimant’s disqualification proposal;
- February 18, 2011—Professor Sands to furnish any explanation; and
- March 2, 2011—The Parties to submit any further observations, including comments arising from Professor Sands’ explanation.

14. Upon request by the Claimant, Professors Jones and Tawil extended the time for the filing of Claimant’s final observations to 9 March 2011. Subject to this extension,

¹ Claimant’s Proposal to Disqualify Professor Sands dated October 18 (“Original PTD”), p. 1.

each of the Parties filed submissions regarding the proposal to disqualify and Professor Sands furnished an explanation within the time limits established in the letter of January 20, 2011.

II. THE PARTIES' SUBMISSIONS AND PROFESSOR SANDS' EXPLANATION

A. CLAIMANT'S SUBMISSIONS

15. Claimant asserts that the standards under Articles 14 and 57 of the Convention require that arbitrators be both impartial and independent.² In Claimant's view, the requirement of impartiality implies the "absence of a bias or predisposition toward one of the parties."³

16. Claimant alleges that it is not necessary to prove an actual bias or conflict of interest; rather, in Claimant's view, "[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."⁴ Claimant further asserts that "[r]easonable doubt' regarding the arbitrator's independence or impartiality is therefore sufficient to meet the manifest standard ...".⁵

17. Claimant references the standards set forth in the International Bar Association Guidelines on Conflicts of Interest in International Arbitration dated May 22, 2004 ("IBA Guidelines").⁶ Claimant acknowledges that the IBA Guidelines do not have binding status, but submits that they provide persuasive authority, including in ICSID arbitrations.⁷ Claimant relies, in particular, on Sections 3.1.3 and 3.3.7 of the IBA Guidelines' "Orange List."⁸ Section 3.1.3 provides that justifiable doubts about an arbitrator's impartiality or independence may arise where an arbitrator has been appointed by a party in two or more

² Claimant's Amended Proposal to Disqualify Professor Sands dated 17 Jan. 2011 ("Amended PTD"), p. 3. Claimant's Further Observations Concerning Its Proposal to Disqualify Professor Sands dated Mar. 9, 2011 ("Claimant's Further Observations"), p. 3.

³ Claimant's Further Observations, pp. 3-4.

⁴ *Id.*, p. 4. *See also* Amended PTD, p. 3; Claimant's Further Observations, p. 12.

⁵ Claimant's Further Observations, p. 5.

⁶ Amended PTD, p. 4; Claimant's Further Observations, pp. 5-7.

⁷ Amended PTD, pp. 3-5; Claimant's Further Observations, pp. 5-7.

⁸ Claimant's Further Observations, p. 6.

instances within the last three years. Section 3.3.7 provides that such doubts may also arise when an arbitrator has received more than three appointments by the same counsel within the past three years.

1. Professor Sands' Alleged Relationship with Respondent and Respondent's Counsel

18. Claimant alleges that Professor Sands:

- “currently is sitting in **six (6)** pending ICSID cases, of which he has received **three (3)** of his appointments from the Curtis Mallet law firm;
- has sat in **eight (8)** treaty arbitrations as a whole in the last three years, of which **five (5)** appointments have come from the Respondent or the Curtis Mallet firm;
- discloses publicly only **nine (9)** total arbitrations in which he has sat, of which **five (5)** appointments have come from the Respondent or the Curtis Mallet firm.”⁹

19. Claimant argues that Professor Sands' appointment in this case “would be on the threshold of exceeding the ‘Orange List’ guidelines on an individual basis and,¹⁰ when viewed in combination, as is appropriate under the circumstances in light of the many points of connection between Professor Sands and the Respondent and its counsel, the proposed appointment in effect exceeds the ‘Orange List’ threshold, giving rise to justifiable doubts that would lead an informed, reasonable person to conclude that the appointment is inappropriate under the circumstances.”¹¹

20. Specifically Claimant claims that “[i]f Professor Sands is permitted to continue to sit as an arbitrator in this proceeding, he will have been appointed in five (5) arbitration proceedings within the last three years by either the Curtis Mallet firm or by Respondent, which represents more than half of his publicly disclosed appointments. Moreover, this represents six (6) instances of appointments of Professor Sands by either Respondent or the Curtis Mallet firm.”¹²

⁹ *Id.*, pp. 1–2. *See also* Amended PTD, p. 3.

¹⁰ Claimant acknowledges that a situation falling within Section 3.3.7 is not in issue because Professor Sands has not been appointed more than three times in three years by Curtis, Mallet-Prevost, Colt & Mosle LLP. *See* Claimant's Further Observations, p. 6.

¹¹ Amended PTD, p. 4. *See also* Claimant's Further Observations, pp. 6–7.

¹² Claimant's Further Observations, p. 7.

21. Claimant argues that “Respondent would like the Tribunal to ignore the mathematics involved because they are not in its favour, the fact remains that multiple appointments by the same party or counsel create a potential for undue influence and for an unfair advantage for the appointing party or counsel.”¹³ Claimant alleges that “[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. In particular, Professor Sands cannot be relied upon to exercise independent judgment because he is beholden to the Respondent and the Respondent’s law firm for a significant number of his arbitration appointments (and therefore presumably his compensation) ...”¹⁴

22. In particular, Claimant relies on four criteria used in *Suez*, which it alleges show that the alleged connections between Professor Sands and Respondent give rise to a manifest lack of independence and impartiality, as follows:¹⁵

(1) *The proximity of the connection.*

Claimant asserts that, by virtue of his appointments, “the connection between Professor Sands and the Respondent and its counsel is direct.”¹⁶

¹³ See also Claimant’s Further Observations, p. 7. Claimant distinguishes the cases cited by Respondent to support its case that Claimant’s challenge should fail because allegedly the arbitrator challenged in those cases had fewer relevant appointments. See Claimant’s Further Observations, pp. 8–9. In particular, Claimant distinguishes the proposal to disqualify Professor Sands in *Tidewater Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision to Disqualify Professor Brigitte Stern, Arbitrator dated Dec. 23, 2010 (“*Tidewater*”) (alleging that *Tidewater* (i) involved fewer appointments by Venezuela and the relevant law firm, (ii) those appointments were made over a longer period, and (iii) that Professor Stern has “nearly **four** times as many investment treaty arbitration appointments as Professor Sands.”) See Claimant’s Further Observations, pp. 8–9.

¹⁴ Amended PTD, p. 2. See also Claimant’s Further Observations, p. 2.

¹⁵ Amended PTD, p. 5.

¹⁶ *Id.*, p. 5.

(2) *The intensity or frequency of any interactions.*

Claimant asserts that “the alleged connection demonstrates a frequency of interaction and contact between Professor Sands and the Respondent or its counsel ...”.¹⁷ “Professor Sands appears to rely on the Respondent or its counsel for a substantial amount of his arbitration appointments.”¹⁸ The “proximity and intensity/frequency criteria therefore suggest that Professor Sands would have a compelling reason to be partial towards Respondent’s positions in this arbitration.”¹⁹

(3) *The degree of dependence of an arbitrator upon a party for any benefits.*

Claimant acknowledges that the two cases in which Professor Sands was appointed by Venezuela have concluded or are inactive.²⁰ Notwithstanding, Claimant alleges that, by virtue of his appointments by Respondent or its counsel, “Professor Sands derives a direct and financial benefit or advantage from, and appears to be dependent on the Respondent or its counsel as a result of the alleged connections.”²¹ Further, Claimant argues that “it stands to reason that his financial compensation as an ICSID arbitrator is sufficiently impacted by the repeated appointments by the Respondent and the Curtis Mallet firm.”²² Claimant asserts that this “creates the appearance of dependence as well as creates a financial incentive – and thus a concern that he cannot be ‘*relied upon to exercise independent judgment.*’”²³

Claimant alleges that “these facts suggest the possibility of a dependence or conflict ... inasmuch as the possibility exists that Professor Sands has a financial incentive to continue to make decisions that benefit clients of the Curtis Mallet firm, including Respondent, to ensure that he will be selected by that firm and its clients as an arbitrator in future matters.”²⁴ Claimant asserts that the “cluster of appointments by Respondents and the Curtis Mallet firm and the accompanying financial and other incentives” “give[s] rise

¹⁷ Amended PTD, p. 5.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Amended PTD, p. 6.

²¹ *Id.*, p. 5.

²² Claimant’s Further Observations, p. 2.

²³ Amended PTD, p. 6.

²⁴ *Id.*

to justifiable doubts with respect to his ability to reach a free and independent judgment, threatening the Claimant's right to legal security."²⁵

Claimant acknowledges Professor Sands' statement that he acts as an arbitrator in non-ICSID cases that cannot be disclosed. However, Claimant argues that "OPIC cannot be expected to meaningfully evaluate, speculate or guess how many arbitral appointments have not been disclosed OPIC's assertion that Professor Sands lacks independence or impartiality is therefore based on and restricted to Professor Sands' disclosed or public appointments."²⁶

(4) *The materiality or significance of any such benefits.*

Claimant argues that "the connections are material to and significantly affect the compensation that Professor Sands earns as an arbitrator, particularly given his statement concerning his withdrawal as counsel in ICSID arbitrations ...".²⁷

Claimant contends that in evaluating the materiality of the income received from appointments by Respondent or Curtis, Mallet-Prevost, Colt & Mosle LLP, "[a]ny undisclosed cases and assertions as to the income derived from them, must remain outside the consideration of the unchallenged arbitrators."²⁸

2. Venezuela's Relationship With Bolivia

23. Claimant asserts that "the substantial financial support provided by Venezuela to Bolivia and the considerable influence of the Venezuelan government on Bolivia ... creates the appearance of a very close connection and affiliation between Bolivia and Venezuela."

²⁵ Claimant's Further Observations, p. 3. Claimant also alleges that the appointments at issue are "particularly problematic because Professor Sands identifies that he no longer acts as counsel in ICSID arbitrations, given the financial implications of that decision. Where an arbitrator also accepts appointments as counsel in ICSID proceedings, the majority of that individual's compensation can be expected to be derived from acting as counsel. Such professionals, therefore, are independent from any fees received from serving as arbitrators. On the other hand, where an ICSID arbitrator's career is focused on serving as an arbitrator, given the financial (and other) implications, clusters of appointment by a particular law firm or party must be viewed with great caution and skepticism and may lead to the appearance of a lack of independence and impartiality." See Amended PTD p. 2. Relatedly, Claimant alleges that "Professor Sands appears to derive a substantial amount of his income from his ICSID arbitration appointments." See Amended PTD, p. 9.

²⁶ See Claimant's Further Observations, pp. 8-9.

²⁷ Amended PTD, p. 6.

²⁸ See Claimant's Further Observations, p. 10.

Claimant acknowledges that “the information about financial support is based on insufficiently detailed information,”²⁹ but relies on the following assertions in support of its contention:

- “Venezuela is financing and supporting the Republic of Bolivia in its nationalization plans, especially with regard to the oil industry ...,” as well as financing other projects.³⁰
- According to cables obtained by Wikileaks, “Venezuela generally was interfering with Bolivia’s internal affairs.”³¹
- Venezuela and Bolivia are among a group of nations that agreed to implement a single regional currency called the “Sucre.”³²

24. Claimant asserts that this affiliation between Venezuela and Bolivia “means that another ICSID case in which Professor Sands was appointed by Bolivia within the last three years should count as an additional connection point between him and the Respondent.”³³

25. In conclusion, Claimant asserts that “[i]n a situation such as this one where 50% (or even 2/3rds when one considers the connection between Bolivia and Venezuela) of an arbitrator’s appointments stem from one law firm and one state,”³⁴ there is a substantial appearance of dependence on Respondent and its counsel.” This allegedly “indicates a manifest lack of the qualities required by paragraph (1) of Article 14 ...”.³⁵

B. RESPONDENT’S SUBMISSIONS

26. Respondent contends that under Articles 14 and 57 of the Convention, the standard applicable to proposals for disqualification in ICSID proceedings is the “manifest” lack of independence or impartiality. Respondent further asserts that “[a] proposal for disqualification must be based on objective facts which, from the point of view of a

²⁹ Amended PTD, p. 8.

³⁰ *Id.*, pp. 6–7.

³¹ *Id.*, p. 7.

³² *Id.*

³³ *Id.* p. 8.

³⁴ *Id.*

³⁵ *Id.*

reasonable and informed third person, evidently and clearly show a manifest lack of the qualities described above.”³⁶

27. Respondent contends that the IBA Guidelines “are only a guide, and are not mandatory in ICSID proceedings.”³⁷ Respondent also contends that, even if a situation falls within the Orange List, disqualification is not automatic.³⁸ It is also necessary for other objective elements to exist “which, in the eyes of a reasonable and informed third party, evidently show that the arbitrator in question lacks independence or impartiality.”³⁹

1. Professor Sands’ Alleged Relationship with Respondent and Respondent’s Counsel

28. In Respondent’s view, “[i]t is clear that there is no objective evidence whatsoever that can lead an independent and informed third party to conclude that it is clear, evident and obvious that Professor Sands’ independence and impartiality should be questioned by virtue of the[] appointments.”⁴⁰

29. As an initial matter, Respondent asserts that Claimant inflates the percentage of Professor Sands’ appointments by Respondent and Curtis, Mallet-Prevost, Colt & Mosle LLP “to its convenience.”⁴¹ Respondent notes that of the seven ICSID cases in which Professor Sands was designated, “he was appointed by Respondent or by Curtis’ clients on only three occasions (in two by Curtis’ clients and in one, *OPIC*, by Respondent) – and not four.”⁴² Accordingly, “if the purpose is to determine the real percentage of ICSID cases in which Respondent or Curtis’ clients have appointed Professor Sands as arbitrator, that percentage would be 42%,”⁴³ and not 50% or nearly 50%. Respondent also asserts

³⁶ Respondent’s Answer to Claimant’s Proposal to Disqualify Professor Sands dated Feb. 4, 2011 (“Answer to PTD”), pp. 2–3, 6–7.

³⁷ *Id.*, p. 3.

³⁸ *Id.*, pp. 3, 7.

³⁹ *Id.*, p. 4.

⁴⁰ *Id.*, p. 11.

⁴¹ *Id.*, p. 4.

⁴² *Id.*, p. 6.

⁴³ *Id.*, pp. 4–5.

that Claimant, when taking into account the number of appointments disclosed by Professor Sands, “exaggerates its arguments by counting a single appointment twice.”⁴⁴

30. Respondent argues that, in any event, “[t]he artificial use of percentages does not constitute objective evidence for determining whether a person enjoys the qualities required to serve as arbitrator in an ICSID proceeding ...”⁴⁵

31. Respondent argues that Claimant creates a new situation that is not contained in the IBA Guidelines and “confuses the origin of the appointments by adding the cases in which Respondent and Curtis’ clients have appointed Professor Sands in arbitral proceedings in general.”⁴⁶ Respondent also contends that “[t]o support this argument, Claimant speculates – without any real knowledge – that Professor Sands is not participating in any other arbitral proceedings that are not public or that have not been disclosed by Professor Sands in his declaration ...”⁴⁷

32. Respondent states that, even if the situation at hand falls within Section 3.1.3 of the IBA Guidelines’ Orange List—through the appointment of Professor Sands by Venezuela in the Nova Scotia commercial arbitration and in the related UNCITRAL Arbitration Rules case—“this does not prove anything beyond the fact that a situation triggering disclosure exists.”⁴⁸ Respondent contends that Claimant “offers no other objective fact or evidence that may lead a reasonable and informed third party to conclude that it is clear, obvious and evident that, as a result of Professor Sands’ appointments by Respondent and Curtis’ clients in prior proceedings, one must doubt his impartiality or independence in the present case. On the other hand, objective facts prove that Professor Sands’ actions in those cases, and in others where he has participated, have been totally independent and impartial.”⁴⁹

33. Respondent alleges that Claimant makes “injurious speculations,”⁵⁰ but fails to offer any objective evidence that Professor Sands has a financial incentive to continue to

⁴⁴ Answer to PTD, p. 6.

⁴⁵ *Id.*, p. 5.

⁴⁶ *Id.*.

⁴⁷ *Id.*

⁴⁸ *Id.*, p. 7.

⁴⁹ *Id.*

⁵⁰ *Id.*, p. 8.

make decisions that benefit clients of the Curtis Mallet firm, including Respondent, to ensure that he will be selected by that firm and its clients as an arbitrator in future matters.⁵¹ Respondent contends that “ICSID tribunals have previously dismissed similar speculations in proposals for disqualification.”⁵²

34. Respondent contends that “it is entirely inappropriate to make accusations pointing to the existence of ‘financial incentives’ without any objective evidence.”⁵³ Respondent claims that, in any event, “[t]here is clear evidence to conclude that Professor Sands does not depend economically on Respondent’s and/or Curtis’ appointments.”⁵⁴ In particular, Respondent notes Professor Sands’ other professional activities referred to in his *curriculum vitae* and asserts that “[w]e cannot but assume that Professor Sands receives economic remuneration for activities other than his participation as an arbitrator in ICSID cases.”

35. Respondent states that Section 3.3.7 of the IBA Guidelines’ Orange List is not applicable because clients of Curtis, Mallet-Prevost, Colt & Mosle LLP have not appointed Professor Sands as an arbitrator in more than three cases;⁵⁵ Respondent states that, in fact, Claimant acknowledges this to be the case.⁵⁶

36. Respondent disputes Claimant’s contention that the four criteria used in *Suez* are met here. Specifically:

(1) *The proximity of the connection.*

Respondent asserts that any connection between Professor Sands and Respondent or Curtis “is limited to his appointment to act as a judge in disputes against third parties.” Respondent contends that “[a]s was recently established in an ICSID decision, ‘... multiple

⁵¹ Answer to PTD, pp. 8, 10–11.

⁵² *Id.*, p. 8.

⁵³ *Id.*, p. 9.

⁵⁴ *Id.*

⁵⁵ *Id.*, p. 10 (noting that Professor Sands has been appointed by clients represented by Curtis, Mallet-Prevost, Colt & Mosle LLP in three cases).

⁵⁶ *Id.* (“[A]lthough Claimant resorts to Section 3.3.7 of the Orange List as a basis for its Proposal, it acknowledges that such scenario has not materialized, forcing it to create a new scenario which is not contemplated in the Guidelines – nor in any other source of law – to support its groundless Proposal.”)

appointments as arbitrator by the same party in unrelated cases are neutral, since in each case the arbitrator exercises the same independent arbitral function’.”⁵⁷

(2) *The intensity or frequency of any interactions.*

Respondent states that “it is untenable to say that the relationship between Respondent and/or Curtis and Professor Sands is ‘intense’.”⁵⁸ The connections with respect to each of Respondent and Curtis are limited to appointments in two cases, in which there was “an inquiry regarding his availability to serve as arbitrator, and in one of the cases, to the participation via conference call in the tribunal’s first session.”⁵⁹

(3) *The degree of dependence of an arbitrator upon a party for any benefits.*

Respondent asserts that “Claimant has provided absolutely no objective evidence that would lead a reasonable and informed third party to conclude that Professor Sands is financially dependent on Respondent and/or Curtis.”⁶⁰

(4) *The materiality or significance of any such benefits.*

Respondent asserts that, “if all of Professor Sands activities are taken in to account, his participation in two active cases (or three, counting *OPIC*) cannot be considered material.”⁶¹

2. Venezuela’s Relationship With Bolivia

37. Respondent asserts that “Claimant’s Proposal is based on pure speculations of economic dependence and arguments, without any factual or legal support, that the Bolivarian Republic of Venezuela and the Plurinational State of Bolivia are not sovereign and independent States.”⁶² According to Respondent, “the speculations of economic dependence have been completely disproved by Professor Sands in the Comments, and the

⁵⁷ Answer to PTD, p. 11 (citing *Tidewater* ¶ 60).

⁵⁸ *Id.*, p. 12.

⁵⁹ *Id.* (noting that the one of the two cases in which Professor Sands was appointed by Respondent concluded in the jurisdictional phase and the other is inactive; the appointments by clients of Curtis, Mallet-Prevost, Colt & Mosle LLP are in recently initiated cases).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Respondent’s Final Observations to Claimant’s Proposal to Disqualify Professor Philippe Sands dated Mar. 9, 2011 (“Respondent’s Final Observations”) at ¶ 2.

factual basis used by Claimant to sustain its argument of unification is no more than a bad internet joke made on April Fools' Day in the Unites [sic] States of America.”⁶³

C. PROFESSOR SANDS' EXPLANATION

38. In his explanation of February 17, 2011, Professor Sands refutes Claimant's factual allegation that he “cannot be relied upon to exercise independent judgment because he is beholden to the Respondent and the Respondent’s law firm for a significant number of his arbitration appointments (and therefore presumably his compensation).”⁶⁴

39. Specifically, Professor Sands confirms that: (i) he is a tenured professor of law at University College, London and in that role receives a salary and pension; (ii) he receives additional income from academic and other writings; (iii) is a practising barrister, in which capacity he acts as counsel in eight of the sixteen cases at the International Court of Justice, as well as in a number of inter-State arbitrations before the Permanent Court of Arbitration and other arbitral institutions, and acts for more than twenty different clients and law firms; (iv) he sits as arbitrator in non-ICSID arbitrations that are not disclosable; (v) he has never been instructed on any matter by the Respondent, or by the law firm that represents it in these proceedings; and (vi) he declines instructions and arbitral appointments in significantly more cases that he accepts.

40. Professor Sands also explains that during the calendar year 2010 “the proportion of [his] total income that was obtained from sitting as an arbitrator was less than 5.89%.” Accordingly, “[t]he assertion of being ‘beholden to the Respondent and the Respondent’s law firm for ... compensation’ is not supported by the facts.”⁶⁵

41. As concerns his two appointments by Respondent, Professor Sands remarks that these appointments relate to the same facts and effectively are the same case as the arbitral tribunal in the case under the arbitration rules of Nova Scotia was never constituted, he

⁶³ Respondent’s Final Observations at ¶ 2. Respondent contends that Claimant’s assertions in Claimant’s Initial PTD that Venezuela and Bolivia had allegedly announced a unification plan—such that the one appointment of Professor Sands by Bolivia should also be counted for purposes of this proposal to disqualify—were based on “a spurious and insulting joke” contained in an article published in the United States on April Fool’s Day. See Answer PTD, p. 13.

⁶⁴ Sands Explanation of Feb. 17, 2011.

⁶⁵ *Id.*

never claimed any fee, and it was superseded by the UNCITRAL case in which jurisdiction was rejected unanimously on the basis that the proper forum was ICSID.

42. Professor Sands further states that “the suggestion that Bolivia and Venezuela are not sovereign, independent States is wrong as a matter of law and fact.”⁶⁶

43. Finally, Professor Sands states that having carefully reviewed the observations of both parties, and having regard to the facts and applicable standards, “I had no doubts as to my independence or impartiality when accepting appointment ..., and I continue to have no doubt today.”⁶⁷

III. ANALYSIS OF THE TWO MEMBERS

44. In order for Claimant’s proposal to disqualify Professor Sands to succeed it must establish a manifest lack of ability on his part to exercise independent judgment in this matter.⁶⁸ As is helpfully pointed out by the learned Tribunal members in *Suez*,⁶⁹ a reading of both the English and Spanish versions of Article 14(1) of the Convention requires that the two standards of independence and impartiality be applied when determining whether Professor Sands manifestly lacks the characteristics of someone who may be relied upon to exercise independent judgment for purposes of the proposal to disqualify him.⁷⁰

45. There thus exists a relatively high burden for those seeking to challenge ICSID arbitrators. 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.

46. Decisions on challenges to ICSID arbitrators based upon multiple appointments of an arbitrator by a party or counsel represent a smaller number of the publicly available challenge decisions, compared to other bases for challenge.

⁶⁶ Sands Explanation of Feb. 17, 2011.

⁶⁷ *Id.*

⁶⁸ See Convention, Articles article 14(1) and 57.

⁶⁹ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Cases No. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, Oct. 22, 2007.

⁷⁰ See *Suez* ¶ 28.

47. We have reviewed with interest the decision of the remaining arbitrators on the proposal to disqualify an arbitrator in *Tidewater*.⁷¹ It is suggested by the arbitrators in that decision that multiple appointments as arbitrator by the same party in unrelated cases are a neutral factor in considerations relevant to a challenge.⁷² We do not agree. In our opinion, 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. In an environment where parties have the capacity to choose arbitrators, damage to the confidence that investors and States have in the institution of investor-State dispute resolution may be adversely affected by a perception that multiple appointments of the same arbitrator by a party or its counsel arise from a relationship of familiarity and confidence inimical to the requirement of independence established by the Convention. The suggestion by the arbitrators in *Tidewater* that multiple appointments are likely to be explicable on the basis of a party's perception of the independence and competence of the oft appointed arbitrator is in our view unpersuasive. 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. In our view, multiple appointments of an arbitrator 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.

48. That the issue of multiple appointments raises a concern in the context of independence and impartiality was reflected in the IBA Guidelines on Conflicts of Interest in International Arbitration by the Council of the International Bar Association.⁷³ The Orange List of the IBA Guidelines provides a non-exhaustive enumeration of specific situations which—depending upon the facts of a particular case—may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Disclosure of circumstances falling within the Orange List is required. The Orange List includes circumstances where an arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties,⁷⁴ or where the arbitrator has

⁷¹ *Tidewater v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, dated Dec. 23, 2010 ¶ 60.

⁷² *Id.*

⁷³ International Bar Association Guidelines on Conflicts of Interest in International Arbitration dated May 22, 2004

⁷⁴ *Id.*, section 3.1.3.

within the past three years received more than three appointments by the same counsel or the same law firm.⁷⁵ We accept that the IBA Guidelines are not conclusive for the purposes of the decision that we are required to make on this challenge, and that the examples contained in the IBA Guidelines are both non-exhaustive and not in themselves decisive of whether or not the standards set out in the guidelines for impartiality and independence of arbitrators have been met. The IBA Guidelines do, however, indicate that multiple appointments represent an issue relevant to impartiality and independence and, in our opinion, are correct in so doing.⁷⁶

49. That this is the case in international commercial arbitration, in our view, suggests that this requirement of impartiality and independence also applies in investor-State disputes, where the need for independence is at least as great.

50. We have, therefore, approached our consideration of Claimant's proposal to disqualify Professor Sands on the basis that multiple appointments of an arbitrator by a party or its counsel is a factor which—contrary to the view expressed in *Tidewater*—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.

51. Professor Sands has had two previous appointments by Respondent but those appointments relate to the same facts and were made in what is effectively the same case. As he explains, the arbitral tribunal in the case under the arbitration rules of Nova Scotia was never constituted and it was superseded by the case under the UNCITRAL Arbitration Rules, in which jurisdiction was unanimously rejected on the basis that the proper forum was ICSID. We are, therefore, of the view that the multiple appointments by Respondent of Professor Sands do not present an issue with respect to his independence in this case.

52. As we have noted, the examples contained in the IBA Guidelines regarding multiple appointments, and the periods of time within which they are made, are neither binding upon us nor decisive of themselves in determining impartiality or independence under those guidelines. In any event, we do not believe that, in this situation, there is a basis for regarding Respondent's multiple appointments of Professor Sands alone as

⁷⁵ *Id.*, section 3.3.7.

⁷⁶ In our view, absent exceptional circumstances, multiple appointments by counsel and parties should be considered separately, not cumulatively.

sufficient to demonstrate the manifest lack of qualities necessary for Claimant's proposal to disqualify to succeed.

53. This leaves the question of Professor Sands' appointments by Respondent's counsel, Curtis, Mallet-Prevost, Colt & Mosle LLP. Here the position is that Professor Sands has been appointed in two unrelated cases involving Turkmenistan. Again, these two appointments by Respondent's counsel do not in our view reach the level of multiple appointments that would by themselves demonstrate the manifest lack of independence required to be established for a successful proposal to disqualify under the Convention.

54. The parties' submissions in relation to the four criteria set out in the *Suez* case have been considered by us carefully. These are helpful criteria but are of necessity applicable in a variety of circumstances and the utility of their application to a challenge solely based upon multiple appointments is in our view limited.

55. Further, we are unpersuaded by Claimant's submissions regarding the alleged financial dependence of Professor Sands upon either Respondent or Respondent's counsel. It is clear that Professor Sands has extensive independent income sources unrelated to fees derived from his appointments as arbitrator in investment arbitrations. Even assuming that this criterion could be helpful in making a judgment regarding his independence, the material provided does not establish any significant dependence by him upon income derived from those appointments.

56. Further, we are not persuaded that the material provided by Claimant regarding the relationship between Bolivia and Venezuela establishes Claimant's proposition that appointments of Professor Sands by Bolivia must be considered when assessing his independence or impartiality in this case. Accordingly, we do not regard as relevant any appointment of Professor Sands by Bolivia in unrelated proceedings.

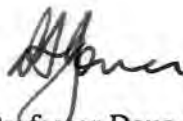
57. Therefore, we find that Claimant has failed to establish the requisite manifest lack of independence by Professor Sands and conclude that the proposal for disqualification submitted by Claimant must be dismissed.


IV. DECISION ON THE PROPOSAL TO DISQUALIFY

58. For the foregoing reasons Claimant's proposal to disqualify Professor Sands dated January 17, 2011 is dismissed.

59. The determination and attribution of costs in connection with this Decision is reserved for decision by the Tribunal at a later stage of the proceedings.

60. As from the date hereof, the suspension of the proceeding pursuant to Arbitration Rule 9(6) is hereby terminated.


Professor Doug Jones
President


Professor Guido Santiago Tawil
Arbitrator