

**ICSID Arbitral Tribunal, ICSID Case No. ARB/12/12, Vattenfall AB and others v. Federal Republic of Germany, Recommendation on the Proposal to Disqualify the Tribunal, international arbitral tribunal, 4 March 2019.**

Member State

 Germany

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Topic

Independence and impartiality of arbitrators with a special focus on lack of impartiality of the President.

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Deciding Court Original Language

ICSID Arbitral Tribunal

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Deciding Court English translation

ICSID Arbitral Tribunal

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Registration N

ICSID Case No. ARB/12/12

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Date Decision

4 March 2019

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National Follow Up Of (when relevant)

Not applicable

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EU legal sources and CJEU jurisprudence

Not directly mentioning EU law but relevant to it in light of Opinion 1/17 and of the ECJ's case law on the independence and impartiality of judicial organs.

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## ECtHR Jurisprudence

Not applicable

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## Subject Matter

In this high-profile case, the respondent State submitted a request to disqualify the entire tribunal. The most interesting point of the request for the purposes of this training is the attempt to disqualify the presiding arbitrator. The problem here lied with the fact that a partner in the arbitrator's law firm had acted as counsel of the Claimant in another dispute brought against the same respondent State, even though it was a claim of a different nature (commercial as opposed to investment arbitration) and relating to a different subject matter (it was a tax dispute).

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## Legal issue(s)

The case is related to the impartiality (or internal aspect of independence), being essentially a case of a possible conflict of interest on the part of the arbitrators (thus affecting his equidistance from the disputing parties).

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## Request for expedited/PPU procedures

Not applicable

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## Interim Relief

Not applicable

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## National Law Sources

Not applicable

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## Facts of the case

The President had not disclosed this circumstance that his associates were involved in litigation against the same Respondent State in unrelated disputes. The Respondent argued that this demonstrated the existence of a conflict of interest. In particular, the Respondent challenged the

legitimacy of the tribunal's decision to pose questions to the parties to clarify some legal issues, which, according to the Respondent, was a disguised attempt to assist the Claimant in the formulation of its claims. The lack of disclosure on the part of the President was considered to be evidence of bad faith.

On the procedural steps, the following points need to be mentioned:

On 31 May 2012, the Secretary-General of ICSID registered the Claimants' request for the institution of arbitration proceedings. The Tribunal in this arbitration comprises of The Honourable Charles Brower, Professor Vaughan Lowe QC, and Professor Albert Jan van den Berg, as the presiding arbitrator.

On 27 September 2013, the Claimants submitted their Memorial on the Merits.

On 22 August 2014, the Respondent submitted their Counter-Memorial on the Merits, a Memorial on Jurisdiction and a request to address objections to jurisdiction as a preliminary question.

On 7 September 2014, the Tribunal issued Procedural Order No. 8 in respect of the Respondent's request, joining the objections to jurisdiction to the merits of the dispute.

On 10-21 October 2016, the Tribunal held a hearing in respect of the Parties' arguments on jurisdiction, liability and damages.

On 31 August 2018, the Tribunal issued a decision on one of the Respondent's objections to jurisdiction.

On 12 November 2018, the Respondent wrote to the ICSID Secretary-General, requesting the disqualification of the Tribunal.

On 20 November 2018, in accordance with the schedule established by ICSID, the Claimants wrote to the ICSID Secretary-General, opposing the Respondent's Proposal.

On 26 November 2018, the ICSID Secretariat wrote to the Parties, conveying the comments of each member of the Tribunal on the Respondent's Proposal.

On 11 December 2018, the Parties wrote simultaneously to the ICSID Secretary-General. In these communications, the Respondent maintained its Proposal, and the Claimants endorsed the comments provided by the members of the Tribunal.

On 24 January 2019, the ICISD Secretariat, on behalf of the ICSID Secretary-General, wrote to Hugo Hans Siblesz, Secretary General of the Permanent Court of Arbitration, enquiring whether he would be willing to make a recommendation on the Respondent's Proposal to the Chairman of the ICSID Administrative Council.

On 28 January 2019, Hugo Hans Siblesz responded that he would be willing to provide a recommendation on the Respondent's Proposal.

On 28 January, 30 January and 1 February 2019, the International Bureau of the PCA and the ICSID Secretariat exchanged correspondence regarding the timing and modalities for the provision

of this Recommendation.

On 4 March 2019, the recommendation was issued and included the rejection of the proposal for disqualification.

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#### Reasoning (role of the Charter or other EU, ECHR related legal basis)

The main conclusion reached by the PCA Secretary General is as follows: “I am not convinced that inferences regarding the Tribunal’s collective decision to pose the questions of 26 October 2018 to the Parties can reasonably be drawn from the very different circumstances of the presiding arbitrator’s disclosures”. This seems to suggest that part of the problem was the way in which the challenge was formulated by the Respondent.

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#### Relation of the case to the EU Charter

As mentioned herein, the case relates to the independence and impartiality standards applicable in the EU to judicial organs as resulting from the Charter and the ECJ’s case law.

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#### Relation between the EU Charter and ECHR

Not applicable

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#### Use of Judicial Interaction technique(s)

The Tribunal makes reference to the existing abundant tribunal case law on the matter, including some cases featuring in this template.

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#### Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)

The Tribunal mostly makes reference to other arbitral tribunals of the same nature and kind.

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#### Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)

Not applicable

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#### Strategic use of judicial interaction technique (purpose aimed by the national court)

The Tribunal engaged in a systemic interpretation of the norms applicable with a view to

preserving an overall coherence of the system.

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#### Impact on Legislation / Policy

The question is very specific and no direct impact can be identified.

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#### Notes on the national implementation of the preliminary ruling by the referring court

Not applicable

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#### Impact on national case law from the same Member State or other Member States

Not applicable

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(Link to) full text

<https://www.italaw.com/sites/default/files/case-documents/italaw10404.pdf>

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