School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

Academic Directors: Ignacio Torterola
*Loukas Mistelis**

SAINT-GOBAIN PERFORMANCE PLASTICS EUROPE
V.
THE BOLIVARIAN REPUBLIC OF VENEZUELA
(ICSID CASE NO. ARB/12/13)
DECISION ON PROPOSAL TO DISQUALIFY ARBITRATOR

Case Report by Fabricio Fortese**
Edited by Mona Davies ***

A Decision rendered on 27 February 2013, under the France (Republic of) – Venezuela (the Bolivarian Republic of) bilateral investment treaty ("BIT"), and in accordance with article 57 of the ICSID Convention and Arbitration Rules.

Tribunal:	Dr. Klaus Michael Sachs (President) and Judge Charles N. Brower (for the Claimant)
Claimant's counsel:	Alexander A. Yanos, Giorgio F. Mandelli, Daniel Chertudi and Becca Everhardt. FRESHFIELDS BRUCKHAUS DERINGER US LLP
Defendant's Counsel:	Dra. Cilia Flores, Attorney General of Venezuela, and its duly authorized attorneys CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Fabricio Fortese is a lawyer and an LLM candidate in the International Commercial Arbitration Law programme (ICAL) at Stockholm University. He can be reached by email at ff@fortese.com or +46 762 833 500

*** Mona Davies is Assistant Director of International Arbitration Case Law (IACL).

Digest

1. Facts of the Case and Procedural History

On 25 May 2012, the French investor Saint-Gobain Performance Plastics Europe ("Claimant") filed a request for arbitration against the Bolivarian Republic of Venezuela ("Respondent"), for breaches to the Agreement on Encouragement and Reciprocal Protection of Investments between France and Venezuela, which entered into force on 15 April 2004.

Following appointments by Claimant and Respondent respectively, Judge Charles N. Brower and Mr. Gabriel Bottini accepted their nominations as arbitrators. After his acceptance, Claimant submitted a Proposal to Disqualify Mr. Gabriel Bottini pursuant to Articles 57 and 58 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules.

2. Legal Issues Discussed in the Decision

The Arbitral Tribunal first addressed: (a) the applicable standard that needs to be fulfilled by a challenge in order to be successful and then; (b) the grounds for challenge, namely Mr. Bottini's former employment with the Argentine Government.

(a) The Applicable Standard

The Tribunal affirmed that it follows from Article 57 and 14(1) of the ICSID Convention that, in order to be successful, Claimant's challenge must be (i) based on "*facts*" which (ii) indicate a "*manifest lack of qualifications*". In this respect, the unchallenged arbitrators understood that a tribunal must:

> …"first analyze the facts submitted by the challenging party and decide whether these facts (in contrast to speculation and inferences) could lead a *reasonable person* to conclude that there is a possibility that the challenged arbitrator is not independent and/or impartial. Only if the answer is yes, the further question has to be decided of how probable the lack of independence and impartiality must be."[1] [Emphasis added]

[1] Award, ¶ 60

(b) Mr. Bottini's former employment

1. The General Nature of Mr. Bottini's position

Contrary to Claimant's argument, the Tribunal considered that Mr. Bottini's former employment as "National Director of International Matters and Disputes" for the Office of the Attorney General of Argentina was not of a political nature, but amongst those of public service.[2] If, the Tribunal had understood that Mr. Bottini's role was indeed ranked as a political appointment, this fact would have disqualified him as a judge under the ICJ Statute. This was the test advanced by Claimant in its challenge and dismissed by the Tribunal, which affirmed that regardless of any interpretation, the situation changed as of 1 January 2013, when Mr. Bottini left his position to pursue doctoral studies in Cambridge, UK. Only the *simultaneous* exercise of the administrative or political function is incompatible with the position of judge of the ICJ[3]. As Mr. Bottini was not involved in a single decision in his role as arbitrator from the time of appointment up to the termination of his position, there should be no concern flowing alone from his former position.[4]

Furthermore, the Tribunal assigned limited relevance to the ICJ Statute as the position of an ICJ judge is a "full time" position and thus a broad interpretation of the incompatibility rule is understandable. By contrast, arbitrators sitting in ICSID cases are intended to be appointed *ad hoc*. It follows that most arbitrators then will hold a different main occupation. Accordingly, a main occupation in itself cannot establish incompatibility between the main occupation and the role as arbitrator.[5]

2. No "Issue Conflict"

The Arbitral Tribunal did not find that Claimant's arguments support a case of a "*manifest*" danger that would disqualify Mr. Bottini as an arbitrator. In the Tribunal's view, Claimant has presented no facts that cast "*reasonable doubt*" on Mr. Bottini's impartiality and independence, let alone facts that "*make it obvious and highly probable*" that Mr. Bottini lacks these qualities.[6]

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[2] Ibid, ¶ 61

[3] Art 16 of the ICJ Statute.

[4] Ibid, ¶ 71

[5] Ibid, ¶¶ 72-74

[6] Ibid, ¶ 78

Claimant had alleged that, "*Mr. Bottini has acted as a zealous advocate for the most recalcitrant State party in ICSID history*"[7], and it emphasised that Mr. Bottini had repeatedly pleaded on issues on Argentina's behalf upon which also the present proceeding would touch. Therefore, in Claimant's view, Mr. Bottini's resignation from his government position (as of 1 January 2013) was insufficient to alleviate the *appearance of bias*.[8] [Emphasis added]

In reaching its decision, the Tribunal reasoned that "[A]bsent any specific *facts* which indicate that Mr. Bottini is not able to distance himself in a professional manner from the cases in which he was acting as counsel, Mr. Bottini has the assumption in his favour that he is a legal professional with the ability to keep a professional distance."[9] Furthermore, the Tribunal distinguished this case from *Republic of Ghana v. Telekom Malaysia Berhard*[10] on which Claimant had relied. The Tribunal held that, unlike in that case, it was not proved that Mr. Bottini was currently advocating for or advising Argentina in any way.

[7] Ibid, ¶ 73
[8] Ibid, ¶ 25
[9] Ibid, ¶ 81
[10] Decision of the District Court of the Hague (Civil Law Section), 18 October 2004