

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**ITALBA CORPORATION
(APPLICANT)**

v.

**ORIENTAL REPUBLIC OF URUGUAY
(RESPONDENT)**

(ICSID Case No. ARB/16/9) - Annulment Proceeding

DECISION ON THE PROPOSAL TO DISQUALIFY MR. GABRIEL BOTTINI

Members of the ad hoc Committee

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Prof. Mónica Pinto, Member

Secretary of the ad hoc Committee

Ms. Celeste E. Salinas Quero

29 October 2019

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I. OVERVIEW

1. This Decision resolves the Applicant's proposal for disqualification of *ad hoc* Committee Member Mr. Gabriel Bottini pursuant to Articles 14 and 57 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**") and Articles 9 and 53 of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**").

II. PROCEDURAL HISTORY

2. On 2 July 2019, Italba Corporation (the "**Applicant**" or "**Italba**") filed with the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") an application for annulment of the Award rendered on 22 March 2019 in *Italba Corporation v. the Oriental Republic of Uruguay* (ICSID Case No. ARB/16/9) (the "**Award**"), accompanied by annexes 1 through 3 (the "**Annulment Application**"). The Annulment Application included a request for stay of enforcement of the Award pursuant to Article 52(5) of the ICSID Convention and Rule 54 of the Arbitration Rules. The Applicant requested the provisional stay of the enforcement of the Award, and that the stay be maintained until a decision in that respect could be rendered by the *ad hoc* Committee.
3. On 10 July 2019, the Secretary-General of ICSID registered the Annulment Application and notified the Applicant and the Oriental Republic of Uruguay (the "**Respondent**," the "**State**," or "**Uruguay**") (and together with the Applicant, the "**Parties**") that enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).
4. On 11 July 2019, Respondent notified ICSID of the names of the individuals and legal advisers authorized to act on its behalf in the Annulment proceedings.
5. On 1 August 2019, the Secretary-General notified the parties of its intention to propose to the Chairman of the ICSID Administrative Council the appointment to the *ad hoc* Committee of Dr. Andrés Rigo Sureda, a national of the Kingdom of Spain, as President of the *ad hoc* Committee, Prof. Mónica Pinto, a national of the Argentine Republic, and Mr. Gabriel Bottini, a national of the Argentine Republic, as Committee Members.

6. After an exchange of correspondence between the parties and the Secretariat,¹ the *ad hoc* Committee (the “**Committee**”) was constituted on 27 August 2019, in accordance with Article 52(3) of the ICSID Convention. All members were appointed by the Chairman of the Administrative Council. In its letter of 27 August 2019, the Secretariat informed the parties of the Committee’s appointment, that the annulment proceeding was deemed to have commenced in accordance with Rules 6 and 53 of the Arbitration Rules, and that Ms. Celeste E. Salinas Quero, Legal Counsel, ICSID, would serve as Secretary of the Committee.
7. On 13 September 2019, Italba submitted a Proposal for Disqualification of *ad hoc* Committee Member Mr. Gabriel Bottini (the “**Proposal**”). On the same date, the Centre acknowledged receipt of the Applicant’s Proposal and informed the parties of the suspension of the proceedings until a decision on the Proposal has been taken in accordance with ICSID Arbitration Rules 9(6) and 53.
8. On 16 September 2019, the unchallenged Committee Members, through ICSID, notified the parties of the procedural calendar to provide observations on Italba’s Proposal.
9. On 23 September 2019, Respondent submitted a Reply to the Proposal (the “**Reply**”).
10. On 30 September 2019, Mr. Gabriel Bottini submitted explanations on the Proposal (the “**Explanations**”).
11. On 7 October 2019, the parties simultaneously submitted observations on the Explanations (the “**Additional Observations**”).

III. THE PROPOSAL FOR DISQUALIFICATION

12. The following sections summarize the parties’ arguments on the Proposal and the Explanations furnished by Mr. Bottini.²

¹ See the Parties’ communications of 8 August 2019 and the Centre’s communications of 16 and 19 August 2019.

² Mr. Bottini furnished his Explanations in Spanish.

(1) The Applicant's position

13. The Applicant argues that the conduct displayed by Mr. Bottini following a prior disqualification proposal made in another case shows his lack of candor, which is inconsistent with the qualifications required by Article 14 of the ICSID Convention.
14. The Applicant refers to the disqualification proposed by the claimant in *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13) (“**Saint-Gobain**”), which the Applicant maintains was rejected on reliance of Mr. Bottini’s representations that he (i) had left the Argentine government service; (ii) was no longer acting for Argentina; and (iii) would inform the parties and the Tribunal if those circumstances changed (the “**Disqualification Decision**”). Italba contends that only after the Disqualification Decision was made, Mr. Bottini disclosed his true role as Argentina’s advisor *and advocate* in other cases.³
15. The Applicant explains that the claimant in *Saint-Gobain* proposed to disqualify Mr. Bottini on the basis, in part, that his role as Argentina’s advisor and counsel in investment disputes made him unsuitable to render independent and impartial decisions on issues very similar to those that he had argued as counsel. The Applicant notes that in rejecting the proposal, the unchallenged arbitrators in *Saint-Gobain* stated that they “*ha[d] no present information that Mr. Bottini currently is advocating for or advising Argentina in any way [...]*”⁴ and requested Mr. Bottini to complete a new declaration under Rule 6 of the ICSID Arbitration Rules.⁵
16. The Applicant notes that the Disqualification Decision was made on 27 February 2013. Two days later, on 1 March 2013, Mr. Bottini disclosed that Argentina had asked him to give advice on issues of international law. After the claimant requested further clarifications, Mr. Bottini admitted that his advice to Argentina included advocacy; that before the Disqualification Decision was issued he had been asked to act as lead counsel in the case *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17)

³ Proposal, p. 1.

⁴ Proposal, p. 1, citing *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant’s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013 (“**Disqualification Decision**”), ¶ 85.

⁵ Proposal, p. 1.

(“**Impregilo**”); and since then, he had been asked to perform advocacy work in other hearings involving Argentina. Following further inquiries from the claimant, Mr. Bottini admitted that he was receiving a monthly fee for his advice to Argentina.⁶

17. The Applicant also points to Mr. Bottini’s CV, indicating that he was external adviser to Argentina at least until March 2016; and refers to published awards showing that he acted as lead advocate in cases involving Argentina.⁷
18. The Applicant contends that Mr. Bottini’s Explanations in this case show that he “*tactically delayed disclosure of facts plainly material to the [Saint-Gobain] challenge,*” and allowed the *Saint-Gobain* challenge to be decided in ignorance of his true role. Such conduct justifies the Applicant’s reasonable doubt as to whether it will receive fair and independent treatment from Mr. Bottini.⁸
19. The Applicant points out that in his Explanations Mr. Bottini admits that:
 - by the time the Disqualification Decision was made on 27 February 2013, Argentina had already in early February 2013 asked him to provide advice, in circumstances that the Disqualification Decision was explicitly made based on the incorrect understanding that Mr. Bottini might provide future advice to Argentina.⁹
 - he disclosed in April 2013, *i.e.* after the Disqualification Decision, that, since early February 2013, *i.e.* before the Disqualification Decision, he had been engaged as advocate for Argentina in *Impregilo*.
 - he disclosed in June 2013 that he was receiving a monthly retainer from Argentina.¹⁰
20. The Applicant disagrees with Mr. Bottini’s Explanations that his disclosure of March 2013 simply confirmed the provision of services which he had expressly announced in his explanations of December 2012. According to the Applicant, Mr. Bottini admitted

⁶ Proposal, p. 2.

⁷ Proposal, p. 3.

⁸ Applicant’s Additional Observations, pp. 1-3.

⁹ Applicant’s Additional Observations, p. 1.

¹⁰ Applicant’s Additional Observations, pp. 1, 2.

that he had been advocating for or advising Argentina only after the Disqualification Decision was made.¹¹

21. The Applicant also disagrees with the Explanations in that the claimant in *Saint-Gobain* must have understood that the role of advisor can include that of presenting arguments at hearings. The Applicant considers that Mr. Bottini used deliberately vague language in the disclosures, and notes that while an advisor may well be an advocate also, one does not imply the other.¹²
22. The Applicant further contends that the fact that the claimant in *Saint-Gobain* did not bring a renewed challenge is immaterial to the present Proposal. The Tribunal in *Saint-Gobain* was on notice of Mr. Bottini's associations with Argentina, and the award was subject to annulment proceedings. Here, however, the *ad-hoc* Committee's annulment decision will not be subject to review. Therefore, the Applicant argues, conflicts should be policed even more carefully.
23. The Applicant, thus, proposes to disqualify Mr. Bottini pursuant to Articles 14 and 57 of the ICSID Convention and Articles 9 and 53 of the ICSID Arbitration Rules. Alternatively, Mr. Bottini should resign and allow the Secretary-General to appoint a replacement.¹³

(2) *The Respondent's position*

24. The Respondent argues that the Applicant fails to present any facts indicating Mr. Bottini's manifest lack of the qualities required by Article 14 of the ICSID Convention, thereby, failing to meet the standard of Article 57 of the ICSID Convention. The Proposal, the Respondent argues, is based on the subjective opinion of the Applicant's counsel, said to be derived from his counsel's "direct personal experience," in mounting an unsuccessful challenge to Mr. Bottini in *Saint-Gobain*.¹⁴
25. The Respondent indicates that the unchallenged arbitrators in *Saint-Gobain* rejected the challenge, finding that "*Claimant ha[d] presented no facts which cast 'reasonable*

¹¹ Applicant's Additional Observations, p. 3, citing Mr. Bottini's Explanations.

¹² Applicant's Additional Observations, p. 3.

¹³ Applicant's Additional Observations

¹⁴ Reply, pp. 1, 2.

*doubt’ on Mr. Bottini’s impartiality and independence, let alone facts which ‘make it obvious and highly probable.’”*¹⁵ The Respondent notes that Mr. Bottini’s subsequent disclosures were satisfactory to the arbitrators who requested them, as Mr. Bottini continued to serve on the Tribunal, which ultimately ruled in claimant’s favor.

26. The Respondent observes that “*Mr. Bottini is an experienced arbitrator who has served with distinction on numerous tribunals; and is unaware of any blemishes on his admirable record. It sees no grounds for his disqualification here.*”¹⁶

(3) Mr. Bottini’s Explanations

27. In his Explanations, Mr. Bottini gives an account of the events transpired in the *Saint-Gobain* challenge, from the moment of his appointment as arbitrator on 4 October 2012, the filing of the proposal on 29 October 2012, going through the explanations he furnished and disclosures he made from December 2012, up to the Disqualification Decision, and those made after the Disqualification Decision, from March 2013 through August 2015.¹⁷
28. Mr. Bottini explains that when the *Saint-Gobain* challenge was filed, he still was National Director of International Affairs and Disputes of Argentina’s Treasury Attorney-General’s Office; a position he left in January 2013. Mr. Bottini asserts that in the explanations he furnished in *Saint-Gobain* on 11 December 2012, he clarified that once he resigned, he expected to “*continue working as an independent advisor, assisting states, which may include Argentina, and investors, in cases unrelated to the dispute at issue here.*” [Committee’s translation]
29. Mr. Bottini indicates that on 21 December 2012, when the claimant in *Saint-Gobain* commented on his December 2012 explanations, the claimant pointed out that Mr. Bottini had confirmed that he would continue presenting arguments as advocate on behalf of Argentina. Mr. Bottini considers that from those comments it can be inferred

¹⁵ Reply, p. 2, citing *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/13), Decision on Claimant’s Proposal to Disqualify Mr. Gabriel Bottini from the Tribunal under Article 57 of the ICSID Convention, 27 February 2013, ¶ 78.

¹⁶ Reply, p. 2.

¹⁷ Explanations, pp. 1-4.

that it was clear for the claimant that Mr. Bottini's role as advisor might include advocacy at hearings.

30. Further, Mr. Bottini explains that his disclosure of 1 March 2013 was made immediately after the lifting of the suspension in *Saint-Gobain*, to comply with the request made in the Disqualification Decision. In his March 2013 disclosure, he “confirm[ed] the provision of services [...] [he] had expressly announced was possible when furnishing explanations on 11 December 2012.”¹⁸ [Committee's translation]
31. Mr. Bottini indicates that, on 7 March 2013, when the claimant commented on his March 2013 disclosure, the claimant asked him to notify any new mandates from Argentina and reserved its right to file new objections against him; yet, the claimant did not criticize the content or timeliness of the March 2013 disclosure.¹⁹ Mr. Bottini notes that the claimant never requested a review of the Disqualification Decision or the annulment of the *Saint-Gobain* award.²⁰
32. Mr. Bottini also explains, contrary to the Applicant's assertion, that since he resigned from his position as National Director, he has never been lead advocate in a hearing involving Argentina, including the annulment hearing in *Impregilo*.²¹ He also refers to the Applicant's assertion that only in April 2013 he admitted that Argentina had asked him to act in *Impregilo* before the Disqualification Decision was issued. However, Mr. Bottini explains that already in his March 1, 2013 declaration he confirmed (using past tense) that Argentina had requested his services, making specific reference to the circumstances announced in his December 2012 explanations.²²
33. Mr. Bottini finally notes that when the Applicant objected to his appointment to this *ad hoc* Committee, it did not mention any alleged lack of candor, nor did the Applicant question his disclosures in other cases. The Applicant objected to the appointment of

¹⁸ Explanations, p. 4.

¹⁹ Explanations, p. 4.

²⁰ Explanations, p. 6.

²¹ Explanations, p. 5.

²² Explanations, p. 5.

two Committee Members, one of them being Mr. Bottini, but expressly accepted the possibility that either one of them be appointed.²³

IV. ANALYSIS OF THE COMMITTEE

(1) *The legal standard*

34. Article 57 of the ICSID Convention provides that:

“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.”

35. Article 14(1) of the ICSID Convention provides that:

“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields 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.”

36. In accordance with these articles, the disqualification has to be based on “any fact” that shows a “manifest lack” of the qualities required to be eligible for an appointment as member of an *ad hoc* committee. Such qualities in turn relate to moral character, competence in the field of law, among others, and reliability to exercise independent judgment. Since the procedural languages of these proceedings may be in English and Spanish, the unchallenged members consider opportune to note that the equally authentic Spanish version of the ICSID Convention refers to impartiality rather than independence in the exercise of judgment. These are two different concepts.²⁴

²³ Explanations, p. 6.

²⁴ “[...] independence relates to the lack of relations with a party that might influence an arbitrator’s decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.” *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17) and Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi*

Nonetheless, since both versions of the ICSID Convention are equally authentic, it is accepted that members of an *ad-hoc* committee need to be impartial and independent.²⁵

37. The meaning of “manifest” has not been the subject of discussion between the parties. The unchallenged members are aware that the term “manifest” has been interpreted to mean “obvious” or relate to the “seriousness” of the allegations. The unchallenged members coincide with the view of the unchallenged arbitrators in *Saint-Gobain* that “*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.*”²⁶ A decision has to be made on facts sufficiently proven for a reasonable person to be convinced that it is possible that the challenged member manifestly lacks the qualities required by Article 14(1) of the ICSID Convention

(2) The ground for disqualification

38. As a first observation, the unchallenged members note that the Applicant has not raised any ground for disqualification related to the impartiality, independence or candor of Mr. Bottini based on facts occurred after the *Saint-Gobain* proceedings, including this proceeding.
39. The Proposal is based on the alleged failure of Mr. Bottini to disclose facts in two instances that might have been material to the Disqualification Decision in *Saint-Gobain*. In both occasions, the Applicant alleges that Mr. Bottini’s disclosures were at variance with the reality. In the first instance, at the time of the Disqualification Decision, dated 27 February 2013, Mr. Bottini had already been requested by the Attorney General of Argentina to advise on points of international law, but Mr. Bottini declared to the unchallenged arbitrators that he had been asked to advise the Attorney General in the future. In the second instance, since early February 2013 Mr. Bottini had

Universal S.A v. Argentine Republic (ICSID Case No. ARB/03/19), Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007 (“**Suez v. Argentina**”), ¶ 29. See also *Disqualification Decision*, ¶ 56, referring, among others, to *Suez v. Argentina*: “*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. 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.*” (Footnotes omitted)

²⁵ See *Disqualification Decision*, ¶ 55 and case law referred therein.

²⁶ *Decision on Disqualification*, ¶ 60.

advised Argentina in *Impregilo*, but did not disclose until 13 April 2013 that his role included advocacy and not only advice.

40. The issue to be decided by the unchallenged members is whether the alleged lack of candor of Mr. Bottini in the case of *Saint-Gobain* shows a manifest lack of the qualifications required under Article 14(1) of the ICSID Convention to be a member of the *ad-hoc* Committee in the instant case. This question is different from the question decided by the unchallenged arbitrators in *Saint-Gobain*. In that case, the allegations related to concerns raised by the simultaneous role of advocate and arbitrator, a concern not raised here. Although the issues are not germane, they are linked: the alleged lack of candor arises from the disclosures of Mr. Bottini in *Saint-Gobain*.
41. The first question for the unchallenged members is whether the Proposal is based on facts. The Respondent argues for dismissal of the Applicant's Proposal because it is based solely on the Applicant's counsel's subjective experience and not on objective facts. The Proposal is based on the allegation that the unchallenged arbitrators in *Saint-Gobain* were not aware of the professional services that Mr. Bottini was effectively providing to Argentina at the time they decided to deny the disqualification proposal in *Saint-Gobain*.
42. Mr. Bottini disputes that the claimant in *Saint-Gobain* was unaware that his role as advisor included advocacy. Mr. Bottini states: "*on 21 December 2012, Saint-Gobain contended that, in the explanations furnished on 11 December 2012, I had confirmed that I would continue arguing as an advocate on behalf of the Argentine Republic.*"²⁷ [Committee's translation] In the explanations of Mr. Bottini of December 11, 2012, he stated that he would "*continue working as an independent advisor, assisting states, which may include Argentina and investors, in cases unrelated to the dispute at issue here*" [Committee's translation]. While the Applicant and Mr. Bottini have exchanged arguments based on the interpretation of Mr. Bottini's disclosures, it remains unexplained why the unchallenged arbitrators would not have been aware of the meaning given now to the disclosures. Indeed, on the date of the Disqualification Decision, the unchallenged arbitrators considered that the case *Telekom Malaysia*

²⁷ Explanations, p. 4.

Behard could be distinguished from the case before them precisely because “*the Arbitral Tribunal has no present information that Mr. Bottini currently is advocating for or advising Argentina in any way.*”²⁸ Evidently, the unchallenged arbitrators were unaware of Mr. Bottini’s role in respect of Argentina. But Mr. Bottini continued to make disclosures after the date of the Disqualification Decision, including the disclosures made on which the Applicant’s Proposal relies; and the parties in *Saint-Gobain* did not take any action based on them. Which raises the next question, what is the relevance of this inaction from the parties in *Saint-Gobain*?

43. The Respondent assumes that the disclosures after the Disqualification Decision were satisfactory to the unchallenged arbitrators who have called for them since Mr. Bottini continued to serve on the tribunal.²⁹ On the other hand, the Applicant has stated that it is irrelevant that the claimant *Saint-Gobain* did not renew the disqualification proposal. But the disqualification proposal in the instant case is based on events flowing from the disqualification proposal made against the same arbitrator by a different party yet represented by the same counsel. Hence, it is not as irrelevant as stated by the Applicant. In fact, on the basis that the claimant in *Saint-Gobain* did not renew the proposal, the unchallenged members of this Committee can reasonably conclude that the claimant in *Saint-Gobain* had no further doubts about Mr. Bottini’s independence and impartiality arising out of the disclosures made after the Disqualification Decision in that case. The allegations made here on lack of candor could have been made on the basis of the same facts in *Saint-Gobain*, but they were not. It is not for the unchallenged members to take action on more than six-year old facts without more recent evidence to sustain the disqualification and on which the party advised by the same counsel did not take action.
44. For these reasons, the unchallenged members conclude that the Applicant has not shown Mr. Bottini’s manifest lack of qualities required by Article 14(1) of the ICSID Convention.

²⁸ Disqualification Decision, ¶ 85.

²⁹ Reply, p. 2.

V. DECISION

45. Having considered the facts alleged and the arguments submitted by the Parties, and for the reasons indicated above, the unchallenged members of the *ad-hoc* Committee:

- (i) reject the Applicant's Proposal for Disqualification of Mr. Bottini; and
- (ii) request Mr. Bottini, as he has undertaken in his Declaration and required under the ICSID Rules, to continue to inform about any circumstance which could raise doubts about his ability to exercise independent and impartial judgment.

[Signature]

[Signature]

Prof. Mónica Pinto
Member of the *ad hoc* Committee

Dr. Andrés Rigo Sureda
President of the *ad hoc* Committee