

## **Statement of Dissent by Dr. Santiago Torres Bernárdez**

I dissent from the contents of the above letter by the following reasons:

### ***1. Hearing date and request for an extension of the deadline for the submission of the Rejoinder (para. 2 of the letter)***

1. By the present majority's letter it is decided "to hold the hearing (of the Arbitral Tribunal) as suggested, i.e., in the last two weeks of June 2014". In a previous letter on the matter of 26 September 2013, the Arbitral Tribunal *suggested* to the Parties the possibility of holding the hearing in June 2014 because of the availability of the arbitrators in such a month, but without prejudice of the Parties' views on the matter. The relevant suggestion of the said 26 September letter reads as follows:

"As concerns the hearing, all arbitrators would be available during the month of June 2014 and therefore suggest holding the hearing during that period. The Arbitral Tribunal hereby invites the Parties and their Counsel to consult and confirm on which dates during that period they would be available for the hearing. Without prejudice of the Parties views on the matter, the Arbitral Tribunal at present estimates that the duration of the two weeks originally envisaged should be sufficient".

2. By a letter dated 9 October 2013 Claimants confirmed that they were available for a two weeks hearing from the 16-30 June 2014, but the Respondent in a letter of 3 October 2013 had already explained that "it was materially impossible for Argentina to submit its Rejoinder next January and attend the hearing in June" in the light of other ICSID, UNCITRAL and US Supreme Court cases in which the Argentina Republic is involved during the second half of 2013 and the first half of 2014 as listed in footnote 11 of the Respondent's letter.

3. According to that list, between 18 November 2013 and 14-16 July 2014 the Argentine Republic has to comply with not less than eleven deadlines already fixed relating either to the submission of pleadings or the holding of hearings, twelve if it is added the deadline for the submission of its Rejoinder in the present case in the middle of January 2014. On 2-4 June 2014 it has a hearing on Quantum in the *Mobil* case and on 14-16 July 2014 a hearing on Annulment in the *Daimler* case.

4. The aggregate work represented by the above list of Argentine Republic's procedural arbitral and judicial obligations is a new fact, previously unknown for the Arbitral Tribunal, leading me to the conclusion that under these circumstances the date for holding the hearing on merits and pending jurisdictional questions in the present case should not be fixed before September 2014.

5. Unfortunately, such a heavy Argentine Republic's verifiable schedule has not been sufficient enough to convince my co-arbitrators that in matters relating to the expression of parties' oral arguments, as the holding of a hearing, the principle of proper administration of justice, international practice and reason advise that, whatever necessary, efforts should be made for fixing the dates taking duly account the needs and convenience of all concerned ( namely Arbitrators as well as both Parties and their respective Counsels) through the presentation of an alternative date or dates.

6. Under the described circumstances, I consider that the holding of the hearing in the last two weeks of June 2014 makes materially impossible a participation of the Respondent in that hearing in *égalité d'armes* with the Claimants. Furthermore, it is beyond credibility that a hearing date convenient for all could not be found as from September 2014 on. It is indeed unusual that an international arbitral tribunal fixes a hearing date by a majority decision with the support of a single Party. Normally, in that matter, international courts and tribunals try always to accommodate as much as possible and reasonable all concerned in the interest of a proper administration of justice. I regret that the majority failed to apply that wise method in the present case.

7. The invocation in the majority letter, as a justification of the decision adopted, of the need “to ensure the progress of this arbitration” is also, in the present context, ill-placed. The retard gathering in the proceeding of the present phase of the case with respect to the original calendar is not the fact of the Respondent, but mainly the result of developments and conducts relating to the Verification Process Undertaking established by the majority, with the support of the Claimants, in order to deal with the mass *ratione personae* aspects of the case as instituted, an Undertaking opposed by the Respondent as from its outset.

8. A second reason for my dissent is the silence of the majority letter on Respondent’s request for an extension of the deadline for the submission of its Rejoinder based upon the principle of the equality of the Parties in the proceeding. This principle is rightly invoked here because it happens that at the end of the day the material time at the disposal of the Claimants for the preparation of their Reply has resulted to be several months superior to the time at the disposal of the Respondent for the preparation of its Rejoinder.

9. In the light of this disparity and the circumstances described above, I consider that an extension of the deadline should have been granted by the Tribunal and the calendar adjusted accordingly, while remaining however open minded as to the extension of the deadline to be decided by the Tribunal.

## ***2. Discontinuance of withdrawn Claimants (para. 3 of the letter)***

10. I consider that this paragraph is out of place in the present majority letter because Claimants’ letter of 9 October 2013 has not yet been transmitted to the Respondent for its comments or observations. In my opinion, a request to the Respondent for such a purpose should have been mailed before the Tribunal’s invitation to the Respondent “to state the reasons why the documents produced by Claimants are not sufficient for the purpose of identifying the Claimants and confirming their withdrawal”.

11. Claimants in their letter of 9 October declare indeed that “no further documents are needed” but the Tribunal does not yet know the position of the Respondent with respect to that bold statement because not comments thereon were requested from the Respondent. In such circumstances, the above invitation of the majority letter risks of being regarded as implying a certain predetermination of the actual situation and is in any case, in my view, premature.

12. Discontinuance is a matter of interest not only for the Parties but also for the Tribunal. In this respect, I must say that the members of the Tribunal (in any case myself) have not yet been supplied with the documentation concerning the “power of attorney revocations” referred to by Claimants. It would have been worthwhile for the majority letter to have tried to devise some remedy to this situation.

***3. Entry of “new data” and “old data” (para. 4 of the letter)***

13. I agree with the sentence on the “new data”, but I reserve my position on the “old data” sentence by reasons explained in paragraphs 4 to 6 of the Individual Statement I joined to P.O. N° 22.

**Signed: Santiago Torres Bernárdez.**