

## **Declaration appended to the Award by Arbitrator Santiago Torres Bernárdez**

The subject-matter of the present Declaration consists in an explanation and a reservation. The explanation of vote concerns my acceptance of the Parties' request to the Tribunal to discontinue the case in accordance with ICSID Arbitration Rule 43 (2). The reservation relates to the Award. I signed the Award because I voted in favour of its operative part but I am entering into a reservation with respect to the section of its motives entitled "Procedural History" because the reporting of facts contained therein is incomplete.

### ***1. The explanation***

1. ICSID Arbitration Rule 43 entitled "Settlement and Discontinuance" provides two procedural ways for discontinuing a case before the award is rendered by the arbitral tribunal concerned depending upon of whether or not the parties have requested to embody their own settlement in an award of the tribunal. If such a request is not made by the parties the tribunal is under the obligation of issuing an order noting the discontinuance of the case as provided for in Rule 43 (1). That is all.

2. But, if the parties' request the tribunal to embody their settlement in an award as a form of discontinuance, the tribunal is under no obligation pursuant to Rule 43 (2) to comply with the request. As provided in this provision, the "Tribunal *may* record the settlement in the form of its award" and, therefore, it may decide in a given case not to accede to the request because jurisdictional, propriety or other kind of considerations, even if the parties have complied with the conditions of submitting their request in writing and filed the full text of their settlement duly signed. In the latter hypothesis, the requested discontinuance would need to be declared by other means, namely by noting it in a tribunal's order, because the right of the parties acting together to discontinue their case - before the award thereon be rendered - is under ICSID Arbitration Rule 43 an unquestionable procedural right of the parties.

3. In their request of 7 October 2016, the Parties informed the Tribunal *inter alia* that as a result of negotiations, on 21 April 2016, the Parties signed a Settlement Agreement pursuant to which they (i) fully settled their dispute, (ii) agreed to terminate the Arbitration, as well as any other pending proceedings, and (iii) agreed to jointly request that the Tribunal incorporate their agreement in the form of a public Consent Award. Together with their request, the Parties provided the

Tribunal with the full signed text of their Settlement Agreement and a proposed draft of a Consent Award.

4. The Parties asked therefore the Tribunal to put an end to the present arbitration by adopting the form of discontinuance set forth in ICSID Arbitration Rule 43 (2), form that, as mentioned above, the Tribunal may or may not grant in the light of the particular circumstances of the case. One of those circumstances is that the Parties' request of 7 October 2016 stated the following important legal caveat:

*“For the avoidance of doubt the Settlement Agreement and the Consent Award and their terms and provisions are made and agreed without any admission by the Parties of ICSID jurisdiction and international liability and it is not, and shall not, be represented and/or construed by the Parties as an admission of international liability or wrongdoing on the part of either Party.”*

5. This legal caveat - incorporated now in paragraph (pp) of the present Tribunal's Consent Award - has been determinative in the decision of this arbitrator to accede to the Parties' writing request of discontinuing the case in accordance with Arbitration Rule 43 (2). Without that legal caveat I would have had to decline the said writing request on jurisdictional as well as propriety grounds of my own.

6. In effect, as to jurisdiction it is in the public domain (see my 2013 Dissenting Opinion in the ICSID *Ambiente Ufficio* case) that I share the conclusion of the Dissenting Opinion of Arbitrator Abi-Saab, issued at the first phase of the present case in which – contrary to the majority 2011 Decision on Jurisdiction and Admissibility– Professor Abi-Saab concluded at the absence of Tribunal's jurisdiction to entertaining the present case. Concerning propriety, as a member of the Tribunal at the merits phase of the case I have participated fully in the deliberation held by the Tribunal reaching then, in conscience, legal conclusions on both the pending jurisdictional *ratione personae* issues and core issues regarding the merits of the case (see majority 2011 Decision, paragraph 670) on the basis of the law applicable to the dispute, the pleading of the Parties and the elements of proof provided by either of them. Without the above legal caveat I would have had to uphold the proposition that the Tribunal will simple note the discontinuance in an order, namely in accordance with ICSID Arbitration Rule 43 (1).

7. But, the above jurisdictional and propriety considerations of mine are not an obstacle at all for me to accede to the joint request of discontinuing the case in accordance with Arbitration Rule 43 (2) from the very moment that both Parties

declare - in the commented caveat - that their Settlement Agreement and draft Consent Award and their terms and provisions are made and agreed without any admission by them of ICSID jurisdiction and international liability on the part of either Party, and it is not, and shall not, be represented or construed otherwise. In other words, I accede to the Parties' request concerning the form of discontinuance of the present case because, as explained by the Parties themselves in the legal caveat, their Settlement Agreement and draft Consent Award is based upon considerations *alien* to the law applicable to the dispute as instituted.

## ***2. The reservation***

8. As indicated above, I signed the present Consent Award of the Tribunal because I voted in favour of its operative part and, therefore, the Present Award has been adopted as a whole unanimously by the Tribunal. Concerning the reasons upon which the Award is based, I endorsed also the section entitled "Settlement" but I entered, as already mentioned, into a reservation with respect to the section entitled "Procedural History" because in my opinion the reporting of the facts contained therein is not as complete as it should be.

9. In this context, I will begin recalling that ICSID Arbitration Rule 43 (2) mentions three instruments, namely the Parties' settlement, their writing request and the Tribunal's award. The Tribunal cannot revise in any respect the Settlement or the Writing Request of the Parties. But, the Tribunal is the master of the text of the Award because it is its own Award. As stated in the last words of Rule 43 (2): "... the Tribunal may record the settlement in the form of *its award*" (italics supplied). It follows that, if the Tribunal accedes to the Writing Request of the Parties it may review or complete the text of any draft Consent Award which might have been provided by the Parties, as occurred in the present case. The Parties seems to have a similar view because they qualify their draft Consent Award as a "proposal".

10. I failed however to convince my co-arbitrators to complete the elements of fact missed in the section of the present Consent Award entitled "Procedural History". Those elements of fact are nevertheless part and parcel of the reality of the arbitral proceeding of the *Abaclat Case* whose integrity and transparency as a whole should, in my opinion, be preserved and recorded in the present Tribunal's Award.

11. The existing temporal gap in the said "Procedural History" of the present Consent Award concerns an ample period of time which goes from 12 November

2014 (see paragraph (hh) of the present Consent Award) to the receiving by the Tribunal, on 21 March 2016, a Parties' joint letter, dated March 2016, requesting the suspension of the arbitral proceeding for a duration of 120 days, suspension which was granted in the light of the Agreement in Principle executed by TFA and Argentina on 31 January 2016. By letters of 26 August 2016 of the Claimants and 22 September 2016 of the Argentine Republic the Tribunal was informed that they have settled their dispute and that they would request the discontinuance of the proceeding. Thereafter, on 7 October 2016, the Parties informed in due form jointly the Tribunal that they have signed on 21 April 2016 a Settlement Agreement settling the whole of the dispute before the Arbitral Tribunal and requesting the discontinuance of the present *Abaclat* Case as described above in paragraph 3 of this Declaration.

12. That factual temporal gap in the said "Procedural History" corresponds mostly to the part of the proceeding concerning the "preparation" by the Tribunal itself pursuant to ICSID Arbitration Rule 46 of the Award on the dispute between the Parties, notion that encompasses the three classic stages of drawing up an award: "study of documentation", "deliberation" and "drafting of a draft Award". In the present case such a temporal period started as usual at the Hearing closing the oral procedure on the Merits on 24 June 2014 (see paragraph (cc) of the present Award) and ended on 7 October 2016 when the Parties requested the Tribunal to discontinue the *Abaclat* Case as indicated above. Thus, the span of time at the disposal of the Tribunal in the present case to render its Award on the *Abaclat* dispute went from 24 June 2014 to 7 October 2016 (minus the 120 days in which the proceeding was suspended).

13. In the months following the closing of the Hearing, the Tribunal commenced its work as it is usual in the internal arbitral practice of ICSID, namely by studying the records of the Hearing and Parties' post-hearing briefs and other documents filed by them, following by the holding of the deliberation of the Tribunal. Once the deliberation was concluded, the Tribunal began, as it is also usual in the said ICSID practice, the task of preparing the draft Award but it was incapable to rendering the Award before March 2016 when the Parties requested the suspension of the proceeding or before 7 October 2016 when they moved jointly the disclosure of the *Abaclat* Case. This is not usual in ICSID arbitral proceedings. It reflects an evident failure, namely the failure of the Tribunal in accomplishing the task of rendering its arbitral Award on the *Abaclat* dispute within a reasonable period of time under the ICSID Convention and Arbitration Rules. Otherwise, it would be legally impossible to suspend the proceeding in March 2016 and, later on, to discontinue the case in October 2016 because the Parties' procedural rights under

ICSID Arbitration Rule 43 operate, obviously, only *before the award on the dispute is rendered*.

14. The silence in the present Award of references to factual sequential events concerning the Tribunal's work adds to the said failure, because of my conviction on the need that arbitral praxis implements basic principles which are in turn manifestations of the fundamental principle of the good administration of international arbitral justice and, particularly, the corollary that justice delayed is justice denied.

15. I am second to none in upholding the right of the Parties to settle their disputes by direct consultations, negotiations or conciliation, as well as to their right of conducting those consultations, negotiations or conciliation in parallel to eventual instituted judicial, arbitration or conciliation by a third proceedings. As the ICJ has recalled in several occasions, the judicial, arbitral or conciliation by thirds of the settlement of disputes is not more than a substitute to the failure of the parties to settle the dispute concerned by mutual agreement.

16. But, this does not mean at all that *the proceedings* of each of those different means of settlement be susceptible of being mixed up with each other without denaturalizing themselves. If that happens, the utility for the parties of having recourse to international judicial, arbitral and conciliation institutions would become less evident. Each of those alternative means might lose its present status of *autonomous means* governed by particular rules and, therefore, impairing the confidence of parties in the settlement of international disputes by thirds.

Signed: Santiago Torres Bernárdez

December 15, 2016