

Undisclosed expert ties prove fatal to ICSID award

Cosmo Sanderson and Sebastian Perry
12 June 2020



Solar Panels (Credit: iStock.com/kynny)

Spain has persuaded an ICSID committee to annul a €128 million award in favour of a solar power investor on the basis of arbitrator **Stanimir Alexandrov**'s failure to disclose a longstanding professional relationship with one of the claimant's expert witnesses from the Brattle Group.

In a unanimous decision issued yesterday, the committee ruled the Energy Charter Treaty award won by UK investment fund Eiser Infrastructure and a subsidiary should be annulled in its entirety. The decision is available in Spanish and English.

It found that Alexandrov's failure to disclose the relationship between **Carlos Lapuerta** of the Brattle Group created a "manifest appearance of bias" which meant that the tribunal was not properly constituted and that there had been a serious departure from a fundamental rule of procedure – two grounds for annulment under the ICSID Convention.

It is understood to be the first time in ICSID's history that an award has been annulled on the basis of an arbitrator's lack of independence and impartiality.

The committee was chaired by Mexican **Ricardo Ramírez-Hernández**, a former member of the WTO Appellate Body. He sat with former Pakistan attorney general **Makhdoom Ali Khan** and French Supreme Court judge **Dominique Hascher**. Khan replaced original panellist **Teresa Cheng** who stepped down when she became Hong Kong's secretary for justice in 2018.

The claimant used Gibson Dunn & Crutcher for the annulment proceeding, having used Allen & Overy in the arbitration. Spain has relied on government lawyers throughout the dispute, also retaining Curtis Mallet-Prevost Colt & Mosle for the annulment phase.

Eiser was one of the numerous investors to bring treaty claims in response to Spain's reforms to its subsidy regime for renewable energy, and the first to prevail in such a claim. In its May 2017 award, a tribunal chaired by **John Crook** of the US ordered Spain to pay €128 million plus interest after finding that the reforms violated the ECT. Eiser's appointee Alexandrov and **Campbell McLachlan QC** of New Zealand, who was chosen by Spain, joined in the unanimous ruling.

Spain filed for annulment soon after, arguing that Alexandrov had violated his obligation of independence and impartiality by failing to disclose a 15-year relationship with the Brattle Group and Lapuerta, who had been retained by Eiser as experts in the arbitration.

At the time of the *Eiser* arbitration, Alexandrov was a partner at Sidley Austin in Washington, DC. Spain argued that during his time at the firm, Alexandrov's team had appointed the Brattle Group in nine investor-state arbitrations and that in four of those cases Lapuerta was the testifying expert – including cases that were pending at the same time as the *Eiser* arbitration.

The state said that this relationship only became public after the *Eiser* award was issued, when Pakistan challenged Alexandrov in an unrelated ICSID arbitration brought by Tethyan Copper Company on the basis of his ties to Brattle. Alexandrov retired from Sidley Austin soon after that to set up an independent practice.

Association with Brattle had “insidious effects”

In its decision, the committee concluded that a tribunal may be held to have been improperly constituted for annulment purposes where an arbitrator lacked independence or impartiality at any time during the arbitration.

The committee also dismissed Eiser's contention that the proper remedy for Spain would be to seek revision of the award. It said revision proceedings were primarily concerned with the substance of the award, whereas an annulment committee is tasked with protecting the "integrity of the proceedings." The fact that Alexandrov would have no opportunity to respond to allegations of bias against him in an annulment proceeding was thus "of little consequence."

It also said Spain had not waived its right to raise the allegations, observing Eiser had not shown a clear instance where Spain was or reasonably ought to have been aware of Alexandrov's relationship with Brattle before the Eiser award was issued – despite the existence of public information about the connection, including in GAR articles.

The committee went on to examine whether a third party would find an "evident or obvious appearance of lack of impartiality or independence" on the part of Alexandrov based on a reasonable evaluation of the facts of the case – the disqualification standard espoused by former World Bank president Jim Yong Kim in the *Blue Bank* case.

The committee said the evidence was unequivocal that before and during the *Eiser* case there were several past and present professional connections and interaction between Alexandrov as counsel and member of Sidley Austin on the one hand and Lapuerta and the Brattle Group on the other.

It noted that Alexandrov had been challenged over his ties to Brattle in other arbitrations. In the *Tethyan* case, the challenge was rejected by Alexandrov's co-arbitrators following an opinion from the secretary general of the Permanent Court of Arbitration. In the *SolEs Badajoz v Spain* case, Alexandrov resigned after his co-arbitrators said they were divided on the challenge.

However, the tribunal said there were key differences with the present case, including the fact that the co-arbitrators in the *Tethyan* case were aware of the Brattle Group relationship, while the other *Eiser* tribunal members were not. Alexandrov was also not simultaneously acting as counsel with Lapuerta during the *SolEs Badajoz* case.

By contrast, Alexandrov and Lapuerta were working together as counsel and expert in two other pending arbitrations at the same time as the *Eiser* case. Simultaneously, Alexandrov was acting as counsel with other Brattle experts in *Bear Creek v Peru*.

The committee said it did not matter that Alexandrov "may not even have been conscious of the insidious effects of this association" with Lapuerta. An independent observer would "conclude that there was a manifest appearance of bias" on the part of Alexandrov.

The committee said Alexandrov had a duty to disclose the relationship and had failed to do so. It declined to rule on Spain's submission that Lapuerta was also under a duty to disclose the relationship under the IBA rules on the taking of evidence.

“Guardians of the ICSID system”

By depriving Spain of the opportunity to challenge him, the committee said Alexandrov had also deprived the state of seeking the benefit and protection of an independent tribunal, thus affecting its right of defence and right to a fair trial. The failure to disclose could not be regarded as an inconsequential error.

The committee said the non-disclosure had resulted in the tribunal deliberating without any knowledge of the relationship. The fact that the award was unanimous was no bar to annulment. Each tribunal member could be expected to have influenced the others with his views and analysis. It further noted that the tribunal adopted the damages model proposed by Lapuerta in its entirety.

While it was possible the arbitrators would have adopted the model in any event, the committee said that “Spain lost the possibility of a different award”.

The tribunal therefore concluded the failure to disclose could have had a “material effect” on the award, thus amounting to a serious departure from a fundamental rule of procedure.

In closing, it said that annulment committees are “guardians of the ICSID system” and “must set the bar high” regarding disclosure obligations. This included addressing conflicts of interests of arbitrators who also choose to act as counsel in investment disputes.

Having annulled the award on this basis, the committee said it saw no need to address the other grounds for annulment raised by Spain. The state had contended that it had made no commitments to provide a stable regulatory environment to renewables investors and that the tribunal had improperly awarded damages for certain claims. It had argued that the tribunal had failed to provide reasons and manifestly exceeded its powers.

The committee ordered Eiser to pay the full costs of the proceeding, US\$560,000, and all of Spain’s legal fees and expenses, which came to roughly US\$3.5 million.

A “historic decision”

Curtis partners **Gabriela Alvarez Avila** and **Benard Preziosi** say that the decision is the “first time in ICSID history that an award has been annulled for improper constitution of the tribunal and a serious departure from a fundamental rule of procedure.”

“The decision of the committee is particularly timely in light of the serious concerns by states regarding double-hatting, an issue that has been the subject of a lot of talk but little action to date.”

Squire Patton Boggs partner **Miriam Harwood**, who was part of the Curtis team in the annulment bid and continues to defend Spain in US enforcement proceedings relating renewables awards, says: “This is a historic decision, one that should have lasting, positive

impact. The annulment committee has taken a clear and firm stand, upholding the fundamental principles of transparency and trust that anchor the investor-state arbitration system. If those principles are lost, the system is lost. Its reputation as a fair and impartial forum hangs in the balance.”

Karel Daele, partner at Mishcon de Reya, also calls the decision groundbreaking, saying it highlights the fundamental importance of independence and impartiality and also parties’ right to “challenge and disqualify arbitrators who do not meet them.”

He says the decision should send a “clear message to the drafters of the revised ICSID Rules who are currently looking into several proposals to limit and restrict the right to challenge.”

“This ad hoc committee of three senior arbitrators and international judges sets the bar high and warns the arbitrators’ community: where you may not be perceived as impartial or independent by a fair-minded and informed third-party observer, either do not sit, be prepared to be challenged and disqualified or have your awards annulled. Whereas conflicts of interest have been increasingly raised as an annulment ground over the last five years, the ICSID jurisprudence is still unsettled and hopefully this decision will set the standard going forward.”

The Federal Court of Australia enforced the *Eiser* award in April this year. Enforcement proceedings in Washington, DC, were stayed in February pending the ICSID annulment proceedings.

Eiser Infrastructure Limited and Energia Solar Luxembourg Sarl v Kingdom of Spain (ICSID Case No. ARB/13/36)

In the annulment proceeding

Annulment committee

- **Ricardo Ramírez-Hernández** (Mexico) (chair)
- **Makhdoom Ali Khan*** (Pakistan)
- **Dominique Hascher** (France)

*replaced **Teresa Cheng** following her resignation in 2018

Counsel to Eiser Infrastructure and Energia Solar Luxembourg

- Gibson Dunn Crutcher

Partner **Jeffrey Sullivan** and associate attorneys **Ceyda Knoebel** and **Theo Tyrrell** in London and partner **Rahim Moloo** and associate **Ankita Ritwik** in New York

Counsel to Spain

- Abogacía General del Estado

José Manuel Gutiérrez Delgado, Pablo Elena Abad, Antolín Fernández Antuña*, Patricia Froehlingsdorf Nicolás, María del Socorro Garrido Moreno, Rafael Gil Nieves, Elena Oñoro Sainz, Amaia Rivas Kortazar, Mariano Rojo Pérez, Ma José Ruiz Sánchez, Francisco de la Torre Díaz, Alberto Torró Molés and Luis Enrique Vacas Chalfoun in Madrid

*now at Antuña & Partners

- Curtis Mallet-Prevost Colt & Mosle

Partner **Benard Preziosi** in New York, partner **Gabriela Alvarez-Avila** and associate **Ricardo Mier y Teran** in Mexico City, partners **Arianna Sánchez** and **Miriam Harwood*** in New York and partner **Claudia Frutos-Peterson** in Washington, DC

*now at Squire Patton Boggs

In the arbitration

Tribunal

- **John Crook** (US) (Chair)
- **Stanimir Alexandrov** (Bulgaria)
- **Campbell McLachlan** (New Zealand)

Counsel to Eiser Infrastructure and Energia Solar Luxembourg

- Allen & Overy

Partners **Judith Gill QC** and **Jeffrey Sullivan** in London and **Marie Stoyanov** in Paris,

Counsel to Spain

- Abogacía General del Estado