

# Dissenter fires parting shot in Argentine bond case

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Argentina's arbitrator in a high-profile sovereign debt dispute at ICSID has criticised his co-panellists for failing to produce a final award before the case settled last year – and they in turn have accused him of breaching the secrecy of their deliberations.

In a [declaration](#) dated 15 December in the *Abaclat* case, Spanish arbitrator **Santiago Torres Bernárdez** said there had been an “evident failure” to produce a final award “within a reasonable period of time” in the nearly two years between the end of merits hearings in 2014 and the parties’ request to suspend the proceedings in March last year.

Torres Bernárdez also criticised tribunal chair **Pierre Tercier** of Switzerland and the claimants’ appointed arbitrator **Albert Jan van den Berg** of the Netherlands for factual omissions in the procedural history for the case set out in a 29 December [consent award](#) marking the formal discontinuance of the proceedings.

Tercier and van den Berg have responded by adding their own terse [declaration](#) to the consent award. They suggest that Torres Bernárdez’s declaration “contains information which is largely irrelevant to this consent award, relies on a unilateral and partly inaccurate presentation of facts and is in breach of the principle of the secrecy of the deliberations.”

The ICSID case was originally filed in 2007 by some 195,000 Italian holders of defaulted Argentine sovereign bonds, though the number of claimants eventually dropped to 50,000 after many accepted debt exchange offers from the state.

In 2011, Tercier and van den Berg formed a majority in [upholding jurisdiction](#), finding that the large number of claimants was not a bar to hearing the case and that sovereign debt instruments were protected by the Argentina-Italy bilateral investment treaty even though they were acquired on the secondary market outside the state’s territory.

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Argentina's original appointee to the tribunal, **Georges Abi-Saab** of Egypt, fiercely dissented from those conclusions before resigning, to be replaced by Torres Bernárdez.

The new tribunal held a merits hearing in June 2014 but no award was issued before the parties requested the suspension of the proceedings in March 2016 after the bondholders agreed a US\$1.35 billion settlement with a newly elected centre-right government in Argentina led by President Mauricio Macri.

The parties formally requested the discontinuance of the case last October, leading to the issuance of the consent award last month.

In his declaration attached to the consent award, Torres Bernárdez says the tribunal's failure to render an award in the nearly two years between the close of hearings and the request to suspend the proceedings in March 2016 was "not usual in ICSID arbitral proceedings."

He noted that had the award been produced in a reasonable time it would have been "legally impossible" to suspend the proceeding as the arbitration would already have concluded.

The Spanish arbitrator suggested the failure to reflect this delay in the procedural history of the case was in tension with "the fundamental principle of the good administration of international arbitral justice and, particularly, the corollary that justice delayed is justice denied."

Torres Bernárdez also expressed agreement with his predecessor Abi-Saab that the tribunal lacked jurisdiction to hear the case. The Spanish arbitrator said he only signed the consent award as the parties had agreed that the settlement would be made "without any admission by the parties of ICSID jurisdiction and international liability."

The bondholders' counsel **Carolyn Lamm**, partner at White & Case, says, "As a matter of international arbitration process and procedure a dissent on a consent award or discontinuance, that both parties agree to and ask the tribunal to approve, is wholly inappropriate."

Tercier and van den Berg declined to comment.

A survey by **Jeffery Commission** of Vannin Capital published in *GAR* in February 2016 found that more than 55% of ICSID arbitrations see a final award within one year of the final hearing, with that period lasting between one and two years in 37% of cases. Only 8% of cases took more than two years from the hearing to resolve.

In 2015, the International Bar Association's arbitration committee floated the idea of "naming and shaming" ICSID arbitrators who take too long to issue their award – though the proposal has yet to be implemented.

The *Abaclat* majority decision on jurisdiction and Abi-Saab's dissent were jointly named as the decade's most influential arbitration decision by the online arbitration community OGE MID.

*Abaclat and others v Argentina* (ICSID Case No. ARB/07/5)

Tribunal

- **Pierre Tercier\*** (Switzerland), President
- **Albert Jan van den Berg** (the Netherlands)
- **Santiago Torres Bernárdez\*\*** (Spain)

\*replaced **Robert Briner** (Switzerland) on 2 September 2009

\*\*replaced **Georges Abi-Saab** (Egypt) on 19 January 2012

Counsel to the claimants

- White & Case

Partners **Carolyn Lamm**, **Jonathan Hamilton**, **Andrea Menaker** and **Francis Vasquez, Jr**, in Washington, DC

- Legance Studio Legale Associato

Partners **Cecilia Carrara** and **Paolo Marzano** and associates **Francesca Colantoni** and **Bianca Berardicurti** in Rome (Legance Studio Legale Associato replaced Grimaldi e Associati as co-counsel in May 2012)

- Perez Alati Grondona Benites Arntsen & Martinez de Hoz Jr

Partners **José Alfredo Martínez de Hoz, Jr**, **Valeria Macchia** (no longer with the firm) and **Jimena Vega Olmos** in Buenos Aires

Counsel to Argentina

- Procuración del Tesoro de la Nación
- Cleary Gottlieb Steen & Hamilton LLP

Partners **Jonathan Blackman**, **Matthew Slater**, **Carmine Boccuzzi**, **Inna Rozenberg** and **Ezequiel Sánchez Herrera** in New York

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