

Individual Statement by Santiago Torres Bernárdez to PO N°22

My vote in favour of PO N° 22 encompasses two reservations concerning paragraphs 2 (i) and 5(i) of the decisional part, as follows:

Paragraph 2 (i)

1. The decisional part of the PO distinguishes *inter alia* between “updates concerning only the hardware or software of the Database” (the so-called Technical Updates) and “updates modifying the contents of the Database”. Furthermore, paragraph 2 thereof distinguishes between “past Technical Updates” and “future Technical Updates”. These latter Technical Updates, including the attempted Update of March 2013, are subject to a given prior written notice procedure set forth in paragraph 2(ii) which I approve. However, such a procedure is not made applicable by the Order to the “past Technical Updates” made by Claimants in September and December 2012 and the Order even “approves” those unilateral and untimely changes.

2. I disagree with this aspect of the decision, embodied in paragraph 2 (i) of the Order, for two main reasons. First, the ICSID Arbitral Rules do not grant a party the right to make *any change* in duly recorded filed evidential elements in between the filing of two instruments of its own, without prejudice of the right of that party to submit additional or new supporting documentation together with its following next instrument. Secondly, the technical changes introduced unilaterally in the Database by the Claimants in September and December 2012 could well have a bearing on the design and structure of the recorded Database to the point of impairing its functioning, access, manageability and/or reliability as an evidential element or of some of the various formats of the Database submitted by the Claimants.

3. Furthermore, the fact that a given “update” could be characterized as technical in nature does not mean necessarily that the ensuing change would be minor or without relevance for the assessment of the value of the Database as an element of proof or of the proof of having discharged the burden of proof. This may be the case of some Technical Updates but by no means necessarily of all Technical Updates.

Paragraph 5(i)

4. I reserve also my position concerning the approval by the PO of unilateral entries made by the Claimants into the Database of “old data” concerning Nationality Data and Holding Data, as provided for in paragraph 5(i) of the Order. In my opinion, the “past entries of that old data” should have been submitted to the same prior written notice procedure as provided for “future entries old data” in paragraph 5 (ii). I find no justification for the distinction made in this respect by the Order.

5. It might be said that on the old data the Respondent have had the opportunity to comment thereon. I admit it but, in my view, this is not the issue at the stake here. The real issue is not so much whether the information concerned is known by the Respondent but the fact that the said data has been newly entered, unilaterally and untimely, into the recorded Database by the Claimants, an act which finds no justification in ICSID Rules (see Rule 26 (3)) and that the Respondent alleges to jeopardize the exercise of its right of defence. ICSID Rules do not allow indeed a party to modify elements of evidence already submitted and recorded by a tribunal, without prejudice of the right of such a party to submit in due course together with another authorized instrument further elements of evidence even on the same item or items.

6. The inputs concern involved, in any case, changes in the recorded Database of the included supporting documentation (Rule 24) and was made by the Claimants outside the time-limit fixed for their filing of the instrument to which it relates, as well as it is going apparently much further than the mere correction of accidental errors (Rule 25). In my opinion, the Arbitral Tribunal is duty bound to upholding and enforcing, in all circumstances, the procedural principle of the integrity of every timely filed element of evidence formally put into the records of the case by a Tribunal’s decision as in the present case.

Signed: Santiago Torres Bernárdez