

International Centre for the Settlement of
Investment Disputes (ICSID) – Additional
Facility Rules

8 February 2019

REQUEST FOR ARBITRATION
under the ICSID Additional Facility Rules

ALOIS SCHÖNBERGER

Citizen of the Republic of Austria

Claimant

- against -

THE REPUBLIC OF TAJIKISTAN

Respondent

1. Introduction

1. Mr Alois Schönberger (the “**Claimant**” or “**Mr Schönberger**”) herewith requests arbitration under Article 2(a) of the ICSID Additional Facility Rules (the “**Rules**”) against the Republic of Tajikistan (“**Tajikistan**” or the “**Respondent**”).
2. Mr Schönberger respectfully requests the ICSID Secretary-General to advise him with all possible haste as to any element needed to supplement this request for arbitration (“**Request**”) with a view to its registration by her in accordance with Article 4 of Schedule C to the Rules (the “**Arbitration Rules**”).
3. Mr Schönberger has duly transferred the USD25,000 lodging fee for this Request. Please see **Exhibit C-1**.

2. Names and contact details of the Parties

2.1. The Claimant

4. The claimant in this arbitration is Mr Alois Schönberger.
5. The Claimant’s contact details are as follows:

Address: Al. Rzeczypospolitej 1, 02-972, Warsaw, Poland

Telephone: + 48 22 852 83 00

Email: schonberger@cottonex.com.pl

6. The Claimant is represented in these proceedings by:

Phillip Landolt
LANDOLT & KOCH
Rue du Mont-Blanc 17
CH-1201 Geneva
Switzerland

Telephone: +41 22 311 00 52

Mobile: +41 76 422 00 52

Fax: +41 22 311 0054

Email: phillip@landoltandkoch.com

7. The power of attorney is found at **Exhibit C-2**.

2.2. The Respondent

8. The respondent in this arbitration is the Republic of Tajikistan ("**Tajikistan**" or the "**Respondent**").
9. The President of Tajikistan is by Article 69 of the Constitution of Tajikistan empowered to represent Tajikistan in international relations. The President of Tajikistan is his Excellency Mr Emomali Rahmon.
10. The contact information of Mr Rahmon is as follows:

Official residence:

Palace of Nations
734000, Sherozi str. 11,
Dushanbe, Tajikistan

Executive office:

Executive office of President of Tajikistan
734023, Rudaki 80,
Dushanbe, Tajikistan

Telephone: +992 37 2210817

Telephone: +992 37 2216800

Fax: +992 22 16800

Tajikstan Embassy in Washington D.C.

c/o H.E. Ambassador Farhod Salim
Embassy of the Republic of Tajikistan
1005 New Hampshire Ave. NW
Washington, D.C. 20037
United States of America

Telephone: +1 202 223 6090

Fax: +1 202 223 6091

Email: tajikistan@verizon.net

2.3. Denomination of the parties in this proceeding

11. The Claimant and the Respondent are also referred to individually as a **"Party"**, and together as the **"Parties"**.

3. The relevant provisions embodying the agreement of the Parties to refer the dispute to arbitration

12. The Parties' agreement to refer the dispute to arbitration originates in, and is based on, the Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan of 15 December 2010 (the **"BIT"**). Please see a copy of the BIT at **Exhibit C-3**.
13. Article 14 of the BIT provides as follows in material part:

Means of Settlement, Time Periods

- (1) A dispute between a Contracting Party and an investor of the other Contracting Party shall, if possible, be settled by negotiation or consultation. If it is not so settled, the investor may choose to submit it for resolution:

[...]

(c) in accordance with this Article to:

- (i) the International Centre for Settlement of Investment Disputes ("the Centre"), established pursuant to the Convention of the Settlement of Investment Disputes between States and Nationals of other States, signed in Washington on 18 March 1965 ("the ICSID Convention"), if the Contracting Party of the investor and the Contracting Party, party to the dispute, are both parties to the ICSID Convention;
- (ii) the Centre under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, if the Contracting Party of the investor or the Contracting Party, party to the dispute, but not both, is a party to the ICSID Convention;

[...]

- (2) A dispute may be submitted for resolution pursuant to paragraph (1) (c) of this Article after 60 days from the date notice of intent to do so was provided to the Contracting Party, party to the dispute, but not later than five years from the date the investor first acquired or should have acquired knowledge of the events which gave rise to the dispute.
14. The following is evidence of the entry into force of the BIT: i) Process-Verbal of the Exchange of Instruments of Ratification dated 28 November 2011 by Austria and Tajikistan (**Exhibit C-4**); ii) Austrian Official Gazette (*Bundesgesetzblatt für die Republik Österreich*) of 25 January 2012 (BGBLA 2012 III 18) notice of the coming into force of the Austria-Tajikistan BIT on 1 February 2012 (**Exhibit C-5**, with translation into English); and iii) Certificate of 16 November 2011 from Tajikistan that it has ratified the Austria-Tajikistan BIT (**Exhibit C-6**, with translation into English).
15. The BIT is Tajikistan's consent to this arbitration.
16. Mr Schönberger is an Austrian citizen. Please find attached a copy of the signature page of Mr Schönberger's Austrian passport as evidence of Mr Schönberger's Austrian nationality (**Exhibit C-7**).
17. Mr Schönberger's consent to arbitration is this Request under the Rules.
18. Austria is a signatory to the ICSID Convention but Tajikistan is not.
19. Therefore, there is no objection to this arbitration on the basis that, within the meaning of Art. 2(a) of the Rules, the ICSID Convention is applicable.
20. On 4 October 2018 Mr Schönberger sent Tajikistan an intention to request arbitration and an invitation to negotiate, in accordance with Article 14(2) of the BIT. Please see **Exhibit C-8**.
21. This invitation to negotiate received no answer.
- 4. Date of approval by the Secretary-General pursuant to Article 4 of the Rules of the agreement of the Parties providing for access to the Additional Facility**

22. The Secretary-General approved access for this arbitration under the Rules pursuant to Article 4 of the Rules on 30 October 2018. See **Exhibit C-9**.

5. The issues in dispute and an indication of the amount involved

5.1. Mr Schönberger's investment in Tajikistan

23. On 11 February 2013, a Hong Kong corporation owned by Mr Schönberger, Super Perfect Investments Limited ("**Super Perfect**"), and a Tajik company called Levakan-M ("**Levakan**") entered into two contracts for the purchase by Super Perfect and sale by Levakan of 20,000 metric tonnes of cotton. A copy of these contracts (the "**Levakan Contracts**") is attached hereto as **Exhibit C-10**.
24. By virtue of the Levakan Contracts, in advance installments Levakan agreed to sell Super Perfect virtually the entirety of its next cotton crop when it had gone through all production stages and was in final form, and Super Perfect agreed to pay the purchase price.
25. The Levakan Contracts expressly provided that the Tajik bank Agroinvestbank Open Joint Stock Company ("**AIB**") would guarantee, in the amount of USD11,000,000, Levakan's delivery of the cotton. AIB issued a guarantee designated "Bank Guarantee No. 08/2013" in the amount of USD11,000,000 (the "**Levakan Guarantee**").
26. On 11 February 2013, Super Perfect and a second Tajik company called ALM LLC ("**ALM**") entered into a contract for the purchase by Super Perfect and sale by ALM of 10,000 metric tonnes of cotton. A copy of this contract (the "ALM Contract") is attached hereto as **Exhibit C-11**.
27. By virtue of the ALM Contract, in exchange for advance payment in installments of the purchase price, ALM agreed to sell Super Perfect virtually the entirety of its next cotton crop when it had gone through all production stages and was in final form, and Super Perfect agreed to pay the purchase price.

28. The ALM Contract expressly provided that AIB would guarantee, in the amount of USD8,000,000, ALM's delivery of the cotton. AIB issued a guarantee in the amount of USD8,000,000. By agreement between Super Perfect and AIB this guarantee was subsequently reduced to USD6,000,000 (the "**ALM Guarantee**").
29. Super Perfect duly performed its pre-payment obligations under the Levakan and ALM Contracts.
30. Neither Levakan nor ALM made any meaningful performance under the Levakan and ALM Contracts.
31. The Levakan and ALM Contracts are an investment within the broad definition of this term in Article 1(2) of the BIT. Notably, they entail "the commitment of capital or other resources, or the expectation of gain or profit, or the assumption of risk [...]". *Inter alia*, they are a "right or claim to money or performance whether conferred by law or contract, including turnkey construction, management or revenue-sharing contracts, and concessions, licences, authorisations or permits to undertake an economic activity" within the meaning of Article 1(2)(d) of the BIT.
32. The Levakan and ALM Contracts are also an investment within the meaning of Article 2(a) of the Rules. They meet the *Salini* test.¹
33. The Levakan and ALM Contracts and the pre-payments under them were a commitment of resources to Tajikistan's economy, the principal activity of which is precisely cotton production. The Contracts foresaw performance and were in practice performed over a period of months, the time necessary for the production of that year's cotton crop. The Contracts engaged an assumption of risk in that cotton production is not assured in any year and there was therefore the risk of non-payment and then of non-payment on the Guarantees by a bank directed by Tajikistan a country struggling to gain financial and legal stability. The underlining commercial arrangement was obviously made in the expectation of profit. It was a contribution to Tajik's

¹ *SaliniCostruttori v. Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001, para. 52

economy as it provided essential financing for cotton crops, and cotton is Tajikistan's principal economic activity. Inasmuch as the Secretary-General may deem relevant, it is noted that this investment was made in good faith.²

5.2. Tajikistan's violations of the BIT

34. AIB was and is majority controlled and owned by Tajikistan.
35. Tajikistan's former Deputy Prime Minister, Mr Murodali Alimardon, directed all aspects not just of AIB's activities in relation to the Levakan and ALM Contracts, but in this relation he also directed all aspects of Levakan and ALM's conduct.
36. The acts of AIB in this case are attributable to Tajikistan.
37. On 19 February 2014 Super Perfect demanded payment in the amount of USD11,000,000 from AIB under the Levakan Guarantee.
38. On 24 February 2014 AIB wrote to Super Perfect to request it to withdraw its demand. AIB has never honoured the Levakan Guarantee.
39. On 21 February 2014 Super Perfect demanded payment in the amount of USD USD604,409.02 from AIB under the ALM Guarantee.
40. On 24 February 2014 AIB responded to this demand, refusing to honour the ALM Guarantee.
41. On 6 November 2014 Super Perfect initiated arbitration proceedings in Geneva, Switzerland under the Swiss Rules of International Arbitration against AIB in relation to the Levakan Guarantee. This arbitration was referenced by the Swiss Chambers as 300310-2014 and Professor Dr Alexander von Ziegler was appointed sole arbitrator. Professor von Ziegler rendered the final (and only) award (the "**Award**") in this arbitration on 17 July 2017.

² See *Phoenix Action v. Czech Republic*, para. 114. See also *Plama Consortium v. Bulgaria*, (ICSID Case No. ARB/03/24), Award of 27 August 2008, paras 144–146.

42. On 16 March 2018 Super Perfect sought enforcement of the Award before the Economic Court of Dushanbe City, Tajikistan but on 28 May 2018 enforcement was refused contrary to Tajik law and in particular contrary to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which Tajikistan is a signatory.
43. On 28 June 2018 Super Perfect initiated an appeal in cassation, against this failure to enforce the Award, before the Supreme Economic Court of the Republic of Tajikistan. On 7 August 2018, in violation of Tajik law and in particular contrary to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to which Tajikistan is a signatory, the Award was refused enforcement.
44. On 25 January 2019 Super Perfect appealed the Tajik Supreme Economic Court's refusal to enforce the Award to this same court in a "supervisory appeal". This is the last opportunity to challenge the refusal to enforce the Award in Tajikistan.
45. Tajikistan's failure to honour the Guarantees and its failure to enforce the Award constitute violations of the fair and equitable treatment and full and constant protection and security standards under Article 3(1) of the BIT.
46. Tajikistan's failure to honour the Guarantees and its failure to enforce the Award constitute violations its obligations not unduly or discriminatorily to impair the management, operation, maintenance, use, enjoyment, sale and liquidation of Mr Schönberger's investment contrary to Article 3(2) of the BIT.
47. Tajikistan's failure to honour the Guarantees and its failure to enforce the Award constitute violations of its obligations to accord Mr Schönberger and his investment treatment no less favourable than that it accords to its own investors and their investments or to investors of any third State and their investments contrary to Article 3(3) of the BIT.

48. Tajikistan's failure to honour the Guarantees and its failure to enforce the Award constitute an expropriation of Mr Schönberger's investment, or measures having equivalent effect, contrary to the protections under Article 7(1) of the BIT.
49. Tajikistan's failure to honour the Guarantees and its failure to enforce the Award constitute a violation of its obligations to Mr Schönberger contrary to Article 11(1) of the BIT.
50. Tajikistan's failure to honour the Guarantees and its failure to enforce the Award constitute a violation of all other laws and obligations of Tajikistan referred to in Article 11(2) of the BIT.

5.3. Relief requested by Mr Schönberger

51. Mr Schönberger requests the arbitral tribunal to be constituted under the Arbitration Rules to decide this dispute to order the following relief:
 - a. The Republic of Tajikistan shall pay Mr Alois Schönberger the principal sums of USD11,000,000 and USD USD604,409.02 as well as interest at 36% respectively as from 19 February 2014 and 21 February 2014 until full payment of such principal sums;
 - b. The Republic of Tajikistan shall pay Mr Alois Schönberger his costs in relation to the enforcement of the Guarantees and the enforcement of the Award as well as interest thereon at the appropriate rate from the appropriate time until full payment of such costs; and
 - c. The Republic of Tajikistan shall pay Mr Alois Schönberger his costs in relation to this arbitration (the "cost of proceeding" within the meaning of Article 58 of the Arbitration Rules) as well as post-award interest at the appropriate rate from the appropriate time until full payment of such costs.
 - d. Such other relief in favour of Mr Alois Schönberger that the arbitral tribunal should determine to be appropriate in accordance with applicable law; and

- e. The dismissal of all contrary and other claims of the Republic of Tajikistan against Mr Alois Schönberger.

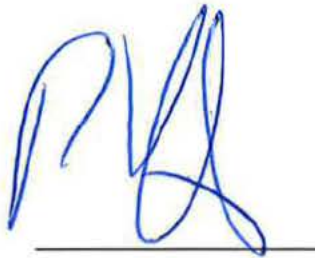
6. Provisions agreed by the parties regarding the number of arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute

- 52. There are no provisions agreed between the Parties concerning the number of arbitrators nor are there any concerning their method of appointment.
- 53. As regards the number of arbitrators, in the interest of saving costs and time, Mr Schönberger encourages Tajikistan without delay to enter into discussions with him with a view to the appointment of a sole arbitrator.
- 54. As regards the place of arbitration, in conformity with Article 19 of the Arbitration Rules the place of arbitration must be in a New York Convention state. In accordance with Article 16 of the BIT, at the request of a Party, the place of arbitration shall be within a New York Convention state.
- 55. Mr Schönberger requests that the place of arbitration be Geneva, Switzerland.
- 56. The Parties have selected Geneva, Switzerland for their commercial arbitration. Swiss law is the municipal law applying to the Guarantees.
- 57. Geneva, Switzerland, within the New York Convention state of Switzerland, is most convenient to the Parties as a place of arbitration.
- 58. Mr Schönberger is open to discussing with Tajikistan, and open to the arbitral tribunal's determination under Art. 21(1) of the Arbitration Rules, a place of arbitration in a western European state which is a New York Convention state, again, for the convenience of the Parties.

Geneva, 8 February 2019

Respectfully submitted,
On behalf of Mr Alois Schönberger

LANDOLT & KOCH



Phillip Landolt