ICSID Case No. ARB/07/5

GIOVANNA A BECCARA AND OTHERS
(**CLAIMANTS**)

and

THE ARGENTINE REPUBLIC
(RESPONDENT)

PROCEDURAL ORDER NO. 3

(CONFIDENTIALITY ORDER)

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27 JANUARY 2010

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PRELIMINARY REMARKS

1. In this Order, the Tribunal adopts the following method of citation:

- "R-MJ" refers to Respondent's First Memorial on Jurisdiction and Admissibility filed on 8 August 2008.
- "C-MJ" refers to Claimants' Counter-Memorial on Jurisdiction filed on 7 November 2008.
- "R-R-MJ" refers to Respondent's Reply Memorial on Jurisdiction and Admissibility filed on 23 February 2009.
- "C-R-MJ" refers to Claimants' Rejoinder Memorial on Jurisdiction filed on 6 May 2009.
- "RSP 20.10.06" refers to Respondent's letter of 20 October 2006.
- "RSP 18.12.06" refers to Respondent's letter of 18 December 2006.
- "RSP 24.01.07" refers to Respondent's letter of 24 January 2007.
- "CL 12.03.08" refers to Claimants' letter of 12 March 2008.
- "RSP 19.03.08" refers to Respondent's letter of 19 March 2008.
- "CL 27.03.08" refers to Claimants' letter of 27 March 2008.
- "CL 03.04.08" refers to Claimants' letter of 3 April 2008.
- "RSP 05.02.09" refers to Respondent's letter of 5 February 2009.
- "CL 07.06.09" refers to Claimants' letter of 7 June 2009.
- "CL 06.07.09" refers to Claimants' letter of 6 July 2009.
- "CL 30.01.09" refers to Claimants' letter of 30 January 2009.
- "RSP 24.06.09" refers to Respondent's letter of 24 June 2009.
- "CL 16.09.09" refers to Claimants' letter of 16 September 2009.
- "RSP 16.09.09" refers to Respondent's letter of 16 September 2009.
- "First Session Tr." refers to the transcript made of the First Session of 10 April 2008 (Tr. p. 1/l. 1 means Transcript on page 1 on line 1).
- "First Session Minutes" refers to the Minutes of the First Session of 10 April 2008.
- "Exh. C-[N°]" refers to Claimants' exhibits.
- "Exh. R[letter]-[N°]" refers to Respondent's exhibits.

I. GENERAL CONTEXT OF THE DISPUTE[1]

2. This Order is issued within the context of a dispute relating to Claimants' claim for compensatory damages due to Respondent's alleged breach of its obligations under the *Agreement between the Republic of Argentina and the Republic of Italy on the Promotion and Protection of Investments*, signed in Buenos Aires on 22 May 1990, in two original copies, in the Italian and the Spanish language, both texts being equally authentic (hereinafter "Argentina-Italy BIT") in relation to alleged bonds issued by Respondent, allegedly held by Claimants, on which payment Respondent defaulted.

3. After Argentina defaulted on 24 December 2001 on over US$ 100 billion of external bond debt owed to both non-Argentine and Argentine creditors,[2] it proceeded with a restructuring of its debt culminating in the launching on 14 January 2005 of an Exchange Offer, pursuant to which bondholders could exchange existing series of bonds, on which Argentina had suspended payment, for new debt that Argentina would issue. On 25 February 2005, the period for submitting tenders pursuant to the Exchange Offer expired with the participation of 76.15% of all holdings.[3]

4. The Claimants did not participate to the Exchange Offer. It is disputed between the Parties whether and, if so, to what extent Claimants are entitled to claim for compensatory damages concerning the bonds purchased by Claimants and not submitted to the Exchange Offer. This dispute brought Claimants to file their Request for Arbitration with ICSID on 14 September 2006.

5. In the light of the object of the present order focusing on particular procedural issues, namely on confidentiality issues, it is at this stage not necessary to enter into more details on the facts and circumstances of this

[1] The following summary of the factual background is not meant to be exhaustive, and simply aims at laying down the general context of the dispute at stake.

[2] R-R-MJ § 66.

[3] R-MJ § 40; C-R-MJ § 205

dispute, which will further be dealt with when dealing with the jurisdictional phase of the case.

II. PROCEDURAL HISTORY

6. On 14 September 2006, Claimants filed their Request for Arbitration, accompanied by Annexes A through E, which contain information relating to individual Claimants, such as name, address, Database file number, ISIN Code(s) of bondholding, nominal amount, purchase price and purchase date, as well as supporting documentation with respect to such data.

7. Between 14 September 2006 and 7 February 2007, the date of registration of the Request for Arbitration, Claimants submitted supplemental annexes as well as "substituted versions" of annexes previously submitted reflecting: (i) the addition of certain Claimants, (ii) the withdrawal of certain Claimants, (iii) certain corrections and substitutions to the documentation for other Claimants, and (iv) the revision of certain aggregate amounts based on the foregoing adjustments and the addition of one new bond series.

In summary, the Annexes to the Request for Arbitration that contain data relating to individual Claimants are organized as follows:

> "Lists of Claimants
>
> Annex A — List of Claimants who are natural persons;
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> Annex B — List of Claimants who are natural persons and who co-own bonds with (non-claiming) non-Italian nationals (and therefore claim compensation only for their pro-rata share);
>
> Annex C — List of Claimants that are juridical entities
>
> Supporting Documentation
>
> Annex D — Supporting documentation for Claimants listed in Annexes A or B;

Annex E Supporting documentation for Claimants listed in Annex C.

Supplemental Lists

Annex K List of Claimants that were added to Annexes A, B or C prior to registration of the Request for Arbitration;

Annex L List of Claimants that have withdrawn their consent to arbitrate and have been removed from Annexes A, B or C, and D or E, as applicable."[4]

In addition, Annexes I and J contain documents relating to the revision of the aggregate amounts (Annex I) and the addition of one new bond series (Annex J).

8. Respondent opposed the changes made to the identity and number of Claimants as reflected in the substitute annexes and repeatedly argued that the concerned Annexes should not be admitted and that the Request for Arbitration should be rejected.[5]

9. On 7 February 2007, based on the finding that the dispute is not manifestly outside the jurisdiction of ICSID, the Secretary-General of ICSID registered Claimants' Request for Arbitration with accompanying Annexes A through L and issued the Notice of Registration.

10. On 16 May 2007 and 5 February 2008, Claimants submitted again "substituted versions" of Annexes A through E and I through L, reflecting the withdrawal of certain Claimants as well as limited corrections to the documentation for certain Claimants.

11. On 4 March 2008, Respondent requested the Tribunal to order Claimants to submit the Excel files of Annexes A, B and C to the Request for

[4] CL 12.03.08 p. 4.

[5] RSP 20.10.06, pp.1,fol.; RSP 18.12.06, pp. 6 fol.; RSP 24.01.07, pp. 1 fol.

Arbitration and its further substitutions, as well as of Annexes K and L in order to facilitate Respondent's exercise of its rights of defence.

12. On 12 March 2008, Claimants responded to Respondent's letter of 4 March 2008 requesting the Tribunal to reject Respondent's request alleging that Claimants have no Excel files of the concerned data and that such data is kept on a Microsoft SQL Database. After giving further explanations on the content of the various Annexes, Claimants stressed that it had already submitted to Respondent computer-readable disks with searchable ".pdf" versions of the concerned Annexes containing individual information on each Claimant. According to Claimants, this information and support provided to Respondent already went beyond the minimal requirements set out in ICSID Institution Rules. Nevertheless, Claimants were further willing to give direct access to Respondent to its online Database, provided that Respondent agrees to sign a confidentiality agreement, a draft of which was attached to Claimants' letter.

13. On 19 March 2008, Respondent responded to Claimants' letter of 12 March 2008 and requested a safety copy of the SQL server for internal use. According to Respondent the format of the information provided by Claimants so far did not allow Respondent to properly exercise its defence rights since it did not constitute "a well organized database of Claimant data and documentation . . .in a format easily accessible for Respondent". Respondent further rejected Claimants' proposed confidentiality agreement arguing that it went beyond confidentiality duties contemplated in the various ICSID Rules and Regulations, which would already and sufficiently ensure confidentiality.

14. On 27 March 2008, Claimants responded to Respondent's letter of 19 March 2008 insisting that ICSID Convention and Rules did not sufficiently protect confidentiality of Claimants' personal data under the applicable Italian law and that they already submitted to Respondent all relevant information in a form complying, and even going beyond the requirements of Rules 1 and 2 of ICSID Institution Rules. Therefore, Claimants asked the Tribunal to reject Respondent's request to order Claimants to provide the

SQL server in back up format, and to order Respondent to execute the proposed confidentiality agreement, so as to allow Claimants to provide Respondent with Annexes A, B, C, K and L in Microsoft Access format.

15. On 31 March 2008, ICSID informed the Parties that the Tribunal had taken note of the Parties' correspondences of 4, 12, 19 and 27 March 2008 and had decided to defer its ruling on the matter until the First Session of 10 April 2008.

16. On 10 April 2008, the First Session was held at the seat of the Centre in Washington, D.C. at which a procedural calendar for the further conduct of the proceedings was established. During the First Session it was agreed that the arbitration would be bifurcated in a jurisdictional and a merits phase. With regard to the confidentiality issue, the President of the Tribunal (Dr. Robert Briner) stated that this issue concerned information relating to individual Claimants and was therefore not relevant for this jurisdictional phase.[6] Thus, the issue of confidentiality would be dealt with at that time when the individual situation of individual Claimants would have to be looked at, stressing however that "it is inherent to arbitration, to ICSID arbitration, even if in ICSID most of the awards and decisions become public, that the individual circumstances of individual Claimants remain confidential".[7]

17. On 9 May 2008, ICSID sent out a letter on behalf of the Tribunal in which it amended the procedural calendar announced during the First Session. According to this new calendar, the Parties were to consult regarding the exchange of documents requested by each of them and, in case no agreement could be reached, to submit on 5 December 2008 their respective "Redfern Schedules" together with optional explanatory letters.

18. On 5 December 2008, the Parties submitted their respective "Redfern Schedules" listing their specific requests for document production by the other Party and their objections to the other Party's requests.

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[6] First Session Tr. p. 140/l. 17; p. 141/l. 3-9.

[7] First Session Tr. p. 141/l. 18-22; p. 142/l. 1-9.

19. On 12 December 2008, the Tribunal issued Procedural Order No. 1 ruling on the Parties' production for document requests and ordering the Parties to submit such documents on or before 22 December 2008.

20. On 22 December 2008, the Parties exchanged documents in accordance with Annex A of the Tribunal's Procedural Order No. 1.

As of this date Claimants contend having provided Respondent access to:[8]

- Annexes A, B, C, K and L on DVDs in a ".pdf" searchable format, as well as in Microsoft Access format;
- Annexes D and E in form of compilations of the scanned documentation (Annexes A, B and C each contain an index cross-referencing the names of each Claimant with the file number allocated to the supporting documentation found in Annexes D and E concerning the Claimant).

21. In contrast, Respondent submitted only part of the documents mentioned in the Tribunal's Procedural Order No. 1 (see above § 19).

22. On 30 January 2009, Claimants sent a letter complaining about Respondent's alleged failure to timely comply with the document production as ordered by the Tribunal in its Procedural Order No. 1 and Respondent's alleged refusal to conclude a confidentiality agreement in order to protect Claimants' personal information. Claimants therefore requested that the Tribunal order Respondent to conclude the production of all documents in accordance with the Tribunal's Procedural Order No. 1 and to treat as confidential any data or documentation relating to individual Claimants (see below § 43).

23. On 5 February 2009, Respondent reacted to Claimants' letter of 30 January 2009 requesting further time to respond. In the meantime, it stressed again that it did not consider a Confidentiality Agreement as necessary, or mandated by Italian law or urgent. Respondent nevertheless indicated that it had agreed to negotiate the matter with Claimants and enclosed a copy of a confidentiality agreement it would be willing to enter into.

[8] CL 12.03.08 p. 3, p. 5; CL 30.01.09, p. 5; C-MJ § 292; C-R-MJ § 241.

24. On 9 February 2009, Respondent completed its document production pursuant to the Tribunal's directions (see above § 20) and Claimants' request (see above § 22).

25. On 12 February 2009, the Tribunal invited the Parties to continue their discussions in order to arrive at a Confidentiality Agreement and stated that "if the Parties cannot come to such an agreement and if so requested by a Party, the Tribunal will hear the Parties on this matter at the occasion of the June 2009 Hearing and then take the necessary measures".

26. On 21 May 2009, the Tribunal set forth certain principles for conduct of the forthcoming Hearing on Jurisdiction confirming among others that the hearing would last 5.5 days, defining the scope of direct examination of witnesses and experts and setting new deadlines for the designation of witnesses and experts and submission of documents for direct and cross-examination. According to this letter, the Parties were to exchange the lists of witnesses to be cross-examined and those presented for direct examination by 28 May 2009, and any documents not already in the record to be used for the purpose of cross-examination were to be exchanged by 3 June 2009 and documents not already in the record to be used for the purpose of re-direct examination by 9 June 2009.

27. On 28 May 2009, the Parties submitted their designation of witnesses and experts relevant to the jurisdictional phase. Claimants did not directly designate witnesses or experts from Respondent for cross-examination, but reserved the right to do so in case Respondent would designate any such witnesses or experts for direct examination and to expand the scope of redirect examination of Claimants' witnesses or experts accordingly.

28. On 3 June 2009, Respondent submitted its documents for direct and cross-examination accompanied by an index, and requested disclosure of documents regarding the direct testimony by Prof. Briguglio and Prof. Nagareda. This submission included the so-called "Supplemental Exhibits" binders. Claimants did not submit any documents relating to its

cross- or re-direct examination of witnesses and experts designated by Respondent.

29. On 7 June 2009, Claimants responded to Respondent's submission of 3 June 2009. With regard to the submission by Respondent of its "Supplemental Exhibits", Claimants deemed it as untimely and abusive. In addition, Claimants brought forward that these exhibits contained 21 expert opinions and transcripts from other treaty arbitrations involving Argentina, ignoring any confidentiality protections in such proceedings. According to Claimants, besides the disregard for confidentiality duties, such submission would be contrary to the principle of equality of the Parties, since Claimants would not have access to those proceedings and Respondent's selective and out of context use of such evidence would be seriously unbalanced. Consequently, Claimants requested the Tribunal to "strike all confidential material Respondent has submitted from other arbitrations, including in particular Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528".

30. On 9 June 2009, ICSID informed the Parties that in the light of unfortunate circumstances affecting the President of the Tribunal (Dr. Briner), the Hearing on Jurisdiction could not take place as foreseen.

31. On 9 June 2009, Claimants acknowledged that the Hearing was postponed and understood that related deadlines were suspended, including deadlines relating to the submission of examination documents.

32. On 17 June 2009, the President of the Tribunal (Dr. Briner) sent out a letter to the Parties providing as follows: (i) with respect to the issues raised by the Parties in relation to the Hearing, in particular to the testimony of fact and expert witness, the Tribunal reserved its decision for a later stage during the proceedings, once the new dates for the Hearing have been established; (ii) with respect to Claimants' request for the production of documents as contained in their letter of 20 May 2009, it is denied; (iii) with regard to Claimants' objection of 7 June 2009 regarding Respondent's submission of 3

June 2009, the Tribunal invited Respondent to state its position, especially with regard to Claimants' objection relating to confidential material, before 24 June 2009.

33. On 24 June 2009, Respondent responded to the President's letter of 17 June 2009 and to Claimants' letters of 7 and 9 June 2009. With regard to the confidentiality issue, Respondent stressed that (i) it had not submitted any document filed in sealed proceedings, (ii) that there was no general rule of confidentiality governing ICSID arbitration proceedings and (iii) that it had never been deprived of making use of such documents in any ICSID arbitral proceedings. Respondent therefore requested that Claimants' objections to the admissibility of the relevant parts of the Supplemental Exhibits be rejected.

34. On 26 June 2009, the Tribunal invited Claimants to respond to Respondent's letter of 24 June 2009.

35. On 6 July 2009, Claimants responded to Respondent's letter of 24 June 2009. With regard to confidentiality, Claimants' position can be summarized as follows: (i) Respondent's selectively-produced confidential documents should be excluded to preserve fairness and equality of the Parties, (ii) Respondent's position and action demonstrates that it feels at liberty to disclose and make use of confidential information. Claimants referred, among others, to an article published in Italy containing allegedly erroneous information regarding the current status of the arbitration proceeding with numerous statements that mimic those in Respondent's written pleadings and correspondence (Isabella Bufacchi, *Tango-Bond, tempi lunghi all'Icsid*, Il Sole, 19 June 2009). Respondent's position and actions would constitute an abuse by Respondent of confidentiality, which would make a confidentiality order necessary in order to protect Claimants' personal information. Consequently, with regard to the confidentiality issue, Claimants requested the Tribunal to issue and order ruling as follows:

"

- The following confidential material Respondent has submitted from other treaty arbitration shall be excluded from the record, including Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-

462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528.

[…]

- The record of this proceeding ("Confidential Information") shall be used solely for purposes of conducting this arbitration and may be disclosed only to each party and its duly appointed representatives, agents and employees directly working on the arbitration proceedings; the Tribunal and persons employed by the Tribunal; ICSID and persons employed by ICSID; or such other entity that may be designated by Claimants or Respondent to maintain Claimant data and documentation; and persons serving as witnesses, experts, advisors or consultants retained by the parties in connection with the arbitration, to the extent the Claimant data or documentation is relevant to any such person's testimony or work. This Order shall be without prejudice to the Parties' ability to publish general updates on the status of the case, including for the information of Claimants, provided that such updates do not contain or reflect any data or documentation relating to individual Claimants. The Tribunal should direct Counsel to agree to a Confidentiality order to be provided for the Tribunal accordingly. In the absence of an agreed order within two weeks from the date of this order, Counsel should then submit their proposed orders for the Tribunal to consider."

36. In their respective letters of 16 September 2009, addressing several hearing issues, Claimants repeated their request to strike from the record of these proceedings confidential material submitted by Respondent, in particular the "21 expert opinions and transcripts from other treaty arbitrations involving Argentina, ignoring any confidentiality protections in such proceedings", while Respondent insisted that all documents submitted by it on 3 June 2009 be admitted.[9] Further, Claimants reiterated their request "– first made in March 2008 – that the Tribunal enter a confidentiality order to govern these proceedings".

37. Following the resignation of Dr. Briner as President of the Tribunal, Prof. Pierre Tercier was appointed on 2 September 2009 as his successor and new President of the Tribunal. The procedure, which had been on hold since June 2009, was actively resumed on 14 October 2009 through a joint telephone conference between the Tribunal, the Secretary and the Parties. During this telephone conference, both Parties confirmed their previous positions

[9] CL 16.09.09, p. 3, item 3.b; RSP 16.09.09, pp. 6 and 10.

concerning the confidentiality issue and the Tribunal announced that it would make a decision.

III. SUMMARY OF THE PARTIES' POSITIONS

A. Claimants' Position

38. According to Claimants, in early 2006, Task Force Argentina collected data and documentation from each Italian national bondholder with a claim who wished to consent to Respondent's offer of ICSID arbitration. Those data and evidence included a declaration of consent to ICSID arbitration, delegation of authority, and power of attorney, as well as information and documentation relating to each bondholder's identity, Italian nationality and domicile, and ownership of bonds. This information was then compiled in coordination with Cedacri. S.p.A. ("Cedacri"), a leading provider of informational technology services in Italy, into an online Database.

39. When submitting their Request for Arbitration, and on various occasions thereafter, Claimants submitted part of the information compiled in the Database in the form of Annexes A to E, K and L to its Request for Arbitration (see above §§ 7 and 10) and in various other formats (see above § 20). The only information contained in the Database and having not yet been submitted to Respondent would be additional information and documents relating to the nationality of the Claimants.[10]

40. On several occasions Claimants stressed that they were willing to give Respondent access to all Claimants' data, including direct access to the Database itself, provided that Respondent executes an appropriate Confidentiality Agreement in order to protect the confidentiality of Claimants' personal data.[11]

41. Claimants' motivated the need to protect their personal information with the following main arguments:

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[10] C-R-MJ § 242.

[11] CL 12.03.08, p. 1 and pp. 5-6 (see also Annex B); CL 27.03.08 p. 4; CL 03.04.08, p. 10 n. 20.

(i) The Database is kept in Italy and is therefore subject to the Italian Legislative Decree of 30 June 2003 n. 196 (hereinafter, the "Italian Privacy Code"), which mandates strict compliance with a set of rules therein established and regulating, under articles 31 to 36, the electronic management of personal data. The Italian Privacy Code "requires, in particular, that in the case of access to, and use of, private information through electronic means (such as stand-alone personal computers, networked systems, online electronic access systems), the holder of the data adopts specific technological protection measures illustrated under an ad hoc Annex to the Italian Privacy Code, as amended from time to time".[12] "Moreover, in the case of transmission of private information to third parties or in the case of transfer of the same towards non-EU Countries, the Italian Privacy Code requires that the transmitting entity takes steps to ensure that the data are thereafter used only for the purposes for which they were originally collected".[13]

(ii) ICSID's legal framework (in particular Article 48(5) of the ICISD Convention and Rules 15 and 32(2) of the ICSID Arbitration Rules) would "not provide for the requisite confidentiality for Claimants' data", and it would be "common practice for parties to an ICSID arbitration to conclude a confidentiality agreement to secure protection of private or business confidential information, and for ICSID Tribunals to order the parties to do so where a party fails to agree to do so".[14]

(iii) Such protection of Claimants' personal information would not cause any prejudice to Respondent, as "Respondent will be free to use the data as necessary for the arbitration and would only be limited as to disclosure". [15]

42. Owing to insurmountable differences in the Parties' respective positions, they were unable to agree on the content and scope of a Confidentiality Agreement.[16]

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[12] CL 12.03.08, p. 5.

[13] CL 12.03.08, pp. 5-6.

[14] CL 27.03.08, pp. 2, 3.

[15] CL 27.03.08, p. 3.

43. Consequently, Claimants subsequently modified their request that the Tribunal order Respondent to execute the proposed Confidentiality Agreement into a request that the Tribunal issue an order providing as follows:

> "The Tribunal orders the parties to treat as confidential any data or documentation submitted by the other party in this proceeding and relating to individual Claimants. Such data or documentation shall be used solely for purposes of conducting this arbitration and may be disclosed only to each party and its duly appointed representatives, agents and employees directly working on the arbitration proceedings; the Tribunal and persons employed by the Tribunal; ICSID and persons employed by ICSID; Cedacri S.p.A. or such other entity that may be relied upon to maintain Claimant data and documentation; and persons serving as witnesses, experts, advisors or consultants retained by the parties in connection with the arbitration, to the extent the Claimant data or documentation is relevant ot any such person's testimony or work." [17]

44. Following the submission by Respondent on 3 June 2009 of its "Supplemental Exhibits", Claimants raised various objections regarding such submission (see above § 28 fol.), including the objection that among the documents submitted by Respondent would be "21 expert opinions and transcripts from other treaty arbitrations involving Argentina, ignoring any confidentiality protections in such proceedings".[18] Because the "selective" and "out of context" use by Respondent of these documents would be "seriously unbalanced" and allow Respondent an "unfair advantage over Claimants, contrary to the principle of equality of the parties",[19] Claimants further requested the Tribunal to issue an order that:

> "Respondent shall not use at the hearing confidential material it has submitted from other arbitrations, including Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528" [20]

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[16] CL 30.01.09, p. 1, see also pp. 4, 6 -7.

[17] CL 30.01.09, p. 8.

[18] CL 07.06.09, p. 3; see also CL 06.07.09 p. 7.

[19] CL 07.06.09, p. 3.

[20] CL 07.06.09, p. 7.

45. In its submission of 6 July 2009, confirmed by its submission of 16 September 2009, Claimants modified and generalized their previous requests regarding confidentiality as follows:

> "The following confidential material Respondent has submitted from other treaty arbitrations shall be excluded from the record, including Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528.
>
> […]
>
> The record of this proceeding ("Confidential Information") shall be used solely for purposes of conducting this arbitration and may be disclosed only to each party and its duly appointed representatives, agents and employees directly working on the arbitration proceedings; the Tribunal and persons employed by the Tribunal; ICSID and persons employed by ICSID; or such other entity that may be designated by Claimants or Respondent to maintain Claimant data and documentation; and persons serving as witnesses, experts, advisors or consultants retained by the parties in connection with the arbitration, to the extent the Claimant data or documentation is relevant to any such person's testimony or work. This Order shall be without prejudice to the Parties' ability to publish general updates on the status of the case, including for the information of Claimants, provided that such updates do not contain or reflect any data or documentation relating to individual Claimants. The Tribunal should direct Counsel to agree to Confidentiality order to be provided for the Tribunal accordingly. In the absence of an agreed order within two weeks from the date of this order, Counsel should then submit their proposed orders for the Tribunal to consider."[21]

46. Besides arguments previously raised (see above § 42 and 44), Claimants base their request on the following supplemental arguments:

(i) The Parties have been unable to agree on a Confidentiality Agreement.[22]

(ii) Respondent has adopted an approach in which it "picks and chooses" when to respect confidentiality according to its convenience, feeling free to use confidential information and records from other arbitrations and court proceedings.[23]

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[21] CL 06.07.09, p. 12; see also CL 16.09.09 p. 3.

[22] CL 06.07.09, p. 6.

[23] CL 06.07.09, p. 2, pp. 5-7.

(iii) Respondent's position that "[t]here is no provision in the ICSID Convention or in the ICSID Arbitration Rules establishing a general principle of confidentiality" indicates that a confidentiality order is necessary in order for Respondent to respect confidentiality.[24]

(iv) Claimants suspect that Respondent may have been leaking information about the present arbitration to the press, whilst misstating some of the information.[25]

(v) Respondent's criminal allegations against Claimants and professional ethics allegations against counsel as contained in Respondent's letter of 24 June 2009 are abusive because they are "unproven and inapposite to the eleven jurisdictional issues".

B. Respondent's Position

47. Respondent rejects all of Claimants' requests for confidentiality protection, based mainly on the following arguments:

48. *Claimants Personal Data*. With regard to the issue of personal information relating to individual Claimants, Respondent contends that Claimants has a duty to provide Respondent with a "well-organized database of Claimant data and documentation", "in a format easily accessible for Respondent".[26] According to Respondent, Claimants cannot condition this duty upon "inappropriate exigencies" such as a Confidentiality Agreement, which would constitute "a wholly unprecedented and in any even inadmissible requirement".[27]

49. Further, Respondent contends that a confidentiality ruling is not necessary in this arbitration and is not and could not be mandated by Italian law. [28]

[24] CL 06.07.09, p. 6.

[25] CL 06.07.09, pp. 6-7.

[26] RSP 19.03.08, p. 6.

[27] RSP 19.03.08, p. 8.

[28] RSP 05.02.09, p. 2.

50. Although Respondent nevertheless agreed to enter into negotiation concerning a confidentiality agreement and submitted a draft of what it thought was an admissible agreement, it rejected Claimants' concrete proposals of a draft Confidentiality Agreement as going "well beyond what is required" and "not fairly balanced".[29] Respondent asserts that Claimants are not entitled to require Respondent "to assume, under a 'Confidentiality Agreement', confidentiality obligations other than those already provided for in the ICSID Convention and ICSID Arbitration Rules", i.e., in Article 48(5) of the ICSID Convention and Rules 15 and 32(2) of ICSID Arbitration Rules.[30]

51. *Confidentiality of the Proceedings and Evidentiary Material*. With regard to Claimants' allegations that Respondent submitted confidential material relating to other arbitrations and to Claimants' corresponding request to strike such material from the record, Respondent asks the Tribunal to deny Claimants' request and to admit all the documents submitted by Respondent on 3 June 2009.[31] Respondent brings forward the following main arguments:

(i) The concerned material, relating to testimonies given by some of Claimants' experts in other arbitral proceedings, is "relevant and wholly appropriate for impeachment purposes"[32] and was "timely filed".[33]

(ii) Respondent has never been deprived of making use of such documents in any ICSID arbitral proceedings it was involved in, since such material would be "essential to ascertain the credibility and consistency of the witnesses and experts the opposing party presents".[34] Restricting the use of

[29] RSP 05.02.09, p. 2.

[30] RSP 19.03.08, p. 8.

[31] RSP 24.06.09, p. 8; RSP 16.09.09, p. 10.

[32] RSP 24.06.09, p. 6.

[33] RSP 16.09.09, p. 6.

[34] RSP 24.06.09, p. 8.

such documents for impeachment purposes would entail a "serious departure from principles of due process and the established procedure".[35]

(iii) The fact that Respondent possesses such material is only the consequence of the fact that such witnesses and experts have been repeatedly presented by different claimants in cases brought against Argentina, and such "de facto experience that Argentina acquired in previous cases does not mean in a juridical sense that the principle of equality of arms might have been breached".[36]

(iv) Respondent has not submitted any document filed in a sealed proceeding. With regard to the documents submitted and relating to the court case *BG Group PLC v. Argentina*, they have become public. [37]

(v) All documents filed by Respondent on 3 June 2009 that were also filed or produced in other proceeding were presented in full, and not "selectively" and "out of context".[38]

(vi) There is "no general rule of confidentiality governing ICSID arbitration proceedings", and in particular there is "no provision in the ICSID Convention or in the ICSID Arbitration Rules establishing a general principle of confidentiality or a confidentiality rule applicable to the kind of documents submitted by Argentina".[39]

IV. TRIBUNAL'S POWER TO DECIDE AND GENERAL LEGAL CONTEXT

A. Preliminary Remarks

52. Having first asked the Tribunal to direct Respondent to enter into an appropriate Confidentiality Agreement protecting Claimants' personal information (see above § 12), Claimants currently request an order for

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[35] RSP 24.06.09, p. 8.

[36] RSP 24.06.09, p. 6, referring to „CIT Group Inc. v. Argentine Republic" (ICSID Case No. ARB/04/9).

[37] RSP 24.06.09, p. 6 and p. 7.

[38] RSP 24.06.09, p. 7.

[39] RSP 24.06.09, p. 7.

confidentiality aiming at protecting the entire "record of these proceedings" and to exclude allegedly confidential material submitted by Respondent (see above § 45). Respondent insists on rejecting Claimants' requests with regard to confidentiality (see above §§ 47-51).

53. In its letter of 12 February 2009 (see above § 25), the Tribunal had announced that – lacking an agreement between the Parties – the issue of confidentiality would be dealt with during the Hearing on Jurisdiction scheduled in June 2009. Unfortunately, this Hearing could not take place as planned in June 2009 due to resignation of the former President of the Tribunal (Dr. Briner) and has been postponed to April 2010. Further, the Parties have been unable to settle this issue and continue to express diverging opinions as to the role and scope of confidentiality in investment arbitration proceedings. This divergence is creating doubts as to the standard of confidentiality to be applied to the present procedure thereby preventing Claimants from submitting further documents and information.

54. Basing itself thereon, the Tribunal is of the opinion that in order to ensure the proper continuation of the procedure as well as the orderly conduct of the up-coming Hearing, it is appropriate and necessary to decide on the confidentiality issue now and by the way of a written decision.

55. Both Parties have had sufficient opportunity to express their positions, which have duly been taken into account by the Tribunal in designing the below order.

56. In this respect, it should be noted that although initiated by Claimants' request, the present order is also based on the Tribunal's own power to rule on the conduct of these proceedings (see below §§ 59-66). The Tribunal is of the opinion that the present circumstances as described above (see §§ 6-37) clearly indicate that Parties will not be able to find an agreement, and the Tribunal is therefore of the opinion that it shall decide on the confidentiality issue right away.

57. After establishing its power to issue such an order, the Tribunal shall firstly describe, in a general manner, the confidentiality standard in ICSID arbitration, before applying this standard to the present dispute.

58. At this stage, the Tribunal wishes to recall that, according to common practice, the Tribunal is not bound by previous decisions of other international tribunals. However, the Tribunal is also of the opinion that, subject to the specific provisions of a treaty in question and of the circumstances of the actual case, it should attempt to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[40] The Tribunal may therefore pay due consideration to earlier decisions of international tribunals, where it deems that such consideration is appropriate in the light of the specific factual and legal context of the case and the persuasiveness of the legal reasoning of these earlier decisions.

B. Power of the Tribunal to Order Confidentiality

59. In their various correspondences requesting the Tribunal to issue an order for confidentiality, Claimants have not indicated the legal basis for issuing such a decision.

60. Respondent has not contested the Tribunal's power to issue such an order, and even suggested the option of a confidentiality order as a substitute to a Confidentiality Agreement between the Parties during the First Session.[41] Respondent merely objects that confidentiality, as requested by Claimants, is not necessary and not mandated by the applicable legal framework (see above §§ 23 and 49).

61. Neither Party thus contests the Tribunal's power to rule on confidentiality issues. Nevertheless, for the sake of comprehensiveness and transparency, the

[40] On the precedential value of ICSID decisions, *see* Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse? Freshfields lecture 2006, Arbitration International 2007, pp. 368 *et seq*.

[41] First Session, Tr. p. 141/l. 10-16.

Tribunal shall expressly indicate the legal provisions on which such power is based.

62. In this respect, two sets of provisions enter into consideration:

(i) Provisions on Provisional Measures:

Article 47 of the ICSID Convention provides:

"Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party".

Rule 39 (1) of the ICSID Arbitration Rules provides:

"At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures".

(ii) Provisions on Procedural Orders:

Rule 19 of the ICSID Arbitration Rules provides:

"The Tribunal shall make the orders required for the conduct of the proceeding".

63. The Tribunal notes that there is as of today no uniform practice concerning the use of "orders" or "provisional measures" with regard to confidentiality issues in international investment arbitration. While in some cases, parties and/or tribunals have addressed confidentiality issues in the form of provisional measures,[42] others used the form of an order or even a combination of both.[43]

64. In this respect, the members of the Tribunal hold somewhat different views. However, the members of the Tribunal all agree that this question is of

[42] See e.g., *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (hereafter "*Amco Case*"), Decision on Request for Provisional Measures of December 9, 1983, 24 *ILM* 365 (1985), and *Biwater Case*, Procedural Order No. 3 of September 29, 2006, §§ 109-111.

[43] See e.g. *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1 (hereafter "*Metalclad Case*"), Award of 30 August 2000, § 13, in which the Party requested a combination of provisional measures and procedural order.

mainly technical nature and does not carry any substantial practical relevance for the present case.

65. In the present case, the nature of Claimants' requests aim to determine the standard of confidentiality that applies to information and documents submitted, issued or otherwise accessed during these proceedings and thereby to determine the scope of the use each Party may make of such information and documents. These questions relate to the rules applicable to the conduct of the proceedings and can therefore appropriately be addressed by an order under the terms of Rule 19 of the ICSID Arbitration Rules.

66. **Consequently**, the present confidentiality order is based on the Tribunal's power to determine the conduct of the proceedings as deriving from Rule 19 of the ICSID Arbitration Rules combined.

C. In General: Confidentiality Standard in ICSID Arbitration

67. Within the context of the generally acknowledged trend towards transparency in investment arbitration, the Tribunal shares the opinion expressed by the tribunal in the *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (hereafter "*Biwater Case*"), according to which:

> "In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources. [44]

68. As analysed by various international tribunals and authors,[45] the ICSID Convention, the Administrative and Financial Regulations and the Arbitration

[44] ICSID Case No. ARB/05/22, Procedural Order No. 3 of September 29, 2006, § 121.

[45] Margrete Stevens, Confidentiality Revisited, in News from ICSID Vol. 17 No. 1 (Spring 2000), pp. 1, 8-10; Christina Knahr / August Reinisch, Transparency versus Confidentiality in International Investment Arbitration — The Biwater Gauff Compromise, The Law and Practice of International Courts and Tribunals Vol. 6 (2007), pp. 97 fol.; Benjamin H. Tahyar, Confidentiality in ICSID Arbitration after Amco Asia Corp. v. Indonesia: Watchword or White Elephant? Fordham International Law Journal Vol. 10 (1986), pp. 93 fol., 109 fol.

Rules only contain limitations on specific aspects of confidentiality and privacy, as follows:

(i) Article 48(5) of the ICSID Convention provides that "[t]he Centre shall not publish the award without the consent of the parties."

(ii) Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of (1) arbitral awards or (2) the minutes and other records of proceedings, if both parties to a proceeding so consent.

(iii) Rule 6(2) of the ICSID Arbitration Rules provides that each arbitrator must sign a declaration according to which the arbitrator "[..] shall keep confidential all information coming to [his/her] knowledge as a result of [his/her] participation in this proceeding, as well as the contents of any award made by the Tribunal".

(iv) Rule 15 of the ICSID Arbitration Rules provides that "[t]he deliberations of the Tribunal shall take place in private and remain secret".

(iv) Rule 32(2) of the ICSID Arbitration Rules provides that the hearing may be opened by the Tribunal to other persons besides the disputing parties, their agents, counsel and advocates, witnesses and experts and officers of the Tribunal - provided that no party objects (in which case, the hearing is to be held in private). In such case, the Tribunal shall establish "procedures for the protection of proprietary or privileged information".

69. The foregoing provisions deal with specific confidentiality duties of the tribunal and ICSID. However, they do not prevent the publication of general information about the operation of ICSID and the cases at hand (see Regulation 22(1) of the ICSID Administrative and Financial Regulations). Further, they do not expressly address the actions of the parties themselves.

70. This silence of ICSID's legal framework has led various authors and tribunals to take the stand that the ICSID Convention and Rules do not prevent the parties from revealing their case, including even from releasing

awards and other pertinent decisions.[46] However, whereby it is widely acknowledged that parties may engage in general discussion about the case in public, some tribunals have deemed it appropriate to set express limits to such freedom requiring that the parties limit public discussion of the case "to what is considered necessary"[47], "to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound"[48], or "to what is necessary, and is not used as an instrument to antagonize the parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult […]".[49]

71. This approach appears also to be in line with the spirit expressed in the official annotations accompanying the original version of the ICSID Arbitration Rules (which are not binding, and do not form part of the Rules) stating the following: "The parties are not prohibited from publishing their pleadings. They may, however, come to an understanding to refrain from doing so, particularly if they feel that publication may exacerbate the dispute […]".[50]

72. In the light of the above considerations, whilst the Tribunal shares the view that transparency in investment arbitration shall be encouraged as a means to promote good governance of States, the development of a well grounded and coherent body of case law in international investment law and therewith legal certainty and confidence in the system of investment arbitration, it also believes that transparency considerations shall not justify actions that exacerbate the dispute or otherwise compromise the integrity of the arbitration proceedings. Further, transparency considerations may not

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[46] Christoph Schreuer, The ICSID Convention: A Commentary, Cambridge 2005, §§ 100 fol. *ad* Article 48; Benjamin H. Tahyar, Confidentiality in ICSID Arbitration after Amco Asia Corp. v. Indonesia: Watchword or White Elephant? Fordham International Law Journal Vol. 10 (1986), p 110; *Amco Case*, Decision on Provisional Measures of 9 December 1983, 1 ICSID Reports 410 fol., 412.; *Metalclad Case* and *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (hereafter "*Loewen Case*"), Decision on hearing of Respondent's objection on competence and jurisdiction of January 5, 2001, 7 *ICSID Rep.* 421 (2005), §§ 25-26.

[47] *Loewen Case*, Decision on hearing of Respondent's objection on competence and jurisdiction of January 5, 2001, § 26.

[48] *Metalclad Case*, Award of 30 August 2000, § 10.

[49] *Biwater Case*, Procedural Order No. 3, § 163 lit. b

[50] Corresponding to Rule 31 of the ICSID Arbitration Rules 2006.

prevail over the protection of information which is privileged and/or otherwise protected from disclosure under a Party's domestic law.[51]

73. **In conclusion**, the Tribunal deems that the ICSID Convention and Arbitration Rules do not comprehensively cover the question of the confidentiality/transparency of the proceedings. Thus, in accordance with Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules, unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents.

V. TRIBUNAL'S ANALYSIS OF THE SPECIFIC ISSUES

74. The confidentiality issue as arising in the present disputes relates to three different aspects of the proceedings: (a) to the "record of this proceeding", i.e., to the arbitration proceedings in general, (b) to the protection of Claimants' personal information contained in the Database, and (c) to the admissibility as evidence of allegedly confidential documents relating to other arbitration proceedings, i.e., of Respondent's Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528.

75. Except as for the Parties' agreement to publish the award,[52] there has been no general or specific agreement with regard to confidentiality between the Parties, and there is further no relevant provision on confidentiality in the Argentina-Italy BIT pursuant to which these proceedings have been brought.

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[51] This is also reflected in Rule 32(2) in fine of the ICSID Arbitration Rules, and in the NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions, par. 2(b). See also Knahr at al., p. 102.

[52] First Session Minutes, § 18.

76. **Consequently**, the Tribunal shall decide on the three different aspects of Claimants' request for a confidentiality order according to the principles set forth above (§§ 67-73).

a) With Regard to the Present Arbitration Proceedings

77. In their latest request for a confidentiality order, Claimants request that disclosure of the "record of these proceedings" be limited to the sole "purposes of conducting this arbitration" and restricted to key persons involved in it, without prejudice however of the Parties' "ability to publish general updates on the status of the case" (see above § 45). As such, Claimants request that the entire proceedings be covered by a general duty of confidentiality allowing only the disclosure by the Parties of "general updates on the status of the case".

78. Without commenting on the specific wording and scope of Claimants' request, Respondent have made it sufficiently clear that they consider that there is "no general rule of confidentiality governing ICSID arbitration proceedings" (see above § 51 (v)). Further, the submission by Respondent in this proceeding of various documents produced in other investment arbitrations involving Argentina and the fact that Respondent seems to have done so in the past in other proceedings shows that Respondent does not consider any such documents to be subject to any restriction, unless they relate to sealed proceedings (see above § 51 (ii)-(iv)). As such, Respondents seems to take the position that unless specifically restricted, information and documents issued and/or submitted in this proceeding may be disclosed by either Party.

79. In the light of the principles set forth above (§§ 67-73), the Tribunal disagrees with both of the Parties' positions. As mentioned above (§ 67), if it is true that there is no general duty of confidentiality, this is not to be understood as a "carte blanche" entitling a Party to disclose as it deems fit any kind of information or documents issued or produced in this proceeding.

80. Depending on the information and documents at stake, different considerations of confidentiality, transparency, public information, equality of the Parties' rights, orderly conduct of the proceedings and other procedural rights and principles may apply, requiring a differentiated treatment.

81. Due consideration must also be paid to the stage of the proceedings, i.e., to whether disclosure happens while proceedings are still ongoing or after their closure. While proceedings are still ongoing, considerations such as ensuring the orderly unfolding of the arbitration and the respect of the Parties' equality of rights, avoiding the exacerbation of the dispute, etc. carry more weight and therefore require more caution than once the procedure has been completed and an award has already been rendered.

82. Therefore the Tribunal rejects Claimants' request to restrict disclosure of the entire "record of these proceedings […] without prejudice to the Parties' ability to publish general updates on the status of the case". Rather, the Tribunal deems that a distinction must be drawn between different kinds of documents and information while giving due consideration to the fact that proceedings are at an early stage, and that "restrictions must be carefully and narrowly delimited".[53]

83. Having considered both Parties' arguments as well as the various documents and information at stake, and having weighted the diverging interests at stake, the Tribunal decides to allow or restrict disclosure of documents and information as follows:

(i) General Discussion about the Case

84. In the *Biwater Case*, the Tribunal decided that, except where specific restrictions apply, "the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary (for example, pursuant to Respondent's duty to provide the public with information concerning governmental and public affairs), and is not used as an instrument to further antagonise the parties, exacerbate their differences,

[53] *Biwater Case*, Procedural Order No. 3, § 147.

unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order".[54]

85. The present Tribunal shares this view. Neither Party shall be prevented from engaging in general discussion about the case in public, whereby such discussion shall in particular not be limited to general updates on the mere status of the case and may include wider aspects of the case such as a summary of the Parties' position, provided however that such discussion remains within the above mentioned boundaries.

86. **Consequently**, ***subject to further specific restrictions on disclosure of specific documents and information as set out herein, the Parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonise the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3.***

(ii) Awards

87. The Parties have agreed to publish the award according to Article 48(4) of the ICSID Convention (see above § 75).

88. **Consequently**, ***no confidentiality restriction shall apply to the publication of the award and its content.***

89. Whether certain Annexes submitted by Claimants, in particular Annexes relating to the identity of the Claimants, should constitute an integral part of the award and be thereby jointly published is a different question, which will need to be determined at a later stage of the proceedings.

[54] *Biwater Case*, Procedural Order No. 3, § 149.

(iii) Decisions, Orders and Directions of the Tribunal (other than Awards)

90. In the *Biwater Case*, the tribunal reasoned that "the presumption should be in favour of allowing the publication of the Tribunal's Decisions, Orders and Directions". It justified this position based on "the treatment of awards, and the treatment of such materials in investment arbitration generally" as well as on the fact that "[p]ublication of the Tribunal's decisions also, as a general matter, will be less likely to aggravate or exacerbate a dispute, or to exert undue pressure on one party, than publication of parties' pleading or release of other documentary materials". So far, the present Tribunal shares this view.

91. However, instead of giving full effect to this presumption, the tribunal in the *Biwater Case* preferred to exercise supplementary caution and to decide on the publication of a decision "on a case-by-case basis", given that "the nature and subject matter of Decisions, Orders and Directions varies enormously, and for some it may still be inappropriate to allow wider distribution".[55]

92. The present Tribunal is of the opinion that such supplementary caution is not necessary in the case at hand, in the light of various factors and further supporting the presumption in favour of the publication of the Tribunal's decisions, orders and directions:

(i) The Parties agreed that the final award be made public, which shows that the Parties give due consideration to transparency and public information issues.

(ii) Respondent's liberal attitude towards disclosure of documents seems to indicate that it would not have a problem with the disclosure of other decisions of the Tribunal.

(iii) It derives from Claimants' position and request, that it is not opposed to the publication by the Parties of "general updates on the status of the case" and that its main concerns relates to the uneven use by

[55] *Biwater Case*, Procedural Order No. 3, §§ 152-154.

Respondent of documents produced and information submitted during the arbitration by the Parties, especially with regard to Claimants' personal information. Thus it appears that Claimants' request aims primarily to limit the risk of exacerbating the dispute, disadvantaging a Party and abusing of personal information, and not to limit the disclosure of information which carries public interest.

(iv) It cannot be ignored that in the present case there are over 180,000 Claimants having in principle all access to the records of the proceedings. This circumstance has a certain diluting effect on the potential need for protection of confidentiality.

93. In the light of the above considerations, the Tribunal is of the opinion that in the case at hand, the presumption in favour of the publication of decisions, orders or directions of the Tribunal should be given full effect, meaning that – unless otherwise expressly provided in the decision, order or direction, and justified by specific considerations against disclosure – decisions, orders and directions of the Tribunal may be published by either Party.

94. **Consequently**, ***in the absence of any specific contrary ground, no confidentiality restriction shall be imposed on orders or directions of the Tribunal, including this Procedural Order No. 3***.

(iv) Minutes and Records of Hearing

95. With regard to the minutes and/or records of oral hearing, ICSID Administrative and Financial Regulations as well as ICSID Arbitration Rules contain specific provisions:

- Regulation 22(2) of the Administrative and Financial Regulations provides that the Secretary-General of ICSID shall only arrange for the publication of the minutes and other records of proceedings if both parties to a proceeding so consent.
- Rule 32(2) of the ICSID Arbitration Rules provides that participation in the hearing is restricted to the parties, their agents, counsel and advocates, and witnesses and experts, and that the tribunal may not allow

other persons to attend or observe all or part of the hearings if a party objects.

96. Thus, the above mentioned provisions establish the principle that the content of hearings, as well as minutes and other records of such hearings should not be disclosed to third parties unless the Parties so agree.

97. The question arises whether the Parties may through their attitude and positions be deemed to have implicitly consented to such disclosure and/or be precluded from their right to object thereto. This question may remain open, since in the case at hand, there are not sufficient elements to deduce such implied consent or preclusion of rights.

98. Whilst decisions, orders and directions of the Tribunal in principle present the facts of the dispute in a summary and neutral manner and take into account each Party's allegations and positions before deciding thereon, the same is not true for minutes of hearings and similar records. Minutes of hearings and records of expert and witness examinations mirror faithfully what happened in a specific hearing, meeting or examination. As such, their publication, and especially a partial and out of context publication of such minutes and records carries the risk of antagonizing the Parties and exacerbating their differences. Also, the prospect of the publication of such minutes and records may further exercise unnecessary pressure on and thereby inappropriately influence the attitude of the various participants during the relevant hearing or meeting. All these elements are likely to endanger the proper unfolding of the arbitration and the efficiency of the hearing itself, and thereby render the resolution of the dispute more difficult.

99. Therefore, the Parties' conduct, and in particular Claimants' position as summarized above (§ 92 (iii)) and its objection to the inclusion in this proceedings of transcripts relating to other arbitration proceedings because of their allegedly confidential character (see above § 44) could not be interpreted as an implicit consent to disclose minutes of hearing or other similar records.

100. **Consequently**, ***minutes and records of hearings of the present proceedings shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs***.

(v) Pleadings, Written Memorials, other Written Submissions

101. Pleadings and written memorials are likely to contain references to and details of documents produced pursuant to a disclosure exercise, and their uneven publication or distribution carry the risk of giving a misleading impression about these proceedings".[56]

102. Indeed, based on their function and aim, pleadings and memorials of a Party often present a one-sided story of the dispute. Their publication therefore carries the inherent risk to give an incorrect impression about the proceedings. This would not only thwart public information purposes, but would further antagonise the Parties and aggravate their differences. In the present proceedings, this risk is further accentuated by the fierce tone of some of the Parties' submissions.

103. Under these circumstances, the Tribunal concludes that – at this stage of the proceedings – the need to preserve a constructive atmosphere allowing the proper unfolding of the arbitration requires restricting publication of the Parties' pleadings, written memorials and other written submissions, including correspondence between the Parties and the Tribunal on substantive issues (see further below § 114-116).

104. The same restriction applies to witness and expert statements attached to pleadings and written memorials, the publication of which would carry the same risk of giving a misleading impression about the proceedings.

105. **Consequently**, ***pleadings, written memorials and other written submissions of the Parties (including correspondence between the Parties and the Tribunal on substantive issues), as well as witness and experts statements attached thereto shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs***.

[56] See *Biwater Case*, see Procedural Order No. 3, § 158.

(vi) Documents and Exhibits relating to Pleadings, Written Memorials or other Written Submissions

106. In the *Biwater Case*, the Tribunal decided that no restriction was in principle appropriate upon the publication by one party of its own documents, except where separate contractual or other confidentiality restrictions on such publication exist. In contrast, it considered appropriate to restrict publication or distribution of documents that had been produced in the arbitration by the opposing party in the interests of procedural integrity. [57]

107. While in principle sharing this view, the Tribunal is of the opinion that the above principles need to be further tailored to the specificities of the present case.

108. Thus, with regard to other documents and exhibits submitted in support of the Parties' pleadings, written memorials and submissions as well as expert and witness statements, the following principles shall apply:

109. Where such documents themselves or their content are under separate contractual or other confidentiality obligations restricting disclosure, their disclosure and the formalities thereof shall be decided according to the law or rules imposing such confidentiality obligation.

110. Where no such contractual or other confidentiality obligations apply:

- A Party shall be free to decide if and how to publish its own documents. Nevertheless, their publication shall not be used as an instrument to further antagonise the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult or circumvent the terms of this Procedural Order No. 3;
- A Party shall not publish or otherwise disclose to third parties the documents produced by the opposing Party and shall use them only for the purpose of participating in the arbitration, except where these documents are already in the public domain or the opposing Party has expressed its consent to their disclosure.

[57] Procedural Order No. 3, §§ 156-157.

111. Although the above stated principles constitute useful guidelines, it cannot be ignored that the nature, type, content and purpose of such documents vary enormously and that it is therefore impossible to anticipate the specific interests at stake in a particular case. The door for diverging case-by-case decisions must therefore remain open.

112. In the present proceedings, the Parties have submitted numerous binders with exhibits, of varying nature, type and content. Except as for Claimants' request concerning the protection of personal information relating to individual Claimants which is dealt with below (§§ 121 fol.), the Parties have not raised any other contractual or other confidentiality obligation affecting specific documents, nor have they otherwise identified specific documents or categories of documents that would require special treatment. Based thereon, and on the preliminary review by the Tribunal of the documents submitted in this case, the above mentioned principles seem appropriate to establish the basic rule with regard to publication of documents.

113. **Consequently**, ***documents and exhibits submitted with pleadings, written memorials and/or other written submissions of the Parties shall be subject to the restrictions contemplated in §§ 109-110 unless the Parties otherwise agree, or the Tribunal otherwise directs***.

(vii) Correspondence between the Parties and/or the Tribunal Exchanged in respect of the Arbitral Proceedings

114. In the *Biwater case*, the Tribunal concluded that in the light of the nature of the correspondence between the parties and/or the tribunal which mainly relates to the conduct of the process itself rather than to substantive issues, "the needs of transparency (if any) are outweighed by the requirements of procedural integrity". Consequently it considered correspondence between the parties and/or the tribunal as an appropriate category for restriction.

115. The present Tribunal agrees with this position. Indeed, information relating to the conduct of the proceedings, such as the number of written submissions and their order, the time and place of hearings, the hearing agendas, the number and order of expert and witness examinations, etc. are in

principle not of public interest. Further, when deciding upon the modalities of the procedure, it is important to have the full cooperation of all actors in order to ensure smooth and rapid unfolding of the proceedings. Restricting the correspondence relating to the conduct of the arbitration proceedings helps ensure a cooperative atmosphere by avoiding external influences and limiting unnecessary publicity. Such restriction therefore seems appropriate.

116. **Consequently,** ***correspondence between the Parties and the Tribunal which does relate to the mere conduct of the case shall be restricte*****d.**

117. With regard to correspondence between the Parties and the Tribunal which do not relate to the mere conduct of the case, but address substantive issues, they have been dealt with above together with pleadings, written memorials and/or other written submissions of the Parties (see § 105).

(viii) Duration of the Restrictions

118. Insofar as the Tribunal has imposed as set forth above specific restrictions on the present proceedings, and in particular on certain categories of information and documents, these restrictions shall apply until conclusion of the proceedings, unless otherwise agreed between the Parties or ordered by the Tribunal upon its own initiative or upon request of a Party.

119. All parties are at liberty to apply to the Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis.

120. The question will arise whether the Tribunal has the power and authority to decide, either on its own initiative or upon request of a Party, on the continuation of some or all of these restrictions beyond the conclusion of the present proceedings. This question will be dealt with when concluding the present proceedings.

b) With Regard to Information Contained in the Database

121. As mentioned above (§ 72), transparency considerations may not prevail over the protection of information which is privileged and/or otherwise protected from disclosure under a Party's domestic law.

122. In the present case, Claimants bring forward that personal information relating to individual Claimants as compiled in the online Database and as partly disclosed to Respondent in the form of hard and soft copies of Annexes A to E are subject to confidentiality obligations under Italian and European law (see above § 41). Consequently, as Respondent accesses this information, it should be ordered to comply with certain confidentiality standards according to the relevant legal provisions. Claimants request for enforcement of this confidentiality obligation aims primarily to protect personal identification, financial information and nationality information.[58] Although Respondent has denied that such confidentiality obligations would be mandated under Italian and European law (see above §§ 23 and 49), it has failed to explain to what extent the legal references invoked by Claimants were not applicable or did otherwise not provide for the alleged confidentiality obligations.

123. Considering that it is to be presumed for the present stage of the proceedings that the Claimants have the Italian nationality and that the online Database is established under Italian law, this issue is to be examined under Italian law.

124. The Italian Privacy Code implements on national level the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.[59]

125. Article 5(1) of the Italian Privacy Code provides as follows:

[58] First Session, Tr. p. 88/l. 15-20.

[59] Italian Privacy Code Section 184(1).

> "This Code shall apply to the processing of personal data, including data held abroad, where the processing is performed by any entity established either in the State's territory or in a place that is under the State's sovereignty."

126. In the case at hand, the processing of personal data, meaning its collection, recording, organization, keeping etc. with the help of electronic means,[60] is done by Cedacri S.p.A., a company registered under the laws of Italy. As such, the Italian Privacy Code applies to the processing of Claimants' personal data.

127. According to the relevant provisions of the Italian Privacy Code, the process of personal data is subject – among others - to the following two relevant principles:

(i) The controller of the database must take specific security measures preventing certain risks, such as unauthorized access to the data base or processing operations that are either unlawful or inconsistent with the purposes for which the data have been collected.[61]

(ii) The transfer of personal data to non-EU countries is restricted to countries which ensure adequate protection of such personal data, unless such transfer is expressly agreed by the subject data or justified by specific circumstances, such as the performance of a contract or the establishment, exercise or defence of legal claims.[62]

128. Although Claimants have brought forward that ICSID legal framework does not sufficiently address and protect the confidentiality of personal data, Claimants have not alleged or demonstrated that Argentinean law does not offer an adequate level of protection in the sense of the relevant provisions of the Italian Privacy Code or EU Directives.

129. Actually, according to the European Commission's Decision of 30/06/2003 pursuant to Directive 95/46/EC of the European Parliament and

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[60] Italian Privacy Code Section 4(1) lit. a.

[61] Italian Privacy Code Sections 31 and 34.

[62] Italian Privacy Code Sections 43-45; EU Directive 95/46/EC Articles 25 and 26.

of the Council on the adequate protection of personal data in Argentina, Argentina is regarded as providing an adequate level of protection for personal data transferred from the Community for the purposes of Article 25(2) of Directive 95/46/EC.[63] This decision was based, among others on the Argentine Constitution which provides for a special judicial remedy for the protection of personal data, known as "habeas data" and the Personal Data Protection Act No 25.326 of 4 October 2000 which develops and widens the Constitutional provisions.

130. Based on this decision of the European Commission, the transfer of Claimants' personal data to Respondent must be seen as a permitted transfer under Section 44(1) lit. b of the Italian Privacy Code, which provides that:

> "The transfer of processed personal data to a non-EU Member State shall also be permitted if it is authorised by the Garante on the basis of adequate safeguards for data subjects' rights
>
> a) […]
>
> b) as determined via the decisions referred to in Articles 25(6) and 26(4) of Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995, through which the European Commission may find that a non-EU Member State affords an adequate level of protection, or else that certain contractual clauses afford sufficient safeguards."

131. However, in the interest of the continued protection of Claimants' personal data, such transfer must still be done in a way to allow the controller of the Database to comply with its own safeguard obligations under the Italian Privacy Code and the EU Directive 95/46/EC, in particular to prevent unauthorized access and processing of information inconsistent with the purposes for which the data has been collected. As such, even though the transfer is permitted and there is no indication that Respondent will not comply with Argentinean data protection laws and regulations, there is still a legitimate interest of Claimants to establish specific rules concerning the use of such information, especially if Respondent is to be given direct access to Claimants' entire online Database.

[63] Decision available on http://ec.europa.eu/justice_home/fsj/privacy/docs/adequacy/decision-c2003-1731/decision-argentine_en.pdf.

132. Based on the above considerations, taking into account Claimants' basic willingness to provide Respondent with direct access to the online Database (see above § 12), and after balancing Claimants' for continued protection of its personal data and Respondent's right in accessing all information necessary to defend its case, the Tribunal orders that Respondent be given direct access to Claimants' online Database subject to the following restrictions:

(i) Access shall be given only to those persons who are directly involved in the present arbitration on behalf of Respondent ("Authorised Persons"). Respondent shall provide Claimants with a list of such Authorised Persons, and shall update this list whenever necessary. Each person or category of Authorised Persons shall be given distinct access codes, so as to monitor the access to the Database.

(ii) Access shall allow Respondent to consult the Database, but not to make any changes or alteration thereto.

(iii) Respondent shall use the information contained in the Database ("Confidential Information") solely for purposes of conducting this arbitration. Further, except for the part of the Confidential Information which is subject to publication in ICSID's registers and website according to Regulations 22 and 23 of the Administrative and Financial Regulations and therefore constitutes public knowledge, Respondent shall not disclose to any unauthorized person or entity any of the Confidential Information, without obtaining prior consent from Claimants' Counsel.

(iv) Respondent shall keep the Confidential Information secure, and take appropriate measures to ensure that the Authorised Persons understand the confidential nature of the Confidential Information and comply with the same obligations as set forth in lit. (iii) above.

(v) Any breach or suspected breach of the present restriction shall be reported immediately to Claimants' counsel.

133. The Confidential Information which has already been provided to Respondent by other means than direct access to the Database (i.e., through the submission of hard and soft copies of the relevant Annexes) shall be subject to the same restrictions as described in § 132 lit. (iii) – (v).

134. **Consequently**, ***Respondent shall be given access to the information contained in Claimants' Database under the terms and conditions set forth in §§ 132-133 above***.

135. The above terms and conditions of Respondent's access to the information contained in Claimants' Database apply until conclusion of the proceedings, unless otherwise agreed between the Parties or ordered by the Tribunal upon its own initiative or upon request of a Party. All parties are at liberty to apply to the Tribunal in justified cases for the lifting or variation of these restrictions on a case-by-case basis. The question will arise whether the Tribunal has the power and authority to decide, either on its own initiative or upon a corresponding request of a Party, on the continuation of this right and some or all of its restrictions beyond the conclusion of the present proceedings. This question will be dealt with when concluding the present proceedings.

c) With Regard to Exhibits relating to other Arbitration Proceedings, in particular Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528

136. As mentioned above (§§ 44-45), Claimants request the Tribunal to strike from the record certain exhibits submitted by Respondent and relating to other arbitration or court proceedings. Claimants' request is based on the following two main arguments: (i) these documents would be subject to confidentiality and (ii) their allegedly selective and out of context use by Respondent would entail the principle of equality of the Parties by disadvantaging Claimants and hindering them from duly exercising their right of defence.

137. In contrast, Respondent requests that these exhibits be admitted (see above § 51). Respondent brings forward that these documents were not issued in sealed proceedings, that they are necessary for impeachment purposes and that, given the lack of general confidentiality duty in ICSID arbitration, Respondent should not be prevented from making use thereof.

138. According to Rule 34(1) of the ICSID Arbitration Rules "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value". The Tribunal thus has the power to decide on the admissibility of the Exhibits at stake.

139. According to the principles established with regard to the present arbitration proceedings (see above §§ 95-100 and 101-105), the category of exhibits at stake would be restricted. However, lacking further knowledge on these other arbitration proceedings, and in particular on potential agreements between the parties or specific orders from the relevant tribunal on confidentiality of the proceedings, the present Tribunal considers that it cannot simply apply its own standard to other arbitration proceedings and assume confidentiality.

140. With regard to Exhibit RE-495 relating to an arbitration (*BG Group PLC v. Republic of Argentina*) in which the award was later subject to setting aside proceedings before the Federal Court of the District of Columbia, confidentiality of the arbitration proceedings was expressly ordered by the tribunal.[64] Even if, as contended by Respondent, the court may have lifted the seal concerning the court proceedings, such lifting of the seal may only apply to the records of the court proceedings, and not render to the whole record of the arbitration proceeding public. Thus, failing proof that Exhibit RE-495 (transcript of the expert examination of Prof. Héctor Mairal held on 5 July 2006 in the arbitration *BG Group PLC v. Republic of Argentina*) was submitted during the court proceedings and is concerned by the lifting of the court's seal, it shall not be admitted into the present proceedings. In addition, even if the lifting of the seal also applied to Exhibit RE-495, the same

[64] CL 07.06.09, p. 3; RSP 24.06.09, p. 7.

considerations as set forth below (§§ 141-150) would apply and hinder the admission of such Exhibit.

141. With regard to the other 20 Exhibits (RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528), they do not seem to have been subject to specific confidentiality orders.

142. However, with regard to the Exhibits relating to transcripts of expert examinations (i.e., Exhibits RE-428, RE-495, RE-452, RE-491, RE-494, RE-495, RE-497, RE-498, RE-504, RE-528), the publication of such documents require in principle the agreement of the parties (see above § 95). Whether such confidentiality considerations may suffice to refuse the admissibility of the concerned Exhibits can remain open. Indeed, besides considerations of confidentiality, further considerations, such as the principle of equality of the Parties, must be taken into account when deciding on the admissibility of evidence.

143. Thus, in order to decide on the admissibility of these documents, it is necessary to balance Respondent's right of defence, including its right to challenge the credibility of any expert or witness, with (i) Claimants' right to equality of arms and (ii) the general interest of ensuring the integrity of the procedure and in particular the finding of the truth.

144. Under due consideration of these diverging interests, it is the Tribunal's opinion that it would not be appropriate to allow these documents as Exhibits in the present proceedings based on the following reasoning:

145. The 20 Exhibits at stake all relate to either expert reports rendered by Prof. Christoph Schreuer, Prof. Rudolf Dolzer, Prof. Michael W. Reisman and Prof. Hector Mairal or transcripts of the examination of these experts in relation to their expert reports. These 20 reports and expert examination transcripts were issued in arbitration proceedings (i) involving different claimants than the ones at stake, (ii) relating to disputes arising from circumstances different than the circumstances of the present case,

(iii) concerning claims raised under BITs signed with countries like the USA, France and Germany and not with Italy as in the case at hand, (iv) concerning claims partly relating to substantial violations of the applicable BITs, and partly relating to jurisdictional issues, sometimes similar to the issues raised in the present case, and (v) based on the stand of laws and jurisprudence in effect at the time of issuance of these reports and conduct of examination, i.e., in the years 2002-2009.

146. Thus, whereas the same experts have rendered expert reports in the present proceedings and partly specifically relating to the issues arising in the present proceedings, the 20 Exhibits at stake have been rendered in different proceedings, relating to different disputes and subject to different laws. As such, except as for very general opinions and opinions of principle, specific considerations expressed in the relevant expert reports or examination transcripts could not be transposed one to one to the present proceedings, but would require to firstly establish the differences and commonalities between the different cases in order to evaluate to what extent and under what conditions these considerations may be transposed. For example:

(i) Part of the expert reports or examinations at stake relate to specific arguments raised by other actors, such as for example specific jurisdictional objections raised by Respondent in the concerned arbitration or to specific arguments set forth in Respondent's memorials.[65] Thus the relevant expert opinions relate to information which is not available. How could the credibility and conviction force of such expert opinions be evaluated without knowledge of such information?

(ii) Some of the expert opinions focus on material violations of the relevant BITs,[66] whilst the current proceedings focus at this stage only on jurisdictional issues.

(iii) Some of the expert opinions focus on specific legal provisions of other BITs signed between Argentina and other countries.[67] Even where such

[65] See, e.g., RE-440, RE-492 and RE-493.

[66] See, e.g., RE-427, RE-428, RE-429, RE-448, RE-490 and RE-496,

provisions are identical to some of the relevant provisions of the Argentina-Italy BIT, opinions relating to one BIT could not be directly transposed to another BIT, but would further require taking into consideration the general circumstances and time under which both BITs were concluded.

147. The exercise of putting the relevant expert opinions back into their original context would not only be a very time consuming exercise, but also a very delicate and difficult one, since the full records of these proceedings are not freely accessible to the Claimants and the Tribunal. The unilateral use of the concerned 20 Exhibits by Respondent would therefore carry an unavoidable risk of "out of context" use of the concerned expert opinions, against which Claimants would have no equal means of defence.

148. The 20 Exhibits at stake are only a small part of a series of binders containing Respondent's so-called "Supplementary Exhibits", primarily intended for the purposes of expert examination. It appears that Respondent's main aim is to use the 20 Exhibits, and other similar Exhibits, in order "to ascertain the credibility and consistency of the witnesses and experts the opposing party presents".[68] It thus seems that these Exhibits would be used in the first place for "impeachment purposes" (see above § 51), and not to shed more light on the legal issues at stake.

149. The four experts concerned by the 20 Exhibits are all Professors of law having published a variety of books and articles, in which their general position on certain relevant issues are laid down. In addition, they have rendered written expert opinions concerning specific issues raised in the present proceedings, and have further been allowed by the Tribunal for cross-examination by Respondent. These circumstances should be sufficient to allow Respondent to challenge the experts' credibility where deemed appropriate. It does not seem necessary to further refer to specific documents issued in other arbitration proceedings, being however understood that

[67] See, e.g., RE-499.

[68] RSP 24.06.09, p. 8.

Respondent may when preparing its cross-examination, make use of the experience it accumulated in other proceedings.

150. In summary, the submission of the concerned 20 Exhibits, as well as of any other Exhibit consisting of expert reports or transcripts of expert examination issued in other arbitration proceedings, seems excessive in the light of Respondent intended use of such Exhibits. The public knowledge concerning the concerned experts' general legal opinions, their specific expert reports rendered in the present case and Respondent's accumulated experience in previous arbitration proceedings involving such experts should suffice to allow Respondent to efficiently defend its rights and in particular to challenge the experts' credibility without referring to documents issued within the course of other arbitration proceedings.

151. **Consequently**, ***Respondent's Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528, as well as any other Exhibit relating to an expert report or transcript of expert examination issued in another arbitration shall not be admitted as evidence in the present proceedings and, hence, shall not be used as examination documents.***

152. The above mentioned Exhibits are part of the so-called "Supplemental Exhibits" submitted by Respondent on 3 June 2009 (see § 28). The admissibility of the remaining part of these "Supplemental Exhibits" will be addressed in the Tribunal's upcoming decision on "the admissibility of all documents submitted by both Parties with regard to expert and witness examinations" according to par. 3 of the Tribunal's letter of 28 December 2009.

VI. ORDER

153. For the reasons set forth above, the Tribunal issues the following decision:

(a) With regard to the present arbitration proceedings, the Tribunal orders that:

(i) ***S*ubject to further specific restrictions on disclosure of specific documents and information as set out herein, the parties may engage in general discussion about the case in public, provided that any such public discussion is restricted to what is necessary, and is not used as an instrument to antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3.**

(ii) **No confidentiality restriction shall apply to the publication of the award and its content.**

(iii) **In the absence of any specific contrary ground, no confidentiality restriction shall be imposed on orders or directions of the Tribunal, including this Procedural Order No. 3**.

(iv) **Minutes and records of hearings of the present proceedings shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs.**

(v) **Pleadings, written memorials and other written submissions of the Parties (including correspondence between the Parties and the Tribunal on substantive issues), as well as witness and experts statements attached thereto shall be restricted unless the Parties otherwise agree, or the Tribunal otherwise directs**.

(vi) **Documents and exhibits submitted with pleadings, written memorials and/or other written submissions of the Parties shall be subject to the restrictions contemplated in §§ 109-110 above unless the Parties otherwise agree, or the Tribunal otherwise directs**.

(vii) **Correspondence between the Parties and the Tribunal which does relate to the mere conduct of the case shall be restricted.**

(b) With regard to Information Contained in the Database, the Tribunal orders that:

Respondent shall be given access to the information contained in Claimants' Database under the terms and conditions set forth in §§ 132-133 above.

(c) **With regard to Exhibits relating to other Arbitration Proceedings, the Tribunal orders that:**

> **Respondent's Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528, as well as any other Exhibit relating to an expert report or to a transcript of expert examination issued in another arbitration shall not be admitted as evidence in the present proceedings *and, hence, shall not be used as examination documents*.**

(d) **The orders set forth in this Procedural Order No. 3 shall remain in force until conclusion of the proceedings, unless otherwise agreed between the Parties or ordered by the Tribunal upon its own initiative or upon request of a Party.**

On behalf of the Tribunal,

[signed]

_____

Pierre Tercier,
Chairman