

**ICSID Case No. ARB/07/5**

**ABACLAT AND OTHERS  
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC  
(RESPONDENT)**

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**PROCEDURAL ORDER NO. 10  
ON SECURITY FOR COSTS**

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**18 JUNE 2012**

## CONSIDERING

Respondent's letter dated 10 February 2012, in which it made the following request:

*"[...] the TFA member banks be required to post a bond, in favor of the Argentine Republic, to secure the pecuniary consequences which Claimants might incur in this proceeding, such as a potential award of costs against Claimants".*

Claimants' letter dated 2 March 2012, in which they took the following position with regard to Respondent's request for posting of a bond:

*"Respondent's request – added, without any elaboration, in the final sentence of its submission – that the Task Force Argentina member banks (who are not even parties to this proceeding) post a bond in favor of Respondent is completely objectionable and rejected by Claimants in toto. Indeed, if any bond were appropriate, it would be posted by Respondent in favor of Claimants, given (i) Respondent's persistent, bad-faith dilatory tactics and violations of Tribunal orders that have needlessly prolonged the proceedings and increased Claimants' costs; and (ii) Respondent's established precedent of refusing to pay ICSID awards and also evading national court judgments secured against it by other bondholders. Claimants are prepared to further brief this issue should the Tribunal request it."* [references omitted]

Respondent's letter dated 9 March 2012, in relation to matters raised in Claimants' letter of 2 March 2012 other than Respondent's request for posting of a bond.

The position of the Parties as further substantiated during the procedural meeting held in Washington, D.C. on 9 May 2012 (hereinafter the "Procedural Meeting"), which are in summary as follows:

- Respondent submits that its requests for posting of a bond addresses the risk relating to TFA's alleged uncertain future existence.
  - (i) According to Respondent, TFA extended its existence only up to the end of 2013, which leads to a situation in which TFA could cease to exist in the near future, and in particular before the closing of these proceedings. In this respect, Respondent relies on "a piece of news that was published in La Sere, where it said that TFA extended their existence only up to the end of next year." (see transcript p. 226 l.5 – 9).
  - (ii) Respondent considers a security for costs to be necessary, because it does not see how, in case there was a decision against Claimants in connection with costs, Respondent would be able to recover these costs from Claimants (see transcripts p. 225, l. 20 -- p. 227 l. 22; p. 242 l. 10 – p. 245 l. 9; p. 246 l. 10 – p. 247 l. 1).
- Claimants object to Respondent's request for posting of a bond and contend that such request would require a provisional measures recommendation from the Tribunal. Claimants base their objections to such measure on the following main arguments (see transcripts p. 228, l. 5 – p. 242 l. 6; p. 245 l. 12 – p. 246 l. 9; p. 247 l. 4-9):
  - (i) The Tribunal has no competence to issue an order against TFA, because TFA is not a party to these proceedings as already stated in Procedural Orders No. 1 and No. 5;
  - (ii) Even if the Tribunal considered having competence, the standard to grant such measure would not be met:

- Firstly, the limited existence of TFA is imposed by its limited purpose, which is to conduct settlement talks with Respondent and if necessary coordinate any legal action on behalf of the bondholders. Furthermore, the bylaws of TFA provide for the extension of its term of existence. Therefore, the limited existence of TFA is irrelevant.
- Secondly, Respondent has failed to meet the high burden established by previous ICSID decisions in relation to the granting of security for costs.
- Thirdly, Respondent's request would in any case fail to meet the required standard for granting of such an exceptional measure as security for costs, i.e. the urgency, necessity to preserve a right and the risk for irreparable harm.

### **CONSIDERING FURTHER**

That Respondent's request for posting of a bond by the TFA member banks is to be considered as a provisional measures request under Article 47 ICSID Convention and ICSID Arbitration Rule 39. According to Article 47 ICSID Convention, "*the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*"

That the question of whether or not the Tribunal has competence to make a recommendation vis-à-vis TFA and/or its member banks, may remain open at this stage, since Respondent's request does otherwise not meet the required standard:

- Although Article 47 ICSID Convention and ICSID Arbitration Rule 39 do not provide for specific requirements for issuing a recommendation of provisional measures and leaves this largely within the margin of appreciation of the arbitral tribunal, a wide consensus has emerged in practice according to which a recommendation for provisional measures would usually require that following conditions be met: (i) urgency of the requested measures, (ii) the risk of irreparable harm or serious prejudice in case the measures are not granted, (iii) the necessity of the measures in order to preserve the right at risk.
- Respondent bases its request for security for costs on the sole argument that TFA will cease to exist by the end of 2013, and certainly before the conclusion of these proceedings.
- This argument is based on the unproven assumptions that (i) a further extension of its term of existence will be necessary, and/or that (ii) TFA will not be able and/or willing to provide for such extension.
- Even if it was established that TFA would cease to exist before the end of these proceedings, Respondent has failed to establish why this would require measures to be taken today.

That Respondent remains at liberty to request security for costs in the future.

**THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS**

**Respondent's request of 10 February 2012 to require the TFA member banks to post a bond, in favor of the Argentine Republic, to secure the pecuniary consequences which Claimants might incur in this proceeding, such as a potential award of costs against Claimants, is rejected.**

**The decision on costs in relation to Respondent's request for posting of a bond is reserved.**

[signed]

For the Arbitral Tribunal  
Pierre Tercier, President