Concurring Opinion of Luis Herrera Marcano
(pursuant to Article 48(4), ICSID Convention)

1. I support the decision of the Tribunal on liability as I believe that its conclusions are in conformity with the law and justice and with what was claimed and proven during the course of the proceedings. However, this does not mean that I fully agree with every statement contained in the decision.

2. Specifically, as concerns the concept of fair and equitable treatment, I do not share the interpretation of this concept given by a number of arbitration tribunals in proceedings between States and investors, namely, that it entails an obligation on the part of the State not to affect the "investor's legitimate expectations" that are based on the explicit or implicit promises of government officials or entities (promises, commitments or representations), even where such promises are not binding on the State under its own laws.

3. In my view, this interpretation is not based on the ordinary meaning of the words "fair and equitable treatment" which must be the first source of interpretation in accordance with the United Nations Convention on the Law of Treaties (Vienna Convention), which is generally accepted in this subject-matter as reflecting customary international law, even by countries, such as France, that have not ratified it.

4. Neither have I found any reference to the effect that Contracting States in the Treaty at hand, nor in any other of the thousands of international treaties providing for the protection of investments that are in force across the world, accord such meaning to the term "fair and equitable treatment".

5. Conversely, I have only found two cases where Contracting States have expressed officially an interpretation of the term "fair and equitable treatment". The first one of these cases is the North American Free Trade Agreement (NAFTA). The Member States, Canada, United States and Mexico stated that the term "fair and equitable treatment" does not imply a superior standard of treatment than the minimum standard of treatment required under international law. The second case is that of Switzerland: in an official statement, the Federal Department of Foreign Affairs of the Swiss Confederation referred to the concept of fair and equitable treatment (*traitement juste et équitable*): *«On se réfère*

ainsi au principe classique du droit des gens selon lequel les États doivent mettre les étrangers se trouvant sur leur territoire et leurs biens au bénéfice du «standard minimum» international, c'est-à-dire leur accorder un minimum de droits personnels, procéduraux et économiques».[1]

6. Moreover, it also is not possible to base such a broad meaning of the concept of *fair and equitable treatment* on a generally recognized principle in the legislation of the States. In all legal systems of which I am aware, a State is only bound by the "promises" or "representations" of its bodies or officers in specific cases in which the State's law so provides. I am not aware of any legal system in which a "promise" by authorities not to raise taxes or not to devaluate a currency would give the right to citizens to claim compensation if the authorities fail to keep it.

7. The relationship between a State and an investor cannot be compared to the relationship between the parties to a contract. In the investor-State relationship, the State does not act *jure gestionis*, as in a commercial relationship, but rather it acts *juri imperii*. Notwithstanding, arbitral tribunals applying investment protection treaties, when interpreting the term "fair and equitable treatment", have introduced certain concepts such as "representation", which are applicable only to contractual relationships in some legal systems influenced by the Common Law.

8. Likewise, it is not possible to compare the role of an investor with that of the State and to treat the investor as though the investor was a party to the treaty for the protection of investments, when, in fact, the investor is only a beneficiary under the treaty, or otherwise to apply for the investor's benefit the rules of acquiescence or "estoppel", which are applicable only to the relations between States, subject to much stricter requirements than those some investment arbitration tribunals have applied, to the prejudice of the State.

9. Investment arbitral tribunals quote previous decisions of other investment treaty tribunals, issued during recent years, as though they reflected mandatory rules of international law. Practically speaking, those tribunals were attempting to transpose into international law

[1] "It is also referred to the classic principle of *jus cogens* according to which States must offer to foreigners who are on their territory (and their assets), the benefit of the international minimum standard *i.e.*, grant them the minimum of personal, procedural and economic rights." *Annuaire suisse de droit international*, 178 (1980), quoted in OECD working paper, Direction des affaires financieres et des entreprises, documents de travail sur l'investissement international numéro 2004/3, *La Norme du Traitement Juste et Equitable dans le Droit International des Investissements,* p.11.

the notions of “case law” and “precedent” that are characteristic of Anglo-Saxon legal systems. However, the Statute of the International Court of Justice, which is universally recognized, clearly states that the decisions of the International Court of Justice, as the highest international tribunal, are not a source of international law but, rather an ancillary means to clarify the scope of international law, and are binding only on parties to the particular cases. If this is the case with respect to the International Court of Justice, then the power to create or change international law cannot possibly be attributed to other tribunals which are not international tribunals under international law, since they do not settle disputes between States and/or other subjects of international law, but rather are a hybrid located half-way between international law arbitral tribunals and arbitral tribunals in international private legal disputes.

10. The decision at hand, despite making the necessary reference to the interpretation of the concept of “legitimate expectations” developed in previous decisions, in my view provides a more solid basis for its conclusions. It seems evident that, pursuant to the ordinary sense of the term, a State’s conduct cannot be considered to provide fair and equitable treatment when that conduct does not comply with the State’s own laws to the investor’s detriment, or when the State exercises in an abusive manner the regulatory power granted by its own laws, imposing tariffs which are manifestly unfair for indefinite periods of time, or when it attempts to apply taxes retroactively, or when it unjustifiably revokes permits or authorizations granted in accordance with its laws.

[*Signed*]

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Mr. Luis Herrera Marcano
Arbitrator
Date: [*December 12, 2010*]