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## Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims against Argentina

By Karen Halverson Cross



### Introduction

Do arbitrators at the World Bank's International Centre for the Settlement of Investment Disputes ("ICSID") have authority to hear an investment treaty claim brought by a class of 60,000 holders of defaulted Argentine debt? On August 4, 2011, two of the three arbitrators appointed to hear the dispute

in *Abaclat and Others* (Case formerly known as *Giovanna a Beccara and Others*) v. *Argentine Republic*<sup>[1]</sup> found that they do. Unprecedented in ICSID's 45-year history, the *Abaclat* decision upholds the tribunal's jurisdiction to hear mass claims alleging breach of the 1990 Italy-Argentina bilateral investment treaty ("BIT") and in the process makes several remarkable jurisdictional findings.

### Background

In 2001, suffering the effects of a devastating economic crisis, Argentina declared a moratorium on service of its outstanding debt owed to foreign creditors. As it emerged from the crisis four years later, the government offered to exchange the defaulted debt for new debt instruments, paying approximately thirty-five cents on the dollar. Although about 76% of Argentina's creditors participated in the restructuring, the debt held by creditors that refused to participate was still massive.<sup>[2]</sup>

The hold-out creditors filed hundreds of lawsuits against Argentina in New York, Germany, Italy, and elsewhere to collect on the defaulted debt,<sup>[3]</sup> but they have found the judgments in their favor were hard to enforce. The Argentine government has refused to pay, and many creditors could not find attachable Argentine assets to levy against.<sup>[4]</sup>

Other holders of defaulted debt have sought arbitration of their claims. Arbitration has some advantages—arbitral awards can be enforced under the New York or ICSID Conventions, with simpler procedures and broader reach than the procedures for enforcing a foreign judgment. There are hundreds of bilateral investment treaties ("BITs") providing for

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arbitration of investor claims against sovereigns, before ICSID or under other rules. And at least under the Foreign Sovereign Immunities Act, it is easier to attach foreign sovereign assets to enforce an arbitral award than to enforce a judgment.<sup>[5]</sup> ICSID arbitration also has the advantage that ICSID awards generally have enjoyed a high rate of voluntary compliance.<sup>[6]</sup>

ICSID was established as a specialized arbitration institution with jurisdiction limited to resolving disputes “arising directly out of an investment” between a foreign investor and a host state. The parties consent in writing to submit to ICSID arbitration, typically through a BIT.<sup>[7]</sup> ICSID investment arbitrations have become customized, expensive proceedings that are in practice inaccessible to smaller claimants like the Italian bondholders. If ICSID is not available as a forum for group or class claims, a treaty violation could go unremedied as long as its victims are many and small. Until *Abaclat*, no tribunal had ever addressed whether consent to investor-state arbitration in a BIT also applies to mass claims, or whether ICSID’s procedural rules allow for a mass claims procedure. How did the arbitrators resolve this?

### Italian Bondholders’ ICSID Claim

Beginning in March 2006, Task Force Argentina (“TFA”), an association of eight major Italian banks, distributed to Italian holders of defaulted Argentine debt a request to sign a mandate for TFA to represent them in pursuing an ICSID arbitration claim against Argentina.<sup>[8]</sup> According to TFA, over 180,000 bondholders accepted TFA’s mandate, and in September 2006, TFA filed on their behalf a request for arbitration against Argentina.<sup>[9]</sup> Argentina contested the tribunal’s jurisdiction to hear the bondholders’ claims.<sup>[10]</sup>

In May 2010, Argentina initiated a second offer to exchange defaulted debt for new debt instruments. Sixty-six percent of the hold-out creditors participated in this offer. Claimants that participated in the 2010 exchange offer withdrew from the ICSID claim, reducing the claimant class to approximately 60,000 bondholders.<sup>[11]</sup>

### The Tribunal’s Decision

On August 4, 2011, the *Abaclat* tribunal issued a 282-page decision upholding its jurisdiction to hear, and to determine the admissibility of, the bondholders’ claims.

First, the tribunal found that the sole criterion as to whether the bonds at issue constitute an “investment” for purposes of the ICSID Convention is whether the bonds fall within the definition of investment provided for in the Italy-Argentina BIT.<sup>[12]</sup> This approach departs from previous ICSID decisions that articulate additional criteria, including the duration of the investment and the significance of the investment to the host state’s development.<sup>[13]</sup>

The bond instruments at issue in *Abaclat* provide for the resolution of disputes in the courts of New York, Switzerland, or other countries.<sup>[14]</sup> Argentina argued that the bondholders’ claims were breach of contract claims to be resolved in accordance with the bond instruments, not claims alleging breach of the BIT. The tribunal found that, by invoking the 2001 financial crisis as a justification for its actions and by adopting emergency legislation “unilaterally modifying” the terms of the bonds, Argentina had acted as a sovereign, and thus its actions amounted to more than a mere breach of contract.<sup>[15]</sup> By adopting this approach, the tribunal sidestepped the contentious question of whether an umbrella clause (a clause providing that any breach of contract by the host state constitutes a breach of the treaty) could apply to the BIT by virtue of the treaty’s most-favored nation (“MFN”)

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provision.

Similarly, the tribunal avoided the issue of whether claimants can rely on the MFN provision to incorporate more favorable dispute settlement provisions from another BIT, an issue that has divided other tribunals.[16] Under the Italy-Argentina BIT, the host state consents to arbitration of investor disputes *after* negotiations have failed and the dispute has not been resolved within eighteen months by a competent court in the host state. Argentina argued that these exhaustion requirements condition its consent to arbitration.[17] The tribunal disagreed, finding instead that the opportunity to resolve the dispute in Argentine courts was “only theoretical” and concluded that it would be unfair to deprive claimants of their right to arbitration based solely on their disregard of the exhaustion requirements.[18]

Finally, Argentina argued that its consent to arbitration in the BIT cannot be construed to cover an unprecedented mass action relating to a sovereign debt restructuring. Allowance of class claims, it asserted, would fundamentally change the nature of ICSID proceedings by making it impossible to evaluate the individual circumstances of each claimant, requiring the tribunal to ignore the particulars “in favor of the lowest common denominator.”[19] Argentina also argued that by encouraging hold-out creditors, allowing arbitration would complicate current efforts to modernize the sovereign debt restructuring process.[20]

In response, the tribunal characterized the relevant question not as whether Argentina consented to mass arbitration, but whether an ICSID arbitration can be conducted in such a form.[21] It acknowledged that the ICSID framework is silent as to mass proceedings, but found that it would run counter to the purpose of the Italy-Argentina BIT and to the spirit of ICSID to interpret such silence as a prohibition on mass proceedings.[22] Similarly, although it acknowledged that it would not be able to examine group claims in the same way it could with individual claimants,[23] the tribunal weighed this consideration against the consequences of rejecting the bondholders’ claims for lack of admissibility, finding that rejection could result in a “shocking” denial of justice to the claimants.[24] Finally, the tribunal dismissed as irrelevant Argentina’s policy argument relating to the sovereign debt restructuring process.[25]

The tribunal’s findings can be contrasted with the approach the U.S. Supreme Court has taken to this issue in the commercial arbitration context. In *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*,[26] the Court found that “the differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties’ mere silence on the issue . . . constitutes consent to resolve their disputes in class proceedings.”[27]

On October 28, 2011, Georges Abi-Saab, the arbitrator Argentina appointed to the *Abaclat* tribunal, issued his dissent from the majority’s decision concluding that the tribunal lacks jurisdiction to hear the bondholders’ claims. He disputed the majority’s approach to interpreting “investment,” asserting that the term has a “hard core” that cannot be waived by the provisions of a BIT.[28] Additionally, since the bonds at issue are sold on the international financial markets, with choice of law and forum clauses designating laws and fora outside of Argentina, he argued that the bonds lack a jurisdictional link to Argentina.[29] As to mass claims, Professor Abi-Saab found, citing *Stolt-Nielsen*, that Argentina’s agreement to arbitrate cannot be read to extend to collective mass claims actions.[30] Finally, he argued that devising new procedures to handle mass claims would manifestly exceed the tribunal’s powers and would deprive Argentina of its procedural rights to individual adversarial examination of differentiated claims.[31] Shortly after issuing his

dissent, Professor Abi-Saab resigned from the tribunal.

## Next Steps

The tribunal's decision allows the bondholders' claims to proceed to the merits, since any request to annul the decision on jurisdiction can only be brought after the tribunal issues a final award.<sup>[32]</sup> On September 15, 2011, however, ICSID suspended the proceeding on the merits in response to Argentina's request that ICSID disqualify Pierre Tercier and Albert Jan van den Berg, the two arbitrators who issued the tribunal's decision upholding jurisdiction. According to news reports, Argentina criticizes the majority's issuance of their decision before Professor Abi-Saab issued his dissent and argues that the majority's decision to allow mass claims will severely limit its right of defense by denying Argentina the opportunity to invoke the specific circumstances of each investor's bond purchase.<sup>[33]</sup>

When the proceeding on the merits resumes, Argentina will likely argue that its 2001 financial crisis was an excusing event. Argentina has raised this defense elsewhere and has succeeded in obtaining annulment of ICSID awards on grounds that the arbitrators failed to interpret a clause in the U.S.-Argentina BIT providing that the treaty does not preclude the host state's application of measures—such as the measures Argentina adopted in response to the crisis—that are necessary for the protection of its “essential security interests.”<sup>[34]</sup> Since the Italy-Argentina BIT does not contain a “non-precluded measures” clause, Argentina will likely rely instead on the customary international law doctrine of necessity.<sup>[35]</sup>

Once the *Abaclat* tribunal issues its award on the merits, Argentina may seek to have the award annulled, either on jurisdictional or substantive grounds. Although the grounds for annulment of ICSID awards are narrowly defined, Argentina frequently has requested annulment of ICSID awards issued against it, and, as noted, some of these challenges have been successful.

## Conclusion

The jurisdictional decision in *Abaclat* may prompt other holders of defaulted sovereign debt to consider investment treaty arbitration as a means of recourse against the issuers. More immediately, there are other bondholder groups whose ICSID arbitration claims against Argentina are pending.<sup>[36]</sup> It will be interesting to see how other tribunals, comprised of different arbitrators than those who decided *Abaclat*, respond to Argentina's jurisdictional challenges.

## About the Author:

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## Endnotes:

[1] *Abaclat and Others* (Case formerly known as *Giovanna a Beccara and Others*) v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), available at <http://italaw.com/documents/AbaclatDecisiononJurisdiction.pdf> [hereinafter *Abaclat*].

[2] Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17(3) *Am. Rev. Int'l Arb.* 335, 335 (2006).

[3] *Abaclat*, *supra* note 1, ¶ 82.

[4] Cross, *supra* note 2, at 335; see also *N.M. Capital, Ltd. v. Banco Central De La Republica Arg.*, Docket No. 10-1487-cv(L), 414 Fed. Appx. 514 (2d Cir. 2011), *available at* [http://www.ca2.uscourts.gov/decisions/isysquery/d6af331a-ea2d-4a6f-ab83-f65f6407ba9b/1/doc/10-1487\\_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/d6af331a-ea2d-4a6f-ab83-f65f6407ba9b/1/doc/10-1487_opn.pdf) (reversing on sovereign immunity grounds the grant of motions to attach funds held by the Banco Central de la Republica Argentina at the Federal Reserve Bank in New York).

[5] Compare 28 U.S.C. § 1610(a)(6) (exception to immunity from attachment for enforcing foreign arbitral awards) with 28 U.S.C. § 1610(a)(2) (exception to immunity from attachment for property used for the commercial activity on which the claim is based).

[6] Cross, *supra* note 2, at 362-63; see also Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* 211 (2011) (noting that countries typically pay ICSID awards voluntarily).

[7] Convention on the Settlement of Disputes between States and Nationals of Other States art. 25, Mar. 18, 1965, 17 U.S.T. 1270 [hereinafter ICSID Convention].

[8] *Abaclat*, *supra* note 1, ¶¶ 65, 85.

[9] *Id.* ¶ 91.

[10] *Id.* ¶ 100.

[11] *Id.* ¶¶ 97, 216.

[12] *Id.* ¶¶ 362-67.

[13] Christoph H. Schreuer, *The ICSID Convention: A Commentary* 128-34 (2d ed. 2009); Waibel, *supra* note 6, at 227-31.

[14] *Abaclat*, *supra* note 1, ¶ 340.

[15] *Id.* ¶¶ 320-26.

[16] See, e.g., *Impreglio S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶¶ 108-09 (June 21, 2011), *available at* [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2171\\_En&caseId=C109](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2171_En&caseId=C109).

[17] *Abaclat*, *supra* note 1, ¶ 493.

[18] *Id.* ¶¶ 496, 583.

[19] *Id.* ¶¶ 470-71.

[20] *Id.* ¶ 517.

[21] *Id.* ¶ 491.

[22] *Id.* ¶¶ 517-19.

[23] *Id.* ¶ 531.

[24] *Id.* ¶ 537.

[25] *Id.* ¶¶ 550-51.

[26] 130 S. Ct. 1758 (2010).

[27] *Id.* at 1776.

[28] *Abaclat*, *supra* note 1 (Professor Georges Abi-Saab, Dissenting Opinion, ¶ 46 (Oct. 28, 2011), *available at* [http://italaw.com/documents/Abaclat\\_Dissenting\\_Opinion.pdf](http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf)).

[29] *Id.* ¶¶ 77-87.

[30] *Id.* ¶¶ 150-51, 190.

[31] *Id.* ¶¶ 242-44.

[32] Schreuer, *supra* note 13, at 921.

[33] Luke Eric Peterson, *Grounds are Revealed for Argentina's Bid to Disqualify Arbitrators in Sovereign Bond Default Dispute*, IAREporter (Oct. 6, 2011), available at <http://www.iareporter.com>.

[34] See *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Decision (July 30, 2010), available at <http://www.italaw.com/documents/EnronAnnulmentDecision.pdf>; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Annulment Decision (June 29, 2010), available at <http://www.italaw.com/documents/SempraAnnulmentDecision.pdf>.

[35] The customary international law doctrine of necessity provides a defense to a state for actions taken to protect an essential interest against serious and impending threats. The state must show that its response to the threat was the only means available to it and that it did not contribute to the situation of necessity. William W. Burke-White & Andreas von Staden, *Non-precluded Measures Provisions, the State of Necessity, and State Liability for Investor Harms in Exceptional Circumstances*, in *Latin American Investment Treaty Arbitration: The Controversies and Conflicts* 105, 141-42 (Mary H. Mourra, ed., 2008). In *LG&E Energy Corp. v. Argentine Republic*, an ICSID tribunal found that the necessity doctrine was potentially applicable to actions taken by Argentina in response to its financial crisis. *Id.* at 157-58.

[36] *Giovanni Alemanni and Others v. Argentine Republic*, ICSID Case No. ARB/07/8; *Giordano Alpi and Others v. Argentine Republic*, ICSID Case No. ARB/08/9.