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**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

IN THE ARBITRATION PROCEEDING BETWEEN

**ABACLAT AND OTHERS**  
CLAIMANTS

and

**ARGENTINE REPUBLIC**  
RESPONDENT

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

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**DECISION ON THE PROPOSAL TO DISQUALIFY**  
**A MAJORITY OF THE TRIBUNAL**

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*CHAIRMAN OF THE ADMINISTRATIVE COUNCIL*  
DR. JIM YONG KIM

*Secretary of the Tribunal*  
Mr. Gonzalo Flores

*Date: February 4, 2014*

REPRESENTING THE CLAIMANTS:

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MR. JONATHAN C. HAMILTON

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AND

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MARTINEZ DE HOZ (JR.)

BUENOS AIRES, ARGENTINA

REPRESENTING THE ARGENTINE REPUBLIC:

DRA. ANGELINA MARÍA ESTHER ABBONA

PROCURADORA DEL TESORO DE LA NACIÓN

PROCURACIÓN DEL TESORO DE LA NACIÓN  
ARGENTINA

BUENOS AIRES

ARGENTINA (C1112ADC)

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## A. PROCEDURAL HISTORY

1. On September 14, 2006, a number of individuals and corporations claiming to hold sovereign bonds issued by the Argentine Republic (“**Claimants**”) submitted a Request for Arbitration to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) against the Argentine Republic (“**Argentina**” or “**Respondent**”).
2. On February 7, 2007, the Secretary-General of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**Convention**”).
3. The Arbitral Tribunal was constituted on February 6, 2008. Its members were Dr. Robert Briner, a Swiss national, appointed as President pursuant to Article 38 of the ICSID Convention, Professor Georges Abi-Saab, an Egyptian national, appointed by Argentina, and Professor Albert Jan van den Berg, a Dutch national, appointed by the Claimants. Following the resignation of Dr. Briner due to ill health, the Tribunal was reconstituted on September 2, 2009, with Professor Pierre Tercier, also a Swiss national, being appointed as President of the Tribunal by agreement of the parties.
4. Following written submissions, a hearing on jurisdiction took place in Washington D.C. from April 7 to 13, 2010. On August 4, 2011, the Tribunal, by a majority composed of Professors Tercier and van den Berg, issued a Decision on Jurisdiction and Admissibility. On October 28, 2011, Professor Abi-Saab issued a Dissenting Opinion on the Decision on Jurisdiction and Admissibility.
5. On September 15, 2011, Argentina submitted a Proposal to Disqualify Professors Tercier and van den Berg under Article 57 of the ICSID Convention. The proceeding was suspended pursuant to ICSID Arbitration Rule 9(6).
6. Professor Abi-Saab tendered his resignation from the Tribunal by letter dated November 1, 2011.
7. On December 21, 2011, the Chairman of the ICSID Administrative Council rejected the Proposal to Disqualify Professors Tercier and van den Berg, pursuant to Article 58 of the ICSID

Convention. The proceeding was resumed on that same date in accordance with ICSID Arbitration Rule 9(6).

8. On December 22, 2011, Professors Tercier and van den Berg consented to Professor Abi-Saab's resignation, as envisaged in ICSID Arbitration Rule 8(2).

9. On January 19, 2012, the Tribunal was reconstituted, its members being Professor Tercier, Professor van den Berg, and Dr. Santiago Torres Bernárdez, a Spanish national, appointed by Argentina to replace Professor Abi-Saab.

10. On May 9, 2012, the Tribunal held a procedural hearing in Washington D.C.

11. Between May 9, 2012 and November 4, 2013, the Tribunal has issued 13 Procedural Orders and 3 set of Directions concerning the conduct of these proceedings.<sup>1</sup>

12. On July 7, 2012, the Tribunal unanimously issued Procedural Order No. 12 concerning the conduct of the proceedings and the procedural calendar. In this Procedural Order, the Tribunal divided the steps leading to the hearing into two main phases: Phases 2 and 3. It further divided Phase 2 into three sub-phases: Phases 2A and 2B, which would run in parallel, and would later merge into Phase 2C.

13. In Phase 2A, the Claimants and the Respondent would file a Memorial and Counter-Memorial setting forth their respective cases on liability and quantum. The Respondent could also address issues of jurisdiction and admissibility but only to the extent that they had not been addressed and decided in the Decision on Jurisdiction and Admissibility.

14. Phase 2B would concern a verification of the Claimants' database by one or more independent experts to be appointed by the Tribunal (the "**Database Verification Process**").

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<sup>1</sup> Procedural Order No. 10 (June 18, 2012), Procedural Order No. 11 (June 27, 2012), Procedural Order No. 12 (July 7, 2012), Procedural Order No. 13 (September 27, 2012), Procedural Order No. 14 (November 1, 2012), Procedural Order No. 15 (November 20, 2012), Procedural Order No. 16 (January 11, 2013), Procedural Order No. 17 (February 08, 2013), Procedural Order No. 18 (March 25, 2013), Procedural Order No. 19 (April 8, 2013), Procedural Order No. 20 (April 24, 2013), Procedural Order No. 21 (May 2, 2013), Procedural Order No. 22 (July 30, 2013), Directions from the Tribunal to the Parties of September 26, October 21, and November 4, 2013.

15. Procedural Order No. 12 granted the parties an opportunity to participate in the Database Verification Process, and, to this end, to retain their own experts. Phase 2B was to be completed by a report of the Independent Expert(s). Originally, this report was to be issued upon the filing of Respondent's Counter-Memorial on Phase 2. Phase 2B also envisaged a document production phase that would follow the issuance of the expert(s) report.

16. Phases 2A and 2B would merge into Phase 2C after the conclusion of the document production. In Phase 2C, the Claimants and the Respondent were to submit a Reply and Rejoinder, respectively, which would address (i) issues of liability and quantum, (ii) jurisdiction and admissibility, should the Respondent raise these in its Counter-Memorial on Phase 2B, and (iii) any comments arising from the Database Verification Process. If the Respondent raised issues of jurisdiction and admissibility in its Counter-Memorial, the Claimants could file a Rejoinder on these issues. This exchange of written pleadings would be followed by a hearing on Phase 2.

17. The above steps were reflected in a schedule included in Procedural Order No. 12.

Phase	Date	Party	Description
2A	15 Sept 12 (2 months)	Claimants	Claimants file their Memorial on Phase 2
	15 Nov 12 (2 months)	Respondent	Respondent files its Memorial on Phase 2
2B	15 Nov 12	External Expert(s)	Report on the verification of Claimants' database in compliance with the requirements set forth in § 501(iii) of the Decision by one or more experts appointed by the Tribunal after consultation of the Parties
	30 Nov 12 (2 weeks)	Requesting Party	Both Parties file their Request for Document Production
	14 Dec 12 (2 weeks)	Producing/ Objecting Party	Both Parties produce non-contentious documents and file their objections concerning contentious document requests
	28 Dec 12 (2 weeks)	Requesting Party	Both Parties file answers to objections concerning contentious document requests
	11 Jan 13 (2 weeks)	Objecting Party	Both Parties reply to answer to the objections concerning contentious document requests
	1 Feb 13 (3 weeks)	Tribunal	Decision on Document Production Requests to be issued
2C	1 Apr 13 (2 months)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2
	3 Jun 13 (2 months)	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2
	3 July 13 (1 month)	Claimants	Rejoinder Memorial on Jurisdiction
	July/Sept/Oct TBC	ALL	Hearing on Phase 2
	TBD	Claimant & Respondent	Post-Hearing Briefs
		Tribunal	Decision on Phase 2

18. On September 27, 2012, the Tribunal, by majority, issued Procedural Order No. 13 addressing issues of confidentiality and the further conduct of the proceedings. In particular, Procedural Order No. 13 granted the Claimants (i) the right to address issues of individual jurisdiction in their Phase 2 Memorial and (ii) approval to amend the contents of the Database, under specified conditions. Procedural Order No. 13 also extended the dates for submission of the Claimants' Memorial and the Respondent's Counter-Memorial. Procedural Order No. 13 was accompanied by a Statement of Dissent issued by Dr. Torres Bernárdez. Dr. Torres Bernárdez agreed with the extension granted, but considered that (i) the Claimants should not be allowed to include issues of individual jurisdiction in their Phase 2 Memorial and file a Rejoinder on jurisdiction and (ii) the entire schedule fixed in Procedural Order No. 12 should be revised to factor the Database Verification Process in the sequence of pleadings.

19. The Claimants filed their Phase 2 Memorial on Jurisdiction and Merits in English on October 1, 2012. A translation into Spanish was filed on October 8, 2012.

20. On November 1, 2012, the Tribunal unanimously issued Procedural Order No. 14, extending the deadline for Argentina's submission of its Counter-Memorial by one week, the same additional time the Claimants had taken to submit the Spanish version of its Memorial on Jurisdiction and Merits.

21. On November 20, 2012, the Tribunal, by majority, issued Procedural Order No. 15, (i) appointing Dr. Norbert Wühler, a German national, as the independent database verification expert envisaged in Procedural Order No. 12; (ii) asking Dr. Wühler to prepare a *Work Proposal* to be presented to the parties and the Tribunal; and (iii) defining the scope of the expert's mandate, the terms of his retainer and the procedure applicable to his role. Procedural Order No. 15 further modified the schedule for phases 2B and 2C.

PHASE	Date	PARTY	Description
2A	30 Sept 12 (2 months)	Claimants	Claimants' Memorial on Phase 2 (CL MP2)
	26 Dec 12 (2 months)	Respondent	Respondent's Memorial on Phase 2 (RSP MP2)

2B	23 Dec 2012	External Expert(s)	Submission of the Expert's Work Proposal
	4 Jan 2013	Claimants & Respondent	Both Parties submit their Comments on Expert's Proposal
	7 Jan 2013	Requesting Party	Both Parties file their Request for Document Production
	14 Jan 2013	Tribunal	Decision on the Expert's Proposal
	21 Jan 2013 (2 weeks)	Producing/ Objecting Party	Both Parties produce non-contentious documents and file their objections concerning contentious document requests
	28 Jan 2013	Claimants & Respondent	Both Parties submit their Summary & Documents to Expert (provided his Work Proposal is confirmed)
	4 Feb 2013 (2 weeks)	Requesting Party	Both Parties file answers to objections concerning contentious document requests
	18 Feb 2013 (2 weeks)	Objecting Party	Both Parties Reply to answer to the objections concerning contentious document requests
	11 Mar 2013 (3 weeks)	Tribunal	Decision on Document Production Requests to be issued
	15 Mar 2013	External Expert(s)	Draft Report on the verification of Claimants' database
	25 March 2013	Claimants & Respondent	Both Parties produce documents according to the Tribunal's decision
	15 Apr 2013	Claimants & Respondent	Both Parties comment on Draft Report on the verification of Claimants' database
	30 Apr 2013	External Expert(s)	Final Report on the verification of Claimants' database (Database Verification Report)
2C	1 Jul 2013 (2 months)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2
	2 Sept 2013 (2 months)	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2
	16 Sept 2013 (TBC)	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	Oct/Nov 2013 TBC	ALL	Hearing on Phase 2 (Hearing P2)
	TBD	Claimants & Respondent	Post-Hearing Briefs
	TBD	Tribunal	Decision on Phase 2

22. In this modified schedule, the Tribunal fixed dates for the steps involved in the Database Verification Process, postponing the deadline for the submission of the Reply and the Rejoinder in Phase 2 to July 2 and September 2, 2013, respectively.



23. Dr. Torres Bernárdez appended a Dissenting Opinion to Procedural Order No. 15, opposing Dr. Wühler as a sole expert, and reiterating his disagreement with the schedule of submissions.

24. Argentina filed its Phase 2A Counter Memorial on Jurisdiction and Merits on December 26, 2012.

25. On January 11, 2013, the Tribunal unanimously issued Procedural Order No. 16, addressing issues concerning the languages of the proceeding and postponing the deadline for each party to file a request for document production until January 16, 2013.

26. On February 8, 2013, the majority of the Tribunal issued Procedural Order No. 17, confirming the appointment of Dr. Wühler as the Tribunal's Database Verification Expert and setting a modified schedule.

PHASE	Date	Party	Description
2A	30 Sept 12 (2 months)	Claimants	Claimants' Memorial on Phase 2 (CL MP2)
	26 Dec 12 (2 months)	Respondent	Respondent's Memorial on Phase 2 (RSP MP2)
2B	26 Dec 2012	External Expert(s)	Submission of the Expert's Work Proposal
	7 Jan 2013	Claimants & Respondent	Both Parties submit their Comments on Expert's Proposal
	22 Jan 2013	External Expert(s)	Submission of the Expert's Alternative Proposal
	31 Jan 2013	Claimants & Respondent	Submission of Comments on Expert's Alternative Proposal
	25 Jan 2013	Requesting Party	Both Parties file their Request for Document Production
	8 February 2013	Tribunal	Decision on the Expert's Proposal
	12 February 2013 (18 days)	Producing/ Objecting Party	Both Parties produce non-contentious documents and file their objections concerning contentious document requests
	15 February 2013	Claimants & Respondent	Both Parties submit their Summary & Documents to Expert
	18 Feb 2013 (6 days)	Requesting Party	Answer to objections concerning contentious document requests
	22 Feb 2013 (4 days)	Objecting Party	Reply to answer to the objections concerning contentious document requests
	11 Mar 2013 (17 days)	Tribunal	Decision on Document Production Requests to be issued

	25 March 2013 (14 days)	Claimants & Respondent	Production of documents according to the Tribunal's decision
	30 April 2013	External Expert(s)	Draft Report on the verification of Claimants' database
	30 May 2013	Claimants & Respondent	Both parties submit comments on Draft Report on the verification of Claimants' database
	15 June 2013	External Expert	Final Report on the verification of Claimants' database (Database Verification Report)
2C	1 Aug 2013 (8 weeks)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2 (CL ReplyMP2)
	+ 8 weeks as of receipt of Spanish CL ReplyMP2	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2 (RSP REjMP2)
	+ 4 weeks as of receipt of English RSP REjMP2 (TBC)	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	18-30 Nov 2013 TBC	ALL	Hearing on Phase 2
	TBD	Claimants & Respondent	Post-Hearing Briefs
	TBD	Tribunal	Decision on Phase 2

27. Dr. Torres Bernárdez dissented from Procedural Order No. 17, objecting to the procedural calendar, the appointment of Dr. Wühler, and generally the Database Verification Process.

28. On March 25, 2013, the Tribunal unanimously issued Procedural Order No. 18 concerning production of documents.

29. On April 8, 2013, the Tribunal unanimously issued Procedural Order No. 19 concerning the conduct of the database verification process. Attached to Procedural Order No. 19 was a letter from Professor Tercier noting the parties' increasing failure to comply with the established

timetable, and advising that the Tribunal would henceforth be stricter on time limits and requests for extension of time.

30. On April 24, 2013, the Majority of the Tribunal issued Procedural Order No. 20 extending the deadline for the independent expert's draft Database Verification Report until May 31, 2013. Dr. Wühler had requested this extension due to delays caused by interruptions in access to the Database. Dr. Torres Bernárdez dissented from Procedural Order No. 20 on the basis of his stated opposition to the Database Verification Process.

31. On May 2, 2013, the Tribunal issued Procedural Order No. 21 concerning the management of the Claimants' Database and the procedural calendar, setting new dates as follows:

- i. Submission of the Draft Verification Report by Dr. Wühler: May 31, 2013.
- ii. Comments by both parties: July 1, 2013.
- iii. Issuance of Final Verification Report: July 15, 2013.
- iv. All other deadlines are suspended.

Dr. Torres Bernárdez dissented from Procedural Order No. 21 on the basis of his stated opposition to the Database Verification Process.

32. By letter of July 22, 2013, the Tribunal gave each party the opportunity to comment on the other party's comments of July 15, 2013. The Tribunal established the following additional steps concerning the Database Verification:

- i. Each party to respond to the other party's July 15, 2013 comments on the Draft Verification Report: Deadline July 31, 2013.
- ii. Issuance of Final Verification Report: Deadline August 31, 2013.

Dr. Torres Bernárdez dissented from this letter on the basis of his stated opposition to the Database Verification Process.

33. On July 30, 2013, the Tribunal issued Procedural Order No. 22 regarding the management of the Claimants' Database. Dr. Torres Bernárdez appended an Individual Statement of Dissent to Procedural Order No. 22.

34. The Final Database Verification Report was issued by the Expert on August 31, 2013 and transmitted to the parties on September 5, 2013.

35. On September 26, 2013, the Tribunal issued Directions to the parties, stating that it would proceed as set out in Procedural Orders No. 15 and 17, while re-adjusting the relevant deadlines. The Tribunal then set a modified schedule.

PHASE	Date	Party	Description
2C	7 November 2013 (9 weeks)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2 (CL ReplyMP2) (CL ReplyMP2)
	+ 9 weeks as of receipt of Spanish CL ReplyMP2	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2 (RSP REjMP2)
	+ 4 weeks as of receipt of English RSP REjMP2  (TBC)	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	June 2014 (TBC)	ALL	Hearing on Phase 2
	TBD	Claimants and Respondent	Post-Hearing Briefs
	TBD	Tribunal	Decision on Phase 2

36. The Tribunal also advised the parties that the three arbitrators would be available for a hearing during June 2014, and invited the parties to confirm the dates during that period on which they would be available for the hearing.

37. Dr. Torres Bernárdez dissented from the Tribunal's Directions as to the above timetable on the basis that it gave the Claimants the last opportunity to respond by filing a Rejoinder Memorial on Jurisdiction contrary, in his view, to Rule 31 of the ICSID Arbitration Rules.

38. By letter of October 3, 2013, Argentina requested an 11-month extension to file its Rejoinder Memorial, requesting the same time that the Claimants had for the filing of its Reply,

and objected to the hearing dates proposed by the Tribunal, claiming Argentina had prior commitments in other ICSID cases. By letter of October 9, 2013, the Claimants objected to Argentina's request and confirmed their agreement with the hearing dates proposed by the Tribunal.

39. In its Directions of October 21, 2013, the majority of the Tribunal decided to hold the hearing in the last two weeks of June, and stated:

*The Arbitral Tribunal has taken note of Respondent's schedule in the first half of 2013. It should be recalled that the hearing has been postponed various times (PO17 [sic] of 7 July 2012: Jul/Sep/Oct 2013; PO 15 of 20 November 2012: Oct/Nov 2013; PO17 of 8 February 2013: 18-30 November 2013; PO21 of 2 May 2013: calendar suspended). In order to ensure the progress of this arbitration, the majority of the Arbitral Tribunal has decided to hold the hearing as suggested, i.e., in the last two weeks of June 2014.*

Dr. Torres Bernárdez dissented, indicating that Argentina should be granted an extension to file its Rejoinder Memorial, that the calendar should be adjusted, and accordingly that the hearing dates set by the Tribunal should be changed.

40. On October 24, 2013, Argentina reiterated its request for an 11-month extension to file its Rejoinder.

41. In its Directions of November 4, 2013, the Tribunal granted a 15-day extension requested by the Claimants, and set a modified schedule.

PHASE	Date	Party	Description
2C	19 November 2013 (75 days)	Claimants	Claimants file their Reply on Respondent's Memorial on Phase 2 (CL ReplyMP2) (CL ReplyMP2)
	+ 75 days as of receipt of Spanish CL ReplyMP2	Respondent	Respondent files its Rejoinder on Claimants' Reply Memorial on Phase 2 (RSP REjMP2)
	+ 4 weeks as of receipt of English RSP REjMP2 (TBC)	Claimants	Claimants file their Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any
	June 2014 (TBC)	ALL	Hearing on Phase 2 (Hearing P2)

TBD	Claimants and Respondent	Post-Hearing Briefs
TBD	Tribunal	Decision on Phase 2

Dr. Torres Bernárdez approved the extension of time for filing the Reply requested by the Claimants on the condition that a similar extension be granted to the Respondent, but rejected the schedule because it allowed the Claimants to submit a further Rejoinder Memorial on Jurisdiction.

42. By letter of November 20, 2013, Argentina repeated its objections, requesting an extension to file its Rejoinder on October 4, 2014.

43. By letter of November 28, 2013, the Tribunal rejected Argentina's requests for an extension to file its Rejoinder Memorial on Phase 2, and stated:

*“The Arbitral Tribunal does not find it justified or appropriate to rely on the number of days between the filing of Respondent’s Counter-Memorial and the filing of Claimants’ Reply Memorial to grant Respondent an exactly same amount of days for the filing of its Rejoinder Memorial. Both Parties have been occupied with various aspects of these proceedings, including most recently the Verification Process and the Database update issues, which are both relevant for the next steps of the proceedings, so that it would be inappropriate to assume that Claimants enjoyed 314 days to prepare their Reply Memorial. The Arbitral Tribunal believes that the period of 10.5 weeks as of receipt of Claimants’ Reply Memorial is sufficient for Respondent to prepare its Rejoinder Memorial. The Tribunal notes that the Parties are aware since the issuance of Order No. 15 of 20 November 2012 (containing the timetable including the Verification Process) that the deadlines fixed for the filing of Claimants’ Reply Memorial in Phase 2 and Respondent’s Rejoinder Memorial in Phase 2 are equally calculated as of the date of the filing of the Final Verification Report (i.e., in Block 2C: ‘(2 months)’; see also Timetable to PO17: in Block 2C: ‘(8 weeks)’.”*

Dr. Torres Bernárdez dissented from this decision.

44. By letter of November 29, 2013, Argentina reiterated its objections to the fixed schedule. By email of December 13, 2013, the Tribunal invited the Claimants to comment on Argentina’s November 29 letter. The Claimants submitted comments on December 17, 2013.

45. On December 19, 2013, Argentina proposed the disqualification of Professors Tercier and van den Berg, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration

Rule 9 (“**Proposal**”). On that same date, the Centre informed the parties that the proceedings were suspended until the Proposal was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural calendar for the parties’ submissions on the Proposal.

46. In compliance with that procedural calendar, the Claimants replied to the Proposal on December 27, 2013. Professors Tercier and van den Berg furnished a joint explanation on December 30, 2013, as envisaged by ICSID Arbitration Rule 9(3). Both Parties submitted additional comments on the Proposal on January 13, 2014.

## **B. PARTIES’ ARGUMENTS REGARDING THE PROPOSAL TO DISQUALIFY PROFESSORS TERCIER AND VAN DEN BERG AND THE ARBITRATORS’ EXPLANATIONS**

### **1. Argentina’s Proposal for Disqualification**

47. Argentina’s arguments on the proposal to disqualify Professors Tercier and van den Berg were set forth in its submissions of December 19, 2013 and January 13, 2014. These arguments are summarized below.

48. Argentina argues that Professors Tercier and van den Berg manifestly lack the qualities required by Article 14(1) of the ICSID Convention. Argentina claims that the procedural decisions on the briefing calendar demonstrates an “absolute lack of equality in the treatment accorded to the parties to the detriment of the right of defense of the Argentine Republic which clearly prevents the challenged arbitrators from being relied upon to exercise independent judgment.”<sup>2</sup>

49. Argentina argues that the periods allowed by the Tribunal for each party to prepare its defense in this case are disproportionate and result in a total lack of fairness in the treatment accorded to the parties. Argentina bases this Proposal on the decision issued by the Majority of the Tribunal on November 28, 2013 (the “**Decision**”) and the facts surrounding it. The November 28, 2013 Decision confirmed the deadlines for the next submissions in the case.

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<sup>2</sup> Proposal for the Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg of December 19, 2013 (“**Proposal**”) ¶2. Observations on the Proposed Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg of January 13, 2014 (“**Respondent’s Second Submission**”) ¶2.

Argentina argues that this Decision means the Claimants had 314 days to prepare their Reply Memorial on Phase 2 (calculated from the date they received the English translation of the Argentine Republic's Counter-Memorial on Phase 2), while Argentina would have 75 days to prepare its Rejoinder Memorial on Phase 2 (calculated from the date it received the Spanish translation of Claimants' Reply on Phase 2).<sup>3</sup>

50. Argentina submits that it asked three times for the same time-limit as the Claimants, but received an answer from the Tribunal rejecting the request only after its third request.<sup>4</sup> Moreover, Argentina states that on one of these occasions, the Majority of the Tribunal granted the Claimants' a 15-day extension to file their Reply Memorial on Phase 2 while ignoring the Respondent's extension request. Argentina submits that this is a clear violation of the principle of equal treatment by the Majority of the Tribunal.<sup>5</sup>

51. Argentina states that the Majority of the Tribunal has disregarded Argentina's repeated opposition to the case procedural calendar since it was established by Procedural Order No. 15 of November 20, 2012.<sup>6</sup> Argentina also states that the Majority of the Tribunal ignored Argentina's numerous hearings and deadlines in other arbitrations when it fixed and confirmed this schedule.<sup>7</sup> Argentina submits that it has been asking the Tribunal to set deadlines for the submission of main pleadings that ensured equal treatment to the parties since December 14, 2012.<sup>8</sup>

52. Argentina argues that the Database Verification Process did not interfere substantially with the Claimants' overall ability to prepare their Reply Memorial on Phase 2. Argentina states that both parties were allowed only one month to review the draft Report submitted by the Independent Expert on May 31, 2013 and that the parties submitted their comments between July 15-31, 2013. Accordingly, Argentina submits that the time spent by the parties on the Database

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<sup>3</sup> Proposal ¶5. Respondent's Second Submission ¶¶5 and 19.

<sup>4</sup> Proposal ¶¶7-9.

<sup>5</sup> Proposal ¶8.

<sup>6</sup> Proposal ¶14.

<sup>7</sup> Proposal ¶12.

<sup>8</sup> Proposal ¶15.



Verification Process between Argentina's Counter-Memorial and Claimants' Reply does not justify the difference in time allocated to each party to file their second round of pleadings.<sup>9</sup>

53. Argentina states that the Proposal to Disqualify is timely as it was triggered by the communications from the Majority of the Tribunal of November 28 and December 13, 2013.<sup>10</sup>

54. Argentina concludes that the manner in which Professors Tercier and van den Berg have conducted the proceedings in this case breaches the principle of equal treatment and has caused Argentina to lose confidence in their capacity to exercise independent and impartial judgment.<sup>11</sup>

## 2. Claimants' Observations

55. The Claimants' arguments on the proposal to disqualify Professors Tercier and van den Berg were set forth in their submissions of December 27, 2013 and January 13, 2014. These arguments are summarized below.

56. The Claimants state that Professors Tercier and van den Berg's impartiality and ability to decide this case fairly has already been affirmed in this proceeding in response to Argentina's challenge in September 2011. They state that nothing has changed in the interim, and nothing in Argentina's Proposal demonstrates otherwise.<sup>12</sup>

57. The Claimants argue that a disagreement with a Tribunal ruling is not a valid basis for arbitrator disqualification under the ICSID Convention.<sup>13</sup> The Claimants state that Argentina has raised no objections to the character or conduct of the challenged arbitrators and that it has based the present challenge "solely on its disagreement with the Tribunal's procedural ruling with respect to Argentina's request for an extension of time."<sup>14</sup>

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<sup>9</sup> Proposal ¶13. Respondent's Second Submission ¶9.

<sup>10</sup> Respondent's Second Submission ¶44.

<sup>11</sup> Proposal ¶¶18-19. Respondent's Second Submission ¶23.

<sup>12</sup> Observations by the Claimants to the Respondent's Proposals for Disqualification of December 27, 2013 ("**Claimants' Observations**") page 1.

<sup>13</sup> Claimants' Observations page 2. Claimants' Additional Observations to the Respondent's Proposal for Disqualification of January 13, 2014 ("**Claimants' Additional Observations**") page 1.

<sup>14</sup> Claimants' Observations page 6. Claimants' Additional Observations page 1.

58. The Claimants argue that Argentina's claim that the refusal to grant its extension constitutes a breach of the principle of equal treatment is meritless. They state that the eight months following the filing of Argentina's Counter-Memorial were dedicated to two matters outside the briefing schedule: a months-long discovery phase and a months-long phase to perform an independent review and verification of the Claimants' Database. Accordingly, "contrary to Argentina's claims that its right to defense has not been respected, much of the procedure implemented by the Tribunal has been dedicated precisely to ensuring that right."<sup>15</sup>

59. The Claimants state that the Database Verification Process was a lengthy process in which both parties prepared multiple, comprehensive submissions with respect to the scope of the expert's work and the conclusions that he ultimately reached.<sup>16</sup> Accordingly, the Claimants disagree with Argentina's assertion that the Claimants had eleven months to prepare their Reply Memorial on Phase 2.<sup>17</sup>

60. The Claimants submit that the Tribunal has given both parties multiple opportunities to present their arguments with respect to Argentina's extension request, duly considered the parties' positions, and fully explained its reasons for rejecting Argentina's request on November 28, 2013.<sup>18</sup>

61. The Claimants submit that this Proposal was not filed "promptly" as required by the ICSID Arbitration Rules and that Argentina waived its right to challenge the arbitrators. The Claimants note that the Tribunal issued Procedural Order No. 15 on November 20, 2012, thirteen months prior to the submission of Argentina's Proposal, and that Argentina "failed to assert any request for disqualification, or any intention to file, when the purported issue arose more than a year ago." They add that "Argentina had ample opportunity to file a disqualification request," and point to "Argentina's tactical abuse of ICSID procedures to its advantage [...] by trying to award itself additional time for the Rejoinder, in direct contravention of the Tribunal's ruling."<sup>19</sup>

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<sup>15</sup> Claimants' Observations pages 8-9.

<sup>16</sup> Claimants' Observations page 9.

<sup>17</sup> Claimants' Observations page 10.

<sup>18</sup> Claimants' Observations page 10-11.

<sup>19</sup> Claimants' Observations page 13. Claimants' Additional Observations page 2.

62. The Claimants conclude that Argentina's Proposal is "groundless on its face" and must not be permitted to extend the procedural calendar.<sup>20</sup>

### **3. Arbitrators' Explanations**

63. Professors Tercier and van den Berg provided a joint explanation stating that they had complied with their duty to exercise independent judgment as required by Article 14(1) of the ICSID Convention, and that "none of the grounds and circumstances invoked by the Respondent in its Request relate to the exercise of [their] independent judgment."<sup>21</sup>

## **C. DECISION BY THE CHAIRMAN**

### **1. Request for Recommendation**

64. Article 58 of the ICSID Convention states that the decision on any proposal to disqualify the majority of arbitrators shall be taken by the Chairman of the ICSID Administrative Council.

65. Argentina has asked the Chairman to request a recommendation from a third party before deciding the Proposal.<sup>22</sup> The Claimants have opposed this request.<sup>23</sup>

66. The Chairman has requested recommendations on a proposal to disqualify an arbitrator on rare occasions in the past, in light of the specific circumstances of the case at issue. In each such case, the parties were informed that the final decision would be taken by the Chairman, as prescribed by the Convention. The circumstances in this Proposal do not justify such a request. Accordingly, the Chairman has decided the Proposal on the basis of the submissions presented by the parties and the explanations provided by the challenged arbitrators, in accordance with Articles 57 and 58 of the ICSID Convention and the Arbitration Rules.

### **2. Timeliness**

67. Arbitration Rule 9(1) reads as follows:

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<sup>20</sup> Claimants' Observations page 5. Claimants' Additional Observations page 2.

<sup>21</sup> Professor Tercier's and Professor van den Berg's Joint Explanations.

<sup>22</sup> Proposal ¶47. Respondent's Second Submission ¶42-43.

<sup>23</sup> Claimants' Observations page 14. Claimants' Additional Observations page 4.

*“A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.”*

68. As the ICSID Convention and Rules do not specify a number of days within which a proposal for disqualification must be filed, the timeliness of a proposal must be determined on a case by case basis.<sup>24</sup>

69. In this case, Argentina filed the Proposal on December 19, 2013. It arose from a November 28, 2013 Tribunal ruling on Argentina’s request for an extension of time and facts surrounding that request. Such a time period falls within an acceptable range and hence, this disqualification proposal was filed promptly for the purposes of Arbitration Rule 9(1).

### 3. Merits

70. Article 57 of the ICSID Convention allows a party to propose the disqualification of any member of a tribunal. It reads as follows:

*“A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.”*

71. A number of decisions have concluded that the word “manifest” in Article 57 of the Convention means “evident” or “obvious,”<sup>25</sup> and that it relates to the ease with which the alleged lack of the required qualities can be perceived.<sup>26</sup>

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<sup>24</sup> See *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuña (December 13, 2013) ¶73 (“**Burlington**”).

<sup>25</sup> *Burlington, supra* note 24 ¶68, footnote 83; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20) ¶61, footnote 43 (“**Blue Bank**”); *Repsol, S.A. and Repsol Butano, S.A. v. Argentine Republic* (ICSID Case No. ARB/12/38), Decision on the Proposal for Disqualification of Arbitrators Francisco Orrego Vicuña and Claus von Wobeser (December 13, 2013) ¶73, footnote 58 (“**Repsol**”).

<sup>26</sup> C. Schreuer, *The ICSID Convention*, Second Edition (2009), page 1202 ¶¶134-154.

72. The disqualification proposed in this case alleges that Professors Tercier and van den Berg manifestly lack the qualities required by Article 14(1).

73. Article 14(1) of the ICSID Convention provides:

*“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”*

74. While the English version of Article 14 of the ICSID Convention refers to “*independent judgment*,” the Spanish version requires “*imparcialidad de juicio*” (impartiality of judgment).<sup>27</sup> Given that both versions are equally authentic, it is accepted that arbitrators must be both impartial and independent.<sup>28</sup>

75. Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both “protect parties against arbitrators being influenced by factors other than those related to the merits of the case.”<sup>29</sup>

76. Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias.<sup>30</sup>

77. The legal standard applied to a proposal to disqualify an arbitrator is an “objective standard based on a reasonable evaluation of the evidence by a third party.” As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.<sup>31</sup>

78. The Respondent has referred to other sets of standards and guidelines in its arguments. While these rules or guidelines may serve as useful references, the Chairman is bound by the

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<sup>27</sup> The French version refers to “*indépendance dans l’exercice de leurs fonctions*.”

<sup>28</sup> The Parties agree on this point: Proposal ¶25; Claimants’ Observations page 5. So does ICSID jurisprudence: Burlington *supra* note 24 ¶65, Blue Bank *supra* note 25 ¶58, Repsol *supra* note 25 ¶70.

<sup>29</sup> Burlington *supra* note 24 ¶66, Blue Bank *supra* note 25 ¶59, Repsol *supra* note 25 ¶71.

<sup>30</sup> *Ibid.*

<sup>31</sup> Burlington *supra* note 24 ¶67, Blue Bank *supra* note 25 ¶60, Repsol *supra* note 25 ¶72.

standard set forth in the ICSID Convention. Accordingly, this decision is made in accordance with Articles 57 and 58 of the ICSID Convention.

79. This has been a lengthy arbitration and it is a complex proceeding. The Tribunal has addressed numerous requests from both parties and has issued an extensive number of procedural orders and directions to the parties. Each of the Tribunal's rulings has been rendered following thorough argument by each of the parties and due deliberation among the members of the Tribunal. Some of these rulings have granted the requests of the parties, while others have denied such requests.

80. The mere existence of an adverse ruling is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention. If it were otherwise, proceedings could continuously be interrupted by the unsuccessful party, prolonging the arbitral process.

81. The Respondent's disqualification proposal in this case was triggered by a procedural ruling. This ruling, which included the reasons on which it was based, was adopted after argument by both parties and due deliberation by the Tribunal. The Respondent is clearly dissatisfied with the ruling in question. However, the ruling in itself and the surrounding facts described in the Proposal do not prove a manifest lack of impartiality on the arbitrators who rendered it.

82. In the Chairman's view, a third party undertaking a reasonable evaluation of the November 28, 2013 ruling, and surrounding facts, would not conclude that they evidence a manifest lack of the qualities required under Article 14(1) of the ICSID Convention. Accordingly, the disqualification proposal must be rejected.

**D. DECISION**

83. Having considered all of the facts alleged and the arguments submitted by the parties, and for the reasons stated above, the Chairman rejects the Argentine Republic's Proposal to Disqualify Professor Pierre Tercier and Professor Albert Jan van den Berg.

[Signed]

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*Chairman of the ICSID Administrative Council*

Dr. Jim Yong Kim