

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

**IN THE ARBITRATION PROCEEDING BETWEEN**

**MOBIL EXPLORATION AND DEVELOPMENT ARGENTINA INC., SUC. ARGENTINA  
AND  
MOBIL ARGENTINA S.A.**

**CLAIMANTS  
and**

**ARGENTINE REPUBLIC**

**RESPONDENT**

**ICSID Case No. ARB/04/16**

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**DECISION ON THE PROPOSAL TO DISQUALIFY  
ALL MEMBERS OF THE ARBITRAL TRIBUNAL**

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*CHAIRMAN OF THE ADMINISTRATIVE COUNCIL*  
DR. JIM YONG KIM

*Secretary of the Tribunal*  
MS. GIULIANA CANÈ

*Date:* June 4, 2015

## REPRESENTATION OF THE PARTIES

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## A. PROCEDURAL HISTORY

1. On December 19, 2003, Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. (“**Claimants**”) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against the Argentine Republic (“**Argentina**” or “**Respondent**”).
2. On August 5, 2004, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (“**ICSID Convention**”).
3. The Arbitral Tribunal was constituted on August 14, 2008. Its members are Judge Gustaf Möller, a national of Finland, appointed as President pursuant to Article 38 of the ICSID Convention and Rule 4(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”), Prof. Piero Bernardini, an Italian national, appointed by the Claimants, and Prof. Antonio Remiro Brotóns, a national of the Kingdom of Spain, appointed by the Argentine Republic.
4. Following written submissions, a hearing on jurisdiction and merits was held in Washington D.C. from April 1 through 13, 2011. On December 14, 2012, after consultation with the parties, the Tribunal appointed Dr. Nils Janson, a U.S. and Panamanian national, as an independent financial expert. On April 10, 2013, the Tribunal issued a Decision on Jurisdiction and Liability. Prof. Remiro Brotóns attached a separate opinion to the Decision.
5. On July 11, 2013, the Tribunal fixed a calendar for the parties’ submissions on *quantum*. On July 11, 2013, the Claimants filed a submission on *quantum*; on August 21, 2013, the Respondent filed observations to the Claimants’ submission on *quantum*; on November 12, 2013, the Independent Financial Expert issued a Report (“the Report”); on December 9, 2013, the Claimants filed observations to the Report; on January 14, 2014, both parties simultaneously filed observations to the Report, and on February 14, 2014, both parties simultaneously filed rebuttal comments on the Report. A hearing on *quantum* was held in Washington D.C. from May 1 to 3, 2014. During

the hearing, the Tribunal and the parties had the opportunity to ask Mr. Janson questions on his Report.

6. On December 22, 2014, the Argentine Republic requested the removal of Mr. Janson as the Tribunal's Independent Financial Expert, on the basis that he lacked independence. After due consideration of the parties' written submissions and explanations furnished by the Independent Financial Expert, the Tribunal rejected the Respondent's motion on March 11, 2015. The Tribunal issued its Decision on March 23, 2015.
7. On April 15, 2015, the Argentine Republic proposed the disqualification of the three members of the Tribunal, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 ("**Proposal**"). On April 16, 2015, the Centre informed the parties that the proceeding had been suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural calendar for the parties' submissions on the Proposal.
8. In accordance with the procedural calendar, the Respondent filed its arguments on the Proposal on April 23, 2015; the Claimants replied to the Proposal on April 30, 2015; and Judge Moller, Prof. Bernardini and Prof. Remiro Brotóns furnished a joint explanation on May 4, 2015, as envisaged by ICSID Arbitration Rule 9(3). Both parties submitted additional comments on the Proposal on May 14, 2015.

## **B. PARTIES' ARGUMENTS**

### **1. The Argentine Republic's Proposal for Disqualification**

9. The Respondent's arguments on the proposal to disqualify all members of the Tribunal were set forth in its submissions of April 15, 2015, April 23, 2015, and May 14, 2015. These arguments are summarized below.
10. Argentina's Proposal alleges that the facts indicate the Tribunal manifestly lacks the qualities required by Article 14(1) of the ICSID Convention, *i.e.* reliability to exercise independent and impartial judgment.

11. Argentina claims that:

- (i) Mr. Janson failed to disclose the existence of a marketing agreement between *Castalia* (his employer) and *Competition Policy Associates* (Compass), a predecessor to *Compass Lexecon*. Compass Lexecon is the consulting firm that Mr. Manuel Abdala and Professor Pablo Spiller, the Claimants' experts on damages, joined in 2011;
- (ii) The Claimants and Mr. Janson failed to provide evidence on the scope of the marketing agreement and the date of its termination despite the Tribunal's request for this information; and
- (iii) The Tribunal noted the failure to produce this information, but still refused to remove Mr. Janson as the Tribunal's Independent Financial Expert.

Argentina alleges that these facts demonstrate that the "Tribunal acted in a manifestly unreasonable manner from a procedural standpoint" showing a "clear predisposition of the Tribunal and its arbitrariness in deciding the challenge to Mr. Janson."

12. In Argentina's view, a reasonably impartial person would conclude that there is an appearance of bias against the Argentine Republic and that the Tribunal lacks the requisite independence. Thus, the Respondent argues that this is a manifest lack of the qualities required by Article 14(1) of the ICSID Convention.<sup>1</sup>
13. In addition, the Argentine Republic requested that the Chairman of the ICSID Administrative Council (or a person to be appointed by the Chairman) convene an in-person hearing to address the Proposal.

## **2. The Claimants' Reply**

14. The Claimants' arguments on the Proposal to disqualify all members of the Tribunal were set forth in their submissions of April 30, 2015 and May 14, 2015. These arguments are summarized below.

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<sup>1</sup> Argentina's submission of April 23, 2015, ¶¶35-36, 74.

15. According to the Claimants, the Proposal lacks factual and legal support and fails to meet the standard imposed by Articles 14 and 57 of the ICSID Convention. In the Claimants' view, the Proposal reflects Respondent's disagreement with the Tribunal's March 23, 2015 decision confirming Mr. Janson's appointment as Independent Financial Expert in this case.
16. Referring to *Universal v. Venezuela*,<sup>2</sup> the Claimants submit that "a manifest lack of the required qualities must be proved by objective evidence. A simple belief that an arbitrator lacks independence or impartiality is not sufficient to disqualify an arbitrator" (emphasis in original).<sup>3</sup>
17. The Claimants submit that sufficient evidence was provided to prove that the agreement between *Castalia* and *Compass* was terminated years before Mr. Janson was appointed as an Independent Financial Expert in this case, and years before Messrs. Abdala and Spiller joined Compass Lexecon. The Claimants also submit that the agreement was unrelated to this case and extremely limited in scope, as it referred only to a marketing alliance for the Pacific Rim.<sup>4</sup>
18. The Claimants further state that the Tribunal's decision not to remove Mr. Janson was issued after careful consideration of the factual and legal arguments provided by the parties, the explanations furnished by the Expert and the evidence on record.
19. The Claimants also argue that Mr. Janson's failure to disclose the past relationship between *Castalia* and *Compass* is insufficient to prove an absence of impartiality or independence.
20. In view of the above, the Claimants request that the Respondents' Disqualification Proposal be rejected in its entirety.

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<sup>2</sup> *Universal Compression international Holdings, S.L. U., v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/9), Decision on the Proposal to Disqualify Prof. Brigitte Stern and Prof. Guido Santiago Tawil, Arbitrators, May 20, 2011, ¶ 71.

<sup>3</sup> Claimants' Observations of April 30, 2015, p. 3.

<sup>4</sup> *Id.*, p. 5.

### 3. Arbitrators' Explanations

21. The three arbitrators jointly furnished explanations on May 4, 2015, stating that they:

“...[A]re of the opinion that their Decision on the Respondent’s request for the removal of Mr. Janson as Tribunal Expert was appropriate under the circumstances. It was rendered after giving both Parties and the Expert full opportunity to present their observations. It was a fully reasoned decision taken within the powers conferred by ICSID Arbitration Rules. The fact that Argentina does not share the reasoning and conclusions of the Tribunal does not equate to a lack of impartiality and independence of the members of the Tribunal based on objective criteria. We therefore respectfully request that the Chairman of the Administrative Council declines to sustain it.”

### C. DECISION BY THE CHAIRMAN

#### 1. Timeliness

22. Arbitration Rule 9(1) reads as follows:

*“A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.”*

23. The ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed. Accordingly, the timeliness of a proposal must be determined on a case by case basis.<sup>5</sup>

24. In this case, the Proposal was triggered by the Tribunal’s ruling of March 23, 2015 refusing Argentina’s request to remove the Independent Financial Expert. Argentina filed this Proposal on April 15, 2015. The time period between March 23, 2015 and the date of the Proposal falls within an acceptable range and hence, this disqualification proposal shall be considered to have been filed promptly for the purposes of Arbitration Rule 9(1).

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<sup>5</sup> See *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify a Majority of the Tribunal, May 05, 2014, ¶39, footnote 26 (“**Conoco**”).



## **2. Request for Oral Hearing before the Chairman**

25. Article 58 of the ICSID Convention states that the decision on any proposal to disqualify the majority of arbitrators shall be taken by the Chairman of the ICSID Administrative Council.
26. The Respondent requested a hearing to address the Proposal with the Chairman of the ICSID Administrative Council or with a person to be appointed by the Chairman. The Claimants have not advanced a position in this regard.
27. Under the ICSID Convention and the ICSID Arbitration Rules, the Chairman has discretion to determine the procedure that will be followed in deciding a disqualification proposal. The sole procedural guidance in the Rules is that the Chairman shall use his best efforts to make the decision within thirty days after he has received the proposal.
28. The Chairman notes that the parties have been given a full opportunity to argue their positions with respect to the Proposal. The parties have comprehensively briefed the Chairman on the relevant facts and law. An oral hearing is not necessary in these circumstances.
29. Accordingly, the Chairman has decided the Proposal on the basis of the written submissions presented by the parties and the explanations provided by the challenged arbitrators, as required by Article 58 of the ICSID Convention and ICSID Arbitration Rule 9.

## **3. Merits**

30. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It 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.”*

31. A number of decisions have concluded that the word “manifest” in Article 57 of the Convention means “evident” or “obvious,”<sup>6</sup> and that it relates to the ease with which the alleged lack of the required qualities can be perceived.<sup>7</sup>

32. The disqualification proposed in this case alleges that the challenged arbitrators manifestly lack the qualities required by Article 14(1).

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

*“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.”*

34. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” and the French version to “*toute garantie d’indépendance dans l’exercice de leurs fonctions*” (guaranteed independence in exercising their functions), the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment). Given that all three versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.<sup>8</sup>

35. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and

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<sup>6</sup> See Conoco *supra* note 5 ¶47 footnote 28.

<sup>7</sup> C. Schreuer, *The ICSID Convention*, Second Edition (2009), page 1202 ¶¶134-154.

<sup>8</sup> The parties agree on this point: Respondent’s Submission of April 23, 2015, ¶65; Claimants’ Observations of April 30, 2015, p. 3. So does ICSID jurisprudence: *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013), ¶65 (“**Burlington**”); *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal (February 14, 2014), ¶74 footnote 28 (“**Abaclat**”); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties’ Proposals to Disqualify a majority of the Tribunal (November 12, 2013) ¶58 (“**Blue Bank**”); *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (December 13, 2013), ¶70 (“**Repsol**”); and Conoco *supra* note 5 ¶50.

impartiality both “protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”<sup>9</sup>

36. Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias.<sup>10</sup>
37. The legal standard applied to a proposal to disqualify an arbitrator is an “objective standard based on a reasonable evaluation of the evidence by a third party.” As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.<sup>11</sup>
38. The challenging party has referred to other sets of standards and guidelines in its arguments. While these rules or guidelines may serve as useful references, the Chairman is bound by the standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.
39. The Tribunal provided both parties with the opportunity to present their arguments on the Request for the Removal of the Independent Financial Expert. The Tribunal also invited the Expert to furnish explanations. The Tribunal weighed the evidence before it and considered the arguments and explanations submitted. After due deliberation, the Tribunal issued its reasoned decision.
40. While Argentina is dissatisfied with the Tribunal’s decision, “the mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention. If it were otherwise,

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<sup>9</sup> Burlington *supra* note 8 ¶66, Abaclat *supra* note 8 ¶75, Blue Bank *supra* note 8 ¶59, Repsol *supra* note 8 ¶71, Conoco *supra* note 5 ¶51.

<sup>10</sup> Burlington *supra* note 8 ¶66, Abaclat *supra* note 8 ¶76, Blue Bank *supra* note 8 ¶59, Repsol *supra* note 8 ¶71, Conoco *supra* note 5 ¶52.

<sup>11</sup> Burlington *supra* note 8 ¶67, Abaclat *supra* note 8 ¶77, Blue Bank *supra* note 8 ¶60, Repsol *supra* note 8 ¶72, Conoco *supra* note 5 ¶53.

proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.”<sup>12</sup>

41. In the Chairman’s view, a third party undertaking a reasonable evaluation of the Tribunal’s decision not to remove Mr. Janson as the Tribunal’s Independent Financial Expert would not conclude that it demonstrates a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

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<sup>12</sup> *Abaclat supra* note 8 at ¶80.

**D. DECISION**

42. Having considered all the facts and arguments submitted by the parties, and for the reasons stated above, the Chairman rejects the Respondent's Proposal to disqualify the challenged arbitrators.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by 'YK' and a long horizontal stroke extending to the right.

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*Chairman of the ICSID Administrative Council*  
Dr. Jim Yong Kim