INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SAPEC, S.A.
Claimant

and

KINGDOM OF SPAIN
Respondent

ICSID Case No. ARB/19/23

DECISION ON THE PROPOSAL FOR DISQUALIFICATION OF JUDGE JAMES SPIGELMAN

Issued by
Justice David Unterhalter SC
Lord Brennan QC

Secretary of the Tribunal
Ms. Anna Toubiana

Date: 25 June 2020

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I. INTRODUCTION AND THE PARTIES

1. The Claimant is Sapec, S.A., a company organized in accordance with the laws of Belgium (the "**Claimant**" or "**Sapec**").

2. The Respondent is the Kingdom of Spain (the "**Respondent**" or "**Spain**").

3. The Claimant and the Respondent are hereinafter collectively referred to as the "**Parties**."

4. This decision addresses the Respondent's Proposal for Disqualification of The Honourable James Jacob Spigelman, AC QC dated 14 April 2020.

II. PROCEDURAL BACKGROUND

5. On 6 August 2019, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**").

6. On 1 October 2019, the Claimant informed ICSID that the Parties had opted for the formula provided in Article 37(2)(a) of the ICSID Convention as the method for the constitution of the Arbitral Tribunal. Pursuant to the Parties' agreement, each Party was to appoint an arbitrator and the third, and presiding arbitrator, was to be appointed by agreement of the Parties, with the assistance of the Secretary-General, if the Parties so required.

7. On 18 November 2019, following appointment by the Claimant, The Honourable James Jacob Spigelman, AC QC, a national of Australia, accepted his appointment as arbitrator and provided his signed declaration, in accordance with Rule 6(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), together with an accompanying statement.

8. On 16 December 2019, following appointment by the Respondent, Lord Brennan QC, a national of the United Kingdom, accepted his appointment as arbitrator and provided the Parties with his signed declaration pursuant to ICSID Arbitration Rule 6(2), together with an accompanying statement.

9. On 18 February 2020, the Claimant requested the assistance of the Secretary-General of ICSID with the appointment of the presiding arbitrator in accordance with the Parties' agreement of 1 October 2019.

10. On 8 April 2020, following appointment by the Secretary-General, pursuant to the Parties' agreement, Justice David Unterhalter SC, a national of South Africa and Malta, accepted his appointment as the presiding arbitrator. The Tribunal was constituted on this same date in accordance with Article 37(2)(a) of the ICSID Convention.

11. In accordance with ICSID Arbitration Rule 6(1), Ms. Anna Toubiana, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal.

12. On 14 April 2020, the Respondent filed a Proposal for Disqualification of Co-Arbitrator Judge James Spigelman, pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "**Disqualification Proposal**" or the "**Proposal**").

13. By letter of the same date, the Centre informed the Parties that, in accordance with ICSID Arbitration Rule 9(6), the proceeding had been suspended until a decision was taken by Justice Unterhalter and Lord Brennan (the "**Unchallenged Arbitrators**"), as provided for in Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4).

14. On 15 April 2020, the Unchallenged Arbitrators set a timetable for the Parties' submissions and Judge Spigelman's explanations.

15. As scheduled, the Claimant filed its response to the Proposal on 22 April 2020 (the "**Claimant's Response**").

16. On 28 April 2020, Judge Spigelman furnished his explanations on the Proposal, as envisaged by ICSID Arbitration Rule 9(3) ("**Judge Spigelman's Explanations**").

17. On 6 May 2020, each Party filed additional observations on the Proposal (the "**Claimant's Additional Observations**" and the "**Respondent's Additional Observations**," respectively). The Secretariat simultaneously circulated both sets of observations to the Parties and the arbitrators on the same date.

18. On 18 May 2020, the Claimant sought leave to submit the Decision on the Proposal to Disqualify Prof. Kaj Hobér issued on 15 May 2020 in the case *KS Invest Gmbh and TLS Invest Gmbh v. Kingdom of Spain* (the "***KS Invest* Decision**").[1]

19. On 19 May 2020, the Respondent informed the Unchallenged Arbitrators that it did not oppose the introduction of the *KS Invest* Decision into the record "provided that it [was] allowed the opportunity to submit brief observations on the new legal authority".

20. On the same date, the Unchallenged Arbitrators invited the Respondent to submit its observations on the *KS Invest* Decision and on the Claimant's observations thereof by 25 May 2020.

21. On 20 May 2020, the Claimant provided comments on the Respondent's communication of 19 May 2020 and reserved its right to seek leave to make further submissions.

22. On 25 May 2020, the Respondent informed the Unchallenged Arbitrators that the Parties had agreed to file simultaneous comments on the *KS Invest* Decision by 27 May 2020. The Claimant confirmed its agreement on the same date.

23. On 27 May 2020, the Parties filed their respective comments on the *KS Invest* Decision.

III. PARTIES' POSITIONS AND JUDGE SPIGELMAN'S EXPLANATIONS

A. RESPONDENT'S DISQUALIFICATION PROPOSAL AND ADDITIONAL OBSERVATIONS

24. The Respondent's arguments on the Proposal to disqualify Judge Spigelman are set forth in its submissions dated 14 April and 6 May 2020. These arguments are summarized in this section.

25. The Respondent seeks the disqualification of Judge Spigelman on the basis of the Decision on Jurisdiction, Liability and Partial Decision on Quantum (the "***Cube* Decision**"), rendered

[1] *KS Invest Gmbh and TLS Invest Gmbh v. Kingdom of Spain*, ICSID Case No. ABR/15/25, Decision on the Proposal to Disqualify Prof. Kaj Hobér, 15 May 2020. A copy of the *KS Invest* Decision was filed by the Claimant on 27 May 2020 as **Claimant's Annex 56**.

in *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*[2] (the "***Cube* case**") by a tribunal in which Judge Spigelman was co-arbitrator.

26. In its Proposal, the Respondent argues that:

> […] *the Cube Case holds substantial similarities with the present case. Such similarities determine that, through the Cube Decision, Judge James Spigelman has already expressed his opinion on essential issues that have been raised and that will have to be resolved in this arbitration, in a way that simply leaves no room for a different determination in the present arbitration. This prejudgement necessarily conveys that the challenged arbitrator manifestly lacks impartiality when approaching the issues at dispute in this case*.[3]

27. According to the Respondent, the Proposal was timely as it was made "five days after the constitution of the Tribunal, which was the Respondent's first opportunity to propose the disqualification of an arbitrator," and thus complies with ICSID Arbitration Rule 9.[4]

28. The Respondent invokes Articles 14 and 57 of the ICSID Convention to set out the applicable standard.[5] For the Respondent, the term "manifest," referred to in Article 57 of the ICSID Convention, "does not necessarily have to do with the professionalism of the challenged arbitrator, of which the Kingdom of Spain does not pose any doubt, but essentially with the ease with which the lack of impartiality can be perceived."[6] In addition, in light of the existing three authentic language versions of the ICSID Convention, Spain argues that in accordance with Article 14 of the ICSID Convention, arbitrators must be "both independent and impartial."[7]

29. The Respondent concurs with the Claimant in that the burden of proof is "borne by the Party proposing the challenge," and also agrees with the interpretation by tribunals of the

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[2] *Cube Infrastructure v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, **Respondent's Annex 1**.

[3] Proposal, ¶ 5.

[4] Proposal, ¶ 8.

[5] Proposal, ¶ 6.

[6] Proposal, ¶ 9.

[7] Proposal, ¶¶ 11-13.

term "manifest" as meaning "obvious" or "evident."[8] However, the Respondent notes that "the impartiality standard does not require actual demonstration of lack of partiality," rather, and as was held in *Blue Bank*, it is sufficient to establish the appearance of dependence or bias.[9] In support of its position, the Respondent refers to the decisions in *Burlington Resources, Repsol* and *EDF* to argue that the applicable standard is therefore "an objective standard based on the reasonable analysis of evidence by a third party."[10]

30. In Spain's view, "a reasonably informed third party would find it highly possible that Judge Spigelman's position in relation to the facts and issues addressed in this arbitration is clearly prejudged against the Respondent's position and thus lacks the impartiality required by the applicable legal standards."[11] In that regard, Spain notes, the same criterion was applied in *Caratube*.[12]

31. According to the Respondent, a "violation of the right to be heard by an independent and impartial tribunal" harms Spain's right of defence.[13] Through its Proposal, the Respondent seeks to preserve its due process rights.[14]

32. The Respondent further stresses the existence of a "paramount resemblance" between the present case and the *Cube* case, which determines the relevance of the Proposal.[15] In

[8] Respondent's Additional Observations, ¶ 42.

[9] Proposal, ¶ 14; *Blue Bank International & Trust (Barbados) Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013 ("*Blue Bank*"), ¶ 59, **Respondent's Annex 9**.

[10] Proposal, ¶¶ 15-16; *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña, 13 December 2013 ("*Burlington Resources*"), ¶¶ 65, 77, **Respondent's Annex 10**; *Repsol S.A. and Repsol Butano S.A. v. Argentine Republic*, ICSID Case No. ARB/12/38, Decision on the Proposal for Disqualification of the Majority of the Tribunal, 13 December 2013 ("*Repsol*"), ¶¶ 71-72, **Respondent's Annex 11**; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID case No. ARB/03/23, Decision, 5 February 2016 ("*EDF*"), ¶ 126, **Respondent's Annex 12**.

[11] Proposal, ¶ 17.

[12] Proposal, ¶ 18; *Caratube International Oil Company LLP & Mr. Devincci Salah Hourani v. Republic of Kazakhstan*, ISCID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boesch, 20 March 2014 ("*Caratube*"), ¶¶ 90-91, **Respondent's Annex 13**.

[13] Proposal, ¶ 22; ¶¶ 23-30.

[14] Proposal, ¶ 30.

[15] Proposal, ¶ 31.

Spain's view, the energy facilities involved in both cases are the same, as are the disputed measures, the Parties' basic arguments and counsel for the Claimant.[16]

33. In its comments on the *KS Invest* Decision, the Respondent accepts that "depending on the particularities of each case, the same arbitrators can decide similar cases in a different manner."[17] However, according to the Respondent, the circumstances listed in the *KS Invest* Decision to distinguish the *Stadtwerke* and *KS Invest* cases—namely, that the two cases involved investments made by unrelated companies in Spain, at different times, and in different sectors—are not apparent in this case.[18] In the Respondent's view, the *KS Invest* Decision should not guide the Unchallenged Arbitrators' decision in this case.[19]

34. The Respondent highlights that Judge Spigelman has formed a clear opinion on the "key issues"[20] at stake in this case, namely: (i) the intra-EU jurisdictional objection and the relevance of EU law to the dispute;[21] (ii) the existence of "stabilization commitments" within the Spanish regulation governing renewable energy projects;[22] (iii) the existence of the investors' "legitimate expectations" based on the Spanish regulatory framework;[23] and (iv) whether the DCF valuation method for the assessment of damages is appropriate.[24]

35. In the Respondent's view, Judge Spigelman's reasoning on the above-listed issues in the *Cube* Decision leaves "no room for a different solution"[25] in the present case. The Respondent notes that its challenge is not an attempt to disrupt the proceeding's timetable,[26] nor is it seeking to remove an arbitrator who is not "sufficiently sympathetic to its

[16] Proposal, ¶ 33.
[17] Respondent's Comments on the *KS Invest* Decision, ¶ 11.
[18] Respondent's Comments on the *KS Invest* Decision, ¶ 14.
[19] Respondent's Comments on the *KS Invest* Decision, ¶ 22.
[20] Proposal, ¶ 31.
[21] Proposal, ¶¶ 41-44, citing to ¶¶ 129, 130, 138, 139, 157, 160, 306 of the *Cube* Decision.
[22] Proposal, ¶¶ 46-50, citing to ¶¶ ¶ 273, 282, 287, 310, 388 of the *Cube* Decision.
[23] Proposal, ¶¶ 52-56, citing to ¶¶ 396, 402 of the *Cube* Decision.
[24] Proposal, ¶¶ 58-61, citing to ¶¶ 473, 477, 501 of the *Cube* Decision.
[25] Proposal, ¶ 64.
[26] Respondent's Additional Observations, ¶¶ 16-19.

position."[27] The Respondent further observes that the Claimant failed to address the specific issues it raised in its Proposal related to the *Cube* Decision "that predetermine the outcome of the instant case" and stresses that its challenge is not based on the "soundness or reasonableness of the *Cube* Decision."[28]

36. Based on the above, the Respondent requests that:

> *a) The Secretary General order the suspension of the SAPEC, S.A. v. Kingdom of Spain case (No.ARB/19/23) until a decision is taken on the request for challenge pursuant to Rule 9(6) of the Arbitration Rules;*
>
> *b) The disqualification of Judge James Spigelman in the SAPEC, S.A. v. Kingdom of Spain arbitration proceedings (No.ARB/19/23) and his replacement in accordance with the terms of Article 58 of the ICSID Convention.*[29]

B. CLAIMANT'S RESPONSE AND ADDITIONAL OBSERVATIONS

37. The Claimant's position on the Proposal to disqualify Judge Spigelman, set forth in its submissions of 22 April and 6 May 2020, is summarized below.

38. The Claimant argues that the Respondent's challenge is "an attempt to disrupt this proceeding's timetable and represents an effort by Spain to undercut the integrity of tribunals in renewable energy cases in which it is respondent (including the unchallenged arbitrators in this case)."[30] In Claimant's view, the challenge has no merit[31] and argues that "Spain does not seek to remove an arbitrator who is actually biased; rather, it seeks to remove an arbitrator who is not, in its view, sufficiently sympathetic to its position."[32]

39. The Claimant notes that the Respondent has "brought multiple arbitrator challenges in as many as eight different arbitration proceedings it is currently facing" but "it does not challenge arbitrators who have ruled in favor of its position, creating the same 'issue

[27] Respondent's Additional Observations, ¶ 20.
[28] Respondent's Additional Observations, ¶¶ 49, 50.
[29] Proposal, ¶ 66; Respondent's Additional Observations, ¶ 89.
[30] Claimant's Response, ¶¶ 2, 6.
[31] Claimant's Response, ¶ 3.
[32] Claimant's Response, ¶ 4.

conflict' to which Spain appeals here."[33] In the Claimant's opinion, the "mere fact that an arbitrator has reached a decision on the same issue in another case does not mean that the arbitrator cannot or will not exercise 'independent judgment' in a subsequent arbitration."[34]

40. On the merits, Sapec argues that the challenge does not meet the rigorous standard of "manifest lack" of impartiality and independence as imposed by Articles 14 and 57 of the ICSID Convention.[35] The Claimant further states that the word "manifest" in Article 57 of the ICSID Convention means "evident" or "obvious" and that given the equal authenticity of all three language versions of the ICSID Convention, Article 14 of the ICSID Convention requires that arbitrators be both impartial and independent.[36]

41. Sapec further argues that "[c]hallenges to ICSID arbitrators based on 'issue conflicts' related to prior awards deciding similar factual and legal issues routinely have been rejected."[37] The Claimant adds that "[e]vidence that an arbitrator holds genuine and good faith views regarding the legal consequences of a particular fact pattern is not evidence that the arbitrator is subject to improper influences."[38] Rather, in the Claimant's view, "if anything it constitutes evidence of impartiality because the arbitrator holds those views based on his or her good faith view of the law regardless of who that benefits in any given case."[39] The Claimant relies on the decisions in *Tidewater*, *Universal*, *Electrabel*, *Suez*, *PIP Sari*, *Urbaser*, and *Highbury* in support of its position that "issue conflicts" are insufficient to disqualify an arbitrator under Articles 14 and 57 of the ICSID Convention.[40]

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[33] Claimant's Response, ¶¶ 6-7.

[34] Claimant's Response, ¶ 9.

[35] Claimant's Response, ¶ 10.

[36] Claimant's Response, ¶¶ 11-12.

[37] Claimant's Response, ¶ 16.

[38] Claimant's Response, ¶ 17.

[39] Claimant's Response, ¶ 17.

[40] Claimant's Response, ¶ 18; *Tidewater Inc. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator, 23 December 2010, ¶ 67, **Claimant's Annex 35**; *Universal Compression Int'l Holdings, S.L.U v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/9, Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, 20 May 2011, ¶ 83, **Claimant's Annex 33**; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, 25 February 2008, ¶ 41, **Claimant's Annex 42**; *Suez, Sociedad General de Aguas de Barcelona SA. v. Argentine 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,

For the Claimant, the Unchallenged Arbitrators should not depart from this unanimous line of decisions.[41] In addition, the *Cube* Decision, which did not admit all of the Claimant's claims, evidences Judge Spigelman's "neutrality and fair-mindedness."[42]

42. Referring to *Caratube*[43] and *CC/Devas*,[44] the Claimant adds that in contrast to the "overwhelming authority rejecting issue challenges," the Proposal cannot succeed based on those two distinguishable outlier decisions.[45] The Claimant also submits that the SCC Board's decision in SCC Arb. No. 2017/060 has no bearing in the current proceeding because the decision was governed by a lower legal standard, which is different from the higher standard pursuant to the ICSID Convention.[46] The Claimant further disagrees with the reasons supporting the SCC Board's decision.[47]

43. In addition, in its comments on the *KS Invest* Decision, the Claimant points out that applying the "narrower legal standard required by the ICSID rules" the ICSID Chairman did not follow the conclusion of the SCC Board.[48] The Claimant argues that the Unchallenged Arbitrators should apply the same appropriate legal standard in the present case.[49]

44. According to the Claimant, the Respondent has failed to offer evidence of Judge Spigelman's supposed bias.[50] The Claimant contends that "it is dubious and unsupported

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22 October 2007 ("*Suez*"), ¶ 35, **Claimant's Annex 32**; *Participaciones Inversiones Portuarias Sari v. Gabonese Republic*, ICSID Case No ARB/08/17, Decision on Proposal to Disqualify an Arbitrator, 12 November 2009, ¶ 33, **Claimant's Annex 43**; *Urbaser S.A. and others v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, 12 August 2010, ¶¶ 44-45, **Claimant's Annex 44**; *Highbury International AVV, Compañía Minera de Bajo Caroni AVV y Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Decisión sobre la propuesta de recusación de la Profesora Brigitte Stern, 9 June 2015, ¶ 104, **Claimant's Annex 45**.

[41] Claimant's Response, ¶ 19.

[42] Claimant's Response, ¶ 19.

[43] Claimant's Response, ¶¶ 21-23.

[44] Claimant's Response, ¶¶ 24-25.

[45] Claimant's Response, ¶ 20.

[46] Claimant's Response, n. 2; Claimant's Additional Observations, ¶¶ 28-31.

[47] Claimant's Additional Observations, ¶¶ 32-35.

[48] Claimant's Comments on the *KS Invest* Decision, p. 2.

[49] Claimant's Comments on the *KS Invest* Decision, p. 3.

[50] Claimant's Response, ¶ 31; Claimant's Additional Observations, ¶¶ 5, 18, 21.

by the vast majority of tribunals that expressing a legal opinion or making a legal or factual determination in one case should be considered evidence that an arbitrator is unable to decide the law and facts impartially in the next case."[51] In the Claimant's view, the ICSID rules for disqualification do not seek to prevent arbitrators from expressing any legal opinion.[52] The Claimant quotes the U.S. Supreme Court to contend that prejudgment of certain factual and legal issues[53] "would be evidence of lack of qualification, not lack of bias."[54] The Claimant concludes that rendering a single decision on related legal issues, without the Respondent's proof of bias, "cannot possibly warrant the extreme and extraordinary remedy of disqualification."[55]

45. Based on the above, the Claimant requests that the Unchallenged Arbitrators:

> a. *dismiss the Challenge for failing to satisfy the standard of manifest lack of impartiality and independence of Articles 14 and 57 of the ICSID Convention;*
>
> b. *decide the Challenge expeditiously, so as not to delay the proceeding; and*
>
> c. *order Spain to bear all costs that arise out of or in connection with the Challenge.*[56]

C. JUDGE SPIGELMAN'S EXPLANATIONS

46. Judge Spigelman furnished his explanations on 28 April 2020, stating that:

> […] *I accept that issues that will arise in these proceedings involve matters on which I have expressed a view, on the basis of the facts and submissions in* Cube Infrastructure SICAV & Ors v Kingdom of Spain *ICSID Case No ARB/15/20. It appears from the Request for Arbitration and the Request for Disqualification that that the parties in this case will advance arguments on which both the Claimants and Spain were not successful in* Cube.
>
> *I am aware that there are subsequent decisions on the changes to Spain's renewable energy regime which take a significantly different view from that*

[51] Claimant's Response, ¶ 28.

[52] Claimant's Response, ¶ 33.

[53] Claimant's Additional Observations, ¶ 10.

[54] Claimant's Response, ¶ 34; citing to *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), pp. 777-78, **Claimant's Annex 50**.

[55] Claimant's Response, ¶ 37.

[56] Claimant's Response, ¶ 38.

> *set out in Cube. I refer to two cases issued on the same day, 2 December 2019:* Stadwerke Munchen GMBH, RWE Innogy GMBH & Ors v Kingdom of Spain *ICSID Case No ARB/15/1 and* BayWa R.E. Asse1 Holding GMBH v Kingdom of Spain *ICSID Case No ARB/15/10.*
>
> *In the former the Tribunal, by majority, rejected all the Claimants submissions, including with respect to the Claimants' legitimate expectations under the FET standard in S 10(1) of the ECT, that being the basis of the decision in* Cube.
>
> *In the latter, the Tribunal, chaired by James Crawford a Judge of the International Court of Justice, rejected the legitimate expectations case, although it found that a feature of the legislative change in 2103* [sic] *did breach the stability clause of S I 0(1).* Cube *did not consider the stability clause.*
>
> *The two cases took different views to that in Cube on a number of steps in the reasoning leading to the ultimate decisions e.g. on the characterisation of some of Spain's regulatory changes, on the deference to be given to decisions of the Supreme Court of Spain and on the significance of EU state aid regulation.*
>
> *These are fully reasoned Awards. I have not formed a view about the reasoning in these new precedents. However, I am confident that I am able to hear and decide submissions based on this different reasoning with an open mind.* […]

IV. ANALYSIS OF THE UNCHALLENGED ARBITRATORS

47. We have given careful consideration to the submissions of the Parties. We consider, in the first place, the legal standard that is of application to the Respondent's Disqualification Proposal.

A. LEGAL STANDARD

48. The Disqualification Proposal is made on the basis of Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

49. Article 57 of the ICSID Convention, in relevant part, reads as follows:

> *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.*

50. Paragraph 1 of Article 14 of the ICSID Convention reads as follows:

> *Persons 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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators*.

51. The Respondent in its Disqualification Proposal challenges Judge Spigelman's independence of judgment. Such a challenge requires the Respondent to satisfy the following requirements.

52. First, the Respondent must establish any fact that indicates a manifest lack of the quality required of an arbitrator to exercise independent judgment. For the lack of the required quality to be manifest, the facts must make it clear and obvious that the arbitrator cannot be relied upon to exercise independent judgment. This requirement ousts from consideration speculative contentions as to the state of mind of an arbitrator or subjective postulates as to an arbitrator's predispositions. What is assumed or tacit is not made manifest.

53. Second, given the variations in the English, Spanish and French versions of Article 14 of the ICSID Convention, an arbitrator must be both impartial and independent. These attributes require that an impartial arbitrator will comply with the duty to decide the dispute on its merits and an independent arbitrator will act in the matter free of extraneous constraint.

54. Third, the attributes of impartiality and independence are assessed against the objective standard that a third party would reasonably apprehend, based on the established facts, that the arbitrator cannot exercise impartiality or independence in deciding the dispute.

55. Although the Parties expressed these matters in somewhat different language, there was little contestation that the Disqualification Proposal must meet these requirements.

B. THE CHALLENGE

56. The Respondent contends that Judge Spigelman lacks impartiality to serve as an arbitrator in the present dispute. The essence of the Respondent's complaint is that Judge Spigelman was the co-signatory to the majority's decision in *Cube.* It is common ground between the Parties that there is a substantial similarity between the issues that will require determination in the present case and those determined in *Cube.* Judge Spigelman has expressed his views in *Cube* on the essential issues that fall to be resolved in the present arbitration. In the light of these facts, Judge Spigelman has already judged the essential issues that will require determination in these proceedings. That is a prejudgment that leaves no room for a different decision by Judge Spigelman in the present arbitration. Judge Spigelman therefore lacks the impartiality required of him to act as an arbitrator in terms of Article 57 read with paragraph 1 of Article 14 of the ICSID Convention.

57. The Claimant disagrees. The Claimant contends that, absent extraordinary circumstances, not here present, if an arbitrator has made factual and legal determinations in one case, this gives rise to no want of impartiality in another case, where similar issues will require resolution. This position reflects the plurality of opinion of other ICSID Tribunals. It is also consistent with the pragmatic recognition that qualified adjudicators in a specialized area of law will often hold views in advance of an arbitration that have relevance for the issues in dispute. That is not a basis to disqualify an arbitrator for a lack of impartiality because it would render competence in a field of law a disqualification from serving as an arbitrator in the very field to which the arbitrator is best suited. It would also place the stipulations of paragraph 1 of Article 14 at odds with one another.

58. The Respondent does not cavil with the general proposition that an arbitrator who has expressed views on issues of law or fact in one arbitration is not, without more, lacking in impartiality for the purposes of a parallel arbitration. The issue here is rather that the manner in which Judge Spigelman decided the issues in *Cube* leaves no room for a different decision in the present arbitration. His decision is unavoidably predetermined because the central issues decided by the majority in *Cube* were reasoned with such firm commitments that there is no basis upon which it is reasonably apprehended that Judge Spigelman would decide these issues differently. The issues that overlap and are likely to be decisive of the

present arbitration include the following: the intra-EU jurisdictional objection; stabilization commitments; the legitimate expectations of the investors; and the valuation of damages.

59. Our assessment of these contentions begins most usefully with what Judge Spigelman has had to say in response to the Disqualification Proposal. His response is transcribed in full in paragraph 46 above. Judge Spigelman accepts the commonality of issues in *Cube* and the present proceedings. He accepts also that he has expressed a view on these issues in *Cube.* However, since the decision in *Cube,* Judge Spigelman is aware of two decisions that took a different view to *Cube* and on a number of steps in the reasoning that led to a different outcome. These decisions are fully reasoned. Judge Spigelman says that he has not formed a view as to the reasoning in the two decisions. He is confident that he is able to hear and decide submissions based on this different reasoning, with an open mind.

60. Judge Spigelman recognizes that two other Tribunals have come to different conclusions on the basis of reasoning that does not accord with Judge Spigelman's decision in *Cube.* The two decisions are fully reasoned. Judge Spigelman's avowed position is that he acknowledges the significance of these two decisions and the need to consider submissions based on different reasoning of the kind reflected in these decisions. It is reasonable to conclude from Judge Spigelman's response that he has made two commitments. First, that the reasoning and outcome in *Cube* require reconsideration by him in the light of the two Tribunal decisions that have not followed *Cube*, issuing from arbitrators of considerable standing. Second, Judge Spigelman will engage upon this reconsideration with an open mind and based on the merits of the submissions made to him.

61. The central question for us is whether Judge Spigelman's response would nevertheless leave a third party with the reasonable apprehension that Judge Spigelman would not discharge his office with the exercise of impartial judgment. The basis of the Respondent's concern is not that Judge Spigelman has supported a decision based on reasoning opposed to the submissions that the Respondent proposes to advance in the present arbitration, but rather that he has done so with a degree of conviction that does not brook of opposition. Judge Spigelman evinces a disposition at odds with this. He says he can and will reconsider the reasoning and outcome in *Cube.*

62. Adjudication is a process of reasoning by which the strength of opposed reasoned arguments are assessed to arrive at a decision. There are other forms of decision making that rest upon prior convictions that seldom, if ever, permit of revision. We recognize that even in a system of adjudication that does not rest upon precedent, there may be some disposition on the part of an arbitrator to adhere to a past decision, more especially when that decision is the product of careful consideration and unequivocal articulation. However, lawyers of experience and standing understand that legal reasoning is responsive to persuasion by recourse to reasons that incline a decision. To reach a proper judgment requires an assessment as to why one argument is to be preferred over another. And this entails a perpetual humility that a position that appears persuasive may not, on reflection, be so. Few who judge cases fail to recognize that their significant judgments could have reached different conclusions and are open to revision, in some contexts by way of appeal, and in others, by way of subsequent awards that take a different view.

63. In order to find that Judge Spigelman lacks impartial judgment to sit as an arbitrator in the present matter, we should have to find that his avowed position that he is open to the revision of his decision in *Cube* is not capable of credence because he has in fact taken a decision that is so entrenched as to admit of no alteration. We do not find that this is so. First, due weight must be given to what Judge Spigelman says he will do. Second, there are now other decisions of importance that run counter to the reasoning adopted in *Cube.* It is hard to imagine that those decisions and the submissions that are to be made by the Respondent will not be conscientiously engaged and considered by Judge Spigelman. To do otherwise and simply repeat what has already been said in *Cube* is an improbable outcome. Third, Judge Spigelman is a judge and jurist of considerable experience and reputation. It would seem unlikely that the essential nature of adjudication, sketched above, that requires the recognition that a judgment may be in error, is not an integral part of his practice. In these circumstances, we cannot conclude that a third party could entertain the reasonable apprehension that Judge Spigelman lacks the impartiality or independence required to sit as an arbitrator in this arbitration.

64. For these reasons, we must decline the Respondent's request for the disqualification of Judge Spigelman.

V. COSTS

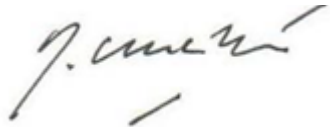
65. The Claimant has requested to order the Respondent to bear all costs that arise of or in connection with Judge Spigelman's Disqualification Proposal.[57] The question of costs will be determined at a later stage.

VI. DECISION

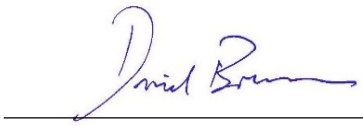
66. For the reasons set forth above, the Unchallenged Arbitrators decide as follows:

(1) The Proposal to Disqualify The Honourable James Jacob Spigelman is dismissed.

(2) A decision on the costs arising from the Proposal will be taken at a later stage.



Justice David Unterhalter SC



Lord Brennan QC

[57] Claimant's Response, ¶ 38; Claimant's Additional Observations, ¶ 37(b).