

**International Centre for
Settlement of Investment Disputes
ICSID Case No. ARB/12/13**

Saint-Gobain Performance Plastics Europe

– Claimant –

vs.

The Bolivarian Republic of Venezuela

– Respondent –

**Decision on Claimant's Proposal to
Disqualify Mr. Gabriel Bottini
from the Tribunal
under Article 57 of the ICSID Convention**

Unchallenged Members of the Tribunal

The Honorable Charles N. Brower, Co-Arbitrator
Dr. Klaus Sachs, President

*Secretary of the Tribunal
Natalí Sequeira*

Date: February 27, 2013

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A. THE PARTIES

I. Claimant

1. Saint-Gobain Performance Plastics Europe,

hereinafter referred to as "**Claimant**",

represented in this arbitration by its duly authorized attorneys Freshfields Bruckhaus Deringer US LLP of 601 Lexington Ave, 31st Floor, New York, NY 10022, United States of America; Counsel: Alexander A. Yanos, Giorgio F. Mandelli, Daniel Chertudi, and Becca Everhardt.

II. Respondent

2. The Bolivarian Republic of Venezuela,

hereinafter referred to as "**Respondent**",

represented in this arbitration by Dra. Cilia Flores, Attorney General of Venezuela, and its duly authorized attorneys Curtis, Mallet-Prevost, Colt & Mosle LLP of 101 Park Avenue, New York, NY 10178, United States of America and of Rubén Darío 281, Piso 9, Col. Bosque de Chapultepec, 11580 México, D.F., United Mexican States; Counsel: George Kahale, III, Benard V. Preziosi, Eloy Barbará de Parres, and Gabriela Álvarez Ávila.

3. Claimant and Respondent are hereinafter each referred to as a "**Party**" and jointly as the "**Parties**".

B. PROCEDURAL HISTORY

4. On 25 May 2012, the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") received a Request for Arbitration ("**Request**") filed by Saint-Gobain Performance Plastics Europe against the Bolivarian Republic of Venezuela ("**Venezuela**").

5. In its Request, Claimant invokes Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") and the Agreement on Encouragement and Reciprocal Protection of Investments between the Government of the French Republic and the Government of the Bolivarian Republic of Venezuela, which entered into force on 15 April 2004.

6. The Centre registered Claimant's Request for Arbitration on 15 June 2012.
7. Following appointment by Claimant, Judge Charles N. Brower accepted his appointment as arbitrator on 4 October 2012. Following appointment by Respondent, Mr. Gabriel Bottini accepted his appointment as arbitrator on 25 October 2012.
8. On 29 October 2012, 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 ("**Claimant's Proposal**"). The Centre acknowledged receipt of Claimant's Proposal on 30 October 2012.
9. The Parties agreed to appoint Dr. Klaus Michael Sachs as President of the Tribunal. Dr. Sachs accepted his appointment on 26 November 2012.
10. In accordance with Article 37(2)(b) of the ICSID Convention, the Tribunal was constituted on 26 November 2012. As provided for by ICSID Arbitration Rule 9(2), on the same date the Centre transmitted Claimant's Proposal to the three members of the Tribunal.
11. Pursuant to ICSID Arbitration Rule 9(6), on 27 November 2012, the proceeding was suspended until Claimant's Proposal was decided.
12. By letter of 28 November 2012, Dr. Sachs and Judge Brower (for the purposes of this Decision referred to as the "**Arbitral Tribunal**") set the following schedule:
 - "(i) The Respondent shall submit a reply to Claimant's disqualification proposal by Friday, December 7, 2012;*
 - (ii) Mr. Gabriel Bottini shall furnish any explanations that he may wish to provide, pursuant to ICSID Arbitration Rule 9(3), within 10 days from receipt of Claimants' submission;*
 - (iii) Both parties are invited to simultaneously file, within 10 days from the date of any explanations furnished by Mr. Bottini, any further observations they wish to make in connection with the disqualification proposal. The parties are requested to submit this presentation only to the Secretary of the Tribunal on the due date. The Secretary of the Tribunal will circulate the submissions upon receipt of both parties' filings."*
13. The Parties and Mr. Bottini filed their written observations according to the schedule indicated above.

C. THE PARTIES' AND MR. BOTTINI'S POSITIONS

14. The background to Claimant's challenge of Mr. Bottini is his employment by the Argentine Government until 31 December 2012. As of 1 January 2013, Mr. Bottini has resigned from his position to pursue doctoral studies in the United Kingdom.

I. Claimant's Position

15. Claimant submits that as a current employee of the Argentine Government at the point in time when he was appointed, Mr. Bottini may not be relied upon to exercise independent judgment and to act impartially in this proceeding.

1. Mr. Bottini's Position with the Government of Argentina

16. Claimant is of the view that Mr. Bottini's role as *National Director of International Matters and Disputes for the Office of the Attorney General of Argentina* was of a political nature and that he had specific political duties *vis-à-vis* the Argentine Government. In particular, Claimant points out that Argentine Decree 1755/2008 describes the role held by Mr. Bottini as follows:

"Plan and propose a strategy for defending the interests of Argentina in cases where it is either plaintiff or defendant before the courts or arbitration, international or foreign."

17. Claimant suggests that it should give rise to concern that Respondent appointed Mr. Bottini at a time when he was still employed by the Argentine Government and before Mr. Bottini had announced that he would leave his position.

18. While Claimant appreciates that it is appropriate for a party to an ICSID arbitration to appoint an arbitrator who is capable of understanding and appreciating its position, Claimant submits that it is untenable to appoint an arbitrator of whom the party knows that he *must* agree with its position.

19. Claimant is concerned that, on the one hand, Mr. Bottini was a government employee and advocate for Argentina and, as such, had an interest that certain issues were decided in a way which is favorable to Argentina and, on the other hand, Mr. Bottini now is supposed to be an arbitrator without any prejudice to the issues which stand to be decided in this arbitration.

20. Claimant submits that its concerns as to Mr. Bottini's impartiality and independence are not alleviated by the fact that Mr. Bottini has taken up studies in the United Kingdom because

*"[b]efore and after he moves to Cambridge, Mr. Bottini is, first and foremost, an advocate for Argentina."*¹

21. Furthermore, Claimant alleges that Mr. Bottini will be influenced by specific duties with regard to his access to sensitive information, confidentiality and national defense.
22. Given the above, Claimant submits that there is a manifest danger that Mr. Bottini will avoid making decisions which would be prejudicial to his positions taken in the cases in which he was working on Argentina's behalf.
23. Claimant further points out that, contrary to what the Respondent alleges, it is not Claimant's case that *no* public servant can sit as an arbitrator in ICSID proceedings. Claimant is rather concerned with the fact that Mr. Bottini—at the time of his appointment—was a public servant whose then current job was to defend Argentine interests from, in material part, precisely the same or similar issues which will be relevant to this case. In doing so, Claimant alleges, *"Mr. Bottini has acted as a zealous advocate for the most recalcitrant State party in ICSID history."*²
24. Claimant argues that situations like the present one are the reason that Article 16 of the Statute of the International Court of Justice ("ICJ") generally prohibits its Judges to exercise any political or administrative function.
25. With reference to Mr. Bottini's observations, Claimant states that the reason for Claimant's Proposal is not merely a narrow view of the nature of Mr. Bottini's job with the Argentine Government (*i.e.* whether it is political or not) but rather the fact that Mr. Bottini repeatedly pleaded on issues on Argentina's behalf upon which also this proceeding will touch. In this context, Claimant refers the Arbitral Tribunal to *Republic of Ghana v. Telekom Malaysia Berhard*, Decision of the District Court of the Hague (Civil Law Section), 18 October 2004. In this decision, the court ruled that Prof. Emmanuel Gaillard could not simultaneously represent an Italian consortium in its ICSID arbitration against Morocco and serve as arbitrator in a separate investor-State arbitration between Telekom Malaysia and Ghana which turned on similar issues. Claimant suggests that this case is similar to the current case because Mr. Bottini would be faced with issues of law similar to those which he had to argue for Argentina. In Claimant's view, Mr. Bottini's resignation from his government position as of 1 January 2013 is insufficient to alleviate the appearance of bias.

¹ Claimant's Final Observations dated 21 December 2012, page 2.

² Claimant's Final Observations dated 21 December 2012, page 4.

2. Mr. Bottini's Relationship with Mr. Guglielmino

26. Claimant further relies on the fact that Mr. Osvaldo César Guglielmino (Argentina's former Attorney General and Mr. Bottini's former direct superior) is currently acting as counsel to Venezuela in the case *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19).

II. Respondent's Position

27. Respondent maintains that Claimant's Proposal should be rejected and that Claimant should be required to bear all costs associated with Claimant's Proposal.

1. The Applicable Standard

28. Respondent submits that Articles 14 and 57 of the ICSID Convention require arbitrators to be independent and impartial. The applicable standard for disqualification under the ICSID Convention is, however, the existence of a "*manifest lack*" of independence and impartiality. Respondent is of the view that there is a high burden of proof.

2. Mr. Bottini's Position with the Government of Argentina

29. Respondent points out that Argentina and Venezuela (as Respondent) are two different countries.
30. Further, Respondent asserts that Mr. Bottini, in his post with the Argentine Government, did not exercise any political functions, and in any event, he has now left his position as of 1 January 2013 in order to attend an academic program at Cambridge University. Generally, Respondent submits that Mr. Bottini's general or specific duties *vis-à-vis* the Argentine Government are of no relevance in a case that involves Venezuela, and not Argentina.
31. Respondent argues that Claimant's Proposal is paramount to submitting that
- (1) no public servant can act as an arbitrator in ICSID proceedings even if that public servant is employed by a State other than the State involved in the proceedings; and
 - (2) no person who has ever worked for a government can sit as arbitrator in an ICSID proceeding even if such person has left his or her post.
32. Respondent points out that while Article 16 of the ICJ Statute does require its Judges to abstain from participating in any national government, the ICSID Convention does not contain such incompatibility rules. When the ICSID Convention was drafted the drafters

were aware of the ICJ Statute and decided—insofar as ICSID is concerned—that government employees are not as such excluded from acting as arbitrator in ICSID proceedings.

33. Respondent has submitted to the Arbitral Tribunal as Exhibit R-1 a list of members of the ICSID panels of conciliators and arbitrators who held political functions. The list includes former members of all three branches of government, namely government officials, judges, as well as members of parliament.
34. Further, Respondent asserts that Article 16 of the ICJ Statute does not only prevent ICJ Judges from exercising any political or administrative function, but virtually any other professional activity. Respondent submits that this provision is interpreted very widely so as to include and thus declare incompatible, *inter alia*, any professional occupation, be it in a commercial concern, in the practice of law, in teaching or in the administration of a university or faculty of law.
35. In contrast to the ICJ's rules, international arbitrators frequently engage in some, or several, of those activities. Applying Article 16 of the ICJ Statute to ICSID by analogy would result in the disqualification of most arbitrators currently sitting. Respondent notes that the prohibition of Article 16 of the ICJ Statute does not extend to those within the ICJ who are most analogous to arbitrators, namely Judges *ad hoc*.
36. Respondent submits that in order to understand the background of Article 16 of the ICJ Statute, one needs to consider the preparatory works of the Statute of the Permanent Court of International Justice ("**PCIJ**"), the predecessor of the ICJ. The wording of Article 16 has not materially changed from the Statute of the PCIJ to the Statute of the ICJ.
37. A review of the *travaux préparatoires* reveals, Respondent says, that the main reason for the inclusion of the incompatibility provision in Article 16 was that serving as a Judge at the PCIJ would require a full time commitment. Further, the *travaux* show that the prohibition was only meant to apply to the simultaneous *exercise* of the functions. The prohibitions of Article 16 thus do not constitute reasons which represent lack of impartiality and independence *per se*, but only reasons for temporal incompatibility. The latter can be remedied if the concerned Judge suspends his or her other functions.
38. Thus, even if one applied Article 16 of the ICJ Statute, Claimant's challenge would be without merit as Mr. Bottini has left his post with the Argentine Government before the very first act of office as a member of the present Tribunal.

39. Respondent concludes that there should be no issue with a government appointing an arbitrator from a different country's government if the other government is not involved in the same dispute.

3. Mr. Bottini's Relationship with Mr. Guglielmino

40. With regard to Mr. Bottini's connection to Mr. Guglielmino, Respondent submits that it should be evident that Mr. Bottini's impartiality and independence are not compromised in any way. The professional relationship with Mr. Guglielmino ended over two years ago and had nothing to do with the present proceedings.

III. Observations by Mr. Bottini

41. Mr. Bottini states that he sees no reason why he should not be able to serve as arbitrator in this case and act independently and impartially. He states that he has never been involved in a dispute based on the Agreement between the Government of the French Republic and the Government of the Bolivian Republic of Venezuela on Reciprocal Encouragement and Protection of Investments.

1. Mr. Bottini's Position with the Government of Argentina

42. Mr. Bottini states that his position with the Argentine Attorney General's Office, which he left at the end of 2012, was not a political position. Mr. Bottini further states that he has never exercised any political function or performed any political task for the Argentine Government, or for any other government.
43. Mr. Bottini points to the Argentine regulatory framework of national public employment according to which all public servants, including him, have a public employment relationship. This framework does not, however, apply to political appointments, such as the Chief of Staff, the Ministers, the Secretaries and the Under Secretaries.
44. With regard to Claimant's reference to Decree 1755/2008, Mr. Bottini explains that his primary responsibility, according to the Decree's Annex II, was to

"[a]ssist the Treasury Attorney-General in the planning, organization, supervision and execution of the strategy of defense of the interests of the Argentine Republic in cases before judicial or arbitral tribunals, foreign or international, and participate in the representation and defense of the Argentine Republic before said tribunals"

and to

"[e]laborate opinions on issues of Public and Private International Law and legal opinions that have to be issued in connection with foreign debt transactions."

45. Mr. Bottini states that his post did not involve making any decisions (whether or not political in nature) but only to advise and assist the Treasury Attorney General in legal matters.
46. With regard to confidential information Mr. Bottini submits that he had only access to information which every lawyer would receive. Furthermore, most of the proceedings in which Mr. Bottini was involved were not confidential. Mr. Bottini further declares that he has never worked in national defense.
47. Mr. Bottini explains that his work for the Argentine Government has always been that of a lawyer. Apart from Argentina, he has over the last years advised other parties, including investors and corporations in ICSID, ICC and commercial law cases. Mr. Bottini intends to continue working as an independent advisor also to States, which *"may include Argentina."*³ Mr. Bottini further intends to remain an active member of the City of Buenos Aires Bar.
48. Finally, Mr. Bottini asserts that he has not made any arrangements with the Argentine Government for his return into government service after the completion of his doctoral studies. The resignation at the end of 2012 has full effect under Argentine law and he has neither any obligation nor any rights or privileges with regard to a potential return into government services. Mr. Bottini assures that he has received no support from the Argentine Government in connection with his doctoral studies in Cambridge University.⁴

2. Mr. Bottini's Relationship with Mr. Guglielmino

49. Mr. Bottini asserts that he has no current professional relationship with Mr. Guglielmino or any connection with the cases on which Mr. Guglielmino is currently working. In the last three years since Mr. Guglielmino left his position, Mr. Bottini does not remember to have seen him more than twice.

³ Explanation from Mr. Bottini dated 14 December 2012, p. 2.

⁴ See Letter from Mrs. Alison Hirst, Degree Committee Administrator and External Relations Administrator, Faculty of Law, University of Cambridge, Explanation from Mr. Bottini dated 14 December 2012, Exh. 1 (*"I am writing to confirm that Mr Gabriel Bottini holds an unconditional offer of admission to the PhD programme in Law at the University of Cambridge from January 2013. Mr Bottini is self-financing and is receiving no funding from the University."*).

D. DECISION BY THE UNCHALLENGED ARBITRATORS

50. The Arbitral Tribunal will first address the applicable standard which needs to be fulfilled by a challenge in order to be successful (**I.**). The Arbitral Tribunal will then turn to the two grounds for challenge, namely Mr. Bottini's former employment with the Argentine Government (**II.**) as well as his professional relationship with Mr. Guglielmino (**III.**).

I. The Applicable Standard

51. The starting point in this regard is Article 57 of the ICSID Convention, which reads as follows:

"A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV."

52. Article 14(1) of the ICSID Convention in turn provides:

"Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the field of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

53. It follows from the above that, in order to be successful, Claimant's Proposal must be (i) based on "facts" which (ii) indicate a "manifest lack of qualifications" pursuant to Article 14(1) of the ICSID Convention.⁵

54. The issue to be determined by the Arbitral Tribunal is therefore whether the facts submitted by Claimant indicate a manifest lack of Mr. Bottini's capacity to exercise

⁵ Universal Compression International Holdings, S.L.U. v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators) ICSID Case No. ARB/10/9, para. 72; GEMA International, NCT Necotrans, GETMA International Investissements & NCT Infrastructure & Logistique c. La République de Guinée (Décision sur la demande en récusation de Monsieur Bernardo M. Cremades, Arbitre) ICSID Case No. ARB/11/29, para. 58; see also Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration*, p. 218.

independent judgment within the meaning of Article 14(1) of the ICSID Convention in the present case.

55. In this regard, the Arbitral Tribunal observes that, while the English version of Article 14 of the ICSID Convention refers to "*independent judgment*"⁶, the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment). Since both versions are equally authentic,⁷ it is therefore generally accepted that, under the ICSID Convention, arbitrators have to be both, impartial and independent.⁸
56. Independence is characterized by the absence of external control, in particular of relations between the arbitrator and a party which may influence the arbitrator's decision.⁹ Impartiality, on the other hand, means the absence of bias or predisposition towards one party and requires that the arbitrator hears the parties without any favor and bases his or her decision only on factors related to the merits of the case.¹⁰

⁶ The French version refers to "*indépendance dans l'exercice de leurs fonctions*".

⁷ See note subsequent to Article 75 of the ICSID Convention.

⁸ Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic (Decision on Second Proposal for Disqualification) ICSID Cases Nos. ARB/03/17 and ARB/03/19, para. 27; OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator) ICSID Case No. ARB/10/14, para. 44; GEMA International, NCT Necotrans, GETMA International Investissements & NCT Infrastructure & Logistique c. La République de Guinée (Décision sur la demande en récusation de Monsieur Bernardo M. Cremades, Arbitre) ICSID Case No. ARB/11/29, para. 59; Conoco Philipps Company et al. v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator) ICSID Case No. ARB/07/30, para. 54; Alpha Projektholding GmbH v. Ukraine (Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz) ICSID Case No. ARB/07/16, para. 36; Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela (Decision on Claimant's Proposal to Disqualify Professor Brigitte Stern, Arbitrator) ICSID Case No. ARB/10/5, para. 37.

⁹ Cf. Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic (Decision on Second Proposal for Disqualification) ICSID Cases Nos. ARB/03/17 and ARB/03/19, para. 29; GEMA International, NCT Necotrans, GETMA International Investissements & NCT Infrastructure & Logistique c. La République de Guinée (Décision sur la demande en récusation de Monsieur Bernardo M. Cremades, Arbitre) ICSID Case No. ARB/11/29, para. 59; Conoco Philipps Company et al. v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator) ICSID Case No. ARB/07/30, para. 54.

¹⁰ Cf. Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic (Decision on Second Proposal for Disqualification) ICSID Cases Nos. ARB/03/17 and ARB/03/19, para. 29; GEMA International, NCT Necotrans, GETMA International Investissements & NCT Infrastructure & Logistique c. La République de Guinée (Décision sur la demande en récusation de Monsieur Bernardo M. Cremades, Arbitre) ICSID Case No. ARB/11/29, para. 59; Conoco Philipps Company et al. v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator) ICSID Case No. ARB/07/30, para. 54.

57. Another issue for the Arbitral Tribunal is the question when the "*lack of qualities*" (including impartial and independent judgment) becomes "*manifest*" within the meaning of Article 57 of the ICSID Convention. There seems to be no unequivocal answer.
58. In several decisions on proposals for disqualification under the ICSID Convention it has been stated that, because the lack of qualifications pursuant to Article 14(1) of the ICSID Convention has to be "*manifest*", Article 57 of the ICSID Convention sets a relatively high bar for challenging an arbitrator.¹¹ In *Suez v. Argentina*, the unchallenged arbitrators stated that, from the perspective of an "*informed reasonable person*", facts must be established which "*make it obvious and highly probable, not just possible that [the challenged arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment.*"¹²
59. However, in other decisions the word "*manifest*" has been interpreted so as to relate to the ease with which the alleged risk of lack of independence or impartiality can be perceived. In *EDF International S.A. v. Argentina* the unchallenged arbitrators decided that the challenged arbitrator should have ceased to serve in the proceedings if "*reasonable doubts exist*" with regard to whether she could be relied upon to exercise independent judgment.¹³ Referring to the Commentary of Professor Schreuer, they stated that the word "*manifest*" in Article 57 of the Convention "*relates not to the seriousness of the allegation, but to the ease with which it may be perceived.*"¹⁴

¹¹ OPIC Karimum Corporation v. The Bolivarian Republic of Venezuela (Decision on the Proposal to Disqualify Professor Philippe Sands, Arbitrator) ICSID Case No. ARB/10/14, para. 45; *Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic* (Decision on Second Proposal for Disqualification) ICSID Cases Nos ARB/03/17 and ARB/03/19, para. 29; GEMA International, NCT Necotrans, GETMA International Investissements & NCT Infrastructure & Logistique c. La République de Guinée (Décision sur la demande en récusation de Monsieur Bernardo M. Cremades, Arbitre) ICSID Case No. ARB/11/29, para. 60; *Conoco Philipps Company et al. v. The Bolivarian Republic of Venezuela* (Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator) ICSID Case No. ARB/07/30, para. 56; see also Reed/Paulsson/Blackaby, *op. cit.*, p. 134.

¹² *Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic* (Decision on Second Proposal for Disqualification) ICSID Cases Nos ARB/03/17 and ARB/03/19, para. 29.

¹³ *EDF International S.A.; SAUR International S.A.; León Participaciones Argentinas S.A. v. Argentine Republic* (Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler) ICSID Case No. ARB/03/03, para. 64; see also *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic* (Decision on the Challenge to the President of the Committee) ICSID Case No. ARB/97/3, para. 25.

¹⁴ *EDF International S.A.; SAUR International S.A.; León Participaciones Argentinas S.A. v. Argentine Republic* (Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler) ICSID Case No. ARB/03/03, para. 68; *Alpha Projektholding GmbH v. Ukraine* (Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz) ICSID Case No. ARB/07/16, para. 37.

60. Hence, there is no clear-cut guideline as to the degree to which the facts invoked by the challenging party must substantiate the alleged lack of qualification. Irrespective of the required degree, the body deciding on the proposal 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.

II. Mr. Bottini's Position with the Government of Argentina

61. Claimant's reasons for proposing the disqualification of Mr. Bottini are: First, that Mr. Bottini's position was a position which was, in fact, political and would disqualify him as a Judge under the ICJ Statute (1.) and, second, irrespective of whether or not his position was political in nature, that Mr. Bottini is to be disqualified on the basis of "issue conflict" because in his previous capacity he has argued from Argentina's perspective issues which may arise in this case (2.).

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

62. The Arbitral Tribunal notes that under Argentine law, Mr. Bottini's position was not ranked amongst "political appointments", but amongst positions of public service. While this point might be an indicator of the nature of his work, the Arbitral Tribunal is of the view that for the purposes of this Decision, it cannot be decisive on its own.

63. Assuming, *arguendo*, that the test of Article 16 of the ICJ Statute could be applied to ICSID arbitrations, the Arbitral Tribunal notes that Mr. Bottini—while in office—would indeed have been unsuitable to serve as a Judge at the ICJ.

64. At the time of the PCIJ, the Court took the view that a function was incompatible with Article 16 if it was a "*function which compelled a person to follow the instructions of his government, regardless of his personal views.*"¹⁵

65. Article 2 of the ICJ Statute requires that the Court be composed of a body of "*independent*" Judges. In 1945, the San Francisco Conference described this

¹⁵ Andreas Zimmermann *et al.*, *The Statute of the International Court of Justice: A Commentary* (2006), at 330.

requirement as follows: the Judges *"should be not only impartial but also independent of control by their own countries or the United Nations Organization."*¹⁶

66. Shabtai Rosenne explains in his commentary:

*"That interpretation does not preclude the nomination or election of a candidate who, at the time of nomination or election, was in the service of a government or of an international inter-government organization – although if no generally recognized 'cooling off' period is not introduced, at the least it would be desirable for candidates in that situation to disengage themselves from their official activities as soon as their candidatures are established."*¹⁷

67. In 1995, the ICJ adopted a memorandum entitled *"Incompatibilities in the Practice of the International Court of Justice"*, which reflects the most recent form of ICJ practice regarding general incompatibilities. The Memorandum notes that Article 16 prohibits Judges from exercising any political or administrative function *"whether international, national, or local, whether commercial or otherwise."* It further prohibits them from engaging in any other occupation of a professional nature, including *"holding a position in a commercial concern, engaging in the practice of law, maintaining membership in a law firm or rendering legal or expert opinions, or holding a permanent teaching or administrative position in a university."*¹⁸

68. In commenting on the Court's Memorandum, Philippe Couvreur notes:

"[T]he prohibition applicable to political and administrative functions in the broad sense (including, since the revision of the PCIJ Statute in 1929, parliamentary and judicial functions and permanent academic duties) concerns only the exercise of those functions, which would place the individual in a position of direct or indirect dependency vis-à-vis a government. A member of the Court is thus entitled to retain vested rights acquired in the course of national public service (different forms of 'leave' exist for this purpose). Likewise, while judges must refrain from participating in any way actively or directly in national political life (including by publicly expressing political opinions), it has always been clear that they are entitled to exercise their rights as citizens in their home countries (in particular, to vote and even, subject to the foregoing, to hold membership of a political

¹⁶ Shabtai Rosenne, *The Law and Practice of the International Court, 1920-2005* (2006), at 359 (2006).

¹⁷ *Ibid.* The double negative appearing in the quotation, which is an exact quotation from the book as published, doubtless should be disregarded.

¹⁸ Zimmermann *et al.*, *op. cit.*, at 332.

party."¹⁹ (Emphasis added.)

69. Against this background it appears that even though Mr. Bottini has stated that his position was not a political position and that he never exercised any political function or performed any political task, he in fact would have fallen within the list of incompatible occupations, as he was:
- "*engaging in the practice of law*";
 - "*compelled [...] to follow the instruction of his government regardless of his personal views*";
 - "*in a position of direct or indirect dependency vis-à-vis*" the Argentine Government; and
 - directly responsible to his superior, the Attorney General.
70. However, this situation changed as of 1 January 2013, when Mr. Bottini left his position.
71. As Philippe Couvreur notes, only the simultaneous *exercise* of the administrative or political function is incompatible with Article 16 of the ICJ Statute. If the individual concerned suspends his other functions and takes "leave", he or she can sit as a Judge at the ICJ. This, of course, must apply *a fortiori* if the administrative or political function is not only suspended but, as in our case, given up completely. 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.
72. However, and more generally, the Arbitral Tribunal is of the view that the ICJ Statute is only of limited relevance for the present dispute.
73. As Respondent correctly points out, the position of an ICJ Judge is a full time position and thus the broad interpretation of the incompatibility rule is understandable. In fact, applying the ICJ's Memorandum²⁰ would disqualify most arbitrators currently sitting in ICSID cases, and certainly all arbitrators on this Tribunal. This shows that the occupations included in the Memorandum are not necessarily included only because they raise doubts with regard to a Judge's impartiality and independence *per se*, but also because the ICJ requires that its Judges devote their entire professional time and

¹⁹ Zimmermann *et al.*, *op. cit.*, at 334-335.

²⁰ *Cf.* paragraph 67 above.

attention to the Court. In addition, cases may come to the Court involving any State, including the ICJ Judges' own States of nationality.

74. By contrast, arbitrators sitting in ICSID cases are intended to be appointed *ad hoc*. It follows that most will hold a different main occupation.²¹ Thus a main occupation in itself cannot establish incompatibility between the main occupation and the role as arbitrator.
75. Finally, the Arbitral Tribunal wishes to point out that Claimant's reference to alleged access to sensitive information, confidentiality and national defense is not supported by any facts and can thus be no reason for the disqualification of Mr. Bottini.

2. No "Issue Conflict"

76. The Arbitral Tribunal thus has to analyze the specific former functions of Mr. Bottini and whether Claimant has established any *manifest* danger that Mr. Bottini would not be able to make an independent and impartial judgment.
77. The Arbitral Tribunal notes that Claimant has not alleged that Mr. Bottini is subject to any current control by either the Argentine or the Venezuelan Government. Claimant's concerns are entirely based on the issue of so-called abstract "issue conflict", *i.e.* on the assumption that there is a danger that Mr. Bottini will decide a certain issue in favor of Venezuela because he has argued the same, or similar, issues in favor of Argentina in the past and potentially in the future, and in doing so, that he will not have sufficient regard to the merits of this case.
78. The Arbitral Tribunal does not find that Claimant's arguments support a case of a "*manifest*" danger in this regard. Claimant has presented no facts which cast "*reasonable doubt*"²² on Mr. Bottini's impartiality and independence, let alone facts which "*make it obvious and highly probable*"²³ that Mr. Bottini lacks these qualities.
79. Mr. Bottini is currently not acting for the Argentine Government, or, to the Arbitral Tribunal's knowledge, for any government. Nor is the Arbitral Tribunal aware of any other connections to the Argentine Government.

²¹ Indeed, a number of ICJ Judges have sat in the past and currently sit as ICSID arbitrators.

²² Cf. EDF International S.A.; SAUR International S.A.; León Participaciones Argentinas S.A. v. Argentine Republic (Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler) ICSID Case No. ARB/03/03, para. 64; see also Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic (Decision on the Challenge to the President of the Committee) ICSID Case No. ARB/97/3, para. 25.

²³ Cf. Suez, Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic (Decision on Second Proposal for Disqualification) ICSID Cases Nos ARB/03/17 and ARB/03/19, para. 29.

80. Even if one assumes *arguendo* that Mr. Bottini did in fact vigorously advocate Argentina's positions in other investment treaty arbitrations, the Arbitral Tribunal cannot see why Mr. Bottini would be locked in to the views he presented at the time. It is at the core of the job description of legal counsel—whether acting in private practice, in-house for a company, or in government—that they present the views which are favorable to their instructor and highlight the advantageous facts of their instructor's case. The fact that a lawyer has taken a certain stance in the past does not necessarily mean that he will take the same stance in a future case.
81. There is no indication in the file, or otherwise, why this should be any different for Mr. Bottini or why he should not be in a position to freely form a view on the merits presented to him in this arbitration. Absent 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 favor that he is a legal professional with the ability to keep a professional distance. The same assumption is granted in favor of many arbitrators who today sit as arbitrators in ICSID cases but who started their career as counsel or who still act as counsel in such cases.
82. The Arbitral Tribunal also notes that Mr. Bottini has stated that he has not only advised Argentina, but also other parties, including investors.
83. Further, the present case is distinguishable from the case *Republic of Ghana v. Telekom Malaysia Berhad*, Decision of the District Court of the Hague (Civil Law Section), 18 October 2004, on which Claimant relies.
84. In the cited case, Prof. Gaillard was acting simultaneously as counsel for a party in one arbitration and as arbitrator in another case. The Arbitral Tribunal agrees that this constellation can potentially raise doubts as to the impartiality and independence of the concerned individual in his role as arbitrator. It seems possible that the arbitrator in such a case could take a certain position on a certain issue, having in mind that if he took a different position as arbitrator, he could undermine his credibility as counsel as which he is arguing on the same, or very similar, issue.
85. However, this case is different. The Arbitral Tribunal has no present information that Mr. Bottini currently is advocating for or advising Argentina in any way. Doubtless Mr. Bottini is aware of the obligation of someone in his position to make appropriate disclosures as needed of any potential conflict of interest, including an issue conflict, for which process the IBA Guidelines on Conflicts of Interest in International Arbitration provide widely accepted guidance.
86. Recognizing that the present challenge to Mr. Bottini arose due to the unfortunate timing of his appointment and the disclosure requirement imposed by Rule 6 of the

ICSID Arbitration Rules, the Arbitral Tribunal dismisses the Claimant's Proposal to disqualify Mr. Bottini on the condition that Mr. Bottini completes, signs, and transmits to the ICISD Secretary-General a new Declaration under Rule 6 of the ICSID Arbitration Rules within 10 days of the date of this Decision. By signing a new Declaration, Mr. Bottini will have certified that he "*assume[s] a continuing obligation promptly to notify the Secretary-General of the Centre of any [...] relationship [with the Parties] or [any other] circumstance [that might cause his reliability for independent judgment to be questioned by a party] that subsequently arises during this proceeding.*"²⁴

3. Mr. Bottini's Relationship with Mr. Guglielmino

87. It is undisputed that Mr. Guglielmino has ceased to be Mr. Bottini's superior about three years ago, and that Mr. Bottini cannot remember having seen him more than twice since. The Arbitral Tribunal is of the view that this is no indication for a possible lack of impartiality or independence.

E. OPERATIVE PART

88. Claimant's proposal to disqualify Mr. Gabriel Bottini pursuant to Articles 57 and 58 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules is rejected, on the condition that Mr. Bottini completes, signs, and transmits to the ICSID Secretary-General a new Declaration under Rule 6 of the ICSID Arbitration Rules within 10 days of the date of this Decision.

89. The costs of this challenge proceeding are reserved.

²⁴ ICSID Arbitration Rules, Rule 6(2).

[Signed]

Dr. Klaus Sachs

[Signed]

The Honorable Charles N. Brower