



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London  
International Arbitration Case Law**

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**Award Name and Date:** Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/20) – Award – 03 April 2017

**Case Report by:** Silke Sofía Miranda Apel\*\*, Editor Ignacio Torterola\*\*\*

**Summary:** In a decision rendered on April 3, 2017, the International Centre for Settlement of Investment Disputes (ICSID) addressed the issue on whether the denunciation of the ICSID Convention by Venezuela affected the existence of consent for arbitration under the BIT, as well as whether a trustee is sufficiently entitled to be the Claimant in the case.

**Main Issues:** Jurisdiction and Competence of the arbitral tribunal and burden of proof in the jurisdictional stage. Denunciation of the ICSID Convention and its effects on jurisdiction *ratione voluntatis*. Jurisdiction *ratione personae*, a trustee as the Claimant.

**Tribunal:** Mr. Christer Söderlund (President), Prof. George Bermann (Arbitrator) and Ms. Loretta Malintoppi (Arbitrator)

**Claimant's Counsel:** Mr. Pedro J. Martinez-Fraga, Mr. C. Ryan Reetz, Mr. Giovanni Angles and Ms. Emma Lindsay (Bryan Cave LLP)

**Respondent's Counsel:** Mr. Osvaldo César Guglielmino, Mr. Diego Brian Gosis (Guglielmino & Asociados) and Dr. Reinaldo Enrique Muñoz Pedroza (Deputy Prosecutor of Venezuela).

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\*\* Silke Sofía Miranda Apel is a final year law student in Universidad Francisco Marroquín, Guatemala. She also is a semi-finalist in the 4th International Investment Arbitration Moot of the American University Washington College of Law, that took place in Colombia. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Ms Miranda can be contacted at [smiranda@ufm.edu](mailto:smiranda@ufm.edu)

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## **Digest:**

### **1. Relevant Facts**

The Claimant to the present arbitration, Blue Bank, engages in international banking business, including the administration and management of trust assets. Blue Bank, based on the Trust Deed, was appointed trustee of the Qatar Trust (a trust under the laws of Barbados) for administering and managing the trust's assets. Among those assets figure shareholdings in two BVI Companies which are indirect shareholders in two Venezuelan Companies, ITC and Hemesa.

Under the Trust Deed, Blue Bank is the trustee of Qatar Trust and the beneficiary is the company Hampton, which is also the "Protector" of the Trust Deed, jointly with another company, Waterstone. According to the Claimant, Venezuela has breached the BIT protections by frustrating the business of Venezuelan companies and destroying its valuable rights.

### **2. Procedural History**

On June 25, 2012, Blue Bank International & Trust Ltd. ("Claimant" or "Blue Bank") filed a request for Arbitration before the International Center for Settlement of Investment Disputes ("ICSID"), against the Republic of Venezuela ("Respondent"), alleging expropriation and other violations of the obligations under the Agreement between Barbados and Venezuela for the Promotion and Protection of Investments ("BIT"), regarding Claimant's tourism and hospitality business. The Request was dated 22 June 2012 and it was not registered until August 7, 2012 by the Secretary-General of ICSID.

After the constitution of the Tribunal, Respondent requested the Tribunal to suspend the proceedings on the merits and to determine the Tribunal's jurisdiction as a preliminary matter. The request for bifurcation and suspension of the proceeding on the merits was granted by the Tribunal on January 13, 2015.

### **3. Legal Issues Discussed in the Award**

#### *3.1 Burden of Proof in the Jurisdictional Phase*

##### **Claimant's position**

Blue Bank claims that in the jurisdictional phase it does not bear the burden of proving that the prerequisites for jurisdiction are met. It suffices that the claimant sets forth a *prima facie* case of jurisdiction under the relevant treaty. Once that is established, the burden shifts to the respondent to prove that there is no jurisdiction (¶59).

##### **Respondent's position**

On the other hand, the Respondent takes the view that, in accordance with the principle "*actori incumbi probatio*", the person invoking the jurisdiction of an international court or tribunal must demonstrate the requirements enabling such jurisdiction to be exercised are met (¶63).

## **Tribunal Analysis**

The Tribunal distinguished between facts that are dispositive for purposes of jurisdiction, that must be proven at the jurisdictional stage, and facts that are relevant to the merits of the Claimant's claims, that must not be proved at this stage. Therefore, the Claimant bears the burden of proving the facts required to establish jurisdiction (¶¶ 66, 73).

### *3.2 Has the Respondent consented to Arbitration (Jurisdiction Ratione Voluntatis)?*

#### **Respondent's position**

The Respondent objects to the jurisdiction of ICSID and to the competence of the Tribunal because the Request for Arbitration was submitted at a time when Venezuela had already denounced the ICSID Convention. Besides, even assuming that the Respondent's consent would have remained in effect six months after the date of denunciation under Article 71 of the Convention, that period had elapsed by the time the Request was registered (¶ 64).

Venezuela argues that, once a notice of denunciation has been given, consent can no longer be perfected through acceptance of an offer, since the offer has become ineffective (¶ 79). Further, Venezuela contends that this opinion does not deprive the six-month period provided for in Article 71 of its *effet utile*, because that period applies to other obligations under the Convention (¶ 80).

The Respondent also explains that the six-month period after the denunciation ended on July 24, 2012. On June 25, 2012, the Claimant submitted its Request to ICSID, but the Request was not registered until August 7, 2012, proceedings having thus been instituted after the six-month period (¶ 84). Venezuela consequently alleges that the critical date for determining the fulfilment of jurisdictional requirements is the date of commencement of proceedings, therefore the date of the registration of the request (¶ 85).

#### **Claimant's position**

The Claimant's position is that Venezuela did not and cannot unilaterally withdraw its consent to arbitration under the BIT, only by denouncing the ICSID Convention and that nothing in the Treaty or the Convention provides that the denunciation affects the Respondent's consent and obligation to arbitrate according to the Treaty's terms. The Claimant also argues that it consented to arbitrate its dispute with Venezuela upon submitting its Request on 22 June 2012. At that time, Venezuela's consent to arbitrate was still in effect because Venezuela was notified of the Request on July 6, 2012, before the six-month period (¶ 89).

The Claimant also claims that Article 72 of the ICSID Convention permits an investor to accept a host State's unilateral offer for arbitration after a denunciation. According to Blue Bank, Article 72 reinforces the unilateral offer of ICSID arbitration given by Venezuela under the BIT. (¶ 107)

## **Tribunal Analysis**

The Tribunal concluded that the Respondent's offer to arbitrate contained in Article 8 of the BIT was still in effect, because the BIT itself remained in force. It also explained that:

“Under the ICSID Convention, it is necessary to distinguish the date of institution of an arbitration from the “date of consent”. The former event is governed by ICSID Institution Rule 6(2), according to which “[a] proceeding [...] shall be deemed to have been instituted on the date of the registration of the request.” As the tribunal in *Venoklim v. Venezuela* found, the date of registration depends only on the ICSID Secretariat and not on a claimant’s procedural conduct, and a claimant should not be prejudiced in its filing of a request of arbitration for any delays that may accrue in connection with the registration.” (¶ 115)

The Tribunal also found that the period of six months under Article 71 is mandatory, for a denunciation of the ICSID Convention to take effect. Therefore, the Claimant did file its Request for Arbitration before the expiry of the six-month period, during which Venezuela was still a Party to the Convention (¶ 120).

### *3.3 Does the Tribunal have Jurisdiction Ratione Personae under the Treaty?*

#### **Respondent’s position**

The Respondent’s position is that the Claimant does not qualify as an investor, because the shares in the BVI Companies belong to the Qatar Trust and not to Blue Bank. In the Respondent’s view, Blue Bank is the trustee of a trust created for the sole purpose of affording protection illegitimately to persons who would not otherwise be protected under the ICSID Convention and the BIT (¶ 122). According to the BIT, the assets making up the investment must be invested by the investor. In this case, the assets invested by Blue Bank belong to the trust and not to the Claimant.

The Respondent also claims that Qatar Trust does not have legal personality and it is not a national of Barbados, therefore, it cannot be afforded protection under the BIT (¶ 124). Moreover, even if the corporate structure provided by the Claimant is correct, that would not justify the tribunal’s jurisdiction either. It would only show that Venezuelan nationals or a Qatari sovereign fund appear to be hiding behind the trust dominating the Claimant (¶ 125).

#### **Claimant’s position**

On the contrary, the Claimants position is that Blue Bank is a protected investor under the Treaty and the ICSID Convention. Blue Bank is a corporation and the BIT has no restriction as to the nationality of a protected investor’s shareholders for the purposes of determining that company’s nationality. Blue Bank also states that it fulfils all the requirements necessary to be considered a national of Barbados (¶ 129).

The Claimant also argues that Investor-State tribunals have recognized that ownership of the investment is not limited to beneficial ownership, and they have accepted that claims may be brought by the trustees on behalf of a trust (¶ 132). According to Barbados Law, Blue Bank, as a trustee, is the legal owner of the trust property.

#### **Tribunal Analysis**

The Tribunal found that Blue Bank, as a trustee, does not own the assets, did not invest them for its own account and cannot ground jurisdiction on any investment made by it as required in the BIT (¶ 172). The Tribunal first pointed out that all the transactions, which constituted the

investment, took place before the Claimant was appointed as a trustee of the Qatar trust and were performed by the trustee at the time, Ansbacher (Bahamas). Later, the Tribunal concluded that Blue Bank is not the owner of the assets but simply manages and administers them on behalf of the trust. Therefore, according to the Trust Deed, Hampton is the “person” that enjoys ultimate control over the trust assets and that will enjoy or suffer the fortunes of the trust assets, not Blue Bank (¶ 170).

The Tribunal also analysed Blue Bank’s performance of its functions as a trustee and concluded that Hampton essentially has full control over Blue Bank’s management, according to the Trust Deed clauses (¶ 197). Regarding this issue of control, the President of the Tribunal differs as to the role that control over the trust plays and considers it has no relevance on the determination of jurisdiction under the BIT (¶ 198).

Lastly, the Tribunal also approached the characterization of the Qatar Trust as a beneficiary or a purpose trust and concluded that it is a beneficiary trust. The Qatar Trust was created for the benefit of a person, Hampton, which is both the Eligible Person and the Protector of the Qatar Trust, therefore it cannot be a purpose trust. (¶ 193). Therefore, the Tribunal lacks jurisdiction to understand in the case.

#### **4. Costs**

In light of the Tribunal’s finding that the Claimant does not prevail on the preliminary question of jurisdiction, it determined that the Claimant must bear in full its legal fees and expenses, the arbitration costs as well as the Respondent’s legal fees and expenses, with the arbitration costs amounting to a total of USD 792,902.24, and the Respondent’s legal fees and expenses to a total of USD 1,709,295.00.