School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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AMBIENTE UFFICIO S.P.S. & OTHERS
(CASE FORMERLY KNOWN AS GIORDANO ALPIO & OTHERS)
V.
THE ARGENTINE REPUBLIC
ICSID CASE NO. ARB/08/09

DECISION ON JURISDICTION AND ADMISSIBILITY

Case Report by: Nchimunya D. Ndulo[†]
Edited by Mona Davies[‡]

In its Decision of February 8, 2013, the Tribunal assumed jurisdiction over claims asserted by multiple Italian investors concerning investments involving the issuance of Argentine government bonds, under a bilateral investment treaty between Italy and Argentina.

Main Issues:	[jurisdiction – consent; jurisdiction - personal – nationality; jurisdiction – subject matter - investment; jurisdiction – ICSID Convention Article 25 – investment; prima facie treaty claims; and treaty obligations - international law standard]
Tribunal:	Judge Brunno Simma, Professor Karl-Heinz Bockstiegel, Dr. Santiago Torres Bernardez.
Claimant's counsel:	Avv. Piero G. Parodi, Avv. Luca G. Radicati di Brozolo, Professor Abogado Rodolfo Carlos Barra
Defendant's Counsel:	Dra. Angelina Maria Abbona, Procuradora del Tesoro de la Nacion Argentina

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1. *Facts of the Case:*

In 2001, in the midst of its economic crisis, the Argentine government defaulted on the payment of sovereign bonds issued to individuals including Italian claimants. In 2005, during the time an Exchange Offer was open for acceptance by Argentina's creditors, Argentina restructured its debt and suspended payments on its issued bonds pursuant to legislation enacted by its Congress, Law No. 26.017 which "forbade the country's government from entering into any judicial, non-judicial or private settlement with the non-participating bondholders as well as from reopening the Exchange Offer." (¶ 585). Subsequently, 90 Italian claimants brought suit against the Argentine government, alleging that by issuing and subsequently defaulting on government bonds, the Argentine government breached the terms under the Argentina-Italy BIT. The Argentine government raised preliminary objections claiming that the Tribunal lacked jurisdiction and that it had not consented to multi-party proceedings in the ICSID arbitration.

2. *Legal Issues Discussed:*

a) *Consent of the Respondent:*

In response to the Respondent's initial objection that the Respondent did not consent to a claim which it termed a "class action" under the Argentina-Italy BIT and ICSID Convention, the Tribunal first addressed whether the multitude of claimants resulted in the case taking the form of a "class action." (¶¶ 114-118)) The Tribunal concluded that the case did not constitute a "class action." (*Id*.) In arriving at this conclusion, the Tribunal emphasized that the Claimants signed individual Powers of Attorney and their claims do not have a representative character, a key feature of a "class action." (*Id*.) Furthermore, the Tribunal concluded that "class action" mechanisms do no not exist under the ICSID Convention nor was it the Claimants intention to submit a "class action" to the tribunal. (¶¶ 115-116). The Tribunal concluded that the claim constituted a multi-party arbitration, which it found to be a generally accepted practice in ICSID arbitrations and that therefore the institution of multi-party proceedings did not require consent on behalf of the Respondent Government beyond the general requirements of consent to arbitration. (¶ 141). Citing *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, the Tribunal further concluded that by including a list of protected investments which are

susceptible to involving a high number of investors, and where such investments may require a collective relief, the authors of the Argentina-Italy BIT were envisaging a high number of potential claimants. (¶ 144). The Tribunal also found that the ICSID Convention does not suggest a certain limitation "to the number of claimants which cannot be exceeded without jurisdiction being eliminated." (¶ 150). The Tribunal also found that the necessary link amongst multiple claimants is the treaty claim they jointly submit and did not find that the ICSID Convention required a contractual link amongst the claimants as argued by the Respondent. (¶¶ 156, 159-160). The Tribunal also found, contrary to the Respondent's objection, that the number of claimants would not affect due process nor make the proceedings "unmanageable." (¶¶ 166, 167, 170).

b) Consent of the Claimants:

The Tribunal found that by instituting proceedings and submitting a claim in writing to the Centre, the Claimants consented to ICSID arbitration under the Italy-Argentina BIT. (¶ 212). In addressing the requirement of the Claimants signing the request for arbitration, the Tribunal further found that in accordance with ICSID practice, it is highly common that the request for arbitration be signed by representatives, such as duly appointed lawyers, and therefore the three signatures on the request for arbitration, which were not signatures of the claimants, did not affect the Tribunal's determination of consent on the part of the Claimants. (¶¶ 219-228). The Tribunal further found that the executed Powers of Attorney proved that the representatives acted with the Claimant's authority in filing the request as required under the ICSID Convention. (¶¶ 243-250).

c) Nationality and Standing of Claimants

The Tribunal found that the nationalities of parties on the date of consent, 23 June 2008, complied with the ICSID Convention and the Argentina-Italy BIT including its Additional Protocol. (¶¶ 313-322). The Tribunal also found that 29 claimants were discontinued. (¶ 345).

d) Existence of a Legal Dispute Directly Arising Out of an Investment

The Tribunal found that the issuance of bonds and their circulation on secondary markets in the form of security entitlements constitute an economic unity. (¶ 429). In determining whether an issuance of bonds constitutes an investment under the ICSID Convention, the Tribunal looked towards the drafting process of the ICSID Convention, particularly the drafting of Article 25, and scholarly interpretations thereof, in assessing whether the Convention's drafters intended to include bonds under the Convention's definition of an investment. (¶ 446). The Tribunal found the remarks it came upon suggested an inclination to adopt a broader definition of the term "investment" restricted by the intentions of the parties to a BIT (¶¶ 451-453). The Tribunal noted that remarks from the drafting process were not meant to be decisive but were merely meant to provide a useful background in the process of interpretation. (¶ 455). In arriving at a conclusion concerning the scope of the term investment and its inclusion of bonds, amongst other considerations, the Tribunal compared the definitions of the term investment under the three languages of ICSID (i.e. English, French, and Spanish), which confirmed a broad character of the concept. (¶ 456). The Tribunal cautioned against a restrictive reading of the term "investment" under the ICSID Convention, and concluded that it should be given a broad meaning, including the issuance of sovereign bonds/security entitlements, whilst conceding that a restrictive reading is required if indicated by the terms of the consent given by a State. (¶¶ 460-461, 470, 472). The Tribunal also found that the Argentina-Italy BIT included sovereign bonds/security entitlements under its exhaustive list defining an investment under the BIT. (¶¶ 488-490, 495).

Contrary to the claim made by the Respondent, the Tribunal found that the issuance of bonds was an investment made in the territory of Argentina. In arriving at this conclusion, the Tribunal focused on the fact that Argentina benefitted from the issuance of bonds as the issuance was devised to raise money for Argentina's budgetary needs. (¶ 459-500). Contrary to a claim made by the Respondent, the Tribunal found that there was no need to trace the proceeds to a specific project in Argentina. (¶ 503). As to further claims made by the Respondent, the Tribunal held that the extent to which the funds accrued from the issuance of bonds were actually used for Argentina's budget or the knowledge of the claimants that they

were making an investment in Argentina were not necessary elements in determining the territorial nature of the investment. (¶¶ 503-504). The Tribunal further held that the issuance of bonds/security entitlements did not violate Argentine law in accordance with the jurisdictional requirements of the Argentina-Italy BIT. (¶¶ 516-517, 519).

e) Existence of Prima Facie Treaty Claims

The Tribunal found that if the facts alleged by the Claimants are found to be true, they amount to an alleged breach under the Argentina-Italy BIT, therefore the claim at issue is a legal dispute under both the ICSID Convention and the Argentina-Italy BIT. (¶¶ 534, 541). The Tribunal also held that contrary to the Respondent's claims, the breach alleged by the plaintiffs did not constitute a mere contractual claim, but rather amounted to a claim involving a use of sovereign power by way of the legislative actions taken by the Argentine government which unilaterally modified the Argentine government's payment obligations. (¶¶ 543-550).

f) Compliance with Article 8 of the Argentina-Italy BIT—The Prerequisites of Amicable Consultations and Recourse to Argentine Courts

The Tribunal found that the requirement for amicable consultations under the Argentina-Italy BIT was not violated if it was established that "(a) the sufficient minimum amount of consultations was actually conducted, or at least offered, or that (b) amicable consultations in order to resolve the case at stake were not possible in the first place." (¶ 538). The Tribunal found that the Claimants could not establish that a minimum amount of consultations were conducted on their part; however, the Tribunal concluded that after Argentina adopted Law No. 26.017, there was no realistic possibility of conducting meaningful consultations to settle the dispute with the Argentine Government. (¶ 585). The Tribunal also found that the Claimants were not required to seek consultations prior to the adoption of the law because at that point the claimants did not have recourse to the domestic courts and proceeds to international arbitration. (¶ 587).

With regards to the Argentina-Italy BIT's requirement to attempt recourse in the host State's courts prior to pursuing international arbitration under ICSID, the Tribunal found that a futility

exception existed and applied. (¶ 607). The Tribunal applied the futility exception threshold applied in diplomatic protection and articulated in the 2006 ICL Draft Articles on Diplomatic Protection, "[l]ocal remedies do not need to be exhausted where [. . .] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress [. . .]." (¶ 608). The Tribunal applied a slightly lower threshold since the BIT only required a temporary recourse to domestic courts as opposed to the exhaustion of local remedies applied in diplomatic protection. (¶ 611). The Tribunal further stated that it had to be evident that there was more than an alleged probability of failure. (¶ 610). The Tribunal found that in light of the Argentine Government's adoption of Law No. 26.017, the Argentine Supreme Court' jurisprudence, and the circumstances prevailing in the case, recourse to domestic courts would have been futile. (¶ 620). Therefore, the Claimants "did not violate the duty to have recourse to Argentine courts under Art. 8(2) and (3) of the Argentina-Italy BIT when they submitted the Request for Arbitration on 23 June 2008." (Id.)

3. *Decision*

The Tribunal found that the claim falls within the jurisdiction of ICSID and that the Tribunal has the competence to decide the case. The Tribunal also found Claimants' claims to be admissible. The Tribunal also took note of the discontinuance of proceedings as of February 8, 2013 with regards to the 29 claimants and set out the manner in which the Respondent and the discontinued Claimants would bear the arbitration costs. The Tribunal also renamed the proceedings to "*Ambient Ufficia S.p.A. and others v. Argentine Republic*" to put in effect the discontinuance of the 29 claimants. (¶ 631).