INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mr. Edmond Khudyan and Arin Capital & Investment Corp.

v.

Republic of Armenia

(ICSID Case No. ARB/17/36)

PROCEDURAL ORDER NO. 2
DECISION ON THE RESPONDENT'S APPLICATION FOR THE REMOVAL OF DR. TUMANOV

Members of the Tribunal
Ms. Melanie Van Leeuwen, President of the Tribunal
Ms. Ank Santens, Arbitrator
Professor Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Ms. Laura Bergamini

December 5, 2018

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I. INTRODUCTION

1. This case concerns a dispute filed with the International Centre for Settlement of Investment Disputes ("**ICSID**") pursuant to the Treaty between the United States of America and the Republic of Armenia concerning the reciprocal encouragement and protection of investment signed on September 23, 1992, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

2. The Claimants are Mr. Edmond Khudyan, a national of the United States of America ("**US**"), and Arin Capital & Investment Corp., a corporation established under the laws of the State of California in the US (collectively, the "**Claimants**").

3. The Claimants are represented in these proceedings by Mr. James H. Boykin and Mr. Alexander Bedrosyan of Hughes Hubbard & Reed LLP, in Washington D.C., US, and Dr. Gevorg Tumanov of ELL Partnership, in Yerevan, Armenia.

4. The Respondent is the Republic of Armenia (the "**Respondent**" or "**Armenia**").

5. The Respondent is represented in this arbitration by Ms. Susanne Schwalb of CMS Hasche Sigle, in Munich, Germany; Dr. Nicolas Wiegand, Dr. Mariel Dimsey, and Ms. Sanjna Pramod of CMS Hasche Sigle in Hong Kong; and Dr. Aram Orbelyan, Ms. Lilit Karapetyan and Ms. Ani Varderesyan of Concern Dialog Law Firm, in Yerevan, Armenia.

6. The Claimants and the Respondent are collectively referred to as the "**Parties**."

II. PROCEDURAL HISTORY

7. On September 18, 2017, ICSID received a Request for Arbitration, together with Exhibits CE-01 through CE-19, from the Claimants initiating arbitration against the Respondent.

8. On September 27, 2017, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the ICSID Convention.

9. On March 15, 2018, the Tribunal was constituted in accordance with the method of constitution agreed to by the Parties. Its members are: Ms. Melanie Van Leeuwen (Dutch), President, appointed by the Parties; Ms. Ank Santens (Belgian), appointed by the Claimants; and Professor Zachary Douglas QC (Australian), appointed by the Respondent.

10. On April 7, 2018, the Secretary of the Tribunal transmitted to the Parties a draft Procedural Order No. 1 and a draft agenda in advance of the first session.

11. On April 19, 2018, the Parties jointly submitted their comments on the draft Procedural Order No. 1. In the revised draft the Claimants identified their representatives as follows: Mr. James H. Boykin and Mr. Alexander Bedrosyan.

12. On April 22, 2018, the Parties jointly submitted a proposed timetable for the proceedings.

13. On April 24, 2018, the first session was held by telephone conference. The following persons participated in the conference on behalf of the Parties:

Participating on behalf of the Claimants:
Mr. James H. Boykin, Hughes Hubbard & Reed LLP
Mr. Alexander Bedrosyan, Hughes Hubbard & Reed LLP

Participating on behalf of the Respondent:
Ms. Susanne Schwalb, CMS Hasche Sigle
Dr. Nicolas Wiegand, CMS Hasche Sigle, Hong Kong LLP
Dr. Mariel Dimsey, CMS Hasche Sigle, Hong Kong LLP
Ms. Sanjna Pramod, CMS Hasche Sigle, Hong Kong LLP

Dr. Aram Orbelyan, Concern Dialog Law Firm
Ms. Lilit Karapetyan, Concern Dialog Law Firm

14. By email of May 30, 2018, the Claimants updated the list of their representatives pursuant to ICSID Arbitration Rule 18 and requested that Dr. Gevorg Tumanov of ELL Partnership be added as counsel of record.

15. On May 31, 2018, the Secretary of the Tribunal transmitted to the Parties a revised draft Procedural Order No. 1 including an updated list of the Parties' representatives, along with draft timetables for the proceedings.

16. On June 6, 2018, the Parties confirmed their agreement with the timetables annexed to the revised draft Procedural Order No. 1.

17. On June 7, 2018, the Tribunal issued Procedural Order No. 1 providing *inter alia* directions on the subsequent conduct of the arbitration.

18. By letter of June 27, 2018, the Respondent objected to the addition of Dr. Tumanov as counsel of record for the Claimants, alleging that he had worked on the case while in the employment of the Ministry of Justice of the Republic of Armenia. The Respondent further indicated that it had approached the Claimants' representatives to resolve the matter, and that Dr. Tumanov had denied the existence of a conflict of interest. The Respondent requested that the Tribunal take the necessary steps to resolve the matter and reserved the right to request Dr. Tumanov's removal as counsel of record.

19. On July 3, 2018, the Claimants responded to the Respondent's letter of June 27, 2018. The Claimants denied the existence of a conflict of interest and described Dr. Tumanov's previous involvement in the case, *inter alia*, by reference to a letter that had been dispatched to the Respondent on June 13, 2018.

20. On July 12, 2018, the Respondent formally requested that the Tribunal proceed to the removal of Dr. Tumanov as counsel of record and submitted Exhibit R-0001 as well as Legal Authorities RL-0001 and RL-0002 ("**Respondent's Application**").

21. On July 20, 2018, the Claimants submitted the Memorial on Jurisdiction and the Merits, along with the witness statements of Mr. Edmond Khudyan, Mr. Lernik Hovhannisyan, and Mr. Nikolay Baghdasaryan, as well as Exhibits C-0001 through C-0131 and Legal Authorities CL-0001 through CL-0081.

22. On July 27, 2018, the Claimants submitted their response to the Respondent's Application, along with a letter dated July 25, 2018 from Dr. Tumanov to the Tribunal and Legal Authority CL-0082 ("**Claimants' Response**"). The Claimants requested that the Tribunal deny the Respondent's Application.

23. On August 10, 2018, the Respondent responded to the Claimants' Response and submitted Legal Authorities RL-0003 through RL-0008 ("**Respondent's Reply**").

24. On August 17, 2018, the Claimants replied to the Respondent's Reply and submitted a letter dated August 15, 2018 from Dr. Tumanov to the Tribunal ("**Claimants' Rejoinder**").

25. This Decision sets out the Tribunal's decision on the Respondent's Application for the removal of Dr. Tumanov as counsel of record for the Respondent.

III. THE POSITION OF THE PARTIES

A. The Respondent's Position

26. The Respondent requests that the Tribunal order the removal of Dr. Gevorg Tumanov as counsel of record in these proceedings.[1] It is the Respondent's case that "*Dr. Tumanov's present involvement as counsel for Claimants* […] *constitutes a conflict of interest and makes a misuse of the confidential information he obtained while being employed by the Armenian Government highly likely.*"[2]

27. The Respondent submits that Article 44 of the ICSID Convention confers upon the Tribunal the power to rule on its Application, as part of the Tribunal's duty to ensure the fair conduct of the proceedings.[3]

(1) Legal standard

28. As to the standard to be applied, the Respondent accepts that the Tribunal be guided by the principles established by the *ad hoc* Committee in the *Fraport v. Philippines* annulment proceedings ("***Fraport***").[4] In addition, the Respondent submits that the Tribunal may be guided by the common general principles reflected in theRepublic of Armenia Law on Advocacy (the "**Law on Advocacy**"), the Code of Attorney's Ethics (the "**Ethics Code**") and The Hague Principles on

1 Respondent's Application, p. 3; Respondent's Reply, p. 10.
2 Respondent's Application, p. 3.
3 Respondent's Reply, p. 2 with reference to the decision in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of Philippines*, ICSID Case No. ARB/03/25 (Annulment Proceedings), Decision on Application for Disqualification of Counsel, (September 18, 2008 (**CL-0082**), paras. 36-37.
4 Respondent's Reply, p. 2.

Ethical Standards for Counsel Appearing before International Courts and Tribunals, developed by the International Law Society Study Group on the Practice and Procedure of International Tribunals (the "**Hague Principles**").[5] Although the Respondent recognizes that Dr. Tumanov is not registered as an attorney with any bar association and that the Tribunal has no jurisdiction to police compliance with any specific set of deontological or ethical rules, the Respondent submits that the Tribunal should take guidance from those regulations as they reflect "*common general principles*" for conduct of counsel.[6] The Respondent further emphasizes that the Hague Principles "*are the only international principles prescribing an internationally accepted standard on the issue of disqualification of counsel due to conflicts of interest in international courts or tribunals.*"[7]

29. The Respondent argues that under the Armenian Law on Advocacy and Ethics Code, as well as under the Hague Principles, conflicts of interest preclude counsel from representing a new client in proceedings to which a former client is a party, or in proceedings that are closely related.[8] On that basis, the Respondent submits that there is a common general principle that prevents counsel from acting in case of conflicting interests, which principle – it contends – is "*indispensable for the fair conduct of the proceedings.*" It is the Respondent's case that this principle has been violated and that therefore, the removal of Dr. Tumanov as counsel of record is imperative.[9]

30. The Respondent further notes that the standard for the disqualification set out by the *ad hoc* Committee in *Fraport* was based on the existence of a "*real risk*" of disclosure of confidential information obtained by the challenged lawyer during his/her representation of the former client, and points out that the standard of "*material risk*" is similarly reflected in Article 4.2 of the Hague Principles.[10] Accordingly, the Respondent submits that the standard to be applied by the Tribunal when deciding its Application to remove Dr. Tumanov is the following:

> *Whether there is a real risk that the lawyer representing a party against his/her former client could have received confidential information from that client, which may be of significance in the present proceedings, and which may accordingly prejudice the fair conduct of the present proceedings.*[11]

(2) Application of the standard

31. Applying this principle to the case at hand, the Respondent claims that there is a "*real*" or "*material*" risk that Dr. Tumanov had access or was privy to the Respondent's confidential information, which is borne out by the following facts:

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5 **RL-0001**, **RL-0002** and **RL-0008**.
6 Respondent's Reply, pp. 2-3. See also, *Fraport*, paras. 40-41; Claimant's Response, p. 3.
7 Respondent's Reply, pp. 3-4. See also, **RL-0004**, **RL-0008**.
8 Respondent's Reply, p. 4.
9 Respondent's Reply, p. 4, quoting *Fraport*, para. 41.
10 Respondent's Reply, p. 5. See also, *Fraport*, para. 42.
11 Respondent's Reply, p. 5.

a. Dr. Tumanov held the position of Deputy Head of the Department of International Mutual Legal Assistance and Foreign Relations of the Armenian Ministry of Justice throughout 2014 and remained in this position until September 2015;[12]

b. Dr. Tumanov was a high ranking official within the Respondent's Ministry of Justice for at least one year, during which the present dispute was ongoing (from August 2014, when the Ministry of Justice received the Claimants' Notice of Dispute (also referred to as "**Statement of Claim**"), until September 2015);[13]

c. Dr. Tumanov prepared an internal memorandum in July 2015 in which, according to the Respondent, Dr. Tumanov provided "*a detailed overview of the alleged facts of the case, the alleged 'violations' committed by State bodies and officials of Respondent, the purported legal grounds for the treaty claim and a preliminary calculation of alleged damages. Notably, the memorandum also includes a paragraph containing Dr. Tumanov's tentative views on the merits of the case.*"[14] The Respondent did not submit a copy of the memorandum (and neither did the Claimants).

32. The Respondent denies Dr. Tumanov's statement that the memorandum was general in nature and based solely upon the contents of the documents that the Claimants had sent to Armenia and publicly available information. The Respondent insists that Dr. Tumanov, in his capacity of Deputy Head of the Department of International Mutual Legal Assistance and Foreign Relations of the Armenian Ministry of Justice has had access to all privileged information and potentially relevant evidence that may be used by the Respondent in this arbitration. According to the Respondent, "*it is reasonable to assume*" that Dr. Tumanov "*would have further looked into the matter, discussed it with other employees and engaged in fact-finding on Respondent's side.*"[15] It further argues that it is implausible that Dr. Tumanov prepared the memorandum, which included Dr. Tumanov's tentative views on the merits of the case, without being privy to confidential information. As such information "*may be of significance*" in the present proceedings, the Respondent claims that the fair conduct of the proceedings is prejudiced.[16]

33. The Respondent takes the position that it is not required to demonstrate that Dr. Tumanov actually had access to confidential information and refutes Claimants' criticism in this respect. Armenia reiterates that the applicable standard merely requires a "*real*" or "*material*" risk that Dr. Tumanov had access to confidential information, which – it argues – is in line with an attorney's professional obligations, pursuant to which "*even the appearance of any conflict of interest should be actively avoided.*"[17] The Respondent submits that the standard is satisfied in the present case.

34. In addition, the Respondent contends that the Claimants' invocation of the refusal of the *ad hoc* Committee in *Fraport* to rely on a presumption of access to confidential information of the challenged counsel as a basis for his disqualification, is inapposite because the facts of the *Fraport*

12 Respondent's letter to the Tribunal, dated June 27, 2018, p. 2.
13 Respondent's Reply, p. 7.
14 Respondent's Application, p. 2. See also, Respondent's Reply, p. 7.
15 Respondent's Application, p. 2.
16 Respondent's Reply, p. 8.
17 Respondent's Reply, pp. 6 and 8.

must be distinguished from the facts of the present case.[18] The Respondent emphasizes that in *Fraport* the challenged counsel's relationship with the former client did not extend beyond seven days, the challenged counsel represented the allegedly opposite interests in two separate arbitrations, and the challenged counsel did not receive any information other than case documents from the ICC, which were common to both parties. By contrast, in the present case Dr. Tumanov was a high-ranking employee of the Ministry of Justice during one year following the notification of the claim to the State, he prepared an internal memorandum on the case and had internal correspondence with the First Deputy Minister of Justice regarding that memorandum.[19] The Respondent claims that given his position within the Ministry of Justice, Dr. Tumanov's involvement in the case was "*comparable to, if not more onerous than, a lawyer who is actively engaged in the course of the retainer*" because he would have had easier access to confidential information than an external lawyer.[20]

35. Finally, the Respondent refutes the Claimants' criticism to the effect that the Respondent failed to address Dr. Tumanov's representation of the Claimants in this dispute earlier. In that respect, Armenia argues that the present arbitration only started in September 2017 and that Dr. Tumanov's role was only formalized on May 31, 2018, when the ICSID Secretariat was notified in accordance with ICSID Arbitration Rule 18 that Dr. Tumanov should be added to the list of counsel, representing the Claimants.[21] The Respondent argues that prior to the Rule 18 designation it had no avenue to challenge Dr. Tumanov's involvement in the case, as the Tribunal does not have jurisdiction to hear challenges to representatives of the Parties who are not counsel of record.[22]

36. On the basis of the foregoing, the Respondent requests that the Tribunal order the removal of Dr. Tumanov as Claimants' counsel of record in these arbitral proceedings.

B. The Claimants' Position

37. The Claimants do not contest that the Tribunal has the authority to rule on the challenge to Dr. Tumanov and expressly accept to abide by the Tribunal's decision.[23]

(1) Legal standard

38. In respect of the applicable legal standard, the Claimants submit that the Tribunal should be guided by the reasoning of the *ad hoc* Committee in *Fraport*, which is "*the only publicly available decision of an international tribunal ruling on a challenge to counsel based on that counsel's prior representation of the party raising the challenge.*"[24] While the Respondent relies on the *Fraport* decision in conjunction with the Armenian Law on Advocacy and Ethics Code, the Claimants emphasize that the *ad hoc* Committee in *Fraport* found that it was not bound by any particular national code of ethics and therefore did not apply any such deontological rules in its assessment.

18 Respondent's Reply, pp. 6-7.
19 Respondent's Reply, pp. 6-7.
20 Respondent's Reply, pp. 7-8.
21 Respondent's Reply, p. 9.
22 Respondent's Reply, pp. 9-10.
23 Claimants' Response, fn. 4.
24 Claimants' Response, p. 2; Claimants' Rejoinder, p. 1.

Similarly, the Tribunal does not have any authority to assess and sanction the compliance of Dr. Tumanov against any set of deontological rules.

39. In addition, the Claimants agree with the Respondent that the Tribunal may also take guidance from the general principles laid down in the Hague Principles.[25]

40. Essentially, the Claimants accept the Respondent's formulation of the applicable legal standard, which they formulate as:

> *Whether there is a real risk that the lawyer could have received confidential information from its former client, which may be of significance in the present proceedings, and which may accordingly prejudice the fair conduct of the present proceedings.*[26]

41. The Claimants emphasize that this standard must be applied in line with the reasoning of the *ad hoc* Committee in *Fraport*, which refused to rely "*simply on mere appearances since to prevent a party from having access to its chosen counsel cannot depend upon a nebulous foundation, but rather from clear evidence of prejudice*."[27] The Claimants' position in this respect is at odds with that of the Respondent, which claims that "*even the appearance of any conflict of interest should be actively avoided.*"[28]

(2) Application of the standard

42. The Claimants submit that, during his employment at the Ministry of Justice of Armenia, Dr. Tumanov neither had access to confidential information about the case, nor participated in or contributed towards Armenia's defense against the Claimants' claims.[29] The Claimants' position in this respect is substantiated by reference to two letters of Dr. Tumanov to the members of the Tribunal, dated July 25, 2018, and August 15, 2018.

43. In those letters, Dr. Tumanov describes his involvement during his employment at the Ministry of Justice as follows:

a. Up to August 28, 2015, Dr. Tumanov was the Acting Head of the Department of International Mutual Legal Assistance and Foreign Relations of the Ministry of Justice of the Republic of Armenia;[30]

b. In early July 2015, Dr. Tumanov submitted his letter of resignation, as a result of which his service with the Ministry of Justice ended as of August 28, 2015;[31]

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25 Claimants' Rejoinder, pp. 1-2.
26 Claimants' Rejoinder, p. 2. See also, Respondent's Reply, p. 5.
27 Claimants' Rejoinder, p. 3.
28 Respondent's Reply, p. 6.
29 Claimants' Response, pp. 6-7; Claimants' Rejoinder, pp. 5-7.
30 Dr. Tumanov's First Letter to the Tribunal, dated July 25, 2018 ("**Tumanov First Letter**"), p. 2.
31 Dr. Tumanov's Second Letter to the Tribunal, dated August 15, 2018 ("**Tumanov Second Letter**"), p. 1.

c. Until July 17, 2015, neither Dr. Tumanov, nor the Department of International Mutual Legal Assistance and Foreign Relations, had any involvement in addressing the Claimants' claims;[32]

d. On Friday, July 17, 2015, Dr. Tumanov received from the Deputy Minister of Justice a hard copy of the Claimants' Notice of Dispute and the supporting documents that had been filed on August 28, 2014, along with instructions to prepare a memorandum summarizing the Claimants' claims;[33]

e. That same day, Dr. Tumanov instructed his team to prepare the translation into Armenian of the received documents while he drafted the section of the memorandum describing the Washington Convention, ICSID as an institution, the Armenian treaties that contain provisions for arbitration of disputes before ICSID (including the U.S. – Armenia BIT[34]), and ICSID arbitration.[35] The sections of the memorandum summarizing the content of the documents submitted by the Claimants were based on the translations prepared by the Department's staff;[36]

f. On July 18, 2015, Dr. Tumanov submitted the memorandum to the Deputy Minister of Justice, Mr. Mkrtchyan, and to the Director of the Ministry of Justice's Office of Implementation of Legal Projects, Mr. Khachatryan. In response, Mr. Khachatryan asked Dr. Tumanov to include a legal analysis in the memorandum, stating that a surface-level legal analysis would be sufficient;[37]

g. Pursuant to the instructions of Mr. Khachatryan, Dr. Tumanov added a paragraph at the end of the memorandum, containing: 1) a sentence stating that, if the facts alleged by the Claimants were true, the Claimants' claims would likely be satisfied in whole or in part; 2) a reproduction of Article 53 of the ICSID Convention; and 3) a sentence stating that the expenses of an ICSID proceedings may be significant. Dr. Tumanov did not support these statements with any further analysis;[38]

h. On July 22, 2015, at the request of Mr. Khachatryan, Dr. Tumanov instructed his staff to remove typographical errors in the memorandum;[39]

i. Between July 22, 2015, and his departure from the Ministry of Justice on August 28, 2015,[40] Dr. Tumanov did not perform any further work on the memorandum;[41]

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32 Tumanov Second Letter, p. 1.
33 Tumanov Second Letter, p. 2; Tumanov First Letter, p. 1.
34 Tumanov First Letter, p. 1.
35 Tumanov First Letter, p. 1; Tumanov Second Letter, p. 2.
36 Tumanov First Letter, p. 1.
37 Tumanov Second Letter, p. 2.
38 Tumanov Second Letter, p. 2; Tumanov First Letter, p. 2.
39 Tumanov Second Letter, p. 2.
40 Tumanov First Letter, p. 2.
41 Tumanov Second Letter, p. 3.

j. Dr. Tumanov insists that throughout his service with the Armenian Ministry of Justice, he never had access to any privileged information concerning the present case[42] and that the only documents he had access to when preparing the memorandum were documents emanating from the Claimants, as well as information available online.[43] He further claims that he never discussed the case with anyone in the Ministry of Justice, save to the extent described in his letters to the Tribunal.[44]

k. Lastly, Dr. Tumanov points out that he started representing Mr. Khudyan as of November 2015, and that the officials at the Ministry of Justice became aware of his representation at the latest in March 2017, when Dr. Tumanov met with the Ministry to explore a possible settlement of the dispute between Mr. Khudyan and Armenia.[45] According to Dr. Tumanov, the Ministry of Justice never called his representation of Mr. Khudyan into question until after he was added to the list of the Claimants' representatives in this arbitration.[46]

44. The Claimants contend that the extent of Dr. Tumanov's involvement is very similar to that of the counsel challenged in the *Fraport* case and claim that, like counsel for the Philippines, Dr. Tumanov had neither received nor had access to any confidential information.[47] The Claimants point out that the Respondent failed to identify any confidential information to which Dr. Tumanov would have had access at the Ministry of Justice or any specific opportunities during which Dr. Tumanov can reasonably have been presumed to have had access to such information.[48]

45. More specifically, the Claimants allege that the Respondent's Application is based on mere speculation as it effectively asks the Tribunal to presume that Dr. Tumanov had access to confidential information during the work he performed prior to his departure for private practice.[49] According to the Claimants, this is precisely the type of presumption that the *ad hoc* Committee in *Fraport* refused to engage in.[50] The Claimants insist that the Tribunal cannot remove Dr. Tumanov without any factual foundation on the presumption that he did have access to confidential information potentially prejudicing the fair conduct of this arbitration.[51] In this context, the Claimants submit that, just as the *ad hoc* Committee in *Fraport* gave weight to the testimony of the counsel whose disqualification was sought, this Tribunal should give weight to Dr. Tumanov's account of the work undertaken and his representation that he never had access to confidential information concerning the present dispute.[52]

46. The Claimants conclude that they demonstrated that, during his employment by the Ministry of Justice, Dr. Tumanov never had access to confidential information concerning this case and that

42 Tumanov First Letter, pp. 1-2; Tumanov Second Letter, p. 4.
43 Tumanov First Letter, p. 2; Tumanov Second Letter, p. 4.
44 Tumanov First Letter, p. 2.
45 Tumanov First Letter, p. 2.
46 Tumanov First Letter, p. 3; Tumanov Second Letter, p. 3.
47 Claimants' Rejoinder, pp. 5-6.
48 Claimants' Response, p. 5.
49 Claimants' Response, pp. 5-6.
50 Claimants' Response, p. 6.
51 Claimants' Response, p. 6.
52 Claimants' Response, p. 6.

his involvement in the case was very limited.[53] In the absence of access to confidential information – the Claimants argue – there also is no risk of misuse, which is corroborated by the fact that prior to June 2018 the Respondent never challenged Dr. Tumanov's representation of the Claimants, despite its awareness thereof since March 2017 at the latest.[54] The Claimants refute the Respondent's allegation to the effect that it had no avenue to challenge Dr. Tumanov until he was formally designated as counsel of record in this arbitration. The Claimants submit that, had the Respondent genuinely believed that there was a real risk of misuse of confidential information, "*it is difficult to imagine that Armenian law has no mechanisms*" by means of which such misuse could have been prevented or redressed.[55]

47. On a balance of interests, the Claimants conclude that "*Mr. Khudyan's fundamental right to counsel of his choice should prevail over an alleged concern that Respondent chose not to raise* [earlier] *and which it now fails to demonstrate poses a 'real risk' of prejudice to these proceedings.*"[56] They state that it would be severely prejudicial to deprive Mr. Khudyan of his Armenian counsel, who has been working on the case for almost three years now, and that there are no facts on the record that show that there is any risk of prejudice to the fairness of the proceedings that could justify the removal of Claimants' counsel of choice.[57] Accordingly, the Claimants request that the Tribunal dismiss the Respondent's Application.

IV. THE TRIBUNAL'S ANALYSIS

48. The Tribunal hereby sets out its analysis of the disputed issues.

A. Introduction

49. As a preliminary matter, the Tribunal notes that the Parties agree that the Tribunal has the authority to rule on the Respondent's request that Dr. Tumanov be removed as counsel of record.[58] It is common ground that the Tribunal's power to deal with the current Application is encompassed within its general power to regulate the conduct of the proceedings, enshrined in Article 44 of the ICSID Convention:

> *Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. <u>If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.</u>*[59]

50. The Tribunal accepts that it has the authority to rule on the Respondent's Application. The power conferred upon the Tribunal by Article 44 is to be exercised in appropriate circumstances, which

53 Claimants' Rejoinder, p. 7.
54 Claimants' Response, pp. 4-5; Claimants' Rejoinder, p. 6.
55 Claimants' Rejoinder, p. 6.
56 Claimants' Rejoinder, p. 6.
57 Claimants' Rejoinder, p. 7.
58 Claimants' Response, fn. 4; Respondent's Reply, p. 2.
59 Emphasis added.

includes cases – like the present one – where there is a risk of a violation of a fundamental rule of procedure, the fairness of the proceedings and the equality of the parties. Judicial propriety calls for the Tribunal to safeguard the integrity of the arbitral process and the equality of the Parties in this arbitration.

B. Legal Standard

51. The Tribunal does not have the authority to police and sanction compliance with any particular national law or professional ethics code that may or may not be applicable to Dr. Tumanov.[60] Accordingly, the Tribunal will focus its assessment on the general principles that are indispensable for the fair conduct of the proceedings. In establishing which are the relevant general principles, the Tribunal will take guidance from the principles established by the *ad hoc* Committee in *Fraport* and those laid down in the Hague Principles, although it does not consider itself bound by them.

(1) The Hague Principles

52. The Hague Principles strive to identify clear and transparent principles of general application with the objective of maintaining "*the highest standards of professional conduct for counsel in proceedings before international courts and tribunals with a view to ensuring integrity, justice and fairness of the international judicial process.*"[61] The Hague Principles expressly recognize that not all persons representing parties in proceedings before international arbitral tribunals[62] are admitted to a bar association or other regulated profession.[63]

53. One of the core principles identified in the Hague Principles is that counsel appearing before "*an international arbitral tribunal in a proceeding in which one or more of the parties is a state*"[64] has the duty to ensure compliance with the principle of confidentiality:[65]

> *Counsel shall respect the confidential character of <u>any information imparted to him or her</u> in confidence in the litigation.*

54. Building on the principle of confidentiality, the Hague Principles also address the issue of conflicts of interest, in the following terms:[66]

> *Counsel may not represent a new client in proceedings <u>where a former client is party to the same or closely related proceedings</u> and <u>there exists a material risk</u>*

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60 See *Fraport*, paras. 41 and 52.

61 **RL-0008**, Preamble, p. 1.

62 **RL-0008**, Article 1.2 (Scope): "'*International court or tribunal' refers to a court or tribunal created under and governed by international law, including criminal and non-criminal courts, whether standing or* ad hoc*, and, as appropriate, to an international arbitral tribunal in a proceeding in which one or more of the parties is a state*."

63 **RL-0008**, Article 1.1 (Scope): "*The Principles apply to any person discharging the functions of counsel by representing, appearing on behalf of, or providing legal advice to a party in proceedings before an international court or tribunal, however such person may be described, and whether or not the person has professional legal training or is admitted as a member of a bar association or other professional body*."

64 **RL-0008**, Article 1.2 (Scope).

65 **RL-0008**, Article 2.4 (General Principles) (emphasis added).

66 **RL-0008**, Article 4.2 (Conflicts of Interest).

> *of breach of confidentiality, except with the express authorisation of the former client.*

55. According to the Hague Principles, there is a conflict of interest if (i) counsel previously represented a party to the same or closely related proceedings; and (ii) there is a material risk that confidential information that his or her prior client shared with him or her may be passed on to the new client. Hence, the mere fact that counsel previously represented another party to the same or closely related proceedings is not sufficient. In order to disqualify counsel on grounds of conflict of interest there must be a showing of material risk that confidential information was imparted on counsel by the first client, which may be passed on to the new client.

(2) Principles established by the Fraport *Committee*

56. The *ad hoc* Committee in *Fraport* formulated the relevant standard as follows:[67]

> [w]*here the allegation relates to the representation of a former client, the issue for the Committee is whether there is a real risk that the lawyer could have received confidential information from that client, which may be of significance in the subsequent proceedings, and which may accordingly prejudice the fair trial of the second proceedings.*

57. The *Fraport ad hoc* Committee considered that the fact that counsel previously represented another party to the same or closely related proceedings, by itself, is not enough. In order for there to be a potential of prejudice to the fairness of the subsequent proceedings, there must be a real risk of receipt in the first set of proceedings of confidential information which may be of significance in the subsequent proceedings.

58. In light of the importance of each party's right to be represented by the counsel of its choice, the *Fraport* Committee also held that the receipt of confidential information may not be presumed lightly. It insisted that clear evidence is required, as a party cannot be prevented from access to its chosen counsel on the basis of mere appearances:[68]

> *The Committee cannot act in this regard simply on mere appearances since to prevent a party from having access to its chosen counsel cannot depend upon a nebulous foundation, but rather must flow from clear evidence of prejudice.*

C. Analysis

59. As a preliminary matter, the Tribunal notes that the Respondent's concern about Dr. Tumanov's representation of the Claimants following his resignation from the Respondent's Ministry of Justice is understandable. Whilst his appearance may seem disconcerting, it does not, however, *per se* constitute a conflict of interest preventing him from representing the Claimants. In order to disqualify Dr. Tumanov, it must be demonstrated that there is a real risk that he obtained confidential information that may be of significance to the dispute before the Tribunal.

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67 *Fraport*, para. 42.
68 *Fraport*, paras. 47 and 55 (emphasis added).

60. In view of the undisputed fact that Dr. Tumanov was employed by the Ministry of Justice of the Respondent when the Ministry received the Claimants' Notice of Dispute and worked on a memorandum about the Claimants' claims during his employment, the Tribunal has formulated the question to be addressed as follows:

> Is there clear evidence of a material risk that Dr. Tumanov received confidential information from the Respondent about the dispute with the Claimants that could be of significance in the present proceedings such that there would be prejudice to the fair disposition of the dispute in this arbitration if the Claimants were allowed to continue being represented by Dr. Tumanov?

61. In *Fraport*, the *ad hoc* Committee refused to disqualify the challenged counsel merely on the basis of his prior retainer, but rather focused on actual work performed as part of the retainer and on whether one would assume that the work actually performed would in the ordinary course entail access to confidential information.[69] The Tribunal agrees with the *Fraport* Committee that it cannot act on the basis of a presumption that a prior retainer gives rise to a material risk that confidential information was imparted by the Respondent to Dr. Tumanov. As the mere appearance of a conflict of interest does not suffice to disqualify Dr. Tumanov, clear evidence is required of the existence of a material risk that the Respondent imparted to Dr. Tumanov confidential information, which may be of significance in these proceedings and accordingly may prejudice the fair disposition of the dispute in this arbitration.

62. The Tribunal further notes that Dr. Tumanov is not an attorney, admitted to a bar. The Tribunal presumes that Dr. Tumanov's prior professional relationship with the Ministry of Justice of the Republic of Armenia was based on terms of service, presumably recorded in an employment contract. As the terms of service are not part of the record of this arbitration, the Tribunal is unable to ascertain whether Dr. Tumanov was bound by any duty of confidentiality, and if so, whether such duty extended beyond the termination of his service.

63. The Tribunal notes at the outset that the facts adduced in respect of Dr. Tumanov's involvement during his service with the Ministry of Justice are limited to the factual allegations set forth in the Respondent's Application, the Claimants' Response, the Respondent's Reply and the Claimants' Rejoinder. Importantly, only the Claimants have attempted to substantiate their factual allegations, by reference to two letters from Dr. Tumanov to the Tribunal.

64. Considering that clear evidence is required to prevent the Claimants from being represented by their counsel of choice, the Tribunal considers that it was for the Respondent to substantiate its Application by reference to information on the basis of which the veracity of Dr. Tumanov's statements could reasonably be called into question. As the Respondent did not seek to demonstrate that Dr. Tumanov's account is factually incorrect – be it by means of email communications or other written records, a statement from Mr. Mkrtchyan, Mr. Khachatryan, staff members of the Department of International Mutual Legal Assistance and Foreign Relations or any other civil servant within the Ministry of Justice of Armenia, with whom Dr. Tumanov would have had exchanges, or otherwise – the Tribunal has no evidence before it that could lead it to doubt the veracity of Dr. Tumanov's description of his involvement in the matter during his service at the Ministry of Justice. Although the Respondent is correct to state that it is not required to prove the actual receipt of confidential information, the difficulty is that the Respondent did not adduce *any*

[69] *Fraport*, para. 53.

facts on the basis of which the credibility of Dr. Tumanov's factual account could be called into question. Considering that Dr. Tumanov's account appears credible and coherent, and the Respondent failed to adduce any evidence that challenges or contradicts that account, the Tribunal will give Dr. Tumanov's explanation the appropriate weight.

65. In light of the foregoing, the Tribunal has identified the following facts as relevant:

a. Dr. Tumanov served as Deputy Head of the Department of International Mutual Legal Assistance and Foreign Relations of the Ministry of Justice of Armenia in the period between August 28, 2014, when the Respondent received the Claimants' "Statement of Claim" with supporting documentation, until the end of his service on August 28, 2015;[70]

b. Dr. Tumanov handed in his resignation letter in early July 2015;[71]

c. The Department of International Mutual Legal Assistance and Foreign Relations of the Ministry of Justice of Armenia had no involvement in this matter until the Deputy Minister of Justice, Mr. Arsen Mkrtchyan, forwarded Claimants' Notice of Dispute dated August 28, 2014 to Dr. Tumanov on July 17, 2015, and instructed him "*to write a memorandum summarizing Claimants' claims*;"[72]

d. On July 17, 2015, Dr. Tumanov "*wrote the sections of the draft memorandum that describe the Washington Convention, ICSID as an Institution, Armenian treaties that contain provisions for arbitration of disputes before ICSID, and Arbitration under the ICSID Rules.*" The remainder of the memorandum, summarizing the claims as described in the Claimants' Notice of Dispute of August 28, 2014, was drafted by members of Dr. Tumanov's staff and supervised by Dr. Tumanov;[73]

e. On July 18, 2015, Dr. Tumanov sent the draft memorandum to the First Deputy Minister, who instructed him that same day to add a legal analysis to the memorandum. Subsequently, Dr. Tumanov sent an updated version of the memorandum on July 20, 2015, that "*was identical to the previous version*" but for:

> *1) a sentence stating that, if the facts alleged by the Claimants were true, Claimants' claims would likely be satisfied in whole or in part; 2) a reproduction of Article 53 of the ICSID Convention; 3) a sentence stating that the expenses of an ICSID proceeding could be considerable.*[74]

f. On that same day, July 20, 2015, Dr. Tumanov received an email from the First Deputy Minister "*criticiz*[ing] *the memorandum's lack of legal analysis and the conclusory nature of that final paragraph*," which he did not follow-up on. The only further work undertaken

70 Tumanov First Letter, pp. 1-2.
71 Tumanov Second Letter, p. 1.
72 Tumanov Second Letter, pp. 1-2.
73 Tumanov First Letter, p. 1; Tumanov Second Letter, p. 2.
74 Tumanov Second Letter, p. 2.

by the Department of International Mutual Legal Assistance and Foreign Relations was the correction of correct typographical errors in the memorandum on July 22, 2015.[75]

66. There are two key differences between the Claimants' pleaded case and that of the Respondent. First, the Claimants allege[76] and the Respondent denies[77] that the memorandum was general in nature and did not contain any legal analysis or advice concerning the Respondent's potential response or defense to the Claimants' claims. Second, the Respondent alleges[78] and the Claimants deny[79] that Dr. Tumanov had access to confidential information and evidence about the dispute during his employment at the Ministry of Justice.

67. First, as to the question whether the memorandum did or did not include legal analysis or advice, given that the memorandum was not produced by either Party, the Tribunal only has the benefit of Dr. Tumanov's explanation who insists on the general nature of the memorandum. He declared in this respect that "*Deputy Minister Mkrtchyan sent an email in which he criticized the memorandum's lack of legal analysis and the conclusory nature of that final paragraph*"[80] and that the memorandum "*did not offer strategic advice about how to respond to those allegations or how to defend against any eventual claim that might be brought in future.*"[81]

68. While it would have been straightforward for the Respondent to deny or to rebut the allegation that Deputy Minister Mkrtchyan criticized the memorandum's lack of legal analysis without divulging any confidential information, it did not. Nor did the Respondent produce any testimony or other evidence that Dr. Tumanov was asked to provide legal advice and, to that end, was provided with confidential information.

69. On the basis of the limited factual information on record, the Tribunal finds that the one paragraph that was reportedly added by Dr. Tumanov following Deputy Minister Mkrtchyan's criticism is so generic in nature that it is equivalent to having expressed no view at all. In the absence of any evidence that the memorandum in its original version of July 18, 2015, or in the iterations of July 20 and 22, 2015, provided some form of legal advice or analysis, the Tribunal will proceed on the assumption that the memorandum did not contain any legal advice or analysis.

70. Second, turning to the assessment as to whether at any time during his employment by the Ministry of Justice, Dr. Tumanov was privy to or had access to confidential information, the Tribunal notes that Dr. Tumanov categorically denies that he ever had access to any confidential information about the present dispute. Dr. Tumanov states that his involvement in the case was confined to an isolated six-day period towards the end of his employment and that the memorandum produced under his supervision was general in nature. It merely summarized the Claimants' claims on the basis of the documents provided to the Respondent by the Claimants and described how BIT claims can be instituted in investment treaty arbitrations under the ICSID Convention and ICSID Arbitration

75 Tumanov Second Letter, p. 2.
76 Claimants' Rejoinder, p. 5.
77 Respondent's Reply, pp. 7-8.
78 Respondent's Reply, pp. 5-8.
79 Claimants' Rejoinder, pp. 5-7.
80 Tumanov Second Letter, p. 2.
81 Tumanov First Letter, p. 2.

Rules. More specifically, Dr. Tumanov denies having been aware of the dispute prior to July 17, 2015 and having seen any documents in connection with this dispute during his employment at the Ministry of Justice, apart from the Claimants' letter of August 28, 2014, the accompanying "*Statement of Claim*," "*various letters written by Mr. Khudyan to Armenian officials*" and information available online.[82]

71. The Respondent's Application is based on the presumption that, in his capacity as Deputy Head of the Department of International Mutual Legal Assistance and Foreign Relations of the Armenian Ministry of Justice, Dr. Tumanov would have had access to all privileged information and potentially relevant evidence that may be used by the Respondent in this arbitration and that "*it is reasonable to assume*" that Dr. Tumanov "*would have further looked into the matter, discussed it with other employees and engaged in fact-finding on Respondent's side.*"[83]

72. The Tribunal is not convinced by the Respondent's unsubstantiated presumption. The Respondent did not adduce any factual elements that challenge or contradict Dr. Tumanov's account of events. Again, without divulging any confidential information, the Respondent could, for instance, have provided the Tribunal with factual information concerning the type of systems and/or files Dr. Tumanov had access to, whether those systems and/or files contained information relating to this dispute, and the clearance level of a civil servant of Dr. Tumanov's ranking or seniority. Nor did the Respondent provide any information about the officers and departments within the Ministry of Justice that are responsible for this file and the involvement in the matter of Dr. Tumanov or his department. In that context, it is striking that the Respondent omitted even to identify any other officers or departments within the Ministry with whom Dr. Tumanov would have had exchanges on the matter or any occasion during which he would have exchanged confidences with his colleagues.

73. To be clear, Dr. Tumanov's explanation, including his description of internal correspondence about the case, in and of itself arguably constitutes information that would be considered confidential under the ethical rules regulating the legal profession in some jurisdictions. However, this information is not of such a nature that it might be of significance in this arbitration or can be misused to the detriment of the Respondent. As such, the information imparted by Dr. Tumanov is not of such a nature that it might prejudice the fairness of these arbitral proceedings, and accordingly the powers of the Tribunal under Article 44 of the ICSID Convention need not be exercised.

74. As there are no factual elements on the basis of which Dr. Tumanov's statements in this respect can be called into question, the Tribunal – like the *ad hoc* Committee in *Fraport*[84] – accepts Dr. Tumanov's factual representations as accurate and concludes that, beyond documents common to both Parties and information available online,[85] Dr. Tumanov had no access to confidential information concerning the present dispute that could be of significance in these proceedings.

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82 Tumanov Second Letter, p. 4.
83 Respondent's Application, p. 2.
84 *Fraport*, paras. 47-52.
85 Tumanov First Letter, p. 2: "*The only documents to which I had access when that memorandum was prepared were documents from the Claimants. These included: (i) the letter from Dentons dated 28 August 2014; (ii)*

75. The Tribunal is comforted in this conclusion by the fact that, during the three-year period that Dr. Tumanov has been representing the Claimants, the Respondent has not taken any action aimed at preventing Dr. Tumanov from representing the Claimants or at enforcing the duty of confidentiality that he may have been subject to under the terms of his service or employment. The Tribunal accepts the Claimants' argument to the effect that prior to Dr. Tumanov's appearance as counsel of record, there must have been legal avenues available to the Respondent within its domestic legal system, aimed at protecting the confidentiality of information provided to Dr. Tumanov and/or preventing him from representing the Claimants. Had the Respondent considered that there was any real risk that confidential information would pass to the Claimants to the detriment of the Respondent, the Respondent could have taken action to protect its interest, at the latest following the meeting with the Ministry of Justice in March 2017 that Dr. Tumanov attended on the Claimants' behalf. The lack of any action whatsoever, under Dr. Tumanov's terms of service or otherwise, be it by email, formal correspondence or legal action, is consistent with the fact that there was no material risk that Dr. Tumanov would divulge confidential information that may aid the Claimants with their claims and be detrimental to the Respondent in these proceedings.

76. Considering that the Respondent has not adduced evidence, let alone clear evidence, of facts demonstrating the likelihood of passing of confidential information of significance - whether by reference to the Claimants' communications and statements over the past three years or the Memorial they filed in this arbitration - it is unlikely that the perceived risk will materialize thereafter. Furthermore, assuming for the sake of argument that Dr. Tumanov was privy to or had access to confidential information that may aid the Claimants with their claims to the detriment of the Respondent, that information would already have passed to the Claimants many years ago. The Respondent's own inaction over the years prior to Dr. Tumanov's designation as counsel of record for the Claimants in this arbitration renders the Claimants' application for the removal of Dr. Tumanov futile.

77. On the basis of the foregoing, the Tribunal concludes that there is no evidence that Dr. Tumanov had access, or was privy, to confidential information that would be of significance in these proceedings and thus threaten the fair disposition of the dispute in this arbitration. The Tribunal accordingly rejects the Respondent's Application for the Removal of Dr. Tumanov.

the document captioned 'Statement of Claim' enclosed with that letter; and (iii) various letters written by Mr. Khudyan to officials within the Armenian government describing his ordeal and other information that was available online."

V. DECISION

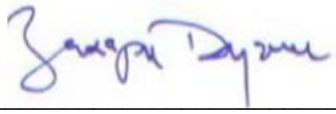
78. For the above reasons, the Tribunal decides and directs as follows:

(i) REJECTS the Respondent's Application for the Removal of Dr. Tumanov; and

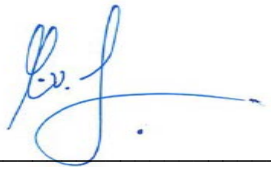
(ii) RESERVES the issue of costs for a later stage of these proceedings.

Date: December 5, 2018

Ms. Ank Santens
Arbitrator



Professor Zachary Douglas QC
Arbitrator



Ms. Melanie van Leeuwen
President of the Tribunal