INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Abaclat and others

(formerly known as Giovanna a Beccara and others)

Claimants

—v.—

Argentine Republic

Respondent

ICSID CASE No. ARB/07/5

Request for the Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg

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15 September 2011

Before:

Ms. Meg Kinnear, ICSID Secretary-General.

TABLE OF CONTENTS

Dear Mrs. Kinnear:

1. I am addressing you to propose the disqualification, in accordance with Article 57 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") and Rule 9 of the Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), of the President of the Tribunal, Mr. Pierre Tercier, and the arbitrator appointed by Claimants, Mr. Albert Jan van den Berg (hereinafter collectively referred to as the "majority of the Tribunal" or - "challenged arbitrators"). The disqualification is grounded upon the manifest lack of the qualities required by Article 14(1) of the ICSID Convention, evidenced by different circumstances described herein below and which manifestly preclude the challenged arbitrators from being relied upon to exercise independent judgment.

2. Further, the Argentine Republic expressly reserves its right to expand the arguments set forth in this Request for Disqualification, in particular after receiving the explanations of the challenged arbitrators in accordance with Arbitration Rule 9 (3), if any.

II. BACKGROUND AND FACTUAL BASIS FOR THE DISQUALIFICATION

A. The evidence of the forgery of signatures and the unsupported rejection of the urgent request for provisional measures

3. At different stages of the proceeding, the Argentine Republic alleged the existence of several irregularities in the TFA Mandate Package, such as instruments bearing forged signatures, powers of attorney signed by persons other than the actual holders —without showing the existence of a mandate allowing execution on behalf of such third party— and even powers of attorney containing no signature whatsoever or containing a cross or a fingertip printed on the signature line, amongst other irregularities.[1]

4. As proof of such irregularities, the Argentine Republic submitted together with its Reply Memorial on Jurisdiction[2] two handwriting expert reports—one elaborated by three experts of the Forensic Document Examination Division of the

[1] *See* Post-Hearing Brief of the Argentine Republic, ¶¶ 95-128.

[2] Reply Memorial, ¶ 394.

Argentine Federal Police Department (Toscano, Pereyra and Di Tommaso)[3] and the other by experts Petersen and Petersen (Jr.) [4]

5. While Argentina initially alleged that there were "justifiable doubts" as to the authenticity of Claimants' signatures—given that Claimants did not provide the original documents but photocopies, and the comparison of signatures had to be carried out on the basis on those copies[5]—, the fact that several signatures had been forged was confirmed when Claimants themselves acknowledged in the Rejoinder on Jurisdiction that six signatures had not been affixed by the Claimants to whom they purportedly belonged, but by members of their families.[6]

6. Before the Hearing on Jurisdiction—which was held in Washington, D.C. from 7 to 13 April 2010—Argentina submitted a second Expert Report of Petersen and Petersen (Jr). The Tribunal decided that such report should not be used during the Hearing but reserved the possibility to admit it at a later stage.[7]

7. The handwriting experts were called to the Hearing and examined by both Parties and the members of the Tribunal.[8]

8. Before the majority of the Tribunal issued the Decision on Jurisdiction and Admissibility (hereinafter referred to as "Decision on Jurisdiction"), the Argentine Republic submitted an Urgent Request for Provisional Measures.[9] In this request, Argentina explained that on 13 July 2011 it had received a notification in the context of the proceedings brought by the Italian Prosecution before the Courts of Bologna (Italy) in connection with the signatures of three Claimants contained in a Declaration of Consent submitted in this arbitration proceeding. Within that framework, the representative of the Italian Prosecutor's Office concluded that that it had "effectively [been] shown that the signatures affixed under the name Pilastro Antonio and Pilastro

[3] Forensic Document Examination Division Report.

[4] Petersen & Petersen Report.

[5] Reply Memorial ¶¶ 191-197

[6] Rejoinder on Jurisdiction ¶ 225. It is worth noting that in none of these cases did the Mandates refer to the fact that a person had signed on behalf of another. Furthermore, the person who signed did not do so by affixing his or her own signature, but "imitating" the other person's signature.

[7] Procedural Order No. 4, 18 March 2010 ¶ 53.

[8] Decision on Jurisdiction ¶ 205.

[9] Urgent Request for Provisional Measures, 21 July 2011.

Silvio have been forged."[10] In effect, Orianna Pilastro, who had affixed the forged signatures on behalf of her brother Antonio Pilastro and her father Silvio Pilastro, testified at the Police Station of San Giovanni in Persiceto, Province of Bologna (Italy), that the bank employee had told her that "she could sign on their behalf, maybe changing the handwriting a little." The employee also told her that it was a "pro forma" form, leading her to understand that it was a formality that the Bank was pursuing with no hopes of success, so it was okay that she affixed all the signatures.[11] Orianna Pilastro further testified that since she thought it was a mere formality requested by the bank, she did not speak about it with her brother (Antonio Pilastro), whose signature she had forged. Further, Orianna Pilastro was unaware that her brother—Antonio Pilastro—signed a statement on 10 April 2009, which Claimants attached to the Rejoinder in this proceeding, whereby he affirmed having previously authorised his sister to sign the Statement of Consent.[12]

9. Antonio Pilastro testified that the signature affixed to the Declaration of Consent under his name and submitted to ICSID was not his own. He also confirmed that only in 2009—i.e., three years after the Request for Arbitration had been submitted in his name—did he learn that his sister had signed on his behalf some years before. There had been no previous authorisation for his sister to give consent to ICSID in his name. As pointed out by Argentina in its Urgent Request for Provisional Measures, the legal consequences of these actions are very significant *vis-á-vis* this proceeding.[13]

10. Equally important is another circumstance which also becomes manifest in Orianna Pilastro's statement, namely that she thought she was complying with "one of the so many formalities that were required for the management of the account," and that "[i]f [she] had understood the importance of the act, [she] would have acted differently".[14] That is, she was not fully aware that she was authorising the initiation of an international arbitration proceeding in her name, which is fatal for the legitimacy of this proceeding. Other relevant issues appear in her statement—for instance, that it was "at the indication of the authorities of the bank" that all the money of the account was

[10] See Filing Petition by the representative of the Italian Prosecutor's Office, Attorney Giampiero Nascimbeni, Annex I of the Urgent Request for Provisional Measures.

[11] Urgent Request for Provisional Measures, 21 July 2011, item I

[12] *Ibid*.

[13] Urgent Request for Provisional Measures, 21 July 2011, item II

[14] *Ibid*, ítem I

used to acquire security entitlements in bonds issued by the Argentine Republic[15]—issues which are essential for the defence of the Argentine Republic. However, given the majority of the Tribunal's arbitrary actions, the Argentine Republic will be precluded from raising these issues as explained *infra*.

11. It has been *proven* that (at least) some of the signatures affixed to the Request for Arbitration were forged, that such forgery was prompted by an official of one of TFA's member banks —considered by the majority of the Tribunal as an entity which in this arbitration "acts as the due representative of Claimants", even with "powers which may go beyond the power granted to a normal agent under Rule 18 ICSID Arbitration Rules"[16]—; that upon the execution of the declaration of consent, the author of the forged signatures did not understand that she was purportedly authorizing the initiation of an international arbitration proceeding in her name (or in the name of her father and brother for that matter), and therefore, neither she nor her father or brother consented to this proceeding; that the contents of the statement submitted by Claimants' attorneys in this case, dated 10 April 2009, pertaining to Antonio Pilastro, are false. According to such statement, Mr. Pilastro had "previously authorised" Ms. Pilastro to sign on his behalf; however, Mr. Pilastro testified before the Italian authorities that he only knew of such signature "on his behalf" three years later.

12. By virtue of the foregoing, the Argentine Republic expressed in the Urgent Request for Provisional Measures that "[n]o ICSID Tribunal should allow such an abuse of process" since "[t]his is an arbitration proceeding 'coordinated' by an entity (TFA) that fabricated alleged consents of claimants based on forged signatures or signatures obtained without the signer comprehending the import of the act."[17] Consequently, in light of the urgency derived from an imminent decision to be adopted regarding the objections raised on jurisdiction, and the irreparable harm that Argentina would suffer in the event it had to litigate thousands of proceedings brought in such conditions, Argentina requested as provisional measures that:

a) A hearing be scheduled urgently so that Orianna Pilastro and Antonio Pilastro could testify before the Tribunal, regarding the events described, in addition to any other claimant that the Tribunal may designate;

[15] *Ibid*.

[16] Decision on Jurisdiction ¶ 532.

[17] Urgent Request for Provisional Measures, 21 July 2011, ítem II.

b) Claimants be ordered to refrain from altering or destroying any document, including but not limited to, the original powers of attorney and mandates that were allegedly granted to TFA and counsel by Claimants; and

c) The ICSID Secretary-General be urgently requested to issue a report on the method it applied to verify the authenticity of the documentation submitted together with the Request for Arbitration.[18]

13. The majority of the Tribunal rejected the request for provisional measures less than 15 days following receipt thereof and one day after Argentina's last submission in that regard, without stating any reasons for the rejection (an unprecedented event in ICSID history). In effect, the majority of the Tribunal devoted only one paragraph of the letter attached to the Decision on Jurisdiction to say that:

> With respect to the Respondent's Request for Interim Measures of 21 July 2011 (the "Request"), Claimants' response of 29 July 2011 and Respondents' reply of 3 August 2011, the majority of the Tribunal is of the opinion that Claimants have convincingly argued that there is a lack of urgency. In the same vein, the majority of the Tribunal is of the opinion that there is no convincing reason why Respondent's Request should be dealt with prior to the issuance of the Decision. Accordingly, the majority of the Tribunal rejects the Request, Professor Abi-Saab dissenting.[19]

14. Not only did the majority of the Tribunal reject the Urgent Request for Provisional Measures abruptly and without stating any reason therefore, but it also failed to consider upon issuing its Decision on Jurisdiction the new evidence presented with respect to the existence of fraud and essential mistake which invalidated Claimants' consent (there is no basis to rule out that the same or similar issues may affect the existence and/or validity of all of the Claimants' consents). In effect, the majority of the Tribunal concluded that "[t]here is at this stage no indication that such execution [that of the documents embodying Claimants' consents] would have been achieved based on fraud, coercion or essential mistake vitiating Claimants' consent"[20];

[18] Urgent Request for Provisional Measures, 21 July 2011, Item III

[19] Letter from Anneliese Fleckenstein, ICSID Consultant, to the parties of 4 August 2011, communicating the decision of the majority of the Tribunal.

[20] Decision on Jurisdiction and Admissibility ¶ 501 (iv)

therefore, "[t]he Declaration of Consent signed by the individual Claimants submitted in this proceeding is **in principle** valid […]."[21]

15. How then could two members of the Tribunal state that "there is at this stage no indication" of fraud or essential error in the face of the overwhelming evidence presented by Argentina in this proceeding and the very confirmation by Claimants involved in the challenged declarations of consent? How could they conclude that the declaration of consent is "in principle" valid without considering the need to appropriately verify the validity of all the documentation submitted by Claimants, when it has already been proven that at least some TFA's member banks obtained the declaration of consent by means of fraud or prompted the forgery of signatures of some of the Claimants? How could they make such a statement and, at the same time, refuse to examine without any grounds the claimants who had testified before the Italian authorities in connection with the forgery of the signatures and who, prompted by the banks, did not know what they were signing?

16. The disqualified arbitrators could argue that the issue of the existence and validity of individual consent "will be addressed, to the extent necessary and appropriate, when dealing with issues concerning individual Claimants."[22] However, such position would not be honest and, in any event, it would be incorrect in light of what has *already been decided* in the Decision on Jurisdiction. This, for the following reasons, amongst others: i) as explained in the section on limitations to the right of defence,[23] the majority of the Tribunal has already acknowledged that individual treatment is "impossible"[24] thus, the analysis of the existence and validity of consent of each Claimant has been rendered "impossible". This would be inadmissible in any international proceeding, especially when the existence of forged signatures and fraudulently obtained consents *has already been proven*; ii) notwithstanding the fact that the majority of the Tribunal has not completely defined the development of the future proceeding, *it has already established* that "the next phase of the proceedings will be dedicated to determining the core issues regarding the merits of the case."[25] In

[21] Decision on Jurisdiction ¶ 502 (ii) (emphasis added).

[22] Decision on Jurisdiction ¶ 466 (ii).

[23] See Section II.C herein.

[24] Decision on Jurisdiction ¶ 296.

[25] Decision on Jurisdiction ¶ 670.

other words, on the basis of a dogmatic prejudgment[26] that "there is no indication" that the operation to obtain the documents for the initiation of the arbitration proceeding "was systematically fraudulent, coercive or otherwise caused Claimants to agree to ICSID arbitration based on an essential mistake"[27] —despite the existence of concrete evidence of fraud and forgery and the Tribunal's refusal upon the rejection of the Urgent Request for Provisional Measures to analyze to *some* extent how widespread such fraud and forgery are —the majority of the Tribunal has already determined that Argentina must now discuss the merits of the case. The Tribunal has decided that the analysis of the validity of each claimant's consent is "impossible" and, in any event, "to the extent necessary and appropriate", will be addressed following the analysis of the merits of the case, which constitutes another flagrant violation of the ICSID Convention and the Arbitration Rules, as they do not provide for the treatment of the merits of a case *before* the treatment of the jurisdictional issue; and iii) the majority of the Tribunal *has already rejected in a final manner* the jurisdictional objections made by the Argentine Republic based on *the acceptance of the validity of Claimants' consent*.

17. Indeed, when Argentina challenged the validity of the instruments submitted for the initiation of the arbitration, the challenged arbitrators acknowledged that "[t]he question may arise whether this cutting into Claimants' rights may have gone too far. This question is however not a question of consent: **Claimants knew what they were doing**."[28] That is to say, the challenged arbitrators *have already rejected in a final manner* fundamental defenses which Argentina may have relied upon[29] on the basis that, purportedly, "Claimants knew what they were doing." Therefore, and notwithstanding that such statement is unsupported and inconsistent with the evidence of the affidavits made by Claimants, the fact remains that the purported reserve of a later stage for the alleged analysis (which is deemed as impossible) of individual consent has been rendered irrelevant with regard to those issues the Tribunal has already decided upon in a final manner.

18. Such conduct undoubtedly leads to an objective loss of reliance upon the exercise of independent and impartial judgment by the majority of the members of the

[26] See also section II.D herein on the question of prejudgment.

[27] Decision on Jurisdiction ¶ 464.

[28] Decision on Jurisdiction ¶ 457 (emphasis added).

[29] Memorial on Objections to Jurisdiction , ¶¶ 237-240; Reply Memorial , ¶¶ 271-302.

Tribunal who adopted the decisions that are questioned here, particularly in light of the limitations on Argentina's right of defence.

B. The Decision was Transmitted without Prof. Abi Saab's Dissenting Opinion and against his will

19. In an unprecedented move and in the absence of any urgency, the majority of the Tribunal transmitted its Decision on Jurisdiction: (a) without the dissenting opinion of the other arbitrator, (b) without his consent, and (c) without even waiting for a draft of said opinion.[30]

20. Such event, together with the fact that the decision of the majority of the Tribunal rejecting the Urgent Request for Provisional Measures was adopted soon after the submission of the request (even only a few hours after Argentina's submission on 3 August 2011), is a manifestation of an absolutely inappropriate conduct, even of bad faith, on the part of the challenged arbitrators. There was absolutely no urgency which might justify not awaiting the dissenting opinion of the other arbitrator, and the consequences that follow from such conduct are serious.

21. Furthermore, the majority of the Tribunal incurs in another serious arbitrariness in suggesting that the Urgent Request for Provisional Measures made by the Argentine Republic would also have justified the issuance of the Decision on Jurisdiction without waiting for even a draft of the dissenting opinion.[31] This, despite the fact that in such request the urgency was invoked in the light of an imminent decision to be adopted by the Tribunal and "the irreparable harm that Argentina would suffer in the event it had to litigate thousands of proceedings brought in such conditions."[32] In other words, the challenged arbitrators justify their decision of not awaiting for the dissenting opinion on an urgent request which required the adoption of

[30] *See* Letter from Anneliese Fleckenstein, ICSID Consultant, to the parties of 4 August 2011, p. 1 ("Having fully deliberated the issues *but having not received the written text of the Dissenting Opinion to date…*") (emphasis added). In the case *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), whilst the decision on jurisdiction was communicated without the dissenting opinion, unlike this proceeding, such communication had been agreed upon by all the members of the Tribunal and in particular by the dissenting arbitrator, who signed the decision on jurisdiction of 14 January 2010. *See* footnote 3 of his dissenting opinion of 1 March 2011, where arbitrator Voss explains that "I had agreed with my colleagues to state my entire Separate Opinion together with the Award".

[31] Letter from Anneliese Fleckenstein, ICSID Consultant, to the parties of 4 August 2011, p. 1.

[32] Urgent Request for Provisional Measures, 21 July 2011, p. 5.

specific and urgent measures *before* the decision was adopted, as there was conclusive evidence of the forgery of signatures and fraudulently obtained consents.

22. The grave nature of such conduct of the majority of the Tribunal is also evidenced when the majority sought to proceed with the arbitration not knowing what the position of the dissenting arbitrator on each of the eleven items would be since it had not yet received Arbitrator Abi-Saab's opinion.

23. Dissenting opinions serve a fundamental purpose in international litigation. They are an instrument of transparency and integrity of the proceeding and thus protect the due and actual deliberation that must prevail in any international proceeding. In effect, it has been argued that "Dissenting opinions […] act 'as a safeguard of the individual responsibility of the judges as well as of the integrity of the Court as an institution.' They preclude 'any charge of reliance on mere alignment of voting' and lift 'the pronouncements of the Court to the level of the inherent power of legal reason and reasoning.' As Judge Huber said: '[…] the possibility of publication (of dissenting opinions) was a guarantee against any subconscious intrusion of political considerations, and the judgments were more likely to be given in accordance with the real force of the arguments submitted."[33]

24. In not even considering a draft of Prof. Abi-Saab's Dissenting Opinion—with no urgent reason justifying such attitude and upon an outright and unsupported rejection of a request for urgent measures before the decision was adopted—the challenged arbitrators fatally affected the deliberation process of the Tribunal and its impartiality. Impartiality requires a reasonable consideration of the different arguments – not only those of the parties but also those of the arbitrators. Such consideration was precluded by the challenged arbitrators' failure to await the dissenting arbitrator's opinion. In the absence of such careful consideration of the contrary arguments, how can it be stated that one or even both challenged arbitrators would not have changed their position had they read the dissenting opinion of the other arbitrator? There is no certainty in this regard and thus the conduct of the challenged arbitrators manifestly precludes their impartiality.

[33] R. P. Anand, *The Role Of Individual And Dissenting Opinions In International Adjudication*, 14 INT'L & COMP. L.Q. 792 (1965)

C. Limitations on the Argentine Republic's right of defence

25. Argentina's loss of confidence upon the independent and impartial judgment of the majority of the Tribunal is, together with the above mentioned reasons, based on the severe limitations on Argentina's right of defence which the challenged arbitrators *have already determined* shall be applied to this proceeding. Such limitations arise from the Decision on Jurisdiction of the majority and from the decision of the majority on the Urgent Request for Provisional Measures. The most flagrant instances in which the majority of the Tribunal has limited Argentina's right of defence both presently and prospectively are described below.

26. This is the first case in ICSID's history in which a mass claim is brought before a tribunal.[34] Given this circumstance, and upon the rejection of the objections raised by the Argentine Republic (with regard to which Argentina reserves all the rights and remedies that is entitled to), the majority of the Tribunal decided it has competence and ICSID has jurisdiction over the claims of the initially almost 190,000 Claimants.

27. In paragraph 296 of the Decision on Jurisdiction, the majority of the Tribunal stated, as the Argentine Republic had anticipated in its submissions,[35] that it cannot treat and examine each individual claim and/or Claimant:

> It is undeniable that the large number of Claimants raises a series of questions and challenges. In particular, **the large number of Claimants makes it impossible to treat and examine each of the 180,000 claims (or 60,000 claims for that matter) as if it were a single claim, and certain generalizations and/or group examinations will be unavoidabl**e […]. (emphasis added)

28. What is more, in a manner that is both a manifest prejudgment and an unprecedented limitation on the right of defence, the disqualified arbitrators state in paragraph 542:

> Therefore, **the specific circumstances** surrounding individual purchases by Claimants of security entitlements **are irrelevant**. (emphasis added)

29. The lack of independent judgment of the disqualified arbitrators is manifest. In effect, after being forced to recognise that the analysis of each individual

[34] Decision on Jurisdiction, ¶295.

[35] *See* Memorial on Objections to Jurisdiction ¶¶ 135, 138, 167-168, 171 and 264-266, Reply Memorial ¶¶ 183-190, 192 and 197-201, and Post-Hearing Brief ¶¶ 3, 62, 74-92 and 100-119.

claim will be "impossible" they state, before the evidence and the arguments on the merits are presented, that the "specific circumstances" of the individual claimants are irrelevant. As has been pointed out, this implies not only an absolutely unsupported prejudgment (please note that the case is only at its first stage of jurisdiction), but it also effectively eliminates Argentina's right of defence as related to the specific circumstances of Claimants, since the Tribunal *has already decided* that such defence is impossible and that, in any event, such circumstances are "irrelevant."

30. Such failure to analyse the individual claims clearly and adversely affects Argentina's right of defence, since the very moment in which the decision was rendered, and with evil effects into the future.[36] It should be noted that the Tribunal's prejudgment and limitation on Argentina's defence are fatal to an investment arbitration: it is a proceeding where the respondent already knows that it will be precluded from invoking issues such as the reasonable expectations of each Claimant in light of his or her "specific circumstances" or the extent to which such expectations may affect the determination of whether a treaty violation has taken place.

31. In this case, said "specific circumstances" might include, among many others, the personal characteristics of each claimant (whether he or she was a sophisticated and/or highly speculative individual, or a retired person who used his or her savings prompted by the bank, etc.), how much information each claimant possessed upon the acquisition of the security entitlements (it is evident that, upon the complaint that the default was unfair and inequitable, a difference must be established between the situation of those individuals that upon purchase possessed information that the default was certain and imminent and those who not even had a notion of such risk), when the purchase took place (since, for example, there are objective market parameters which show that the purchase of security entitlements in Argentinean bonds was much riskier in the moments prior to the default than years before such event took place), the behaviour and information provided by the intermediary bank (there is evidence in this case that a Claimant said she was prompted by the bank to use all the funds in her

[36] In paragraphs 330 and 385 the majority of the Tribunal holds that the banks' failure to comply with some of its obligations with regard to Argentina or Claimants is irrelevant. However, in paragraphs 358-361 the majority of the Tribunal takes account of the banks' role as distribution agents of the security entitlements eventually purchased by Claimants. Such sale of security entitlements by the banks with respect to Argentina and subsequently, to Claimants, is considered therein by the Tribunal as "part of one and the same economic operation and they make only sense together." (¶ 359). In any event, the fact that Claimants have brought actions against the banks evidences the need for an analysis of each individual claim.

account to purchase security entitlements in Argentinean bonds), and so on. The challenged arbitrators, without considering any evidence or argument on the merits, *have already decided* that Argentina will be unable to defend itself by invoking any of such "specific circumstances", since they are "irrelevant" and in any event their treatment is "impossible."

32. It should also be noted that the impossibility for Argentina to invoke such "specific circumstances" applies not only to issues of jurisdiction[37] and to merit issues, but also to something as important as a possible stage of determination of damages. This impossibility is coupled with another crucial prejudgment on the part of the disqualified arbitrators, who found in their Decision on Jurisdiction that "the potential damage caused to Claimants is, by nature the same for all Claimants although the scope of such damage will of course depend on the scope of their individual investment."[38]

33. Such unsupported statement that any "potential damage" is "by nature, the same" precludes the possibility of duly raising fundamental defences with regard to specific circumstances: the purchase price paid by each Claimant and the market value of each security entitlement upon purchase (which are not necessarily equal). In order to see the importance that this defence (excluded by the Tribunal) would have had for Argentina with regard to damages it must be noted, in addition, that in many cases the value of the security entitlements prior to the declaration of default was equal to, or even lower than, their market value after the default.

34. In this sense, in paragraph 487 (last sentence), the majority of the Tribunal found that "[t]he high number of Claimants further […] limits the proceedings to the defence of interests common to the entire group of Claimants.," and in paragraph 488 decided that it would not adopt a multiple-party proceeding but a "representative" proceeding which takes no account of the individual aspects:

> In summary, the present proceedings seem to be a sort of a hybrid kind of collective proceedings, in the sense that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of Claimants involved.

[37] Whilst in paragraph 409 the challenged arbitrators acknowledge that the conditions of jurisdiction *ratione personae* must be fulfilled with respect to "each Claimant", the irrelevance of the "specific circumstances," already decided by the majority of the Tribunal, deprives Argentina of its defences also in jurisdictional issues.

[38] Decision on Jurisdiction, ¶ 543

35. From the very moment when the majority of the Tribunal found itself unable to qualify this proceeding as anything else but a "hybrid kind" which precludes the proper analysis of each individual claim, the procedural and substantive rights of the Argentine Republic as embodied within the framework of the ICSID Convention, the BIT and international law in general are adversely affected.

36. Further, in paragraph 519 the majority of the Tribunal held that "adaptations made to the standard procedure must be done in consideration of the general principle of due process and must seek a balance between procedural rights and interests of each party." However, it then found that:

> […] it is undeniable **that the Tribunal will not be in a position to examine all elements and related documents** in the same way as if there were only a handful of Claimants. In this respect, the Tribunal would need to implement mechanisms allowing a **simplified verification** of evidentiary material […].

37. In turn, it concluded in paragraph 536 that:

> […] it will not be possible to treat each Claimant as if he/she was alone and certain issues, such as the existence of an expropriation, will have to be examined collectively, i.e., as a group; and (ii) the implications will likely **limit certain of Claimants' and Argentina's procedural rights** to the extent that Claimants have to waive individual interests in favor of common interests of the entire group of Claimants, **while Argentina will not be able to bring arguments in full length and detail concerning the individual situation of each of the Claimants** […].

38. The foregoing was stated once again by the majority of the Tribunal in paragraph 545: "[…] Argentina may not be able to enter into full length and detail into the individual circumstances of each Claimant […]."

39. Then, in paragraph 545 the majority of the Tribunal reiterated the effect that the Tribunal's decision would have on Argentina's procedural and defence rights. Such assertions are shocking. There is no basis or legal rationale to justify an international tribunal's decision which explicitly limits and infringes the rights of defense of a sovereign State, such rights being protected by international conventions and procedural rules. In light of such conduct, Argentina, or any other party for that

matter, cannot be expected to rely upon the exercise of independent judgment of those who adopted such an egregious decision.[39]

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40. Another specific instance wherein Argentina's right of defence was adversely affected as a consequence of the impossibility to consider the "specific circumstances" can be found in paragraph 460. In such paragraph, the majority of the Tribunal found that Argentina had failed to show that Claimants would not have agreed to ICSID arbitration had they known that they risked losing their claims against the banks. However, the Tribunal has not allowed such issues to be discussed at this first jurisdictional stage, and has already decided that it will be "impossible" and "irrelevant" to consider the "specific circumstances" of each individual Claimant; thus, Argentina has never had, nor will it have, the possibility to prove such defense.

41. Such arbitrary conduct on the part of the majority of the Tribunal cannot but contribute to the loss of confidence in its capacity to decide this dispute in an impartial fashion.

D. Prejudgment

42. There is a clear example of prejudgment in paragraph 321, and this example is sufficient to warrant the disqualification here presented as no reasons are stated for the conclusion reached. In effect, in said paragraph the majority of the Tribunal stated that:

> The Emergency Law **had the effect of unilaterally modifying Argentina's payment obligations**, whether arising from the concerned bonds or from other debts. Argentina does not contend that it had any contractual right of doing so, such as for example, a force majeure provision. Argentina has not invoked any contractual or legal provision excusing its non-performance of its contractual obligations towards Claimants.

[39] Furthermore, in paragraph 546 the majority of the Tribunal explained that "the setting of strict boundaries in relation to Claimants' procedural rights has been consciously accepted by Claimants in order to benefit from the collective treatment of their claims before an ICSID tribunal." That opportunity that Claimants had to waive or limit certain procedural rights was not granted to Argentina. To the contrary, Argentina's limitation on its procedural rights has occurred against its express will.

> In fact, Argentina relies and justifies its non-performance based on its situation of insolvency, which has nothing to do with any specific contract.

43. The challenged arbitrators have already decided that Argentina has unilaterally modified its contractual obligations by means of the Emergency Law, and further that Argentina has not invoked any contractual basis for doing so. Such prejudgment on the merits, without having received or considered the evidence and the arguments on the merits, amounts to, under some extreme conceptions, already having condemned Argentina for the violation of the Treaty.

44. Said prejudgment, made perhaps on the most significant question on the merits, albeit at the jurisdictional stage, manifestly denies once again the exercise of independent judgment of the disqualified arbitrators. The seriousness of said prejudgment is further evidenced by the fact that the Emergency Law does not apply to the bonds invoked in this case; thus, said law, or any other Argentinean legislation[40], can hardly be said to have affected the terms thereof (the bonds invoked in this case were governed by foreign laws and the Emergency Law applies, exclusively, to contracts subject to Argentinean law).

45. Another instance of prejudgment on the part of the majority occurs in paragraph 324 in the following terms:

> In other words, the present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the Claimants.

46. In stating that Argentina "intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the Claimants," the majority of the Tribunal made a prejudgment on a question exclusively related to the merits. The challenged arbitrators have already decided, before the merits phase, that Argentina "modified its payment obligations."

[40] Further, when Argentina has referred to Law No. 26,017, it has expressly manifested that the rights derived from the interests in bonds have not been altered. See Memorial on Objections to Jurisdiction ¶ 42 (footnote 105), ¶ 317; Reply on Jurisdiction and Admissibility ¶ 537; Post-Hearing Brief ¶¶ 370-371.

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47. Furthermore, paragraph 461 *in fine* contains the following clear prejudgment:

> Of course, one could argue that some information of the TFA Mandate Package could have been better explained or should have been more comprehensive. However, one should also take into account that the present dispute is not a consumer dispute, although a number of the Claimants may have a consumer like profile. It is a dispute surrounding multi faceted financial investments. Thus, the degree and nature of the information provided did not need be of the same extent and nature than in the context of pure consumer transactions, and TFA was entitled to assume a certain level of sophistication and knowledge of the investors.

48. However, such assertion has no basis whatsoever, since all the evidence presented by the parties expressly indicates that Claimants were precisely unsophisticated consumers.[41] As a matter of fact, the majority of the Tribunal acknowledges its own contradictions in paragraph 463:

> In addition, even if the TFA Mandate Package did not contain sufficient information or did to some extent misrepresent certain information, such a flaw would have been cured by the subsequent events. Indeed, various associations started to assist Italian purchasers of Argentinean bonds by disseminating information on available legal means […].

49. And even the absurd assertion is made that:

> Thus, even if at the time of signature of the TFA Mandate Package, some of the Claimants did not have a full picture of what they were doing, they were able to get such a full picture afterwards through the various actions of associations, legal proceedings and news reports on the ongoing ICSID arbitration. Given that Claimants themselves do not invoke a lack of consent, it is sufficient that they were in a position to appreciate the scope of their commitment to ICSID arbitration, and it is irrelevant whether or not they eventually really understood such commitment.

50. This Decision on Jurisdiction was not only issued without a detailed and individual analysis of the consent of each Claimant, which was objected to by Argentina on repeated occasions (see, *inter alia*, the Urgent Request for Provisional Measures) and which constitutes a flagrant prejudgment, but it is also at war with the basic ICSID

[41] Counter-Memorial on Jurisdiction ¶¶ 164 and 884; Claimants' Post-Hearing Brief ¶ 68.

provisions that require a PRIOR valid consent in writing. The Tribunal goes to the extreme of making a prejudgment that whether or not Claimants "really" understood their commitment to ICSID arbitration is "irrelevant." It further makes another prejudgment, without having considered—and with no prospects of doing so in the future—that "the subsequent events would have had the effect of curing" any flaws in the information contained in the documentation provided to Claimants to obtain their consent.

51. Finally, and after the submission of multiple evidence that seriously casts doubts on Claimants' consent,[42] the majority of the Tribunal comes to the surprising conclusion that "there is no indication that such operation was systematically fraudulent, coercive or otherwise caused Claimants to agree to ICSID arbitration based on an essential mistake" (¶ 464).[43] Such conclusion, together with the assertion made in paragraph 466 (ii) that this issue might not be examined (which evidences that in fact it has not been examined) and the finding in paragraph 486 (each individual Claimant "is aware of and consented to the ICSID arbitration") does not but evidence the manifest prejudgment whose effect is to, objectively, cause a loss of confidence in the exercise of impartial and independent judgment.

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52. Throughout all its decision, the majority of the Tribunal stated that Claimants' claims and investments were homogeneous (¶¶ 541 and 545). Such assertion, when no claim has been discussed in a proper and individual manner, constitutes a prejudgment.

53. In paragraphs 544 and 545 the majority of the Tribunal decided that the claims are homogeneous, without having analyzed them on an individual basis. Such unfounded assertion supports its conclusion of limiting the Argentine Republic's procedural rights:

> […] Claimants' claims are to be considered sufficiently homogeneous to justify a simplification of the examination

[42] Forensic Document Examination Division Report,; Reply on Jurisdiction and Admissibility, ¶ 194; Peterson & Peterson Report; Reply on Jurisdiction and Admissibility, ¶¶ 195, 196; Petersen & Petersen Second Report; Claimants' Post-Hearing Brief, ¶¶ 98, 101.

[43] *See also* the conclusion in paragraph 466, (i): "Based on the circumstances leading to the execution of the documents embodying Claimants' consents, in particular, the Declaration of Consent and the Power of Attorney, there is at this stage no indication that such execution would have been achieved based on systematical fraud, coercion or essential mistake vitiating Claimants' consent."

> method and procedure. It appears that the effect of such examination method and procedure on Argentina's defence rights is limited and relative. Whilst it is true that Argentina may not be able to enter into full length and detail into the individual circumstances of each Claimant, it is not certain that such approach is at all necessary to protect Argentina's procedural rights in the light of the homogeneity of Claimants' claims.

54. In paragraph 665 the majority of the Tribunal finds once again that "the present case involves a number of Claimants, which makes it *de facto* impossible to deal with all them *seriatim*. Based thereon, as well as on the homogeneity of the claims […]."

55. Even more serious is the described prejudgment in the following assertion by the majority of the Tribunal: "[t]he legislation and regulations promulgated and implemented by Argentina, together with the implementation of its Exchange Offer 2005, affected all Claimants in the same way. Thus, the potential damage caused to Claimants is, by nature the same for all Claimants […]."[44] In this case, the prejudgment can be verified not only with regard to the alleged (albeit certainly unknown) homogeneity when the claims have not yet been analyzed on an individual basis, but also with regard to the manner in which the Exchange Offer affected each Claimant.

III. LEGAL BASIS FOR THE DISQUALIFICATION

56. The purpose of the disqualification mechanism is to preserve the integrity of the Tribunal and the arbitration proceeding. When the majority of the Tribunal adopts decisions "before the proper time or without having a complete knowledge of it" [45] and when, basic values of a party's right of defence are patently altered, in a manner contrary to justice, reason, or law,[46] that party knows for sure that is subject of manifest prejudgment and arbitrariness by the members of a Tribunal.

57. The ICSID Convention provides in Article 57 and 14, the conditions to the proposal of disqualification of arbitrators. Article 57 provides:

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[44] Decision on Jurisdiction ¶ 543, last point.

[45] Definition of "*prejuzgar*" (prejudge) in the *Real Academia Expañola* Dictionary , 22 ° edition (www.rae.es).

[46] See definitions consistent of the terms "*prejuzgar*" (prejudge) and "*arbitrariedad*" (arbitrariness) in the *Real Academia Española* Dictionary, 22° edition (www.rae.es).

> 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.

58. Article 14 (1) of ICSID Convention states the requisites that an arbitrator must meet:

> (1) 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 (*emphasis added*)

59. It is evident that the disqualified arbitrators **may not be relied upon to exercise independent judgment** according to the manifest prejudgement and arbitrariness of the majority of the Tribunal. In effect, this is, par excellence, a case of "manifest lack of the qualities required by paragraph (1) of Article 14" (cfr. article 57 of ICSID Convention), whereas, someone who prejudge and decide not to apply, arbitrarily, the most fundamental and basic standard of due process, could never "be relied upon to exercise independent judgment."

60. The term "manifest" provided for in article 57 means *obvious* or *evident*, as outlined in *Suez, SGAB and Interaguas v. Argentine Republic, Suez, SGAB and Vivendi v. Argentine Republic and AWG Group v. Argentine Republic*.[47] Therefore, if it is clear that a member of the Tribunal may not be relied upon to exercise independent judgment, then it should be concluded that this member must be disqualified. In other words, the manifest nature of the lack of impartiality does not necessarily have to do with its seriousness, but principally with the easiness with which it can be perceived.[48]

61. There is a difference between the three authentic texts of Article 14 of the ICSID Convention. While the English version of article 14 refers to people who "*may*

[47] *Suez, Sociedad General de Aguas de Barcelona S.A. e InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case Nº ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A. y Vivendi Universal S.A. v. Argentine Republic, ICSID* Case Nº ARB/03/19, y *AWG Group v. Argentine Republic*, UNCITRAL Arbitration, Decision on the Proposal of Disqualification of a Member of the Tribunal October 22, 2007, ¶ 34.

[48] *Cfr*. *Ibid*, pág. 933.

be relied to exercise independent judgment" and the French text states that people who are designated to serve on the Panels must "*offrir toute garantie d'indépendance dans l'exercice de leur fonctions*" (offer total guarantee of independence in the exercise of their functions),, in the Spanish version it is provided for that the arbitrators must "*inspirar plena confianza en su imparcialidad de juicio*" (inspire full confidence in its impartiality of judgment).

62. In case of difference between texts equally authentic, in conformity with article 33(4) of the Vienna Convention on the Law of Treaties—which reflects customary international law—,[49] "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."[50] Within the object and purpose of the ICSID Convention is the peaceful settlement of investment disputes through conciliation or arbitration. In this regard, the right to be judged by an independent and impartial Tribunal is a basic inherent characteristic of all legal proceedings, whether judicial or arbitration. Corollary of this is the respect of the right to defence.

63. Therefore, in accordance with article 14(1) of ICSID Convention, persons designated to serve on the Panels shall be person that may be relied upon to exercise independent judgment[51] (or offer total guarantee of independence in the exercise of their functions),[52] as well as person who inspires confidence in its impartiality of judgment.[53] This criteria have been adopted in numerous cases where disqualification was decided,[54]—decisions that can be considered at this point as consistent case-law

[49] La Grand (Alemania v. United States of America), 2001 ICJ 104, ¶ 101 (june 27). *See also Repsol YPF Ecuador, S.A. c. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case Nº ARB/01/10, Decision on annulment of 8 January 2007, ¶ 81 (the *ad hoc committee* relied on article 33(4) of Vienna Convention to conciliate the three authentic texts of article 52(1)(d) of ICSID Convention).

[50] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Art. 33(4).

[51] According to the English version.

[52] According to the French version.

[53] According to the Spanish version.

[54] *Suez, Sociedad General de Aguas de Barcelona S.A. andInterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case Nº ARB/03/17, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case Nº ARB/03/19, and *AWG Group v. Argentine Republic*, UNCITRAL arbitrarion, Decision on the Propose of Disqualification of a Member of the Tribunal of October 22, 2007, ¶ 28. *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case N° ARB/08/6, Decision on the Disqualification of an Arbitrator December 8, 2009, ¶ 57.

(jurisprudence constante)—which is coherent with different rules of arbitration that require arbitrators be both independent and impartial.[55]

64. In this regard, the facts hereby described, which cause the loss of reliance upon the exercise of independent judgment, are perceived with a simple reading of the decisions adopted on 4 August 2011, and the attitude taken by the majority of the Tribunal upon issuing such decisions. In effect, in an unprecedented conduct, the Decision on Jurisdiction was communicated without the consent of the dissenting arbitrator and without waiting even a draft of said opinion.[56]

65. The Argentine Republic argues that the arbitrators, who issued the decision of August 4, manifestly failed to inspire full confidence on its impartiality of judgment, as they have incurred in: 1) prejudgment 2) arbitrariness and 3) undermine Argentina´s right of defence.

66. In this vein, the right to be heard by an independent impartial and objective tribunal is a characteristic feature of all modern constitutions, that is to say, is a general principle of law. In effect, one of the essential characteristics of any judicial proceedings is the Tribunal's impartiality and, its consequence, the legal equality of the parties in their capacity as litigants.[57] Therefore, a violation to the right to be judged by an independent and impartial tribunal, and a real and declared violation of the right of defence is the maximum violation of due process and a ground for disqualification.[58] The *ad hoc committee* in the *Wena* case asserted that is "fundamental, as a matter of procedure that each party is given the right to be heard before an independent and

[55] *International Bar Association* (IBA), Guidelines on Conflicts of Interest in International Arbitration, 2004, general standard 1; *American Arbitration Association* (AAA), Rules of Internacional Arbitration, 2000, art. 7; *London Court of International Arbitration* (LCIA), Arbitration Rules, 1998, art. 5.2; United Nations Commission on International Trade Law (UNCITRAL), Arbitration Rules, 1976, arts. 9-10; Permanent Court of Arbitration (PCA), Optional Rules for Arbitration of Disputes between two States, 1992, arts. 9-10; Permanent Court of Arbitration (PCA), Optional Rules for Arbitration of Disputes between two Parties of which only one is a State, 1992, arts. 9-10.

[56] In the case *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), notwithstanding that the decision on jurisdiction was communicated without the dissenting opinion, unlike this proceeding, such event had been agreed upon by all the members of the Tribunal and in particular the dissenting arbitrator, who signed the decision on jurisdiction of 14 January 2010. See, for example, that in footnote No. 3 of his dissenting opinion of 1 March 2011, arbitrator Voss explains that "I had agreed with my colleagues to state my entire Separate Opinion together with the Award".

[57] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 290 (1987). "Indeed, it may be said that there are two cardinal characteristics of a judicial proceeding, the impartiallity of the tribunal and its corollary, the juridical equality between the parties in their capacity as litigants."

[58] *Application for Review of Judgment N° 158 of the United Nations Administrative Tribunal*, advisory opinion, 1973 ICJ 16, ¶ 92 (July 12).

impartial tribunal".[59] In the same vein, the *ad hoc* committee in the case *Klöckner I* stated:

> Impartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(1)(d), a "serious departure from a fundamental rule of procedure" in the broad sense of the term 'procedure,' i.e., a serious departure from a fundamental rule of arbitration in general, and of ICSID arbitration in particular.[60]

67. Likewise, the annulment committee in the case *Mine v. Guinea* has considered that ("[…] In order to constitute a ground for annulment the departure from a "fundamental rule of procedure" must be serious. The Committee considers that […] a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: 'The parties shall be treated with equality and each party shall be given full opportunity of presenting his case'."[61] It is difficult to imagine a clearer case in which a party's right to fully present its case is not granted, since when the majority of the Court, based on a series of prejudgment, already decided that Argentina may not submit any defence based on the "particular circumstances" of each Claimant.

68. If it is manifest that a member of the Tribunal does not inspire full confidence in its impartiality of judgment because it has prejudged and violated one party's right of defence, that member should be separated. The decision of the majority of the Tribunal, in this case, shows a clear evidence of partiality when it does not admit and consider important and serious evidentiary issues. In this regard, Professor Tupman has stated that: "certain procedural or evidentiary rulings might be evidence of partiality."[62]

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[59] *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case Nº ARB/98/4, Annulment Decision February 5, 2002, ¶ 57. *See also MTD Equity Sdn. Bhd. y MTD Chile S.A. c.* ***Republic*** *of Chile*, ICSID Case Nº ARB/01/7, Annulment Decision March 21, 2007, ¶ 49; *CDC Group plc c. la Republic of Seychelles, ICSID Case* Nº ARB/02/14, Annulment Decision of June 29, 2005, ¶ 49.

[60] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon y Société Camerounaise des Engrais*, ICSID Case Nº ARB/81/2, Annulment Decision, May 3,1985, ¶ 95. *See also* Palamara-Iribarne v. Chile, Court IDH (ser. C) Nº 135, ¶ 145 (November 22, 2005) ("[T] he right to be judged by an impartial tribunal is a fundamental guarantee of due process. That is, we must ensure that the tribunal in the exercise of its function as a judge has the greater objectivity to stand trial").

[61] *Maritime International Nominees Establishment (MINE) v. Guinea*, ICSID Case ARB/84/4, Annulment Decision of December 14, 1989, p 5.06-5.07.

[62] *See* W. Michael Tupman, Challenge and Disqualification of Arbitrators in International Commercial Arbitration, 38 Int"l & Comp. L. Q. 30 (1989). It also mentioned that "The UNCITRAL rules further

69. Consequently, if there are justified doubts concerning an arbitrator's impartiality or independence, it can be concluded that this arbitrator does not comply with the fundamental requirements of article 14(1) of ICSID Convention. Indeed, in conformity with the three authentic texts of article 14(1), it must be corroborated not only that the arbitrator is actually impartial and independent, but also that there are no justified doubts concerning its impartiality and independence.

70. Arbitrariness is defined as an "act or conduct contrary to justice, reason or law, dictated only by the will or preference,"[63] and it means "[d]epending on individual discretion: specif., determined by a judge rather than by fixed rules, procedures, or law" or "founded on prejudice or preference rather than on reason or fact."[64] This ordinary meaning is demonstrated also in the scope of international law. In the well known *Elettronica Sicula* case, the International Court of Justice held that: "[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law […]. It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[65] Said principle was repeated in numerous international proceedings.[66]

71. By deciding as it did, without relying on the law but directly in a supposed "balance of interests," incurring on prejudgment,[67] and by limiting in a serious and irremediable way Argentina's right of defence, the majority of the Tribunal incurred in an intentional disrespect of the law, which disturbs any sense of juridical virtue. This would objectively lead any state that is in Argentine Republic's position to lose all confidence in said arbitrators.

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provide for replacement if 'an arbitrator fails to act', or if he does not treat one of the parties 'with equality' or provide 'a full opportunity of presenting its case'. ICSID more generally provides for removing an arbitrator for 'incapacity'") (omitted quote).

[63] *See DICCIONARIO DE LA LENGUA ESPAÑOLA* (22º ed. 2001), avaialable at http://buscon.rae.es/draeI/SrvltConsulta?TIPO_BUS=3&LEMA=arbitrariedad (arbitrariness definition).

[64] *See* BLACK'S LAW DICTIONARY 100 (7º ed. 1999) .

[65] *See* Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), 1989 I.C.J. 15, ¶ 128 (July 20). Available at http://ita.law.uvic.ca/otherinterinvestmentcases.htm

[66] *See* Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision of July 14, 2006, ¶ 392. Available at http://ita.law.uvic.ca/

[67] Prejudging is a typical case of impartiality, *see Perenco Ecuador Limited c. Ecuador Republic and Empresa Estatal Petróleos del Ecuador*, ICSID Case N° ARB/08/6, Decision on the Propose of Disqualification of an Arbitrator of December 8, 2009, ¶¶ 53, 58.

72. The independence and impartiality of the arbitrators must start from the moment they were appointed, and it also must be maintained along all the arbitration proceeding. In this case, that situation manifestly has not occurred.

73. It follows that, as it has been stated by numerous scholars and judicial decisions, when the impartiality, independence and/or neutrality of the arbitrators are affected, the integrity of the arbitration proceeding is been affected too. Such deprivation not only occurs when there is a probability of affecting the process but when the appearance is affected.[68] In this case, there is not only an appearance of bias but also a concrete and real lack of it.

A. The UNCTAD Report considers as manifest partiality the kind of behavior that is similar to the one present in this case

74. UNCTAD, in its report on "Dispute Settlement International Commercial Arbitration 5.3 Arbitral Tribunal", has expressly made reference to that situation in which prejudgment exists on the part of arbitrators. It has expressed that the conclusions reached by arbitrators should be "based only on the evidence, arguments, and applicable law in the case at hand."[69] This is not the case here.

75. From the very moment the Argentine Republic consented to the jurisdiction of international tribunals, it enjoys the right to be judged by impartial and independent arbitrators necessarily appearing to be impartial and independent. Argentina cannot allow being judged by individuals who are not only not impartial but that cannot be believed to be impartial by an objective observer.

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[68] In this regard, see Arbitration (2) – Issue 10, February 2000: *Must arbitrators be impartial?* QUENTIN Bargate, Simmons & Simmons, London, " "the common thread running through the test is that the appearance of bias is the determining factor", Litigation of International Disputes in US Courts, Database updated September 2007, Ved P. Nanda, David K. Pansius, Chapter 19. Recognition of Foreign Arbitral Awards Under the New York Convention, "It would seem that matters related to the appearance of arbitrator bias would be particularly conducive to asserting an overriding international standard;" Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 148-50, 89 S.Ct. 337, 339-340, 21, L. Ed. 2d 301 (1968): "Most courts would conclude that a showing of "actual bias" is not required […] This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be un biased but also must avoid even the appearance of bias". The IBA Guidelines on Conflicts of Interest in International Arbitration have expressed in this regard: "Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision." (General Standard 2(c)).

[69] UNCTAD, Dispute Settlement International Commercial Arbitration 5.3 Arbitral Tribunal, UNCTAD/EDM/Misc.232/Add.34, 2003, at 18-19.

B. The disqualification presented by the Argentine Republic is based on a general principle of law

76. There is no doubt, as expressed by Prof. CARLO SANTULLI, that the right of the parties to object the participation of a person in an arbitral tribunal is a general principle of law.[70] In general, domestic legal systems contain rules regarding disqualification which allow separating a judge or arbitrator from a proceeding when there is doubt about his/her independence or impartiality; thus, we would be in presence of a general principle of law in the sense of article 38 of the Statute of the International Court of Justice.

77. As highlighted by Prof. CARLO SANTULLI, when refering to the disqualification of members of ICSID tribunals, "in jurisprudence, the general principles of law regarding the impartiality of members are the ones governing this scrutiny[…]".[71]

78. In this sense, GIORGIO BERNINI in his Report on Neutrality, Impartiality and Independence has expressed that:

> […] a mere negative appearance may also be harmful as the arbitrators´ independence is deemed a guarantee for the correct and orderly implementation of the arbitral proceedings.[72]

79. This principle has been estabished in the leading English case *R. v. Sussex Justices, Ex parte McCarthy*, in which Lord Hewart stated that "it is not merely of some importance but is of fundamental importance that justice should not only be done, *but should manifestly and undoubtedly be seen to be done.*"[73] He added that "[n]othing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."[74]

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[70] CARLO SANTULLI, DROIT DU CONTENTIEUX INTERNATIONAL, at 447.

[71] CARLO SANTULLI, DROIT DU CONTENTIEUX INTERNATIONAL, at 448 (in French: "en jurisprudence, ce sont les principes généraux relatifs à l'impartialité des membres qui gouvernent cette appréciation […]).

[72] Giorgio Bernini, "*Report on Neutrality, Impartiality and Independence. The Arbitral Process and the Independence of Arbitrators.*" International Chamber of Commerce Publication No. 472. Ed. 1991, ¶ 5.2.1. cited in T. Varady, J.J. Barceló y A.T von Mehren, *"International Commercial Arbitration. A Transnational Perspective"*, American Casebook Series. Thomson West, 2nd Edition, at 259.

[73] *R. c. Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256, 259 (emphasis added).

[74] *Ibid.*

80. This principle has also been admitted by several domestic and international tribunals. For instance, the Australian Highest Tribunal considered this principle in the case *Webb and Hay v. The Queen*.[75] The Highest Tribunal held that:

> It is highly desirable, and it has always been so considered, that not only should justice be administered purely and without any actual bias on the one side or the other on the part of the tribunal which hears the case, but further that no reasonable ground of suspicion should be allowed to arise as to the fairness of the tribunal.[76]

81. In addition, both the European Court of Human Rights (hereinafter ECHR) and the Inter-American Court of Human Righst (hereinafter IACHR) have applied this principle. The ECHR has repeatedly expressed that in order to determine whether a judge has been impartial, it must be shown not only that the judge was not partial but also that he offered sufficient guarantees that excluded any legitimate doubt of partiality.[77] The IACHR has used this same principle. For example, in the *Palamara-Iribarne v. Chile* case the Curt held the following:

> The judge or tribunal must be separated from a case when there are grounds or doubts that the integrity of the tribunal as an impartial organ can be prejudiced. In order to safeguard the administration of justice there must be assurances that the judge is free from any prejudice and that there is no fear that creates doubt on the exercise of jurisdictional functions.[78]

82. This criterion was adopted by the House of Lords in the case *Magill v. Porter*. In the words of Lord Hope of Craighead, "[t]he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."[79]

83. This criterion was also used by the Australian Highest Tribunal in the case *Webb and Hay v. The Queen*. According to this Tribunal, the appropriate criterion to determine the existence of apparent partiality consists in verifying whether, under the

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[75] *Webb and Hay v. The Queen* (1994) 81 C.L.R. 41, ¶¶ 3, 9 (opinion of the President of the Tribunal Mason and Judge McHugh).

[76] *Ibid.* ¶ 5 (opinion of Judge Brennan) (citing Trewartha v. Confidence Extended Co. N.L. (1906) VLR 285, at 288-289).

[77] *See, e.g., Piersack c. Bélgica*, 1982 Eur. Ct. H.R. 6, ¶ 30; *De Cubber v. Belgic*, 1984 Eur. Ct. H.R. 14, ¶ 24; *Hauschildt v. Denmark*, 1989 Eur. Ct. H.R. 7, ¶ 46; *Thorgeir Thorgeirson v. Island*, 1992 Eur. Ct. H.R. 51, ¶ 49; *Fey v. Austria*, 1993 Eur. Ct. H.R. 4, ¶ 28; *Pullar v. United Kingdom*, 1996 Eur. Ct. H.R. 23, ¶ 30.

[78] *Palamara-Iribarne v. Chile*, IACHR (ser. C) N° 135, ¶ 147 (22 November 2005).

[79] *Magill v. Porter, Magill v. Weeks*, [2001] UKHL 67, ¶ 103.

circumstances of the case, an objective and informed individual would have the perception of a reasonable lack of impartiality.[80]

84. The ECHR has also used this objective criterion so as to determine the existence of an apparent partiality. In fact, said Tribunal has held that the crucial question is to determine whether the circumstances of the case would lead an objective observer to doubt of the impartiality of a certain judge.[81]

85. It has been pointed out that the existence of justified doubts regarding the impartiality or independence of an arbitrator must be established by means of an objective criterion.[82] Pursuant to this criterion, one must ask: "would a reasonably well-informed person believe that the perceived apprehension, the doubt, is justifiable?"[83]

86. Based on these grounds, the Argentine Republic holds that the conduct of the challenged arbitrators cannot be relied upon to exercise independent and impartial judgment.

IV. ICSID must request the Permanent Court of Arbitration to render an opinion in connection with the present disqualification

87. As has been the case in other proceedings,[84] the Argentine Republic requests the President of the Administrative Council to ask the SecretaryGeneral of the Permanent Court of Arbitration to provide his recommendation in connection with the request for disqualification.

88. This request is based on the fact that one of the fundamental bases for the disqualification refers to the arbitrary manner in which the Tribunal decided the issues regarding the massive nature of the claim based only on statements that merely constitute a prejudgment on the individual claims. Such objection could also be

[80] *Webb and Hay v. The Queen* (1994) 81 C.L.R. 41, ¶¶ 2, 3, 9, 11-12, 14 (opinion of the President of the Tribunal Mason and Judge McHugh), ¶¶ 1, 4 (opinion of Judge Brennan), ¶¶ 2, 5, 7, 11, 15-16, 20 (opinion of Judge Deane), ¶ 20 (opinion of Judge Toohey).

[81] *Pullar v. Reino Unido*, 1996 Eur. Ct. H.R. 23, ¶ 39; *see also Piersack v. Belgic*, 1982 Eur. Ct. H.R. 6, ¶ 30; *De Cubber v. Belgic*, 1984 Eur. Ct. H.R. 14, ¶ 26; *Hauschildt v. Denmak*, 1989 Eur. Ct. H.R. 7, ¶ 48; *Thorgeir Thorgeirson v. Island*, 1992 Eur. Ct. H.R. 51, ¶ 51; *Fey v. Austria*, 1993 Eur. Ct. H.R. 4, ¶ 30.

[82] ICS Submission in Response to Disqualification, ¶ 8. This criterion has also been addressed by Nasser Alam, *Independence and Impartiality in International Arbitration – an assessment*, 1(2) TRANSNATIONAL DISPUTE MANAGEMENT (2004); *see also* UNCTAD, *Dispute Settlement: International Commercial Arbitration – 5.3 Arbitral Tribunal*, at 25-26, U.N. Doc. UNCTAD/EDM/Misc.232/Add.34 (2003) (prepared by Alejandro Garro).

[83] Nasser Alam, *Independence and Impartiality in International Arbitration – an assessment*, 1(2) TRANSNATIONAL DISPUTE MANAGEMENT (2004).

[84] Such as *Victor Pey Casado v. Republic of Chile*, ICSID Case N° ARB/98/2 and *Siemens A.G. v. Argentine Republic*, ICSID Case Nº ARB/02/8.

potentially applicable, *mutatis mutandis*, to the manner in which the ICSID Secretariat acted when registering the Request for Arbitration. Furthermore, one of the circumstances supporting the disqualification is the unsupported denial of the urgent request for provisional measures, by which the Argentine Republic had requested the Tribunal to "urgently request [the ICSID's Secretary-General] to issue a report on the method it applied to verify the authenticity of the documentation submitted together with the Request for Arbitration dated 14 September 2006."[85]

V. REQUEST FOR RELIEF

89. Based on the grounds herein explained, the Argentine Republic respectfully requests that:

a) the Secretary-General ask the Secretary General of the Permanent Court of Arbitration to provide an opinion in connection with this request for disqualification;

b) Mr. Pierre Tercier and Mr. Albert Jan van den Berg be separated from this arbitration and be replaced pursuant to the terms of article 58 of the ICSID Convention;

c) the Secretary-General immediately order the suspension of this proceeding until a decision on the request for disqualification be decided in accordance with Rule 9(6) of the Arbitral Rules; and

d) the Secretary General takes note of the reservations made.

[Signed]
Dra. Angelina M. E. Abbona
Attorney General of the Treasury

[85] Urgent Request for Provisional Measures, 21 July 2011.