LCIA Reference No. 91431-91442 (the First Challenge Decision), Decision Rendered 5 April 2011

| Subject: | Challenge to Tribunal’s appointment pursuant to Article 10.4 of the LCIA Rules 1998, based on Articles 14.1 (general duty of the Tribunal to act fairly and impartially as between all parties and to avoid unnecessary delay and provide a fair and efficient means for the resolution of the dispute), 10.2 (failure by the arbitrator to act with reasonable diligence) and 10.3 (justifiable doubts as to the arbitrator’s independence or impartiality) |
| Division/Court member: | Former Vice President of the LCIA Court (acting alone) |
| Summary: | The Division found no ground upon which it could be said that the Tribunal failed to act with reasonable diligence. The fact that a tribunal consistently finds in favour of one side or the other, without more, cannot properly be regarded as an indication of bias or partiality. The involvement of a board member of an international arbitral institution as counsel for one of the parties should create no cause for concern, while the preclusion of a voluntary unremunerated member of a board of an institution from taking on arbitrating work under the auspices of that institution would create concern. Further, it should be known that the LCIA, like other well-known arbitral institutions, plays no part in any decision of the Tribunal, whether procedural or substantive. |

1 Background

1.1 The challenge concerns twelve arbitrations brought by the Claimant parties against the same Respondent. Each arbitration concerns an investment agreement and related guarantees, which were governed by English law. The arbitration clauses contained in the agreements and guarantees provided that disputes were to be resolved by arbitration under the LCIA Rules and that the seat of the arbitration would be London.

1.2 The Claimants filed twelve Requests for Arbitration with the LCIA on 16 September 2009. The Respondent filed a combined Response on 16 October 2009.

1.3 On 2 December 2009, the LCIA notified the parties that it had appointed the same Tribunal in each case.

1.4 The parties agreed that the twelve arbitrations run concurrently.

1.5 Separate Statements of Case were filed by the Claimants on 16 December 2009 and separate Statements of Defence, including counterclaims, were filed by the Respondent on 2 March 2010. Statements of Reply and Defences to Counterclaim were filed on 9 April 2010. The Respondent filed a
combined Statement of Reply to Defence to Counterclaim on 17 May 2010, which included a challenge to the jurisdiction of the Tribunal.

1.6 A hearing had been fixed to commence on 10 May 2011 in Procedural Order No. 2, dated 4 August 2010.

1.7 On 4 February 2011, the Respondent made an application to the Tribunal to suspend the proceedings in view of a new Decree promulgated in Russia which was said to prohibit a foreign company from acting as an investor. The Respondent further asked for time to renegotiate the investment agreements, for time to collect evidence relating to alleged forgery of signatures of one of the other parties to the Investment Agreements and for leave under Section 44 of the English Arbitration Act 1996 to apply to the English Courts seeking assistance with the taking of evidence of witnesses in Russia.

1.8 On 7 February 2011, the Chair stated that, subject to any objections the Respondent may make by 17.00 (London time) on 8 February 2011, the Tribunal was prepared to accept the timetable proposed by the Claimants in the email below his email. He further stated, “we draw to the parties’ attention the need to stick to the dates to ensure that the case is ready for the hearing on the merits as scheduled”.

1.9 On 8 February 2011, the Respondent interpreted the Chair’s email as effectively ignoring the Respondent’s motion of 4 February 2011 for suspension. It further expressed “deep concern” that the Chair was ready to accept a notion from the Claimants (for an extension of time) while the Respondent’s motion remained without reaction.

1.10 The Chair wrote to the parties on the same day stating that the email of 7 February “appears to have been misunderstood” and that the Tribunal had not rejected the Respondent’s application of 4 February but had provided for the Claimants to respond to it and for the Respondent then to have an opportunity to reply before the Tribunal considered the application.

1.11 The Claimants responded on 15 February 2011 and the Respondent replied on 18 February 2011, requesting the Tribunal to suspend the proceedings without further delay.

1.12 On 24 February 2011, the Respondent reiterated its concerns expressed on 7 February 2011 and replied to the Claimants’ correspondence of 25 February 2011.

1.13 Also on 24 February 2011, the Chair emailed the parties advising that the Tribunal had met the previous day to consider the Respondent’s applications inter alia to suspend the proceedings, and stated it would issue its decision as soon as possible.

1.14 The Tribunal issued its decision on 25 February 2011, rejecting the Respondent’s application to suspend the proceedings in order to renegotiate the investment agreements, and reserving its decision under Section 44 and the alternative request for suspension on this account, subject to the Respondent providing by 8 March a draft of its application under Section 44 and directing a further procedural meeting as soon as practicable thereafter.

1.15 The Chair’s clerk emailed the parties on the same day to ascertain their availability for the further procedural meeting indicated to follow the Respondent’s provision of its draft application
under Section 44 by 8 March 2011, and requested details of availability on 10, 11 or 15 March 2011. A reminder was sent to the parties on 2 March 2011.

1.16 Also on 2 March 2011, the Tribunal circulated its decisions on the Respondent’s consolidated Redfern Schedule dated 23 December 2010.

1.17 A further email chasing the parties about the procedural meeting was sent on 3 March 2011, to which the Claimants responded that they were available on 10 March 2011. The Chair’s clerk sent another email directed to the Respondent on 4 March 2011 stating that the hearing was potentially taking place on 10 March and asking for confirmation of the Respondent’s availability to attend the hearing. The Chair’s clerk confirmed later that day that the procedural meeting was intended to take place by telephone conference call.

1.18 The Respondent filed a challenge against all three members of the Tribunal on 4 March 2011, prior to the Chair’s clerk’s final email.

1.19 On the same day, the LCIA invited the Claimants to advise if they agreed to the challenge and the members of the Tribunal to advise whether they wished to withdraw.

1.20 On 5 March 2011, the Respondent made a submission in support of its challenge.

1.21 On 10 March 2011, each member of the Tribunal confirmed that they did not wish to withdraw, unless the challenge was supported by the Claimant or upheld by the LCIA Court.

1.22 On the same day, the Claimants advised that they did not agree with the challenge.

1.23 On 22 March 2011, the LCIA notified the parties that, pursuant to Article 10.4 of the Rules and paragraph D.3(b) of the Constitution of the LCIA Court, the LCIA Court had appointed a former Vice President of the LCIA Court to determine the challenge.

1.24 The former Vice President of the LCIA Court issued his Decision on the challenge on 5 April 2011.

2 Decision excerpt

“[...]

The Respondent’s Challenge of 4 March 2010

24. This is a formal challenge to all the three members of the Tribunal in each arbitration in accordance with Article 10.4 of the LCIA Rules [...]. The challenge asserts that the way in which the Tribunal has acted amounts to wilful and deliberate violation of Articles 10.2, 10.3 and 14.1 of the LCIA Rules. The challenge asserts that ‘the way in which the Chairman was acting in these proceedings (sic) always favouring position of the Claimants also amounts to breach of the norms of Articles 10.2, 10.3 and 14.1 of the LCIA Rules’. The Respondent states that the possibility that the co-arbitrators authorised the Chairman to decide matters on behalf of the whole Tribunal is not excluded; but even if it were so, the co-arbitrators are challenged for their ‘failure ... to interfere despite numerous and fully justified complaints of the Respondent’.
25. The relevant Articles relied on are the following:

‘10.2 If any arbitrator acts in deliberate violation of the Arbitration Agreement (including these Rules) or does not act fairly and impartially as between the parties or does not conduct or participate in the arbitration proceedings with reasonable diligence, avoiding unnecessary delay or expense, that arbitrator may be considered unfit in the opinion of the LCIA Court.

10.3 An arbitrator may also be challenged by any party if circumstances exist that give rise to justifiable doubts as to his impartiality and independence. A party may challenge an arbitrator it has nominated, or in whose appointment it has participated, only for reasons which it becomes aware after the appointment has been made.

14.1 The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal’s general duties at all times:

(i) To act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and

(ii) To adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute.

Such agreements shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties.’

26. Paragraphs 4 to 7 of the challenge statement set out the background matters relied on by the Respondent. These include the assertion that the guarantees, pursuant to which the claims are brought, were signed by the Respondent ‘by influence of misapprehension and fraud committed by the Claimants’ and are invalid, unenforceable and oppressive transactions. Moreover, at least 8 of the 12 Investment Agreements were not properly signed and some signatures were forged so that the proceedings concerned fraudulent actions of the Claimants. The Respondent, while impecunious, submitted its briefs on time, with minor exceptions, until on 2 March 2011 it became obvious that ‘the Tribunal is biased and deliberately precludes the Respondent from putting its case’.

27. Paragraphs 8 to 18 of the challenge set out the Respondent’s case in support of the assertion that the Tribunal failed to act with reasonable diligence with regard to the Respondent’s jurisdictional objections. The Respondent first notes that jurisdictional objections were raised in October 2009 and in May 2010 concerning the requirement for an Experts’ decision on the future of the Investment Agreements, before arbitrators may consider any disputes. Furthermore by a new Decree No. 843 issued in October 2009, the Government of the Russian Federation allowed only Russian companies to act as investors in such projects so requiring amendment of the Investment Agreement, which is provided for within the terms of the Agreement. The Respondent states the key question is whether the Claimants affirmed the Contracts in 2008 and were thus not allowed to terminate them in 2009, in which case the Tribunal has no jurisdiction to consider the case before the experts’ determination. Disclosure had revealed numerous documents supporting the contention that the Contracts were
affirmed during 2008 and even later in 2009. The Respondent’s jurisdictional objections were set out in briefs submitted in 16 October 2009, 2 March 2010 and repeated in a brief dated 17 May 2010. The Respondent’s brief of 17 May specifically requested that the jurisdiction issue be considered separately from other matters but the Tribunal declined without explanation ‘thus favouring the position of the Claimants’.

28. The Respondent states that it returned to the jurisdictional issues in 2011 when the Russian Government proposed further amendment of Decree No. 843, the effect of which would be that the governing law of contracts for the sale of [the subject matter of the investment agreements] should be Russian substantive law and that contracts concluded earlier would be construed as having no legal effect.

29. On 4 February 2011 the Respondent had moved for suspension of the proceedings on the ground that the matter would have to be submitted for the experts’ determination before the Tribunal would have jurisdiction. On 25 February 2011 the Tribunal rejected that motion ‘thus again favouring the position of the Claimants’. The Respondent’s objection filed in its first brief and subsequently repeated several times was rejected by the Tribunal without a separate hearing, as was requested by the Respondent, without any oral hearing and with an obviously erroneous explanation that it was submitted ‘far too late’. The Respondent characterises this as a ‘cynical breach of rules of Articles 10.2 and 10.3 of the LCIA Rules requiring the Tribunal to act fairly and impartially’.

30. Considering the above point, Article 10.3 does not require proof of failure to act fairly and impartially: it is sufficient that the challenging party establishes that circumstances exists that give rise to ‘justifiable doubts as to (his) impartiality or independence’. The important question is whether the facts and matters raised by the Respondent do give rise to ‘justifiable doubts’. While the Respondent does not cite case law, it may be noted that the application, which is made in relation to an arbitration the seat of which is in England and Wales and in which application is made and dealt with within that jurisdiction, must be subject to English law. As a matter of English law, justifiable doubts as to lack of impartiality (or a ‘real danger’ of bias) would be a ground of challenge in any tribunal; but it is clear that the test to be applied is not whether the complaining party entertains such ‘justifiable doubts’ but whether such doubts can be said to exist on an objective basis. Furthermore, the appropriate test, as generally accepted, is whether an impartial and informed by-stander would, in the circumstances relied upon, conclude that such justifiable doubts existed. The word ‘informed’ indicates that the by-stander is taken to know all the relevant facts, so as to appreciate the issues in relation to which the complaint is made.

31. The Respondent relies on paragraphs 35 and 36 of the Tribunal’s Decision of 25 February 2011 which are recited briefly in the application. The full paragraphs are as follows:

‘35. The Tribunal rejects renegotiation as a ground for ordering the suspension of these proceedings. The whole basis of the Claimants’ case is that the Investment Agreements were terminated in April 2009. If they are right, renegotiation is irrelevant; if they are wrong, their claims for Termination Costs will fail. In the Tribunal’s view, so far as these arbitrations are concerned the question of operating Clauses 11 and 10.3 does not arise.'
36. In addition this application is far too late: the only possible relevant change in Russian law that has actually occurred took place in October 2009.

32. The Tribunal’s Decision of 25 February 2011 summarises the Respondent’s application for stay on the ground of ‘renegotiation’, including the requirement for experts’ determination, and then summarises the Claimants’ Response and the Claimants’ Rebuttal. The Respondent does not suggest that the Tribunal’s summaries of the submissions put forward by each party are materially inaccurate or that the Tribunal has overlooked any significant point. There are two matters on which the Respondent bases the present complaint. First, the Tribunal is said to have erred in concluding that the application is ‘far too late’. The Respondent is at pains to point out that its challenges to the Tribunal’s jurisdiction were raised much earlier, being raised in the Respondent’s first brief in October 2009. There is no doubt that the jurisdictional challenge was before the Tribunal and would have to be decided at some point. The Tribunal could have addressed the issue under their powers under the LCIA Rules at any point. However, it is to be noted that the application made to the Tribunal on 4 February 2011 was not for the jurisdictional issue to be decided as such, but was an application for stay, made on the basis that the Respondent’s case on re-negotiation was correct and meant that the contract had to be re-negotiated. The application was thus for a suspension of the proceedings ‘to allow the parties to renegotiate the Investment Agreements’.

33. What the Tribunal did was to consider the merits of the jurisdictional issue in order to decide whether a stay was necessary. The Tribunal notes at paragraph 36 of its decision that the only possibly relevant change in Russian law took place in October 2009. If the Respondent was going to ask for the proceedings to be suspended to allow renegotiation, it could clearly have done so much earlier; and there does not appear to be any proper explanation as to why the Respondent chose to leave it until February 2011, only 3 months before the hearing, to apply for suspension for the purpose of renegotiation, particularly in the face of the Claimants’ contention that this was irrelevant anyway. The Tribunal decided that the renegotiation issue was irrelevant and, incidentally, observed that the application for stay was far too late. While not a necessary part of the decision, the observation was, in my view, entirely justified.

34. The second point is that the Tribunal is criticised for accepting or ‘favouring’ the position of the Claimants, when concluding that the question of renegotiation was irrelevant. The Tribunal observed that if, as the Claimants contend, the Investment Agreements were terminated, no question of renegotiation could then arise; and if the Claimants are wrong, the claims for termination costs fail in any event. It is not clear what criticism the Respondent advances as to this conclusion. It follows logically from the issue formulated by the parties.

35. The complaints set out in paragraph 18 of the challenge make the following points:

(1) The Respondent’s ‘objection’ was rejected without a separate hearing ‘which was requested by the Respondent’.

(2) The objection was rejected ‘without any oral hearing’.

(3) It was rejected ‘with an obviously erroneous explanation that it was submitted far too late’.
36. As regards (1) above, it is not entirely clear what is meant by a ‘separate hearing’ or when this was said to be requested. The applications and responses considered by the Tribunal are listed in the decision. It is notable that the complaints raised by the Respondent up to the submission of 24 February 2011 were not concerned with whether there should have been a ‘separate hearing’ but with the delay in deciding the motion of 4 February 2011. The submission of 24 February concludes by stating that any further delay would be treated ‘as an attempt to create an artificial delay for the purposes of exercise of our rights under Article 10.4 of the LCIA Rules’. The Tribunal responded to this in their email of 24 February which stated that the Tribunal would issue its decision on the application to suspend proceedings ‘as soon as practicable’. The Respondent did not at this point raise the question of a ‘separate hearing’ and, whether or not there had been any earlier requests, there could not be any justified complaint that the Tribunal then proceeded to render its decision on the following day.

37. As to (2) above, the same considerations apply: the Respondent’s applications are silent as to any suggestion of an oral hearing. Article 19.1 of the LCIA Rules provides:

‘Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal on the merits of the dispute, unless the parties have agreed in writing on documents-only arbitration’.

The Tribunal plainly has discretion as to whether any procedural application should be dealt with by way of oral hearing but in the absence of any clear request no criticism of the Tribunal can lie. With regard to (3) the Tribunal has set out the reasons by which it regarded the Respondent’s application as submitted ‘far too late’ and, in my view, this was a conclusion that the Tribunal was entitled to draw from the matters placed before it. In any event the Tribunal’s decision was expressed on two concurrent grounds both being conclusions the Tribunal was entitled to reach.

38. The heading to this section of the Respondent’s complaint is ‘Failure of the Tribunal to act with reasonable diligence with regard to jurisdictional objections raised by the Respondent’. The complaint is not that the Tribunal has failed to determine the jurisdictional objections: neither party had asked the Tribunal to do so. The real complaint is that the Tribunal has refused to suspend the proceedings in the light of these objections. All that the Tribunal has decided is that, in their view, the jurisdictional objections simply do not arise; and that, even if they did arise, the application for suspension was made far too late. In my view, both of these conclusions are justifiable on the facts before the Tribunal; and it was entirely within the powers of the Tribunal to reach them. Furthermore, I can see no ground upon which it can be said that the Tribunal has failed to act with reasonable diligence given that the application for suspension was indeed first made on 4 February. The exchange of submissions was effected to a very tight timetable and the Tribunal’s Decision given very soon after the conclusion of those submissions. In my view, no case of lack of diligence (Article 10.2) or lack of impartiality or independence (Article 10.3) is made out.

39. The second section of the challenge (paragraphs 19 to 28) is headed ‘Failure of the Tribunal to permit production of documents being vital for the Respondent’s case’. This complaint arises from the Respondent’s contention that the Investment Agreements were not signed by authorised representatives and were tainted with fraud. The Respondent’s lack of documents
necessary to prove these contentions is said to make the requests for disclosure particularly important. The Respondent accepts that the Claimant has disclosed a number of significant documents, including a letter from the Respondent company which the Respondent was advised by its criminology expert was most likely falsified. The Respondent had requested production of the original document, which the Claimants say it does not have, and the Tribunal had taken no measures to urge the Claimants to produce it.

40. On 23 December 2010 the Respondent submitted its Redfern Schedule which the Respondent asserts was ‘forgotten’ by both Claimants and the Tribunal, despite the terms of Procedural Order No. 4 of 18 October 2010 which provided for determination by the Tribunal of objections by 14 January 2010. The Claimants in fact filed their objections only on 16 February 2011, after the Respondent’s reminder, and on 2 March 2011 the Chairman in his decision rejected the vast majority of the Respondent’s requests for ‘lack of sufficient relevance of materiality’. In fact Procedural Order No. 4 required service of requests for documents on 10 December so that the Respondent’s request was 13 days late and, more significantly, meant that there would inevitably be a further delay over the Christmas and New Year period. The Claimants’ request for production was also late but was served one week before the Respondent’s schedule, on 16 December 2010. The Respondent was then late in responding to the Claimants’ request such that the Chairman on 26 January 2011 wrote to the parties in the following terms:

‘The Claimants requested production of documents in a Redfern Schedule dated 16 December 2010. So far as the Tribunal is aware, the Respondents have made no objections to these requests and time for making objections has expired. The Respondents have not, however, so far produced any of the documents requested. The Claimants complained about the Respondent’s failure to produce in their email of 23 January 2011. An Order was made that the Respondent should produce the documents requested unless the Respondent before 31 January 2011 showed cause why they should not produce the documents’.

41. The proceedings were then diverted by the Respondent’s application of 4 February, which gave rise to the Claimants’ email of 7 February, requesting the opportunity to respond to the application and further requesting an extension of two weeks to submit rebuttal witness statements. This led to the Chairman’s response by email of 7 February and the Respondent reaction to that email which has already been reviewed. However, on 8 February the Chairman sent an email dealing with a number of outstanding procedural matters, including disclosure issues, in directions including the following:

‘(1) …

(2) …

(3) The Claimants should serve their objections (if any) to the Respondent’s document request by 15 February 2011.’
(4) That the Tribunal will decide outstanding objections to the production of documents by 22 February (assuming this to be practicable).

If the Respondent does have any objections to the timetable set out in the numbered paragraphs above, please would it let the Tribunal know immediately.’

42. The Respondent did respond by email of 9 February in the following terms:

‘We agree with the timetable proposed by the Tribunal in four paragraphs. Meanwhile it concerns the documents and witness statements to which we have access. We reserve the right to submit the documents that we received from the Russian Investigation Authority as a result of criminal investigation of this international trickery.

The Respondent also reserves the right to defend itself by all possible legal means.’

43. On 22 February the Claimants sent their application to the Tribunal for extension of the deadline for rebuttal witness statements and also replying to the Respondent’s request for production of the original of the letter dated 25 July 2007. It is stated that while the Claimants are currently reviewing their files, it is unlikely that they have the original because they were not the recipient. On 24 February, having been no objection to the Claimants’ request to extend time for rebuttal witness statements, an extension was granted to 2 March.

44. The Tribunal, as it had promised, delivered its decision in respect of the Respondent’s consolidated Redfern Schedule served, taking into account the Claimants’ comments served on 16 February 2011. The Respondent observes that many of the requests were refused ‘for lack of sufficient relevance and materiality’. As regards the delay which had occurred, it is not unusual in any commercial arbitration for deadlines set by the Tribunal to become extended, with or without formal orders from the Tribunal. In this case, neither party complied with the Tribunal’s ordered dates and the Tribunal found itself dealing with disclosure on a timetable largely being set by the parties themselves. At the outset the Respondent was in greater delay than the Claimants but neither side raised particular complaint as regards the timetable which, in any event, was being influenced if not driven by other events culminating in the Respondent’s application of 4 February. It is significant that the Respondent agreed, or did not object, to the revised timetable set by the Chairman of 8 February. Thus the effective delay in deciding on production issues was from 22 February to 2 March. In the circumstances then obtaining, this cannot be regarded as significant, let alone a matter of serious criticism.

45. With regard to the Tribunal’s decision on the Respondent’s requests for disclosure, the Respondent complains that the decision rejected the vast majority of requests for ‘lack of sufficient relevance and materiality’. The Respondent, in somewhat emotive language, complains that the decision is wrong and that the Chairman consistently has ‘fully supported the claimants’ both in denying the Respondent’s requests and in upholding the Claimants’ requests. The Tribunal’s order states, in fact, that in a number of instances the Respondent must explain in what way the Claimants’ document production was inadequate and what more it seeks; and that ‘the respondent must identify with greater particularity the documents in question and explain to what issue or issues they are said to be relevant’.
46. The most serious complaint about the Tribunal’s disclosure orders is that the Tribunal or the Chairman had made decisions both on the Respondent’s applications and on the Claimants’ applications consistently in favour of the Claimants. This gives rise to the question whether such decisions could be said to indicate, to an impartial informed observer, a lack of impartiality or independence. In my view the fact that a Tribunal finds consistently in favour of one side cannot lead to any proper conclusion at all, without a detailed review of the relevant facts concerning each decision. Consistent findings in favour of one side or the other, without more, cannot support an allegation of impropriety of any sort.

47. The Respondent develops a separate point with regard to its application made on 4 February for suspension of the proceedings in order to apply for judicial assistance under Section 44 of the English Arbitration Act. The exchange of emails that followed this application has already been dealt with. But the Respondent now makes an additional point that on 25 February the Tribunal issued a decision that the application under Section 44 would be considered during an oral hearing in London to be held as soon as practicable after 8 March and that the date was later fixed for 10 March which, in the light of UK Visa requirements, would prevent any appearance by or on behalf of the Respondent. Further, the Respondent contends that in view of decisions of the Tribunal which consistently favoured the Claimant, including decisions that the documents regarded by the Respondent as most significant in disclosing the criminal nature of the claims as ‘irrelevant’, there was no chance that the Tribunal would allow the application under Section 44.

48. The contention that there was to be an oral hearing has already been touched on above. The Tribunal’s direction for a procedural hearing as soon as practicable after 8 March 2011 is contained in its decision dated 25 February 2011 on the Respondent’s Application dated 4 February. The direction itself does not use the word ‘oral’, nor do the emails from the Chairman’s clerk which were sent on a number of occasions from 25 February onwards. To the extent the word ‘hearing’ may have created an expectation that there would be a physical meeting in London, this was corrected by the email from the Chairman’s clerk of 4 March which states to all the parties that:

‘I understand that you have formed the impression that the procedural hearing is take place with the parties being present in person in London. In fact the procedural hearing that we have been trying to fix is intended to be, like all previous procedural hearings in this arbitration, attended by the parties by conference call. Please confirm whether you will be available for such a hearing on 10 March 2011.’

49. In an earlier email of 4 March, the Chairman’s clerk requested confirmation that both parties were available for a hearing on 10 March. There was no such confirmation from the Respondent which, in fact, submitted the present challenge on the same day. Thus, whatever impression the Respondent may have formed, it is incorrect to say either that an oral hearing was to be held or that it was fixed for 10 March 2011. Thus, the Respondent’s complaints as to their inability to be represented fall away. It is surprising that the Respondent, to whom all the relevant communications were copied, should base its case on such an inaccurate representation of the facts.
Finally, the Respondent comments on paragraph 22 of the Claimants’ Consolidated Reply dated 15 February, in which the Claimants submit that the factual issues could be answered without resort to direct testimony by the [regional companies]. The Respondent contends this to be an ‘outrageous approach’ given the Respondent’s position as to the significance of the [regional companies] in terms of the existence and performance of the Investment Agreements, the list of questions earlier formulated by the Claimants and the Redfern Schedule, all concerning [regional companies]. The Respondent contends that the Claimants’ position had been fully supported by the Chairman’s Order of 2 March 2011 on production of documents, in breach of Article 14.1 of the LCIA Rules. It may be noted that the Consolidated Reply was served in accordance with the directions given by the Chairman on 8 February, with which the Respondent took no issue. Those directions provided that:

‘Once the Claimants have responded to the Respondent’s application of 4 February, the Respondent will have an opportunity to reply before the Tribunal considers and decides the application.’

The Claimants’ Consolidated Reply was served on 15 February and the Respondent served its rebuttal submission on 18 February, including (inter alia at paragraph 12) the same accusations as are raised in paragraph 28 of the challenge. Following this there were further exchanges which have already been reviewed, leading to the decision issued by the Tribunal on 25 February. This decision included the direction for the Respondent to provide a draft of its application under s.44 of the Arbitration Act and the direction that a procedural hearing would be held as soon as practicable after 8 March. Paragraph 45 of the decision set out the matters to be considered at the hearing which included consideration of whether the proceedings should be suspended in order for the Respondent to seek judicial assistance to obtain further evidence. Thus, it is clear that the Tribunal had not reached any decision on the Respondent’s application for judicial assistance, which remained dependent on the Respondent providing a draft of its application and a procedural meeting being convened (by conference call). In the event neither of these things happened and the matter remains in abeyance. Separate from these issues, the Tribunal gave its decisions on the Respondent’s consolidated Redfern Schedule on 2 March 2011, but this did not affect the outstanding application under s.44.

Thus the matters raised by the Respondent in paragraph 28 of the challenge were then outstanding and are still outstanding. Whether or not the Tribunal’s separate decision on the Respondent’s Redfern Schedule can be regarded as material to the application under s.44, the Tribunal had made it clear that disclosure issues would be dealt with in accordance with the timetable which the Respondent complains had become over-extended. The LCIA Court cannot review the Tribunal’s decisions, whether on procedural or substantive matters. As regards the application under s.44 of the Arbitration Act and the linked application to suspend the proceedings, the Tribunal has expressly refrained from reaching any conclusion on that issue pending further steps to be taken by the Respondent. That issue too remains outstanding.

Procedural Decision

Having carried out an initial review of the substance of the challenges, I address the question set out above (paragraph 8), namely whether the challenge should be the subject of responses
or whether it is lacking in merit and such that it would be fair and appropriate in all the circumstances that it should be determined without response.

54. Having carried out such review I am clearly of the view that the challenge is lacking in merit and, further, that it would be fair and appropriate in all the circumstances that it should be determined without response. Accordingly on 1 April 2011 I wrote to the parties to inform them that I had come to the conclusion that I could decide the challenges without the provision of any further information or submissions and intended to proceed on the basis that the challenge proceedings were now closed.

55. I therefore now set out my conclusions and Decision in the following paragraphs

Conclusion

56. It is convenient to express my conclusions by reference to the conclusion set out in the challenges, where the Respondent requests, in strong and direct language, the removal of the whole Tribunal which is described as ‘biased and partial’ and ‘which does not conceal its sympathy with the Claimants’ [Counsel], maybe because the legal team of the Claimants is headed by […], a member of the Board of LCIA and does its best to prevent the Respondent from defending its case’.

57. These are serious matters which, apart from the accusation that the Tribunal is ‘biased and partial’ are not otherwise supported by or developed in the body of the submission. They must, however, be dealt with.

58. First, with regard to the involvement of [the Board member], his work as a practitioner in the field of international arbitration and as a member of the Board of the LCIA is a matter of public knowledge. The involvement of a Board member of the relevant arbitral institution in a commercial arbitration conducted under the rules of such institution should create no cause for concern. Indeed it would create concern if, by being a voluntary unremunerated member of the Board, [this Board member] (or any other Board member) was precluded from taking on arbitration work under the auspices of that institution. Anyone with knowledge of the international arbitration institutions should be well aware of the situation; and should also be well aware that the LCIA (in common with all other arbitral institutions) plays no part in any Decision of the Tribunal, whether procedural or substantive. However, this complaint is not concerned with [this Board member]’s conduct but with the conduct of the Tribunal. No facts are put forward to suggest that the involvement of [this Board member] has or might have had any influence on the Tribunal. In my view the challenge in this respect is entirely without substance or merit.

59. Secondly, it is alleged that the Tribunal does not conceal its sympathy with the Claimants’ [Counsel]. Again no additional facts are put forward. The assertion is presumably based on the lengthy catalogue of complaints already recited and reviewed which amount in substance to a complaint that the Tribunal has generally decided matters in favour of the Claimants rather than the Respondent. This could not properly be regarded as an indication of bias or partiality by an informed observer with knowledge of international arbitration practice. The detailed allegations supporting this summary have already been dealt with; and in my view no case of bias or partiality is made out in relation to the decisions given by the Tribunal.
The final paragraph of the Respondent’s conclusions appears to contain a threat that if the present Tribunal renders awards in favour of the Claimants ‘thus supporting their criminal activities punishable under Russian law this would constitute a separate criminal offence and the Respondent will do its best to bring it to publicity and to have the corresponding persons being prosecuted under Russian and English law’. This accusation appears to threaten the Tribunal both with the consequence of committing a criminal offence and with adverse publicity. It is relevant only to the extent that it could be seen as a ground for removal of the Tribunal. The Respondent has neither tried to conceal nor in any way to understate its accusations of criminality. The Tribunal was clearly aware of them; and when relevant to its decisions, the Tribunal has dealt with them. The allegation of criminality is, on the Respondent’s case, a serious issue in the arbitration which the Tribunal will ultimately have to decide. No conclusion can be reached for the purpose of this application. However, in my view, the threat contained in the last paragraph of the application, so far as it concerns this challenge, is no more than a restatement of the Respondent’s case which is yet to be considered by the Tribunal. It is irrelevant to the present challenge.

It is clear, both from the substance of the Respondent’s contentions and from the extreme language adopted, that the Respondent’s challenge is seriously intended and is to be taken seriously. Despite this, I find no substance whatever in the accusation, variously expressed, of partiality or lack of independence. Nor do I find any breach of Article 14 of the LCIA Rule [sic] either (i) in terms of the requirement to act fairly and impartially as between the parties and to give each a reasonable opportunity of putting its case and dealing with that of its opponent; or (ii) of avoiding unnecessary delay and providing a fair and efficient means for the resolution of the disputes.

The challenge under Article 10.2 of the LCIA Rules, by which the Tribunal is required (in addition to acting fairly and impartially) to conduct the arbitration proceedings ‘with reasonable diligence, avoiding unnecessary delay or expense’ needs to be considered separately. Having reviewed the conduct of the proceedings during the past approximately 6 months, and particularly during February 2011 and up to 4 March 2011, in my opinion no case is made out that the Tribunal has failed to act in accordance with Article 10.2; nor is any case made out that the Tribunal has failed to act in accordance with its general duty to avoid unnecessary delay or expense pursuant to Article 14.1 of the LCIA Rules. On the contrary, there are numerous instances in which the Tribunal has acted with commendable diligence in seeking to ensure that the parties themselves complied, so far as was achievable, with the timetables laid down and amended from time to time by the Tribunal.

Decision

2.1 It follows that these challenges fail on each and every ground advanced and are therefore dismissed.”