

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

**ABACLAT AND OTHERS  
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC  
(RESPONDENT)**

---

**PROCEDURAL ORDER NO. 21**

---

**2 MAY 2013**

## **IN VIEW OF**

1. Procedural Order No. 19 of 8 April 2013, in which the Arbitral Tribunal dealt with the issue of the update by Claimants on or around 15 March 2013 of information contained in the Database with regard to bank certification letters, and ruled as follows:
  - “1. *From now on, Claimants are strictly forbidden to make any update to the database without filing a prior request with the Arbitral Tribunal indicating (i) the reasons for the update; (ii) the nature of the update; (iii) the consequences on the content of the Database; and (iv) what measures Claimants intend to take to ensure traceability of the changes made to the Database.*
  2. *Claimants are invited to provide the Arbitral Tribunal by 11 April 2013 with the information mentioned in paras. 1 of the dispositif and 12 above, and in particular whether the “updated Access Database” allows to easily trace the changes made or whether any other action is necessary in this regard.*
  3. *Respondent will then be invited to comment thereon, and the Arbitral Tribunal will in due time decide what weight to give to such updated information.”*
2. Claimants’ letter of 11 April 2013, in which Claimants provided the requested information in accordance with item 2 of the executive part of Procedural Order No. 19 of 8 April 2013.
3. Respondent’s letter of 19 April 2013, in which Respondent commented on Claimants’ letter of 11 April 2013.
4. Claimants’ letter of 25 April 2013, in which Claimants requested permission to upload further bank certification letters to the Database and make corresponding updates to the Database data.

## **CONSIDERING**

5. In their letter of 11 April 2013, Claimants provided the following explanations regarding the update referred to in their letter of 15 March 2013, and which was the object of Procedural Order No. 19 of 8 April 2013:
  - The version of the Database as accessible and submitted to the Expert on 15 February 2013 “*reflected the bank certification letters and other underlying documents in the Database as of that date*”.
  - When compiling the new bank letters to be produced to Respondent upon the latter’s request, Claimants “*identified inconsistencies in the Database data, [which] required limited updates to the Database data so that this data corresponded fully to the information in the new bank certification letters*”.
  - The updates made were limited to the following:

- (i) 317 new bank certification letters were uploaded to the Database, pursuant to Respondent's document request for new bank letters;
  - (ii) updates were made to the purchase data of 12 Claimant files to maintain consistency between the information contained in the new bank letters and the bond purchase data in the Database;
  - (iii) bond data was updated for two additional Claimant files.
- The updates listed above in items (i) and (ii) are visible in chart form in Exhibit 1 to Claimants' letter of 15 March 2013. The update listed above in item (iii) was not included in Exhibit 1 because new bank letters were not submitted for them.
  - No other changes were made to the content of the Database or any other Claimant files and no other changes have been made since 15 March 2013.
  - With regard to traceability, Exhibit 1 to Claimants' 15 March 2013 letter identifies those Claimant file numbers for which new letters were produced and unloaded to the Database. As concerns the corresponding bond data, changes are visible in Access format using readily available software, and Claimants provided an illustration of these changes in Annex 1 of their letter of 11 April 2013.
  - Any past or future update to the Database can be readily traced and verified as needed.

6. In addition, Claimants suggested the following procedure to deal with future Database updates and requested that the Tribunal enter an order accordingly:

“

- *Claimants will advise Respondent and the Tribunal (with copy to Dr. Wühler) of their desire to make any updates to the Database, including the nature of any proposed updates. Such updates could include, for example, the uploading of additional new documents or revisions to data to accurately reflect underlying documents.*
- *Respondent, the Tribunal, and/or Dr. Wühler may raise any objections to the Database update within 5 days.*
- *If no objections are raised within the 5-day period, Claimants will proceed with the Database update, and produce the following materials to ensure traceability: (1) a list of file numbers for which new documents are uploaded to the Database, if any; and (2) a software print-out of revisions made to the data in the Database.*

“

In Claimants' view, this procedure would “*safeguard both parties' due process rights, and facilitate accuracy of the record and efficiency among all groups involved in the arbitration*”.

7. In its letter of 19 April 2013, Respondent objected to the modification of the Database made by Claimants and also reiterated its view that “*such Database [is] a useless tool for the Tribunal to rule on this claim*”. Respondent based this objection and view on the following main considerations:

- By admitting that they “*identified inconsistencies*”, Claimants in effect acknowledged that the Database is “*not complete or accurate*” and is an “*incomplete and flawed tool containing documents whose validity has been demonstrably called into question*”.
  - Claimants acknowledged that “*they [Claimants] continue to purge their original claim and go far beyond by introducing into the Database documents it was not supposed to contain*”, and which are therefore “*not part of the record this Tribunal has before it*”.
  - Claimants state that they will potentially introduce changes into the Database and produce new evidence even until the Rejoinder on Jurisdiction.
  - Claimants’ letter of 11 April 2013 only confirms “*the unmanageability of their Database, devised and controlled solely by Claimants*” and that “*it does not and will not resolve any jurisdictional issues because it is essentially built on the basis of documents riddled with defects and irregularities*”. These problems “*cannot be cured by Claimants’ proposal of 11 April 2013*”.
8. In addition, Respondent repeated its request that the Arbitral Tribunal re-consider the procedural timetable ensuring that “*both parties are afforded the same terms to file their submissions for the second written round of this phase, from the moment each party is in receipt of the other party’s submission*”.

## CONSIDERING FURTHER

9. That, with regard to the version of the Annexes (which form the basis of the Database), in its Decision on Jurisdiction and Admissibility of 4 August 2011, the Arbitral Tribunal made the following relevant rulings:

[...]

612. [...] *the Tribunal rules that the present arbitration proceedings were validly initiated by all the Claimants mentioned in Annex K as being in the record before the date of the Notice of Registration of the Request for Arbitration, i.e., 7 February 2007.*

[...]

640. *In conclusion and in (partial) response to Issues Nos. 3(a) and 3(b), the Tribunal finds that the present arbitral proceedings have been effectively initiated by all Claimants listed in Annex K as substituted before the Notice of Registration of the Request for Arbitration of 5 February 2007. The Tribunal further finds that the present arbitral proceedings are discontinued as of the date of dispatch of the present Decision with regard to all Claimants listed in Annex L as substituted by Claimants on 5 October 2010.*

[...]

680. [...] *the Tribunal holds that the Annexes submitted by Claimants are in principle admissible and the latest version of the Annexes as submitted by Claimants on 5 October 2010 is hereby accepted into the record.*

[...]

713. [...]

(1) *With regard to the Issues of the List of 11 Issues of 9 May 2008:*

[...]

(iii) *Issue 3(a): The Annexes submitted by Claimants are in principle admissible and the latest version of the Annexes as submitted by Claimants is hereby accepted into the record.*”

[...]

(4) *With respect to the further conduct of the procedure:*

[...]

(ii) *The Annexes submitted by Claimants are in principle admissible and the latest version of the Annexes as submitted by Claimants on 5 October 2010 is hereby accepted into the record (see § 680 above). “*

10. That, according to Procedural Order No. 13 of 27 September 2012, executive part lit. B(ii), Claimants were entitled to “*amend the content of the Database in accordance with the principles set out in paras 592-641 of the Decision on Jurisdiction and Admissibility and may submit it in the form of computer-searchable spreadsheets, it being understood that the current Database as admitted into the record by the Arbitral Tribunal’s Decision on Jurisdiction and Admissibility remains in the record and the amended Database shall be such that it can be compared with the current Database*”.
11. That, based thereon, the Annexes currently in the record are the Annexes as submitted by Claimants on 5 October 2010 in the formats authorized under Procedural Order No. 13 of 27 September 2012.
12. That besides the changes expressly authorized in paras 592-641 of the Decision on Jurisdiction and Admissibility of 4 August 2011 and in lit. B(ii) of the executive part of Procedural Order No. 13 of 27 September 2012, the Arbitral Tribunal has not authorized any other changes or updates.
13. That the Arbitral Tribunal considers the Annexes and Database to constitute “*supporting documents*” in the sense of Articles 24 and 25 of the ICSID Arbitration Rules, which provide as follows:  

*Rule 24 Supporting Documentation*

*Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.*

*Rule 25 Correction of Errors*

*An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.*”
14. That, consequently, the filing, maintenance and update of the Annexes and/or the Database must comply with these basic principles and a Party may not make changes thereto as it may deem fit.
15. That this is all the more important as according to para. 21 of Procedural Order No. 15 of 20 November 2012 and para. 25 of Procedural Order No. 17 of 8 February 2013, the scope of the Expert’s mission includes the review of the technical functionality and reliability of the Database and the verification of “*whether or not the information*

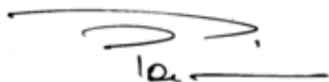
*contained in the Claimants' Database and the documents relating thereto contain any inconsistencies, discrepancies or any duplication or any vice affecting Claimants' Database or the documents themselves, and in particular inconsistencies concerning signatures apposed by a (presumably) same Claimant on various documents".*

16. That, consequently, ongoing and unauthorized changes to the Database would also compromise the efficiency of the Expert's work.
17. That the Arbitral Tribunal therefore considers it necessary to get clarity over the current status of the Database (compared to the Annexes as admitted into the record as of 5 October 2010), the changes made thereto and establish clear rules regarding its future maintenance and update.
18. That, for this purpose, the Arbitral Tribunal has prepared a list of questions addressed to Claimants and concerning the maintenance and management of the Database as of 5 October 2010. This list of questions is attached hereto as Annex 1. Claimants are invited to respond to these questions **by Friday, 10 May 2013**.
19. That Respondent will be provided with the opportunity to comment on Claimants' answers to these questions.
20. That the Arbitral Tribunal will then determine the appropriate next steps based on its power deriving from Article 44 ICSID Convention and Rule 19 of the ICSID Arbitration Rules.
21. That, in the meantime, it would be inappropriate to allow any further changes to the content of the Database and that Claimants' request of 25 April 2013 should therefore temporarily be denied.
22. That, in view of the issues concerning the maintenance and update of the Database and the extended deadline for submission of the Draft Verification Report, the current timetable does not seem realistic anymore.
23. That therefore, the timetable needs to be revised.
24. That, with regard to the submission of the Expert's Verification Report, the following deadlines should apply:
  - (i) Submission by the Expert of the Draft Verification Report: 31 May 2013
  - (ii) Comments thereon by the Parties: 1 July 2013
  - (iii) Issuance of Final Verification Report: 15 July 2013
25. That all other deadlines currently mentioned in the timetable are suspended and the hearing planned in November 2013 will be postponed to a date to be further determined.

**CONSEQUENTLY THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:**

1. The Arbitral Tribunal confirms the principle set forth in item 1 of the executive part of Procedural Order No. 19 of 8 April 2013 regarding further updates to the Database, i.e. that Claimants are strictly forbidden to make any update to the database without filing a prior request with the Arbitral Tribunal indicating (i) the reasons for the update; (ii) the nature of the update; (iii) the consequences on the content of the Database; and (iv) what measures Claimants intend to take to ensure traceability of the changes made to the Database.
2. The Arbitral Tribunal will determine the appropriate next steps, and, in particular, specific rules on how to deal with past and future changes made or to be made to the Database.
3. For this purpose, Claimants are invited to respond to the questions listed in Annex 1 by Friday, 10 May 2013, and Respondent will then be invited by the Arbitral Tribunal to provide comments thereon within a time frame to be determined by the Arbitral Tribunal.
4. Claimants' request of 25 April 2013, which relates to modifications of the content of the Database, is temporarily denied and will be re-examined once the Arbitral Tribunal has decided on the appropriate next steps as provided for under item (2) above.
5. The current Procedural Timetable is modified as follows:

(i) Submission by the Expert of the Draft Verification Report:	31 May 2013
(ii) Comments thereon by the Parties:	1 July 2013
(iii) Issuance of Final Verification Report:	15 July 2013
(iv) All other deadlines are suspended.	



---

*Pierre Tercier,*

*President*

*On behalf of the Arbitral Tribunal*

*An Individual Statement of Dr. Santiago Torres Bernárdez is attached.*

**Annex 1 to Procedural Order No. 21**  
**List of Questions addressed to Claimants and concerning the Maintenance and Management of the Database**

**A. Technical Changes**

1. What were the Technical Changes made to the Database since (a) Respondent was first given access on 2 April 2010, and (b) the Tribunal was first given access thereto on 26 November 2012, to date?
2. What is the nature of these changes, i.e. are they ordinary updates of software and hardware?
3. As of when and at what moment did they occur?
4. If and when were the Tribunal and Respondent informed of the Technical Changes? If not, should they have been informed?
5. Have the Technical Changes been logged and/or backed up, and can previous versions be restored, if needed, without impairing the integrity of the Database?

**B. Data Changes**

1. Which Data were changed? What was the scope and nature of the changes made?
2. When did the Data Changes take place?
3. By whom were the Data Changes made?
4. At whom's request were the Data Changes made?
5. If and when were the Tribunal and Respondent informed of the Data Changes? If not, should they have been informed?
6. Were these Changes made to the Database only or also to the Annexes? If only to the Database, should corresponding changes be made to the Annexes and these Annexes introduced into the record? If made to both, should the amended Annexes be introduced into the record?

**C. General**

1. Who would be able to verify independently the above questions? Could this be done by the Expert and his team? Another expert for each category?
2. How much time would such verification require?
3. Does any of the above Changes impact any of the issues in the arbitration? If so, how?
4. Does any of the above Changes affect Respondent's substantive and/or procedural rights? If so, which rights?
5. If the answer to question C.3 or C.4 is affirmative, is remedial action possible in the arbitration? If so, which action?



## **Individual Statement of Dr. Santiago Torres Bernárdez**

I approve Procedural Order N° 21 without prejudice of my dissent concerning the present Database Verification Undertaking for reasons explained in my previous relevant dissenting opinion and statements. It follows that my approval of the Procedural Order as a whole is subject to the reservation that it does not encompass any endorsement on my part of the passages of the Order concerning that Undertaking, namely paragraphs 10, 12, 15, 16 and 22 to 24 of the recitals and paragraph 5 of the executive part of Procedural Order N° 21.

Signed: Santiago Torres Bernárdez