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International Arbitration Case Law

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ABACLAT AND OTHERS (CASE FORMERLY KNOWN AS GIOVANNA A BECCARA AND OTHERS) V. THE ARGENTINE REPUBLIC (ICSID CASE NOS. ARB/07/5)
DECISION ON JURISDICTION AND ADMISSIBILITY

Case Report by Orlando F. Cabrera C. **
Edited by Loukas Mistelis ***

A majority Decision on Jurisdiction and Admissibility concerning the first ICSID case that involves sovereign debt and mass claims, dispatched to the Parties on August 4, 2011, under the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments ("BIT"), and in accordance with the ICSID Convention, Institution Rules, ICSID Arbitration Rules, and the Administrative and Financial Regulations.

Tribunal: Professor Pierre Tercier (President), Professor Georges Abi-Saab, and Professor Albert Jan van den Berg

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INDEX OF MATTERS DISCUSSED

1. Facts of the Case 2

2. Legal Issues Discussed in the Decision 4

   2.1 Law (paras. 221-298) 4

      (a) Introductory Remarks (paras. 221-250) 4

      (b) Legal Basis for the Tribunal's Jurisdiction (paras. 251-298) 5

   2.2 The Arbitral Tribunal's Jurisdiction (paras. 299- 503) 6

      (a) Legal Dispute Arising out of the BIT (paras. 301-332) 6

      (b) Legal Dispute relating to an Investment (paras. 333-387) 7

      (c) Between Argentina and Italian Investors (paras. 388-422) 8

      (d) Subject to the Claimants' Written Consent (paras. 423-466) 9

      (e) Subject to Argentina's Written Consent (paras. 467-500) 11

   2.3 Admissibility of the Claim (paras. 504- 662) 12

      (a) Mass action (paras. 506-551) 12

      (b) 18 Months Litigation Requirement (paras. 567-591) 13

      (c) Withdrawal and Addition of Claimants (paras.592-641) 15

      (d) Abuse of rights (paras. 642-659) 16

   2.4 Costs (paras. 682-694) 17

3. Decision 17

Digest

1. *Facts of the Case*

From 1991 through 2001, Argentina issued 179 bonds in the international capital markets, 173 bonds were denominated in foreign currencies. Claimants allegedly purchased 83 of the 173 foreign currency bonds. The 83 bonds allegedly purchased by Claimants are governed by the laws of different jurisdictions, were issued in different currencies and listed on various international exchanges, such as Buenos Aires, Frankfurt, Hong Kong, Luxemburg, Milan, Munich, and Vienna. The maturity varies from 3 to 5 years.[1]

By the late 1990s, Argentina suffered a severe economic recession and consequent reduction of fiscal revenues, leading Argentina to incur additional debt. These adverse economic developments resulted in "capital flight" and decrease of capital inflow. In 2001, Argentina took various measures in an attempt to restructure its economy and lighten its debt. Nevertheless, these efforts did not suffice to redress the situation. On December 23, 2001, Argentina defaulted by publicly announcing the deferral of over US$100 billion of external bond debt owed to both non-Argentine and Argentine creditors.[2]

In January 2002, the Argentine Congress declared a public emergency in social, economic, administrative, financial and exchange matters with the passage of the Public Emergency and Reform Law of 2002 (the Emergency Law). In addition, the devaluation of the peso further accentuated the weight of debt denominated in foreign currencies. This led Argentina to envisage the restructuring of its foreign debt.[3]

In 2002, the Executive Committee of the Italian Banking Association established "Task Force Argentina" (TFA)[4] which aims to "*represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina."* Bondholders wishing to be represented by TFA were requested to sign a mandate for the protection of the interests connected with the bonds involved in the Argentinean Crisis. Allegedly, over 450,000 Italian persons claimed to have held Argentine

[1] Decision ¶¶ 50-51

[2] Decision ¶¶ 52-58

[3] Decision ¶¶ 60-62

[4] *L'Associazione per la Tutela degli Investitori in Titoli Argentini* or TFA is established in Rome and organized under Italian law as an *associazione non riconsciuta*, founded by its members' contributions.

bonds for an aggregated nominal amount of US$ 12 billion and submitted their mandates to TFA.[5]

On January 14, 2005, Argentina launched the Exchange Offer 2005, pursuant to which bondholders could exchange 152 different series of bonds, on which Argentina had suspended payment in 2001 for new debt that Argentina would issue. On February 9, 2005 Law 26,017 was enacted and provided that regarding those bonds which were not exchanged in the Exchange Offer 2005, the Executive Branch of the government could not reopen the exchange process and could not enter into any judicial, extra-judicial or private transaction.[6]

In February 2005, the period for submitting tenders pursuant to the Exchange Offer 2005 expired, 76.15% of all holdings participated in the Exchange Offer 2005, following which Argentina issued several bonds. The Exchange Offer 2005 settled on June 2, 2005. Claimants did not participate in said Exchange.[7]

Unsatisfied with the situation, TFA considered the initiation of ICSID arbitration. A new mandate (TFA Mandate Package) was designed by TFA to represent the Italian bondholders in the arbitration.[8]

TFA's member banks arranged for the distribution and collection of the Mandate Package among their clients during March and April 2006, which was accepted by over 180,000 Italian bondholders. In September 14, 2006, White & Case filed with ICSID the Request for Arbitration accompanied by Annexes A through E on behalf of these Italian bondholders (Claimants). On September 26, 2006, ICSID transmitted to Respondent the Request for Arbitration. [9]

In December 2006, Claimants submitted supplemental Annexes related to Annexes A through E and submitted Annexes K and L. The substitute annexes reflected: (i) An addition of Claimants, (ii) the withdrawal of certain Claimants, (iii) corrections and substitutions as to the information on Claimants, (iv) the revision of the aggregate amounts and (v) the addition of one new bond series.[10]

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[5] Decision ¶¶ 65-66, 68
[6] Decision ¶¶ 77-78
[7] Decision ¶ 80
[8] Decision ¶ 85. TFA Mandate Package consisted of TFA Instructions Letter, Power of Attorney in favor of White & Case, TFA Mandate among other documents.
[9] Decision ¶¶ 90-91, 98-99
[10] Decision ¶ 103

On May 3, 2010, Argentina launched the Exchange Offer 2010 which aimed to restructure defaulted debt obligations of Argentina, to release Argentina from any related claims and to terminate legal proceedings against Argentina in respect of the tendered Eligible Securities in consideration for this issuances of New Securities and in certain cases a cash payment.[11]

In this offer, Respondent invited "*the Owners of each Series of Bonds listed in Annexes A-1 and A-2 (jointly "Eligible Securities") to submit offers to exchange Eligible Securities for New Securities and, in certain cases, cash…*" Claimants hold security entitlements in the bonds listed in said Annexes and Claimants were eligible to tender into this Exchange Offer 2010. Many Claimants tendered into the Exchange Offer of 2010, and withdrew from these proceedings.[12]

2. *Legal Issues Discussed in the Decision*

2.1 Law (paras. 221-298)

(a) *Introductory Remarks (paras. 221-250)*

The Tribunal decided that the main object of the decision was to examine the jurisdiction of the Centre and the competence of the Tribunal over the claims and to determine whether or not such claims were admissible. The decision did not aim at determining whether or not the Tribunal had jurisdiction with regard to each specific Claimant. Instead, it would set forth the general requirements for the jurisdiction of the Tribunal and the admissibility of the claims.[13]

The Convention does not define the concept of jurisdiction of the Centre or of competence of the Tribunal contemplated in Arts. 25 and 41 of ICSID Convention. However, the Executive Directors of the Centre have interpreted the concept of jurisdiction of the Centre as a convenient expression to mean the limits within which the provisions of the Convention will apply for conciliation and arbitration proceedings. The concept of jurisdiction under the Convention also covers issues which may usually be regarded as issues of admissibility.[14]

The Tribunal distinguished jurisdiction and admissibility issues as follows: (i) A lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in

[11] Decision ¶¶ 92-93
[12] Decision ¶¶ 94-97
[13] Decision ¶¶ 225, 227
[14] Decision ¶ 245

front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment; (ii) a decision refusing a case based on a lack of arbitral jurisdiction is usually subject to review, a decision refusing a case on a lack of admissibility can usually not be subject to review; (iii) a final refusal based on a lack of jurisdiction will prevent the parties from successfully re-submitting the same claim to the same body, a refusal based on admissibility will in principle, not prevent the claimant from resubmitting its claims, provided it cures the previous flaw causing the inadmissibility.[15]

The Tribunal distinguished issues of jurisdiction from issues of admissibility as follows: "*If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction.*"[16]

(b) Legal Basis for the Tribunal's Jurisdiction (paras. 251-298)

In order to be subject to ICSID's jurisdiction, the dispute must concern an investment and the claims must arise directly from such investment. The dispute must exist between a Host State having ratified the Convention and an investor of another State, having also ratified the Convention. A State must have consented to ICSID's jurisdiction in the specific case at hand in order to give consent for ICSID's jurisdiction. An arbitration clause and providing for ICSID arbitration in a BIT constitutes a valid written offer for ICSID arbitration by the State. Art. 8(3) of the BIT comprises the State's consent and may be accepted by an investor through the initiation of ICSID proceedings.[17]

Through the express designation of ICSID arbitration in Art. 8 of the BIT, Italy and Argentina, expressed their consent required under Art. 25 of ICSID Convention to submit specific disputes with nationals of each other to ICSID. Under the BIT an investor must be a national of the other Contracting Party, and must further fulfill the domiciliation requirements of the Additional Protocol.[18]

The ICSID framework is silent with regard to the question whether the

[15] Decision ¶ 247
[16] Decision ¶ 249
[17] Decision ¶¶ 256-258
[18] Decision ¶¶ 275, 286-287

arbitration proceedings can be rendered conditional upon the fulfillment of further requirements, and if so, what are the effects of such additional requirements on ICSID's jurisdiction for handling the case.[19]

The Tribunal noted that this was the first case in ICSID's history that mass claims were brought before it. Thus, the large number of Claimants made it impossible to treat and examine each of the 60,000 claims as if they were a single claim, and certain generalizations and/or group examinations would be unavoidable. Neither the ICSID framework nor the BIT addresses the issue of mass proceedings and fail to provide an answer if such treatment might constitute a hurdle to ICSID jurisdiction and/or to the admissibility of the claims.[20]

2.2 The Arbitral Tribunal's Jurisdiction (paras. 299- 503)

(a) Legal Dispute Arising out of the BIT (paras. 301-332)

The task of the Tribunal at the stage of determining whether it had jurisdiction to hear a claim under an investment treaty consisted in determining whether the facts alleged by the Claimant(s), if established, were capable of constituting a breach of the provisions of the BIT which had been invoked. In performing this task, the Tribunal applied a *prima facie* standard to the determination of the meaning and scope of the relevant BIT provisions, as well as to the assessment of whether the facts alleged may constitute breaches of these provisions on its face.[21]

The Tribunal found that the facts on which Claimants base their allegations relate to the acts of Argentina preceding and following its public default in December 2001, and in particular the way it consulted with its creditors, the way it reached a decision on how to deal with its foreign debt and the nature, scope and effects on Claimants' security entitlements of the legislation and regulations it promulgated in the implementation of its decision.[22]

Additionally, the Tribunal considered that, *prima facie,* the facts, if established, may constitute a possible violation of at least some of the provisions of the BIT invoked by Claimants, particularly:

(i) The arbitrary promulgation and implementation of regulations and laws can

[19] Decision ¶ 289
[20] Decision ¶¶ 295-297
[21] Decision ¶¶ 303, 311
[22] Decision ¶ 313

amount to an unfair and inequitable treatment, and may constitute an act of expropriation where the new regulations and/or laws deprive an investor of the value of its investment or from the returns thereof.

(ii) The alleged different treatment afforded to domestic investors may constitute discriminatory treatment and breach national treatment.[23]

The Tribunal considered that the claims were not purely contractual claims but treaty claims, based on the fact that Argentina intervened as a sovereign by virtue of its State power to modify its payment obligation towards its creditors.[24]

The Tribunal found that third parties, such as banks involved in the process of the bond issuances and distribution, were auxiliaries of Argentina, who helped the latter to create the basis for Claimants' alleged investment. If such third parties had breached any obligation towards Argentina and/or the Claimants, redress might be sought under the remedies provided for in the relevant contractual bond documents or in the applicable statutory laws.[25]

(b) Legal Dispute relating to an Investment (paras. 333-387)

The Tribunal determined that a certain value may only be protected if generated by a specific contribution, and – vice versa – contributions may only be protected to the extent they generate certain value, which the investor may be deprived of. The investment had to fit under the BIT and the ICSID Convention.[26]

The term "obligation" under Art. 1 (1) may be understood as referring to an economic value incorporated into a credit title representing a loan. The Tribunal found that the bonds constitute "obligations" and/or "public securities." They also represent "securities" since they constitute an instrument representing a financial value held by the holder of the security entitlement in the bond. Thus, the bonds and Claimants' security entitlements were considered "investments."[27]

The purchase of security entitlements in Argentinean bonds constituted a contribution which qualified as an "investment" under Art. 25 of the ICSID Convention, since Claimants purchased security entitlements in the bonds and

[23] Decision ¶ 314
[24] Decision ¶¶ 324-326
[25] Decision ¶¶ 329-330
[26] Decision ¶¶ 350-351
[27] Decision ¶¶ 354-361

paid certain amount of money in exchange of the security entitlements.[28]

With regard to investments of a purely financial nature, the relevant criteria for the determination of the place of the investment should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid or transferred. Additionally, the Tribunal did not doubt that the funds generated through the bonds were ultimately made available to Argentina and served to finance Argentina's economic development. They were used by Argentina to manage its finances and as such to have contributed to Argentina's economic development and thus to have been made in Argentina.[29]

The Tribunal found that forum selection clauses are clauses of procedural nature aiming to determine the place of settlement of a dispute relating to a contractual performance. They have nothing to do with the place where a party is supposed to perform its obligations. Furthermore, if such clauses had an influence on the place of contractual performance, they would not be relevant to determine the place where the investment was made.[30]

The bonds were made "*in compliance with the laws and regulations of Argentina.*" The alleged breaches committed by the Italian banks should not be relevant for the purpose of examining Claimants rights and Argentina's obligations under the BIT. Thus, an alleged misconduct of the Italian banks may not render the security entitlements unlawful pursuant to Art. 1(1) BIT.[31]

(c) Between Argentina and Italian Investors (paras. 388-422)

The Tribunal had jurisdiction *rationae personae* over each Claimant being a natural person (i) with Italian nationality on September 14, 2006 and February 7, 2007; (ii) who on either date was not a National of Argentina; (iii) who was not domiciled in Argentina for more than two years prior to making the investment; (iv) who had made an investment pursuant to the BIT. The Claimants are holders of the security entitlements; thus, they are considered investors under the BIT.[32]

The Tribunal found that in order to qualify as a "juridical person" under Art.

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[28] Decision ¶¶ 366-367
[29] Decision ¶ 378
[30] Decision ¶ 379
[31] Decision ¶¶ 384-385
[32] Decision ¶¶ 411-412

1(2)(b) it was sufficient that Italian law affords legal entities or other forms of organizations with the capacity to make the investment and the right to litigate in their own name. It is not necessary that they be granted full legal personality under Italian law. At this stage of proceedings it was not necessary to determine which of the Claimants constitute entities.

In order to benefit from the protection of the BIT and be a party to the arbitration, entities must fulfill the criteria of "Italian nationality." Such entities must be duly constituted under Italian law and/or have their '*siège social*' in Italy. Additionally, the Tribunal had jurisdiction *rationae personae* over each Claimant being a juridical person with Italian nationality on September 14, 2006 (in compliance with the Italian legislation on such date).[33]

(d) Subject to the Claimants' Written Consent (paras. 423-466)

The Tribunal did not decide whether each Claimant had validly consented to the arbitration. The Tribunal limited its analysis to the question whether Claimants' consent constitutes a valid consent to the ICSID arbitration taking into account the representation mechanism implemented by the TFA Mandate Package.

The Tribunal considered that questions of consent under Art. 25 of the ICSID Convention are subject to the principles of international law and not pursuant to the law applicable to the merits designated in Art. 42 ICSID of the Convention.[34]

Art. 8 of the BIT does not impose any specific form requirement, whilst Art. 25(1) the ICSID Convention only requires the consent to be in "written" form. No other procedure is requested. With regard to the substantive requirements, the above articles are silent and there are no internationally recognized specific rules for that. Thus, a tribunal's role is limited to the examination of the existence of a written document, incorporating the parties' consent to submit the dispute to ICSID arbitration. Furthermore, the Tribunal considered that it not only had the duty to examine the existence of a written document incorporating a consent to submit the dispute to ICSID arbitration, but it should also ask itself whether such consent reflected each Claimant's sincere intention.[35]

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[33] Decision ¶¶ 420-421

[34] Decision ¶ 430. Citing the *Ceskoslovenska Obchodni Banka, A.S. v. the Slovak Republic* (ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, ¶ 35.

[35] Decision ¶¶ 432-435

Consent that was not freely given, i.e. given under threats or coercion, fraudulently induced, or based on an essential mistake, may not constitute a valid consent under general principles of law. An investor who consents to ICSID arbitration must understand and want to initiate ICSID arbitration. The reasons why such investor opts for ICSID arbitration are irrelevant for the validity of the consent, provided such consent was free and informed.[36]

Under BIT-based arbitration, consent is given through the initiation of ICSID arbitration, which constitutes the acceptance by an investor of the Host State's offer to arbitrate. It is the power of attorney instructing the lawyer to launch the arbitration proceeding on behalf of the investor and the request filed by empowered attorney which contain and constitute the consent of the investor.

The validity of such power of attorney is subject to general principles of international law. The Tribunal distinguished between the validity of the power of attorney itself which is a matter of procedure regulated in ICSID Arbitration Rule 18 and the validity of the consent embodied in the power of attorney, which is a matter of jurisdiction and subject to the law applicable to the consent itself, i.e. international law.[37]

ICSID arbitration is open to any investor, irrespective of its legal qualifications. Thus, there was no reason to impose on lawyers and their principal specific limitations or restrictions existing in their home jurisdiction.[38]

The Tribunal held that the power of attorney constituted a written power of attorney and contained a clear and unambiguous expression of irrevocable consent by the relevant Claimant to initiate ICSID arbitration against Argentina in relation to its non-payment of amounts due under the relevant bonds, and to entrust White & Case with the conduct of such arbitration. Thus, the power of attorney constituted a written consent under Art. 25 (1) ICSID Convention.[39]

Additionally, the Tribunal held that the TFA Mandate Package contained sufficient information to allow Claimants an informed consent. It sets forth that during ICSID arbitration Claimants cannot simultaneously initiate legal claims

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[36] Decision ¶¶ 437-438
[37] Decision ¶¶ 258, 446
[38] Decision ¶ 448
[39] Decision ¶ 453

against the TFA member banks and that the statute of limitations is not tolled.[40]

The Tribunal found that the information of the TFA Mandate Package allowed Claimants to make an informed choice and there was no indication that TFA's representation had been systematically fraudulent, coercive or otherwise caused Claimants to agree to ICSID arbitration based on an essential mistake.[41]

The Tribunal considered that there was no indication that Claimants' consent to ICSID arbitration through the TFA Mandate Package and the initiation of the arbitration by White & Case in accordance with such package would be invalid.[42]

(e) Subject to Argentina's Written Consent (paras. 467-500)

Under Arts. 8(3) and 8(5) Argentina consented to submit "*disputes relating to investments*" and "*in relation to the issues governed by this Agreement*" to ICSID arbitration, if so chosen by the investor. Additionally, there was no reason to exempt foreign debt restructuring from the scope of application of the BIT. [43]

The Tribunal referred to "mass proceedings" as a qualification for the proceedings, due to the high number of Claimants appearing together as one mass, and without any prejudgment on the procedural classification of the proceedings as a specific kind of "collective proceedings." Additionally, the Tribunal stated that collective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right.[44]

The Tribunal considered that the proceedings appeared to be aggregate proceedings, in which each individual Claimant is aware of and consented to the ICSID arbitration. The number of Claimants and their identity were established. However, their participation was limited to a passive participation, in the sense that a third party, TFA, represented their interests and made on their behalf all the decisions relating to the conduct of the proceedings. The high number of Claimants made it impossible for the representative to take into account individual interests of individual Claimants, and rather limited the proceedings

[40] Decision ¶ 461
[41] Decision ¶¶ 462, 464
[42] Decision ¶ 465
[43] Decision ¶¶ 473, 479
[44] Decision ¶¶ 480, 484

to the defense of interests common to the entire group of Claimants.[45]

The presence of forum selection clauses in the contractual bond documents was irrelevant for the assessment of the existence and/or validity of Argentina's consent to ICSID arbitration.[46]

2.3 Admissibility of the Claim (paras. 504- 662)

(a) Mass action (paras. 506-551)

The Tribunal recalled that it is undisputed that the ICSID framework contains no reference to collective proceeding as a possible form of arbitration. Thus, the key question was how to interpret such silence. Additionally, the Tribunal found that it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a "qualified silence" categorically prohibiting collective proceedings just because it was not mentioned in the ICSID Convention. Thus the silence of the ICSID framework regarding collective proceedings was interpreted as a "gap." Consequently, the Tribunal had a limited power under Art. 44 ICSID Convention to fill this gap.[47]

Art. 44 of the ICSID Convention provides that where the ICSID framework is silent on a procedural question, which is not subject to the parties' agreement, the Tribunal shall decide the question.[48]

A modification of existing rules can only be effected subject to the parties' agreement, in accordance with minimum standards of fair procedure and to the extent that the rules to be modified are not mandatory. A tribunal's role is not to complete or improve the ICSID framework in general, i.e. the tribunal's power to fill gaps is limited to the design of specific rules to deal with specific problems arising out of the proceedings.

The Tribunal considered that it would need to implement mechanisms allowing a simplified verification of evidentiary material, where this simplification can concern either the depth of examination of a document or the number of

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[45] Decision ¶¶ 486-487

[46] Decision ¶ 499

[47] Decision ¶ 517

[48] Decision ¶ 521. This rule is further complemented by ICSID Arbitration Rule 19 according to which "*the Tribunal shall make the orders required for the proceeding.*"

evidentiary documents to be examined.[49]

The procedure necessary to deal with the collective aspect of the proceedings concerns the method of the Tribunal's examination, as well as the manner of representation of Claimants. However, the Tribunal is obliged to examine all relevant aspects of the claims relating to Claimants' right under the BIT as well as to Respondent's obligations subject to the Parties' submissions. Thus, it was the manner in which the Tribunal would conduct such examination.[50]

Group examination of claims is acceptable where claims raised by a multitude of claimants are to be considered identical or at least sufficiently homogeneous. The proceedings concerned potential treaty claims. Thus the identity or homogeneity requirement applies to the investment and the right and obligations based on the BIT. The specific circumstances surrounding individual purchases by Claimants of security entitlements were irrelevant.[51]

The Tribunal considered that claims were sufficiently homogeneous to justify a simplification of the examination method and procedure. Furthermore, the Tribunal stated that whilst it was true that Argentina might not be able to know the details of each Claimant, it was not certain that such approach was at all necessary to protect Argentina's procedural rights in the light of the homogeneity of claims. The only alternative would be to conduct 60,000 separate proceedings that would be a bigger challenge to Argentina's effective defense rights.[52] Thus the Tribunal considered that the procedure to deal with the claims in a collective way was admissible and acceptable.[53]

Finally, the Tribunal stated that it would be wrong to hinder the effective exercise of such jurisdiction through the rejection of the admissibility of the claims merely on policy considerations.

(b) 18 Months Litigation Requirement (paras. 567-591)

Art. 8(2) BIT provides for a requirement to resort to local courts for 18 months in the case of failure of amicable consultations. The Tribunal stated that it was

[49] Decision ¶ 531
[50] Decision ¶ 533
[51] Decision ¶¶ 540-542
[52] Decision ¶¶ 544-545
[53] Decision ¶¶ 546-547. Citing Art. 44 ICSID Convention, Rule 19 ICSID Arbitration Rules, as well as the general spirit, object and aim of the ICSID Convention.

undisputed that Claimants had not submitted their dispute to the Argentine courts before initiating the present arbitration. Nevertheless, the Tribunal considered that Claimants' disregard of the 18 months litigation requirement was in itself not sufficient to preclude Claimants from resorting to arbitration.[54]

The disregard of the 18 months litigation requirement was considered incompatible with the system of Art. 8 where it unduly deprived the Host State of a fair opportunity to address the issue through its domestic legal system. The opportunity must be a real chance in practice that the Host State, through its courts, would address the issue in a way that could lead to an effective solution of the dispute. The Tribunal considered that such opportunity was only theoretical and/or could not have led to an effective resolution of the dispute within 18 months, and it would be unfair to deprive the investor of its right to arbitration based on the mere disregard of the 18 months litigation requirement.[55]

By not resorting to the Argentinean courts, Claimants disregarded the 18 months litigation requirement. Claimants could bring claims before the Argentine courts. However, looking at the nature of the claims available to Claimants in the local courts, the Tribunal found that none of them would have been suited to address the present claims in such a way as to effectively resolve the dispute:

- Claims for compensation by Argentina's action surrounding its default were deemed to fall under the Emergency Law which prohibited any judicial, extra-judicial or private transaction. Thus, even if the Claimants would have won the case before the courts, it would be impossible for the government to pay out the compensation;

- Claimants could have also initiated proceedings aimed at declaring the Emergency Law unconstitutional. However, claims for compensation would only available following the Emergency Law having been found unconstitutional, which was unlikely to happen within 18 months.[56]

In addition, the Tribunal stated that Argentina's legal system does generally not provide for mass claims mechanisms, and that Claimants would have needed to initiate separate claims which would have been incredibly burdensome for them and for the courts. Furthermore, the Tribunal found that due to the Emergency

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[54] Decision ¶¶ 567, 576, 580
[55] Decision ¶ 583
[56] Decision ¶ 585

Law which prohibited any kind of payment to Claimants, Argentina was not in a position to adequately address the dispute within the framework of its domestic legal system. Thus, Argentina's interest in pursuing local remedies did not deprive Claimants of their right to resort to arbitration because they had not submitted their dispute to the Argentinean courts.[57]

(c) Withdrawal and Addition of Claimants (paras.592-641)

The Tribunal stated that it is true that ICSID Secretary-General reviews the request for arbitration and accepts or refuses to register the request; however, this examination is limited to assure that the request for arbitration contains all information requested. The examination cannot cover all aspects relevant to ICSID's jurisdiction and/or to the admissibility of the case.[58]

Art. 36 of the ICSID of the Convention requires that relevant information on the parties' identity be submitted with the request for arbitration. The Tribunal noted that: (i) The identity of Claimants was changed (Claimants were added after the filing of the Request for Arbitration); (ii) Claimants submitted information on their identity as annexes, instead of inserting relevant information in the Request.

The Tribunal considered that Art. 36 of the ICSID Convention does not prohibit cure of the lack of relevant information in the request for arbitration before its registration; it actually conforms to ICSID's practice and the powers of the Secretary-General to give parties the opportunity to supplement their request for arbitration before its registration if any core information is missing; and the identity of the Claimants is subject to the Tribunal's competence, thus it could only be examined once the Tribunal has been constituted. When the Tribunal took the case and started the examination, all new Claimants had already been added. The Tribunal found that subsequent addition of Claimants did not lead to the inadmissibility of the additional Claimants.[59]

The addition of Claimants after the filing of the Request for Arbitration and before its registration through the submission of Annex K, as substituted, was

[57] Decision ¶¶ 587-588

[58] Decision ¶ 606

[59] Decision ¶¶ 610. The Tribunal considered two reasons: (i) The unilateral withdrawal of a request for arbitration before its registration would not lead to any particular problem and would just reduce the number of Claimants; conversely, it is also possible to add claimants prior to the registration of the request for arbitration; and (ii) Mass proceedings may require making certain adjustments to the number and identity of Claimants.

admissible and did not contravene the ICSID Convention Rules.[60]

The withdrawal of certain Claimants was considered a request for discontinuance pursuant to Rule 44 ICSID Arbitration Rules. The Tribunal can only order discontinuance to the extent it is accepted by Respondent, i.e., to the extent that such discontinuance would be "full and final" and that costs be allocated as requested by Respondent. The Tribunal considered that the terms of discontinuance for the costs suggested by Respondent were reasonable. Thus, parties would bear each half of the arbitration costs and bear their own cost.[61]

Discontinuance means that the proceedings involving the Claimants who are withdrawing will terminate. However, discontinuance does not mean the termination of the entire proceedings. Claimants having withdrawn from the proceedings would not be subject to nor bound by the Decision, except for the consideration of these sections and subject to the corresponding costs.[62]

(d) Abuse of rights (paras. 642-659)

The Tribunal stated that the theory of abuse of rights is an expression of the principle of good faith, which is a fundamental principle of international and investment law.[63] Such theory has been applied by other tribunals.

Argentina's allegations of abuse of rights and abuse of process were directed against TFA, asserting that the Tribunal should not allow the dispute because TFA was pursuing its own interest, which conflict with Claimants' interest and which were foreign to the interests that the BIT and the ICSID Convention protect. However, the Tribunal found that even if TFA had pursued interests which conflicted with Claimant's interest, this would not lead to the inadmissibility of Claimants' claims.[64]

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[60] Decision ¶ 611

[61] Decision ¶¶ 620, 632

[62] Decision ¶ 637

[63] Citing: Hersch Lauterpacht, Development of International Law by the International Court, London, 1958, p. 164. "There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused." and *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction of 10 June 2010, ¶¶ 169 *et seq.*

[64] Decision ¶¶ 646-659. The Tribunal stated the following reasons: The alleged abuse of rights did not concern Claimants' rights as arising out of the BIT but TFA's interests as arising out of Claimants' pursuit of ICSID proceedings. In addition, Argentina did not allege that Claimants were abusing their

2.4 Costs (paras. 682-694)

The Tribunal concluded that it was too early in the proceedings to rule on costs, except for the Claimants subject to discontinuance. The Tribunal held that Respondent and the Claimants subject to discontinuance shall each bear half of the arbitration costs and bear their own cost. From 180,000 Claimants about 120,000 Claimants were subject to discontinuance. Thus, two thirds of the arbitration costs were attributed to the proceedings between the Claimants subject to the discontinuance and Respondent (US$1,139,068.3).

3. Decision

The Tribunal decided that Argentina's consent to the jurisdiction of the Centre included mass claims. The Declaration of consent signed by the individual Claimants submitted in this proceeding were in principle valid.[65]

The Tribunal considered TFA as Claimants' agent. The role of TFA in the proceedings did not amount to an abuse of rights which would justify dismissing Claimants' claims for lack of admissibility.

The Tribunal admitted the Annexes submitted by Claimants and it stated that it was possible to add further Claimants after the filing of the claim, to the extent that additions were made before the date of the Notice of the Registration of the Request for Arbitration (February 7, 2007). In addition, Claimants were entitled to initiate ICSID arbitration notwithstanding the 18-month domestic litigation clause under Art. 8(2) of the BIT.

The Tribunal determined that the claims, as Treaty Claims arising out of the BIT, fell under the jurisdiction *ratione materiae* of the Tribunal. With regard to the forum selection clauses referring to national courts in the bonds, the Tribunal determined that such clauses did not apply to the Treaty Claims and did not affect the Tribunal's jurisdiction over such Treaty Claims

The Tribunal determined that the bonds held by Claimants qualify as Investment

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right to resort to ICSID arbitration in order to protect their investment. Furthermore, dismissing Claimants' claims would mean depriving them of a remedy they are entitled to invoke, because of the alleged behavior of a third party.

[65] The potential existence of fraud, coercion or essential mistake invalidating the consent of a specific Claimant based on the specific circumstances of the individual case remained open and would be dealt in a later stage of the proceedings.

under Art. 1(1) of the BIT, "made in the territory of Argentina" and "in compliance with the laws and regulations of Argentina." The Tribunal had jurisdiction *rationae personae* (1) over each Claimant who is a natural person and (2) over each Claimant who is a juridical person as set forth in the Decision.

The Tribunal granted the request for discontinuance and the proceedings were discontinued with regard to all Claimants listed in Annex L. Thus, the Tribunal determined that two thirds of the arbitration costs (USD$1,139,068.3) would be borne in half by the Claimants who were subject to discontinuance and by the Respondent. The Claimants subject to discontinuance and the Respondent would bear their own cost, which were quantified at two thirds of each Party's costs claimed. The remaining one third of each Party's costs was reserved until a later stage.

The Tribunal determined that the merit phase of the case would be split into two phases. The first phase would determine the core issues regarding the merits and conditions required to resolve the claims; in the second phase the Tribunal would determine how to examine the relevant issues. The Annexes submitted were in principle admitted and the latest versions of the Annexes were accepted.