



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:** Fábrica de Vidrios Los Andes, C.A. & Owens-Illinois de Venezuela, C.A. v Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/21) – Award – 13 November 2017

**Case Report by:** María Solana Beserman Balco\*\*, Editor Diego Luis Alonso Massa\*\*\*

**Summary:** Claimants brought an action for relief against Venezuela pursuant to the Netherlands-Venezuela BIT ('BIT') alleging that Venezuela breached, *inter alia*, fair and equitable treatment, full protection and security, most-favoured nation and expropriation protections under the BIT in relation to their investment in the two largest glass container production plants in Venezuela. Respondent objected to the jurisdiction of the Tribunal based on its denunciation of the ICSID Convention and termination of the BIT.

**Main Issues:** Effects of Venezuela's denunciation of the ICSID Convention over its consent to arbitration in Article 9 (1) of the BIT; interpretation of Articles 71 and 72 of the ICSID Convention.

**Tribunal:** Professor Hi-Taek Shin (President), The Honorable L. Yves Fortier, C.C., Q.C. (Arbitrator) and Professor Zachary Douglas, Q.C. (Arbitrator)

**Claimant's Counsel:** Mr. Robert Volterra, Mr. Giorgio Mandelli, Ms. Suzanne Spears, Mr. Álvaro Nistal, Ms. Jessica Pineda, Ms. Zuzana Morháčová and Mr. Anass El Mouden (Volterra Fietta, London) and Mr. José Antonio Muci Borjas (Escritorio Muci-Abraham & Asociados, Caracas).

**Respondent's Counsel:** Dr. Reinaldo Enrique Muñoz Pedroza (Procurador General de la República, Caracas), Mr. Osvaldo César Guglielmino, Mr. Pablo Parrilla, Mr. Guillermo Moro, Ms. Verónica Lavista, Ms. Mariana Lozza, Mr. Patricio Grané Riera, Mr. Nicolás Bianchi, Mr. Alejandro Vulejser and Mr. Nicolás Caffo (Guglielmino & Asociados, Buenos Aires) and Mr. Diego Brian Gosis (Florida).

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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. Beserman can be contacted at [solana.beserman@oxfordalumni.org](mailto:solana.beserman@oxfordalumni.org).

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## Digest:

### 1. Relevant Facts

Fábrica de Vidrios Los Andes, C.A. ('Favianca') and Owen-Illinois de Venezuela, C.A. ('OldV', and together the 'Claimants') are companies which were incorporated under the Laws of Venezuela between 1956 and 1968 but are controlled directly or indirectly by OIEG, a legal entity constituted under the laws of the Kingdom of the Netherlands. Respondent is the Bolivarian Republic of Venezuela ('Venezuela' or 'Respondent') (¶¶ 2-4 and 124). The underlying dispute arose out of Claimants' ownership and management of the two largest glass container production and distribution businesses in Venezuela (¶ 125).

Between 2002 and 2003, Venezuela adopted an Expropriation Law and established a currency exchange control system, which required governmental approval for individuals and companies to complete foreign currency transactions (¶¶ 129 and 134). In October 2010 Respondent passed an Expropriation Decree concerning Claimants' investments in Venezuela and immediately seized control of all movements in and out of the plants. Soon after, the local courts granted Venezuela the occupation, possession and use of Claimants' properties and Venezuela established a State Company ('Venvidrio') to take over management of its administrative boards (¶¶ 138-140, 150 and 156). Claimants refused to participate in any court or administrative proceedings regarding the expropriation and compensation negotiations and argued that fair compensation should be determined based on the BIT. Irrespective of that, Respondent initiated court proceedings, which granted its request for expropriation and were, at the time this award was rendered, pending recourse (¶ 159, 161 and 164). During 2011 the Parties held four meetings over compensation but reached no agreement (¶¶ 165-167).

Claimants' majority shareholder, OIEG, launched a parallel arbitration against Venezuela over mostly the same substantive matters at issue in the present proceedings and was awarded damages (¶¶ 8-9). Claimants noted that the OIEG Award did not cover 100% of Claimants' businesses expropriated in Venezuela and that any recoveries payable by Respondent under the two arbitrations shall be set off (¶ 172).

On 30 April 2008 Respondent sent to the Netherlands a notice of termination of the BIT. On 24 January 2012 Venezuela denounced the ICSID Convention (¶¶ 173 and 176).

On 20 July 2012 Claimants brought an action for relief against Venezuela pursuant to the Netherlands-Venezuela BIT alleging Venezuela breached, *inter alia*, fair and equitable treatment, full protection and security, most-favoured nation and expropriation protections under the aforementioned BIT (¶¶ 7, 10 and 12).

## 2. Procedural History

Claimants filed a Request for Arbitration on 20 July 2012, which was registered by ICSID on 10 August 2012 (¶¶ 12-13). Claimants appointed The Honorable L. Yves Fortier, Q.C., Respondent appointed Mr. Alexis Mourre and the Centre appointed Professor Hi-Taek Shin. The Tribunal was constituted on 14 February 2013 (¶¶ 14, 16 and 21-22). On 15 July 2013 Claimants filed a Memorial on the Merits (¶ 25). On 16 August 2013 Respondent filed Preliminary Objections to Jurisdiction (¶ 26). Then on 20 December 2013 it filed its Counter-Memorial on the Merits (¶ 29). The Parties later submitted Replies and Rejoinders (¶¶ 30-34). Respondent proposed the disqualification of Mr. Mourre, who resigned and was replaced by Professor Zachary Douglas Q.C. (¶¶ 48, 55 and 59). On four separate occasions, Respondent challenged Mr. Fortier. All challenges were dismissed (¶¶ 48, 55, 73, 76, 98, 101, 108 and 118). On 21 September 2015 the Tribunal invited Respondent to address the significance of the Parallel Arbitration Award over this case (¶ 65). A hearing on jurisdiction, merits and quantum took place on 4-8 April 2016 (¶ 90) and the Parties submitted simultaneous post-hearing briefs on 3 June 2016 (¶ 93). On 8 July 2016 the Parties filed submissions on costs (¶ 95) and they later filed new statements of costs related to the third and fourth proposals of disqualification of Mr. Fortier. The Tribunal declared the proceeding closed on 1 August 2017 (¶ 121). On 22 August 2017 it refused Respondent's request to reopen the proceedings to introduce new documents and indicated it would furnish its reasons in the Award (¶ 122).

## 3. Positions of the Parties

### 3.1 Respondent's Position

Respondent argued that the Tribunal lacked jurisdiction because there was no “*mutual consent*” by the Parties to submit the dispute to ICSID in light of Venezuela's denunciation of the ICSID Convention and because such denunciation rendered ineffective Article 9 of the BIT. Additionally, Respondent argued the investments made by Claimants after the termination of the BIT were outside the scope of its jurisdiction (¶ 178).

#### 3.1.1 The Tribunal's jurisdiction under the ICSID Convention

Respondent submitted that jurisdiction of ICSID depends upon the existence of “*mutual consent*” between the Host State and the investor. It construed that under Article 72 of the ICSID Convention such “*mutual consent*” must be given before the denunciation. Given that Respondent had already withdrawn from the Convention by the time Claimants consented to the jurisdiction of ICSID on 20 July 2012, it concluded the Tribunal lacked jurisdiction (¶¶ 185-186).

##### 3.1.1.1 Scope of application of Articles 71 and 72

Respondent said that Article 72 deals with rights and obligations arising out of “*mutual consent*” and applies to consent performed until the date of receipt of the notice of denunciation. Whereas Article 71 regulates the effects of the denunciation on other rights and obligations not arising out of consent and produces its effects six months after the date of receipt of this notice. Respondent construed that the six months' period of Article 71 does not apply to the rights and obligations arising out of Venezuela's consent to ICSID (¶¶ 188-192 and 194). Respondent added this interpretation aligns with Article 72 drafting history in that

such provision was intended to deal with the effects of the denunciation of the Convention on “*mutual consent*” to arbitration already given (¶ 201).

### 3.1.2 *The Tribunal’s Jurisdiction under the BIT*

Respondent contended that because of the wording of Article 9 (1) of the BIT, Venezuela’s consent to arbitrate was expressly limited to ICSID arbitration: the States agreed to arbitration “*under the Convention*” (¶¶ 206-207). Therefore, it explained that when Venezuela denounced the ICSID Convention, consent to ICSID arbitration under Article 9 of the BIT followed suit (¶ 213). Additionally, it explained that its position is compatible with the principle of ‘*pacta sunt servanda*’: Venezuela was fully committed to meeting its obligations under the BIT and the ICSID Convention, provided they existed (¶ 218).

### 3.2 *Claimants’ Position*

Claimants argued that the Tribunal had jurisdiction over the dispute because under Article 71 of the ICSID Convention, Venezuela’s denunciation took effect six months after receipt of the notice of withdrawal. They further stated that consent under the BIT was “*unconditional*” and could not be limited by ICSID’s denunciation. Lastly, they argued their investments pre-dated the BIT’s termination date and were covered by Article 14 (3) of the BIT (¶ 179).

#### 3.2.1 *The Tribunal’s jurisdiction under the ICSID Convention*

Claimants submitted that Articles 71 and 72 of the ICSID Convention establish that a State’s consent to ICSID arbitration survives for six months from the notice of denunciation (¶ 219). Additionally, in their Post Hearing Brief, Claimants stated that since they had notified Respondent of their intention to arbitrate under the BIT in 2011, they consented to ICSID jurisdiction back then, i.e., prior to Respondent’s denunciation (¶ 220).

##### 3.2.1.1 *Scope of application of Articles 71 and 72*

In Claimants’ view, Article 71 provides that all consequences of denunciation of the ICSID Convention take effect six months after receipt of such denunciation (¶ 221). Claimants further construed that Article 72 does not regulate when consent can be perfected nor does it require “*mutual consent*”; rather it relates to a “*singular consent*” to ICSID arbitration given by the denouncing State (¶ 226). They added that scholar interpretation of Article 72 drafting history confirms that “*singular consent*” of the denouncing State is what’s relevant consent under Article 72 (¶ 234).

##### 3.2.2 *The Tribunal’s Jurisdiction under the BIT*

Claimants argued that Articles 9 (1) and 9 (4) of the BIT provide for “*unconditional*” consent to ICSID jurisdiction and that such consent remained in force until 2023, i.e., fifteen years after the termination of the BIT. They also stated that the term “*under*” in Article 9 (1) of the BIT meant in accordance with the ICSID Convention and not dominance or control. Accordingly, they concluded that withdrawal from ICSID cannot limit nor quantify “*unconditional*” consent given in the BIT and that other treaties cannot serve as interpretative guidelines in the construction of the BIT (¶¶ 235, 238 and 240).

#### 4. Tribunal's analysis

The Tribunal established as facts that Venezuela denounced ICSID on 24 January 2012 and that according to Article 71 of the ICSID Convention such denunciation took effect six months after on 25 July 2012. It also dismissed Claimants Post Hearing Brief argument as to the 2011 consent and established that Claimants consented to ICSID jurisdiction on 20 July 2012. Finally, it valued that the core provisions relevant to the Tribunal's jurisdiction in these proceeding are Article 9 of the BIT and Articles 71 and 72 of the ICSID Convention (¶¶ 250-253).

##### 4.1 Article 9 of the BIT

The Tribunal found it manifest from the express terms of Article 9 that Respondent's consent to ICSID arbitration was "*unconditional*" (¶ 257). However, the Tribunal concluded that term "*under*" in Article 9 (1) of the BIT did not create a relation of subordination between the BIT and the ICSID Convention (¶ 262).

As to what effect did Venezuela's denunciation of the ICSID Convention have on Venezuela's consent to ICSID arbitration in the BIT, the Tribunal noted that Parties to a BIT cannot by that treaty amend rights and obligations arising out of a multilateral treaty like the ICSID Convention and that there can be no incorporation by reference when it comes to a multilateral treaty. The Tribunal further explained that consent to ICSID arbitration in the BIT was conditional upon actions taken by Venezuela as a Contracting State to the ICSID Convention. Therefore, ICSID arbitration is only available when both the conditions for access in the BIT and in the ICSID Convention are met (¶¶ 258-261).

##### 4.2 Articles 71 and 72 of the ICSID Convention

The Tribunal stated that Article 71 is addressed to Venezuela as a Contracting State to the ICSID Convention whereas Article 72 is addressed to it as a Party or potential Party to ICSID arbitration (¶ 269).

Additionally, the Tribunal noticed that the Parties to this arbitration disagree over the meaning of the phrase '*arising out of consent given by one of them*' found in Article 72 (¶ 272). Regarding its true meaning, it disagreed with Claimants argument over "*singular consent*" of one Party for two reasons: first, because it would deprive of any utility the words '*agencies or of any national of that State*', and second because rights and obligations under the ICSID Convention can only arise when there exists an arbitration agreement, i.e., with perfected or "*mutual consent*". The Tribunal remembered that jurisdiction in Article 25 is also that of perfected consent (¶¶ 272-277). Therefore, the Tribunal concluded that the phrase '*given by one of them*' refers to either the denouncing Contracting State, its constituent subdivisions or agencies or a national of that State (¶ 279) and that Article 72 is directed to a Contracting State and its nationals to affirm that such Contracting State and its nationals will continue to be bound by arbitration agreements entered prior to the denunciation (¶ 281).

The Tribunal explained that if the denouncing State gave its "*singular consent*" to ICSID before the notice of denunciation and the investor did not accept it prior to the notice, then the Centre will not have jurisdiction (¶ 295).

#### 4.3 Other decisions

The Tribunal also referred to the meaning of perfected or “*mutual consent*” in the *Tenaris*, *Venoklim* and *Blue Bank* cases and stated that it disagreed with Mr. Söderlund’s argument that the offer-acceptance model does not apply to ICSID arbitration (¶¶ 297-301).

#### 4.4 Conclusions

The Tribunal found that it did not have jurisdiction over this case and thus considered it unnecessary to analyse Respondent’s objection over investments made by Claimants after the termination of the BIT (¶ 305).

### 5. Costs

The Tribunal decided that each Party should bear its own legal fees and expenses and that the costs of the arbitration –fees and expenses of the Tribunal, ICSID’s administrative fee and direct expenses– should be borne entirely by Claimants (¶¶ 320-321).