

July 3, 2013

Volume 17, Issue 16

Tribunal Establishes Initial Procedures for Review of Mass Bondholder Claims against Argentina

By Ronald J. Bettauer



ASIL Insights, international law behind the headlines, informing the press, policy makers, and the public.

Introduction

The Tribunal in *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5) held in its Decision on Jurisdiction and Admissibility of August 4, 2011 (the *Abaclat* Decision) that it would hear the claims of 60,000 holders of defaulted Argentine bonds.[1] A previous article in the *Insight* series discussed this Decision,[2] and it has also been discussed in a number of articles.[3] Two other cases also concern bondholder claims against Argentina, *Giovanni Alemanni and others v. Argentine Republic* (ICSID Case No. ARB/07/8) and *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (ICSID Case No. ARB/08/9); no decision has been issued in the former case but a Decision on Jurisdiction and Admissibility was issued in the latter case on February 8, 2013, also agreeing to hear the claims.[4] The procedures adopted by the *Abaclat* Tribunal will likely be taken into account by other tribunals considering defaulted bond claims.

The *Abaclat* Decision dealt with jurisdiction and admissibility as a general matter and disposed of objections of a general character; it found jurisdiction over individual claimants who meet a number of specific requirements without entering into issues touching specifically on each individual claimant, which would be dealt with in a later procedural decision.[5] Subsequent procedural orders appoint an expert to review whether those requirements are met in specific cases and establish a timetable.[6] The relevant orders were issued by majority decisions of the Tribunal (Pierre Tercier, president, and Albert Jan van den Berg), with dissents by Santiago Torres Bernárdez. This *Insight* focuses on the decisions in these procedural orders. It should be recognized of course that there are many other important matters at issue in this complex arbitration proceeding.

Jurisdiction *Rationae Personae* and Selection of a Database Verification Procedure

RELATED ASIL INSIGHTS

[Challenges of Arbitrators in International Disputes: Two Tribunals Reject the "Appearance of Bias" Standard](#)

[Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims against Argentina](#)

[UN Commission Awards Compensation for Environmental and Public Health Damage from 1990-91 Gulf War](#)

[UN Commission Awards \\$187 Million Against Iraq](#)

[Insights Archive>>](#)

DOCUMENTS OF NOTE

[Convention on the Settlement of Investment Disputes between States and Nationals of Other States](#)

[ASIL EISIL>>](#)

ORGANIZATIONS OF NOTE

[International Centre for Settlement of Investment Disputes](#)

Copyright 2013 by The American Society of International Law ASIL

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: [Cymie Payne](#); [Tania Voon](#); and [David Kaye](#). Kathleen A. Doty serves as the managing editor.

After an extensive review of the facts and the procedural status of the case, the *Abaclat* Decision discusses in depth and rejects the many general objections Argentina raised to the Tribunal's jurisdiction and to the admissibility of the 60,000 claims brought by bondholders after Argentina defaulted on, and sought to reduce and restructure, its debt during and subsequent to its financial crisis. The Italian claimants provided powers of attorney to "Task Force Argentina" to bring claims. Among the many issues address in the lengthy *Abaclat* Decision, the Decision considered (in paragraphs 280-287 and 388-422) whether the claimants have the necessary capacity to bring an arbitration proceeding under the 1990 Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments ("Argentina-Italy BIT") and its Additional Protocol.^[7] These documents specify the persons with respect to whom Argentina has provided advance consent to investor-state arbitration and thus the persons for whom there is jurisdiction (i.e., jurisdiction *rationae personae*).

The *Abaclat* Decision held (in paragraphs 501(iii) and 713(x) and (xi)) that it has jurisdiction *rationae personae* over natural persons who had Italian nationality on September 14, 2006, and February 7, 2007, who were not also Argentine nationals on those dates, who were not domiciled in Argentina for the two years prior to making their investments, and who were investors as of the date of the alleged breach by Argentina of its treaty obligations. The Tribunal held that is has jurisdiction over juridical persons that had Italian nationality on September 14, 2006, that complied with applicable Italian law requirements as of that date, that had their *siège social* (headquarters) in Italy, and that had the legal capacity to make investments and litigate under Italian law. The Decision further stated that the online and Excel database provided by claimants presented sufficiently manageable information to allow for claimant-specific review.

In Procedural Order 12 of July 7, 2012, the Tribunal decided to split the remaining proceedings into two phases, and split the first of those phases in three, one of which is a Tribunal-supervised "verification of Claimants' database against the requirements set forth in § 501(iii) of the Decision by one or more experts appointed by the Tribunal after consultation of the Parties" ("Database Verification"). This Order also set out a timetable that has been updated several times in subsequent orders. Recalling this decision, in Procedural Order 15 of November 20, 2012, the Tribunal by a majority asked Norbert Wühler, the proposed sole expert, who had formerly handled claims programs at the International Organization of Migration (IOM), the UN Compensation Commission (UNCC) and the Iran-United States Claims Tribunal, to prepare a work proposal describing his proposed team, methodology, and budget for examining the information in the claimants' database to verify that the requirements were met for jurisdiction with respect to individual claimants' *rationae personae*. It would decide whether to appoint him after receiving and reviewing his proposal.

Wühler submitted a work proposal (the "initial proposal") that included a technical examination of the database by a database expert and then, after working with a statistician, an anticipated review of a random sample of not more than 1060 natural persons' claims and of one-half the claims submitted by juridical persons. He proposed hiring a database expert, a statistician, and a claims reviewer, and estimated the cost of conducting the verification review and preparing a report at \$92,450. Assuming the parties submitted required materials and comments within the time frames established by the Tribunal, Wühler estimated completion of a draft report by March 15 and the final report by April 30, 2013.

Procedural Order 17 of February 8, 2013, which annexed the initial proposal, indicated that after receiving the proposal the Tribunal asked Wühler to prepare an alternative work

proposal that would examine the feasibility of examining all the documents in the database without sampling and to address the impact of such a change in terms of personnel, time and cost. Wühler's alternative proposal is also annexed to Order 17 (the "alternative proposal"). In this Order, the Tribunal confirmed Wühler's appointment as expert and decided he was to proceed under the terms of the alternate proposal.

Under the alternative proposal, Wühler indicated that fifteen additional persons would need to be employed to review the claims of natural persons, that the process would take at least one additional month (i.e., the draft report by April 15 and the final report May 30, 2013), and that the cost would be almost \$180,000 higher (i.e., \$270,350). Taking approximately 15 minutes per claim, claims reviewers would check the database information on each natural person's claim for completeness, consistency, discrepancies and duplication; verify the information against the documents related to the claim; and check the completeness and accuracy of the relevant documents. There is no discussion of the evidentiary standard that would be applied. Wühler would himself review all the claims of juridical persons. The only additional information and documentation needed for the review under this proposal concerned the design and contents of, and the use and access to the information and documents contained in, the database. Wühler submitted résumés of his proposed staff, many of whom previously worked at the UNCC and/or at IOM or other institutions on claims programs.

Procedural Order 20 of April 24, 2013, made clear that the verification process was behind schedule. Wühler requested and was granted permission by the Tribunal for the current members of the claims review team to work more than five days a week and to hire five additional claims reviewers. The deadline for submission of a draft report was extended to May 31, 2013.

In Procedural Order 19 of April 8, 2013, the Tribunal noted that claimants had made changes to the database without requesting prior approval from the Tribunal. The Tribunal requested that information about the changes be filed and ordered that no further changes be made without a prior request explaining the proposed changes and reasons for them. In Procedural Order 21 of May 2, 2013, the Tribunal reports requests by the claimants to update the database further. The Tribunal propounded a series of questions concerning the modifications and, pending response, temporarily denied the most recent request. The Tribunal restated that May 31, 2013, is the deadline for Wühler's draft verification report. It set July 1, 2013, as the deadline for comments by the parties on the draft report and July 15, 2013, as the deadline for issuance of the final verification report. Recognizing that its detailed timetable no longer seemed realistic, the Tribunal suspended all other deadlines.

Comments on the Database Verification Procedure

The initial proposal would have been quicker and less costly because it would have employed sampling techniques to test the facial validity of whether a subset of the claimants met the Tribunal's requirements for jurisdiction *rationae personae* and then extrapolated the results to all claimants. This proposal may have been inspired by article 37 of the UNCC rules, which provided that the secretariat would check certain categories of claims by a database analysis, which could be cross checked by the panels of Commissioners that would recommend decisions to the UNCC Governing Council; article 37 further provided that individual claims that could not be "completely verified through the computerized database" could be checked by the panels of commissioners "on the basis of sampling with further verification only as circumstances warrant."^[8] Other institutions have also provided for the application of such special mass claims processing techniques.^[9]

However, sampling techniques have previously not been used to determine jurisdiction

rationae personae in an investor-state arbitration proceeding. The institutions where such procedures have been used, such as the UNCC (which operated under mass claims procedures and relaxed standards of proof decided upon by the members of the UN Security Council sitting in Geneva as the UNCC Governing Council), were established to provide quick, rough justice to a large number of claimants. In each case the critical aspect determining whether a claimant is eligible to bring a claim is the text of the instrument establishing the mandate for the claims process.^[10] In the UNCC, claims could be filed by nationals of any country except persons with sole Iraqi nationality, and almost all claims were submitted by governments or international institutions capable of doing an initial eligibility check. Thus, for the large number of claims processed by the UNCC under mass claims techniques, checking claims individually for eligibility to file was secondary to the task of checking other factors.

Since 180,000 claimants had initially filed in *Abacfat* but 120,000 of those had withdrawn, the Tribunal could have felt a special need to check whether the 60,000 remaining claimants each meet the filing requirements set out under the Argentina-Italy BIT and Additional Protocol.

In any event, in paragraph 251 the *Abacfat* Decision made clear that the Tribunal would only have jurisdiction to consider claims that came within the scope of the relevant provisions of the applicable legal instruments, and, as noted, those instruments only allowed claims to be brought by persons who met their nationality requirements as interpreted by the Tribunal. This does not appear to allow for sampling, since sampling might not catch a claim that did not, even *prima facie*, meet those requirements. Presumably, an individualized review of the information and documents in the database by the claims review team could pick up facial difficulties, but it appears the review would not discover discrepancies beyond that.

Procedural Order 21 provided Argentina only until July 1, 2013 – one month – to comment on the draft expert report. Procedural Order 15 appears to place much of the burden of challenging whether individual claimants meet the requirements for jurisdiction on the Respondent. Argentina was to make initial comments on the claimants' database by the end of January 2013 and then, as noted, comments on the draft report after it is submitted. Procedural Order 21 gives Wühler until July 15, 2013 – only two weeks after the due date for comments by the parties on the draft report– to produce a final report. According to the schedule annexed to Procedural Order 17, the Tribunal then contemplates additional pleadings by the parties and an additional hearing before making a decision on the current phase of the proceedings. The Tribunal did not indicate whether it itself plans to review the documents and evidence for jurisdiction *rationae personae* for each claimant, to rely entirely on the expert's final report, to spot check the work of the expert itself (despite its refusal to let the expert work on the basis of sampling), or to conduct an individualized review of the information and document only with respect to those claimants for which Argentina specifically challenges the expert's conclusions. Argentina might contest the latter approach as an unwarranted shift from the claimants of the burden of proving the facts and claims they assert.

The Tribunal's decision on how to proceed will likely also depend on how it balances speed and efficiency against accuracy. It is this author's experience that, no matter how qualified and diligent the claims review personnel, a further case-by-case review will discover errors (particularly where the review staff is under enormous time pressure and given only fifteen minutes per claim to verify the accuracy of the information and documents pertaining to 60,000 claimants). Payne believes that the jurisdictional threshold question of claimants' nationality on relevant dates is among the issues that require individualized treatment.^[11]

Donovan suggests employing a "pilot case" approach and warns about the uncertain legality of the Tribunal delegating decision-making.^[12] In paragraph 247(ii) of the *Abaclat* Decision, the Tribunal recognized that a decision refusing a case based on lack of arbitral jurisdiction (and presumably a decision accepting a case where arbitral jurisdiction is lacking) is usually subject to review by another body;^[13] the Tribunal will presumably be extremely cautious in deciding how to reach its decision.

The cost-efficiency trade-off also needs to take into account the start-up cost of training a large team of claims reviewers for a project of limited scale and duration. The alternative proposal envisaged 15 claims reviewers working 9 weeks, with a total of 19 persons, costing \$270,350. Procedural Order 20 added five claims reviewers and allowed all the reviewers to work longer hours, but provided no new information on the time or cost of the claims review process and did not significantly lengthen the deadlines. A conservative estimate of the total cost with the additional staff and hours would total about \$327,000. While this may seem like a small expense considering the overall costs of the proceeding,^[14] to the extent that the Tribunal itself embarks on a detailed review of jurisdiction with respect to individual claimants, the costs and the length of the proceedings could obviously increase substantially.

Conclusion

After almost seven years, the *Abaclat* case still has a long way and years to go, as the Tribunal is only now embarking on the initial phases of the merits and there are additional complex issues, filings, decisions and hearings envisaged before an award. As is clear from the *Abaclat* Decision and the dissent (and from the *Ambiente* Decision and its dissent), the rulings that bond debt claims are admissible and there is jurisdiction are highly controversial. The procedures adopted to date by the *Abaclat* Tribunal for the determination of jurisdiction *rationae personae* may also be challenged. Other tribunals will face the same issues, and annulment requests may well follow. At this stage, it is not clear whether the procedures adopted by the *Abaclat* Tribunal will be upheld under annulment challenge and/or whether they will be followed by other tribunals.

About the Author:

Ronald J. Bettauer, an ASIL member, is a visiting scholar at George Washington University Law School and a former Deputy Legal Adviser at the U.S. Department of State.

Endnotes:

[1] This decision and the procedural orders in the case (except for Annex 3 to Procedural Order 17 and Annex 2 to Procedural Order 18) are available at the International Centre for the Settlement of Investment Disputes (ICSID) website, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&reqFrom=Main&actionVal=ViewAllCases>. Except for Procedural Order 21, this decision and the procedural orders are available at the Investment Treaty Arbitration (ITA) website, <http://italaw.com/cases/documents/343>.

[2] Karen Halverson Cross, *Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims against Argentina*, ASIL Insights (Nov. 21, 2011), <http://www.asil.org/insights111121.cfm>. Since this *Insight* was written, the challenges to Tribunal members Pierre Tercier and Albert Jan van den Berg were rejected and Santiago Torres Bernárdez (also the Argentine-appointed arbitrator in *Ambiente*, see *infra* note 4) was appointed to replace Georges Abi-Saab, who had dissented from the *Abaclat* Decision and subsequently resigned from the Tribunal.

[3] E.g., S.I. Strong, *Mass Procedures as a Form of 'Regulatory Arbitration'--Abaclat V. Argentine Republic and the International Investment Regime*, 38 J. Corp. L. 259 (2013); Jessica Beess Und Chrostin, *Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, the Abaclat Case*, 53 Harv. Int'l L.J. 505 (2012); S. I. Strong, *Collective Arbitration in ICSID Disputes: Abaclat*

(formerly *Beccara*) v *Argentine Republic*, 17 IBA Arb. News 84 (2012); William W. Park, *The Politics of Class Action Arbitration: Jurisdictional Legitimacy and Vindication of Contract Rights*, 27 Am. U. Int'l L. Rev. 837 (2012); Joanna Simões, *Sovereign Bond Disputes Before ICSID Tribunals: Lessons from the Argentina Crisis*, 17 L. & Bus. Rev. Am. 683 (2011).

[4] Information on the status of the cases and the Decision in *Ambiente* is available at the ICSID website, *supra* note 1. The *Ambiente* Decision is also available at the ITA website at <http://italaw.com/cases/1750>. The members of the *Ambiente* Tribunal are Bruno Simma (president), Karl-Heinz Böckstiegel and Santiago Torres Bernárdez, who dissented. As in the *Abaclat* Decision, in the *Ambiente* Decision the Tribunal deals with the general prerequisites for its jurisdiction and the admissibility of the claimants' claims but does not determine whether it has jurisdiction in respect to each single claimant; it joins jurisdictional issues touching upon individual claimants to the merits. *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 5-6 (Feb. 8, 2013).

A Slovak bank and shareholder have brought an ICSID claim concerning Greece's debt restructuring. *Slovak Bank, Shareholder File Arbitration Against Greece Over Debt Restructure*, 2013-1157 Mealey's Daily News Update 17 (May 7, 2013). On May 20, 2013, ICSID registered Case No. ARB/13/8, a claim by Poštová banka, a.s., and ISTROKAPITAL SE against Hellenic Republic, indicating it concerns debt instruments.

[5] *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 227 (Aug. 4, 2011).

[6] *Abaclat* Procedural Orders 12-21 issued between July 7, 2012 and May 2, 2013 are available at the websites cited *supra* note 1 and will be discussed further below. Two articles, written after the *Abaclat* Decision but before the Procedural Orders were issued, consider the procedures that might be appropriate for dealing the claims. Donald Francis Donovan, *Abaclat and others v. Argentine Republic As a Collective Claims Proceeding*, 27 ICSID Rev. 261 (2012); Cymie R. Payne, *Argentina's ICSID Arbitrations and the UNCC Experience: Consistency and Capability in Mass Claims*, 6 WAMR 427 (2012).

[7] The texts of the relevant provisions are set out in the *Abaclat* Decision, *supra* note 5.

[8] U.N. Compensation Commission Governing Council, Decision Taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, U.N. Doc S/AC.26/1992/10 (June 26, 1992), available at http://www.uncc.ch/decision/dec_10.pdf. The procedures used at the UNCC are described in, e.g., United States Compensation Commission, Thirteen Sokol Colloquium 119-203 (Richard B. Lillich ed., 1995); see also Payne, *supra* note 6, at 443 et seq.

[9] See International Mass Claims Processes: Legal and Practical Perspectives 243-254 (Howard M. Holtzmann and Edna Kristjánsdóttir, eds., 2007). In addition, the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory allows its Board, in its review of claims for inclusion on the Register, to adopt "procedures that are appropriate to the character, subject-matter, number and types of claims under consideration, including mass claims processing techniques such as sampling." United Nations Register of Damage, Rules and Regulations Governing the Registration of Claims art. 12(3), June 19, 2009, <http://www.unrod.org/docs/UNRoD%20Rules%20and%20Regulations.pdf>.

[10] See Holtzmann, *supra* note 9, at 53-72 for which claimants were eligible for various previous mass claims processes.

[11] Payne, *supra* note 6, at 451.

[12] Donovan, *supra* note 6, at 264-65.

[13] As noted, Argentina and arbitrator Torres Bernárdez have consistently objected to the appointment of Wühler and to the procedural orders concerning jurisdiction *rationae personae*. Once an award is issued, either party may request annulment. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 52, Oct. 14, 1966, 17 U.S.T. 1270, 575 U.N.T.S. 159. According to the ICSID website, there are seven annulment proceedings pending involving Argentina, one annulment proceeding that has been discontinued, and three that have been concluded by a decision. Those three annulment cases added between 24 and 38 months to the process.

[14] Claimants initially filed their request for arbitration in September 2006. The case was registered with ICSID in February 2007 and the Tribunal constituted in February 2008. As recorded in the *Abaclat* Decision, as of June 15, 2011, the fees and expenses of Tribunal members amounted to \$1,331,960.45 and the ICSID charges amounted to \$376,641.95. During this period there were numerous filings, decisions by the Tribunal on such matters as production of documents and conduct of the hearing, a five-day hearing, nine Procedural Orders, and the 282-page *Abaclat* Decision. As

of August 24, 2010, after deduction of the ICSID costs, the claimants' costs were stated as \$27,309,604 and the respondent's as \$11,620,340.