

Dissenting Opinion of Dr. Torres Bernárdez

I object to Procedural Order No. 15 signed by the President on behalf of the majority of the Arbitral Tribunal for the following reasons:

Introduction

1. Paragraph 3 of PO No. 15 explains that the Order “aims to move forward with the appointment of one expert”; in paragraph 17 the majority declares that Dr. Wühler” is duly qualified to act as Expert in the present proceedings”; in paragraph 18 the majority asks him to prepare a “Work Proposal” in accordance to the terms and conditions set out in section D of the Order; and in paragraphs 26 to 30 the majority provides for the remuneration and expenses of the Expert in relation to the preparation of the “Work Proposal”, the “Draft Verification Report” and the “ Final Verification Report”.

2. It follows that the majority opted for a solution which divides the Tribunal, as well as now the Parties, with the consequential procedural effects of their disagreement for the appointment of one or more “experts’ of the tribunal”, in the light of the limited powers granted to the arbitral tribunals for getting direct evidence by Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules.

3. I gave my support to PO No. 12 of 7 July 2012 and, therefore, to the decision in point 4 of that Order to the effect *inter alia* that: “Phase 2B will concern a verification of Claimants’ database against the requirements set forth in (para.) 501 (iii) of the Decision by one or more experts appointed by the Tribunal after consultation of the Parties (‘Database Verification’)”. At the time of the unanimous adoption of that Order, the “Database Verification” was envisaged as an objective operation under the control of the Arbitral Tribunal as a whole and to be performed,

with the collaboration of both Parties, in the interest of the proceedings and in the confidence of all concerned.

4. It was unfortunate that, soon after, the majority in its former *draft* PO No. 13 proposed, under the form of an integral proposal, the appointment of Dr. Wühler as sole expert for Verification of the “Database” submitted by the Claimants. For reasons set out in my “statement of dissent” joined to the said draft PO No. 13, I was not in the position to accept such a integral proposal and, looking for a consensus, I proposed Professor José Carlos Fernández Rozas as a second expert to form a tandem on the same standing with Dr. Wühler in order to maintain the advisable balance of confidence of the three members of the Tribunal in the projected verification undertaking.

5. The majority rejected my proposal and both the former draft PO No. 13 of the majority and my “statement of dissent” thereto were circulated to the Parties for consultation (as decided by PO No.12) with the result that the Parties disagreed on both accounts, namely on the proposal of the majority and on my own proposal. This created a new procedural situation which the present Order does not solve because it maintains the essential of former draft PO No 13, namely the appointment of Dr. Wühler as sole expert of the Tribunal for the said “Work Proposal” and “Database Verification”.

I. Appointment of one or more Tribunal’s expert(s) for the Database Verification

A. The object of the consultation of the Parties

6. Section B (The Arbitral Tribunal’s Position) of the present Order begins by recalling that having considered the Parties’ comments to the former draft PO No. 13, the Arbitral Tribunal, by majority decision, decides as follows:

“1. Appointment of an Expert

“11. As decided in para.4 of Procedural Order No. 12, the Arbitral Tribunal considers it necessary to appoint an independent expert (the “Expert”) for the Database Verification”.

7. This wording of the present Order is misleading because para. 4 of PO No.12 adopted unanimously did not decide the appointment of an expert (“the Expert”), but of “one or more experts appointed by the Tribunal after consultation of the Parties” (for the whole text of para.4 of PO No. 12 see paragraph 1 of the present Order).

8. The appointment of one expert in the person of Dr. Wühler is, as indicated, the proposal made by the majority under the form of a *draft PO*, namely former draft PO No. 13, circulated for consultation purposes to the Parties, together with my “statement of dissent”. It was therefore the majority which in its first act of implementation of PO No. 12 proposed a sole expert in the person Dr. Wühler in the following terms:

“In view of the complexity of the issues relating to the Database Verification and that diverging position of the Parties and their experts with regard to the reliability, usefulness and content of Claimant’s Database, the Arbitral Tribunal considered it necessary to appoint an independent expert.

“The Arbitral Tribunal hereby appoints:

“Dr. Norbert Wühler
(subject to approval by the Arbitral Tribunal)

“as expert in this arbitration (the ‘Expert’)”

(paras.4 and 5 of former draft PO No.13).

9. Thus, the majority’s proposal circulated for consultation to the Parties did not distinguish the appointment of Dr. Wühler from the question of whether or not there was a general need of appointing more than one expert. It was an integral proposal

whose object was: *a sole independent expert in the person of Dr. Wühler (the “Expert”)*.

10. The majority never proposed or suggested as “the Expert” of the Tribunal for the Verification any person other than Dr. Wühler. For the majority, the choice of only one expert and the appointment of Dr. Wühler as the “Expert” constituted an indissoluble whole, as reflected in the presentation and wording of paragraphs 4 and 5 of former draft PO No. 13 and in the present Order. It is too late for trying to dissociate the integral, indissoluble, unchanged and unquestionable majority’s proposal embodied in former draft PO No. 13. However, the attempt to make such a dissociation in the present Order must be noted and rejected.

11. Since the last Tribunal’s meeting at Washington and, thereafter, I reiterated to my co-arbitrators during the written exchanges among us relating to former draft PO No. 13 that I was not convinced that a sole expert was the right solution in view of the difficulty to find a competent person enjoying the same degree of confidence of the three members of the Tribunal. I continued to give all along my preference to the second alternative in para. 4 of PO No. 12, namely to appoint more than one expert.

12. It was with this purpose in mind that I submit my proposal concerning the appointment by the Tribunal of an additional expert in the person of Professor Fernández Rozas, proposal which was rejected by my co-arbitrators. In those circumstances, I had not alternative but to join to the former draft PO No.13 the “statement of dissent” which was circulated to the Parties. In the relevant paragraphs of that statement, I explain the reasons of my objection to the majority’s proposal as following:

“1. The Draft rejects my proposal of appointing a second expert to form a tandem on the same standing with Dr. Wühler.

“2. I do not have full confidence in Dr. Wühler as sole (‘unique’) expert because: (a) of his long data professional

relationship with an arbitrator appointed by claimants in parallel sovereign debts cases; (b) his lack of knowledge of the Italian language which is the original language of the materials to be verified; and (c) the magnitude of the task for a single expert.

“3. The rejection by the majority of the second candidate I propose without, in my opinion, any objective grounds, prevents the indispensable balance of confidence of the three members of the Tribunal in the projected verification undertaking.”¹

13. Neither the majority’s proposal nor my proposal rise or evoke in any respect the issue of Tribunal’s competence or power to appoint one or more independent “*expert(s) of the Tribunal*” without the agreement of the Parties. To do otherwise would have amounted, at that time, to prejudge the results of the procedure of consultation which was going on since the circulation to the parties of the said proposals.

14. The majority’s proposal stated that it was based on Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules and “as part of (the Tribunal) general power to take and assess evidence and after having consulted with the Parties, appoint one or more expert(s) where it considers it necessary”², without any comment or explanation concerning the then hypothetical event of lack of agreement as between the Parties on none of the two proposals following consultation (para.3 of former PO No. 13). My proposal did not make reference either to the legal basis of the Arbitral Tribunal’s competence to appoint “expert(s) of the Tribunal” without Parties’ agreement.

15. In the light of the text of Article 43 of the ICSID Convention it is obvious that an eventual issue of competence does not arise concerning the appointment of “expert(s) of the Tribunal” when

¹ As stated in paragraph 2 (a) of the quoted text, I refer to “long data professional relationship” and not to a mere “personal” or “friendly” relationship.

² The alleged “general power” has been replaced in the present Order by “the past practice of various ICSID tribunals” following by the sentence “that neither Party has contested the Arbitral Tribunal’s competence to appoint an independent expert” (para. 12 of the Order).

the Parties are in agreement as to the appointment and the person of the appointee or appointees. But, it does certainly arise if the Parties do not agree either on the appointment of the independent expert(s), or on the person(s) to be appointed to exercise that function, or on both accounts.

B. The existing disagreement as between the Parties

16. As recorded in paragraphs 4 to 9 of the present Order the Parties' written comments on the appointment of one or more experts are contained in four letters: Claimants' and Respondent's letters of 6 September 2012 and Claimants' and Respondent's letters of 18 September 2012. As it comes out from these four letters, the Parties are in *disagreement* on the two alternative proposals constituting the object of the consultation, namely:

(i) a single expert of the Tribunal in the person of Dr. Wühler (majority's proposal) or

(ii) a tandem of two experts of the Tribunal in the persons of Dr. Wühler and Professor Fernández Rozas (my proposal).

17. On one hand, Claimants accepted the majority's proposal and the Respondent rejected that proposal. On the other hand, Respondent rejected the majority's proposal and considered unfortunate that the Arbitral Tribunal and Claimants rejected my proposal. Notwithstanding this disagreement as between the Parties, the majority entrusts by the present Order to Dr. Wühler - without any further inquiry on the Tribunal's power to do so - the preparation of a "Work Proposal" and, if confirmed, the "Expertise" as a sole expert of the Tribunal ("the Expert").

18. In the present Order, the majority considers that Dr. Wühler is "duly qualified to act as Expert in the present proceedings" as sole expert, but at the same time allow him to be assisted in the conduct of the Expertise *by one or more persons* (paras.17 and 22 of the Order). In other words, in the "Database Verification" are going to participate a number of persons, but a sole expert. This

reveals that the majority of the Tribunal admits that Dr. Wühler is unable to do the job alone, but neither the majority nor Dr. Wühler are willing to accept equals within team, namely a second expert. My preference go exactly to the other way around, namely more competent experts and fewer assistants, in order to appear the making of the Database Verification as much objective and trustful as possible for all concerned and, in the first place, for the two Parties.³

19. However, the majority of the Tribunal decided to maintain essentially its original proposal as formulated in former draft PO No. 13 with the support of the Claimants only, and without any try or attempt to find a solution satisfactory for the Claimants and the Respondent respectively. In fact, the present Order incorporates all the points advanced by the Claimants in the consultation and none of the Respondent, except when they coincide with Claimants' views. Thus, in the same way that former draft PO No. 13 divided the Tribunal, the present PO No. 15 is going to divide further the Parties on a subject-matter in which reason and law advice to proceed by consensus.

20. I say "law" because the letter and the spirit of the text of Article 43 of the ICSID Convention provide a clear invitation for the arbitrators to proceed in the matter by way of consensus or at the least to try to reach a solution satisfactory for all. To have recourse to the tool of "majority decisions" in arbitral procedural issues as the present one is not, in my opinion, advisable and may even become a hurdle for an efficient and orderly unfolding of the proceedings. In any case, the appointment of Dr. Wühler as "expert of the Tribunal" poses in the light of ICSID applicable law a previous question concerning the Tribunal's power to issue the present Order, as it will be explained below in paragraphs 24 to 45 of this Opinion.

³ The considerations of efficiency and cost increasing invoked against the appointment of a second independent expert of the tribunal do not appear to be an obstacle to provide Dr. Wühler with *one or more assistants*.

21. As indicated, I gave the reasons for my objection to appoint a sole expert of the Tribunal in the person of Dr. Wühler in my “statement of dissent” joined to former draft PO No. 13 (para.12 of the present Opinion). In this regard, I would like further to recall (i) that the answer given by Dr. Wühler to the effect that he would be “in a position to conduct and complete the verification process as sole expert” was adopted by him in full knowledge that he was the candidate of the majority and not of the Arbitral Tribunal as a whole; (ii) that the Dr. Wühler’s letter did not challenge in any respect his long data professional relationship with an arbitrator appointed by claimants in parallel sovereign debts cases; and (iii) that the statement of independence attached by Dr. Wühler to its letter is not a document susceptible of overcoming the effects of Cesar’s wife adagio.⁴

22. The decision of the majority embodied in the present Order will have the effect of diminishing, in some of those concerned, the credibility of the conduct and final product of the envisaged Database Verification. So far as myself, I reserve as from now any right under ICSID procedural law concerning the personal examination in due time by members of an arbitral tribunal of the elements of evidence presented by the Parties in any form, as well as the exercise at the oral phase of the right granted to any member of the Tribunal by Rule 32 (3) of ICSID Arbitration Rules.

23. The choice of Dr. Wühler as sole expert appointed by a majority of the Arbitral Tribunal with the only support of the Claimants’ Counsel for the task of verifying “Claimants’ Database” as an element of the identification of the individual Claimants in the case is, in my opinion, a wrong choice, but is it the considered choice of the majority.

⁴ I did not question in my “statement of dissent” Dr. Wühler’s independence and impartiality in the exercise of his functions. But, I do consider that his appointment does not take into account the Cesar’s wife adagio which is prior to any consideration on independence and impartiality. Cesar’s wife is particularly relevant in the administration of justice by arbitral tribunals.

C. The legal effects of the disagreement as between the Parties on the Arbitral Tribunal's power to appoint one or more "expert(s) of the Tribunal" in matters of evidence

24. In paragraph 12 of the Present Order, the majority of the Arbitral Tribunal considers that: "based on Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules and on past practice of various ICSID tribunals, it has competence to appoint an independent expert. In this respect, it should be noted that neither Party has contested the Arbitral Tribunal's competence to appoint an independent expert".⁵

25. I do not concur with that affirmation of the Order for two main reasons. First, the majority did not propose to the Parties "to appoint an independent expert", but "to appoint an independent expert in the person of Dr. Wühler". Second, as a result of the consultation process, the Arbitral Tribunal knows the existence of a total disagreement as between the Parties on the appointment of Dr. Wühler as sole expert of the Tribunal. Playing with words is never a substitute of legal reasoning.

26. In my opinion, the applicable ICSID law allows an arbitral tribunal (or a dissenting member thereof) to submit a proposal or proposals to the Parties on the appointment of a given tribunal's expert or experts in connection with the taking or assessing of evidence. But, this does not mean that the arbitral tribunal in question be entitled to appoint for that purpose one or more of the proposed given expert or experts, unless the Parties empower by their mutual agreement the Arbitral Tribunal to do so.

27. In other words, ICSID law knows the figure of "expert(s) of the tribunal" in the context of the taking or assessing evidence, but by leave of both Parties to the case, not as of right of the arbitral tribunal.

⁵ The present Order modifies in this respect the former draft PO N° 13 (See para.14 of this Opinion).

(a) The ICSID applicable law

28. Both the ICSID Convention and the ICSID Arbitration Rules contain mutually supporting affirmative provisions regulating the appointment of experts for evidence purposes. The 1965 Convention has not been amended and the latest amendments of the Arbitration Rules adopted by the Administrative Council for the Centre which came into effect on 10 April 2006 did not amend Rule 34. It is therefore clear that the Arbitral Tribunal is not here in the presence of “gaps” or “silences” (qualified or unqualified) in the sense referred to in the 2011 Decision on Jurisdiction and Admissibility of the Arbitral Tribunal, and it is not so invoked by the present Order.

29. A perusal of the relevant ICSID applicable law provisions allows at its face value the following relevant textual conclusions:

(a) Article 43 of the Convention and Rule 34 of the Arbitration Rules distinguish between the means of evidence to be produced by the parties and the arbitral tribunal’s own means of getting evidence directly;

(b) In these provisions the “experts” appear only in connection with Parties’ production of means of evidence;

(c) These provisions empower an arbitral tribunal to call upon the parties to produce *inter alia* “experts of party” (Rule 34), but they do not empower the Arbitral Tribunal to appoint one or more experts of its own, as a means of getting direct evidence;

(d) The parties are duty-bound to cooperate with the arbitral tribunal in the production of evidence and in the other measures which may be taken by the tribunal as provided for in paragraph 2 of Rule 34;

(e) The expression “taking of other measures in accordance with paragraph 2 of Rule 34” in paragraph 3 and 4 of Rule 34 does not

include but two measures that an arbitral tribunal may decided without leave of the parties: (i) to visit the scene connected with the dispute and (ii) to conduct inquiries there as it may be deem appropriate (Article 43 of the Convention; the same in Rule 34 (2));

(f) The arbitral tribunal's power to take formal notice of the failure of a party to comply on evidence matters with its obligations is limited to compliance with the obligations set forth in paragraph 2 of Rule 34;

(g) Only the expenses incurred in producing evidence by the parties, and in the taking by the arbitral tribunal of other measures in accordance with paragraph 2 of Rule 34, shall be deemed to constitute part of the "expenses incurred by the parties" within the meaning of Article 61(2) of the ICSID Convention

30. However, the above face value conclusions are expressly subject to the following condition in Article 43 of the ICSID Convention: "*except as the parties otherwise agree*". Thus, an "expert or experts of the arbitral tribunal" may ultimately be appointed by the latter, but solely if the parties agree allowing the arbitral tribunal to proceed to such an appointment. However, as indicated above, there is not agreement as between the Parties in the present case to appoint Dr. Wühler as sole expert of the Arbitral Tribunal for the preparation of the Work Proposal decided by the latter, nor for the Verification of the Database submitted by the Claimants, as decided in the present Order.

31. The text of Article 43 of the 1965 ICSID Convention is sufficiently clear in itself to need to have recourse to preparatory work or any other supplementary means of interpretation of treaties to determine the ordinary meaning of its terms. Furthermore, the interpretation of treaties must be based above all upon the text of the treaty. In any case, an interpretation of the Article 43 of the Convention in accordance with customary international law as reflected in the general rule of the interpretation of article 31 of the Vienna Convention on the Law

of Treaties (VCLT) will not yield a meaning altering essentially the face value meaning of the text of the Article as explained.

32. As the ICJ has often stressed, it is not the function of the interpretation to revise treaties or to read into them what they do not contain expressly or by necessary implication as does apparently the present Order. To avoid making the present Opinion unnecessarily long, I will limit myself to quote below in support of the application of the VCLT Article 31 (general rule of interpretation of treaties) to the interpretation of Article 43 of the ICSID Convention the following passage of *Oppenheim's International Law* edited in 1992 by Sir Robert Jennings, former President of the ICJ, and Sir Arthur Watts:

“The general rule of interpretation laid down in Article 31 of the Vienna Convention adopts the textual approach, ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. That such a textual approach - on which the International Law Commission was unanimous - is an accepted part of customary international law is suggested by many pronouncements of the International Court of Justice, which has also emphasised that interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain, or of applying a rule of interpretation so as to produce a result contrary to the letter or spirit of the treaty’s text.”⁶

(b) The past practice of the various ICSID tribunals invoked by the present Order

33. As indicated, the “past practice of the various ICSID tribunals” is also mentioned in paragraph 12 of the present Order (and corresponding footnote) as a basis for justifying the

⁶ Oppenheim’s International Law, Vol.1 (parts 2 to 4), 9th Edition, pages 1271 to 1272. It is to be noted that in the quoted passage the reference “to the spirit” it is not to a floating spirit but to the “spirit of the treaty’s text”.

interpretation by the majority of the ICSID applicable law as allowing the appointment - without agreement of the Parties - of Dr. Wühler as the sole expert of the Arbitral Tribunal, notwithstanding the ordinary meaning of the terms of the text of Article 43 of the ICSID Convention.

34. In this connection, I asked by email of 18 October 2012 the ICSID Secretary of the Arbitral Tribunal, Mr. Gonzalo Flores, information about how Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules had been generally applied in the ICSID practice, by the way of a factual Secretariat answer to the following questions:

(a) Are there in ICSID arbitration practice cases of appointment of tribunal's expert(s) for getting evidence or elements of evidence in the case?

(b) In the case of a positive answer, was the task of tribunal's experts to verify the identity and/or other relevant data concerning the purportedly individual claimants?

(c) Is there any case in which an arbitral tribunal decided to appoint its own expert(s) without the agreement of both parties after consultation?

(d) Is there any case in which a given person or persons were appointed as tribunal's expert(s) without the agreement of both parties to the case?

(e) Is there any case in which the expenses incurred by a given tribunal's expert appointed by the tribunal without the agreement of one of the parties be considered expenses incurred by the "parties" within the meaning of Article 61 (2) of the ICSID Convention?

(f) May it be said that it is in conformity with ICSID practice and Administrative and Financial Regulations that the allocation of the expenses incurred by a verification process, performed by

an expert or experts of the tribunal, appointed without the agreement of the other party and for the purpose of verifying individual verification data of claimants needed because of the exercise by them of a collective action, falls under Article 61(2) of the ICSID Convention?

35. By email of 8 November 2012, Mr. Gonzalo Flores, Secretary of the Arbitral Tribunal, kindly answered my questions as follows:

“By email of October 18, 2012, Dr. Torres Bernárdez asked six questions related to the appointment of experts by ICSID Tribunals. Professor van den Berg responded to Dr. Torres Bernárdez by email of October 3, 2012, referring to a number of cases in which independent experts were appointed by ICSID Tribunals. I note that this response has been incorporated as Footnote 1 to procedural Order No. 15. As can be seen in those cases most (if not all) of the experts appointed by ICSID Tribunals have been Financial Experts, tasked to assist in the determination of damages. In all of these cases, the tribunals consulted with the parties as to the appointment of the experts. The process that led to these appointments is part of the record for each case and as such subject to confidentiality restrictions (beyond of what it stated in the published awards). I can confirm, however that as a general rule, the power of the tribunals to appoint independent experts in ICSID cases has not been challenged by the disputing parties.

I understand that this response is limited, but hope is somehow helpful.”

36. Certainly, the response is limited because of confidentiality restrictions, but quite helpful to confirm in the first place that the eight cases mentioned by Professor Schreuer in his *The ICSID Convention: A Commentary* (2nd Edition, 2009) referred in Footnote 1 to PO No. 15 appear to be the main relevant examples, if not all, of ICSID practice on the appointment of “expert(s) of the tribunal” by ICSID arbitral tribunals. They are really a very

small number in the light of the total number of ICSID arbitration cases.

37. The number of host States parties in those eight cases is still smaller: five States, namely Congo, Liberia, Senegal, Zaire and Argentina (three times). Even if it were legally possible, it would not make sense to invoke for reform purpose of the ordinary meaning of the terms of the relevant provisions of the multilateral 1965 ICSID Convention a so-called “past practice of the various ICSID tribunals” as does the present Order. It cannot be otherwise in the light of the interpretation rules of the Vienna Convention on the Law of Treaties and common sense. By its very nature, and the number of the States involved, it is beyond the reach of such an invoked limited practice to amend or modify the ICSID conventional law on the matter.

38. Second, the experts appointed have been financial experts to assist in the determination of damages as described by the Secretary of the Arbitral Tribunal. Having now verified by myself the examples given in the said Footnote 1, I confirm the exactness of that information which corresponds itself with a usual and extended practice of international and national courts and tribunals in that very particular technical field once proceedings reach the reparation phase.

39. The instant case has not reached yet that phase and Dr. Wühler is entrusted by the present Order not with a financial technical task but with the task of verification of a Claimants’ Database relevant for the Tribunal’s determination, at its present phase, of *the pending jurisdictional question of identifying the individual Claimants*, namely the scope *ratione personae* of the Arbitral Tribunal itself with respect to those Claimants. Then, there is simple no practice of any kind of ICSID arbitral tribunals concerning the appointment of “expert(s) of the tribunal” for verification of data supplied by a collective claimants’ party for the purpose of identifying its individual components. It follows that for handling in the present case the question of appointment of “expert(s) of the Tribunal” for verifying the identity of the

individual Claimants of that collective Party, the Arbitral Tribunal has only at its disposal the legal tools of Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules.

40. Thirdly, the factual information provided by the Secretary of the Tribunal confirms that the power of the arbitral tribunals to appoint independent expert(s) in ICSID cases has not been in general challenged by the disputing parties with respect to financial experts tasked to assist ICSID arbitral tribunals for damages evaluation purpose, including methods of assessment of compensation. This attitude of the disputing parties manifests indeed their agreement to the appointment of the “expert(s) of the tribunal” as provided for in Article 43 of the ICSID Convention. It was not, therefore, a conduct *contra legem*, but in conformity with the ICSID applicable law.

41. On the basis of the information provided for in the published awards listed in the said Footnote 1 of the present Order, it is clear that in no case expert(s) of the tribunal⁷ were appointed without the agreement of the parties or of the participating party (AMT v. Zaire case, 1997, was a case of “non-appearance” of the respondent party). None of those experts were appointed against the manifested opposition of both parties or of one party. In some instances, the awards recorded expressly the parties’ consent to the appointment (i.e. SOABI v. Senegal (1988), LG&E v. Argentina (2007)). In others, the non-opposition of the parties to the appointment is clearly inferred from the information provided for in the pertinent award (i.e. LETCO v. Liberia (1986), Enron v. Argentina (2007), Sempra v. Argentina (2007)). In most cases, arbitral tribunals took the initiative of proposing the appointment of the expert(s) to the parties, but not always (SOABI v. Senegal case). Practice knows also cases not listed in Footnote 1 of the present Order in which the question of the appointment of expert(s) of the tribunal was considered but agreement was not

⁷ More than one expert was appointed in cases such as CMS v. Argentina and LG&E v. Argentina. In most cases, the appointees were physical persons, but arbitral tribunals requested likewise an expertise to companies or entities as in Benvenuti and Bonfant v. Congo (1980) and LG&E v. Argentina.

reached and, ultimately, no expert(s) of the tribunal was appointed.⁸

42. Finally, a point of clarification to avoid eventual misunderstandings in view of the fact that the examples in Footnote 1 of present Order are taken from Professor Christoph Schreuer's *Commentary to the ICSID Convention*. Professor Schreuer gave oral evidence before the ICSID arbitral tribunal in *Wintershall v. Argentina* case on 15 October 2007 where he was asked in cross-examination, as Claimants' expert witness on international law, several questions. Among them the general one of whether he really believed that sovereign States will negotiate, sign and ratify a BIT without caring to consider what was put in it. Following his answer to that question, the following specific one was put to him by the president of the tribunal: "Q. Do you mean to say that States negotiate nonsensical clauses? (...) Would you agree with me? Being a reputed international lawyer, Professor Schreuer responded to the question with the following answer applicable to the treaties in general and, therefore, to the ICSID Convention:

"... sometimes they do but that doesn't mean that you should ignore them. I think you must still take the text of the Treaty at its face value. I am not suggesting that you should classify Treaty provisions into those that are sensical and those which are nonsensical. Treaty interpretation must proceed from the ordinary meaning, even if we don't like them ..." (emphasis supplied)⁹

43. This answer of Professor Schreuer is fully in accordance with the Vienna Convention rules on treaty interpretation, as well as his further answer on the role of parties' intention in the interpretation of treaties, namely that: "the intention is relevant to the extent that it finds expression in the text of a treaty, but not

⁸ Kilic v. Turkmenistan (2012) in connection with the question of the appointment of an independent expert translator; and Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt (2002) on independent expert valuation expertise. Even for "assistants" the parties' consent for the appointment is generally recorded in decisions and awards (see, for example, Decision on the Application for Annulment of the Argentina Republic in the Enron case, para.12).

⁹ Wintershal v. Argentina (ICSID Case N° ARB/04/14), Award of 8 December 2008, para 85.

beyond”¹⁰ It is as a result of the application of Vienna rules so interpreted to the interpretation of Article 43 of the ICSID Convention with respect to the appointment of Tribunal’s expert(s), that this Opinion differs from the one underlying the majority’s conclusions as embodied in the present Order.

(c) Conclusion

44. The majority’s decision on the appointing of Dr. Wühler as sole expert of the Tribunal to prepare a Work Proposal and, if confirmed, to verify the Database filed by the Claimants *without the agreement of both parties to the case, due to the manifest opposition of the Respondent to such an appointment*, as embodied in the present Order, is, in my opinion, an act in breach of Article 43 of the ICSID Convention and 34 of the ICSID Arbitration Rules.

45. Furthermore, it disregards the mandate set forth in the first Section of Article 44 of the ICSID Convention to the effect that *any ICSID arbitration proceeding* “shall be conducted in accordance with the provisions of this section (Section 3 of the Convention) and, *except as the parties otherwise agree*, in accordance with the Arbitration Rules in effect on the date in which the parties consented to arbitration” (*emphasis supplied*).

II. Terms and Conditions of the Expertise, Applicable Procedure for the Expertise and Rules of Conduct and Communications

46. I object on the accounts below the application made by the provisions of the present Order (sections D and F) to the elaboration of a “Work Proposal” on the verification expertise. My first concern relates to the date (23 December 2012) in which Dr. Wühler is supposed to submit to the Arbitral Tribunal and the Parties a “detailed Work Proposal” (para.25 of the present Order).

¹⁰ Ibid. para. 86.

47. It is a premature date bearing in mind that the said time limit, fixed by the amended PO No.14, corresponds to the time limit date of the filing by the Respondent of its Counter-Memorial on Phase 2. Expert's working on the "Work Proposal" should not be done, in my opinion, in the interval between Claimants' filing of their Memorial and Respondent filing of its Counter-Memorial.

48. The information contained in the first pleadings of both Parties on Phase 2 cannot but have a bearing on the preparation of the "Working Proposal". For example, as it is stated in paragraph 340 of the Claimants' Memorial on Phase 2: "The full extent to which grouping may be necessary or appropriate will be more apparent after each Party filed its first Memorial." As for the expertise itself, Claimants reiterate in point (v) of their letter of 18 September 2012 that "it would be more efficient to start the verification process after the submission of both Parties' Memorial".

49. Secondly, I object also that pursuant to the Order certain confidential documents under PO No.3 would be provide to Dr. Wühler in order to be able to assess the nature and amount of work to be done, subject only to the caveat that the document shall be used by the Expert exclusively for the purpose of preparing his "Work Proposal" (para.24 of the present Order).

50. This is not in my opinion a sufficient guarantee against eventual misused of the said documentation by the Expert and or his assistants if any, in particular in the case in which after his elaboration of the "Working Proposal" his appointment would not be confirmed by the Tribunal. The sensibility showed by the majority on confidentiality issues does not manifest itself with the same intensity in the present context.

51. Thirdly, I further object to the Order because the organization of the relationship between the Parties and the Expert during the preparation of the "Work Proposal" is not clear enough. According to the terms set out in section E (para.24 of the present Order), it seems that the Parties are authorized to submit further

documents and information to the Expert directly under the same rules as those applicable during the Expertise itself (paras.31 and 32 of the Order). However, the rules of conduct and communications of section F (paras.41-44) do not contain any express cross-reference to the paragraph on the elaboration of the “Work Proposal” (namely to para.24).

52. In my opinion, any kind of communications between the Parties and the Expert should be done through the Secretariat of the Tribunal which should keep a record of every thing going in or out of the Expert’s undertakings, during the “Work Proposal” preparation as well as during the “Database Verification”.

53. Lastly, I object the provisions of the Order on remuneration and expenses (paras. 26-30) going beyond the remuneration which the Expert shall receive for the time spent in relation to the preparation of the “Work Proposal”. The rest should be considered and decided by the Tribunal in consultation with the Parties after the submission by the Expert in his “Work Proposal” of the requested detailed budget estimate of his fees and expenses (para.23).

54. I do not accept either (subject to further clarifications) the application made in paragraph 28 of the present Order of Rule 34 (4) of the ICSID Arbitral Rules to the expenses derived from the appointment of a “expert of the Tribunal” without agreement of both Parties, as it should be in accordance with Article 43 of the ICSID Convention.

III. Amendment of Procedural Order No. 12

55. I object the amendment of Procedural Order No. 12 effected by the present Order, because its paragraph 47 continues still to grant Claimants, in certain hypothetical situations, “a last opportunity to respond” in written after the filing of the Respondent’s Rejoinder. This is contrary to Rule 31 of ICSID Arbitral Rules governing the written procedure, the principle of

the equality of the Parties in the proceedings and to the logic of the alternative submission of pleadings method followed so far in the present case.

56. Under the method of alternative submission of pleadings, the Party which submits the first pleading cannot be by definition the one to have the last opportunity to respond in writing. Furthermore, the drafting of the said paragraph 47 of the present Order is discriminatory in nature because it does not provide for a similar requesting right in favour of the Respondent if, during a granted “last opportunity to respond”, the Claimants go beyond a mere “reply” to the Respondent’s arguments in its Rejoinder and includes new arguments, documents or other kind of evidence.

General Conclusion

57. In the light of the existing disagreement between the Parties, I object on the basis of Article 43 of the ICSID Convention and Rule 34 of the ICSID Arbitration Rules, as well as of the related considerations and conclusions of this Opinion, to the present Procedural Order No.15 as adopted by the majority, by the following five main grounds:

(1) First, I find that without agreement of the Parties, the Arbitral Tribunal, pursuant to Article 43 of the ICSID Convention and 34 of the ICSID Arbitration Rules, lacks the necessary competence to appointing Dr. Wühler as sole expert of the Tribunal for the tasks assigned to him by the present Order;

(2) Second, even if against my conviction the Arbitral Tribunal were competent on the subject-matter, I cannot but continuing to object the present Order because the opposition of the Respondent to the appointment of Dr. Wühler as sole expert of the Tribunal makes still more necessary, in the interest of general trustfulness in the conduct and outcome of the Work Proposal and, eventually, of the Database Verification, the appointment of more than one expert of the tribunal;

(3) Third, I object also the present Order because without agreement of both Parties on the appointment by the Tribunal of its own of expert or experts, the expenses incurred thereby do not appear to constitute on the basis of the information at my disposal “expenses incurred by the parties” within the meaning of Article 61(2) of the ICSID Convention reading together with Rule 34 of the ICSID Arbitration Rules.

(4) Four, I object likewise the present Order for its shortcomings on the treatment of the specific points indicated in paragraphs 46 to 54 of this Opinion concerning Terms and Conditions of the Expertise, Applicable Procedure for the Expertise and Rules of Conduct and Communications; and

(5) Finally, I object the present Order because the amendment of PO No. 14 continues not to respect Rule 31 of ICSID Arbitration Rules, nor the principle of equality of the Parties in the proceedings, nor the logic of the alternative pleadings method applied so far in the present case.

Signed:

Santiago Torres Bernárdez