

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the Proceeding between

URBASER S.A.
AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAI A UR PARTZUERGOA
(Claimants)

and

THE ARGENTINE REPUBLIC
(Respondent)

ICSID Case No. ARB/07/26

Decision
On Claimants' Proposal to Disqualify
Professor Campbell McLachlan, Arbitrator

Rendered by

Professor Andreas Bucher, President
Mr. Pedro J. Martinez-Fraga, Arbitrator

Secretary of the Tribunal: Mr. Marco Tulio Montañés-Rumayor

Representing Claimants:

Dra. Mercedes Fernández Fernández
Dr. Juan Ignacio Santabaya González
Jones Day
Madrid, Spain

Representing Respondent:

Dr. Joaquín Pedro da Rocha
Procurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Buenos Aires, Argentina

Date: August 12, 2010

I. Background

1. On July 20, 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration dated July 6, 2007, presented in the Spanish language (“Solicitud de Arbitraje”) and submitted by URBASER S.A. AND CONSORCIO DE AGUAS BILBAO BIZKAIA, BILBAO BISKAI A UR PARTZUERGOA (“Claimants”, respectively “URBASER” and “CABB”) against the ARGENTINE REPUBLIC (“Argentina” or “Respondent”). The Claimants submitted the Request pursuant to Article X of the Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain signed on October 3, 1991¹ (“Argentina-Spain BIT” or “the BIT”).

2. On October 1, 2007, the Acting Secretary–General of ICSID registered the Request and notified the Parties of its registration.

3. Claimants and Respondent (the “Parties”) agreed to waive the nationality requirement as provided in Article 39 of the ICSID Convention (the “Convention”). Respondent selected the formula provided for in Article 37(2)(b) of the Convention regarding the constitution of the Tribunal. Claimants agreed to this choice, subject to the provisions of Article 38 of the Convention.

4. On December 18, 2007, Claimants appointed a national of Spain as arbitrator and proposed the designation of another arbitrator as president of the Tribunal. Respondent rejected the latter proposal on December 28, 2007, and suggested another candidate to become president. Claimant objected to this new proposal on January 3, 2008. On February 15, 2008, Respondent appointed an arbitrator of Argentine nationality and asserted a new proposal for president of the Tribunal. Because both arbitrators appointed by the Parties share the nationality of Claimants and Respondent, respectively, pursuant to Article 39 of the Convention the agreement of all parties was required to confirm these appointments. On June 18, 2008, Claimants rejected both proposals that Respondent had raised.

5. On September 29, 2008, Claimants withdrew their initial appointment of an arbitrator and instead appointed Mr. Pedro J. Martinez-Fraga, a national of the United States of America, as Arbitrator. The Parties were informed on October 30, 2008 that Mr. Martinez-Fraga had accepted his appointment.

6. Respondent stated on December 18, 2008 that an agreement had been reached between the Parties to accept the appointment of a national of a party pursuant to Ar-

¹ Acuerdo para la promoción y protección recíprocas de inversiones firmado por la República Argentina y el Reino de España el 3 de octubre de 1991.

article 39 of the Convention. On January 20, 2009, Claimants requested that the two remaining arbitrators be appointed by the Chairman of the Administrative Council, one of them to serve as the Tribunal's president. By letter dated February 13, 2009, the Centre confirmed that in the absence of an agreement between the Parties, no party could designate an arbitrator having the nationality of either Party.

7. On February 23, 2009, Respondent appointed Sir Ian Brownlie, a national of the United Kingdom, as arbitrator. On February 26, 2009, the Centre confirmed that Sir Ian Brownlie had accepted his appointment.

8. On May 26, 2009, Respondent rejected and Claimants accepted a proposal by the Centre for the appointment of a president of the Tribunal. A new proposal by the Centre on June 9, 2009 was accepted by Claimants on June 16, 2009 and rejected by Respondent on the same day. A further proposal submitted by the Centre on July 10, 2009 was refused by both Parties on July 17, 2009.

9. The Centre then considered Claimants' earlier request to have the third presiding arbitrator appointed by the Chairman of the ICSID Administrative Council as provided for in Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules. By letter dated July 30, 2009, the Centre informed the Parties that it intended to propose the appointment of Professor Andreas Bucher, a national of Switzerland and a member of the ICSID Panel of Arbitrators, as the third arbitrator and President of the Tribunal. In an additional letter dated August 21, 2009, the Secretary-General of ICSID responded to Respondent's objections to the proposed appointment by concluding that these objections were not compelling.

10. On August 25, 2009, Respondent agreed to the appointment of another Swiss national that the Centre earlier had suggested and to which Claimants had agreed on May 26, 2009. When the Centre stated that it was going to seek this appointee's acceptance, on September 1, 2009, Claimants stated that their earlier acceptance was no longer in effect and that they were opposed to Respondent's attempt to have Professor Bucher's designation replaced upon its unilateral initiative.

11. On October 13, 2009, the Parties were informed that the Chairman of the ICSID Administrative Council had appointed Professor Andreas Bucher as the President of the Tribunal. On October 16, 2009, the Parties were further informed that Professor Bucher as well as Sir Ian Brownlie and Mr. Pedro J. Martinez-Fraga had accepted their respective appointments and that accordingly, the Tribunal was deemed to be constituted and the proceedings to have begun on that date.

12. In view of the first session of the Tribunal that was envisaged to be held in Paris on December 16, 2009, the Parties submitted an agreement on multiple issues

listed on that meeting's provisional agenda. By letter dated December 10, 2009, the Tribunal offered additional suggestions for the Parties' consideration. As the Parties were making progress in resolving outstanding issues, the meeting in Paris was cancelled, based on the expectation that agreement would be reached on the outstanding issues listed on the provisional agenda within a few days between the Tribunal and the Parties.

13. On January 3, 2010, Arbitrator Sir Ian passed away. Pursuant to Arbitration Rule 10(2), the proceeding was thus suspended and the Argentine Republic was invited to appoint an arbitrator.

14. On February 26, 2010, the Argentine Republic appointed Professor Campbell McLachlan, a national of New Zealand as arbitrator. On March 8, 2010, the Centre informed the Parties that Professor McLachlan had accepted his appointment and that therefore, in accordance with Arbitration Rule 12, the proceeding resumed the same day from the point it had reached at the time the vacancy occurred.

15. On March 18, 2009, Claimants filed with the Centre a Proposal to disqualify ("Propuesta de Recusación") Professor McLachlan as Arbitrator pursuant to Article 57 of the ICSID Convention. The same day, the Centre confirmed receipt of the Proposal and declared that in accordance with Arbitration Rule 9(6) the proceeding was suspended until a decision on the Proposal for disqualification was taken.

16. On April 16, 2010, Respondent filed a submission in response to the disqualification proposal.

17. Invited thereupon to make his own statement on the matter, if any, Professor McLachlan submitted such statement by letter dated May 5, 2010. The Parties all filed a further response to this statement on May 14, 2010.

18. In a case like the present one, where one of the members of the Tribunal is challenged, Arbitration Rule 9(4) provides that "the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned." Mr. Pedro J. Martinez-Fraga, Arbitrator, and Professor Andreas Bucher, President (both also designated hereinafter as the "Two Members") have thus considered the Proposal and agreed upon the reasons and conclusions stated below.

19. Because Claimants filed their Proposal within ten days after they were informed of Professor McLachlan's acceptance, it is certain that Claimants have acted promptly as required by Arbitration Rule 9(1).

II. The circumstances relevant to the Proposal for disqualification and the Parties' position

20. Claimants' proposal for the disqualification of Prof. McLachlan as an arbitrator and member of this Tribunal is based on views expressed by Prof. McLachlan in his publications as a legal scholar on two questions that Claimants consider crucial to this arbitration.

21. In connection with the Most Favored Nation (MFN) Clause, Claimants refer to the statement made by Prof. McLachlan in the book "International Investment Arbitration, Substantive Principles", published in 2007 by Oxford University Press. This book has been written by Prof. McLachlan together with Laurence Shore and Matthew Weiniger, assuming joint responsibility for the entirety of the work. It is, however, stated therein that Chapter 7 was written by Prof. McLachlan. Claimants base their claim and analysis on Chapter 7. Their concerns are focused on an extract that reads as follows:

"Like national treatment, most favored nation (MFN) treatment has an impressive lineage in both investment and trade treaties. The general approach to the interpretation of such clauses has received considerable attention from international courts [recte: tribunals] and from the International Law Commission.

....

*However, it is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question. It is submitted that this is precisely the effect of the heretical decision of the Tribunal on objections to jurisdiction in *Maffezini v Spain*. In this case, the Tribunal held that the specific provisions of the dispute resolution clause in the Argentine-Spain BIT did not constitute a bar to its jurisdiction in view of the more liberal provisions of the Chile-Spain BIT, which could be applied as a result of the MFN provision...*

*In *Maffezini*, the Argentine-Spain BIT contained a dispute settlement clause which permitted the submission of the dispute to international arbitration only if it had first been submitted to the courts of the host State and no decision had been rendered within eighteen months. The Chile-Spain BIT merely contained a cooling off period of six months, with no requirement to resort to the host State courts...*

*On that question, the Tribunal found that the protection of the rights of traders by means of dispute resolution clauses was a matter which fell within the protections afforded by treaties of commerce and navigation or investment treaties.... Accordingly, *Maffezini* could take the benefit of the Chile-Spain BIT, and was not required to resort to the Spanish courts before invoking the jurisdiction of the arbitral tribunal...*

*The correctness of this analysis was convincingly questioned in *Plama*.... States could provide expressly that they intended the MFN clause to apply to dispute settlement (as was the case, for example, in the UK model form BIT). But the fact that the*

MFN clause was expressed to apply 'with respect to all matters' dealt with by the basic treaty was not sufficient to alleviate the doubt as to whether the parties had really intended it to apply to the dispute settlement clause.

...
It is submitted that the reasoning of the Tribunal in Plama is to be strongly preferred over that in Maffezini... Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration. In those circumstances, it is particularly important to construe the ambit of the State's consent strictly....It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State parties and in other circumstances. Moreover, it is in any event not possible to imply a hierarchy of favour to dispute settlement provisions. The clauses themselves do not do this, and it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration....

The result, if as is suggested, the approach in Plama is preferred, will be that the MFN clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide. Its domain of application will be as to the substantive rights vouchsafed to investors from third States to which special preferences have been granted.²

"The application of MFN protection will not be justified where it subverts the balance of rights and obligations which the parties have carefully negotiated in their investment treaty. In particular, it will not apply to the dispute settlement provisions, unless the parties expressly so provide."³

22. In summary, the key points on which Claimants' proposal is based in this respect are that (i) Prof. McLachlan described as "heretical" the jurisdictional decision handed down in the *Maffezini* case, (ii) he found the criticism of this decision by the Tribunal in the *Plama* case convincing, (iii) the reasoning of this Tribunal was to be preferred, he sustains that the MFN Clause does not apply to the dispute settlement provisions of a BIT unless the parties expressly have so agreed and (iv) that doubts are to be raised in this respect in those cases where the clause provides to be applied "with respect to all matters" as stated in Article 4.2 of the Spain-Argentina BIT.

23. On this basis Claimants draw the conclusion that Prof. McLachlan "has already prejudged an essential element of the conflict that is the object of this arbitration". It is Claimants' submission that the claim presented before this Tribunal is under the auspices of the Spain-Argentina BIT in the same way as the claim presented by Mr. Maffezini against the Kingdom of Spain. When describing the *Maffezini* decision as "heretical", Claimants sustain that Prof. McLachlan has prejudged the jurisdiction of this

² See "International Investment Arbitration, Substantive Principles, Oxford University Press, 2007, pages 254 to 257. Emphasis added by Claimants. Footnotes omitted.

³ McLachlan *et al.*, *op. cit.*, page 263. Emphasis added by Claimants.

Tribunal. This would appear all the more so as Prof. McLachlan's position has been taken as support in one recent decision where the jurisdictional objection raised by the Argentine Republic in respect of the MFN Clause has been admitted.⁴

24. The other matter on which, according to Claimants' Proposal, Prof. McLachlan has clearly given his views is the defence posed by the Argentine Republic on the state of necessity, in relation to the decisions handed down in the *CMS*, *Enron*, *Sempra*, and *LG&E* cases. Prof. McLachlan's statement, on which the proposal for disqualification is based in this respect reads:

"Unfortunately, however, the tribunals which have so far considered the matter have come to very different conclusions on the application of the defence. In CMS, Enron, and Sempra the tribunals (which all had the same President) considered that the defence was not available...."

The award in CMS was the subject of annulment proceedings. On 25 September 2007, the Annulment Committee delivered its decision. It found manifest errors of law in the tribunal's treatment of necessity, but it declined to annul on this ground, holding that the errors did not amount to a manifest excess of powers or lack of reasoning, as would have been required for annulment.

... The Committee concluded: Those two texts having a different operation and content, it was necessary for the Tribunal to take a position on their relationship and to decide whether they were both applicable in the present case. The tribunal did not enter into such an analysis, simply assuming that Article XI and Article 25 are on the same footing.

This led to a second error of law, namely the failure to consider whether each such rule was a primary or a secondary rule of international law. The Committee's views was that Article XI was a primary rule, in that, if it applied, there would have been no breach of the BIT.

... These two errors made by the Court could have had a decisive impact on the operative part of the Award.

... The answer to that question is clear enough: Article XI, of and for so long as it applied, excluded the operation of the substantive provisions of the BIT. That being so, there could be no possibility of compensation being payable during that period.

In formal terms, the decision of an annulment committee has no greater precedential effect than an award. Nevertheless, the very opportunity of a second tier of review; the narrowly circumscribed limits of the review; and the eminent experience in public international law of the Committee, suggest that great weight should be given to the Committee's categorical views on the central issues confronted in these cases...

⁴ *Wintershall v. Argentine Republic*, ICSID No. ARB/04/14, Award of 8 December 2008, §§ 167 and 188.

*... It was taking the customary doctrine first, and then conflating its test with that of the Treaty, without close consideration of the differences, which contributed to the errors of the CMS Tribunal, and those which followed it.*⁵

25. While Claimants admit that they are conscious that a clear difference exists between the BIT applied in the *CMS* case and the Spain-Argentina BIT, they nevertheless deem that Prof. McLachlan has prejudged the defense of necessity because the case submitted to this Tribunal involves the emergency measures adopted in Argentina in 2002, which were the subject of the *CMS* case and of many other cases where they were invoked as a defense by the Argentine Republic, thus making it highly probable that they will be referred to again in the case pending before this Tribunal. Claimants submit that Prof. McLachlan has prejudged the defense of necessity because he declared that more weight should be given to the decision of the Annulment Committee than to the Award handed down in the *CMS* case, as the latter did contain a “manifest error of law” in the Committee’s view, which is shared by Prof. McLachlan, thus prejudging yet another crucial question relevant to the case before this Tribunal.

26. Claimants’ position, as will be considered below, is that an arbitrator appointed to an ICSID Tribunal must fulfill the two requirements of impartiality and independence. In Claimants’ view, the first requirement has a strong subjective content. Partiality exists not only in relation to one of the parties, but it also exists when the arbitrator shows a preference towards the position adopted by one of the litigants or has in some other way prejudged the matter or a certain aspect thereof. In this respect, Claimants submit that Prof. McLachlan does not meet the requisite of impartiality. He lacks the freedom to give his opinion and to make a decision with respect to the facts and circumstances of this case because he already had prejudged those facts and circumstances, issued his opinion, and made it known. Claimants further note that the requirement of impartiality is a question of appearance and trust, an approach that attempts to “make objective” a condition that is clearly subjective in Claimants’ view. In the instant case, however, Prof. McLachlan’s prejudice towards fundamental elements of this arbitration stems from circumstances that have been verified and not from mere appearance, no element showing furthermore that he might have changed his opinion in the meantime. Claimants do not formulate any reproach against Prof. McLachlan for not having made any disclosure when he accepted his appointment as arbitrator, as they do not know whether he had, at that time, knowledge of the elements that gave rise to Claimants’ disqualification proposal.

⁵ See Campbell McLachlan, “Investment treaties and general international law”, *International & Comparative Law Quarterly*, 2008, pages 361-401, quoted from pages 385, 386, 389 and 390. Emphasis added by Claimants.

27. Respondent rejects all arguments the Claimants put forth as groundless and lacking legal basis. Respondent notes that the opinions previously expressed by Prof. McLachlan and on which the Proposal for his disqualification is based make no reference whatsoever to the instant case. Respondent's position, as will be further considered below, is that opinions previously published by an arbitrator do not raise an issue of lack of impartiality or independence when issued outside the framework of the ongoing arbitration. In another ICSID case, the objection to the appointment of an arbitrator based on an opinion given by him in another case was rejected.⁶ Respondent highlights that Prof. McLachlan has given opinions on a large number of concepts of international investment law and they were rendered in consideration of neither the Argentine Republic, URBASER, nor concerning the dispute in question. Only two general comments included in two different publications constitute the factual basis of Claimants' Disqualification Proposal. Prof. McLachlan has never given a legal opinion in which he expressed a preference for the Argentine Republic, nor did he ever refer to the strategy of the Argentine Republic in its international arbitration proceedings.

28. In relation to Prof. McLachlan's comments regarding the defense of necessity, Respondent notes that they are about two international law concepts based on the idea that importance must be given to the comparative analysis made by the Annulment Committee in the *CMS* case. Prof. McLachlan only intended to transcribe what this Committee stated. The Committee never asserted that the facts in question met the necessary requirements of the state of necessity in order to justify its invocation by Argentina. Prof. McLachlan's "preference" for the Committee's arguments in no way means that he is in favour of and in agreement with the merits of the arguments of the Argentine Republic. In any event, Claimants' objection is not applicable to this case, as the Argentina-Spain BIT does not contain any non-preclusive measures clause.

29. Respondent also notes that based on the appointment made by the Chairman of the ICSID Administrative Council in the *Alemanni* case, an institutional position of ICSID has been issued that prior opinions expressed on the MFN clause by the president of a Tribunal do not constitute an obstacle for its appointment and performance in said position, reason for which, *a fortiori*, it could not constitute a ground for the disqualification of an arbitrator. The substance of the decision made by ICSID in that case is perfectly applicable in the instant case with respect to opinions previously entered on the scope and application of the MFN clause.

30. Claimants stated expressly and the Argentine Republic acknowledged that the Proposal to disqualify Prof. McLachlan as arbitrator in no way questions the latter's moral consideration and competence. The motive of disqualification is exclusively

⁶ *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8.

based on the opinions expressed by Prof. McLachlan in his writings as a scholar, which in Claimants' view constitute a source for a lack of confidence in the impartiality of his judgment concerning two essential issues to be debated in the course of this proceeding. For Respondent, no doubt about Prof. McLachlan's independence and impartiality is permitted. Moreover, there has been no showing by Claimants that their alleged lack of full confidence is "manifest" as required by Article 57 of the ICSID Convention.

31. Prof. McLachlan's statement dated May 5, 2010, made in regards to the Proposal for disqualification, in relevant part, reads:

"I have evaluated my own position in the light of the fundamental requirements of Article 14 of the ICSID Convention. On accepting my appointment on 7 March 2010, I signed an unqualified Declaration. After consideration of the matters raised in the Claimant's Proposal, I see no reason to qualify that Declaration, nor any reason why I may not be relied upon to exercise independent judgment in this arbitration.

It is important to distinguish the task of the legal scholar from that of the arbitrator. When writing a book or article, the scholar must express views on numerous general issues of law, based on the legal authorities and other material then available to him. A scholar of any standing should always be prepared to reconsider his views in the light of subsequent developments in the law or further arguments.

However, and in any event, the task of the arbitrator is completely different. It is to judge the case before him fairly as between the parties and according to the applicable law. This can only be done in the light of the specific evidence, the specific applicable law and the submissions of counsel for both parties.

I wish to assure both parties that I would approach such a task in this, as in any, arbitration, unconstrained by my prior publications and without having prejudged any of the issues. This is the essence of the role of the arbitrator."

32. Claimants argue that their presentation of Prof. McLachlan's writings is not challenged and thus, they have not committed an error in interpretation. Claimants accept that there is a difference between the task of a scholar and that of an arbitrator, but in the case of the opinions expressed by Prof. McLachlan, Claimants assert that circumstances that would clearly permit distinguishing between the two duties are not present. They note that the opinions expressed by Prof. McLachlan on the state of necessity specifically refer to the Argentine Republic. Additionally, Claimants argue that in regard to the MFN clause, Prof. McLachlan expressed a degree of conviction and took a stance much greater than a mere doctrinal opinion by describing the decision rendered in the *Maffezini* case as "heretical".

33. Respondent affirms that it expects each of the members of the Tribunal to judge this case exclusively based upon the evidence, applicable law, and submissions

presented by the parties, wholly independent from any views expressed by them in any scholarly writing.

III. The legal basis for the consideration of the disqualification proposal

34. The Parties do not dispute that provisions for dealing with the disqualification proposal are contained in Article 57 (first sentence) of the ICSID Convention, including the reference made to Article 14(1). These provisions read:

“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.” (Art. 57, first sentence)

“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.” (Art. 14[1])

When reading both provisions together, Article 57 has the effect of extending the qualities required by Article 14(1) to all members of the Tribunal, whether or not they are designated to a Panel, and of allowing any party to propose the disqualification of any member on account of any fact indicating a lack of such qualities, under the condition that it must be “manifest”. Because Article 57 of the Convention refers to “any of its members” it leaves no doubt that the applicable rules and requirements are the same for all arbitrators of a three member Tribunal.

35. When considering Claimants’ disqualification proposal in light of the provisions quoted above, the Two Members of this Tribunal are called to decide whether the opinions expressed by Prof. McLachlan on the two matters Claimants qualify as crucial to the outcome of this proceeding, this Arbitrator is deemed to indicate a manifest lack of the required quality to be relied upon to exercise independent judgment.

36. Both Parties have rightly pointed to the fact that the Spanish version of the ICSID Convention introduces a variant to the extent that the final words of the first sentence of Article 14 refer to an arbitrator’s quality to “inspirar plena confianza en su imparcialidad de juicio”, thus referring to the notion of impartiality instead of independence as in the English and French version, as well. The Convention states in its last final clause that the texts in all these three languages are “equally authentic”. It does not contain a rule giving preference to one version over the other. Therefore, the Two Members agree that in case of a divergence of wording the respective versions are to be construed as equivalent. Accordingly, both notions of independence and impartiality are to be considered as equally pertinent for the examination of the Proposal

to disqualify Prof. McLachlan. As Respondent rightly pointed out, the ICSID Convention says nothing, however, about specific factual circumstances that would justify a challenge.

37. The Two Members are fully aware of a large body of case law, proposals and guidelines rendered or issued with the aim of providing definitions for such fundamental notions as the independence and impartiality of arbitrators. In particular, they have taken a close look to definitions quoted and explained in Claimants' Proposal and in Respondent's Reply, some of which are rightly considered, as Claimants put it, of "general acceptance" in international arbitration, such as the IBA Guidelines on Conflicts of Interest in International Arbitration. However, while these texts certainly constitute a most valuable source of inspiration, they are not part of the legal basis on which the decision rendered in respect of Claimants' Proposal is based. This Decision is based on the provisions of the ICSID Convention, as quoted above, which are to be construed and interpreted in the broader context of the objectives and the operation of the arbitral proceedings governed by this instrument.

IV. The content and scope of the notions of independence and impartiality

38. As stated above, both concepts of independence and impartiality are deemed to be of equivalent content and pertinence in the framework of Articles 14(1) and 57 of the ICSID Convention. Therefore, a debate on the question of whether the concepts may have, at least in part, different meanings, becomes moot. In any event, many efforts to discover a manner to divide these notions cannot overcome their inherent redundancy. Indeed, an arbitrator's lack of independence of judgment results in favor shown to one of the parties and thus demonstrates the arbitrator's lack of impartiality, while an arbitrator's lack of impartiality is a sign of the arbitrator's lack of independent judgment.

39. Claimants, however, focus on the notion of impartiality, which, in their opinion, has a "strong subjective content" and therefore, is different from the concept of independence. Claimants consider independence as an objective circumstance, implying the nonexistence of a relationship with the parties. Based on these definitions, Claimants reach the conclusion that no doubt exists regarding Prof. McLachlan's independence, however, in their view, the circumstances relating to his publications demonstrate that he "does not meet the requisite of impartiality since he has prejudged certain fundamental aspects of this arbitration".

40. According to Articles 57 and 14(1) of the ICSID Convention, the crux of the analysis is whether the opinions expressed by Prof. McLachlan qualify as indicating a manifest lack of the qualities required to provide independent and impartial judgment. This principle, however, requires that an inherent qualification is expressed. No arbi-

trator and, more generally, no human being of a certain age is, in absolute terms, independent and impartial. Simply put, every individual is conveying ideas and opinions based on its moral, cultural, and professional education and experience. What is required, when it comes to rendering judgment in a legal dispute, is the ability to consider and evaluate the merits of each case without relying on factors having no relation to such merits.

41. Claimants' definition of the requirement of independence and more particularly, the concept of impartiality, is broader. Claimants admit that the opinions expressed by Prof. McLachlan do not raise an issue of partiality shown towards a party or related to the outcome of the claims as to their merits. They contend that there is a showing of preference and partiality in favor of the position that the Respondent will undoubtedly assert in this arbitration with respect to the two crucial issues described above. Claimants assert that Prof. McLachlan lacks the freedom to give his opinion and to make a decision solely based on the facts and the circumstances of the case because he has allegedly already prejudged those facts and circumstances, and issued his opinion on these matters. Claimants argue that Prof. McLachlan cannot issue an opinion contrary to that which he published and thus face criticism that he was inconsistent or possibly "heretical" himself.

42. In support of this latter point, Claimants refer to the IBA Rules of Ethics, which state:

“3.1 The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises when an arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute.

3.2 Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it.”⁷

When arguing that a position taken on a matter of legal interpretation, as is the case with the excerpts published by Prof. McLachlan, constitutes a prejudice “in relation to the subject-matter of the dispute” and that it reflects “a position in relation to it [*i.e.* the ‘outcome of the dispute’]”, Claimants go far beyond the reasonable understanding of these provisions. The “subject-matter of the dispute” and the “outcome of the dispute” are the core concepts that these provisions refer to; their content is thus identical or at least very close to the outcome of the proceedings. These provisions are far from clearly supporting the purported interpretation that any position taken on a particular issue to be raised in arbitration shall be considered as an element of bias showing a lack of impartiality and independence. The provisions are even more unclear or totally

⁷ Emphasis added by Claimants.

ambiguous when the issue to be considered is, like in the instant case, the interpretation of legal concepts in isolation from the facts and circumstances of a particular case.

43. The requirements of independence and impartiality serve the purpose of protecting the parties against arbitrators being influenced by factors other than those related to the merits of the case. In order to be effective this protection does not require that actual bias demonstrate a lack of independence or impartiality. An appearance of such bias from a reasonable and informed third person's point of view is sufficient to justify doubts about an arbitrator's independence or impartiality. Claimants refer to the decision made on December 8, 2009, by the Secretary General of the Permanent Court of Arbitration (PCA)⁸ upon the challenge of Judge Charles N. Brower. This decision states that a point of view expressed in an interview gave rise to an appearance that this arbitrator prejudged the issue of an arbitration proceeding although he had not given a specific opinion on the outcome of the pending arbitral proceedings. The issue in the instant case, however, is that the appearance of doubt in regards to the independence and impartiality of Prof. McLachlan is directly linked to the statements quoted by Claimants as grounds for their challenge.

44. What matters is whether the opinions expressed by Prof. McLachlan on the two issues qualified as crucial by Claimants are specific and clear enough that a reasonable and informed third party would find that the arbitrator will rely on such opinions without giving proper consideration to the facts, circumstances, and arguments presented by the Parties in this proceeding. Claimants' view is, as stated, broader. They do not include in their position the latter qualification and they contend that the opinions expressed by Prof. McLachlan are to be taken as such and that it appears "unquestionable" that he shares the same opinion today, absent any evidence that he has changed his opinion in the meantime (such change not being noticed in Prof. McLachlan's statement of May 5, 2010).

45. The Two Members seized with the challenge submitted by Claimants are of the view that the mere showing of an opinion, even if relevant in a particular arbitration, is not sufficient to sustain a challenge for lack of independence or impartiality of an arbitrator. For such a challenge to succeed there must be a showing that such opinion or position is supported by factors related to and supporting a party to the arbitration (or a party closely related to such party), by a direct or indirect interest of the arbitrator in the outcome of the dispute, or by a relationship with any other individual involved, such as a witness or fellow arbitrator.

⁸ Decision on Challenge to Arbitrator by the Secretary General of the Permanent Court of Arbitration (PCA) in ICSID Case No. ARB/08/6, *Perenco Ecuador Ltd v. Republic of Ecuador and Petroecuador*.

46. Indeed if one would prefer to extend such requirement of independence or impartiality beyond this framework, as supported by Claimants, the mere fact of having made known an opinion on an issue relevant in an arbitration would have the effect of allowing a challenge for lack of independence or impartiality. Such a position, however, would have effects reaching far beyond what Claimants seem to sustain, and incompatible with the proper functioning of the arbitral system under the ICSID Convention.

47. The opinions expressed by Prof. McLachlan are those of an academic. They represent, even when taken together with numerous other opinions expressed by scholars, a small part of all opinions contained in publications relating to arbitrations governed by the ICSID Convention. These opinions include, in particular, the full set of opinions expressed in the awards and decisions rendered under the ICSID system, most of which are published or available through the Internet. The appointment of the President of the Tribunal in the *Alemanni* case, as reported by Respondent, seems to indicate that an opinion previously expressed in an arbitral decision does not constitute an obstacle for an arbitrator to be appointed in another case raising similar issues. In the Decision on the proposal for the disqualification of a member of the Arbitral Tribunal rendered in the *Suez/Vivendi v. Argentine Republic* cases on October 22, 2007⁹, the Two Members stated that the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case does not mean that such judge or arbitrator cannot decide the law and the facts impartially in another case. They further observed that:

“A finding of an arbitrator’s or a judge’s lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.” (§ 36)

48. If Claimants’ view were to prevail and any opinion previously expressed on certain aspects of the ICSID Convention be considered as elements of prejudice in a particular case because they might become relevant or are merely argued by one party, the consequence would be that no potential arbitrator of an ICSID Tribunal would ever express views on any such matter, whether it may be procedural, jurisdictional, or touching upon the substantive rights deriving from BITs. The wide spreading of ICSID awards through publication and appearance on the Centre’s website has greatly contributed to dense exchanges of views throughout the world on matters of international investment law. This is very largely considered as a positive contribution to the development of the law and policies in this segment of the world’s economy. It goes without saying that such a debate would be fruitless if it did not include an ex-

⁹ ICSID No. ARB 03/17 and 03/19.

change of opinions given by those who are actually involved in the ICSID arbitration process, whether they are writing and speaking as scholars, arbitrators, or counsel. Such activity is part of the “system” and well known to all concerned. Therefore, it seems extremely strange to the Two Members to accept Claimants’ position that a view previously expressed on an item relevant in an arbitral proceeding should be qualified as a prejudgment that demonstrates a lack of independence or impartiality.

49. The above analysis is not intended to suggest that Claimants’ views are not a matter for debate. It is true, indeed, that each arbitrator’s personal opinion is of greater weight in a system like ICSID arbitration than in most other systems of judicial adjudication world-wide. In other judicial systems, decisions are based on precedent that all members of the judicial body have to respect or, at least, observe within a usually small margin for possible overruling, under the control of the appellate body. In such a system, the opinion of an individual judge counts for little to the extent that previous precedents have to be followed. This is not how ICSID arbitration operates. Despite many statements made in ICSID awards affirming the necessity or the duty to achieve consistency through ICSID case law, the principle remains that each Tribunal is sovereign in its decision making. This autonomy also applies to decisions rendered by Annulment Committees, which do not have precedential value and are not in practice considered as having such value. This necessarily implies that weight is given to the opinion of each member of an ICSID Tribunal. However, this is not without limits. The requirement of independent and impartial judgment means that an arbitrator’s previously adopted opinion, whether published or not, shall not be of such force as to prevent the arbitrator from taking full account of the facts, circumstances, and arguments presented by the parties in the particular case.

V. Professor McLachlan’s statements

50. The Two Members have examined whether the opinions expressed by Prof. McLachlan should be viewed as being so strongly argued that their author will not, in the view of a reasonable third party, give due consideration to the position taken by a party in this proceeding.

51. The Two Members wish to emphasize at the outset that Prof. McLachlan has provided the Parties with a clear statement in which he acknowledges the Claimants’ concern and ensures both Parties that he will approach his task as an arbitrator unconstrained by his prior publications and without having prejudged any of the issues. The Two Members have no reason whatsoever not to trust this statement. They also note that the opinions referred to by Claimants have been expressed by Prof. McLachlan in his capacity as a scholar and not in a decision that could have some kind of a binding effect upon him. One of the main qualities of an academic is the ability to change his/her opinion as required in light of the current state of academic knowledge. The

Two Members have no doubt that Prof. McLachlan reaches such high standard of science and conscience.

52. When looking more closely at the opinions that form the basis for the Proposal for disqualification, the Two Members observe that the opinions appear to be of different significance in view of the influence one might derive for the resolution of the dispute before this Tribunal. For the purpose of such examination, the Two Members are not convinced that distinctions like the one based on the notion of “general opinion” as it is used to define the attitudes to be put on the “green list” according to the IBA Guidelines make much sense. Such a distinction between “general” and “specific” views is of little value when it comes to characterizing academic work. The hypothesis of research done by a scholar on a merely “general” level is a description more caricatured than that of actual academic work. As well, it is not much more convincing to draw a strict dividing line between opinions expressed as a scholar and those to be formed as an arbitrator. While it is correct to say that a scholar’s opinion might change and is unrelated to the pattern of facts and arguments related to a particular case, Claimants are right to the extent that they argue that such opinion may nevertheless be a factor of influence when it comes to considering the same or similar issues in a particular dispute. In other words, a legal scholar who becomes an ICSID arbitrator does not lose his/her capacity of being a scholar that conveys academic opinions, which might become relevant to the legal analysis undertaken in the resolution of a particular dispute. Irrespective of such more artificial distinctions, the focus has to be put on statements made by Prof. McLachlan as they stand in order to determine whether they prevent him from taking an independent and impartial judgment in the instant case.

53. In respect to the issue relating to the defense that may be posed by the Argentine Republic on the state of necessity, the Two Members observe that Prof. McLachlan’s statement made in the *International and Comparative Law Quarterly*, 2008, p. 361-401 (385-391), reproduced in relevant parts above, is in very large part devoted to a description and comparison of the decisions handed down in the *CMS*, *Enron*, *Sempra*, and *LG&E* cases. Elements of personal opinion are contained in the statement that “great weight should be given to the Committee’s [seized with the CMS case] categorical views on the central issues confronted in these cases” and that the errors it identified in the decision under its scrutiny was that it “was taking the customary doctrine first, and then conflating its test with that of the Treaty, without close consideration of the differences, which contributed to the errors of the CMS Tribunal, and those which followed it” (page 390).

54. The Two Members are not able to identify anything more in these statements than an analysis of international law, the relationship between general and customary international law, and the law of the BITs involved in the cases under examination.

Even at this level, it is not clear whether the statements made by Prof. McLachlan are relevant in the instant case, especially given that Claimants' acknowledge that there is a clear difference between the BIT applied in the *CMS* case and the Spain-Argentina BIT relevant to the matter before this Tribunal. The statements made by Prof. McLachlan do not contain any element indicating, from the point of view of a reasonable third party, that he will not be capable of giving his full attention and consideration to the positions developed by each Party involved in the instant case as they relate to the legal items he previously examined. If Claimants' challenge would be upheld on the basis of the challenged statements made by Prof. McLachlan, nearly all arbitrators who have ever expressed an opinion on an item specific to ICSID arbitration would be at risk of a challenge. Such an approach would lead to the disqualification of as many arbitrators, including in particular those who have acquired the greatest experience, thus leading to the paralysis of the ICSID arbitral process. Such a perspective cannot be even an implicit outcome of the decision to be taken by the Two Members of this Tribunal.

55. Compared to his explanations on the defense of necessity, Prof. McLachlan's analysis of the "Most Favoured Nation Treatment" in his book on International Investment Arbitration (pages 254-257, 263) appears to be of a more case driven density. While several decisions rendered under the ICSID Convention are quoted, Prof. McLachlan's statement on this matter concentrates on a comparison between the decisions on jurisdiction made in the cases *Maffezini v. Spain*¹⁰ and *Plama Consortium Ltd v. Republic of Bulgaria*¹¹. In the author's view, the *Maffezini* decision had "the effect of fundamentally subverting the carefully negotiated balance of the BIT in question" (*i.e.* the Argentina-Spain BIT), a statement which allows the author to qualify this decision as "heretical" (p. 254). Turning to the *Plama* decision, Prof. McLachlan observes that it "convincingly questioned" the correctness of the analysis in *Maffezini* (p. 256). In his view, *Plama* admitted that the agreement on international arbitration "must be clear and unambiguous, even where reached by incorporation by reference" (p. 256). For such a purpose, a MFN clause expressed to apply "with respect to all matters" was not sufficient (p. 256). The *Plama* tribunal therefore decided that a MFN provision would not apply to dispute settlement provisions unless the parties expressly so provided. On this point, Prof. McLachlan submits his view "that the reasoning of the Tribunal in *Plama* is to be strongly preferred over that in *Maffezini*" (p. 257). The result of his analysis is therefore that "the MFN clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide" (p. 257, and in similar terms p. 263).

¹⁰ ICSID No. ARB/97/7, Decision on Objections to Jurisdiction of January 25, 2000.

¹¹ ICSID No. ARB/03/24, Decision on Jurisdiction of February 8, 2005.

56. The *Plama* decision referred to another MFN clause, contained in the Bulgaria-Cyprus BIT. The comparison between this decision and the *Maffezini* decision therefore remains on a more general level of legal interpretation of the scope of MFN clauses in respect of dispute settlement provisions contained in a BIT. The preference goes to the *Plama* “approach” (p. 257), which seems to leave open a more in-depth analysis of each MFN clause at issue in a particular arbitral dispute.

57. The Two Members further observe that Prof. McLachlan’s scholarly works are far from providing a complete picture of the potential role of how MFN clauses relate to dispute settlement clauses, by virtue of the mere fact that they do not consider all or most decisions rendered in this respect and the many academic and other contributions published in recent years. It may also be observed that the only conclusion beyond the preference given to the *Plama* approach is the statement that the MFN clause should apply to dispute settlement only if this has been “expressed” therein. On this point as well, the analysis leaves open the possibility of adding other elements of interpretation in support of a conclusion which accepts the pertinence of a MFN clause in relation to dispute settlement, not based exclusively on the formal requirement of will having been “expressed”, but also the history of the negotiation, the intentions of the parties having ratified the BIT, the objective of the MFN clause within the overall context of the BIT, and others.

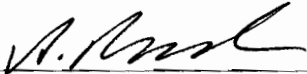
58. In light of the elements contained in Prof. McLachlan’s statement on the role of MFN clauses in matters of dispute settlement provided for in a BIT and based on the trust the Two Members have in Prof. McLachlan’s ability to examine the matter from a more broad perspective, and in taking full account of the facts, circumstances and arguments presented by the Parties in the present proceeding, the Two Members conclude that Prof. McLachlan’s scholarly opinions do not meet the threshold of presenting an appearance that he is not prepared to hear and consider each Parties’ position with full independence and impartiality.

59. This conclusion necessarily implies that Prof. McLachlan’s statements on which the Proposal for his disqualification is based do not indicate a “manifest” lack of independence or impartiality as required by Article 57 of the ICSID Convention.

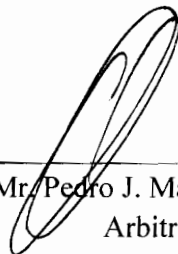
VI. Conclusion

Based on the reasons given above, the Two Members decide –

1. Claimants Proposal to disqualify Professor Campbell McLachlan as Arbitrator and member of this Tribunal is dismissed.
2. The determination and attribution of costs in connection with this Decision is reserved for a decision made by this Tribunal at a later stage of this proceeding.
3. As from the date hereof, the state of suspension of the proceeding according to Arbitration Rule 9(6) is hereby terminated.



Professor Andreas Bucher
President



Mr. Pedro J. Martinez-Fraga
Arbitrator