

NAFTA/UNCITRAL

Decision on the Challenge to Mr. J. Christopher Thomas, QC

in the Arbitration

VITO G. GALLO

– Claimant –

v.

GOVERNMENT OF CANADA

– Respondent –

Nassib G. Ziadé
Deputy Secretary-General, ICSID

1. The present challenge of Mr. J. Christopher Thomas, QC arose in the case of *Vito G. Gallo v. Government of Canada*, which is being heard under the UNCITRAL Arbitration Rules and Section B of Chapter 11 of the North American Free Trade Agreement (“NAFTA”) by a three-member tribunal. The Tribunal consists of Mr. Juan Fernández-Armesto (presiding arbitrator), Mr. Jean-Gabriel Castel OC, QC, and Mr. J. Christopher Thomas, QC. The arbitral proceedings in this case are being administered by the Permanent Court of Arbitration (“PCA”).

2. NAFTA Article 1124(1) provides that the ICSID Secretary-General shall serve as appointing authority for arbitration under Section B of NAFTA Chapter 11. NAFTA Article 1120(2) indicates that the applicable arbitration rules, i.e., in this case the UNCITRAL Arbitration Rules, shall govern the arbitration. Article 12(1) of the UNCITRAL Arbitration Rules provides that the decision on a challenge shall be made by the appointing authority.

3. Article 10(3) of the ICSID Convention provides that “[d]uring the Secretary-General’s absence or inability to act ... the Deputy Secretary-General shall act as Secretary-General” as, indeed, during any vacancy of the office of Secretary-General. In the present case, the Secretary-General of ICSID is unable to act within the meaning of Article 10(3) of the ICSID Convention. In such circumstances, the Deputy Secretary-General is automatically required by the ICSID Convention to act as Secretary-General in the specific matter, and to perform all of the Secretary-General’s functions, including those of an appointing authority, without having any reporting relationship to the Secretary-General. It is in this context that I am deciding this challenge.

Factual Background and Procedural History

4. On June 4, 2007, the Respondent appointed Mr. Thomas as an arbitrator and forwarded to the Claimant Mr. Thomas' *curriculum vitae* ("CV"). The CV disclosed a significant amount of past and present work for the Government of Mexico. In his CV, Mr. Thomas stated that he was "presently managing partner of Thomas & Partners, Barristers & Solicitors (due to retire from counsel work and to withdraw from the firm on or about 31 December 2007)." The Tribunal was constituted on December 4, 2007 following the presiding arbitrator's acceptance of his own appointment.

5. On March 7, 2008, the Tribunal held its first procedural hearing. Procedural Order No. 1 of June 4, 2008 incorporated, among other things, the procedural rules governing the arbitration which had been discussed on March 7 between the parties and the Tribunal. Procedural Order No. 1 stated that "[t]he disputing parties agree and confirm that the Arbitral Tribunal has been duly constituted in accordance with Article 1123 of the NAFTA." It further stated that "[t]he disputing parties confirm that they waive any possible objection to the constitution of the Arbitral Tribunal and to the appointment of the Arbitrators on the grounds of conflict of interest and/or lack of independence or impartiality in respect of matters known to them at the date of signature of this Procedural Order."

6. On June 25, 2008, Mr. Thomas informed the parties of his new address and contact details as of June 15, 2008. In the same communication, Mr. Thomas referred to his Thomas & Partners address as his "former office premises," albeit without referencing it by name. During the same period, the national press in Canada as well as some arbitration and trade publications reported that Mr. Thomas' former colleagues in Thomas & Partners had joined Borden Ladner

Gervais, LLP (hereinafter “BLG”) as partners, while Mr. Thomas joined the firm as an independent counsel.

7. On March 5, 2009, Mr. Thomas sent to the parties through the PCA a letter updating them as to changes in his professional situation. He indicated to them that “[e]ffective 15 June 2008, [he] became a sole practitioner practicing through [his] personal law corporation.” He further indicated:

My files are administered and maintained autonomously from BLG. My law corporation has separate computer, financial records, and telecommunications system. As a part of my consultancy agreement, I can assist BLG in a particular matter if both firms have cleared their conflicts checks. Neither firm has access to the other’s computer systems, internal communications and file openings, *etc.*

8. In the same letter of March 5, 2009, Mr. Thomas brought what he described as a “recent development” to the parties’ attention:

I have recently been advised by BLG that the Government of Mexico has decided to retain it to provide legal services to it for the period 1 March to 31 December 2009. The government sought agreement that I could (through BLG) advise on specific legal matters as they arose and I agreed to that request.

9. The letter of March 5 was never received by the parties, due to Mr. Thomas’ incorrectly typing the e-mail address of the Legal Secretary at the PCA. On June 3, 2009, he discovered the error and sent the March 5 letter again to the parties through the PCA.

10. On June 15, 2009, counsel for the Claimant wrote a letter to Mr. Thomas inquiring about the following:

We would appreciate receiving confirmation from you as to whether you have already commenced the work contemplated in the retainer agreement mentioned in your letter. Could you also please confirm whether the retainer agreement contemplates the provision of legal research, advice or representation with respect to the interpretation or application of the provisions of NAFTA Chapter 11, or similar provisions in Mexico’s Bilateral Investment Treaties?

11. On June 22, 2009, Mr. Thomas replied to the Claimant's letter of June 15. He stated:

Since BLG's retainer entered into force, I have done a small amount of work for BLG on Mexico-related matters, consisting principally of reviewing its advice in respect of matters that fall within the rubric of international trade and investment law. I have not provided representation to Mexico in respect of the interpretation or application of the provisions of NAFTA Chapter 11 or similar provisions in Mexico's Bilateral Investment Treaties. I estimate that my time spent in this regard amounts to less than 5% of my time spent on professional matters.

12. On July 7, 2009, the Claimant requested that Mr. Thomas withdraw from his position as arbitrator. It expressed the belief that "circumstances exist that give rise to justifiable doubts as to [Mr. Thomas'] impartiality and independence to continue serving as arbitrator appointed by the Government of Canada." The Claimant stressed, however, that it did "not allege the existence of actual bias" on the part of Mr. Thomas. Rather, the Claimant stated that its challenge was "based upon the objective standards prescribed under Articles 9 and 10 of the UNCITRAL Arbitration Rules and the applicable rules of international law."

13. On July 10, 2009, the Respondent stated that it did not "believe that there exist circumstances sufficient to create justifiable doubts as to [Mr. Thomas'] impartiality and independence" as an arbitrator.

14. On July 15, 2009, Mr. Thomas, in response to the Claimant's allegations, decided not to tender his resignation.

15. On July 20, 2009, the Claimant wrote to me in my capacity as Deputy Secretary-General seeking my "determination of the challenge [it had] submitted to Mr. Thomas' continued service as arbitrator." The Claimant made it clear that this request was entered without prejudice to its standing position that the "Deputy Secretary-General should not exercise the authority granted to the Secretary-General under NAFTA Article 1124(1)." Canada had for its part, on July 14,

2009, expressed the view that the Deputy Secretary-General of ICSID was the “appointing authority with respect to this matter.”

16. On July 20 and 21, 2009, the parties proposed different schedules for the filing of further submissions on the challenge to Mr. Thomas. On July 22, 2009, I wrote to the parties on this point, informing them that I had decided:

- (1) to invite the Claimant to file any further observations that it may have on the challenge by July 27, 2009;
- (2) to invite the Respondent to file any further observations that it may have by August 10, 2009;
- (3) to invite Mr. Thomas to file any additional comments that he may have within ten days of his receipt of the Respondent’s submission;
- (4) to invite the parties to file simultaneously any further comments that they may have within ten days of their receipt of Mr. Thomas’ comments; and
- (5) to reserve the possibility of inviting further submissions if deemed necessary.

17. The Claimant and the Respondent filed their submissions as scheduled on July 27, 2009 and August 10, 2009, respectively. Mr. Thomas submitted his comments on the parties’ submissions on August 17, 2009. On August 28, 2009, the Claimant filed a Reply on the Challenge, and the Respondent submitted a letter with respect to the challenge. On September 1, 2009, the Respondent stated its intention not to file an additional submission.

18. Both of the parties and Mr. Thomas have conducted themselves with the utmost civility in the course of this challenge. The Claimant emphasized at the outset that it was pursuing the challenge with regret, and that it was not alleging the “existence of actual bias” on Mr. Thomas’ part. Mr. Thomas in turn expressed his appreciation for the Claimant’s pursuing the challenge with regret, and affirmed that he took no offense by the challenge. Both the Claimant and Mr. Thomas stressed the importance of preserving the legitimacy of, and confidence in, the investor-

State dispute settlement process. Both of the parties and Mr. Thomas are to be commended for the professionalism of their submissions and the spirit in which the challenge procedure has been conducted.

Considerations

19. The applicable standard for deciding whether to sustain a challenge to an arbitrator in the present case is set out in Article 10(1) of the UNCITRAL Arbitration Rules, which provides that an “arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” This is an objective standard in that it requires not only a showing of doubt, but doubt that is justifiable. (“[U]nder the UNCITRAL Arbitration Rules doubts are justifiable ... if they give rise to an apprehension of bias that is, to the objective observer, reasonable.” See the Challenge Decision of 11 January 1995, XXII *Yearbook Commercial Arbitration* 227, 234 (1997).) Furthermore, as the standard requires an exercise of judgment, it is only logical to conclude that all relevant facts and circumstances must be considered in reaching that judgment. The first question to be addressed is, however, the timeliness of the challenge.

Timeliness of the Challenge

20. Pursuant to Article 11(1) of the UNCITRAL Arbitration Rules, a challenge to an arbitrator must be made within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party, or within fifteen days after circumstances giving rise to justifiable doubts as to the arbitrator’s impartiality or independence have become known to the challenging party. The parties dispute at length the issue of when the Claimant became aware or should have become aware that Mr. Thomas was continuing to act as a counsel after December

31, 2007. The burden of proof here lies with the Respondent. While the Claimant as the party raising the challenge must show that justifiable doubts exist as to the arbitrator's impartiality or independence, the burden of proving that the Claimant knew of relevant circumstances more than fifteen days prior to bringing the challenge falls upon the Respondent.

21. The Respondent first observes that the Claimant sent submissions to Mr. Thomas at Thomas & Partners on multiple occasions between February 29 and May 12, 2008. The Respondent next observes that Procedural Order No. 1 of June 4, 2008 listed Mr. Thomas' office at Thomas & Partners as his contact information and place of service for documents. The Respondent contends that the Claimant was thus on notice that Mr. Thomas remained a counsel. The Respondent further notes that Mr. Thomas on June 25, 2008 informed the parties and the other members of the Tribunal of his new address, referring to the Thomas & Partners address as his "former office premises." The Respondent observes that the Claimant had no more than fifteen days from this last date to challenge Mr. Thomas' statement that he would retire from counsel work prior to the arbitration getting underway. The Claimant takes issue with the Respondent's assertions concerning Mr. Thomas' address.

22. Even taking the Respondent's view of the facts, the Respondent's arguments here are of no moment. Merely maintaining an address at a law firm for some months after a declared date of departure does not by itself indicate continuing work as a counsel.

23. The Respondent next invokes in support of its position press coverage of the "merger" between Thomas & Partners and BLG in June 2008, and of Mr. Thomas' relationship with BLG as an independent counsel. (Mr. Thomas contests the use of the term "merger" as being merely colloquial.) The Respondent further notes the small size of the Canadian trade and investment

bar as evidence of constructive knowledge of Mr. Thomas' continuing status as a counsel. The Claimant denies any actual knowledge of Mr. Thomas' remaining as counsel prior to Mr. Thomas' disclosure in June 2009.

24. Allowing the Respondent to invoke evidence of constructive knowledge (even if reasonably proved) would relieve the arbitrator of the continuing duty to disclose. This would unfairly place the burden on the Claimant to seek elsewhere the notice it should have received from the arbitrator. Of interest in this respect is the Respondent's statement that counsel for the Claimant were "almost certainly aware" of the "merger" shortly after it occurred in June 2008. Such speculative statements cannot replace proof of actual knowledge.

25. Easily dismissed is the Respondent's observation that one of the Claimant's counsel spoke on May 13, 2009 on a panel with Mr. Thomas, and that the conference materials contained a CV of Mr. Thomas noting at page 2 his continuing advice to clients on a case-by-case basis. The Claimant's counsel denies having obtained such materials. This denial need not be assessed, however. The burden of proof here lies with the Respondent. It would in any event be unreasonable to burden a party with the expectation that its counsel will have read every line of every page of every CV provided at a conference.

26. The Respondent has not established that the challenge was untimely. Even if the Respondent proved that the Claimant knew that Mr. Thomas remained a counsel, this fact would not in itself be determinative. The proper matter to be considered is whom Mr. Thomas has counseled, and on what topics. These questions will be considered further below.

27. The appropriate date from which time shall be deemed to have started running is June 22, 2009, the date on which Mr. Thomas disclosed to the parties the extent of his advisory work to

Mexico. The challenge has therefore been made within the fifteen-day time limit set out in Article 11(1) of the UNCITRAL Arbitration Rules.

Merits of the Challenge

28. Turning then to the merits of the challenge, the Claimant first complains that Mr. Thomas has remained a counsel despite his indication to the contrary in his CV of 2007.

29. It would have been preferable for Mr. Thomas not to have stated in a CV provided to the parties that he intended to retire as counsel if his intentions were not entirely certain. As things stand today, and irrespective of the advisability of such a situation, one may as a general matter be simultaneously an arbitrator in one case and a counsel in another. There is no need to disavow the possibility of assuming either role. The fact that one makes such a statement and then changes one's mind is therefore hardly sufficient to sustain a challenge absent other evidence of a conflict. Thus, the Claimant's assertion that it relied on Mr. Thomas' statement in his CV in evaluating his acceptability as an arbitrator does not by itself sustain the challenge raised against Mr. Thomas.

30. The real issue is that Mr. Thomas is presently advising Mexico, a State Party to the NAFTA and a potential participant in this case pursuant to NAFTA Article 1128. In his letter of June 22, 2009, Mr. Thomas stated that he had not since March 2009 represented Mexico "in respect of the interpretation or application of the provisions of NAFTA Chapter 11 or similar provisions in Mexico's Bilateral Investment Treaties," but has done "a small amount of work for BLG on Mexico-related matters, consisting principally of reviewing its advice in respect of matters that fall within the rubric of international trade and investment law."

31. In the particular context of NAFTA Article 1128, this is too fine a distinction to dispel doubt. By serving on a tribunal in a NAFTA arbitration involving a NAFTA State Party, while simultaneously acting as an advisor to another NAFTA State Party which has a legal right to participate in the proceedings, an arbitrator inevitably risks creating justifiable doubts as to his impartiality and independence.

32. The Respondent opines that there can be no conflict of interest since the amount of legal advice provided by Mr. Thomas to Mexico is *de minimis*. The Respondent misses the point, however. Where arbitral functions are concerned, any paid or *gratis* service provided to a third party with a right to intervene can create a perception of a lack of impartiality. The amount of work done makes no difference. What matters is the mere fact that work is being performed.

33. Mr. Thomas' personal integrity is unquestioned, and he is to be commended for disclosing his advisory services to Mexico in a forthright manner. Nevertheless, in an arrangement like the one presently at issue, the arbitrator could be perceived as attentive to the interests of the advised State Party. His judgment may appear to be impaired by the potential interest of the advised State Party in the proceedings. Moreover, if the advised State Party were formally to intervene under Article 1128, this would necessarily lead to the reconstitution of the tribunal. In any event, the arbitrator's involvement is problematic.

34. The Claimant demands Mr. Thomas' disqualification on the basis that "there is no way to 'un-ring' the bell." But the bell has not yet actually been rung. Mexico has not stated an interest in this case by participating under Article 1128, or otherwise. Had Mexico intervened, this would have required Mr. Thomas' immediate disqualification. The fact is, however, that Mexico has not yet done so. The Claimant's request must therefore be rejected.

35. Nevertheless, because Mexico has the immanent right under Article 1128 formally to state its interest by participating in the case, an apparent conflict of interest is perceptible. Even if Mexico were not in the end to intervene, the arbitration would have had to proceed under the shadow of this possibility. The parties would inevitably be in a distracting and unsettled situation. It would be next to impossible for Mr. Thomas to avoid altogether, in his work as an arbitrator, the appearance of an inability to distance himself fully from the interests of Mexico, the advised NAFTA State Party and a potential participant in the present case.

36. In the instant case, from the point of view of a “reasonable and informed third party” (General Standard 2(c) of the IBA Guidelines on Conflicts of Interest in International Arbitration), i.e., a “fair minded, rational, objective observer” (Challenge Decision of 11 January 1995, *op. cit.* at 236), there would be justifiable doubts about Mr. Thomas’ impartiality and independence as an arbitrator if he were not to discontinue his advisory services to Mexico for the remainder of this arbitration. Mr. Thomas must therefore now choose whether he will continue to advise Mexico, or continue to serve as an arbitrator in this case. Mr. Thomas shall inform me of his choice (with copies being sent to the parties, the two other arbitrators and the PCA) within seven (7) days of his receipt of the present decision.

Costs

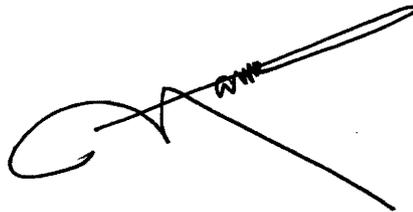
37. The Respondent requests that the Claimant be ordered to bear all of the costs of this challenge. It is reasonable, unless the Tribunal determines otherwise, that the authority ruling on the challenge should also decide the subsidiary question of whether to award costs in respect of the challenge. Both sides asserted their positions cogently and constructively. In view of the

importance of the legal issues raised by both parties, and the usefulness of both parties' pleadings in deciding the present challenge, each party will bear its own costs.

Decision

For the reasons discussed above, I have decided:

- (1) the Claimant's challenge to Mr. Thomas is timely;
- (2) the Claimant's challenge is rejected;
- (3) Mr. Thomas is requested to inform me within seven (7) days of his choice between continuing to advise Mexico and serving as an arbitrator in this case;
and
- (4) each party will bear its own costs in respect of this challenge.



Nassib G. Ziadé
Deputy Secretary-General, ICSID

Date: *October 14, 2005*