

**IN THE MATTER OF AN ARBITRATION  
UNDER THE ICSID CONVENTION**

**PCA Case No. IR 2011/1**  
**ICSID Case No. ARB/07/5**

**BETWEEN:**

**ABACLAT AND OTHERS**

**Claimants**

**-and-**

**ARGENTINE REPUBLIC**

**Respondent**

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**RECOMMENDATION PURSUANT TO THE REQUEST BY ICSID  
DATED NOVEMBER 18, 2011  
ON THE RESPONDENT'S PROPOSAL FOR THE DISQUALIFICATION OF PROFESSOR  
PIERRE TERCIER AND PROFESSOR ALBERT JAN VAN DEN BERG  
DATED SEPTEMBER 15, 2011**

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**Christiaan M. J. Kröner**  
**Secretary-General**  
**Permanent Court of Arbitration**

**December 19, 2011**

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## A. Introduction

1. The present Recommendation concerns the arbitration proceedings commenced in 2006 by a group of individuals and corporations known presently as “Abaclat and others” who are holders of sovereign bonds issued by the Argentine Republic (the “**Claimants**”), against the Argentine Republic (the “**Respondent**”). Those arbitration proceedings are administered by International Centre for the Settlement of Investment Disputes (“**ICSID**”) pursuant to the Convention on the Settlement of Disputes between States and Nationals of Other States (the “**ICSID Convention**”) and the Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”).
2. By letter from Mr. Gonzalo Flores, Senior Counsel at ICSID, dated November 18, 2011, I have been asked to provide a recommendation to ICSID on the Respondent’s proposal, submitted on September 15, 2011, for the disqualification, pursuant to Article 57 of the ICSID Convention, of Professor Pierre Tercier and Professor Albert Jan van den Berg (the “**Proposal**”).
3. The Proposal is based on the following four grounds:
  - (i) the rejection, by decision communicated to the Parties on August 4, 2011, of the Respondent’s Urgent Request for Provisional Measures dated July 21, 2011 (“**Ground One**”);
  - (ii) certain aspects of the Decision on Jurisdiction and Admissibility dated August 4, 2011 (the “**Decision**”), which are said to limit the Respondent’s right of defense (“**Ground Two**”);
  - (iii) the alleged prejudgment of certain issues in the Decision (“**Ground Three**”); and
  - (iv) the communication of the Decision to the Parties prior to the communication of the Dissenting Opinion of Professor Georges Abi-Saab dated October 28, 2011 (“**Ground Four**”).
4. Because of the seriousness of the matters to which the Proposal relates, the reasons on which the present Recommendation is based are set out herein.

## B. Procedural History

### 1. The Arbitration Proceedings

5. By Request for Arbitration dated September 14, 2006, the Claimants commenced arbitration proceedings against the Respondent concerning the Respondent’s alleged breach of its obligations under the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments (the “**Argentina-Italy BIT**”).
6. According to the Claimants, who number some 60,000, most of them are natural persons of Italian nationality and juridical persons incorporated and existing under the laws of Italy.<sup>1</sup> They are represented in these proceedings by “*l’Azzociazione per la Tutela degli Investitori in Titoli Argentini*” (“Task Force Argentina, or “**TFA**”),<sup>2</sup> an entity created organized under Italian law.<sup>3</sup>

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<sup>1</sup> Decision, para. 3.

<sup>2</sup> Decision, para. 4.

<sup>3</sup> Decision, para. 65.

7. The Arbitral Tribunal (the “**Tribunal**”) was constituted on February 6, 2008, by (i) Professor van den Berg (appointed by the Claimants); (ii) Professor Georges Abi-Saab (appointed by the Respondent) and (iii) Dr. Robert Briner (appointed by ICSID pursuant to Article 38 of the ICSID Convention), President of the Tribunal. The Tribunal was reconstituted, due to the sudden and unfortunate death of Dr. Briner, by the appointment of Professor Tercier on September 2, 2009. The Secretary to the Tribunal is Mr. Flores.
8. Following several rounds of written submissions, a Hearing on Jurisdiction took place in Washington D.C. from April 7 to April 13, 2010.
9. At various stages of the arbitral proceedings, the Respondent alleged the existence of several irregularities in certain of the documents designed and used by TFA in order to initiate the arbitration on behalf of the Claimants (the “**TFA Mandate Package**”), including the alleged use of forged signatures and the signature of powers of attorney by persons other than the named signatory. In support of its allegations, the Respondent referred to two reports by handwriting experts that were annexed to its Reply Memorial on Jurisdiction, and a second expert report which it submitted prior to the Hearing on Jurisdiction, and which the Tribunal declined to admit but reserved the possibility of admitting it at a later stage in the proceedings.<sup>4</sup>
10. On July 21, 2011, the Respondent submitted an Urgent Request for Provisional Measures (the “**Urgent Request for Provisional Measures**”) to the Tribunal. According to the Respondent, on July 13, 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.”<sup>5</sup> In the context of those criminal proceedings, the Italian Prosecutor’s Office had concluded that it had “effectively [been] shown that the signatures affixed under [the names of two of the Claimants] have been forged.”<sup>6</sup> The Respondent requested that (a) a hearing be scheduled urgently so that the Tribunal could hear the testimony of the Claimants to whom the allegations of forged signatures related; (b) the Claimants be ordered to refrain from altering or destroying any document; 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.<sup>7</sup>
11. On August 4, 2011, by a majority composed of Professor Tercier and Professor van den Berg, the Tribunal issued the Decision. The signature page of the Decision does not contain co-arbitrator Professor Abi-Saab’s signature, but rather the words “Dissenting Opinion Forthcoming” appear in typescript in the relevant space.
12. The Decision was communicated to the Parties by letter sent on behalf of the Tribunal by Ms. Anneliese Fleckenstein, ICSID Consultant, dated August 4, 2011 (the “**Letter dated August 4, 2011**”).
13. The Dissenting Opinion of Professor Abi-Saab (the “**Dissenting Opinion**”) was issued on October 28, 2011 and was circulated to the Parties by letter from ICSID dated October 30, 2011.
14. By letter dated November 1, 2011, Professor Abi-Saab tendered his resignation from the Tribunal.

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<sup>4</sup> Proposal, paras. 4-6, citing Report of the Forensic Document Examination Division of the Argentine Federal Police Department (Toscano, Pereyra and Di Tommaso); Expert Report of Héctor Jorge Petersen and Héctor Jorge Petersen, Jr.; Reply Memorial, paras. 191-197; Rejoinder on Jurisdiction, para. 225; Procedural Order No. 4, March 18, 2010, para. 53.

<sup>5</sup> Proposal, para. 8.

<sup>6</sup> Proposal, para. 8, citing Filing Petition by the representative of the Italian Prosecutor’s Office, Attorney Giampiero Nascimbeni, Annex I of the Urgent Request for Provisional Measures.

<sup>7</sup> Proposal, para. 12, citing Urgent Request for Provisional Measures, Item III.

## 2. The Proposal for Disqualification

15. On September 15, 2011, the Respondent submitted to ICSID a Proposal for the Disqualification of President Pierre Tercier and Arbitrator Albert Jan van den Berg (the “**Proposal**”), in which it proposed that (a) the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”) be asked to “provide an opinion in connection with this [R]equest”; (b) Professor Pierre Tercier and Professor Albert Jan van den Berg “be separated from this arbitration and be replaced”; and (c) this proceeding be suspended until a decision on the Proposal be made.
16. By letter dated September 16, 2011, the Claimants objected to the Proposal.
17. On September 21, 2011, the Respondent sent a letter to ICSID to supplement its Proposal of September 15, 2011, further requesting a hearing to be scheduled with respect to the Proposal.
18. By letter dated September 21, 2011, the Claimants objected to the Respondent’s letter of the same date, and requested “a prompt schedule for submissions and the Chairman of the Administrative Council’s decision within the 30 days contemplated by the ICSID Arbitration Rules.”
19. By letter dated October 5, 2011, ICSID informed the Parties that “the proceeding has been suspended since September 15, 2011” due to the Respondent’s Proposal.
20. By letter dated October 6, 2011, the Claimants requested that ICSID reject the Respondent’s Proposal within the 30-day period provided under the ICSID Rules, or, alternatively, that ICSID immediately issue a schedule for party submissions regarding the Proposal.
21. By letter dated October 13, 2011, ICSID communicated to the Parties the following schedule for submissions concerning the Proposal:
  - a. *Claimants are invited to submit a reply to Respondent’s disqualification proposal by Friday, October 28, 2011;*
  - Professor Pierre Tercier and Dr. Albert Jan van den Berg, are invited to furnish any explanations that they may wish to provide, pursuant to ICSID Arbitration Rules 9(3); within 10 days from receipt of Claimants’ submission;*
  - Both parties are invited to simultaneously file, within two weeks from the date of any explanations furnished by Prof. Tercier and Dr. van den Berg, any further observations they wish to make in connection with the disqualification proposal.*
  - The parties are requested to submit this presentation only to the Secretary of the Tribunal on the due date. The Secretary of the Tribunal will circulate the submissions upon receipt of both parties’ filings;*
  - d. *To avoid any possible confusion, the Secretary of the Tribunal will confirm to the parties the exact due date for the filing of (c) above, once Prof. Pierre Tercier’s and Dr. van den Berg’s explanations (if any) are received.*
22. On October 21, 2011, the Claimants submitted their reply to the Proposal (the “**Claimants’ Reply**”).
23. By letter of October 24, 2011 (mistakenly dated October 20, 2011), ICSID invited Professor Pierre Tercier and Professor Albert Jan van den Berg to submit any comments they might wish to provide within 10 days.

24. By letter dated October 28, 2011, ICSID informed the Parties (i) that Article 58 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules authorize the Chairman of the ICSID Administrative Council to decide on the Proposal; and (ii) that the Chairman had decided to deny the Respondent's request for a hearing on the Proposal and to grant the Respondent's request for a recommendation from the Secretary-General of the PCA concerning the Proposal.
25. On October 31, 2011, Professor Pierre Tercier and Professor Albert Jan van den Berg transmitted a joint letter to ICSID, furnishing their comments on the Respondent's Proposal.
26. By letter dated November 2, 2011, ICSID invited the Parties to submit any further observations they might wish to make in connection with the Proposal, and enclosed a letter from Professor Georges Abi-Saab communicating his resignation from the Tribunal.
27. By letter to the PCA dated November 8, 2011, the Respondent referred to the Proposal and requested that any recommendation of the Secretary-General of the PCA "be based on the opinion of a person to be designated by [the Secretary-General of the PCA], who is absolutely unquestionable and completely independent from the parties and the challenged arbitrators," and that "such designation be communicated to all the parties to these proceedings."
28. By letter to ICSID and to the Parties dated November 11, 2011, the PCA stated that it had not received a formal communication from ICSID regarding the Proposal and that it would welcome comments from ICSID regarding the Respondent's letter dated November 8, 2011.
29. On November 16, 2011, the Claimants and the Respondent submitted to ICSID, in English and Spanish respectively, their further observations in relation to the Respondent's Proposal (respectively, the "**Claimants' Observations**" and the "**Respondent's Observations**").
30. By letter dated November 17, 2011, ICSID informed the Parties that it would "now seek a recommendation from the Secretary-General of the PCA" on the Respondent's Proposal and conveyed to the Parties a list of documents to be provided to the PCA.
31. By letter to ICSID dated November 18, 2011, the Claimants noted that "[ICSID's] transmission to the PCA omitted several documents relating to the Request", and requested that ICSID "promptly transmit the omitted materials to the PCA."
32. By letter dated November 18, 2011, ICSID communicated to the Parties a revised list of documents to be provided to the PCA, and invited the Respondent to indicate when an English translation of the Respondent's Observations, would be ready.
33. By letter dated November 18, 2011, ICSID requested that the Secretary-General of the PCA make a recommendation to the Chairman of the ICSID Administrative Council on the Proposal, and enclosed copies of the Proposal and related documents as listed in its letter to the Parties of the same date.
34. By letter dated November 21, 2011, the Claimants requested that ICSID (a) "[d]irect [the Respondent] to cease and desist from any *ex parte* communications with the PCA or [ICSID]"; (b) "[p]rovide the Parties with copies of all prior correspondence and all further correspondence immediately upon transmission"; and (c) "[f]acilitate a prompt conclusion to this process by encouraging the PCA to conclude its review on a timely basis and by facilitating the issuance of a decision by the Chairman of the Administrative Council before the end of the year."
35. On November 22, 2011, the Respondent provided an English translation of the Respondent's Observations

36. By letter dated November 29, 2011, the Claimants submitted comments on the Respondent's letter to the PCA dated November 8, 2011, and expressed their preference that the Secretary-General of the PCA make a recommendation on the Proposal within 30 days of the request from ICSID.
37. By letter dated November 30, 2011, the PCA requested that ICSID provide copies of those documents referred to in the Parties' submissions that were not attached to the letter from ICSID dated November 18, 2011.
38. By letter dated December 1, 2011, ICSID invited the Parties to submit, by December 2, 2011, any comments they wished to make on the PCA's request dated November 30, 2011.
39. By letter dated December 2, 2011, the Claimants stated that they did not object to such documents being provided to the PCA, provided that this would not delay the making of a recommendation by the Secretary-General of the PCA.
40. By letter to ICSID and to the Parties dated December 2, 2011, the PCA stated that the Secretary-General would use his best endeavors to make a recommendation by December 19, 2011.
41. By letter to the Parties dated December 9, 2011, ICSID stated that, since the Claimants had indicated that they did not object to the transmission of the documents requested by the PCA and that the Respondent had not submitted any comments in this connection, the requested documents would be transmitted to the PCA.
42. By e-mails dated December 9, 10, and 14, 2011, ICSID transmitted to the PCA the documents requested in the PCA's letter dated November 30, 2011. By letter dated December 9, 2011, ICSID transmitted to the PCA further correspondence at the request of the Parties.
43. By letters to ICSID dated December 14, 2011, and December 15, 2011, the Claimants and the Respondent, respectively, provided further comments on the transmission of documents to the PCA.

### **C. Observations on the Applicable Law**

44. The legal basis for the Proposal that Professor Tercier and Professor van den Berg be disqualified is Article 57 of the ICSID Convention, which provides:

*A party may propose to a Commission or Tribunal the disqualification of any obits 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.*

45. In the Proposal, the Respondent proposes disqualification based on the first sentence of Article 57, namely, the existence of facts "indicating a manifest lack of the qualities required by paragraph (1) of Article 14." According to Article 14(1) of the ICSID Convention:

*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.*

46. Neither the moral character of Professor Tercier and Professor van den Berg nor their competence in the field of international law has been questioned by the Respondent. The issue centers only on whether they may be relied upon to exercise independent judgment with respect to the Parties to

the dispute. In this connection, the Respondent and the Claimants are in agreement on the proposition, which I accept, that the term “independent judgment” in Article 14(1) of the ICSID Convention encompasses both independence and impartiality.<sup>8</sup>

47. Rule 9 of the ICSID Arbitration Rules provides:

*Disqualification of Arbitrators*

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

*(2) The Secretary-General shall forthwith:*

*(a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and*

*(b) notify the other party of the proposal.*

*(3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.*

*(4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.*

*(5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.*

*(6) The proceeding shall be suspended until a decision has been taken on the proposal.*

48. The Respondent has cited various sources outside of the ICSID Convention and Arbitration Rules concerning the disqualification of arbitrators and concerning the issues on which the Proposal is based. However, in the absence of express agreement by the Parties on the applicability of such sources, the present recommendation is based upon the ICSID Convention and Arbitration Rules.

49. It is clear that decisions on challenges previously brought in other cases under the ICSID Convention are not binding upon me. However, this does not preclude me from considering such decisions and the arguments of the Parties based upon them, to the extent that I find that they shed any useful light on the issues arising in this case.

**1. Burden and Standard of Proof under Article 57**

50. Under Article 57, the burden is on the challenging party to establish the existence of the required fact or facts and to prove that such fact or facts indicate a “manifest lack” of the quality required of an arbitrator, that is, that such an arbitrator lacks the quality of being a person who can be relied upon to exercise independent judgment and impartiality of judgment. The standard of proof required is that the challenging party must prove not only facts indicating the lack of independence, but also that the lack is “manifest” or highly probable, not just possible.

51. In the case of *SGS Société Générale de Surveillance v. Pakistan*, the tribunal gave the following guidance on the standard that must be met under Article 57 of the Convention:

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<sup>8</sup> Proposal, para. 63; Claimants’ Reply, pp. 4-5.



*The standard of appraisal of a challenge set forth under Article 57 of the Convention may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such a nature or character as to 'indicat[e] a manifest lack of the qualities required by' Article 14(1). The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made. The first requisite that facts must be established by the party proposing disqualification, is in effect a prescription that mere speculation or inference cannot be a substitute for such facts. The second requisite of course essentially consists of an inference, but that inference must rest upon, or be anchored to, the facts established. An arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences.*

*It is important to stress that the inference which constitutes the second constituent element must itself be reasonable. There must, in other words, if the challenge is to succeed, be a clear and reasonable relationship between the constituent facts and the constituent inference they generate. The facts established or undisputed must, in the circumstances of the particular case, be plainly capable of giving rise to the inference claimed to be derived from such facts. The inference resulting from the facts must be that, manifestly, that is, clearly, the person challenged is not to be relied upon for independent judgment, or that a readily apparent and reasonable doubt as to that person's reliability for independent judgment has arisen from the facts established or not disputed. More succinctly, the critical inference must be reasonable in view of the facts from which it springs and should accord with the common experience of the pertinent community of arbitrators and lawyers.<sup>9</sup>*

52. Applying that reasoning to the facts of the challenge, which was based on the professional relationship between the challenged arbitrator and counsel for one of the parties, the tribunal then held that:

*It appears to us that the Claimant merely supposes the existence of what it must prove. A supposition ... standing on the shoulders of another assumption ... which itself rests on still another speculation ... will not sustain the challenge in the instant case.<sup>10</sup>*

53. I consider that Article 57 requires that the challenging party establish facts indicating a lack of the required qualities; in other words, that it both prove the existence of those facts and prove that such indication is "manifest."

## **2. The Meaning of "Independence" under Article 14(1)**

54. The case of *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*<sup>11</sup> ("Suez I") concerned a proposal for the disqualification of Professor Gabrielle Kaufmann-Kohler based on the fact that she had been a member of an ICSID tribunal in the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, which had rendered an award against Argentina two months previously.
55. Concerning Article 14(1), the majority of the tribunal in *Suez I* addressed the question of what was meant by the requirement of "independence." It noted as follows:

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<sup>9</sup> *SGS Société Générale de Surveillance v. Pakistan*, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Reports 398, 402.

<sup>10</sup> *SGS Société Générale de Surveillance v. Pakistan*, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Reports 398, 405.

<sup>11</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007).

*Although Argentina did not point to this fact, the Spanish language version of the Convention Article 14(1) appears to be slightly different from that of the English language version. The Spanish version of Article 14(1) refers to a person who "...inspira[r] plena confianza en su imparcialidad de juicio. (i.e. who inspires full confidence in his impartiality of judgment.) Since the treaty by its terms makes both language versions equally authentic, we will apply the two standards of independence and impartiality in making our decisions. Such an approach accords with that found in many arbitration rules which require arbitrators to be both independent and impartial.*

*The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp. Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties. Thus Webster's Unabridged Dictionary defines 'impartiality' as 'freedom from favoritism, not biased in favor of one party more than another.' Thus it is possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial.<sup>12</sup>*

56. The majority continued:

*Independence and impartiality are states of mind. Neither the Respondent, the two members of this tribunal, or any [other] body is capable of probing the inner workings of any arbitrator's mind to determine with perfect accuracy whether that person is independent or impartial. Such state of mind can only be inferred from conduct either by the arbitrator in question or persons connected to him or her. It is for that reason that Article 57 requires a showing by a challenging party of any fact indicating a manifest lack of impartiality or independence.<sup>13</sup>*

57. The Tribunal in *Suez I* also addressed the question whether in applying the standards of Article 14(1) of the Convention to challenges, one is to use a subjective standard based on the belief of the complaining party or an objective standard based on a reasonable evaluation of the evidence by a third party. The majority concluded that an objective standard was required, holding:

*Implicit in Article 57 and its requirement for a challenger to allege a fact indicating a manifest lack of the qualities required of an arbitrator by Article 14, is the requirement that such lack be proven by objective evidence and that the mere belief by the challenge[r] of the contest[ed] arbitrator's lack of independence or impartiality is not sufficient to disqualify the contested arbitrator. Previous ICSID decisions on challenges to arbitrators support our decision.<sup>14</sup>*

58. The majority in *Suez I* cited the decision on the challenge to the president of the annulment committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, in which a similar approach was taken in stating that the challenging party shall rely on established facts and "not on any mere speculation or inference",<sup>15</sup> and in holding as follows:

*Indeed, the application of a subjective, self-judging standard instead of an objective [one] would enable any party in arbitration who becomes discontented with the process for any reason to end it at any time at its sole discretion simply by claiming that an arbitrator is not independent and impartial, a result that*

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<sup>12</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), paras. 28-29.

<sup>13</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), para. 30.

<sup>14</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), para. 40.

<sup>15</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Challenge to the President of the Committee, para. 25.

would undermine and indeed destroy the system of investor-State arbitration that was so carefully established by the states that have agreed to the Convention.<sup>16</sup>

59. On the facts of the challenge in *Suez I*, the majority concluded that the proposal by the Respondent on the basis of the challenged arbitrator's participation in a tribunal that had rendered an award unfavorable to the respondent "failed to prove any fact indicating a manifest lack of independence or impartiality."<sup>17</sup>
60. It may be conceivable that a ruling might in certain circumstances be of such a nature on its face as to demonstrate evidence of partiality or lack of independence. Such might be the case, for example, where there is a ruling which, on its face, shows objective evidence of bad faith on the part of the arbitrator. However, in general, dissatisfaction with a ruling is not a fact indicating a manifest lack of independence or impartiality.
61. In *Suez I*, the majority of the tribunal articulated this point as follows:

*[I]t must be pointed out that a difference of opinion over an interpretation of a set of facts is not in and of itself evidence of lack of independence or impartiality. It is certainly common throughout the world for judges and arbitrators in carrying out their functions honestly to make determinations of fact or law with which one of the parties may disagree. The existence of such disagreement itself is by no means manifest evidence that such judge or arbitrator lacked independence or impartiality. Even if an appellate body should ultimately reverse such determination, that reversal in and of itself would by no means be evidence of a failure of impartiality or independence. A judge or arbitrator may be wrong on a point of law or wrong on a finding of fact but still be independent and impartial.*<sup>18</sup>

62. This principle also follows from Article 52 of the ICSID Convention, which sets out an exhaustive list of the grounds on which a party that is dissatisfied with a ruling of the Tribunal can seek redress by way of a request for annulment, and the procedure to be followed in that event. Article 53(1) of the ICSID Convention provides:

*The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.*

63. The applicable legal principles can be summarized as follows. Under Article 57 of the ICSID Convention, the burden of proof is on the challenging party to establish, first, the existence of the facts from which it is said that a manifest lack of the relevant qualities can be inferred, and, secondly, to establish that such an inference can reasonably be inferred in the circumstances. The standard required by Article 57 is an objective one; it is not based on the subjective perception of the party proposing disqualification. It is not sufficient to posit an inference of lack of independence and impartiality which itself rests on another inference or mere speculation. Such speculation is inconsistent with Article 57 because, as stated by the majority of the tribunal in *Alpha Projektholding GmbH v. Ukraine*, in terms with which I am in complete agreement, it

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<sup>16</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), para. 41, with reference to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Challenge to the President of the Committee, para. 25 [sic].

<sup>17</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), para. 43.

<sup>18</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal (Oct. 22, 2007), para. 35.

“requires the creation of the very inferences that the common definition of the term ‘manifest’ does not in its ordinary meaning permit.”<sup>19</sup>

64. Moreover, if the existence of an adverse ruling were sufficient to establish a lack of independence and impartiality, no ruling by an adjudicator would ever be possible. It is not the function of an arbitrator to reach conclusions which are mutually acceptable to the Parties or which are neutral in their effects. It follows from the foregoing that the mere fact of an adverse ruling against the party proposing disqualification does not establish, let alone suggest, a lack of independence or impartiality.
65. The above propositions apply even if it is claimed that the adverse ruling in question is wrong in fact or in law or is susceptible of appeal. An arbitrator can be wrong in fact or in law, and still be independent and impartial.

#### **D. Observations on the Timeliness of the Proposal**

66. The Claimants assert that the Proposal for Disqualification is “late” and has been “transparently interposed after Argentina’s failed jurisdictional objections in an effort to disrupt the proceedings.”<sup>20</sup> The Claimants submit that under the ICSID Convention and Arbitration Rules, “Argentina has waived its right to challenge the arbitrators by delaying the filing of its Request as long as it did.”<sup>21</sup> The Respondent argues that it submitted the Proposal “as soon as it learned of the factual and legal bases, which could not occur but after the thorough analysis of each and every of the 713 paragraphs of the Decision adopted by the majority of the Tribunal.”<sup>22</sup>
67. The issue thus arises whether the Respondent has waived its right to make a proposal for disqualification.
68. Under Rule 9(1) of the Arbitration Rules, the right to challenge an arbitrator must be exercised “promptly” but there is no time limit prescribed by the Arbitration Rules or the ICSID Convention. The Parties agree that the word “promptly” means that the party proposing disqualification must make such proposal as soon as it learns of the facts on which the proposal is based. I note that the majority issued the Decision on August 4, 2011. The Proposal for Disqualification was submitted 42 days later, on September 15, 2011. The Dissenting Opinion was issued on October 28, 2011.
69. Having regard to the grounds on which the Proposal is based, and allowing for the time which the Respondent says that it needed in order to learn of the facts giving rise to the challenge, I find no reason not to accept the Respondent’s assertion that the Proposal dated September 15, 2011 was made as soon as the Respondent “learned” of such facts, such time being the point at which the Respondent asserts that it completed its “thorough analysis”<sup>23</sup> of the Decision.

#### **E. Observations on the Grounds on which the Proposal is Based**

70. I shall now set out my reasons in respect of each of the four grounds for the Proposal put forward by the Respondent.

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<sup>19</sup> *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent’s Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010), para. 44.

<sup>20</sup> Claimants’ Reply, p.1.

<sup>21</sup> Claimants’ Reply, p. 2.

<sup>22</sup> Respondent’s Observations, para. 9.

<sup>23</sup> Respondent’s Observations, para. 9.

## 1. Ground One: Rejection of the Urgent Request for Provisional Measures

71. In relation to Ground One of the Proposal, the Respondent contends that the arbitrators' rejection of the Urgent Request for Provisional Measures showed a lack of independent and impartial judgment.<sup>24</sup> The issue therefore arises whether the majority's decision to reject the application for provisional measures constitutes or evidences a lack of independent and impartial judgment.
72. The Respondent bases its Proposal for Disqualification on this issue upon the "manifest arbitrariness" of the Decision of the majority by reason of the defects that the Respondent perceives in that decision, namely, the "abrupt rejection by the majority of the Tribunal of the Urgent Request for Provisional Measures, stating no reasons therefor, failing to consider the new evidence submitted with respect to the existence of fraud and essential mistake, and prejudging the validity of Claimants' consent."<sup>25</sup> The Respondent contends that those defects lead "to an objective loss of reliance upon the exercise of independent judgment" of the challenged arbitrators.<sup>26</sup> As evidence in relation to this ground for the Proposal, the Respondent refers to the Letter dated August 4, 2011,<sup>27</sup> and to certain passages of the Decision.
73. The Respondent argues that the Decision is "clear evidence of partiality when [the majority of the Tribunal] does not admit and consider important and serious evidentiary issues."<sup>28</sup> In this connection, the Respondent refers to paragraphs 501 and 502 of the Decision, in which it is stated that "[t]here is at this stage no indication that such execution [of the documents embodying Claimants' consents] would have been achieved based on fraud, coercion or essential mistake vitiating Claimants' consent" and therefore "[t]he Declaration of Consent signed by the individual Claimants submitted in this proceeding is in principle valid."<sup>29</sup> In the Respondent's view, the Tribunal ought not to have made such a finding "without considering the need to appropriately verify the validity of all the documentation submitted by Claimants."<sup>30</sup>
74. The Respondent refers, further, to paragraph 466 of the Decision, in which it is stated 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," in relation to which it contends that: (i) "the majority of the Tribunal has already acknowledged that individual treatment is 'impossible' thus, the analysis of the existence and validity of consent of each Claimant has been rendered 'impossible'"; (ii) the next phase of the proceedings has already been established to determine the core issues regarding the merits of the case; and (ii) "the majority of the Tribunal has already rejected in a final manner the jurisdictional objections made by [Respondent] based on the acceptance of the validity of Claimants' consent."<sup>31</sup>
75. The Claimants have set out in detail the circumstances surrounding the Urgent Request for Provisional Measures and the Tribunal's ruling on that Request. They submit that the Tribunal's determination that there was no evidence of systematical impropriety as to the manner in which the Claimants' consent to ICSID arbitration was obtained is "fully supported by the record."<sup>32</sup>

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<sup>24</sup> Proposal, paras. 3-18; Respondent's Observations, paras. 12-22.

<sup>25</sup> Respondent's Observations, para. 12.

<sup>26</sup> Respondent's Observations, para. 12.

<sup>27</sup> Proposal, para. 13, citing Letter dated August 4, 2011.

<sup>28</sup> Proposal, para. 68.

<sup>29</sup> Proposal, para. 14, citing Decision, paras. 501 (iv) & 502 (ii).

<sup>30</sup> Proposal, para. 15.

<sup>31</sup> Proposal, para. 16, citing Decision, paras. 296, 670, 464.

<sup>32</sup> Claimants' Reply, p. 14.

76. With respect to the rejection of the Urgent Request for Provisional Measures, Professor Tercier and Professor van den Berg refer to the third and fourth paragraphs of the Letter dated August 4, 2011.<sup>33</sup>
77. Having regard to the importance of the Letter dated August 4, 2011, in relation to the Proposal, the text of that letter is reproduced in full here:

*Dear Mesdames and Sirs,*

*I write to you in the absence of Mr. Flores from the office. At the request of the President of the Tribunal, I send you herewith the Decision on Jurisdiction and Admissibility (the "Decision"), signed by the majority of the members of the Tribunal. The President asked me to inform you as follows.*

*Having fully deliberated the issues but having not received the written text of the Dissenting Opinion to date, the majority of the members of the Tribunal does not see a justification to delay any longer the notification of the Decision to the Parties, also in light of Respondent's recent request mentioned below. Professor Georges Abi-Saab wishes to record his disagreement with the notification of the Decision today without his Dissenting Opinion. If and when the Dissenting Opinion is received and translated into Spanish, it will be communicated to the Parties.*

*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.*

*The matters raised in the Request, however, may be discussed for scheduling and other purposes at the case management conference that will be organized at the earliest convenience of the Parties and the members of the Tribunal for the purposes of the further conduct of the proceedings.*

*Sincerely yours,  
Anneliese Fleckenstein  
Consultant*

78. According to the third paragraph of the Letter dated August 4, 2011, to which the Respondent itself refers in support of its argument on this ground, the majority rejected the request for provisional measures on the grounds that it was convinced by the Claimants' arguments.
79. I recall that the standard of proof required by Article 57 of the ICSID Convention is an objective one which is not based on the perception of the Party proposing the disqualification, and dissatisfaction with a ruling of the Tribunal is not a valid basis for disqualification under Article 57 of the ICSID Convention. On their face, the Respondent's submissions on Ground One are aimed at the reasoning and the decision of the Tribunal. The Respondent's objections are thus based on defects which it perceives in the ruling of the Tribunal on the Urgent Request for Provisional Measures. This cannot give rise to a valid basis for disqualification.
80. Aside from its arguments on the substance of the Tribunal's ruling, the Respondent has not presented any evidence that the majority of the Tribunal was influenced by anything other than its analysis of the arguments which the Parties presented to it concerning the request for provisional measures. Nor has the Respondent pointed to any facts, other than the fact that the Tribunal issued this ruling, with which it disagrees, in support of its challenge on this ground.

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<sup>33</sup> Joint letter of Professor Pierre Tercier and Albert Jan van den Berg dated October 31, 2011, p. 2.

81. The Respondent seeks to present such evidence by referring, first, to the short period of time of 15 days in which the majority of the Tribunal rejected the Urgent Request for Provisional Measures, one day after the Respondent's last submission in that regard,<sup>34</sup> and secondly, by arguing that the majority of the Tribunal "failed to consider the new evidence presented."<sup>35</sup> In the context of the instant case, in which the Hearing on Jurisdiction and Admissibility had taken place in April 2010, and the Tribunal had indicated in a letter dated June 16, 2011, that the English text of the draft Decision had been ready for some time, and, moreover, in the context of an "urgent" request which by its nature requires prompt resolution, I do not see impropriety in the timing of the decision on the Urgent Request for Provisional Measures.
82. The Respondent presents its objections under Ground One as matters giving rise to "objective loss of reliance upon the exercise of independent and impartial judgment by the majority of the members of the Tribunal who adopted the decisions that are questioned here, particularly in light of the limitations on Argentina's right of defence."<sup>36</sup> However, I find that the arguments by the Respondent in relation to Ground One amount to an expression of dissatisfaction with the way in which the majority of the Tribunal decided to conduct the case.
83. An arbitrator is not bound to make rulings which are mutually acceptable to both parties or which are neutral in their effects as against both of the parties. It is the arbitrator's function to make a decision between competing claims, based on his or her judgment. That function will necessarily entail rulings which are adverse to the party whose arguments are not accepted. It follows that a finding of an arbitrator's lack of independence or impartiality requires evidence other than the making of a decision which is considered to be adverse to one party or, indeed, wrong in law or insufficiently supported by reasons. To hold otherwise would be incompatible with any system of adjudication.
84. The "facts" on which the Respondent relies thus do not meet the standard required by Article 57 of the Convention. In other words, the Respondent's Proposal "merely supposes the existence of what it must prove."<sup>37</sup> It "requires the creation of the very inferences that the common definition of the term 'manifest' does not in its ordinary meaning permit."<sup>38</sup>
85. For these reasons, the rejection of the urgent measures application does not give rise to any valid basis for disqualification of an arbitrator.

## **2. Ground Two: Alleged Limitations of the Respondent's Right of Defense**

86. The second basis of the Respondent's Proposal is the allegation that its "right of defense" has been limited by the Decision. The issue thus arises whether there has been a limitation of the Respondent's right of defense that could be deemed to meet the requirements of Article 57.
87. There are three aspects of the Respondent's claim under Ground Two. First, the Respondent points to the fact that the majority has decided to entertain the present mass claim, in which the Claimants initially numbered 180,000 and now number 60,000, and the manner in which it has determined that it will do so. Secondly, the Respondent objects to rulings by the majority on the relevance of certain issues and admissibility. The Respondent points out that there is some overlap between this objection and the issue of "prejudgment", which is considered below.

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<sup>34</sup> Proposal, para. 13.

<sup>35</sup> Proposal, para. 14.

<sup>36</sup> Proposal, para. 18.

<sup>37</sup> *SGS Société Générale de Surveillance v. Pakistan*, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Reports 398, 405.

<sup>38</sup> *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010), para. 44.

Thirdly, the Respondent objects to the majority's finding that the Respondent had failed to present sufficient evidence to demonstrate that the Claimants would not have consented to the arbitration had they known that they risked losing the right to litigate against third parties.

88. The Respondent's case is that it "cannot be expected to rely upon the exercise of independent judgment of those who adopted such an egregious decision"<sup>39</sup> and that "[s]uch 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."<sup>40</sup>
89. In reply to the Respondent's objections towards the Decision, the Claimants submit that the Decision "reflects a thorough and well-reasoned effort to account for the particular nature of the investments and alleged treaty violations at issue, and to balance the procedural and substantive rights of both parties."<sup>41</sup> The Claimants submit that the Decision provides that while the Claimants' "homogeneous" claims might warrant general consideration as to certain issues, individual assessment would still be required as to others.<sup>42</sup> They add that in the Decision, the majority of the Tribunal stated that it "would next assess how best to implement such a framework, and would invite party submissions and possibly hold a hearing to address in particular which issues would require uniform, group, or individual treatment."<sup>43</sup>
90. The Claimants submit, further, that following the issuance of the Decision, the Tribunal provided the Parties with an opportunity to comment on the procedures going forward, and the Respondent did not submit any comments in this regard.<sup>44</sup> The Claimants argue that although the Dissent "reaches divergent conclusions on the issue of Argentina's right of defense", it "does not provide any support for Argentina's claims of arbitrator partiality or lack of independent judgment."<sup>45</sup> They argue, further, that "a difference of opinion over an interpretation of a set of facts is not in and of itself evidence of lack of independence or impartiality," and an arbitrator may even "be wrong on a point of law or wrong on a finding of fact but still be independent and impartial."<sup>46</sup>
91. Professor Tercier and Professor van den Berg refer to the fact that the mission of the Tribunal for the phase of the proceedings that resulted in the Decision concerned the resolution of the 11 issues set forth at paragraphs 127-130 of the Decision.<sup>47</sup> They state that the Tribunal considered those 11 issues in the Decision, and other issues will be addressed in the next phases of the proceedings.<sup>48</sup>
92. I turn now to each of the three aspects of the Respondent's claim of limitation of its right of defense. Any such limitation, to come within Article 57 would have to amount to or evidence a *manifest* lack of independence. Article 57 imposes an objective standard and does not depend on the subjective belief of the challenging party; to hold otherwise would make the system of arbitration under ICSID unworkable. Disagreement with the majority's rulings is not a valid basis for disqualification under Article 57 of the ICSID Convention.
93. In relation to the first aspect, the "mass claims aspect", the Respondent contends that the majority's failure to require each claim to be dealt with individually at the jurisdiction stage and

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<sup>39</sup> Proposal, para. 39.

<sup>40</sup> Proposal, para. 41.

<sup>41</sup> Claimants' Reply, para. 16, citing Decision, paras. 490, 537, 543, 544 and 545.

<sup>42</sup> Claimants' Reply, para. 17, citing Decision, para. 669.

<sup>43</sup> Claimants' Reply, para. 17, citing Decision, para. 670.

<sup>44</sup> Claimants' Reply, para. 17; see also Claimants' Observations, p. 9.

<sup>45</sup> Claimants' Observations, p. 9.

<sup>46</sup> Claimants' Observations, p. 9.

<sup>47</sup> Joint letter of Professor Pierre Tercier and Albert Jan van den Berg dated October 31, 2011, p. 1.

<sup>48</sup> Joint letter of Professor Pierre Tercier and Albert Jan van den Berg dated October 31, 2011, pp. 1-2.



to allow the Respondent to defend each claim one by one indicates lack of independence and impartiality.

94. In my view, the Respondent's contention is not supported by the evidence. Those paragraphs cited by the Respondent in which the majority itself draws attention to limitations on the Respondent's procedural rights (paragraphs 536, 543) demonstrate that it was aware of such limitations and that it considered them justified in the circumstances and on the basis of the applicable law. At paragraphs 521-547, the Tribunal set out its legal reasoning in ruling on its competence to proceed with the collective claim. Indeed, several of the paragraphs cited by the Respondent (paragraphs 519, 536, 545) demonstrate that the majority was conscious of the need to balance the procedural rights of the Claimants and the Respondents and that it adopted an approach which it considered would do so. Significantly, at paragraph 545 of the Decision, the majority states: "The measures that Argentina would need to take to face 60,000 proceedings would be a much bigger challenge to Argentina's effective defense rights than a mere limitation of its right to individual treatment of homogenous claims in the present proceedings."
95. It follows from the foregoing that neither the fact that the majority decided to uphold jurisdiction over the present collective claim nor the manner in which it decided to do so either suggest or establish a lack of independence or impartiality. Rather, the Respondent's complaint on this basis relates to its dissatisfaction with the substance of those rulings.
96. In relation to the second aspect, the "jurisdiction/merits" aspect, the Respondent's case is that it has been precluded from invoking specific defenses, both at the phase of the proceedings to which the Decision relates, and in the assessment of the merits and of any damages, to such an extent as to call into question the impartiality and independence of the majority. The Respondent refers to paragraphs 542 and 543 in support of its contention.
97. The context of paragraphs 542 and 543 of the Decision is the question at paragraph 541 "whether Claimants have homogenous rights of compensation for a homogenous damage caused to them by potential homogenous breaches by Argentina of homogenous obligations provided for in the BIT". The underlying question, set out at paragraph 540, is whether the Claimants' claims are sufficiently homogenous to justify the collective treatment of the 60,000 claims. In that context, at paragraph 542, the majority refers to its reasoning for considering certain claims against third parties to be irrelevant by a cross-reference to paragraphs 327-330 of the Decision. In the same context, at paragraph 543 of the Decision, the Tribunal finds that the potential damage is the same in nature. These rulings are said to breach the Respondent's procedural rights and to limit its right of defense in the remainder of the proceedings because they are said to preclude defenses raised by the Respondent in respect of the individual circumstances the Claimants.
98. Bearing those considerations in mind, I note that the Respondent's objections to paragraphs 542 and 543 of the Decision are based exclusively on the defects which it perceives in the reasoning and conclusions set out therein. As such, they are not directed at the qualities of the challenged arbitrators but at the correctness of the decision.
99. I recall that under Article 57 of the Convention, the Respondent has the burden of establishing facts indicating a lack of the qualities required by Article 14(1) of the Convention. An inference based on the supposition that a ruling must result from partiality by reason of its being perceived as legally or procedurally defective or adverse to the Respondent cannot suffice for this purpose. To find otherwise would require the application of a subjective, self-judging standard, rather than the objective one required under Article 57 of the ICSID Convention, and the creation of the very inferences that the word "manifest" does not in its ordinary meaning permit. I do not consider that the objections raised in relation to paragraphs 542 and 543 of the Decision demonstrate any fact other than the Respondent's dissatisfaction with the reasoning set out therein.

100. The third and final aspect of the Respondent's objection under the ground of limitation of its right of defense relates to the finding at paragraph 460 that the Respondent had failed to demonstrate that the Claimants would not have consented to ICSID jurisdiction had they known that they risked losing potential claims against certain third parties.
101. The Respondent has not presented any evidence to suggest that the majority's finding at paragraph 460 is based on anything other than an impartial assessment of the evidence and arguments presented to the Tribunal. The Respondent contends that the Tribunal had "already decided" that the specific circumstances of each Claimant are irrelevant and thus prevented it from bringing arguments on this issue. However, that contention is not supported by any evidence. On the contrary, the finding set out at paragraph 460 relates to the Claimants' claims in their entirety, and the relevant conclusion at paragraph 465 is qualified by the words "at this stage". In any event, the Respondent's contention simply amounts to an expression of dissatisfaction with the content of the decision.
102. Aside from its dissatisfaction with the content of the Decision as set forth in detail above, the Respondent has not put forward any evidence that leads it to suppose that the majority lacked independence in reaching that decision, nor indeed has it put forward any arguments based on the qualities of the persons who made it, or the circumstances in which it was made. The Respondent argues that the decision was so "egregious" that it has lost confidence in the independence and impartiality of the majority. In this way, the Respondent seeks to infer that the majority reached the conclusions with which it disagrees because they lacked independence. Thus, in relation to the alleged limitation of its right of defense, the Respondent's Proposal "merely supposes the existence of what it must prove."<sup>49</sup> It "requires the creation of the very inferences that the common definition of the term 'manifest' does not in its ordinary meaning permit."<sup>50</sup>
103. For the above reasons, the alleged limit on the Respondent's right of defense does not give rise to any valid basis for disqualification of an arbitrator.

### 3. Ground Three: Prejudgment

104. The third issue is whether the Proposal should be upheld on the basis that certain issues are "prejudged" by the Decision. The Respondent submits, in relation to Ground Three, that certain rulings of the majority in its Decision amount to a prejudgment of certain of the underlying facts pertaining to the merits, including the certain of the underlying facts, the nature of the Claimants' claims, and the validity of the instruments of consent submitted on the Claimants' behalf.<sup>51</sup>
105. The issues which are said to be prejudged by the Decision are (i) the characterization of the Respondent's actions in passing the legislation known as the Emergency Law of 2001 as a "unilateral modification" of its payment obligations, which is said to amount to a prejudgment on the merits of the dispute; (ii) certain issues pertaining to the expression of the Claimants' consent to ICSID arbitration through the TFA Mandate Package; and (iii) the issue of whether the Claimants' claims are "homogenous in nature".
106. In response to the Respondent's submissions on this ground, the Claimants emphasize that in the Decision, "[t]he treatment of factual issues is set forth 'to the extent it is not disputed between the Parties' and is 'not meant to be exhaustive, and simply aims to lay down the general context of

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<sup>49</sup> *SGS Société Générale de Surveillance v. Pakistan*, Decision on Claimant's Proposal to Disqualify Arbitrator (Dec. 19, 2002), 8 ICSID Reports 398, 405.

<sup>50</sup> *Alpha Projektholding GmbH v. Ukraine* (ICSID Case No. ARB/07/16), Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010), para. 44.

<sup>51</sup> Proposal, paras. 42-55; Respondent's Observations, paras. 35-42.

the dispute, while focusing on aspects relevant to this jurisdictional phase.”<sup>52</sup> Furthermore, “[t]he Tribunal’s ‘task at the stage of determining whether it has jurisdiction to hear a claim under an investment treaty merely consists in determining whether the facts alleged by the claimants, if established, are capable of constituting a breach of the provisions of the BIT which have been invoked...Whether Claimants’ presentation of the facts is accurate will, if necessary, be examined during the merits stage of these proceedings.”<sup>53</sup> According to the Claimants, it follows from the foregoing that the Respondent’s description of specific passages in the Decision as “prejudgment” is a mischaracterization.<sup>54</sup>

107. In their comments dated October 31, 2011, Professor Tercier and Professor van den Berg state that the fact that they considered and decided on the 11 issues relating to jurisdiction and admissibility “cannot be characterized as ‘prejudgment’” and does not relate to the exercise of independent judgment.<sup>55</sup>
108. I turn now to each of the passages in the Tribunal’s reasoning which are cited by the Respondent as specific instances of “prejudgment” indicating a manifest lack of the qualities required by Article 14(1) of the Convention. It is recalled that any such prejudging, to come within Article 57, would have to amount to or evidence a *manifest* lack of independence. This is to be determined by reference to an objective standard and does not depend on the subjective belief of the challenging party. It is recalled, further, that disagreement with the majority’s rulings is not a valid basis for disqualification under Article 57 of the ICSID Convention.

**(a) Alleged Instances of Prejudgment concerning the Emergency Law of 2005**

109. Paragraph 321 of the Decision states:

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

110. Paragraph 324 of the Decision states:

*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.*

111. In relation to paragraphs 321 and 324 of the Decision, the Respondent states that those paragraphs evidence the fact that “[t]he 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.”<sup>56</sup> The Respondent contends that “[s]uch 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 Argentina-Italy BIT].”<sup>57</sup>

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<sup>52</sup> Claimants’ Reply, p. 18.

<sup>53</sup> Claimants’ Reply, p. 18.

<sup>54</sup> Claimants’ Observations, p. 8.

<sup>55</sup> Joint letter of Professor Pierre Tercier and Albert Jan van den Berg dated October 31, 2011, p. 2.

<sup>56</sup> Proposal, para. 43; See also Respondent’s Observations, para. 35.

<sup>57</sup> Proposal, paras. 43, 46.

112. The Claimants submit that it is an “established fact” that is undisputed in these proceedings and in the public domain that Argentina “defaulted on its sovereign debt payment obligations in December 2001 and that Argentina subsequently deconstructed the applicable legal framework and restructured its debt.”<sup>58</sup> According to the Claimants, “[t]here simply is no question, and thus can be no prejudgment, as to the established fact that Argentina modified its payment obligations.”<sup>59</sup> The Claimants add that “[w]hether such modification constitutes a violation of Argentina’s [obligations under the Argentina-Italy BIT] will be assessed and decided during the merits phase.”<sup>60</sup>
113. To my mind, the question that arises in relation to these paragraphs is whether the majority of the Tribunal can, in these statements, properly be considered as having taken a position on the issue whether the Respondent’s modification of its payment obligations was a violation of the Argentina-Italy BIT, as alleged in the Proposal,<sup>61</sup> rather than on the question whether such modification was said by the Respondent to be effected pursuant to any “contractual right.”<sup>62</sup> The question to which paragraphs 321 and 324 of the Decision relate is whether the Claimants’ claims were treaty claims in nature.<sup>63</sup> I find that, on the face of the Decision, the majority of the Tribunal was not taking a position on the issue of whether the Respondent’s modification of its payment obligations was justified or not. In my view, therefore, the objections raised in the Proposal in relation to the characterization of the Respondent’s modification of its payment obligations amount to a criticism of the legal effect of the relevant paragraphs for the Respondent in the next phase of the proceedings, which is said to be prejudicial to the Respondent. Such legal effect is in dispute between the Parties and does not fall to be determined in the present analysis; in any event, it is not connected with the independence and impartiality of the challenged arbitrators.

**(b) Alleged Instances of Prejudgment concerning the Claimants’ Consent to Arbitration**

114. Paragraph 461 of the Decision states:

*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.*

115. Paragraph 463 of the Decision states:

*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 and even by supporting them in the revocation of the TFA Mandate Package, the tolling of the prescription period and/or the filing of legal claims against the banks. 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*

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<sup>58</sup> Claimants’ Reply, p. 19.

<sup>59</sup> Claimants’ Reply, p. 19.

<sup>60</sup> Claimants’ Reply, p. 19.

<sup>61</sup> Proposal, para. 43.

<sup>62</sup> Decision, para. 321.

<sup>63</sup> Decision, paras. 316-326.

*commitment to ICSID arbitration, and it is irrelevant whether or not they eventually really understood such commitment.*

116. Paragraph 464 of the Decision states:

*Thus, while the Tribunal does not take a position on TFA's representation scheme resembling a "seduction operation," 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.*

117. The Respondent argues that the assertion, at paragraph 461 of the Decision, that the present dispute is not a consumer dispute has no basis in fact because "all the evidence presented by the parties expressly indicates that the Claimants were precisely unsophisticated consumers."<sup>64</sup> The Respondent also argues that the challenged arbitrators acknowledge their own contradictions in paragraph 463 of the Decision, which provides that "various associations started to assist Italian purchasers of Argentinean bonds by disseminating information on available legal means."<sup>65</sup>
118. In relation to paragraph 463 of the Decision, the Respondent submits, further, that the Tribunal made "a prejudgment that whether or not Claimants 'really' understood their commitment to ICSID arbitration is 'irrelevant.'"<sup>66</sup>
119. In relation to paragraph 464 of the Decision, the Respondent submits that this conclusion is surprising in light of the submission of "multiple evidence that seriously casts doubt on Claimants' consent."<sup>67</sup> According to the Respondent, "[s]uch 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')" is evidence of manifest prejudgment "whose effect is to, objectively, cause a loss of confidence in the exercise of impartial and independent judgment."<sup>68</sup>
120. The Claimants maintain that "individual Claimant issues were beyond the scope of the first jurisdictional phase" and thus "the Tribunal properly preserved them for treatment at a later stage."<sup>69</sup> The Claimants state that "[i]n any event, the Tribunal expressly stated that its review of the Claimants' claims for jurisdictional purposes was governed by the applicable *prima facie* standard."<sup>70</sup> According to the Claimants, "[s]hould Argentina want to dispute the factual allegations, or should individualized Claimant assessments be deemed appropriate, there will be opportunities at a later stage."<sup>71</sup> The Claimants maintain that the Respondent's presentation of the conclusions of the majority as "prejudgments" is a mischaracterization.<sup>72</sup>
121. I consider that the objections raised by the Respondent in respect of paragraph 461 of the Decision are that the Tribunal's assessment does not accord with the evidence in the case and that it is inconsistent with the finding at paragraph 463. Similarly, the Respondent's objection in respect of paragraph 463 of the Decision amounts to disagreement with the Tribunal's evaluation of the relevance of individual Claimants, and disagreement with the Tribunal's analysis of the legal effect of subsequent events in "curing" relevant flaws in the TFA Mandate Package. Finally, and again, the Respondent's objection to paragraph 464 of the Decision is leveled at the analysis

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<sup>64</sup> Proposal, at paras. 47-48.

<sup>65</sup> Proposal, para. 48.

<sup>66</sup> Proposal, para. 50.

<sup>67</sup> Proposal, para. 51.

<sup>68</sup> Proposal, para. 51.

<sup>69</sup> Claimants' Reply, p. 19.

<sup>70</sup> Claimants' Reply, p. 19, citing Decision, paras. 311, 315.

<sup>71</sup> Claimants' Reply, p. 19.

<sup>72</sup> Claimants' Observations, p. 8.

of the evidence and the conclusion drawn from that analysis by the majority. Such analysis relates to the issues that are in dispute between the Parties in the present proceedings and it is not appropriate to seek to resolve such issues in the present recommendation. In any event, I find that the issues raised by the Respondent here do not relate to the independence and impartiality of the challenged arbitrators.

**(c) Alleged Instances of Prejudgment concerning the Nature of the Claimants' Claims**

122. At paragraphs 541, 544 and 545 of the Decision, the majority of the Tribunal states that the Claimants' claims and investments were "homogeneous."
123. At paragraph 543 of the Decision, the majority of the Tribunal states that "[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 [...]."
124. The Respondent contends that the description of the Claimants' claims as "homogenous" at paragraphs 541, 544 and 545 of the Decision constitutes a prejudgment as "no claim has been discussed in a proper and individual manner."<sup>73</sup> According to the Respondent, at paragraph 543 of the Decision, the challenged arbitrators prejudged "the manner in which the Exchange Offer affected each Claimant."<sup>74</sup>
125. The Claimants maintain that the ruling that the Claimants' claims are homogeneous prior to an individual assessment does not constitute a prejudgment.<sup>75</sup> The Claimants note that the Tribunal's "review of Claimants' claims for jurisdictional purposes was governed by the applicable *prima facie* standard", and further submit that "[t]o the extent that Claimants each invested in Argentine bonds and held them at the time of Argentina's default and subsequent actions, their claims arise from the same acts and circumstances, and raise the same alleged violations of the Argentina-Italy BIT."<sup>76</sup>
126. I consider that the Respondent's objections in relation to paragraphs 541, 543-545, and 665 of the Decision are concerned with the Respondent's dissatisfaction at the fact that the Tribunal declined to analyze each claim individually. Similarly, the Respondent's objection to paragraph 543 of the Decision is a criticism of the effect of the Tribunal's conclusion. In my view, such criticisms amount to disagreement with the way that the majority determined was appropriate to proceed with the conduct of the proceedings, and its analysis of the evidence in support of its findings.
127. It can thus be seen that each of the Respondent's specific objections on this ground are based on its characterization of specific statements as "prejudgment", which in turn is based on the contention that they lack merit, or in other words, on the Respondent's evaluation of the Tribunal's reasoning, or of the underlying facts, or of the consequences in the next phase of the proceedings. Each of the specific instances of alleged prejudgments amounts, in effect, to a substantive criticism of the basis or of the effect of the Tribunal's conclusions. Each of those objections is thus aimed at the substance of the Decision. This is not a valid basis for disqualification under Article 57 of the ICSID Convention.
128. The Respondent has not presented evidence of any objective fact that would suggest that the Tribunal's findings were based on anything other than its analysis of the available materials. On

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<sup>73</sup> Proposal, paras. 52-54.

<sup>74</sup> Proposal, para. 55.

<sup>75</sup> Claimants' Reply, p. 19.

<sup>76</sup> Claimants' Reply, p. 19.

the contrary, the face of the record indicates that the majority did exercise its judgment in relation to the Parties' submissions and the available evidence.

129. The Respondent has not pointed to any fact other than the defects that it perceives in the majority's findings of fact and its rulings on the law, as set forth in the Decision. The Respondent has not provided any evidence of any such fact, nor has it pleaded any facts relating to the qualities of the challenged arbitrators. The Respondent seeks to draw an inference of lack of independence from the assertion that the Tribunal could only have reached such a ruling if it lacked independence. However, Article 57 requires proof of the existence of facts giving rise to the inference of lack of independence. A mere assertion or speculation is not sufficient.
130. The Respondent has submitted that Professor Tercier and Professor van den Berg, in their comments in the context of the present disqualification proceedings, should have provided an explanation of why their decision entailed no prejudgment whatsoever.<sup>77</sup> However, the burden of proof is on the party making the allegation of a failure to meet the qualities required by Article 14(1) of the Convention. In the absence of some objective fact, such as a connection or relationship with one party, indicating a predisposition towards that party, it is not for the challenged arbitrator to provide positive proof of his or her independence and impartiality.
131. In conclusion, the Respondent has not provided evidence of any "prejudgment" by the challenged arbitrators such as would indicate a lack of independence or impartiality.

#### **4. Ground Four: Issuance of the Majority Decision without the Dissent**

132. The fourth and final ground on which the Proposal for Disqualification is based is the fact that the majority communicated the decision without the Dissenting Opinion.
133. The Respondent argues that "[t]he decision to transmit the majority award only, without the dissenting opinion, relates to the issue of failure to exercise independent judgment ... as such decision benefitted Claimants but prejudiced the Argentine Republic."<sup>78</sup> The Respondent also argues that the Tribunal manifestly lacked independence because it did "exactly what the Claimants asked it to do" in their letter of July 21, 2011. Finally, the Respondent points to the role of dissenting opinions in due process, and argues that there has been a violation of due process in this case, on the grounds that the failure to wait for the dissenting opinion indicates that there was a lack of proper deliberation by the Tribunal.
134. The Respondent makes the distinction that the issue of whether the Tribunal had authority to issue a majority decision is not in issue: "The Tribunal may adopt a majority decision and this power has not been questioned by Argentina. What the majority should not have done is transmit the determination to the parties without even waiting for the dissenting opinion of the other member of the Tribunal. This situation was expressly objected to by Arbitrator *Abi-Saab*."<sup>79</sup>
135. The Claimants argue that the absence of a dissenting opinion does not indicate an absence of proper tribunal deliberation.<sup>80</sup> In support of their argument, the Claimants note that the hearing on jurisdiction was held in April 2010 and thus the Tribunal had a period of 16 months in which to deliberate.<sup>81</sup> They contend that the Tribunal's correspondence with the parties confirm that all members were involved in the deliberative process and the process was delayed due to Professor

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<sup>77</sup> Respondent's Observations, para. 42.

<sup>78</sup> Respondent's Observations, para. 26.

<sup>79</sup> Respondent's Observations, para. 29.

<sup>80</sup> Claimants' Reply, pp. 8-9.

<sup>81</sup> Claimants' Reply, pp. 8.

Abi-Saab's health concerns.<sup>82</sup> They further contend that "[t]he Dissent makes no mention of any purported issue with the Tribunal's deliberations."<sup>83</sup>

136. The Claimants also argue that in any event, the timing of the communication of the Dissenting Opinion (i) nearly three months after the Decision, (ii) more than four months after the Tribunal indicated that a draft Decision had been ready for some time, and (iii) nearly 19 months since the conclusion of the hearing, lends further support to the majority's determination to issue the Decision when it did.<sup>84</sup> The Claimants submit that, given the fact that they have been "prejudiced by repeated delays throughout these proceedings" and "the Dissent could not alter the outcome", "there was no reason to further delay the Decision and the proceedings to wait for the Dissent."<sup>85</sup> They add that the record demonstrates that the challenged arbitrators waited more than one month before issuing the Decision.<sup>86</sup>
137. In their comments dated October 31, 2011, Professor Tercier and Professor van den Berg maintain that they decided to issue the Decision after the issues had been "fully deliberated" and mindful of the principle that arbitration should take place expeditiously.<sup>87</sup> They add that they are not aware of any "legal requirement that a decision must be issued simultaneously with a dissenting opinion", and thus their determination does not implicate their independent judgment.<sup>88</sup>
138. The issue that thus arises is whether the decision of the majority to communicate its Decision to the Parties without the Dissenting Opinion is a fact indicating a "manifest" lack of independence.
139. I note that the Respondent has presented arguments on the function of dissenting opinions generally as an instrument of due process. Whatever view one might take with respect to such arguments, I consider that these are outside the scope of the present analysis since they pertain directly to the correctness of the majority's rulings (i) that it was competent to issue the Decision without the Dissenting Opinion and (ii) that it was appropriate to do so in the circumstances. Such arguments thus amount to a statement of dissatisfaction with those rulings. I recall that under Article 57 of the ICSID Convention, the Respondent is required to prove that its proposal is supported by objective fact, and that an allegation that a decision was wrong in law or susceptible of reversal does not suffice for that purpose.
140. The Respondent has sought to present evidence in order to discharge the burden of proof under Article 57 of the ICSID Convention. However, almost all of the documents relied on by the Respondent as evidence, including the legal submissions and the evidence presented by the Parties; procedural orders issued by the Tribunal; the Decision; and the Dissenting Opinion, are submitted as support for the Respondent's legal analysis in relation to its disagreement with the rulings of decision of the challenged arbitrators to issue the Decision in the circumstances. There are two documents relied upon by the Respondent which in my view could be considered as exceptions in that regard.
141. First the Respondent refers to a letter from the Claimants dated July 20, 2011. It states that the Tribunal did "exactly what Claimants had asked them to"<sup>89</sup> in that letter, demonstrating a manifest lack of independent judgment. Secondly, the Respondent relies on the Letter dated August 4,

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<sup>82</sup> Claimants' Reply, pp. 8-9.

<sup>83</sup> Claimants' Observations, p. 6.

<sup>84</sup> Claimants' Observations, p. 6.

<sup>85</sup> Claimants' Observations, p. 6.

<sup>86</sup> Claimants' Observations, p. 6.

<sup>87</sup> Joint letter of Professor Pierre Tercier and Albert Jan van den Berg dated October 31, 2011, p. 2.

<sup>88</sup> Joint letter of Professor Pierre Tercier and Albert Jan van den Berg dated October 31, 2011, p. 2.

<sup>89</sup> Respondent's Observations, para. 26.



2011,<sup>90</sup> as evidence of the fact that the majority communicated the Decision without the consent of the dissenting arbitrator and “without even waiting for a draft of said opinion”.<sup>91</sup> The Respondent states that this is evidence of arbitrary and “absolutely inappropriate”<sup>92</sup> conduct by the majority.

142. I turn first to the Claimants’ letter dated July 20, 2011.<sup>93</sup> This is a letter addressed to the Tribunal and copied to the Respondent. It requests the Tribunal to proceed immediately to issue a decision, “even if by only a majority.” I will return to this letter below.<sup>94</sup> First, in order to understand such request in its context, I have reviewed the correspondence exchanged prior to July 20, 2011, to which the Parties refer in their submissions.

143. By letter dated February 11, 2011, the President of the Tribunal stated:

*The Tribunal hereby would like to inform the Parties that – since the hearing of April 2010 – it has made substantial progress in the decision making and drafting of its conclusions on jurisdiction. However, it is not yet in a position to render its findings and it is difficult to estimate any specific time for doing so. Nevertheless, the Tribunal would like to reassure the parties that all the members of the Tribunal are actively and constructively cooperating in view of rendering its conclusions as soon as possible.*

144. By letter dated May 25, 2011, the Claimants referred to the above letter dated February 11, 2011, and requested that the Tribunal “proceed to a prompt conclusion of its deliberations and issuance of the decision on jurisdiction”. In support of that request, the Claimants pointed to the time that had elapsed in the proceedings to date and stated that many of the Claimants were past retirement age or had died in the interim.

145. By letter dated June 16, 2011, the President of the Tribunal informed the Parties as follows:

*The Tribunal has deliberated several times [after the Hearing on Jurisdiction]. .... The English text of the draft of the Award/Decision has been ready for some time. Recently, one of the arbitrators expressed his intention to dissent with respect to the resolution of the issues contained in the List of 11 Issues as addressed in the draft of the Award/Decision. Every effort will be made to issue the Award/Decision as soon as possible.*

146. The Claimants’ letter dated July 20, 2011, is a response to the above letter dated June 16, 2011. It begins by noting that “more than a month has passed” since the letter informing the Parties that the text of the Decision had been ready for some time. In addition to setting out the reasons why the Claimants considered that the Tribunal could and should issue a decision by majority while the dissent was in progress, the letter states that “[b]oth Parties have emphasized the importance of a prompt decision.” It then requests that the Tribunal “issue its ruling immediately – even if by only a majority.”

147. The Respondent then submitted its Urgent Request for Provisional Measures on July 21, 2011.

148. By e-mail dated July 27, 2011, the Secretary of the Tribunal informed the Parties, in response to the Claimants’ letter dated July 20, 2011, that “the Tribunal is conscious of the importance of an expedited and efficient administration of the arbitration proceeding and of the parties’ shared desire to promptly receive the Tribunal’s findings on the eleven preliminary jurisdictional issues. The Tribunal intends to convey these findings imminently.”

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<sup>90</sup> Proposal, paras. 13, 19.

<sup>91</sup> Proposal, para. 19.

<sup>92</sup> Proposal, para. 20.

<sup>93</sup> Claimants’ letter dated July 20, 2011.

<sup>94</sup> See below, para. 146.

149. I have not been directed to any objection by the Respondent to this message or to the Claimants' letter dated July 20, 2011. However, the Respondent did have the opportunity to present its views on how the Tribunal should proceed, and it did so. On August 3, 2011, in its final submission on the Urgent Request for Provisional Measures, the Respondent requested that the Tribunal either (i) resolve immediately to decide on the Urgent Request for Provisional Measures prior to the adoption of its decision on jurisdiction or (ii) inform the Parties forthwith that its decision on the Urgent Request for Provisional Measures would not be adopted before its decision on jurisdiction.
150. It would be reasonable to suppose that, had the Respondent wished to raise an objection to the Tribunal proceeding to issue a Decision while a dissent was in progress, it would have done so at the latest following the e-mail dated July 27, 2011, which confirmed that a decision would be issued imminently, on the express basis that the Tribunal understood that the Parties' desire for prompt resolution was "shared". The Respondent did have the opportunity, after July 20, 2011, to present its comments on the way in which the Tribunal should proceed, but did not offer any comments on the question of whether a decision ought to be issued while a dissent was in progress. It was only in its Proposal, after the content of the majority decision was made known to the Parties, and, in its own words, after the Respondent had had the opportunity for "thorough analysis"<sup>95</sup> of that Decision, that the Respondent raised an objection to the issuing of a majority decision without the dissent.
151. I turn, secondly, to the Letter dated August 4, 2011, which is reproduced in full above.<sup>96</sup> For convenience, the paragraph concerning the Dissenting Opinion is reproduced here:

*Having fully deliberated the issues but having not received the written text of the Dissenting Opinion to date, the majority of the members of the Tribunal does not see a justification to delay any longer the notification of the Decision to the Parties, also in light of Respondent's recent request mentioned below. Professor Georges Abi-Saab wishes to record his disagreement with the notification of the Decision today without his Dissenting Opinion. If and when the Dissenting Opinion is received and translated into Spanish, it will be communicated to the Parties.*

152. The Respondent submits, with reference to the above passage, that 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."<sup>97</sup> It concludes that the conduct of the challenged arbitrators, as evidenced by the Letter dated August 4, 2011, "manifestly precludes their impartiality."<sup>98</sup> The Respondent argues, further, that it was arbitrary for the challenged arbitrators to point to the Urgent Request for Provisional Measures as a reason for issuing the Decision "without waiting for a draft of the Dissenting Opinion."<sup>99</sup>
153. In the Letter dated August 4, 2011, the challenged arbitrators state their reasons both for rejecting the Urgent Request for Provisional Measures and for issuing the Decision without waiting for the Dissenting Opinion. They noted that the issues had been "fully deliberated" and concluded that there was no justification in waiting any longer. In the absence of objective evidence that such conclusion was tainted by a predisposition towards the Claimants, rather than an objective assessment of the Parties' arguments in all the circumstances, I do not see any reason to find that the issues were not fully deliberated within the Tribunal. In the circumstances, I do not consider that the Letter dated August 4, 2011, indicates a lack of impartiality.

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<sup>95</sup> Respondent's Observations, para. 9.

<sup>96</sup> See above, para. 77.

<sup>97</sup> Proposal, para. 24.

<sup>98</sup> Proposal, para. 24.

<sup>99</sup> Proposal, para. 21.

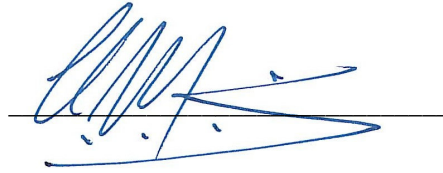
154. In sum, and leaving aside the arguments presented by the Respondent in terms of the requirements of due process, which are directed at the legal correctness of the Tribunal's ruling and as such are not sufficient to establish a valid basis for disqualification under Article 57, I do not find that there is any evidence to support the suggestion that the majority demonstrated partiality by issuing the Decision without waiting for the Dissenting Opinion.
155. In conclusion, the communication of the Decision to the Parties prior to the communication of the Dissenting Opinion does not give rise to any valid basis for disqualification.

#### **F. Conclusion**

156. It follows from the legal principles set out at paragraphs 63 to 65 of this Recommendation that a proposal for disqualification that is based *only* on an inference drawn from the substance of rulings which are said to be so unjust to the challenging party that they can only have resulted from a lack of independence and impartiality on the part of the arbitrators in question, without evidence of any objective fact in support of such inference, but supported only by arguments directed at the supposed injustice of the rulings in question, does not meet the standard required by Article 57 of the ICSID Convention.
157. I consider that the Respondent's submissions in support of the Proposal are based on its legal arguments directed at the substance of the rulings of the challenged arbitrators. They are thus based on the Respondent's subjective perception of the challenged arbitrators. The Respondent has offered no objective evidence demonstrating that the challenged arbitrators had regard to anything other than their independent and impartial assessment of the Parties' arguments in making any of the rulings to which the four grounds of the Proposal relates, whether those four grounds are considered individually or as a whole, nor has it offered evidence of any other objective fact from which it would be reasonable to infer a lack of independence or impartiality.
158. In the circumstances, I conclude that the Respondent has not discharged the burden of proving that either Professor Tercier or Professor van den Berg manifestly lacks any of the qualities required under Article 14(1) of the ICSID Convention in relation to any of the four grounds on which the Proposal is based.

**G. Recommendation**

159. It is for the foregoing reasons that I recommend that the proposal to disqualify Professor Tercier and Professor van den Berg be rejected.



Christiaan M. J. Kröner

Secretary-General  
Permanent Court of Arbitration

The Hague, December 19, 2011