

**International Centre for Settlement of Investment Disputes  
Washington, D.C.**

**In the proceedings between**

**Hrvatska Elektroprivreda, d.d.  
(Claimant)**

**v.**

**The Republic of Slovenia  
(Respondent)**

**(ICSID Case No. ARB/05/24)**

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**Tribunal's Ruling**

regarding the participation of David Mildon QC in further stages of the proceedings

6 May 2008

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**BACKGROUND**

1. The Request for Arbitration was filed on 4 November 2005 by the Claimant which is the national power company of the Republic of Croatia. The Tribunal was constituted on 20 April 2006.
2. The First Session of the Tribunal was held in London on 3 July 2006. Hunton & Williams and Allen & Overy have represented the Claimant and Respondent respectively from the outset. Allen & Overy presented on behalf of the Respondent an extensive Counter-Memorial on 6 July 2007 and a Rejoinder on 7 April 2008.

3. On 25 April 2008, Allen & Overy sent to the Secretary of the Tribunal the Respondent's list of persons who would be attending the two-week substantive hearing in Paris scheduled to begin on 5 May. The list included Mr. David Mildon QC of Essex Court Chambers London. The Tribunal's President is a door tenant at the same Chambers.
4. On 28 April 2008 Hunton & Williams for the Claimant wrote to the Tribunal as follows:

“The Claimant and its counsel learned for the first time upon receipt of Allen & Overy's letter dated April 25, 2008, that the Respondent apparently plans for Mr. David Mildon, Q.C. of Essex Court Chambers to play a role in presentation of the Respondent's defense at the May 5-16 2008 hearing in Paris.

The Claimant is deeply concerned about the Respondent's 'eleventh hour' disclosure of Mr. Mildon's proposed participation at the hearing.

Having in mind the 'IBA Guidelines on Conflicts of Interest in International Arbitration', and especially General Standard 2(b) and paragraph 3.3.2 of the 'Orange List', the Claimant requests full disclosure, as soon as possible, by Messrs. Williams and Mildon of the following:

- (1) All details of their professional and personal relationship; and
- (2) Any other facts or information relating to the relationship between Messrs. Williams and Mildon that could give a reasonable third person justifiable doubts as to Mr. Williams' impartiality or independence if Mr. Mildon serves as counsel for the Respondent.

The Claimant also requests disclosure from Respondent, as soon as possible, of the following:

- (1) A detailed explanation of the role that the Respondent expects Mr. Mildon to play at the hearing; and
- (2) How long the Respondent has been planning for Mr. Mildon to participate in the presentation of the Respondent's defense at the hearing beginning in one week, including the precise date upon which Slovenia decided to use Mr. Mildon as part of its arbitration team, and the precise date upon which Mr. Mildon agreed to become part of Slovenia's arbitration team.

The Claimant seeks the above-described disclosure so that it may determine its course of action with respect to the proposed participation of Mr. Mildon at the hearing next week.

The Claimant regrets any burden which the Respondent's 'eleventh hour' disclosure of Mr. Mildon's proposed participation in this case places upon the Tribunal or the ICSID Secretariat.”

5. On 29 April 2008, the President replied to Hunton & Williams noting that he had been unaware of Mr. Mildon's retainer until he received their letter of 28 April 2008. He said he had never had any personal relationship with Mr Mildon QC and that his professional relationship with Mr Mildon QC arose solely because of his door tenancy at Essex Court Chambers. He also explained the nature of his position as a door tenant at Essex Court Chambers and indicated that he had sat as an arbitrator in numerous international arbitrations where one of the parties had been represented by counsel from Essex Court Chambers. He stated that he had never perceived any difficulty in acting objectively and impartially in those circumstances and that he considered the position to be no different on this occasion.
  
6. On 29 April 2008, Allen & Overy replied, stating that neither they nor Mr. Mildon QC were obliged to respond to the request for disclosure but indicating that Mr. Mildon had willingly offered the following clarification:

- “1. Mr Mildon has no professional or personal relationship with Mr Williams.
2. Mr Mildon has never had any professional or personal relationship with Mr Williams.
3. Mr Mildon has never appeared as advocate in a case in which Mr Williams was involved whether as advocate or arbitrator.
4. Mr Williams has never appeared as advocate in a case in which Mr Mildon was involved as arbitrator.
5. The only connection between Mr Williams and Mr Mildon is that Mr Williams conducts his London arbitration practice from the same address at which Mr Mildon is one of the self-employed barrister tenants.
6. Mr Mildon has never spoken to Mr Williams about the present reference.
7. Mr Mildon cannot recall when he last spoke to Mr Williams but he thinks it probable that he has not spoken to him since some time last year.
8. There are no facts or information known to Mr Mildon that could give a reasonable third person justifiable doubts as to Mr Williams impartiality or independence”.

Allen & Overy refused to disclose when Mr. Mildon had been retained and what role he was expected to play at the hearing.

7. On 30 April 2008 Hunton & Williams acknowledged with appreciation the President's response and acknowledged to Allen & Overy receipt of their letter of 29 April. Their letter continued:

"The Claimant remains deeply concerned about both the 'eleventh hour' disclosure that a member of Slovenia's legal team and the President of the Tribunal are both members of Essex Court Chambers, as well as your complete refusal to answer our legitimate question of when Mr. David Mildon, Q.C. was first engaged by the Respondent.

For the Claimant who, like many throughout the world, is entirely unfamiliar with the English legal system, the fact that the President of the Tribunal, who will preside over an important hearing scheduled to start in less than a week, and counsel for the Respondent are members of the same 'Chambers', is a matter of great concern and a circumstance which could cast an unwanted 'cloud over these proceedings'. HEP's concerns are understandable, especially in this commercial age in which Barristers' Chambers publish promotional material lauding the capabilities of its members collectively. Without meaning any disrespect to Mr. Williams, had HEP known at the outset that the lawyer proposed to be President of the Tribunal and one of Slovenia's lawyers were members of the same Chambers, the Claimant would not have consented to that lawyer's appointment as President.

The IBA Guidelines require prompt disclosure by arbitrators and parties (*see* General Standards 3 and 7). Thus, for example, Standard 7 requires a party to inform other parties about potentially problematic circumstances 'as soon as it becomes aware of such relationship'. The 'Background Information' on the IBA Guidelines similarly states that barristers affiliated with the same Chambers 'should make full disclosure as soon as they become aware of the involvement of another member of those chambers in the same arbitration, whether as arbitrator, counsel, or in any other capacity.'

These prompt disclosure requirements are designed to avoid having parties put in the invidious position in which Slovenia has now placed HEP immediately before the hearing. Let us be clear on this. HEP is entirely innocent in this situation. This dilemma has been created by Slovenia (and its legal team) alone.

In order to decide its course of action with respect to this matter (including the issue of Mr. Mildon's representation of Slovenia in this arbitration), HEP requires prompt, precise and candid answers to the following questions:

1. How long has Slovenia intended to use Mr. Mildon's services as counsel in this case?
2. When did Slovenia first ask Mr. Mildon to represent it in this case?
3. When did Mr. Mildon first agree to represent Slovenia in this case?

If you elect, once again, to refuse to answer these questions, we will need to schedule a telephone conference with the Tribunal on May 1 or May 2."

8. Allen & Overy responded on 1 May 2008 and stated:

“Thank you for your letter dated 30 April 2008 regarding David Mildon.

You refer to Standards 3 and 7 of the IBA Guidelines. Standard 3 relates to disclosure by an arbitrator. Standard 7 covers disclosure by a party. David Mildon is not a party to those proceedings.

Nonetheless, you have now received full details about the relationship (or, to be more accurate, the lack of a relationship) between Mr Mildon and Mr Williams. Further, Mr Mildon has confirmed that:

*‘There are no facts or information known to [him] that could give a reasonable third person justifiable doubt as to Mr Williams’ partiality or independence.’*

It is by no means unusual in international arbitrations for a barrister to appear as an advocate before an arbitrator who is from the same chambers. That often happens when both advocate and arbitrator are full members of the same chambers, which is not the case here.

We see little point in continuing with this correspondence or having a telephone conference with the Tribunal as it is abundantly clear that there is no justifiable cause for concern on the part of the Claimant. We do not propose therefore to answer the questions set out at the end of your letter; you are not entitled to that information which is, in any event, irrelevant.”

9. Hunton & Williams were dissatisfied with this response. In a reply of 1 May 2008 they stated:

“We write in response to your letter bearing today’s date.

The Claimant rejects your narrow interpretation of Standard 7 of the IBA Guidelines. Information known to attorneys representing a party concerning facts or circumstances which might give rise to justifiable doubts about conflicts of interest certainly are, and will be, imputed to the client/party for purposes of Standard 7.

There are two possibilities here. First, Mr. Mildon was engaged only a short time ago. That is one situation. The second, and more likely, possibility is that Mr. Mildon was engaged some time ago and Slovenia and its attorneys ignored their obligations to make prompt disclosure, thus placing HEP and all other participants in these proceedings, including the members of the Tribunal and ICSID, in very awkward circumstances. These circumstances could have been avoided had disclosure been promptly made by Slovenia and its lawyers as required by the IBA Guidelines and suggested in the clearest language by the ‘Background Information.’

We urge you in the strongest possible terms to respond to the questions we have posed in our letters dated April 28 and 30, 2008.”

10. Hunton & Williams then wrote to the Tribunal on 2 May 2008 as follows:

“The Tribunal has seen the correspondence between the parties over the past week regarding Respondent’s disclosure, for the first time, on April 25, 2008 that it plans to have Mr. David Mildon, Q.C., a member of Essex Court

Chambers participate in the hearing commencing on Monday, May 5, as a lawyer for the Respondent. Mr. David A.R. Williams Q.C., also a member of Essex Court Chambers, was appointed President of the Tribunal over two years ago.

We understand that the Respondent and its London-based legal team believe that a reasonable third person should have no justifiable concerns about the fact that the President of the Tribunal and a lawyer for the Respondent are both members of Essex Court Chambers or that the announcement of Mr. Mildon's participation was made by the Respondent and its legal team on the eve of the hearing. But the community of participants in ICSID arbitrations is much broader than the English bar, and what may not, apparently, be cause for concern in London may well be viewed very differently by a reasonable third person from Africa, Argentina, or Zagreb, Croatia. The Claimant is concerned that the President, and a member of the Respondent's legal team, are from the same Chambers. Viewed from the Claimant's cultural perspective, such concerns are justified, and, indeed, they are unavoidable.

We wish to be clear. Responsibility for these circumstances rests with the Respondent and its legal team, including Mr. Mildon, alone. They apparently knew of the troublesome circumstances some time ago, yet failed to make prompt disclosure as required by the IBA Guidelines. Had the Respondent met its disclosure obligations in a timely fashion, these circumstances, and the prospect of an unwanted cloud over these proceedings, could have been avoided.

This is to advise the Tribunal that the Claimant intends to raise the matter at the outset of the proceedings, and will ask the Tribunal to recommend to the Respondent that it refrain from using the services of Mr. Mildon at the hearing.”

11. As the hearing was convened Mr. Mildon QC left the room and, upon inquiry by the Tribunal, the Respondent volunteered the following:

“Mr. Mildon was approached in late February [2008]”<sup>1</sup>

“ ... [w]e accept the point now made that it would have been sensible and prudent for us to have made that disclosure at the time.

The matter was considered at that time, and ... it was not considered that there was any conflict or any basis upon which there could be an objection and therefore no disclosure was made.”<sup>2</sup>

“We took the view that it was not relevant.”<sup>3</sup>

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<sup>1</sup> Transcript Day One, 5 May 2008, 5:10-11 (hereafter “T and page”).

<sup>2</sup> T.10:17-24.

<sup>3</sup> T.5:8-9.

## ISSUES

12. Such were the circumstances as the substantive hearings commenced. In summary, the Respondent has sought to announce the augmentation of its legal team at a very late stage by the listing as one of its counsel Mr. David Mildon QC, who is affiliated with the same barristers' Chambers as the President of the Tribunal. The Claimant is deeply troubled by this development and seeks an order from the Tribunal that the Respondent refrain from using the services of Mr. Mildon QC. This raises two central issues: Does the Tribunal have the power to make such an order, and, if so, should it do so in the circumstances of this case?
13. As to the Tribunal's powers to make an order that counsel not appear, counsel for the Claimant referred to ICSID Arbitration Rule 18(1) which obliges a party to notify the Secretary General of the identity of counsel and for the Secretary General to "promptly inform the Tribunal and the other party". Reference was also made to ICSID Arbitration Rule 19 which states that "[the] Tribunal shall make the orders required for the conduct or the proceeding" and to ICSID Arbitration Rule 39 relating to provisional measures "for the preservation [of a party's] rights."<sup>4</sup> Counsel for the Claimant also submitted that there was inherent power in the Tribunal to make orders to deal with the situation.<sup>5</sup>
14. Counsel for the Respondent disputed that any or those Rules provided apposite powers and added that he was "not aware of any inherent jurisdiction or authority in ... a public international law proceeding ... LCIA ... ICC ... WTO, ICJ, ITLOS ... which would enable the Tribunal to grant ... the relief [Claimant] is seeking."<sup>6</sup>
15. The Tribunal's obligation as guardian of the legitimacy of the arbitral process is to make every effort to ensure that the Award is soundly based and not affected by procedural imperfection. If the Tribunal grants the order sought it may later be

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<sup>4</sup> T.21.

<sup>5</sup> T.22.

<sup>6</sup> T.23.

contended by the Respondent that there was a serious departure from a fundamental rule of procedure, i.e. the right to representation (ICSID Arbitration Rule 19) and the right to be given a full opportunity to present a case. On the other hand, if the order were refused the Claimant may later assert unfairness in that the President was not in a position to be relied upon to “judge fairly” as required by ICSID Arbitration Rule 6 or that there existed an impermissible appearance of partiality.

16. During the submissions of the parties the Tribunal stated on several occasions that, in view of the Claimant’s strong objections if Mr. Mildon QC did not withdraw, the only other realistic outcome which would avoid such future problems would be the resignation of the President. Both parties repeatedly affirmed that they did not wish the President to resign. The cost and delay implications of that course were apparent to all. Nevertheless the Respondent strongly pressed its case for Mr. Mildon QC’s continued involvement based on its right to have counsel of its choice.

#### **DISCUSSION**

17. Barristers are sole practitioners. Their Chambers are not law firms. Over the years it has often been accepted that members of the same Chambers, acting as counsel, appear before other fellow members acting as arbitrators. The Essex Court Chambers website puts the position as follows:

“Essex Court Chambers is a leading set of Barristers Chambers specialising in commercial, international and European law. Its members advise and act in a broad range of litigation, arbitration, and dispute resolution worldwide.

Chambers is not a firm, nor are its members partners or employees. Rather, Chambers contains the separate, self-contained offices of individual barristers, each self-employed and working separately. Indeed, (as in all specialist sets) individual Barristers within Chambers are commonly retained by opposing sides in the same dispute, both in litigation and arbitration. As well as acting on opposing sides, individuals regularly appear in front of other members acting as Deputy Judges or Arbitrators. Members of Chambers may be instructed individually or in a team to provide a wide range and level of expertise in both contentious and non-contentious work.”



18. It is, however, equally true that this practice is not universally understood let alone universally agreed, and that Chambers themselves have evolved in the modern market place for professional services with the consequence that they often present themselves with a collective connotation. Essex Court Chambers' elaborate website, obviously serving marketing purposes, contains special sections entitled "about us" and "how we operate" and quotes with apparent approval a Law Directory which states that the Chambers are recognized as "a premier commercial operator..."
19. This evolution has been observed in the Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration.<sup>7</sup> Paragraph 4.5 of that Background Information discusses the question of barristers who practise as arbitrators, and states:
- "While the peculiar nature of the constitution of barristers' chambers is well recognised and generally accepted in England by the legal profession and by the courts, it is acknowledged by the Working Group that, to many who are not familiar with the workings of the English Bar, particularly in light of the content of the promotional material which many chambers now disseminate, there is an understandable perception that barristers' chambers should be treated in the same way as law firms."
20. It is true that many parties would readily accept that a member of such a professional grouping would not be affected by any favouritism when considering submissions made by a fellow member, but by the same token other parties may take a different view.
21. In this case, the Claimant has unambiguously objected to Mr. Mildon QC's participation as counsel following the repeated refusal of the Respondent's counsel to make the disclosures regarding Mr Mildon QC urged by Claimant's counsel. It does not wish that the President step down, and has expressed its confidence in his conduct. The same is true of the Respondent. The Claimant

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<sup>7</sup> Published in (2004) 5 *Business Law International* 433, and available at <http://www.ibanet.org/images/downloads/Background%20Information.pdf>.

understandably considers, however, that Mr. Mildon QC's participation would create an "appearance of impropriety",<sup>8</sup> and thus an unacceptable situation.

22. The ICSID Convention in Article 14 demands that arbitrators "be relied upon to exercise independent judgment." ICSID Arbitration Rule 6 requires them to "judge fairly". The objection in this case is not predicated on any actual lack of independence or impartiality, but on apprehensions of the appearance of impropriety. In the interest of the legitimacy of these proceedings, the arbitrators consider that the Claimant is entitled to make this objection and that it is well founded.
23. The consequences of this conclusion are not straightforward. For an international system like that of ICSID, it seems unacceptable for the solution to reside in the individual national bodies which regulate the work of professional service providers, because that might lead to inconsistent or indeed arbitrary outcomes depending on the attitudes of such bodies, or the content (or lack of relevant content) of their rules. It would moreover be disruptive to interrupt international cases to ascertain the position taken by such bodies.
24. The ICSID Convention and Rules do not, however, explicitly give the power to tribunals to exclude counsel. To the contrary, we readily accept that as a general rule parties may seek such representation as they see fit – and that this is a fundamental principle.
25. Even fundamental principles must, however, give way to overriding exceptions. In this case, the overriding principle is that of the immutability of properly constituted tribunals (Article 56(1) of the ICSID Convention).
26. To be concrete: although the Respondent in this case was free to select its legal team as it saw fit prior to the constitution of the Tribunal, it was not entitled subsequently amend the composition of its legal team in such a fashion as to imperil the Tribunal's status or legitimacy.

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<sup>8</sup> T.55:20.

27. The principle of the immutability of properly constituted tribunals was explicitly considered by the drafters of the Convention. The matter was the subject of considerable discussion. The consensus that emerged crystallized notably in the much discussed provision of Article 56(3) of the Convention to the effect that a party may not appoint a replacement arbitrator if its prior appointee has resigned “without the consent” of the other arbitrators. That provision is a specific consequence of the general rule in Article 56(1) of the Convention that “After a Commission or Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; ...”. As Mr. Aaron Broches explained on 23 February 1965: “If a party could prevail upon an arbitrator to resign in the course of proceedings without cause he would be able to frustrate or slow down the proceedings.”<sup>9</sup>
28. The principle of the immutability of arbitral tribunals was conceived in the International Law Commission’s 1953 “Draft Convention on Arbitral Procedure”.<sup>10</sup> It is true that one of the relevant provisions was ultimately abandoned as unrealistic in the final 1958 text of Model Rules on Arbitral Procedure, on the footing that it is “not in practice possible to prevent an arbitrator from withdrawing or resigning”.<sup>11</sup> The drafters of the ICSID Convention had no difficulty seeing that immutability was not absolute. It may be impossible to overcome the simple incapacity or even personal disinclination of an arbitrator to serve. The drafters nevertheless agreed that the immutability principle should be

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<sup>9</sup> Memorandum of the Meeting of the Committee of the Whole (23 February 1965), Doc. SID/65-6 (February 25, 1965), reprinted in ICSID, *Documents Concerning the Origin and Formulation of the Convention* (1968), Vol. II, 989 at 992, para. 29.

<sup>10</sup> Reprinted in ILC, “Report of the International Law Commission covering the work of its fifth session, 1 June – 14 August 1953”, UN Doc. A/2456, [1953-II] *Yearbook of the International Law Commission* 200 at 201. Article 7(1) read in material part: “Once the proceedings before the tribunal have begun, an arbitrator may withdraw only with the consent of the tribunal.” An earlier draft of 1952, which was circulated for comments to governments, contained an almost identically worded Article 7(1). See UN Doc. A/2163, [1952-II] *Yearbook of the International Law Commission* 57 at 60.

<sup>11</sup> ILC, “Report of the International Law Commission covering the work of its tenth session, 28 April-4 July 1958”, UN Doc. A/3859, [1958-II] *Yearbook of the International Law Commission*, 78 at 87, para. 28. Nevertheless, the final text retains in Article 4(1) the general rule that “Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered”, which was later adopted almost in terms in Article 56(1) of the ICSID Convention.

the norm, since it affects not only arbitrators. As the Special Rapporteur Georges Scelle wrote in his first report to the ILC on international arbitral procedure, as early as 1950,<sup>12</sup> there is a distinction to be made between:

“Events which affect the composition of the tribunal independently of any purposeful action of the parties [and] incidents which may be generated by the litigants.”

29. The present case involves precisely such an initiative undertaken by one of the litigants, which only at an extremely late stage has disclosed the involvement of counsel whose presence is for all practical purposes incompatible with the maintenance of the Tribunal in its present proper composition.
30. The Tribunal is concerned – indeed, compelled – to preserve the integrity of the proceedings and, ultimately, its Award. Undoubtedly, one of the “fundamental rules of procedure” referred to in Article 52(1)(d) of the ICSID Convention is that the proceedings should not be tainted by any justifiable doubt as to the impartiality or independence of any Tribunal member. The Parties agree that the relevant perspective in that inquiry is that of a reasonable independent observer. For reasons set out in the second paragraph of Hunton & Williams’ letter of 2 May 2008<sup>13</sup> and at paragraphs 18-19 above, Mr. Mildon’s QC’s continued participation in the proceedings could indeed lead a reasonable observer to form such a justifiable doubt in the present circumstances.
31. The Tribunal does not believe there is a hard-and-fast rule to the effect that barristers from the same Chambers are always precluded from being involved as, respectively, counsel and arbitrator in the same case. Equally, however, there is no absolute rule to opposite effect. The justifiability of an apprehension of partiality depends on all relevant circumstances. Here, those circumstances include, first, the fact that the London Chambers system is wholly foreign to the Claimant; second, the Respondent’s conscious decision *not* to inform the

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<sup>12</sup> Report of the Special Rapporteur on Arbitral Procedure, UN Doc. A/CN.4/18, [1950-II] *Yearbook of the International Law Commission*, 114 at 126 (translation by the Tribunal).

<sup>13</sup> See paragraph 10 above.

Claimant or the Tribunal of Mr. Mildon's involvement in the case,<sup>14</sup> following his engagement in February of this year, third, the tardiness of the Respondent's announcement of Mr. Mildon's involvement and, finally, the Respondent's subsequent insistent refusal to disclose the scope of Mr. Mildon's involvement, a matter of days before the commencement of the hearing on the merits. The last three matters were errors of judgment on the Respondent's part and have created an atmosphere of apprehension and mistrust which it is important to dispel.

32. The Tribunal's conclusion about the substantial risk of a justifiable apprehension of partiality leads to a stark choice: either the President's resignation (which, as noted, neither Party desires), or directions that Mr. Mildon QC cease to participate in the proceedings. In the light of the cardinal rule of immutability of Tribunals, (Article 56(1) of the Convention), resignation of its President is a course of action that the Tribunal simply cannot endorse in the present circumstances.
33. The Tribunal disagrees with the contention of Respondent that it has no inherent powers in this regard. It considers that as a judicial formation governed by public international law, the Tribunal has an inherent power to take measures to preserve the integrity of its proceedings.<sup>15</sup> In part, that inherent power finds a textual

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<sup>14</sup> See paragraph 11 above.

<sup>15</sup> See Scheurer, *The ICSID Convention: A Commentary* (2001) at 683 where the learned author states:

"An ICSID tribunal's power to close gaps in the rules of procedure is declaratory of the inherent power of any tribunal to resolve procedural questions in the event of *lacunae*. In exercising this power, the tribunal may not go beyond the framework of the Convention, the Arbitration Rules and the parties' procedural agreements but must, first of all, attempt to close any apparent gaps through the established methods of interpretation for treaties and other legal documents. But the tribunal is free of the constraints of procedural law in any national legal system of law, including that of the tribunal's seat (see also paras. 3, 20 supra).

ICSID tribunals have exercised their procedural discretion by formulating general rules for the proceedings before them or by making specific decisions. They have done this earlier in the form of procedural orders or informally. The Arbitration Rules provide in this context:

**Rule 19**

Procedural Orders

The Tribunal shall make the orders required for the conduct of the proceeding."

The doctrine of inherent, i.e. non-statutory, powers has been applied by the International Court of Justice and other international tribunals in a number of different contexts. Notably, inherent powers have been invoked in order summarily to dismiss proceedings lacking even a *prima facie* jurisdictional foundation, suspend proceedings in certain cases of parallel related litigation, and

foothold in Article 44 of the Convention, which authorizes the Tribunal to decide “any question of procedure” not expressly dealt with in the Convention, the ICSID Arbitration Rules or “any rule agreed by the parties”.<sup>16</sup> More broadly, there is an “inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction”; that power “exists independently of any statutory reference”.<sup>17</sup> In the specific circumstances of the present case, it is in the Tribunal’s view both necessary and appropriate to take action under its inherent power.

34. In light of the fundamental rule enshrined in Article 56(1) of the Convention and given its inherent procedural powers confirmed by Article 44, the Arbitral Tribunal hereby decides that the participation of Mr. Mildon QC in this case would be inappropriate and improper. We appreciate that the Respondent was under a misapprehension in this regard and will, by making appropriate procedural adjustments, ensure that the Respondent’s ability to present its case will not be adversely affected by this ruling.
35. The circumstances of this case are clearly distinguishable from those in the ICC case relied upon by Respondent and discussed by Mr. Michael Hwang SC in his article “Arbitrators and Barristers: An Unsuccessful Challenge”.<sup>18</sup> There the

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refuse to hear vexatious claims. See C. Brown, “The Inherent Powers of International Courts and Tribunals”, (2005) 76 B.Y.I.L 195, in particular 231-232 and the references.

<sup>16</sup> Examples of the use of Article 44 include *Aguas Provinciales de Santa Fe S.A v The Argentine Republic* ICSID Case No. ARB/03/17, Order Accepting Amicus Submissions, March 17 2006; *Aguas Argentina S.A Suez and Vivendi Universal S.A v The Argentine Republic*, ICSID Case No ARB/03/19, order allowing withdrawal of one party from an arbitration that is to continue thereafter, April 14 2006; *SGS v Republic of Philippines*, ICSID Case No ARB/02/06, Decision on Objections to Jurisdiction, January 29 2004, paras 173 (*et seq*) (Order to Stay Proceedings).

<sup>17</sup> *Prosecutor v. Beqa Beqaj*, Case No. IT-03-66-T-R77, Judgment on Contempt Allegations (27 May 2005), paras. 10 and 9. *Beqaj* was one of the recent cases on charges of contempt in the International Tribunal for the former Yugoslavia (ICTY). It is established ICTY jurisprudence that the power to punish contempt is part of “an inherent jurisdiction, deriving from [ICTY’s] judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by [its] Statute is not frustrated and that its basic judicial functions are safeguarded”: *Prosecutor v. Duško Tadic*, Case No. IT-94-I-A-R77, Judgment on Allegations of Contempt against Prior Counsel (31 January 2000), para. 13 (citation omitted). The specific power to deal with contempt has since been codified in Rule 77(A)(iv) of ICTY’s Rules of Procedure and Evidence.

<sup>18</sup> (2005) 6 Business Law International 235.

complaining party knew of the common Chambers membership before the hearing started but did not make its unsuccessful challenge until after the hearing was concluded and the Tribunal was working on its Award. There is also a great deal of difference between the present case and those cases to which the President referred in his letter of 30 April 2008, where there was early and timely disclosure of the fact that the President and one of the counsel were from the same Chambers and no objection to the participation of either.

36. It is a matter of significance that the Claimant has explicitly confirmed that Mr. Mildon QC's withdrawal would "eliminate ... the problem entirely" from its standpoint<sup>19</sup>. The position could be different if a party objects, on reasonable grounds, that its opponent's case has been irretrievably infused with decisive strategic contributions from the counsel in question in memorials and other important written submissions embodying that party's position, with the consequence that withdrawal of counsel would not be a complete and satisfactory solution.

## **RULING**

In accordance with the foregoing, and after deliberations, the Tribunal hereby makes the following ruling:

1. Mr. David Mildon QC may not participate further as counsel in this case.
2. The hearing will proceed this afternoon with opening statements on all except quantum matters. It is clear from the written openings that there is an easy division, because each side has a section headed "Quantum" in their pre-hearing submissions. This will be followed by the hearing of evidence from witnesses who speak as to liability issues.<sup>20</sup>

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<sup>19</sup> T.10:1.

<sup>20</sup> When Directed by the Tribunal to disclose the nature and extent of Mr Mildon QC's instructions it was indicated that he was "assisting....principally on matters of quantum..." T.5:10-16.

Date: 6 May 2008

[Signed]  
The Honorable Charles N. Brower  
Arbitrator

[Signed]  
Mr. Jan Paulsson  
Arbitrator

[Signed]  
Mr. David A.R. Williams QC  
President