Statement of Dissent of Dr. Santiago Torres Bernárdez to Procedural Order Nº 27 of 30 May 2014

I have participated fully, together with my co-arbitrators, in the Tribunal's deliberations on the subject-matter of Procedural Order Nº 27, but I am unable for reasons of principle developed below to join them in supporting an Order which I consider unbalanced:

a) Respondent's request for examination of individual Claimants

1. In this request, the Respondent asked, *in the first place*, for the examination of all of the Claimants remaining in the case and, *in the alternative*, that the Tribunal indicates the number of Claimants which may be examined at the hearing and, on the basis of such a number, the Argentine Republic will proceed to identify them. It is therefore evident that this alternative proposal means that once the Tribunal decided the number, the Argentine Republic will select the individual Claimants concerned.

2. The Procedural Order of the Majority distorts the above Respondent's request. First, by dealing separately with the two elements thereof in an inverse order, the "alternative request" is dealing first under the heading *"(i) Cross-examination of Claimants' fact Witnesses"* (at p. 10) and the "main request" thereafter under the heading *"(iv) Examination of Claimants who are not Witness"* (at p. 11).

3. Second, as expressed in these headings the treatment of both, the alternative and the main requests of the Respondent, are linked to the alien fact of being or not a Claimant *"Witness"*. Third, it is stated in the Order "that the Respondent's alternative request is *granted* to the extent that it shall have the right to cross-examine these eight Claimants" (namely, the eight called as witnesses by the Claimants themselves), but in fact is not granted at all because in the Respondent's alternative request once indicated by the Tribunal the *number* of Claimants for examination the individual Claimants up to that number would be selected by the Respondent itself, not by the Claimant Party. Fourth, the Respondent's main request of examining all of the Claimants is transform in a request "to examine individual claimants who have not submitted any witness statement" and, on that sole basis, rejected. Through that scheme the Majority twists the Respondent's request beyond recognition.

4. I consider that an international arbitral tribunal, or a majority thereof, may accept or reject the requests or submissions of any of the parties in a given case with a proper motivation in law, but I will never join in a decision based upon schemes or technicalities which denaturalize a party's request or submission or contradict the tenets of the good administration of international arbitral procedural justice. Furthermore, I consider that the Respondent's request at issue as a whole is quite in order because the Majority appointed an *unique* Expert of the Tribunal for the Verification of the Claimants' Database not only without the consent of both Parties, but in face of the duly manifested opposition of the Respondent Party. I have had already the occasion to explain in a Dissenting Opinion why that decision of the Majority was adopted, in my view, in breach of Article 43 of the ICSID Convention. In such a situation is in the logic a mass collective aggregate arbitral proceeding as the present one, that the Respondent would have the

opportunity to verify directly whether the purported Claimants fulfil or not all and each of the conditions required by the applicable law to be a Party in the present case.

5. I support likewise the Respondent's request because is an inherent right of any Respondent State in any international judicial or arbitral proceeding to know before the closure of the oral phase of the merit proceeding whether the purported Claimant or Claimants fulfilled the conditions established by the law to be a Party in the case or, at the least, be in the position of verifying by itself if it is so by the means required in the light of the particular circumstances of the case. Furthermore, the mass *personae* aspects of the present case are *'le fait' of the Claimants* and as such cannot derogate the said right of the Respondent neither generally nor in particular because the present case is not a mass action proceeding (unknown in the ICSID system), but an aggregate actions proceeding with a massive presence of purported Claimants, this being confirmed by the fact that the question of the **individual** *ratione personae* jurisdiction of the Tribunal was not *decided* in the preliminary objections phase of the but referred to the present one.

6. None of the thousands of Claimants in *Abaclat* appears indeed to be acted representing the whole of the Claimants or a part thereof. Furthermore, as it has been written:

"Even accepting as the Majority would have us do, the TFA (Task Force Argentina) is acting *like* a representative Claimant does not sit well. It is not for the majority to use the way in which the Claimants have organized their representation to characterize the proceeding. The claims within the *Abaclat* proceeding have been pleaded individually and they must be dealt as such by the majority; this is the defining characteristic of the proceeding" (Hans van Houtte and Bridie McAsey, *Case comment. Abaclat and Others v, Argentine Republic, ICSID, the BIT and MASS claims"*, ICSID Review,Vol. 27 (2012), at p. 235).

7. In the 2011 Decision on Jurisdiction and Admissibility the Majority provided certain assurances to the Parties as to an objective verification of the personal data and security-entitlement-holdings data of each individual purported Claimant. I regret to say that Procedural Order Nº 27 is not leaving up to the expectations that those assurances might have created. The subject-matter of the Respondent's request is highly relevant and too important, and continue to be so notwithstanding the Order, for the principles of arbitral justice and fairness to be overcome in law by the decomposition of the Respondent' request and related technicalities.

8. For example, the distinction between "cross-examination", "direct examination" or "examination" *tout court*, or the distinction between "Claimant Witnesses" and "Claimants who are not Witnesses" are perfectly irrelevant for granting or rejecting the Request as formulated by the Respondent. The factual outcome of the described Majority's exercise is that the Respondent is denied *altogether* the right of examination at the next hearing of any purported individual Claimants, except of ***the 8 "Claimant Witnesses" who are persons chosen by the legal representation of the Claimants themselves!!*** This is an amazing outcome by all standards, a procedural joke. Moreover - as a consequence of the decomposition of the Respondent's Request - the refusal by the Majority to give to the Respondent the opportunity to verify by itself by examination at the next hearing the personal and holding data of purported individual Claimants lacks in the Order of an adequate motivation. The relevant reasoning as advanced in

the Order relates to the decomposed Request not to the Request formulated by the Respondent. In fact, no legal explanation is given for the rejection as a whole of the Request as formulated by the Respondent.

9. Furthermore, the Majority decision contradicts itself because as from the moment the Claimants Party was allowed to present *individual Claimants as witnesses*, the right of the Respondent Party to call for examination *other individual Claimants* cannot be denied without impairing the principle of the equality of the Parties. To do otherwise would amount to give an unwarranted advantage to the Multiparty over the Single Party. There is indeed nothing unconventional - in an aggregate multiparty case with mass personal aspects as the present one - to allow the examination by the Respondent of individual Claimants when the Claimants Party does the same in writing and orally. In any case, the ICSID Convention and Arbitration Rules contain no provision on the basis of which the Respondent's Request should be rejected and the Procedural Order does not quote or mention any.

10. It must be added that, in the instant case, the interpretation given by the Majority of Article 44 of the ICSID Convention in its 2011 Decision on Jurisdiction and Admissibility would cover any eventual doubt about the right of the Respondent to call for examination individual claimants at the hearing for the purpose of ascertaining the individual *ratione prsonae* jurisdiction of the Tribunal in the case, unless it was intended to apply to Claimants' requests or needs only (see paragraphs 518-551 of the 2011 decision).

11. In these paragraphs (very much criticised in the Dissenting Opinion of Professor Abi-Saab) the Majority starts finding that "it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret (the) silence (of the ICSID framework) as a 'qualified silence' categorically prohibiting collective proceedings, just because it was not mention in the ICSID Convention" (at page 206) and concludes as follows:

"(i) The silence of the ICSID framework regarding collective proceedings is to be interpreted as a 'gap' and not as a 'qualified silence';

"(ii) The Tribunal has, in principle, the power under article 44 ICSID Convention to fill this gap to the extent permitted under Article 44 ICSID Convention and Rule 19 ICSID Arbitration Rules;

"(iii) The procedure necessary to deal with the collective aspect of the present proceedings concern the method of the tribunal's examination, as well as the manner of the representation of Claimants …;

"(iv) Such procedure is admissible and acceptable under article 44 ICSID Convention, Rule 19 ICSID Arbitration Rules, as well as under the more general spirit, object and end of the ICSID Convention" (at pages 216-217).

12. There is not therefore any legal obstacle preventing the Tribunal to grant the Request for examination of individual Claimants at the hearing as formulated by the Respondent. The only difficulty for the exercise by the Respondent of its right to examine orally at the next hearing of

'all' purported Claimants is their number. However, that difficulty may be overcome by holding a few post-hearing meetings in Europe (or by video conference) for that particular purpose.

13. However, the Respondent made, as indicated above, the alternative proposition that the Tribunal determine the number of individual Claimants that it would be allowed to examine orally. I find this proposition a very reasonable alternative. The Majority rejects it as well in its Order through the decomposition method referred to above. And do that notwithstanding the need and advisability, in my opinion, of further verifications in the light of: the shortcomings of the Verification Database Procedure adopted by the Majority and the gaps of its Final Version; the defects of the original Database and the uncontrolled modifications introduced therein by the Claimants in the original duly recorded version of the Database; and the Claimants' Party admission that the Database is a mere instrumentality, the *evidence being the documentation* of each individual Claimant fed in the Database which apparently have not yet been transmitted to ICSID and remains in Italy.

b) The direct examination by the Respondent of its own witness

14. I support likewise the Respondent's request of allowing him to examine orally its own witness at the hearing. I do not see in the ICSID Convention and Rules any provision excluding from the oral phase of a given case any Party's witness because the person concerned had submitted previously a written witness statement in the case. A direct examination at the hearing may add, develop further or correct the written statement and the direct examination by the Party concerned of the witness may relate to questions other or more precise than those dealt with in the former written statement. Paragraph 16 of the Minutes of the First Session of the Tribunal provides that "Each Party may call its own witness or experts *for direct examination"* and adds ".., including as to issues arising in the Reply/Rejoinder phase that are not fully briefed". ("including" not "excluding").

15. Procedural Order Nº 27 begins mentioning Procedural Order Nº 2 of 1 December 2009 which according to its text follows a telephone conference which left open for decision by the Tribunal: (A) Whether or not to allow direct and cross-examination of the handwriting experts during the hearing; (B) Whether or not to allow direct examination of Professors Richard A. Nagareda and Antonio Briguglio; (C) Dates for the hearing on jurisdiction and admissibility. Here again we are in the context of the jurisdiction and admissibility phase. Moreover, issue (A), the Respondent requested a *reconsideration* of a majority decision adopted a few days before. This explains the reference at page 3 of the Procedural Order Nº 2 to "*the exceptional nature of the reconsideration of the Tribunal's previous decision"*. Issue (B) relates also to a particular previous decision in paragraph 4.1 of the Order of 1 May 2009. Procedural Order Nº 27 has not been however adopted in a *reconsideration of decisions context*. And it is also a fact, that notwithstanding the reconsideration then at issue, the Tribunal admitted, with restrictions, the requests for direct examination under the sound principle of "*ensuring that both parties will have a full opportunity to present their respective cases* (at page 3 of the PO Nº 2).

16. I do not know any "general principle of public international law" or any "general principle of law" in the sense of Article 38 (c) of the Statute of the ICJ or a "general principle" in international law arbitration of general application to the effect that the right of a Party to call its

own witness and experts for direct examination does not apply to those having previously submitted written statements in the case. It may be that some commercial arbitration rules or a given particular arbitration system incorporates such a "principle" but it is not the case of the ICSID instruments. The texts of the ICSID Convention and Arbitration Rules do not set out a "principle" of that kind either explicitly or by necessary implication.

17. It follows that I cannot accept that as stated in Procedural Order Nº 27 "there shall in principle be no direct examination (by the Respondent) of (its own) witness and experts (having submitted statement at the written phase) unless otherwise justified by special circumstances". By this statement the Order converts the exception in the rule without mentioning the legal applicable rule on which such a reversal is based (which should not be confused with doctrinal commentaries or trends or subjective views of arbitrators). I consider also that to allow such a right to be exercise by the Parties is of help for the Tribunal and therefore in the interest of the present arbitration.

18. The Respondent's Request is on the other hand quite justified in the light of the very particular circumstances of the case and its unfolding since the preliminary objections phase. As such, it should not have posed any procedural difficult for the Majority in the light of the interpretation by its members of Article 44 of the ICSID Convention referred to above. To require the Respondent to fill a new written application by 3 June 2014 and "provide explanations as to the reasons why such direct examination is justified" is an artificial overdoing. In my view, procedural issues of that kind should be solved within the ICSID framework in more a simple and effective manner. Particularly when, as in the present case, Procedural Order Nº 27 grants expressly to the Claimants Party "an equal right in accordance with the principle of equality of arms". I welcome in any case this express recognition by the Order of the equality of arms principle. Since I was appointed arbitrator in the present case I do not cease to repeat again and again the need to respect that fundamental principle under the formula of the equality of the parties in the proceeding.

c) Other questions

19. Concerning other questions dealt with in Procedural Order Nº 27, I like to underline the following;

a) Concerning the First Part of the Order I have no objections to the conclusions relating to RE-775 and RE-736. I go also along with the conclusions concerning RE-776 and RE-812 providing that the documents concerned are not in the public domain.
b) Concerning the Second Part of the Order:
(i) I agree to the attendance at the hearing of Mr. Ted Bloch, M. Nicola Stock and Dr. Nobert Wühler as per the decisional part of the Order;
(ii) I reserve my right of calling individual Claimants for questioning pursuant to Article 32 (3) of ICSID Arbitration Rules;
(iii) And agree with and support the last residual matters clause of the decisional part of the Order.

Signed: SantiagoTorres Bernárdez