

## **Statement of Dissent of Dr. Santiago Torres Bernárdez to Procedural Order N° 28 of 9 June 2014**

1. I dissent from the present Procedural Order N° 28 because its underlying principles on the main procedural legal questions at issue, namely the rights concerning (i) the examination at the forthcoming hearing of individual Claimants and (ii) the examination by the Respondent at that hearing of its own witnesses and experts, are similar to those set forth in Procedural Order N° 27 of 30 May 2014, an Order to which for reasons of principle I joined a detailed Statement of Dissent.

2. Basically, the present Order is a continuation of the Majority's views which inspire the previous one. Thus, the considerations developed in my Statement of Dissent to Procedural Order N° 27 apply *mutatis mutandis* to the present one. I will therefore limit my considerations below to explain briefly my position with respect to some of the main specific decisions listed in the decisional part of Procedural Order N° 28:

### *A) Individual Claimants (paragraph A (1) of the decisional part)*

3. As explained in my Statement of Dissent to P.O N° 27, the Majority distorted the Respondent's request asking, in the first place, for examination of all the purported Claimants remaining in the case and, in the alternative, that the Tribunal indicates the number of Claimants which would be examined at the hearing and, on the base of such a number, the Argentine Republic will select the individual Claimants concerned. I explained as well the schemes and technicalities used by the Majority to denaturalize the Respondent Party's request beyond recognition and rejected it.

4. At its place, the Majority in P.O. N° 27 granted to the Respondent the right to cross-examine among the thousands of individual purported Claimants only eight "Claimants witnesses" who are persons chosen by the legal representation of the Claimants themselves. I qualify such amazing outcome as a "procedural joke". It was therefore to be expected that the Respondent declined to call the eight purported individual Claimants concerned. Point 1 of the decisional part of P.O. N° 28 limits itself to record that Respondent's decision. Thus, the outcome of the handle by the Majority of the Respondent's request for examination at the hearing of individual purported Claimants described above is that, apparently, no individual Claimants shall be heard during the hearing.

5. I regret very much that outcome which I consider harmful for the present arbitration because: (i) the particular characteristics and circumstances of the case; (ii) the lack yet of any kind of direct examination by the Tribunal of the relevant documentation submitted by the Claimants Party concerning each individual Claimant; (iii) the

assurances given in the Decision on Jurisdiction and Admissibility of 4 August 2011 concerning the determination of the *ratione personae* jurisdiction of the Tribunal with respect to each of the individual Claimants; and (iv) the opportunity of the forthcoming hearing for beginning to look for a remedy to the said lack.

6. For me is inconceivable that an international arbitral tribunal, an ICSID Arbitration Tribunal in the present case, could proceed to adopt *ratione personae* individual jurisdictional decisions without having a **direct** knowledge of the relevant evidence on each of the purported Claimants concerned as duly submitted by the Claimants Party for the purpose of establishing, precisely, the Tribunal *ratione personae* jurisdiction with respect to every one of the said individual purported Claimants. In any case, in the light of the present situation I continue to reserve my right of questioning, for such a purpose, any individual purported Claimant pursuant to ICSID Arbitration Rule 32 (3) at any appropriate moment of time.

*B) Experts called by the Arbitral Tribunal (paragraphs A (2) and (3) of the decisional part)*

7. I concur in the decisions in these paragraphs, namely to call Messrs. Wühler and Bloch at the hearing and to waive the Arbitral Tribunal's right to put questions to Mr. Nicola Stock at such a hearing.

*C) Direct examination of witnesses and experts (paragraph A (4) of the decisional part)*

8. I concur with the Majority in granting the Respondent's requests to conduct a direct examination of Mr. Molina, Ms. La Greca and Mr. Marx as well as of Messrs. Keifman and Simpson which I consider, contrary to the Majority's view, to be a matter of right. I reject however, as too narrow, the terms in which the direct examination of Messrs. Keifman and Simpson is given. Likewise, I concur, as a matter of right as well, with the granting to the Claimants the right to conduct a direct examination of Mr. Kaczmarek in the same terms than such a right is given to Messrs. Keifman and Simpson.

*D) Dropping of Messrs. Cottani and Guidotti from Respondent's list of cross-examination (paragraph A (5) of the decisional part)*

9. The decision to reject Respondent's request to withdraw Cottani and Guidotti is in principle contrary to the fundamental principle of the equality of the Parties in the proceeding because the dropping from the Claimants' list of cross-examination of

Messrs. Eichengreen, Mastroiani and Roubini have been treated by the Majority in P.O. N° 27 the other way around.

10. However, the additional decision of the Tribunal to call Messrs. Eichengreen and Roubini for questioning at the hearing and, if not available to come to the hearing in Washington, to be examined by video-conference, introduces a balance in paragraph 5 of the decisional part of P.O. N° 28 allowing me to give a qualified support to that paragraph of the present Order as a whole.

*E) Confidentiality (paragraph C (2) of the decisional part)*

11. I support the above paragraph in the hope that it would be sufficient to avoid breaches of the confidentiality at the hearing, without prejudice of the consideration of any further request on the matter by any one of the Parties or by both of them.

**Signed: Santiago Torres Bernárdez**