

Statement of Dissent of Dr. Santiago Torres Bernárdez to Procedural Order N° 32 of August 1, 2014

I am unable for reasons of principle to join my co-arbitrators in supporting the above Order which I consider in several respects quite unbalance and detrimental to the right of defence of the Respondent Party.

As concerns individual Claimants and the Respondent's request to examine each Claimant (points 1 and 3 of the decisional part)

1. In point 1 of the Order, the majority finds it appropriate to proceed first with regard to the “Verified Claimants who are not subject to any withdrawal request” and to defer its ruling on all remaining Claimants until after its decision on the said Verified Claimants. In the first place, I cannot but expressed my surprise for the adoption by the majority of a ruling approach on the pending *ratione personae* individual jurisdiction and admissibility issues before any deliberation (either as a whole or in part) by the Tribunal on the merits of that matter.

2. Secondly, the distinction introduced by the majority between “Verified Claimants who are not subject to any withdrawal request” and the rest of the alleged Claimants is based, according to the reasoning of the Order, upon the final verification report of Dr. Wühler, a person appointed by the majority as sole Expert of the Tribunal with the sole support of the Claimants, namely of the Party having submitted the materials supposed to be the object of the verification. I have explained in a Dissenting Opinion issued at the time of Dr. Wühler's appointment, and reiterated in subsequent statements and at the hearing, that such a verification procedure adopted without the consent of both Parties, and in the face of the manifested opposition of the Respondent, is an act adopted by the majority in breach of Article 43 of the ICSID Convention. The Respondent having maintained all along until the present its opposition to the said verification procedure the said breach has not been cured and, consequently, Dr. Wühler's final verification report partakes the same original vice as his appointment. Therefore, the report is inadmissible as the basis of any ruling by the members of the Tribunal on the pending *ratione personae* individual jurisdictional and admissibility issues.

3. In the light of the above, I consider that the Respondent's request for examination of each Claimant to be in order. By rejecting it (point 3), the majority adds to the breach of the above Article 43 a further decision detrimental to the Respondent's right to verify the fulfilment by each alleged Claimant of the conditions required to be a Claimant in the present case as defined in the 2011 Decision on Jurisdiction and Admissibility. In particular, because the lack of access to the originals of the documents fed in the Database (which has had several versions), the numerous changes - with and without authorization - introduced therein by the Claimants and the very scope of Dr. Wühler's report which excludes, for example, the verification of the authentication of the signatures. This is why, in my opinion, the Tribunal should arbitrate an appropriate procedure for the Respondent's examination, under its control, of each of the individual remaining alleged Claimants as requested.

4. It should also be recalled that the present request of the Respondent is consequential of Procedural Order N° 27 of 30 May 2014 whereby the majority denied to the Respondent the right

of examination of each purported individual Claimants as well as, alternatively, the indication by the Tribunal of the number of Claimants who the Respondent might have examined at the June hearing (except the eight “Claimants Witnesses” chosen by the legal representation of the Claimants themselves!!). Thus, the opportunity offered by the hearing for the Respondent’s examination of a number of individual purported Claimants was closed altogether by my co-arbitrators and it is not the fault of the Respondent.

5. In my Statement of Dissent to Procedural Order N° 27, I have developed with some detail my position, *inter alia*, on the Respondent’s request for examination of individual Claimants, which I reiterate here in the light of the invocation by the majority of a “standard applicable in the present proceeding” without any kind of reference to the ICSID rule where the invoked so-called standard would be embodied (reasoning point 3). In other words, the majority invokes its self-made technicalities to deny fundamental rights of the Respondent notwithstanding that the mass *personae* problems of the case are the fact of the Claimants not of the Respondent.

6. In sum, the position adopted by the majority from the very beginning of the present phase of the case in the matter under consideration shows a quite determined attitude of my co-arbitrators to maintain the breach of Article 43 of the ICSID Convention until the very end, even if other participants in the case, like for example myself, are deprived of reliable elements of proof relating to the still pending *ratione personae* jurisdiction and admissibility issues with respect to the individual purported Claimants.

As concerns the introduction of documents relating to the U.S. Supreme Court’s proceedings (point 2 of the operative part)

7. The 2011 Decision on Jurisdiction and Admissibility devoted a considerable number of paragraphs, under the heading “Contract Claims v. Treaty Claims”, concluding with the finding of the existence of *ratione materiae* jurisdiction of the Tribunal on “treaty claims” and excluding altogether jurisdiction on “contract claims”. The terms used then by the majority in those paragraphs of the Decision cannot be more clear. One may read, for example, that: “It is undisputed that Argentina, as debtor of the bonds, has failed to perform its obligations under these bonds. Argentina may (or may not) thereby have breached contractual obligations towards Claimants or other owners of security entitlements; *this question is not at the stake here*” (para. 320) (italic supplied).

8. However, following the ruling of 16 July 2014 of the U.S. Supreme Court in *NML Capital Ltd. v. Argentina* the Tribunal, following an initiative of the Claimants, adopted Procedural Order N° 31 and pursuant to that order the Claimants filed a certain number of documents. Three of these documents were objected by the Respondent on the argument that they exceeded the submissions admitted under the said Procedural Order. But, in the present Order, the majority rejects those Respondent’s objections and admits on the records the three documents in question. I agree with this decision.

9. What I object is that the majority adopted a different approach in an analogous matter with respect to the Respondent. The present Order rejects in effect seven out of the 25 documents submitted by the Respondent following Procedural Order N° 31 through arguments of a mere

technical nature relating to whether or not the rejected documents relate to the U. S. Supreme Court ruling, interfering thereby unduly with the right of the Respondent to choose and file the documents it considers necessary in response to the initiative and documents filed by the Claimants following the said ruling. Then, the same standard has not been applied by the majority to all the documents submitted by the Claimants. For example, the accepted 29 May 2014 Paris Club press release concerning an agreement with Argentina has nothing to do with the ruling of the U.S. Supreme Court. The unequal treatment of the Parties in this incidental question is therefore obvious.

10. For my part, I consider that the seven Respondent's documents rejected should have been admitted at least tentatively, namely without prejudice of a final decision thereon following a more detailed consideration of the whole of the documentation submitted on the matter by each of the Parties and in the light of any eventual relevant subsequent developments. The Tribunal must not depart from the principle of the equality of the Parties in the proceeding even if, as in the present case, the Tribunal is without jurisdiction to decide "contract claims".

11. As to the production of the letter from the Italian Prime Minister Mr. Matteo Renzi to Argentina's President Mrs. Cristina Fernandez de Kirchner the leave granted to the Respondent by the Order is quite correct. In any case, the two States are the Contracting Parties to the BIT applicable in the case and the Claimants have Italian nationality. The Claimants have of course the right to object, without prejudice that the final decision corresponds to the Tribunal.

As concerns the declaration of Mr. Stock

12. Regarding Mr. Nicola Stock's letter to the *Financial Times* of 21 July 2014 the Order is too shy. It fails to ask him to refrain from making such kind of declarations in public while acting as *Agent* in the present ICSID case. Instead, the Order recalls *both Parties* their obligations under Procedural Order N° 3, when it was Mr. Stock, *Agent* in the case, the one who has send the letter in question to the *Financial Times*.

As concerns other issues

12. The invitation to the Respondent to comment, within a week, on Claimants' letter of 23 June 2014 is in order because in conformity with the procedure followed by the Tribunal.

1 August 2014

Signed: Santiago Torres Bernárdez