

Statement of Dissent to the President' letter dated 4 November 2013.

I cannot join my colleagues on the above letter for the following reasons:

1. The further entries of data in the Database requested by the Claimants

1. I reiterate my objections to the entries of old data in the Tribunal's recorded Database done by the Claimants before and/or after P.O. N° 22 which I consider to be contrary to an orderly unfolding of the present proceeding as well as to basic principles, rules and practices concerning the administration of proof followed in international arbitral and judicial procedures, as I had already the occasion to explain in my previous relevant individual or dissenting statements on the matter. The same considerations apply to the present Claimants' requests to be authorized to make further entries, of new data this time, in the said Database.

2. The right of the Parties to submit elements of evidence is not envisaged by the applicable procedural principles and rules as a *continuum* during the written phase, but rather as a right to be exercised by each Party on the occasion of the filing of their respective second written pleading and without modifying in any respect the Tribunal's recorded elements of proof (or relating thereto) submitted by the same Party together with its own first written pleading.

3. I cannot therefore but declining the authorization requested by Claimants to make new entries of new data in the recorded Database, without prejudice of the right of the Claimants to submit the alleged new data in their possession either in another database or under any other convenient manageable form separated from the original recorded Database. The solution of the majority's letter consisting in authorizing the entries of new data in the recorded Database subject to the reservation of its formal admission into the record in the future by the Tribunal seems to me an awkward one, susceptible of confusing the autonomy of each element of proof as originally presented, as well of multiplying the problems which poses the introduction of databases to the security of arbitral proceedings. However, I take formal notice of the said reservation of the majority while waiting for the Parties' views on the issue in their for-coming Memorials.

2. The discontinuance of alleged withdrawing Claimants requested by the Claimants

4. The present proceeding is not a "representative" but an "aggregate" proceeding, but by today there is not certainty as to the identity of the individual claimants Parties to the case. Further, the exchanges between Claimant's Counsel and the Respondent have not clarified the issue at all to the point that it emerges from those exchanges an "incidental dispute" calling for hearing the parties thereon at a meeting, before the Tribunal takes any decision on the matter.

5. Furthermore, at present any decision cannot be but a *blind decision* because of the lack of circulation of copies of the withdrawn powers nor of other relevant information which might exist to the members of the Tribunal. For my part, I am not in a position to adopt a blind decision on any matter, and still less in a matter concerning one of the constituting elements of the case, namely the definition of the parties thereto.

6. Thirdly, I do not see in its letter of 24 October 2013 the Respondent's consent to the thousands of discontinuances requested by the Claimants Party, as provided for in ICSID Rule 44. The Respondent in that letter asked for an extension of the two days time limit granted to it for the comments requested the Tribunal, so as to achieve verification of the relevant material concerning each and every one of the Claimants referred to in the 90.000 files forwarded to it by the Claimants. Rule 44 does not provide either that, in the exercise of its right under that Rule, the Respondent must motivate its objection or not objection. In any case, the majority of the Tribunal never answered the demand for the extension of the said time limit of the Respondent.

7. The above silence does not prevent now the majority to go along with the Claimants Counsel's request by granting discontinuance with regard to the Claimants listed in the list attached to Claimants' letter of 24 September 2013 to the extent that these Claimants' withdrawals be "full and final" in the sense of para. 629 of the Decision of the Tribunal of 4 August 2011. In such a manner and with the addition of the underlying confusion between Respondent's consent to "discontinuance in general" and its consent to "the particular discontinuance of each and every one of the thousands of Claimants", the exclusive right of the Respondent under ICSID Rule 44 is put aside for any practical purpose. The application made by the majority's letter of ICSID Rule 44 makes me remember the fallacies of the "similar issues theory", an unacceptable proposition in public international law that I cannot accept.

8. In the light of the text of Rule 44 and the circumstances surrounding its no application by the majority in the present context as it should be, I decline also at present the discontinuances requested by the Claimants. At the same time, I take note that the majority's letter postpones the final decision of the Tribunal on the withdrawals referred above after receiving the Parties' Memorials. However, in the meantime, namely now, Claimants are already entitled by the majority's letter to withdraw the alleged "Withdrawing Claimants" from the Database (my position above entries in the recorded Database apply likewise to deletions therein). How could the Tribunal find in the future the Claimants deleted now from the Database in order to be in a position to take the announced final decision on discontinuance? The list of withdrawals provided so far to the Tribunal by the Claimants is not more than a mere list without annexing any element of proof of the intention of the alleged "Withdrawing Claimants".

9. In any case, the present decision of the majority not being cast in the form of a Procedural Order I consider that, in the said meantime, the Claimants deleted by Counsel continued to be in law Claimants with all their rights and obligations, notwithstanding their deletion from the recorded Database following authorization given by the today's letter of the majority.

3. The extension of the deadline for the filing of the Reply requested by the Claimants

10. I approve the extension of the deadline for the filing of the Reply as requested by the Claimants, (although I consider that the extension granted should have been under the circumstances of a month), but providing of course that an equitable extension should likewise be granted to the Respondent as requested by and for the reasons advanced by it, as explained in my statement of dissent of 21 October 2013. I therefore reject the calendar in the letter as

framed, as well as the Claimants' entitlement for submitting a further Rejoinder Memorial on Jurisdiction listed in the calendar *as per* my prior several statements on the that particular issue.

4 November 2013

Signed: Santiago Torres Bernárdez