INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN:

CEMEX CARACAS INVESTMENTS B.V. AND
CEMEX CARACAS II INVESTMENTS B.V.
(CLAIMANTS)

AND

BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE NO. ARB/08/15)

DECISION ON THE RESPONDENT'S PROPOSAL TO DISQUALIFY A MEMBER OF THE TRIBUNAL

Judge Gilbert Guillaume, *President*
Professor Georges Abi-Saab, *Arbitrator*

Secretary of the Tribunal
Ms. Katia Yannaca-Small

On Behalf of the Claimants	*On Behalf of the Respondent*
CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. c/o Mr. Barry H. Garfinkel, Mr. Marco E. Schnabl, Mr. Timothy G. Nelson and Ms. Julie Bédard Skadden, Arps, Slate, Meagher & Flom LLP Four Times Square New York, N.Y. 10036-6522	Bolivarian Republic of Venezuela c/o Mr. George Kahale, III, Mr. Mark H. O'Donoghue, Ms. Miriam K. Harwood, Curtis, Mallet-Prevost, Colt & Mosle LLP 101 Park Avenue New York, N.Y. 10178, U.S.A. and c/o Ms. Gabriela Alvarez-Avila Curtis, Mallet-Prevost, Colt & Mosle, S.C. Torre Chapultepec Ruben Dario 281, Piso 9 Col. Bosque de Chapultepec 11580 México, D.F., Mexico

I. Procedural Background

1. On 16 October 2008, Cemex Caracas Investments B.V. and Cemex Caracas II Investments B.V., companies incorporated in the Netherlands, filed at the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") a Request for Arbitration against the Bolivarian Republic of Venezuela. On 30 October 2008, the Centre registered the Request.

2. The Claimants are represented in this proceeding by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP in New York, New York. Since 29 January 2009, the Respondent is represented in this proceeding by the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP in New York, New York and Mexico City.

3. No agreement having been reached between the parties on the method of constituting the Tribunal, and more than sixty days having elapsed since the registration of the Request for Arbitration, by letter of 31 December 2008, the Claimants invoked Article 37(2) of the ICSID Convention.

4. By the same letter, the Claimants reiterated their appointment, as arbitrator, of Mr. Robert B. von Mehren, a national of the United States, whose appointment had initially been mentioned in the Request for Arbitration. Mr. von Mehren accepted his appointment, and on 11 February 2009, signed a Declaration and furnished a Statement pursuant to ICSID Arbitration Rule 6. His Declaration, Statement and *Curriculum Vitae* were transmitted to the parties by the Centre on 12 February 2009.

5. By letter of 20 February 2009, the Respondent appointed Professor Georges Abi-Saab, a national of Egypt. Professor Abi-Saab accepted his appointment, and on 2 March 2009, signed a Declaration pursuant to ICSID Arbitration Rule 6. His Declaration was transmitted to the parties by the Centre on 3 March 2009.

6. The Tribunal not having been constituted within 90 days since the registration of the Request for Arbitration, by letter of 21 May 2009, the Claimants requested the appointment of the third, presiding, arbitrator by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules.

7. The Chairman of the ICSID Administrative Council has appointed Judge Gilbert Guillaume, a national of France, as the President of the Tribunal. Judge Guillaume accepted his appointment and on 7 July 2009, signed a Declaration pursuant to ICSID Arbitration Rule 6. His Declaration was transmitted to the parties by the Centre on 3 November 2009. All of the arbitrators having accepted their appointments, the Tribunal was constituted on 6 July 2009.

8. On 20 July 2009, having consulted with the parties and the Centre, the Tribunal fixed the first session to take place on 16 November 2009, at the Paris offices of the World Bank. On the

same day, the parties were invited to confer and advise the Tribunal, by no later than 16 October 2009, of any points of the session's provisional Agenda on which they are able to reach agreement. The parties were also invited to notify the Tribunal of any other items that they would like to see included in the Agenda.

9. On 3 September 2009, the Claimants filed a request for provisional measures. On 26 October 2009, the Respondent filed observations on the Claimants' request for provisional measures. The Tribunal, by letter of 30 September 2009, from the Centre, informed the parties that their positions on the request for provisional measures would be heard at the first session.

10. By letter of 21 September 2009, the Respondent requested "supplemental information and clarification concerning the exact nature of Mr. von Mehren's relationship with Debevoise [& Plimpton LLP], who "is acting as counsel to Holcim Ltd. in a case against the Republic [of Venezuela], which was registered by ICSID on 10 April 2009 as Case No. ARB/09/3."

11. Mr. von Mehren provided a response to the above request by letter of the same date.

12. By letter of 15 October 2009, the Respondent requested "further clarifications regarding certain aspects of Mr. von Mehren's relationship with Debevoise."

13. Mr. von Mehren provided a response to the above request by letter of 20 October 2009.

14. By e-mail of 21 October 2009, the Respondent stated that it "remain[ed] most uncomfortable with the relationship between Mr. von Mehren and the Debevoise firm" and "therefore intend[ed] shortly to file a formal proposal with the Secretary-General of ICSID for disqualification of Mr. von Mehren pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules."

15. By e-mail of 22 October 2009, the Claimants commented on the Respondent's e-mail of 21 October 2009.

16. On 26 October 2009, the Respondent filed a formal proposal for disqualification of Mr. Robert B. von Mehren as an arbitrator.

17. By letter of 27 October 2009, from the Centre, the President of the Tribunal invited Mr. von Mehren to furnish explanations, pursuant to ICSID Arbitration Rule 9(3), by 29 October 2009 and the parties to submit their observations by 2 November 2009. It also informed the Parties that the President, Judge Guillaume and his co-arbitrator, Professor Abi-Saab, will "promptly consider" the request pursuant to Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4). The proceeding was suspended pursuant to ICSID Arbitration Rule 9 (6).

18. By letter of 28 October 2009, Mr. von Mehren furnished explanations with respect to the Respondent's proposal for the disqualification.

19. On 2 November 2009, the parties submitted their observations on the proposal for disqualification.

20. By letter of 3 November 2009, from the Centre, the President of the Tribunal invited the Respondent to comment by 4 November 2009 on the Claimants' argument, made in their 2 November 2009 submission, that the Respondent's challenge was "untimely." On 4 November 2009, the Respondent filed its comments.

II. The Proposal for Disqualification of Mr. Robert B. von Mehren

21. On 21 September 2009, counsel for the Bolivarian Republic of Venezuela sent a letter to the Tribunal stating:

> I regret to have to raise a matter concerning Mr. von Mehren which we believe should be addressed and clarified. The law firm of Debevoise and Plimpton LLP ("Debevoise") is acting as counsel for Holcim Ltd. in a case against the Republic, which was registered by ICSID on April 10, 2009 as case No ARB/09/3. That case, like this one, relates to governmental action concerning the cement industry in Venezuela taken in 2008.

The counsel noted that Mr. von Mehren was a retired partner of Debevoise, but added that he was still listed on Debevoise website under the section captioned "Lawyers" and that his contact information on the last page of his curriculum vitae lists the Debevoise office and a Debevoise telephone number and e-mail address. The Respondent requested "supplemental information and clarification concerning the exact nature of Mr. von Mehren relationship with Debevoise."

22. On the same day, in response to that letter, Mr. von Mehren confirmed that, since 1995 he was a retired partner of Debevoise and provided detailed information on his present relation with that law firm. He specified that, "[t]he Debevoise firm has had for many years a generous policy of providing an office – needless to say a small one – and some secretariat services to its retired partners." He said that, after his retirement, he structured his practice of arbitration so that neither the Debevoise firm, nor himself were conflicted out by activities of the other. He mentioned the fact that he receives a pension from Debevoise based on the firms' earnings during his period of partnership. He finally declared that he did not know that Debevoise was counsel in the *Holcim* case and had no knowledge of that case. He concluded by stating that he would decide the present case on the sole basis of the relevant facts and the applicable law.

23. On 15 October 2009, the Respondent asked for further information regarding the use by Mr. von Mehren of office and secretariat services provided by Debevoise with respect to the measures taken to keep his files and e-mails confidential. Mr. von Mehren answered on 20 October 2009 and gave further information on those measures.

24. In its letter of 26 October 2009, the Respondent proposed the disqualification of Mr.von Mehren pursuant to Article 57 of the ICSID Convention and ICSID Arbitration Rule 9. The

"basis for this proposal is Mr. von Mehren's continuing relationship with the law firm of Debevoise and Plimpton LLP ("Debevoise"), which is counsel to the claimants in Holcim Limited, Holderfin B.V. and Caricement B.V. v. the Bolivarian Republic of Venezuela, ICSID Case No. ARB/09/3 (the "Holcim Arbitration"), a case arising out of the same nationalization process that lies at the heart of the present case. According to the Respondent, "the necessity of ensuring the impartiality of arbitrators and of maintaining confidentiality makes it inappropriate for Mr. von Mehren to serve as arbitrator in this case."

25. In the same letter, the Respondent explained why the present case has "a close relation to the Holcim Arbitration." It recalled that Debevoise was acting for Holcim in that arbitration. It stressed that "Mr. von Mehren's continuing relationship with Debevoise would cause a reasonable person, having knowledge of the undisputed facts, to have doubts as to whether he would 'exercise independent judgment', as required by Article 14 of the ICSID Convention." Moreover, that relationship "creates a risk of disclosure of confidential information."

26. Under Article 58 of the ICSID Convention, "[t]he decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be." ICSID Arbitration Rule 9(4) further provides that, when a party proposes the disqualification of an arbitrator, the other members of the Arbitral Tribunal "shall promptly consider and vote on the proposal in the absence of the arbitrator concerned." Pending their decision, the proceeding is suspended in accordance with Rule 9(6).

27. On 27 October 2009, the President of the Tribunal, through the Centre, accordingly informed the parties that Professor Abi-Saab and himself would "promptly consider" the request and that the proceeding was suspended. In the same letter, the President informed Mr. von Mehren that he may "furnish explanations to the two other Members of the Tribunal, pursuant to ICSID arbitration Rule 9(3), by October 29, 2009." He asked the parties to submit their observations by November 2, 2009.

28. In his letter of 28 October 2009, Mr. von Mehren responded in part as follows:

> I do not wish to comment on the merits of the Respondent's proposal, I affirm here that I have always considered it my duty to be impartial and to exercise independent judgment and that I intend to comply with this duty in this arbitration as I have in all others in which I have served.

The Tribunal forwarded Mr. von Mehren's explanation to the parties for any comment they wished to make.

29. On 2 November 2009, the Respondent informed the Tribunal that it "continues to believe that the continuing relationship between Mr. von Mehren and Debevoise gives rise to an appearance of a lack of impartiality and creates a risk of disclosure of confidential information." Accordingly, it maintained its position.

30. The Claimants also submitted their observations on 2 November 2009. They contended that the Respondent's challenge to Mr. von Mehren was untimely. They added that, "[e]ven if timely, Respondent's challenge fails to identify facts suggesting Mr. von Mehren is unfit to serve as arbitrator." They concluded that the Respondent's proposal to disqualify Mr. von Mehren should be rejected. On 4 November 2009, the Respondent submitted that the Claimants' objection lacks any merit as far as they claim that the proposal for disqualification is untimely. The Claimants commented on that letter on the same day.

III. Discussion

31. The Tribunal will first consider whether the Respondent's proposal to disqualify Mr. von Mehren was untimely. If so, it will not have to consider the substance of that proposal.

32. An orderly and fair arbitration proceeding, while permitting challenges to arbitrators to be made on specific grounds, also requires that such challenges be made in a timely fashion. As a consequence, arbitration rules normally provide that challenges that are not timely should not be considered.

33. In this respect, it can be recalled that Article 11 of the UNCITRAL Rules provides that: "[a] party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to the party." The Guidelines of the International Bar Association on Conflicts of Interest, provided to the Tribunal by the Respondent, mention a time limit of 30 days in its Article 4(a) of Part I. Article 11 of the rules of arbitration of the International Court of arbitration of the International Chamber of Commerce provides that "[f]or a challenge to be admissible, it must be sent by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification."

34. By contrast, neither the ICSID Convention, nor the ICSID Arbitration Rules specify a definite deadline beyond which a challenge is not to be considered. However under ICSID Arbitration Rule Rule 9(1) :

> A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefore.

35. The word "promptly" is defined by the Oxford English dictionary as "readily, quickly, directly at once, without a moment's delay." The Webster unabridged dictionary (2nd edition) defines it as "readily, quickly, expeditiously."

The Spanish version of Rule 9(1) requires the challenging party to act "sin demora," i.e. "without delay" and the French version requires it to file its proposal "dans les plus brefs délais."

36. It thus appears that Rule 9(1) does not fix a quantifiable deadline for submission of challenges. It is on a case by case basis that tribunals must decide whether or not a proposal for disqualification has been filed in a timely manner. However the text of Rule 9(1) implies that such a proposal must be made as soon as the party concerned learns of the grounds for a possible disqualification.[1] The sanction for the failure to object promptly is waiver of the right to make objection, as provided for in ICSID Arbitration Rule 27.

37. In *Azurix v. Argentina*, the ICSID Tribunal considered a delay of eight months as obviously too long under any "reasonable standard."[2] In *CDC v. Seychelles*, the *ad hoc* Committee arrived at the same conclusion for a delay of 147 days.[3] It was also decided in *Vivendi v. Argentina* that a delay of fifty three days in submitting a challenge in "a document of just 23 pages, does not constitute acting promptly given the nature of the case and the fact that the hearings on the merits were scheduled to take place within two weeks of the submission."[4] By contrast, in *Saba Fakes v. Turkey*, the Tribunal noted that the Claimant filed its proposal for disqualification "promptly," i.e. ten days after the constitution of the Tribunal.[5]

38. Did Venezuela act promptly ("sin demora") in making its proposal to disqualify Mr. von Mehren in the present case?

In this respect, one must recall that the basis of this proposal is "Mr. von Mehren's continuing relationship" with the law firm of Debevoise and the fact that Debevoise is counsel of the Claimant in another ICSID case, the *Holcim* case, which, according to Venezuela, is similar to the present case. Thus one has to determine the date at which the Respondent became aware of those circumstances and to assess whether it submitted its proposal for disqualification in a timely manner.

39. Mr. von Mehren was nominated in the Request for Arbitration filed on 16 October 2008. The Request was registered on 30 October 2008. The Request and the registration were in due

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[1] *See* Christopher H. Schreuer, "The ICSID Convention: a Commentary," 2nd edition, Cambridge University Press, 2009, p. 1200, para. 11. *See also* Note B to ICSID Arbitration Rule 9, last published in 1975 as part of ICSID/4/Rev.1 ("ICSID Regulations and Rules").

2 *Azurix Corp v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Challenge to the President of the Tribunal (25 February 2005), unpublished, but reported in para. 35 of the Decision of the *ad hoc* Committee seized of an application for annulment (1 September 2009) [Claimants' Legal Authorities, Tab 2].

[3] *CDC Group PLC v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision of the *ad hoc* Committee on the Application for Annulment (29 June 2005), para. 53 [Claimants' Legal Authorities, Tab. 3].

[4] *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/03/19), *AWG Group v. Argentine Republic* (UNCITRAL); Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (22 Oct. 2007, para. 26).

[5] *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Decision on the Proposal for Disqualification of a Member of the Arbitral Tribunal (5 May 2008), para. 15 [Claimants' Legal Authorities, Tab 7].

time notified to Venezuela by ICSID. The nomination of Mr. von Mehren was confirmed by letters of 4 November 2008 and 31 December 2008, and finally by letters of 29 January 2009 and 5 February 2009, copy of which was sent to Venezuela. Most probably, the Respondent was already aware at that time that Mr.von Mehren was a retired partner of Debevoise. In any case it was so informed when, on 12 February 2009, it received the *curriculum vitae* submitted by Mr. von Mehren.

40. Debevoise, on behalf of Holcim, initiated an ICSID proceeding against Venezuela at the latest on 23 March 2009 and this proceeding was registered on 10 April 2009.

41. Thus, according to the Claimants, "every material element of Respondent's application for disqualification was well known to it" at the latest on 10 April 2009.[6] The delay must be computed from that date. The Respondent waited at least six months to present its proposal for disqualification. That was too long and it must be "deemed to have waived its right to request a disqualification."[7]

42. The Respondent, for its part, alleges that:

> …there was no reason at the outset for the Republic to question Mr. von Mehren's qualifications as an arbitrator or his status as a retired partner of Debevoise. The filing of the *Holcim* case, with Debevoise as its counsel, came well after Mr. von Mehren was identified as Claimants' designated arbitrator, and no linkage was drawn between Mr. von Mehren and Debevoise prior to constitution of the Tribunal on July 6, 2009. Even when that connection was made, the facts disclosed on his curriculum vitae did not fully describe the full nature of the relationship with his former firm.[8]

According to Venezuela, those facts were only elucidated in late September 2009 and the proposal for disqualification was then promptly presented.

43. We must observe that, on 10 April 2009, the Respondent knew that Debevoise was acting for the Claimants in the *Holcim* case. It also knew at the latest on 12 February 2009 that Mr. von Mehren was a retired partner of Debevoise.

Moreover, as noted by the Respondent itself in its request for information of 21 September 2009, the contact information on the last page of Mr. von Mehren's *curriculum vitae* circulated in February 2009 lists the Debevoise office at 919 Third Avenue, New York and a Debevoise telephone number and e-mail address. If the Respondent had any doubt on the risk that such a relationship could create for the independence of Mr. von Mehren, he could have asked for more information in April 2009, or at least at the beginning of July 2009 when the Tribunal in this case was constituted.

[6] Claimants' Observations of 2 Nov. 2009, p. 6.
[7] Claimants' Observations of 2 Nov. 2009, para. 17.
[8] Respondent's Observations of 4 Nov. 2009, para. 7.

It waited till 21 September 2009 to do so. Mr. von Mehren answered that request in detail on the same day. The Respondent still waited till 15 October 2009 to ask for some further information relating to the measures taken to keep confidential Mr. von Mehren's files and emails. The answer was given on 20 October 2009 and the proposal for disqualification made on 26 October 2009.

44. We note that in April 2009, the Respondent had in hand all the elements allowing it to raise the questions it raised in September 2009. It waited more than five months to put those questions. It did it more than two months after the constitution of the Tribunal. Having immediately received on 21 September 2009 the required information, it still waited one month before presenting its proposal for disqualification. It did it in a document of less than five pages registered only three weeks before the session of the Tribunal which was scheduled to examine, *inter alia*, the Claimants' request for provisional measures.

Taking all those factors into consideration, we conclude that Venezuela did not file its proposal to disqualify Mr. von Mehren "promptly" within the meaning of ICSID Arbitration Rule 9(1) and that therefore it has waived such objection under ICSID Arbitration Rule 27.

45. As a consequence we do not have to consider the substance of the Respondent's objection.

IV. Dispositive

46. For the foregoing reasons:

The Respondent's proposal for disqualification of Mr. Robert B. von Mehren of 26 October 2009 is dismissed.

Made on 6 November 2009

[*Signed*]

Judge Gilbert Guillaume

[*Signed*]

Professor Georges Abi-Saab