

## Cameroon sees off claim linked to tycoon's son



Yves Michel Fotso

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An ICSID tribunal has declined to hear a claim against Cameroon linked to the imprisoned son of one of the state's most powerful businessmen, after upholding jurisdictional objections based on the "abusively"-revived claimant company's nationality and lack of investment.

In a 102-page majority award issued on 22 June and published by ICSID on Friday, **Pierre Tercier**, as chair of the tribunal, and **Alain Pellet**, appointed by Cameroon, explained why they rejected jurisdiction over claims brought by Capital Financial Holdings Luxembourg SA (CFHL). The company is ultimately controlled by Yves-Michel Fotso, a Cameroonian serving life sentences for his role in various scandals while serving as director general of Cameroon Airlines.

Tercier and Pellet upheld all but one objection to jurisdiction raised by Cameroon. **Alexis Mourre**, appointed by the claimant, issued a dissenting opinion disagreeing with the majority's findings and stating that jurisdiction should have been upheld.

CFHL was ordered to bear its own share of the arbitration costs, including the costs of the tribunal and hearing, and to reimburse Cameroon for its share. The parties will each bear the costs of their legal representation: Jones Day for the claimant and Curtis Mallet-Prevost Colt & Mosle for the state.

Yves-Michel Fotso is the son of Victor Fotso, a billionaire Cameroonian businessman who started the Fotso group of commodity-importing companies in the 1980s. The giant group now operates in several west African countries and produces goods including matches in Liberia, batteries in Senegal, insecticides in Mali and green beans for export in Cameroon.

In the ICSID case begun two years ago, CFHL accused Cameroon of expropriating its shares in Commercial Bank Cameroon, which Fotso founded with his father in 1997 and later managed. Amid rumours of insolvency, the bank was placed into provisional administration by the central African bank regulator in 2009, though CFHL says it continued to be profitable.

In 2013, the company's shares were attached by Cameroon's finance ministry and the bank's capital reduced to zero, with no scope for CFHL to obtain more shares. CFHL says its uncompensated loss amounted to €105 million.

Cameroon says the regulator approved the taking of the shares so that the state could inject funds into the bank and embark on a restructuring to save it from insolvency. Such measures were needed because of mismanagement by Fotso and the mysterious "disappearance" of bank funds, the state alleges.

### **No foreign investor and an abuse of right**

Based on a hearing on jurisdiction alone, the majority of the tribunal held that CFHL did not meet the nationality requirements of the bilateral investment treaty between the Belgo-Luxembourg Economic Union and Cameroon, in particular the requirement that its "siège social" [seat] was in Luxembourg.

Experts for both sides agreed that this should be understood as the place where the company has its head office or main place of administration.

The majority said the record indicated that CFHL had initially been managed from Luxembourg but that for some years it had essentially been a dormant company with little, if any, activity or management.

The arbitrators applied Luxembourgish law to determine where the seat was located, considering the location of CFHL's sporadic board and shareholder meetings and the place where its corporate documents were filed. For much of the company's life, it found that the company did not have a seat in Luxembourg, including at the time of the alleged BIT breaches and the request for ICSID arbitration. Accordingly, it was not a foreign investor as required by Article 25 of the ICSID Convention.

The majority went on to uphold Cameroon's objection, closely linked to the nationality one, that CFHL had committed an "abuse of right" in attempting to mask the reality of its dormant state. Cameroon suggested that the company had engaged in a number of manoeuvres with this aim, after the dispute had arisen and even once the arbitration was under way.

The tribunal considered several past treaty awards that have sanctioned abusive behaviour before ruling that CFHL had sought to create the impression that it was seated in Luxembourg. Although it was uncontested that the company was set up more than 10 years before the dispute arose – and therefore not established for the purpose of bringing the claim – the majority held that it had become dormant very quickly and was revived by Fotso purely to fight the arbitration.

The majority noted that the company had no board members or board or shareholder meetings for more than three years, with new board members appointed only after the dispute had arisen. Although it accepted that CFHL made use of professional services companies to file accounts and tax returns, it said that none had been filed for seven years before the case started and CFHL finally made filings just a few days before the tribunal's first session.

### **The importance of "origin of funds"**

A further successful objection to jurisdiction raised by Cameroon was that CFHL had not made an investment that qualified for the protection of the BIT and the ICSID Convention – failing, in particular, to meet the objective requirements of economic contribution and risk.

The majority held that CFHL had not itself contributed to the acquisition of the vast majority of its shares in Commercial Bank Cameroon but had obtained them from Fotso, his family's companies or people closely related to him without proof of payment.

It agreed with Cameroon that loans CFHL had made to the bank – which the company said formed part of its investment – came from a holding company and other entities owned by Fotso for no consideration.

The assets of companies owned and run by Fotso were deliberately intended to confuse, it said.

Even though the importance of “origin of funds” has been ruled out in many investment cases, the majority said it cannot be disregarded when it comes to determining whether the claimant itself made the economic contribution at the heart of the investment. It also made a link between contribution and risk, suggesting that you cannot have one without the other.

At the outset of the award, the tribunal rejected Cameroon’s final objection to jurisdiction relating to its consent to ICSID arbitration. This was based on the language of the BIT, which requires mandatory diplomatic conciliation before any submission of a dispute to an ICSID tribunal.

This requirement was met when CFHL informed the diplomatic representative of Luxembourg in Cameroon of the dispute, the tribunal said.

### A rare dissent by Mourre

In his seven-page dissenting opinion, Mourre – a French arbitrator and president of the ICC International Court of Arbitration – disagreed with the majority’s findings and embarked on what **Luke Eric Peterson’s** *Investment Arbitration Reporter* has called “a more formal inquiry on nationality and investment”.

Mourre, who is not known for issuing dissenting opinions, said the majority erred in the application of Luxembourgish law, a correct application of which would have led to the conclusion that CFHL qualified as a foreign investor under the BIT. His analysis was based on the premise that the *siège social* equates to the *siège statutaire*, which is similar to the place of incorporation.

Mourre said that CFHL had always maintained physical offices in Luxembourg but that its administration had been in the hands of other companies, making delays in filing annual accounts or complying with corporate formalities irrelevant.

He said that “origin of funds” should not be considered at all and that, by acquiring shares and providing loans to the bank, CFHL had made investments that qualified for protection. He disputed that there had been no consideration for these transactions, stating that there was evidence of payments on record.

Mourre also said the majority had ignored the distinct legal personalities of the entities involved in the investment.

### Novel or troubling?

**Nadia Darwazeh**, partner at Curtis in Paris, calls the award “a clear-cut victory” for Cameroon. “The tribunal upheld the state’s jurisdictional objections and recognised loud and clear that the claimant committed an abuse of right in bringing the arbitration,” she says. “This case should simply never have been brought before ICSID.”

**Gabriela Alvarez-Avila**, partner at Curtis in Mexico City, says the tribunal’s analysis of the elements of contribution and risk required in a protected investment is “particularly welcome”, since it puts the focus on whether the entity has contributed funds “in reality”. This is “a very novel approach,” she says.

**Gaston Kenfack Doujani**, a leading arbitrator, director of legislation at Cameroon’s ministry of justice and the president of UNCITRAL, was one of two representatives of the state in the arbitration, along with **Mougnal Sidi**, the head of the legal department at the Cameroonian Ministry of Finance. Kenfack declined to comment on the outcome.

As for counsel for the claimant, **Michael Bühler** of Jones Day in Paris calls the decision “troubling and surprising”.

“The majority’s approach consisted of investigating the origin of the investment while ignoring the legal personality of the investor, which clearly puts in question legal certainty for investors and departs from a large majority of investment treaty cases,” he says.

Bühler notes the recent ICSID decision in *Orascom v Algeria*, which he says “followed the exact opposite approach when analysing the issue of nationality.” In an award issued in late May, a tribunal chaired by **Gabrielle Kaufmann-Kohler** and including **Albert Jan van den Berg** and **Brigitte Stern** rejected Algeria’s argument that Orascom did not have a real seat in Luxembourg and found that the elements for a qualifying investment were present.

He also says the ICSID award is “a clear denial of justice, since CFHL cannot obtain any independent justice before the courts of Cameroon, a fact that could not be ignored by the majority”.

It is not the first time an ICSID tribunal led by Tercier, a Swiss arbitrator who has also been chair of the ICC International Court of Arbitration, has rejected a claim against a West African state on jurisdictional grounds.

In late 2015, he, **Horacio Grigera Naón** and **Laurent Lévy** threw out a US\$91 million claim against Guinea after holding that a French-incorporated real estate company that had leased a commercial and shopping complex in the capital, Conakry, was not a foreign investor for the purpose of Guinea’s 1987 investment code. The tribunal also said the lease did not qualify as an investment.

A lawyer for the state told *GAR* at the time that the decision was unlikely to cause “a tempest” because it relied on the definitions in the code. The decision in favour of Cameroon could be more influential.

### **Fotso’s life sentences**

Yves Michel Fotso is well-known in Cameroon, not just because of his powerful father. In the early 2000s, President Paul Biya appointed him as director general of the state’s struggling national airline, known as Camair, just a few years before it was put into liquidation by the government in 2005. Since then, Fotso has been investigated for his part in scandals associated with the management of Camair as part of a state anti-corruption drive.

In 2012, Fotso was sentenced to 25 years in prison after being found guilty of misappropriating €25 million intended for the purchase of a presidential plane. In 2016, he received a further life sentence for embezzling an alleged €49 million from Camair and making fraudulent withdrawals from a Commercial Bank of Cameroon account on its behalf.

Fotso, who has been in prison in Cameroon since 2010, has always declared his innocence. CFHL says that he has been targeted by Cameroon and that his due process rights were ignored by the state’s Special Criminal Tribunal, which has been criticised by human rights groups for its handling of the prosecutions of former politicians. The United Nations’ working group on arbitrary detention is currently reviewing Fotso’s case, CFHL says.

In the award, the majority of the tribunal said the difficulties suffered by Fotso personally and his family were “background” matters that did not fall within its competence to rule upon. It could consider only the state’s measures in relation to Commercial Bank Cameroon, it said.

### **A new West African centre?**

The award comes as Cameroon’s capital, Yaoundé, takes on a new role as the planned African headquarters of UNCITRAL – announced during a recent conference to mark the international trade law commission’s 50th anniversary, which was spearheaded by Kenack as its president.

Cameroon has been on the receiving end of three other ICSID claims in the past, including the notorious claim brought by German steel company Klöckner in 1981, which led to two annulment proceedings and questioning of the scope of annulment committees’ power to review awards under the ICSID Convention.

In the past 20 years, claims against the state by French cement company Lafarge and US oil company RSM – which is owned by a controversial Colorado billionaire known for bringing claims against developing states – were both withdrawn following settlement agreements.

*Capitale Financial Holdings Luxembourg SA v République du Cameroun (ICSID Case No. ARB/15/18)*

## **Arbitral tribunal**

- **Pierre Tercier** (Switzerland) (President)
- **Alexis Mourre** (France) (appointed by claimant)
- **Alain Pellet** (France) (appointed by state)

## **Tribunal secretary**

- **Benjamin Garel**

## **Counsel to claimant**

- **Jones Day**

Partner **Michael Bühler**, of counsel **Pierre Heitzmann** and **Nicole Dolenz**, counsel **Claire Habibi** and associate **Ileana Smeureanu** in Paris

## **Counsel to Cameroon**

- Curtis Mallet-Prevost Colt Mosle

Partners **Peter Wolrich** and **Nadia Darwazeh** in Paris and **Gabriela Alvarez-Avila** in Mexico City; counsel **Virginie Liautaud** and associates **Marie-Odile Trouvé** and **Jeremy Bocock** in Paris

- Ministry of Justice

**Gaston Kenfack Douajni**, director of legislation and justice minister **Laurent Ezzo** in Yaoundé

- Ministry of Finance

**Mougnal Sidi**, head of the ministry's legal department in Yaoundé