

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

In the proceedings between

**GIOVANNI ALEMANNI AND OTHERS**  
(CLAIMANTS)

- and -

**THE ARGENTINE REPUBLIC**  
(RESPONDENT)

(ICSID Case No. ARB/07/8)

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DECISION ON JURISDICTION AND ADMISSIBILITY

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**Members of the Tribunal**

Sir Franklin Berman KCMG, QC, President  
Professor Karl-Heinz Böckstiegel, Arbitrator  
Mr J. Christopher Thomas QC, Arbitrator

*Secretary of the Tribunal*

Ms Anneliese Fleckenstein

*Date of Dispatch to the Parties: November 17, 2014*

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## **I. INTRODUCTION**

### **A. THE PARTIES**

1. The Claimants are a series of initially 183 Italian individuals and legal entities, each of whom claims in its capacity as a holder of “debt instruments issued by the Republic of Argentina” on which Argentina is said to have defaulted in 2001 and subsequently.<sup>1</sup> As more fully explained in paragraphs 327ff. below, the Claimants’ state that as a result of intervening events, notably Argentina’s Exchange Offer of 2010, the remaining number of Claimants is 74.<sup>2</sup>
2. By letter of 5 October 2010, Respondent did not oppose the discontinuance of the proceedings on the part of those Claimants who had tendered into the 2010 Exchange Offer and requested that the Tribunal order the Claimants to inform it which of them had tendered their security entitlements into the 2010 Exchange Offer.
3. The uncertainties remaining as to the number and identities of the withdrawn Claimants, as well as to the appropriate title of the case in light of Mr. Alemanni’s withdrawal, were addressed by the Tribunal in a letter to the Parties of 22 March 2011, further details of which are given in paragraphs 333-334 below.
4. The Respondent is the Argentine Republic.

### **B. PROCEDURAL HISTORY**

5. On 9 January 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration (the “Request”) dated 22 December 2006, from Mr. Giovanni Alemanni and others (the “Claimants”), against the Argentine Republic (the “Respondent”). On 12 January 2007, the Centre acknowledged receipt of the Request. On 16 January 2007, the Centre transmitted a copy of the Request and its accompanying documentation to Respondent and its Embassy in Washington, D.C. The Request was supplemented by counsel for the Claimants’ letters dated 28 February and 9 March 2007.

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<sup>1</sup> Request for Arbitration of 22 December 2006, para. 4.

<sup>2</sup> Claimants’ Comments on the Decision on Jurisdiction and the Dissenting Opinion in the *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5 (formerly known under the name *Giovanna a Beccara*, hereinafter “*Abaclat*”), 19 December 2011, para. 50.

6. On 27 March 2007, ICSID's Secretary-General registered the Request pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"). The same day, the Secretary-General dispatched the Notice of Registration to the parties, inviting them to proceed as soon as possible with the constitution of the arbitral tribunal, in accordance with Articles 37 to 40 of the ICSID Convention.
7. By letter of 31 May 2007, Claimants invoked Article 37(2)(b) of the ICSID Convention since the parties had not reached an agreement regarding the method for constitution of the Arbitral Tribunal. In the same letter Claimants appointed Professor Karl-Heinz Böckstiegel, a national of Germany, to the Arbitral Tribunal. Professor Böckstiegel accepted his appointment on 4 July 2007.
8. By letter of 25 June 2007, Respondent appointed J. Christopher Thomas, QC, a national of Canada, to the Arbitral Tribunal. Mr Thomas accepted his appointment on 4 July 2007.
9. Absent an agreement between the parties on the appointment of the President of the Tribunal, by letter of 25 June 2008, pursuant to Article 38 of the ICSID Convention, the Chairman of the ICSID Administrative Council appointed Sir Franklin Berman, KCMG, QC, a national of the United Kingdom, as presiding arbitrator.<sup>3</sup> Sir Franklin accepted his appointment on 3 July 2008.
10. On the same day, the Centre notified the parties that the Arbitral Tribunal was deemed to be constituted and the proceeding to have begun on that day. The Tribunal is accordingly composed of Sir Franklin Berman, KCMG, QC (appointed by the Chairman of the Administrative Council); Prof. Karl-Heinz Böckstiegel, (appointed

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<sup>3</sup> By letter of 15 February 2008, the Respondent had objected to the Centre's intention to designate Sir Franklin Berman as President of the Tribunal, on the grounds of the position publicly adopted by him on the most favoured nation clause, citing in this connection the Jurisdictional Award of the Tribunal in *RosInvestCo v The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 1 October 2007, (hereinafter "*RosInvest*"). By letter of 29 February 2008, elaborated in a more detailed letter of 3 March 2008, the Claimants rejected, with reasons, the Respondent's objection. By letter of 14 March 2008, the Respondent replied to the Claimants' reasons. By letter of 5 June 2008, the Centre indicated to the Parties that the Respondent's objections had not been found to be compelling, and that the recommendation to designate Sir Franklin Berman would therefore go ahead unless the Parties jointly submitted an alternative solution. No such alternative solution was in the event received by the Centre.

by Claimants); and Mr J. Christopher Thomas QC (appointed by Respondent). The Centre also informed the parties and the Tribunal that Mr. Gonzalo Flores, Senior Counsel, would serve as Secretary of the Tribunal. Mr. Flores was replaced as Secretary of the Tribunal by Mrs. Anneliese Fleckenstein, Legal Counsel, on 4 October 2011.

11. On 5 December 2008, the Tribunal held a First Session with the parties at the seat of the Centre in Washington D.C. at which a procedural calendar for the further conduct of the proceedings was agreed by the parties. During the First Session it was agreed that the arbitration would be separated into a preliminary jurisdictional and admissibility phase and a merits phase. The preliminary phase would deal with objections of a general character only, but not with any jurisdictional issues that might arise in relation to individual claimants, which, it was agreed, would be dealt with at a later stage as necessary and appropriate.
12. By letters of 6 and 9 January 2009, Respondent and Claimants agreed to a time schedule for the submissions on Jurisdiction and Admissibility.
13. On 21 May 2009, in accordance with the agreed schedule, Respondent filed a Memorial on Jurisdiction and Admissibility. On 5 November 2009, Claimants filed their Counter-Memorial on Jurisdiction and Admissibility. On 5 February 2010, Respondent filed a Reply on Jurisdiction and Admissibility.
14. On 28 April 2010, Claimants requested the suspension of the proceedings in light of the Argentine Government's New Exchange Offer. On 30 April 2010, Respondent agreed to the requested suspension.
15. On 4 May 2010, the proceeding was suspended pursuant to the parties' agreement. The hearing on jurisdiction, scheduled to be held on 21-25 June 2010 was cancelled, and the deadline for the Claimants' Rejoinder on Jurisdiction and Admissibility was extended.
16. By letter of 31 May 2010, Respondent objected to a communication to Claimants from the North Atlantic Société d'Administration ("NASAM") with respect to the New Exchange Offer. By letter of 10 June 2010, Claimants submitted a response to Respondent's letter. Exchanges between the parties ensued concerning this matter, as

well as the Claimants' request for an extension to submit their Rejoinder on Jurisdiction and Admissibility.

17. On 21 July 2010, following an invitation from the Tribunal, the Claimants submitted a statement of their position as to the continuation of the proceedings, and the possible procedural implications of the potential adherence by some of the Claimants to Argentina's New Exchange Offer.
18. By letter of 29 July 2010, following an exchange of correspondence between the parties, the Tribunal: (i) directed that the Claimants must indicate no later than 12 August 2010, on the instructions of the persons concerned, whether any of the Claimants wished to discontinue their claim in the proceedings, and to specify such persons by name; (ii) requested the Respondent to confirm, within two weeks thereafter, whether Respondent agreed, for the purposes of the ICSID Arbitration Rules, to the discontinuance of the claims in question, in which case the Tribunal would formally order those claims to be removed from the record for the subsequent stages of the proceedings; (iii) set 1 September 2010, as the deadline for the submission of the Rejoinder on Jurisdiction and Admissibility by all Claimants in respect of whom the proceedings continued.
19. On 1 September 2010, the Claimants filed their Rejoinder on Jurisdiction and Admissibility, attaching a list of claimants who wished to discontinue their claim. Counsel for the Claimants requested leave from the Tribunal to update the list of Claimants who had discontinued the proceeding as of 1 September 2010.
20. On 7 September 2010, the Tribunal granted Counsel for the Claimants' request. By letter of 21 September 2010, Counsel for the Claimants submitted an updated list of Claimants who had decided to discontinue the proceeding. By letter of 5 October 2010, Respondent agreed to the discontinuance of the proceeding in respect of those Claimants "who, among those listed in the Updated List, have entered into the 2010 Exchange Offer". Respondent further requested the Tribunal to order, in due course, that Respondent and those Claimants with respect to whom the proceeding is discontinued share equally the arbitration costs and that each of them bear their own costs.

21. On 7 and 8 June 2011, the Tribunal held a hearing on jurisdiction in Paris. Present at the hearing were, for the Tribunal: Sir Franklin Berman KCMG, QC, President; Professor Karl-Heinz Böckstiegel; Mr J. Christopher Thomas, Q.C.; and Mrs. Anneliese Fleckenstein, Secretary of the Tribunal. The Claimants were represented by Professor Luca G. Radicati di Brozolo, Ms. Maria Cristiana de Giovanni di Santa Severina, Ms. Victoria Viñes and Mr. Giovanni Minuto. The Respondent was represented by Dr. Horacio Diez, *Subprocurador del Tesoro de la Nación*; Dr. Gabriel Bottini, *Director Nacional de Asuntos y Controversias Internacionales de la Procuración del Tesoro de la Nación*; Ms. Silvina González Napolitano, Ms. Cintia Yaryura, Ms. Mariana Lozza, Ms. Verónica Lavista, Mr. Diego Gosis and Ms. Carolina Coronado from the *Procuración del Tesoro de la Nación*; Ms. Marianela López and Ms. Florencia Rosental from the *Ministerio de Economía y Finanzas Públicas*.
22. On 8 August 2011, the parties submitted simultaneously their Post-Hearing Briefs.
23. On the same day, the Claimants sought leave to submit brief comments on the Decision on Jurisdiction and Admissibility in the case of *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, which it understood to have been rendered a few days earlier, but withdrew this request on 29 August 2011 on the basis that “all the issues addressed in the [*Abaclat*] decision have been amply debated in both parties’ submissions in this case.”
24. On 29 August 2011, however, the Respondent submitted that the Tribunal should indeed be apprised of the views of both Parties on the *Abaclat* Decision, but proposed that that should be postponed until after receipt of the Dissenting Opinion of Prof. Abi-Saab in that case, a request which the Tribunal granted by letters of 8 September and 9 November 2011 once the Dissenting Opinion had become available. The Respondent’s comments on the *Abaclat* Decision were duly received on 29 November 2011 followed by those of the Claimants on 19 December 2011.
25. By letter of 29 December 2011, the Respondent asked the Tribunal to exclude certain new authorities cited in the Claimants’ comments on the *Abaclat* Decision, or in the alternative to allow the Respondent an opportunity to submit comments of its own on those authorities. By letter of 17 February 2012, the Respondent made a reasoned

application for leave to introduce into the record two recent arbitral decisions (*Republic of Argentina v BG Group plc* and *ICS v Argentine Republic*), which the Claimants contested by reasoned letter of 5 March 2012. By a decision of 11 April 2012, the Tribunal (a) took note of the Respondent's request of 29 December 2011 on which it would rule, if necessary, at the appropriate time; (b) admitted into the record the materials referred to in the Respondent's letter of 17 February, together with the Claimants' comments on them in its letter of 5 March; while (c) indicating that it did not wish to receive any further materials from either Party without the leave of the Tribunal having been obtained in advance.

26. In the same letter, the Tribunal renewed its requests of 8 September and 9 November 2011 to know whether the Parties had reached an agreement on the need to change the title of the case to reflect the discontinuance by certain of the original claimants, in the absence of which the Tribunal would itself decide. By letter of 18 June 2012, the Tribunal regretted that, despite repeated requests, the Parties had not come back to it either with an agreed position on the name by which the case should now be known after the decease of Sig. Alemanni, or with an indication that they had reached agreement as to which of the original Claimants should be regarded as having discontinued their claims in accordance with Rule 44 of the ICSID Arbitration Rules and the Tribunal's communications of 8 September and 9 November 2011, and 11 April 2012, and ruled as follows:-

“ - as regards the name by which the case will in future be known, the Tribunal will take whatever action may be necessary in this respect as part of its forthcoming decision on the Respondent's Preliminary Objections. In the meanwhile, the Centre's website will include an indication that the name of the case is under review.

“ - as regards the identification of the remaining Claimant Parties, if, in the event, the Tribunal's decision on the Respondent's Preliminary Objections has the effect that the case continues to the merits, the Tribunal will at an early stage thereafter lay down a procedure, after consultation with counsel, that will place it in a position to determine formally and conclusively the identities of the Parties to the substantive phase of the arbitral proceedings.”

27. By letter of 14 September 2012, the Respondent sought leave to introduce into the record a further ICSID Award and a decision rendered by a Swedish court. By letter

of 18 September 2012, the Claimants resisted this application. By direction dated 28 September 2012, the Tribunal ruled as follows:-

“The Tribunal recalls the direction conveyed in the Centre’s letter of April 11, 2012 that, pending its decision on the Respondent’s Preliminary Objections, the Tribunal did not wish to receive any further unsolicited materials from either party, without its leave having been obtained in advance. That said, the Tribunal is in doubt as to its inherent authority, in accordance with the principle *iura novit curia*, to consult any arbitral decision or award which is in the public domain and which the Tribunal considers may be materially relevant to its own decision, whether or not that decision or award has been specifically introduced into argument by either party.

In the light of the foregoing, the Tribunal takes the view that it would be unrealistic to exclude from consideration the decisions in the *Daimler* and *Rosinvest* arbitrations to which the Respondent’s letter refers, and in the circumstances the Tribunal agrees exceptionally to the introduction into the record of the Respondent’s comments on those decisions, subject however to the other Party having an equivalent opportunity to comment. The Claimants’ comments must however be brief (not exceeding in scope or extent those in the Respondent’s letter under reference) and must be received not later than Friday, October 12, 2012.”

The Tribunal emphasized that this ruling should be regarded as an exception, and that from that point onward it did not wish to receive any further materials from either Party while it was in the process of completing its decision on the Respondent’s Preliminary Objections.

28. By letter of 16 October 2012, the Claimants submitted brief comments on the *Daimler* and *RosInvest* Awards in accordance with the above ruling by the Tribunal.
29. By letter of 14 March 2013, the Respondent drew attention to the recent Decision on Jurisdiction and Admissibility of the ICSID Tribunal in the case of *Ambiente Ufficio S.P.A. v Argentine Republic*<sup>4</sup> and sought leave for both Parties to be given an opportunity to comment briefly on this decision; it referred in this context to the fact that one of the members of that tribunal is also a member of the present Tribunal. By e-mail dated 16 March 2013, the Claimants registered their strong objection to this request. By letter of 22 March 2013, the Tribunal indicated that it saw no reason to

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<sup>4</sup> *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/09, (formerly known under the name *Giordano Alpi*, hereinafter “*Ambiente Ufficio*”), Decision on Jurisdiction and Admissibility, 8 February 2013.

vary the terms of its direction of 28 September 2012 at an advanced state of its deliberations, and rejected the Respondent's application accordingly.

## **II. THE ARGUMENTS OF THE PARTIES**

30. As will be explained below, the dispute which is the subject of the present Arbitration does not cover new ground, but corresponds instead to two other disputes that have already, as of the date of this Decision, proceeded to decision on questions of jurisdiction and admissibility under the same bilateral investment treaty as forms the foundation of the present proceedings. The account that follows of the arguments of the Parties, as well as the construction of the Tribunal's decision itself, have been adjusted accordingly, where the Tribunal finds it appropriate to do so, in the interests of economy of expression.

### **A. THE WRITTEN PLEADINGS**

#### **1. The Request for Arbitration**

31. The Request for Arbitration need not be summarized at length. It is signed by Advocate Piero Parodi, and by Professor Radicati di Brozolo both in his own name and p.p. (*per procuracionem*) for Advocate Rodolfo Carlos Barra, on behalf of 183 named Claimants, each one of whom is said to be an Italian citizen or an Italian corporate entity and the holder of "debt instruments issued by the Republic of Argentina." These instruments are referred to in the remainder of the Request as the "Bonds", and they are described as denominated in various currencies (Euros, US Dollars, Italian Lire, and Deutschmarks), with an indication of which Claimants had subscribed to which instruments, in what amount, and with what maturity date. The Request cites breaches by the Respondent of the guarantees of fair and equitable treatment and full protection and security as well as the guarantee against expropriation without the payment of prompt, adequate and immediate compensation contained in the Agreement between the Argentine Republic and the Italian Republic on the Reciprocal Promotion and Protection of Investments signed in Buenos Aires on 22 May 1990 ("the BIT"). By way of relief, the Request seeks: a declaration of breach; the refund to each Claimant of the entire nominal value of his Bonds, plus accrued interest until maturity, plus compound interest thereafter to the date of the Request; plus "all other damages that shall be demonstrated to be a direct

consequence of the Respondent's international law violations; and compound interest on the above between the date of the Request and the date of payment.”

32. To found the jurisdiction of the Tribunal, the Request cites Article 8 of the BIT, which provides (as set forth in greater detail in paragraphs 1-5 of that Article) for ICSID arbitration as one of the two available processes for the settlement of disputes between an investor from one of the Contracting Parties and the other Party, and in particular gives “advance and irrevocable consent that any dispute may be submitted to arbitration” given by the Contracting Parties in Article 8(3). The Claimants’ matching consent to arbitration is then attributed, as is commonly the case, to the Request for Arbitration itself, and there is attached to the Request a ‘Special Power of Attorney’ granted for this purpose, in identical terms, to Mr Piero Giuseppe Parodi by each of the named Claimants. According to the Request, Professor Luca Radicati di Brozolo and Professor Rodolfo Carlos Barra have both been designated as co-Counsel for the Claimants by Mr Parodi himself, in exercise of powers to that effect granted him under the Special Powers of Attorney.
33. As to the substance, the Request cites “actions whereby the State of Argentina deprived the Claimants of all their rights with respect to the Bonds held by them”. It rehearses in brief terms –
- the economic crises suffered by Argentina in the late 1980s and early 1990s
  - the steps taken to revive the Argentine economy, including pegging the local currency to the US dollar
  - the steps taken to give positive encouragement to inward investment into Argentina, including the ratification of the ICSID Convention and the conclusion of several bilateral investment treaties (including the present BIT)
  - the renewed economic crisis from 1998 onwards
  - the attempt to counter the crisis by the issue of government bonds to foreign investors, which is said to have happened in unprecedented

amounts both of capital raised and of the number of foreign purchasers, and to have amounted at its peak to more than one-quarter of all emerging-market debt issuance

- the worsening of the crisis notwithstanding these measures, leading to a run on the Argentine banks, restrictions on withdrawals, and in due course at the end of 2001 to a moratorium on all payments on the external debt, resulting in what the Request terms “the largest sovereign default in history”; this constituted, it is claimed, a repudiation of the Respondent’s promise to honour its financial obligations and to pay the full amount of principal and interest at the agreed maturity dates

34. The Request then cites the new economic plan instituted by Argentina in 2002, entailing a moratorium on debt repayments and the ‘pesification’ of debt obligations, through a scheme providing for a conversion of debts denominated in US dollars to Argentine pesos at a fixed rate of one-to-one, and then in due course, but some three years later, the launch of a Public Offer of Exchange (“the POE”) on 14 January 2005, which, it is alleged, effectively imposed the exchange of all outstanding public debt instruments (including those held by the Claimants) for new financial instruments on extremely unfavourable terms. Although the new instruments fell into four series, with different interest rates, maturities etc., the common feature was a “huge reduction” in net present value, which the Request estimates at approximately 70% and thus assesses as having the effect of a confiscation of the Claimants’ property. Moreover, the POE remained open for a short period only (6 weeks) and was backed by the threat that bonds not exchanged would “remain in default indefinitely”.<sup>5</sup> This situation was further reinforced by Argentine Law No. 26,017, enacted during that period, which on the one hand precluded the Argentine Government from making any further offer on bonds not exchanged under the POE or any judicial, extra-judicial or private settlement in respect of those bonds, and on the other hand shut bondholders out from effective access to the Argentine domestic courts, by providing that resort to those courts would result “*de pleno derecho*” in the conversion of the bonds that were the subject of legal action into one of the new bonds offered under the POE. Similarly, bondholders accepting the POE were required to waive their right to bring

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<sup>5</sup> Quoting the prospectuses and notices put out by the Argentine Ministry of Economy and Production: Exhibits C-3(A) and (B).

any further legal action or claim and to abandon any action already brought. That remained the position to date despite the very substantial improvement in Argentina's economic situation in the meanwhile.

35. On that basis, the Request asserts a breach by the Respondent of its obligations under the BIT to accord the Claimants' investments fair and equitable treatment and full protection and security, as well as the obligation not to expropriate without prompt, adequate and effective compensation. As to the failure to accord fair and equitable treatment, the Request invokes, in addition to the terms of Article 2(2) of the BIT, arbitral decisions to the effect that the standard is an objective one, not depending on malice or bad faith, and the Respondent's continued "refus[al] to make a good faith effort to restructure its debt on reasonable terms even after its robust economic recovery that has allowed it to repay a large fraction of its outstanding debt"<sup>6</sup> and cites in that connection various recent arbitral awards on disputes arising out of the same Argentine economic measures as lie at the origin of the present dispute. As to the failure to provide full protection and security, the Request prays in aid the most-favoured-nation clause in Article 3 of the BIT, and seeks via that route to rely on Article 2(2)(a) of the US-Argentina BIT signed on 14 November 1991.<sup>7</sup> As to expropriation without compensation, the Request cites the terms of Article 5 of the BIT and refers to cases and commentary supporting the proposition that cancellation of loans and bonds, or interference in their contractual arrangements by legislative fiat, constitute acts of expropriation for which compensation is due.
36. Moving to the Tribunal's jurisdiction, the Request enumerates four conditions that need to be satisfied under Article 25(1) of the ICSID Convention: the dispute must be of a legal nature; it must arise directly out of an investment; it must be between a Contracting Party and a national of another Contracting Party; and the parties have expressed their consent in writing to submit the dispute to ICSID. The Claimants submit that all four conditions are satisfied: the first because the dispute is governed by international law, and in particular the BIT; the second because the notion of 'investment' under the Convention is a broad one which extends to loans, including bonds, especially where (as in the present case) they contribute towards a State's economic development, and because the BIT itself expressly contemplates State-

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<sup>6</sup> Request, para. 43.

<sup>7</sup> Entered into force on 20 October 1994.

issued bonds and other public debt instruments in Article 1(1)(c), and Article 1(1)(f) encompasses “any right having an economic value conferred by law or by contract”; the third because all of the Claimants are either Italian nationals or entities incorporated in Italy, and both Italy and Argentina were Contracting States at the relevant time; the fourth because Argentina gave, under Article 8 of the BIT, its irrevocable consent in advance to arbitration at the option of Italian investors, including resort to ICSID, and the Claimants exercised that option, in accordance with well-established precedent, by submitting the Request for Arbitration itself; conversely, the preconditions for resort to arbitration under Article 8 were clearly inapplicable in the present case, given the combination of the exclusion of amicable settlement by the Argentine legislation and the effective bar on recourse to the Argentine courts, as described above (which would in any case have been futile within the 18 month period laid down in Article 8).

37. On that basis, the Request seeks the following relief:-

- a declaration of breach;
- the repayment of the full nominal value of the bonds, plus accrued interest payments due until maturity, plus compound interest from maturity until the date of the Request, plus “all other damages that shall be demonstrated to be a direct consequence of the Respondent’s international law violations”;
- compound interest on the above from the date of the Request until the date of payment.

2. The Respondent’s Memorial on Jurisdiction and Admissibility

38. In its Memorial on Jurisdiction and Admissibility, filed on 21 May 2009, Argentina requested the Tribunal to decline jurisdiction for a series of reasons, the majority of which went to the Tribunal’s formal competence under the ICSID Convention, but certain of which derived from the claim that the nature of the proceedings as initiated by the Claimants was such as to deny Argentina its due process rights as Respondent.

2.I The background to Argentina's default

39. The Memorial prefaces the particularization of these preliminary objections by offering Argentina's own summary account of the events underlying the Claimants' claims. It begins by describing the magnitude of the collapse of the Argentine economy in the period from 1998 onwards as the worst political, social and economic crisis in its modern history, caused by a series of external shocks, the effects of which are still present. The contraction of GDP in the period 1998-2001 was comparable to (perhaps even greater than) in the USA during the Great Depression of the 1930s, and the reduction in public revenue forced Argentina to default on its foreign debt. The will to deal with creditors fairly and equitably thereafter was shown by Argentina's collaboration with international arrangements to restructure its foreign debt, leading to voluntary offers to creditors which the majority of them accepted.
40. The Memorial describes the background to the bond issues of the 1990s, notably their link to the Brady Plan in relation to the USA and equivalent restructuring programmes for other regions including Europe. The interests asserted by the Claimants in the present proceedings involve 51 of these series of bond issues, but each one of the bond issues is governed by the law of a State other than Argentina, and each incorporates Argentina's submission to the jurisdiction of non-Argentine courts; neither of these two characteristics was fortuitous – to the contrary, they were requirements commonly insisted upon by the underwriters, precisely to protect the interests of the debt purchasers and to ensure them a forum for asserting their rights independently of the law of the issuing State.
41. The Memorial also gives an account of the process by which bonds were issued in Europe, starting with approaches to Argentina by the leading investment banks and continuing through competitive proposals to the appointment by Argentina of a lead manager for each bond issue, and then to the establishment by the lead manager of an underwriting syndicate, and 'road shows' (in which Argentina participated) for institutional investors (not private investors) designed to assess the market for the bond issue in question, leading finally to the conclusion of an underwriting agreement under which the banks gave a full and unconditional commitment to payment of the purchase price out of their own funds on the closing date. From that moment onwards, once it had delivered the bonds to the joint lead managers in exchange for

the agreed purchase price, Argentina dropped out of the process, and it became entirely a matter for the underwriting banks if, when, and how to sell on the indebtedness on the secondary market.

42. According to the Memorial, this situation had consequences of its own for the restructuring process after Argentina's default. Like other sovereign issuers of debt, Argentina had no knowledge of the identity of the holders of interests in its bonds, since these normally took the form of tradable interests (known as 'security entitlements'), listed in the stock markets, which were freely bought and sold and would be held by a very large number of beneficial owners for variable periods of time, some of which could be very short indeed (hours, or even minutes). This made it impossible to negotiate with each holder of an interest in a bond issue, or even with groups of holders, but instead made it necessary to carry out market surveys to determine the terms of a replacement offer, which is what Argentina did, with the encouragement *inter alia* of the G7, the IMF, and the World Bank. After Argentina had announced general guidelines for the restructuring of its foreign debt in September 2003, a series of meetings was held with representatives of retail bondholders in Zurich, Rome, Tokyo, San Francisco and New York, and in addition consultative groups were formed with bondholders in the United States, Germany, Italy and Japan. The purpose was to explain the inevitable effects on bonded debt of the economic constraints under which Argentina was suffering, but the consultations also allowed counter-offers from the creditor side to be put forward and considered by Argentina during a lengthy period extending over two years, and culminating in the POE of January 2005, covering 152 different series of bonds embracing some USD 81.8 billion of outstanding debt, and offering creditors a menu of options with varying admixtures of discounted capital values and interest rates. The offer was accepted by approximately 76.15% of the outstanding debt, making it into the biggest sovereign debt restructuring in history.
43. The Memorial asserts that the exchange instruments issued under the POE have since performed according to their terms. It describes the resulting situation as follows:-

Contrary to the statements made by Claimants, the restructuring process was completely voluntary in nature. There is no bankruptcy legislation for sovereign states and, therefore, there is no way to require creditors to accept a proposal for the restructuring of a state's

debt, regardless of the percentage of such creditors that are willing to do so. Contrary to the typical “cram down” provisions contained in local laws on insolvency, each creditor has the right to reject the proposal for the restructuring of sovereign debt and demand the fulfilment of the legal obligations arising under the terms of his debt instrument. It is precisely in order to preserve these unaffected rights that the underwriters of sovereign debt instruments issued abroad always insist that debt must be governed by the legislation of a jurisdiction other than that of the issuer and that legal remedies before courts other than those of the issuer must be provided for. The existence of such contractual rights, which, as a result, cannot be affected by any action taken by the State represents the legal framework within which all sovereign debt restructurings are carried out and provides the ultimate remedy for those who do not wish to voluntarily exchange their instruments.

At the same time, the holders of interests in bonds who choose not to participate in a restructuring cannot reasonably expect that the sovereign debtor will be able to pay them a sum higher than that accepted by the creditors who did participate in the restructuring. Given that the whole process is voluntary in nature, no holder of interests would choose to participate if he knew, or even had the reasonable expectation, that another person, in a similar position, would later receive a better offer. This is why the essential premise of the debt restructuring process is that the sovereign state will accord the same treatment to all creditors who are in a similar position.

In the case of Argentina’s 2005 Exchange Offer, this principle was reflected in a clause, which set forth that if Argentina offered better conditions to holdouts, it would have to provide the same improved terms to such creditors as had previously accepted the Offer. In view of the fact that the Exchange Offer was based upon terms that would make it possible for Argentina to pay its new debt in the long term, offering to pay a higher amount to any other creditor at a later time would have defeated the purpose of the initial restructuring and would have led Argentina once again to the position of unsustainable debt existing before the Exchange Offer.<sup>8</sup>

44. The Memorial concludes this description with an assessment of the contribution made by the debt restructuring under the POE itself to Argentina’s economic recovery, against the prevailing economic circumstances, before offering its own account of the onward sale of the original bond issues on the Italian secondary market, in which it makes the following assertions among others:-

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<sup>8</sup> Memorial, paras. 46-48.

- that the widespread dissemination of Argentine debt at the retail level was unique to Italy; up to 450,000 persons or entities whose average holdings barely amounted to €30,000;
- that the retail bondholders purchased their holdings mainly from the Italian banks which had themselves typically acquired their interests “in the context of private placements intended for institutional purchasers”;<sup>9</sup>
- that these “massive” retail sales were in violation of a series of Italian laws and regulations relating to both the offering of securities to the public and the duties of financial intermediaries in respect of the sale of securities to retail customers;
- that the sales were moreover in breach of selling restrictions contained within the terms applying to the bonds themselves.

45. Before proceeding to enunciate its formal preliminary objections, the Memorial dwells on the circumstances under which the arbitration had been brought by the Italian bondholders, and specifically on what it refers to as the ‘NASAM Mandate Package’, against the allegation that the initiative to launch the arbitration originated from a company based in the Principality of Monaco called North Atlantic SAM (hence “NASAM”) which had solicited the claimants to complete and sign a package consisting of “at least” five documents. These included in particular, under cover of a letter encouraging claimants to sign up to a “joint action to be brought before the ICSID arbitration tribunal (World Bank) in order to recover from the Argentine government the unpaid principal of and interest on the bonds”<sup>10</sup> and for that purpose to sign the remaining documents, a mandate to establish a principal-agent relationship between the individual and NASAM (“the NASAM Mandate”), and a Special Power of Attorney, in English and Italian, in favour of Avv. Guiseppe Parodi. The Memorial alleges that the NASAM Mandate Package establishes a structure through which NASAM entirely controls Claimants’ claims in any “joint action” brought on their behalf, including the present arbitration, while at the same time not precluding Claimants from suing Italian banks for any wrongdoing that may have occurred in the

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<sup>9</sup> Memorial, para.57.

<sup>10</sup> Lettera Ai Portatori Di Bond Argentini, available at <http://guardiansa.com/docs/LTR%20ai%20bond%20holders.jpg> (A RA 107).

sale and purchase of their investments (and itemizes the remedies potentially available in that connection). It alleges also –

- that the Claimants are not permitted any say in how the arbitral proceedings are run;
- that they have no control over the attorneys representing them, and are not even supposed to contact them but are to receive all information through a third party source;
- that the chosen attorney, Avv. Parodi, was selected by NASAM, not the investors, so that the attorney-client relationship is in effect with NASAM, not with the Claimants in the Arbitration;
- that NASAM’s control over the proceedings is mirrored by its financial interest in them, as represented by its undertaking to finance their cost (subject to a percentage contribution *ad valorem* by each Claimant) and by its entitlement to a success fee on a sliding scale that, in the event of total success, would amount to 30.5% of the face value of the bonds but, in the event of less than 30% recovery, would fall to zero;
- that the Claimants in fact irrevocably assign to NASAM the right to collect on their claims, subject to a right to repayment against NASAM.

The Memorial asserts that, taken overall, these factors make NASAM into a veritable party in interest in the arbitral proceedings.

## 2.II Jurisdiction and Admissibility

46. Against that background, the Memorial lodges the following objections to the Tribunal’s jurisdiction or to the admissibility of the Claimants’ claims.

*a. The claims fall outside the framework of the ICSID Convention and the BIT and would violate due process*

47. The Memorial characterizes the Arbitration as a “collective action” through which 180 unrelated Claimants attempt to jointly arbitrate their claims against a State in a single ICSID proceeding. The attempt is described as extraordinary, and as being

without precedent for good reason, namely that the States party to the ICSID Convention did not consent to jurisdiction over collective actions and neither the ICSID Arbitration Rules and Procedures nor the Argentina-Italy BIT provide any standards or procedures to govern proceedings of that kind. The Memorial asserts that the failure to provide explicitly for collective proceedings cannot be construed as permitting them by implication, since it constitutes “powerful evidence of the absence of any intent by the parties to these instruments to permit such claims”<sup>11</sup> and invokes in further support that national jurisdictions permitting mass or collective claims typically make specific provision for them by legislation, in fulfilment of a policy choice. It supports this with an analysis of the procedures for class actions in the United States of America under Federal Rule of Civil Procedure No. 23, of the provision made in the United Kingdom for collective claims under Civil Procedure Rule 19, of the legislation on collective claims recently enacted in Italy, and of the Supplementary Rules for Class Arbitrations drawn up by the American Arbitration Association, as well as certain arrangements in the international field, such as the International Oil Pollution Compensation Fund and the United Nations Compensation Commission, in order to show that each of them contains consciously limiting features which would not be satisfied by the present claims. It draws the conclusion that acceptance of jurisdiction over these claims would “manifestly disregard” the jurisdictional limitations imposed by the ICSID Convention and the limits of the consent given by Argentina in the BIT, and would be fundamentally different from the multiparty claims hitherto entertained by ICSID tribunals, which “have involved claims joined by common holders of interests of a single investment or a single investment vehicle or similar connections between the individual claimants; they have not involved claims—like those Claimants seek to prosecute here—by contractually unrelated persons who made their purported investments at different times, in different instruments, and under different circumstances.”<sup>12</sup> According to the Memorial, the present claims involve “180 different holders of security entitlements relating to 50 different classes of bonds, which have different applicable laws, issuance dates, type of currency, and amounts, that were acquired in different places, at very different prices and on different dates,”<sup>13</sup> whereas no prior ICSID case has

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<sup>11</sup> Memorial, para. 91.

<sup>12</sup> *Ibid.*, para. 104.

<sup>13</sup> *Ibid.*

involved more than 14 claimants, and moreover there has always been a strong connection between claimants coupled with no opposition by the respondent State to their joinder (including by Argentina itself where such a strong pre-existing connection was present).<sup>14</sup> The Memorial refers in that connection to the views of Schreuer<sup>15</sup> and Szasz<sup>16</sup>, and to an article by Parra describing an earlier proposal for the creation of a consolidation facility which could be opted into by interested parties.<sup>17</sup>

48. As to the second limb of the objection (due process), the Memorial raises a number of issues which, in the Respondent's opinion, would lead in the present case to a violation of fundamental principles of due process, including: the lack of any mechanism to verify the identity of the individual Claimants; the multiple issues of fact and law that would arise in unravelling the nature and incidents of their respective holdings would be unworkable and unfair to Argentina as the Respondent; and the fact that the Claimants offer no solution as to how the Respondent could, within any reasonable period of time, address all these issues as regards to each Claimant in its written submissions, let alone in cross-examination and oral submissions in the course of a hearing. The Memorial itemizes the principal issues as follows:

“whether each individual Claimant has Italian nationality, does not have Argentine nationality, and was not domiciled in Argentina for more than two years prior to acquiring his or her security entitlement, the place of incorporation, seat, and legal status under Italian law of each of the Claimant entities, whether additional people and entities identified in discovery purport to have succeeded to the legal rights represented by the security entitlements of the persons previously listed as Claimants (and its consequences for the Tribunal's jurisdiction), the amount allegedly invested by each Claimant (the purchase price), the circumstances of each Claimant's acquisition of their security entitlement, including the date on which the security entitlement was acquired, the identity and characteristics of each person who sold the security entitlement to each Claimant, what disclosures and assurances, if any, each seller made to each Claimant,

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<sup>14</sup> Such as *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1 (hereinafter “*LG&E*”); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, (hereinafter “*Compañía de Aguas del Aconquija*”); and *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v Argentine Republic*, ICSID Case No. ARB/03/17, (hereinafter “*Suez*”).

<sup>15</sup> Christoph H. Schreuer, *ICSID Convention: A Commentary* (2001), p.162 (AL RA 4).

<sup>16</sup> Paul Szasz, *The Investment Dispute Convention—Opportunities and Pitfalls* (How to Submit Disputes to ICSID), 5 *Journal of Law and Economic Development* (1970), p. 23, 28 (AL RA 6).

<sup>17</sup> A.R. Parra, *Desirability and Feasibility of Consolidation: Introductory Remarks*, 21 *ICSID-Review Foreign Investment L.J.* (2006), p. 132, 134 (AL RA 8).

whether such sale violated contractual and statutory requirements, the circumstances and terms and conditions of each of the 50 bond issuances, including the existence of different choice of law and forum clauses, the flow and use of funds resulting from the original bond issuances, how the value of each bond evolved before and after the contested measures, and the value of each security entitlement at the date of acquisition.”<sup>18</sup>

It asserts that individual treatment of the circumstances of each claimant was crucial in this case because – unlike international mechanisms that provide for collective claims where liability had been established and the only issue that remained was the quantum of damages – here responsibility under the Argentina-Italy BIT had yet to be established and was very much in dispute in relation to each individual Claimant.

49. The Memorial further alleges the absence of any link between the individual Claimants, who were suing on 50 different series of bonds, which had different governing rules, issuance dates, type of currency, and amounts, and were acquired in different places, at different prices, and on different dates.
50. Lastly, the Memorial draws attention to the absence of a legal representative who can adequately and fairly represent, and vigorously pursue, the interests of the individual Claimants.

*b. The Claimants have not validly consented to ICSID arbitration*

51. The Memorial recalls that a host State’s consent to arbitrate contained in a legislative or treaty provision is no more than an offer that must be validly accepted by the investor in order to perfect consent for the purposes of Article 25(1) of the ICSID Convention. Whereas the Claimants contention is that their consent was established in the normal course by the filing of the Request for Arbitration itself, the Memorial submits that, inasmuch as the Request was not signed by the Claimants in person, but by an attorney claiming to act on their behalf, the effectiveness of their consent is dependent on whether or not the attorney had been duly authorized by the Claimants to do so. The Memorial draws attention in this connection to the fact that the Power of Attorney (see paragraphs 32 and 45 above) nowhere contains a mention of ICSID, nor indeed of the Italy-Argentina BIT, the only reference coming in two of the recitals in the NASAM Mandate, and asserts that in both cases the reference constitutes

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<sup>18</sup> Memorial, para. 110.

information being conveyed to the recipient, but not any form of authorization given by the recipient. The Memorial points finally to the circumstance that the Claimants did not in fact sign the Request for Arbitration, although it was specifically foreseen in the documents constituting the ‘package’ that they would have to do so; it follows from this that the mere filing of the Request by counsel, without the Claimants’ signatures, is not capable of fulfilling the requirement of consent in writing laid down in Article 25(1) of the ICSID Convention.

52. The Memorial further argues that, even assuming *arguendo* that the NASAM Mandate and the Power of Attorney, the only instruments actually signed by the Claimants, did contain their written consent, that consent would be invalid because both of these instruments violate formal and substantive requirements of Italian law, as the applicable law regulating them; the defects relate both to matters of form, which determine how powers of attorney must be entered into, and of substance, which determine what the relations must be between the client and the attorney, and these defects taint all of the instruments in the package, under the Italian legal doctrine of *negozi collegati*. In particular, the structure under which the Claimants, in effect, surrender all control over the handling of their claims in favour of NASAM is incompatible with the requirements of Article 77 of the Italian Code of Civil Procedure.

*c. There is no ‘investment’ ...*

53. The Memorial maintains that the Tribunal is without jurisdiction *ratione materiae* as the assets in respect of which the Claimants are claiming do not rank as ‘investments’ for the purposes of the ICSID Convention or the BIT. The Claimants’ bare assertions to that effect are belied by the fact (a) that the BIT does not refer to ‘bonds’ or to ‘rights derived from bonds’, and that in any case (b) a stringent set of criteria has to be fulfilled in order to turn holdings of these kinds into protected investments under the ICSID system.

*i. ... under the ICSID Convention*

54. As to point (b), the Memorial relies on a series of ICSID cases for the proposition that the ICSID Convention itself is based upon an autonomous notion of ‘investment’ that

must be satisfied and is not determined by the terms of a particular BIT. It cites with approval the dictum of the tribunal in *Joy Mining* that:

“The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise, Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision.”<sup>19</sup>

55. To ascertain the criteria that go to determine whether an asset is an ‘investment’ for the purposes of the ICSID Convention, the Memorial relies on the Awards in *Salini*, *Joy Mining*, and *Phoenix Action*<sup>20</sup> to support its submission that there may be as many as seven criteria that come into play: duration; regularity of returns; risk; substantial commitment; contribution to the host State’s economy; compliance with local law; and bona fides. The Memorial asserts that the doubts as to whether the Claimants’ assets fulfil any of the first five of these criteria are so substantial as to require the conclusion that they do not fall within the concept of ‘investment’ under the Convention. Specifically –

- The Claimants have made no commitment, still less a substantial one; the only information provided by them is the nominal value of their security entitlements, but nothing even about the price they had paid for them.
- Set against the criterion laid down in prior ICSID Awards that an investment should as a minimum have a duration of two – five years, the Claimants have provided no information on the intended tenure of their assets, a matter which is entirely under the control of each individual holder; the nature of security entitlements purchased on the secondary market is that they need not be held for any particular duration since they are freely tradable, and can be sold virtually instantaneously following their purchase. Even if the maturity dates were taken as a guide, a large number of Claimants bought security entitlements with a duration of less

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<sup>19</sup> *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, (hereinafter “*Joy Mining v Egypt*”), (AL RA 46), para. 50.

<sup>20</sup> *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, (hereinafter “*Phoenix Action*”) (AL RA 44).

than five years, and some appear to have bought them immediately before maturity.

- There is no evidence that the risk assumed was anything more than normal commercial risk, whereas Tribunals have held that ordinary commercial contracts cannot be considered as ‘investments’.<sup>21</sup>
- the fact that security entitlements are easily and recurrently transferred implies in turn that there is no regularity of profit and return for Claimants, who would have been able to acquire the security entitlements at stake at any moment, including on the day immediately preceding the maturity date, in which case there would have been no regularity of return at all.
- Likewise, the Claimants’ security entitlements made no contribution to Argentina at all; they merely served to reimburse the underwriting and intermediary banks who had taken on themselves full responsibility for selling on these entitlements on the open market in conformity with the laws and regulations applicable at the places of sale. It is of the nature of secondary market transactions that their proceeds “accrue to the selling dealers and investors, not to the companies that originally issued the securities,”<sup>22</sup> whereas the economic benefit to Argentina derived from the contracts concluded by it with the underwriters themselves.

*ii. ... under the BIT*

56. As to point (a), the Memorial begins with an indication of what it considers to be errors in the Claimants’ translation into English of Article 1(1)(c) of the BIT, and points out that the Spanish and Italian language versions constitute the authentic texts, and thus the valid ones for interpretation, pursuant to the Vienna Convention on the Law of Treaties. It submits that the failure to use in either language a term corresponding to the English ‘bonds’ should be seen as evidence that the Contracting Parties intended to exclude bonds from the scope of application of the BIT.

57. The Memorial then submits that in any event the governing law clauses in the security entitlements in themselves exclude these instruments from the scope of protected

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<sup>21</sup> Cf. *Joy Mining v Egypt* (AL RA 46), para. 57.

<sup>22</sup> Memorial, para.176, citing Barron’s Financial Guides (6<sup>th</sup> ed.).

investments under the BIT. Invoking the *dictum* of the *Bayview* Tribunal that the “salient characteristic” of a covered investment is that it “is primarily regulated by the law of a State other than the State of the investor’s nationality, and that this law is created and applied by that State which is not the State of the investor’s nationality,”<sup>23</sup> the Memorial asserts that Argentine law does not apply to any of the security entitlements at issue in the arbitration, nor did any law or regulation created or applied by Argentine authorities govern the issue or sale of the security entitlements.

*iii. ... by reason of violations of the applicable law*

58. The Memorial further asserts that the sale and purchase of the security entitlements to the Claimants was in violation of the governing law, the law of Italy, and that as a result the security entitlements cannot be investments falling under the protection of the BIT. This conclusion is founded on the argument that the express ‘in accordance with law’ reference in Article 1 of the BIT is a reflection of general public policy and of the principle of good faith, with the result that the Treaty cannot be construed as protecting assets acquired illegally. Under Argentine conflict of laws rules, the validity of contracts made outside the territory of Argentina, and the obligations that derive from them, is governed by the law of the place where the contract was made, i.e., in the present case, Italy. However, under Italian law, the terms and conditions of the bonds expressly prohibited the sale of security entitlements to unqualified, unsophisticated buyers, and a specific restriction to that effect was included in almost all the prospectuses or subscription agreements. The Memorial submits that, in consequence, the acquisition of the security entitlements by the present Claimants was unlawful under both Italian and Argentinian law.

*iv. ... in the territory of Argentina*

59. The Memorial asserts finally that the security entitlements fail to meet the territoriality requirement under the BIT, since there was, in fact, no investment ‘in the territory of’ Argentina, as is required under the definition of ‘investment’ in Article 1(1) of the BIT. The Memorial relies on the equivalent wording in the Preamble to the BIT, and on the reasoning of the Tribunals in *SGS v Philippines*<sup>24</sup>,

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<sup>23</sup> *Bayview Irrigation District and others v United Mexican States*, ICSID Case No. ARB(AF)/05/1, (hereinafter “*Bayview*”), (AL RA 54) para. 98.

<sup>24</sup> *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, (hereinafter “*SGS v Philippines*”) (AL RA 57).

and *Canadian Cattlemen*<sup>25</sup>, to support its argument that the plain meaning of Articles 1(1) and (2) excludes from the scope of the BIT investments made outside the territory of the respondent State, whether or not beneficial to that State.

60. The Memorial further asserts that a series of factors combine to show that the claimed assets are indeed not invested ‘in the territory of’ Argentina, namely:-

- Claimants’ security entitlements are not physically located in the territory of Argentina;
- Claimants’ purchases of security entitlements were made outside the territory of Argentina;
- Claimants’ security entitlements are registered outside the territory of Argentina;
- all of Claimants’ security entitlements are governed by foreign law;
- and all of Claimants’ security entitlements are enforceable in foreign jurisdictions.

The Memorial reiterates once more that the proceeds of Claimants’ purchase of security entitlements did not accrue to Argentina, no funds from Claimants were made available to Argentina, and the security entitlements generated no ‘capital at the disposal of’ Argentina. The Memorial asserts that there was no contractual connection between the initial purchase of the bonds and the secondary sale of the security entitlements in these bonds.

*d. The failure to state a prima facie treaty violation*

61. The Memorial asserts as a well-established general principle that an international court or tribunal must satisfy itself at the preliminary stage that the claim brought before it is capable of coming within the provisions of the treaty that has been invoked, and cites in support the *Ambatielos* and *Oil Platforms* cases before the International Court of Justice, applying a *prima facie* test which had in turn been

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<sup>25</sup> *Canadian Cattlemen for Fair Trade v United States*, NAFTA/UNCITRAL, Award on Jurisdiction, 28 January 2008, (hereinafter “*Canadian Cattlemen*”) (AL RA 59).

applied by a large number of ICSID tribunals, including in *SGS v Philippines* and *Salini*.

62. On that basis, the Memorial asserts that the Claimants

“do not state an arguable case under the BIT that Argentina interfered with their security entitlements in the exercise of her sovereign authority under any of their legal theories. Indeed, it was impossible for Argentina to do that. Claimants’ security entitlements and the underlying bonds are governed by foreign law and enforceable in foreign courts. The bonds and security entitlements are therefore beyond the scope of Argentina’s legislative jurisdiction and are subject to the jurisdiction of foreign courts over which Argentina has no influence. Argentina could not and did not alter or cancel the rights represented by Claimants’ security entitlements through exercise of her sovereign authority because those rights were not created by and are not governed by Argentine law, and they are enforceable in municipal courts outside of Argentina.”<sup>26</sup>

63. Instead, the Memorial says, the Claimants have no more than a contractual claim, which could not be cognisable before the Tribunal unless their contractual rights had been interfered with by the Respondent, acting not as a contractual party but in exercise of its *puissance publique*. The Memorial asserts further that it is not open to the Claimants to evade this essential fact by attempting to disguise their claims as Argentina “not respecting its obligation to pay principal and interest in accordance with the conditions of the Bonds,” or “imposing on the Claimants the scandalous conditions of the ‘take-it-or-leave-it’ POE,” or “continuing to refuse to make a good faith effort to restructure its debt on reasonable terms even after its robust economic recovery that has allowed it to repay a large fraction of its outstanding debt”.<sup>27</sup> These allegations are not, however, capable of constituting breaches of the BIT because it is well established that a mere failure to pay a contractual debt cannot in itself amount to a violation of international law, nor does international law preclude a debtor from offering terms of settlement to its creditors or to offer special treatment to creditors who do accept settlement terms, all of these being actions that would be open to any contractual party. Moreover, the assertion in the Request that “Argentina’s actions have definitively deprived the Claimants of property of the Bonds without adequate effective or immediate compensation” flies in the face of the statements made by their

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<sup>26</sup> Memorial, para. 224.

<sup>27</sup> The quotations are from para.43 of the Request.

own banks, contained in the annexes to the Request, to the effect that the bonds are “at present in the full property and availability” of the named Claimants.<sup>28</sup> In sum, the Claimants are simply asserting that Argentina failed to pay Claimants their contract entitlements, which does not however amount to expropriation under international law. This analysis of the essential nature of the Claimants’ claims is further reinforced by the terms of the Powers of Attorney granted by them, which never refer to rights under the BIT but only to property in the bonds and the credits due under them.

64. The Claimants therefore fail to state a *prima facie* claim under the BIT, and this fundamental defect is not capable of being cured by the invocation of the most-favoured-nation clause in the BIT in an attempt to summon up the protection of the principle of ‘full protection and security’ since no argument is offered in the Request either to justify it or to indicate how it would apply to Claimants’ claims.

*e. The absence of jurisdiction ratione personae and of standing on the part of the Claimants*

65. The Memorial asserts that the onus lies on the Claimants to establish that they are ‘nationals of a Contracting State’ (other than the Respondent) for the purposes of Article 25(2) of the ICSID Convention, and also (positively) that they meet the definition of ‘investor’ under Article 1(2) of the BIT and (negatively) that they are not disentitled pursuant to the corresponding provision in the Additional Protocol to the BIT; yet the Request merely asserts Italian nationality and neither it nor the documents submitted in support offer sufficient material either to substantiate the time element or to enable the criteria in the Additional Protocol to be applied, for example in relation to dual nationality, which is permitted in both Italian and Argentine law, or in relation to domicile in Argentina before the claimed investment was made. Given that Italian nationality law is based upon *ius sanguinis*, whereas Argentine nationality law is based upon *ius solis*, and that under both sets of laws nationality can be acquired on other grounds, such as marriage, residence or naturalization, mere declarations of birth and residence are not sufficient for the *prima facie* establishment of nationality. These failures are exacerbated, according to the Memorial, by the inconsistencies in the Claimants’ documentation in respect of the identification of

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<sup>28</sup> Cf. Exhibit C-2.

who the Claimants are. The Memorial alleges that certain persons covered in the Claimants' disclosure of documents did not appear on the list of Claimants in the Request, while, conversely, some Claimants listed in the Request were not covered in the disclosure.

*f. The absence of an investment in the Republic of Argentina*

66. The Memorial points out that under the BIT the definitions of 'investor' and 'investment' are inherently linked, from which it follows that no person can be considered to be an 'investor' under the definition in Article 1(2) without having made an investment<sup>29</sup> "in the territory of" the other Contracting Party (in this case Argentina). However, for the reasons already given, none of the Claimants' security entitlements meets this criterion.

*g. The Claimants' lack of standing*

67. The Memorial asserts that the Claimants' security entitlements do not represent a legal interest in the underlying bonds. The consequence would be that, even if the bonds themselves could be considered to be 'investments' within the meaning of the BIT, the same would not hold for the security entitlements because of the remoteness of their connection with the bonds. In support, the Memorial argues that the Claimants acquired their security entitlements on the secondary market from the Italian banks, and that the banks, in turn, had acquired their security entitlements through a layer of intermediaries, varying from case to case. It further argues that neither the Claimants' nor the banks from whom they bought have any contractual relationship with either Argentina or the underwriters. It argues further that Claimants' security entitlements are registered in the accounts of the Italian banks, not in the accounts of the registered owners of the bonds, the clearing organizations, with the result that the Claimants are at least one step more remote than an Italian bank or intermediary that has an account with the clearing organization. It submits that this indirect holding system implicates a cut-off point beyond which claims would not be admissible because of the remoteness of their connection with the investment. The Memorial finally submits that the Claimants' assets lie beyond this cut-off point, as evidenced by the fact that they fall outside Argentina's consent to arbitrate, and should therefore be declared in any case to be inadmissible.

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<sup>29</sup> Or being in the process of so doing or having assumed an obligation so to do.

68. The Memorial raises two further arguments in favour of this submission of inadmissibility. The first is that the Claimants remain free to pursue their remedies against the banks from whom they bought (and one Claimant at least had already done so before the Italian courts, seeking the nullification or termination of the contract of sale), and that issues of that kind ought to be determined before the arbitration proceeded. The second is that the Claimants are in fact pursuing their claims for the benefit of a third party (NASAM), which has itself no standing to bring arbitral proceedings, and this constitutes an abuse of process. It was NASAM that took the decision to bring the proceedings, not any of the Claimants, individually or jointly, and NASAM retains the sole power to instruct counsel, and to settle them, including the decision as to whether the terms of settlement are expedient or not.

*h. The failure to comply with the preconditions under Article 8 of the BIT*

69. The Memorial draws attention to the provisions of Article 8 of the BIT which, it asserts, establish a multi-layered, sequential dispute resolution system, beginning with amicable consultations, and proceeding through recourse to the administrative or judicial authorities of the host State, and finally to the possibility of international arbitration, but only if 18 months has elapsed since the notification of the local recourse. Here the Claimants have jumped, inadmissibly, directly to the third stage without proceeding through the prior stages. The Memorial rejects both of the reasons adduced by the Claimants for their failure to comply: that in the circumstances the conditions laid down in Article 8 are not applicable, or alternatively that direct consultations would have been fruitless, in the light of the Respondent's general 'hostile and uncooperative' attitude, and in the face of Argentine Law No. 26,017.

70. As to the applicability of the prior steps under Article 8(1) and (2) of the BIT, the Memorial invokes the common approach under the dispute settlement provisions of investment protection treaties and the decision by the Tribunal in the *Wintershall v Argentina* arbitration,<sup>30</sup> upholding the "interdependent and inter-linked" dispute resolution provisions of the Argentina-Germany BIT which, it asserts, are closely related to those of the present BIT. It draws attention in particular to the fact that

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<sup>30</sup> *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, (hereinafter "*Wintershall*") (AI RA 78).

both paragraph (2) of Article 8 (referring to recourse to local authorities or courts) and paragraph (3) (referring to international arbitration), begin with the word ‘If’, thus clearly indicating the existence in each case of a prior condition that had to be satisfied. The Memorial denies also, on the factual level, the allegation of Argentina’s ‘hostile and uncooperative’ attitude, citing Argentina’s “substantial efforts” over several years to engage with purchasers and their representatives and that the POE was a product of these discussions, and reflected the contributions of many creditor groups. On the legal level, it denies further that Law No. 26,017 did more than establish an “internal process” that would prevent the executive branch from reopening the Exchange Offer without legislative authorization. In other words, Law 26,017 did not make settlement with Argentina impossible or futile: it only required legislative consent to any settlement.

71. As to the 18 month delay laid down by Article 8(3) of the BIT, the Memorial rebuts what it refers to as the ‘excuses’ put forward by the Claimants for not attempting to meet this requirement. It points to the absence of any *jurisprudence constante* in favour of the Claimants’ submission that the provision lacked a jurisdictional character, citing in particular the decisions of the Tribunals in *Wintershall v Argentina* and *Enron v Argentina*.<sup>31</sup> It asserts further that a categorical denial of this provision, and of the evident intention lying behind it, runs counter to the basic principle of *effet utile* in the interpretation of treaties. It takes issue also with the Claimants’ invocation of an exception to the application of this provision (and others of a similar kind) in circumstances where resort to local courts or authorities would be futile, on the grounds that an asserted futility has to be ‘obvious’ or ‘manifest’; that Article 8(3) says only that a dispute must be submitted to the local courts or authorities, not that it must necessarily be resolved within 18 months of submission, the plain intention of the Contracting Parties being that the local courts or authorities should have the opportunity to decide a dispute before the route to arbitration was opened; and that, based on actual experience, there was no factual or legal reason why the Argentine courts could not decide a dispute of the present kind, and do so within the time limit prescribed by the BIT.

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<sup>31</sup> *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v Argentine Republic* (formerly known under the name *Enron Corporation*, hereinafter “*Enron v Argentina*”), ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (AL RA 75).

72. For all the above reasons, the Memorial seeks a decision that the Tribunal (and ICSID) lacks jurisdiction over the dispute, and that the Respondent be awarded its costs and expenses.

3. The Claimants' Counter-Memorial on Jurisdiction and Admissibility

73. In their Counter-Memorial on Jurisdiction and Admissibility, filed on 5 November 2009, the Claimants contest the Respondent's description of the circumstances surrounding Argentina's default on its bonded debt and set out in greater detail their reasons for asserting that both ICSID and this Tribunal have jurisdiction to hear the dispute, which should be ruled admissible.

3.1 The background to Argentina's default

74. The Counter-Memorial begins with a rebuttal of the Respondent's factual description contained in the Memorial, alleging that the Respondent offers a distorted and self-serving account which is designed to paint itself as an innocent victim of the crisis leading to its default rather than as the author of that default, bearing responsibility for its consequences. It alleges that (although this is properly an issue for the merits) it was Argentina's own profligate and undisciplined policies that led to the financial collapse in 2001-2002. It cites in this context a report of 2004 by the Independent Valuation Office of the IMF, and the serious long-term effects of the convertibility regime which pegged the Argentine Peso to the US Dollar at a fixed parity of one to one, against the background of a failure to maintain fiscal discipline and control public expenditure (provincial as well as national) and in particular to control the level of the external public debt. It alleges that the Argentine governing authorities knew what was required, as this was at the centre of its discussions with the IMF in the 1990s, but nevertheless failed to introduce the necessary structural reforms. It sets out the economic reasons why Argentine debt ought to have been kept at a low level, and contrasts this with the growth in the ratio of debt to GDP from 35.1% in 1994 to 64.1% in 2001. It alleges that Argentina failed to estimate a sustainable level of national debt and massively over-borrowed, mostly on the international markets and notably in foreign currencies. It asserts that, had Argentina been a responsible policy-maker and enforcer and a prudent spender and borrower, it would have prevented the 2001 crisis and would have been able to service its debt commitments.

75. The Counter-Memorial continues with its own account of what happened in the wake of Argentina's default, which it describes as being of historically record-breaking proportions, leading to a rise in the debt-to-GDP ratio to 150% in 2002 after the currency devaluation that followed the abandonment of the peg to the US Dollar. The Counter-Memorial asserts that the total debt balance amounted in 2004 to US\$195.5 billion, 53% of which was in bonds, which had a cumulative unpaid principal of US\$81.2 billion and accrued interest of US\$22.9 billion; this bonded indebtedness was held as to 47% by Argentine citizens and as to 35% by retail private investors concentrated in Italy, Switzerland and Germany (with the remaining 18% divided between the USA, Asia and Latin America). It further asserts that, although Argentina took certain of the measures required of it to deal with this situation, the same was not true in respect of the restructuring of its debt even though it had succeeded by 2004 in bringing inflation under control, stabilizing the currency and indeed generating a fiscal surplus of between 3 and 4%. That notwithstanding, debt restructuring did not take place until the early months of 2005 and took the form, the Counter-Memorial alleges, of "impos[ing] on the holders of its bonds, without any good faith negotiation, an outrageous take-it-or-leave-it offer unprecedented in the history of sovereign debt restructuring and totally out of keeping with the commonly accepted guidelines of sovereign debt restructuring."<sup>32</sup> The Counter-Memorial maintains that, contrary to the Respondent's assertions, it never negotiated in good faith with its bondholders or gave consideration to counter-offers, but dictated an offer to bondholders which it declared would not be improved.
76. The Counter-Memorial rebuts Argentina's argument that sovereign States were not aware of the holders of its external bonds or interests in them, so that it would be impracticable to enter into negotiations with each such person individually or even in groups, by retorting that an issuing State's duty is to negotiate not with individual bondholders but with groups or categories of bondholders; while it concedes that meetings with creditor representatives did take place and even that Argentina did form consultative groups with US, German, Italian, and Japanese bondholders, it denies that Argentina made any genuine effort to negotiate the counter-proposals of such groups, sticking instead to its own proposal, which imposed an unprecedentedly high rate of loss on the bondholders. The Counter-Memorial gives its own account of the

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<sup>32</sup> Counter-Memorial, para. 58.

history of the Argentine offer to bondholders from the Dubai proposal of September 2003, through its rejection by creditor groups and criticism by the IMF, to the meetings with bondholder groups in April 2004 (which it characterizes as the mere presentation of Argentine conditions) and the Buenos Aires offer of June 2004 and the criticism of that by bondholder representatives, and finally to the POE of January 2005 (which it describes as being only a slightly modified version of the Buenos Aires offer). It refers further to the enactment, during the brief period in which the POE was open for acceptance, of Law 26,017, commonly known as the *Ley Cerrojo*,<sup>33</sup> and to the fact that 50% of the acceptances of the POE came in the fortnight remaining after the promulgation of this Law.

77. The Counter-Memorial summarizes as follows the main features of the POE, which together establish its ‘total illegality under international law’:-

- the magnitude of the loss imposed on bondholders, both capital and accrued interest, which far exceeded the average in previous restructurings;
- the fact that it was imposed unilaterally without any consideration of creditors’ counter-proposals;
- the deliberate understatement of the debtor’s capacity to pay;
- the low acceptance rate: a nominal 75% (by contrast with the IMF threshold of 90%) which however masked the real level of voluntary acceptance at around 50% only, once one discounts for the Argentine pension funds which succumbed to Government pressure;
- the threat that bonds not offered for exchange “may remain in default indefinitely” (and in fact are no longer recorded in Argentina’s public accounts).

All in all, the Counter-Memorial assesses the total loss to bondholders at US\$ 97 billion, \$67 billion of which is attributed to bonds that were surrendered and the remainder to hold-out bondholders.

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<sup>33</sup> ‘cerrojo’ is the Spanish word for ‘lock’.

### 3.II Jurisdiction and Admissibility

78. The Counter-Memorial then proceeds to an analysis of the ‘NASAM mandate’, the powers of attorney granted by the individual Claimants, and the funding arrangements for the Claimants’ case, in order to contest the Respondent’s argument that these elements are tainted with illegality that fatally undermines the Claimants’ written consent to arbitration, as required by Article 25 of the ICSID Convention.

#### *a. The NASAM mandate*

79. The Counter-Memorial sets out the origin and development of NASAM since 1978 as part (since 1998) of the NASAM-GUARDIAN Group, the core business of which is described as “providing qualified tax advice, at domestic and international level and a wide range of administrative services to corporate entities and individuals”.<sup>34</sup> It asserts that it was in the context of its routine activities that NASAM decided in 2006 to co-ordinate, organize and fund legal action against Argentina by the owners of defaulted Argentine bonds, with the intention of recovering the amounts unpaid under the bonds; bondholders who intended to bring such an action gave NASAM the authorization known as the “NASAM Mandate”. The Counter-Memorial insists that NASAM has no conflict of interest in respect of the arbitral proceedings, that it is not an Italian bank nor has any connection with Italian banks, and that it played no role of any kind in the placing of the bonds with the Claimants (nor indeed with any investors); in sum, that the present arbitration must be sharply distinguished from the situation in the *Beccara v Argentina* arbitration, where the third party funder is, it asserts, an association of Italian banks which may possibly have been involved in the sale of Argentine bonds to Italians.

80. As regards the NASAM Mandate, the Counter-Memorial describes it as a contract (*‘Incarico’*) between each individual Claimant and NASAM, governed by Italian law, under which NASAM undertakes to co-ordinate and to finance litigation against Argentina in connection with the bonds. The following features are singled out: the Claimants acknowledge that Argentina’s default may constitute a serious violation of the BIT which entitles them to institute arbitration proceedings under the ICSID or the UNCITRAL Rules; they confer on NASAM the power to promote, co-ordinate and

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<sup>34</sup> Counter-Memorial, paras. 85-87, referring further to online information at [www.guardiansa.com](http://www.guardiansa.com).

pursue any legal action deemed appropriate for the recovery of the amounts due; to that end, they agree to issue a power of attorney (*‘Procura Speciale’*) to Mr Guiseppe Parodi; they agree to pay, as a contribution to the expenses a set fraction (0.5%) of the nominal value of the bonds which they hold, the contribution being payable to a NASAM account under the reference *‘Arbitrato ICSID’*; NASAM agrees to defray all of the remaining legal and other costs relating to any legal action commenced by them; in consideration of NASAM’s activity as coordinator and for the risk assumed by it in relation to the funding, they agree to pay NASAM a ‘base amount’ of 5% of any amount recovered, plus a variable percentage ‘success fee’ linked to the amount of the actual recovery.

81. The Counter-Memorial rejects the Respondent’s claim that this arrangement is questionable, either in fact or in law, or that there is anything in it that contaminates the validity of the powers of attorney, for the following reasons –

- there is no basis for claiming that NASAM is given ‘complete control’ over the claims, as its powers are limited and circumscribed by the Mandate itself;
- nor is there any basis for alleging that the Claimants are prohibited from contacting and instructing their attorneys or that the Mandate displaces the attorney-client relationship: the intermediate entity “MFO” has only the functions of managing the bank account and acting as a centre for the exchange of information; the relationship between each Claimant and counsel is governed solely by the Power of Attorney, and the Mandate gives NASAM no power to instruct counsel for the Claimants; nor is NASAM by any stretch of the imagination a party to the arbitral proceedings;
- the argument that the Mandate is contrary to Italian law is therefore lacking in both a factual and a legal basis, and confuses the situation in arbitration with that before the Italian courts under the Code of Civil Procedure, from which it follows that under Italian law a party to an arbitration may delegate any third party (who need not even be a lawyer) to appear before the tribunal on its behalf and to dispose of its substantive

or procedural rights; in any case, the Code could at the very most only apply to arbitrations having their seat in Italy, not to foreign arbitrations, still less to ICSID arbitration.

*b. The funding arrangement*

82. The Counter-Memorial recalls that third party funding is becoming increasingly common in arbitration, recalls (by reference to numerous examples, including in particular that of Italy) its increasing acceptance in national jurisdictions as well, and maintains that no-one seriously contests the legality of third party funding in international arbitration “especially in a case like the present one where the claims are brought by the original holders of the rights which are the subject of the litigation and where the benefits of the arbitration accrue for the most part to the Claimants”.<sup>35</sup> It recalls also that the NASAM funding scheme is essential to allow the present Claimants access to justice, as they would never have had on their own account the means to finance an ICSID arbitration. It draws the conclusion that NASAM’s role is therefore perfectly legitimate and has no impact on the rights of the Claimants to bring and to control the proceedings, or on their position within the proceedings.

*c. The Powers of Attorney*

83. The Counter-Memorial rejects the Respondent’s invocation of the doctrine of “*negozi collegati*” (connected transactions) as being irrelevant, given that there is nothing illegal in the NASAM Mandate which could infect the validity of the powers of attorney. As to the powers of attorney in their own right, it equally rejects the Respondent’s reliance on provisions of the Italian Civil Code which apply only to proceedings before Italian courts and not to arbitration, even arbitration governed by Italian law. It cites authority for the lack of formality in the designation of party representatives in arbitral proceedings, which may even be accomplished orally. It submits that, merely because (as the Respondent asserts) the powers of attorney are legal instruments signed in Italy by Italian citizens in favour of an Italian lawyer practising in Italy, that does not make Italian law applicable to them for the purposes of an ICSID arbitration. It recalls that, were the position otherwise, ICSID tribunals would have to engage in preliminary conflict of law analyses just to verify that the powers of attorney of those appearing before them were in order, and cites in this

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<sup>35</sup> Counter-Memorial, para.113.

connection the ‘curt dismissal’ by the Tribunal in *Amto v Ukraine* of an argument that the consent of the claimant in that case was defective owing to its being based on an invalid power of attorney,<sup>36</sup> a finding which it argues is directly in point to the present case.

84. The Counter-Memorial submits further that, in order to assess their jurisdiction, ICSID tribunals have to apply only the provisions of Article 25 of the ICSID Convention, which are free-standing, and which require no particular legal requirement or requirement as to form for the “consent in writing” stipulated by Article 25(1), citing in this connection the Decision on Jurisdiction in the *CSOB v Slovakia* arbitration that “[t]he question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law [but] is governed by international law as set out in Article 25(1) of the ICSID Convention.”<sup>37</sup>

*d. The Claimants’ ‘consent in writing’*

85. The Counter-Memorial next counters the Respondent’s contentions that the Claimants have not given their ‘consent in writing’ for the purposes of Article 25(1) by reason of the fact that they did not personally sign the Request for Arbitration and that there is no specific mention of ICSID arbitration in the powers of attorney. It dismisses these contentions as wholly without merit, given the universal recognition that an investor may validly accept an offer of ICSID arbitration contained in a BIT by the simple expedient of instituting proceedings, and that that is in fact precisely the mode by which the great majority of ICSID proceedings have been set in train in recent years, relying in this context on the clear holding by the Tribunal in *Tokios Tokelés v Ukraine* that “the Convention does not stipulate the form that written consent must take, much less to whom it must be addressed and sent.”<sup>38</sup>
86. The Counter-Memorial submits that the present Claimants clearly did give their consent to ICSID arbitration by filing the Request through their duly appointed Counsel, acting under powers of attorney that (as had been shown) were perfectly

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<sup>36</sup> *Limited Liability Company Amto v Ukraine*, SCC Case No.080/2005, Award of 26 March 2008 (hereinafter “*AMTO v Ukraine*”), para.56.

<sup>37</sup> *Československa obchodní banka, a.s. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999 (hereinafter “*CSOB v Slovakia*” or “*CSOB*”), para. 35.

<sup>38</sup> *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 97.

valid. The powers of attorney expressly authorize Counsel to “communicate any notice of dispute in my/our name and on my/our behalf” and to “sign and forward any request of arbitration ... in my/our name and on my/our behalf”. Moreover, if the powers of attorney are read in conjunction with the NASAM Mandate, there is no room for dispute that they confer on Counsel the authority to institute ICSID proceedings, and in fact explicitly instruct him to do so, inasmuch as their general wording unquestionably includes ICSID within the category of “the Arbitral Tribunal and/or ... any other competent Court or Authority of whatever Country of the World,” the NASAM Mandate explicitly mentions ICSID, and the Claimants’ initial contributions were paid in under the reference “*Arbitrato ICSID*”. It is, moreover, common practice for requests for arbitration to be signed by duly authorized counsel, and not by the parties in person, nor has it ever been questioned that this meets the requirements of Article 25(1).

*e. Claims brought by multiple claimants*

87. In rejecting the Respondent’s submission that the multiplicity of claimants requires the Request to be rejected *in limine*, either because it falls outside the Tribunal’s jurisdiction or is otherwise inadmissible, the Counter-Memorial asserts that this submission rests on a three-fold argument: (i) that it represents a ‘mass claim’; (ii) that it does not meet the conditions under which it could be dealt with by an ICSID tribunal as a multi-party arbitration; (iii) that it could not be handled without violating fundamental principles of due process. In contesting all three of these arguments, the Counter-Memorial asserts that there is nothing either extraordinary or unprecedented about the present proceedings, against the well-known background that another arbitration is pending on much the same subject matter with a number of claimants one hundred times larger.<sup>39</sup>
88. As to the ‘mass’ nature of the Claimants’ claims, the Counter-Memorial points out that the Respondent’s written argument refers variously to ‘mass claims’, ‘collective claims’, and ‘collective actions’, but that it is mostly concerned to paint the claims as a class action, in order to show that the conditions for bringing such an action are not met. The entire line of argument is however said to be beside the point, since the main feature of class actions is their representative nature; a representative is

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<sup>39</sup> The reference is to *Abaclat*.

permitted to act on his own behalf and also on behalf of others who are not directly party to the proceedings but suffered the same harm at the hands of the defendant, and who lose their individual capacity to decide when and how to exercise their own rights against the defendant. That essential feature is however missing from the present case. The individual Claimants are moreover identified with precision. The Claimants therefore need no further representative to represent their interests before the Tribunal.

89. The Counter-Memorial denies the allegation that NASAM ‘recruited’ the Claimants to take part in the arbitration, asserting to the contrary that NASAM merely made available to them a mechanism to fund their action, so providing for them a concrete opportunity to pursue their rights.
90. The Counter-Memorial denies further that there is any analogy between the present proceedings and the global machinery set up in past instances for the settlement of claims against a State, *e.g.* to compensate the victims of the Iraqi invasion of Kuwait. In those cases the aim was to reach a global settlement in the wake of State conduct that affected a large number of individuals whose identity could not be determined in advance, and whose interests had been affected in many different ways; that shows the contrast with the present case, in which a limited number of well-identified claimants is participating, through duly appointed counsel, in complaints about the very same illegality committed by the Respondent State.
91. The Counter-Memorial concedes that nothing in the ICSID Convention and rules nor in the BIT expressly envisages claims brought by a plurality of claimants, but maintains that this does not in any way serve to exclude them. It asserts that it is “extremely common” for ICSID tribunals to entertain such claims, which the Respondent indeed accepts while asserting that the difference lies in the fact that the present Claimants are not contractually related to one another. The Counter-Memorial contests, however, whether the Respondent’s characterization is more than just a description of past cases rather than a comprehensive account of the entire field of cases capable of being brought before an ICSID tribunal, and relies in that respect on the change between the treatment in the first edition of the authoritative commentary by Schreuer (cited by the Respondent) and the second edition. It submits that, under the ICSID Convention, the only requirement for setting in motion arbitral

proceedings, including those involving a multiplicity of parties, is that all of them should have given their written consent, which is clearly the case here; nor can there be any doubt that all of the Claimants have expressed their consent for their claims to be adjudicated in the same proceedings. It denies, however, that there is any requirement for the Respondent to give a specific consent to that effect, maintaining that the case is different from one where a multiplicity of plaintiffs is claiming under different arbitration clauses linking them to the defendant under different contracts, but rather is a case in which the respondent State had made an offer to arbitrate to an indefinite number of potential counterparties, and there is nothing in the terms of the BIT to suggest that this consent by the respondent State had been made conditional on their claims being brought in separate proceedings. It cites in support the approach adopted by the Tribunal in *LG&E v Argentina*, which contented itself with establishing the Respondent's consent but did not further investigate specific consent to a multipartite arbitration.

92. The Counter-Memorial concedes that there ought to be a “reasonable and significant link” between the claims of the individual claimants, for the simple reason that it would not be possible to adjudicate unrelated claims in a single arbitration, but submits that this criterion is amply satisfied here, because all of the claims arise out of a substantially identical legal and factual situation, in that “each one of the Claimants is the holder of Bonds issued by Argentina in almost identical circumstances to finance its external debt and each one of them suffered harm to its interests from the same sovereign acts of the Republic of Argentina, *i.e.* the POE and the Law No. 26,017,”<sup>40</sup> from which it can be seen that it is quite untrue to assert that they have different or divergent interests. It argues that the identical nature of the illegality, the legal basis and the relief sought is amply sufficient to establish a link between them that justifies their being treated in the same proceedings, and draws a comparison in this respect with the situation which prevailed in the *Funnekotter v Zimbabwe* arbitration, brought by fourteen unrelated Dutch investors where the only link between them was that they had all suffered the same harm from the host State's measures.<sup>41</sup> It cites the Schreuer commentary as authority for the proposition that,

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<sup>40</sup> Counter-Memorial, para.179.

<sup>41</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6 (hereinafter “*Funnekotter*”). And also the Decisions in *Antoine Goetz v Republic of Burundi*, ICSID Case No. ARB/01/2, (hereinafter “*Goetz v Burundi*”), where the tribunal saw no need to investigate the differences between the

once the principle of multiple claims is accepted, no question arises by virtue only of the number of co-claimants. It discounts the Respondent's argument that the earlier multipartite actions against Argentina can be explained away by the latter's consent, by retorting that the issue of admissibility was simply not addressed by the tribunals in question.<sup>42</sup>

93. As to the management of the case and the question of due process, it dismisses the Respondent's arguments as based on a failed attempt to assimilate the case to mass claims or a class action, and accuses the Respondent of deliberately exaggerating the complexity of the case, which involves on the one hand only 120 Claimants and on the other, legal and factual situations which are in reality quite straightforward, and for the most part are common to all the claims. The prospect would be that the documentary load would be no greater than that routinely dealt with by commercial and investment arbitration tribunals. That was demonstrated in practice by the *Bayview* and *Canadian Cattlemen* cases, where the numbers of claimants were similar to the present (although both tribunals ultimately declined jurisdiction).
94. The Counter-Memorial accuses the Respondent of failing to make out in what way its right to due process might be jeopardized, inasmuch as all that it mentions is a potential difficulty in the hearing of witnesses; this argument is however rejected as far-fetched, since it is hard to imagine for what reason the Respondent could seek to cross-examine each individual Claimant. The great majority of the issues likely to arise on the merits could be dealt with on the documents. All other issues relate simply to case management, and are well within the capacity of an experienced Tribunal.
95. The Counter-Memorial asserts that the absence of specific procedural rules is not a valid criterion for the assessment of a tribunal's jurisdiction, which is exclusively determined by the conditions laid down in Article 25(1) of the ICSID Convention and in the BIT, and these do not include the availability of suitable procedural rules. Jurisdiction once established, it is for the tribunal and the parties to agree on the appropriate procedures to deal with the issues that may arise, and nothing prevents the

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acquisition and nature of the holdings of the six shareholders, and in *Bayview v Mexico*, where, although the tribunal ultimately declined jurisdiction, the widely differing nature of the 46 unrelated claimants was not even addressed as a possible objection to the admissibility of their claim.

<sup>42</sup> *LG&E, Compañía de Aguas del Aconquija, and Suez.*

tribunal from borrowing, on an *ad hoc* basis, from instruments developed in other mechanisms.

96. The Counter-Memorial finally submits that, at the practical level, the bringing of all of the claims in one single proceeding is unquestionably the most efficient and advantageous course, which is in fact to the benefit of the Respondent itself, saving it complication and expense. Had each claim been brought by a separate request for arbitration, the Respondent would undoubtedly have moved for them to be joined, and this is also what a national court would have done.

*f. Jurisdiction ratione materiae*

97. The Counter-Memorial contests the Respondent's twin contentions that the Claimants' holdings do not amount to 'investments' under the ICSID Convention or under the terms of the BIT, and that they were in any event not made 'in the territory of Argentina' in accordance with applicable law so as to entitle them to protection under the BIT. It takes issue in particular with the Respondent's premise that the Claimants' holdings are not 'bonds' but 'security entitlements', which it characterizes as a semantic exercise designed to escape the express terms of the BIT.
98. Beginning with the position under the ICSID Convention, the Counter-Memorial asserts that the Respondent is mistaken in the value it attaches to the '*Salini* test', but that in any case the financial instruments at issue in the arbitration do satisfy the *Salini* test, and are properly ranked as 'investments' for the purposes of the Convention.<sup>43</sup> It reproaches the Respondent for having espoused the notion of a strict and wholly autonomous concept of 'investment' under the ICSID Convention, while ignoring entirely the growing and authoritative body of opinion and decision which adopts a two-fold test that allows considerable scope for agreement between the parties (as, for example, in a BIT) on the precise definition of what will constitute an investment within a broad and flexible conception of the term.
99. The Counter-Memorial points out that, although the Respondent relies on the Decision in *CSOB v Slovakia*, that Decision in fact held that the concept of investment "should be interpreted broadly because the drafters of the Convention did not impose

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<sup>43</sup> The reference is to the Decision on Jurisdiction of 23 July 2001 in *Salini Costruttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, (hereinafter "*Salini*"); the Counter-Memorial cites also *Joy Mining v Egypt* and *Phoenix Action v Czech Republic*.

any restrictions on its meaning”<sup>44</sup> and the Award is of no assistance to the Respondent either in this or in other respects. Similarly the *Fedax* tribunal supported a “broad approach” to the interpretation of investment which left to the parties to a BIT a “large measure of discretion” to determine whether a transaction constitutes an investment for the purposes of the ICSID Convention.<sup>45</sup>

100. As to the ‘*Salini* test’ itself and the five conditions which the Respondent derives from it, the Counter-Memorial submits that some tribunals have attached undue weight to them, citing in particular the more flexible approach taken by the *CSOB, MCI v Ecuador*, and *Biwater Gauff* tribunals, and draws attention to the description in the latest edition of the Schreuer commentary as “unfortunate” of the tendency to elevate a descriptive list of typical features into a set of mandatory legal requirements. It submits further that the Decision of the Annulment Committee in *Malaysian Historical Salvors* is especially instructive in its criticism of the sole Arbitrator for his having failed to give full effect to the definition of ‘investment’ in the relevant BIT, and cites an extensive list of arbitral awards in support of the argument that the *Salini* criteria are not to be regarded as separate and independent of one another, nor do all of them have to be satisfied in each individual case.
101. The Counter-Memorial submits further that “there is little doubt that financial instruments, and hence the Bonds held by the Claimants, are investments for the purposes of the Convention no matter how an investment is defined,”<sup>46</sup> given that bond instruments are for present purposes the same as borrowings under loan agreements. It points out that the *Fedax* tribunal was categorical that loans qualify as investments, therefore so do bonds, and that for the same reason the purchase of promissory notes qualifies as an investment.<sup>47</sup>
102. The Counter-Memorial specifically rejects the Respondent’s analysis of the characteristics of the present Bonds, pointing out that the overall capital outlays of the bondholders undoubtedly constitute a huge financial commitment on their part, so that to disaggregate it into the amounts paid by any individual Claimant is disingenuous

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<sup>44</sup> *CSOB* Decision, para. 64.

<sup>45</sup> *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction of 11 July 1997, (hereinafter “*Fedax*”), para. 22.

<sup>46</sup> Counter-Memorial, para.237.

<sup>47</sup> It cites as further Awards accepting loans as investments, those in *CSOB v Slovakia* and in *CDC Group plc v Republic of Seychelles*, ICSID Case No. ARB/02/14.

and part of a strategy to distract attention from the overall nature of the bond issues and their relation with the international financial market, as is the attempt to evade the nature of the Respondent's intervention to deprive of all value the Bonds issued by it. Similar arguments, asserts the Counter-Memorial, apply to the question of duration, where the *Fedax* Tribunal had readily recognized that the fact that the investor changed with each endorsement of a promissory note did not affect the overall duration of the investment itself; in the present case, the average interval between the issue of the bonds and their maturity date is some 7½ years. The Counter-Memorial rejects likewise the Respondent's assertion that the Bonds did not qualify as investments inasmuch as they involved no more than ordinary commercial risk, arguing instead that the risk entailed in lending to sovereigns is fundamentally different from commercial risk, notably in view of the very possibility that had occurred here, i.e. repudiation of the debt by sovereign act. As in the case of *Kardassopoulos v Georgia*, lending to Argentina entailed a high intrinsic risk.

103. The Counter-Memorial dismisses as completely beside the point the argument that the Bonds had never provided 'a regularity of profits or returns' when the reason for that was the Respondent's default on its obligations and the entrenchment of that situation through the *Ley Cerrojo*. The situation of investors was, in this respect as well, identical to that in *Fedax*; the periodic interest payments due were precisely the expected regular return for the holders.
104. The Counter-Memorial regards as unworthy of comment the allegation that the investments did not contribute to Argentina's economic development, when the Memorial itself describes the purpose of the bonds as having been to raise capital to finance its foreign debt, and focusses its attention instead on the Respondent's argument that the investments were not made 'in the territory of' Argentina. It begins by recalling the terms of the definition of 'investment' in Article 1 of the BIT, and in particular the use of the terms "*obbligazioni*" (in the Italian language text of subparagraph (1)(c)) and "*obligaciones*" (in the Spanish language text), for which it submits the literal translation into English, in this context, is "bonds". It argues further that this is supported by a range of authoritative Italian-English and Spanish-English dictionaries, whereas the Respondent has not marshalled any similar backing for its claim that the term should be translated as "obligations". While conceding that

the term is capable of having that broader meaning, it submits that, if the provision is read in its context in the BIT, namely its juxtaposition to the phrase “public or private securities,”<sup>48</sup> it can plainly be seen that it refers to the particular, not the general meaning, and renders the Respondent’s reading untenable. Moreover, even if the term did not mean “bonds”, but simply “obligations”, this would hardly help the Respondent since a ‘bond’ is clearly the source of ‘obligations’. Furthermore bonds would certainly be caught by the catch-all phrase “any other right to benefits or services of an economic value, as well as capitalized income” that appears at the end of Article 1(1)(c). The Counter-Memorial draws attention finally to Article 1(1)(f), referring to “any right having an economic value conferred by law or contract” which once again would cover the case of a bond.

105. As regards the Respondent’s argument to the effect that, for various listed reasons, the Bonds are not an investment made in the territory of Argentina, the Counter-Memorial asserts that this argument deliberately seeks to avoid the real features of the transaction at issue, where what matters is the initial transaction, i.e. the issue of negotiable bonds on the international financial markets, not subsequent sales and purchases on the secondary market. It submits that, in considering the place where the investment was made, account must be taken of the destination of the proceeds of the bond issues, which undisputedly went to the benefit of Argentina, from which it follows that they cannot be held not to have been made in its territory. This is not affected by the fact that, by definition, the bond instrument will be physically held by the owner, presumably at the latter’s place of residence. The Counter-Memorial refers once again to the *Fedax* Decision, where the Tribunal rejected an almost identical objection that had been raised in relation to an equivalent provision in the relevant bilateral investment treaty. It refers also to the *CSOB* Decision and asserts that the Respondent’s reliance on *SGS v Philippines* is misplaced, because in that case the Tribunal expressly referred to “an injection of funds into the territory of” the host State, and pointed out that the provision of services outside of the host State was a very different matter.<sup>49</sup> Likewise in *Canadian Cattlemen* the would-be investors and their investments had no connection whatever with the Respondent State.

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<sup>48</sup> In the authentic languages: “*titoli pubblici o private*” / “*títulos públicos o privados*”.

<sup>49</sup> Counter-Memorial, para. 284.

106. The Counter-Memorial further dismisses the Respondent's argument based on the law governing the Bonds, which it asserts is merely the same argument in another form. It distinguishes the Award in the *Bayview* arbitration on the basis that there the tribunal was searching for the rationale to distinguish an investment made by an investor in his own home State from one that would be under the protection of a treaty (in that case NAFTA); that was different from the present case where the investors were very much subjecting themselves to the law of the issuing State, or at least assuming the risk that the State would interfere with their investment, and the submission of the Bonds to another system of law did not (unfortunately for the investors) have the effect of protecting them against that risk. Neither that Award nor scholarly commentary justifies adding yet another criterion (that of applicable law) to the supposed list of factors determining the existence of an 'investment'.
107. The Counter-Memorial finally refers to the Respondent's argument that the Claimants' investments fall outside the protection of the BIT because the sale of the Bonds to them was in breach of Italian law. This argument is firmly rejected on the basis that, for the purposes of Article 1(1) of the BIT, the laws and regulations there mentioned, in common with most bilateral investment treaties, are plainly those of the host State, for sensible and logical reasons. But there has been no claim that Argentine law has been violated, unlike in the cases of *Inceysa* and *Fraport*, and the novel attempt to bring Argentine law in by the back door via the reference to conflict of laws in Article 8(7) of the BIT is not valid, as that provision governs only the merits of the case, not the question of jurisdiction. The Counter-Memorial observes further that, in those cases in which the argument of illegality had been upheld, it had always been on the basis that three conditions were fulfilled: a serious illegality, committed knowingly by the investor, and taking place at the time of the admission of the investment to the host State, not later. Conversely, in cases like *Kardassopoulos* and *Saluka*, illegalities imputable either to host State authorities or to third parties had not been admitted.
108. The section concludes by asserting that, in any case, the situation over the resale of the Bonds was not as simple as the Respondent argues. Specifically, there was no limitation in the Bonds themselves on who could be their holders; as could be seen from, for example, the Offering Circulars, the only limitation on onward sales was

that there could not be a general public offer, and that the sale had to be negotiated, on an individual basis, through properly authorized financial intermediaries (including therefore the banks), so that, in other words, there was nothing amounting to a prohibition on the sale of the bonds to private investors in Italy. Where individual investors had brought legal actions in the Italian courts, the actions were about whether the financial intermediary had duly met its duty of information towards the individual investor in the particular case, thus taking the issue outside the ‘preliminary objections of a general character only’ which were the subject of the present phase of the arbitration. But even if such a claim by an investor were found to be valid, it would not affect who was the rightful owner of the Bonds as such, and therefore able to pursue the corresponding rights against Argentina, as the Bonds’ issuer. The legal principles had been authoritatively declared by the *Corte Suprema di Cassazione* in two decisions of a fundamental character, which had held that the breach by an intermediary of its duty to inform the client of the specific risks of a security before its purchase did not entail the nullity of the sale but rather gave the injured purchaser the option to claim damages or seek the termination of the sale contract. It was not open to Argentina to avail itself of such breaches of duty in order to extricate itself from its own liability, especially if one takes into account that it was Argentina itself that caused the loss of value in the first place.

*g. A prima facie Treaty violation*

109. The Counter-Memorial strongly contests the Respondent’s accusation that the Claimants have failed to establish a *prima facie* breach of the BIT, pointing out in this connection that the accusation depends on the assertion that the acts complained about represent a mere failure by Argentina to pay. It maintains that Argentina’s acts were emphatically ones of sovereign authority, springing as direct consequences of Law 26,017 (the *Ley Cerrojo*), and that it is fruitless for the Respondent to argue in these circumstances that the fact that the bonds were stipulated to be governed by foreign law put them beyond the reach of Argentina’s legislative jurisdiction, since Argentina was at one and the same time the debtor and the possessor of sovereign power on its own territory. It alleges a striking inconsistency between the Respondent’s assertion, on the one hand, that the State had signed away its ability to control the bonds and on the other its insistence that the bondholders ought first to have resorted to Argentina’s domestic courts. It accuses Argentina of misrepresenting the situation in claiming that

in destroying the Claimants' rights it was acting as an ordinary party to a contract. It asserts that the present case is obviously not one of a contract claim but a Treaty violation, relying in this context on the well-known *dictum* of the *Impregilo v Pakistan* Tribunal that "the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim."<sup>50</sup> It cites also the finding by the Annulment Committee in *Compañía de Aguas del Aconquija v Argentina* that, where the 'fundamental basis' of a claim is an independent standard laid down by treaty, the application of that treaty standard cannot be ousted by an exclusive jurisdiction clause in the underlying contract. That is exactly the situation here, where the Claimants are manifestly not pursuing a contract claim.

110. As to the *prima facie* test itself, the Counter-Memorial submits that, following the decisions in *Salini v Jordan*, *Impregilo v Pakistan*, and *Saipem v Bangladesh*,<sup>51</sup> it should be understood to be that the Tribunal must be satisfied that, if the facts alleged by the claimant(s) ultimately prove true, they would be capable of coming within the provisions of the investment treaty. In the present case, however, the facts relied on by the Claimants are laws passed by the Argentine Republic and are therefore incontestable and uncontested; their link, moreover, to the guarantee of fair and equitable treatment and the prohibition on expropriation under Articles 2 and 5 of the BIT (inter alia) has already been demonstrated.

*h. Jurisdiction racione personae*

111. After certain preliminary remarks relating to issues already covered above, the Counter-Memorial turns to the question whether sufficient evidence has been provided that the Claimants satisfy the nationality requirements of Article 25 of the ICSID Convention and Article 1 of and the Protocol to the BIT.
112. The Counter-Memorial points out that Annex C-2 to the Request contains: in respect of each Claimant who is a natural person both a copy of that person's passport or identity card and also a certificate of Italian citizenship, residence and/or domicile;

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<sup>50</sup> *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, (hereinafter "*Impregilo v Pakistan*"), para 77.

<sup>51</sup> Counter-Memorial, para. 337, citing *Salini Costruttori S.p.A. and Italstrade S.p.A. v Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision of the Tribunal on Jurisdiction, 29 November 2004, (hereinafter "*Salini v Jordan*"); *Impregilo v Pakistan*; *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, (hereinafter "*Saipem v Bangladesh*").

and in respect of the three Claimants who are corporate entities, either their articles of association or their accounts or the survey (*visura*) issued by the Chamber of Commerce, which demonstrate their Italian nationality and the absence of any link to Argentina. The Counter-Memorial asserts that all of the certificates of citizenship were issued shortly before the filing of the Request and continue in force, thus demonstrating the necessary link of nationality both at the date of the Claimants' consent to arbitration and at the date on which the Request was registered by ICSID, and asserts further that the above constitute sufficient proof of the Italian nationality of all Claimants for the purposes of both the Convention and the BIT.

113. The Counter-Memorial submits that, against this background, if the Respondent seeks to contest this, it is up to the Respondent to produce the necessary evidence. It submits further that the Respondent's position is not supported by the Awards in either *Mihaly v Sri Lanka* or *Soufraki v Egypt*, since in the first case the company at issue had the nationality of a State that was not party to the arbitration, and the second case turned on the question of a change of nationality.<sup>52</sup> It asserts moreover that the Respondent's allegations as to dual nationality or the acquisition of Argentine nationality are pure speculation without any showing of proof of the registration that a change of nationality would require under the applicable law. Likewise, the certificates of residence that had been produced with the Request sufficed to show the lack of merit in the Respondent's arguments. It asserts that, at all events, it is clear that some of the Claimants satisfy the nationality requirement, which had been deemed sufficient for the Tribunal to uphold jurisdiction in other cases.

*i. The connection between the Claimants and the investment*

114. The Counter-Memorial denies that the arrangements by which the Claimants acquired their security entitlements attenuate the necessary connection between them and the investment. It asserts that the arrangements for the onward sale and purchase of the security entitlements to private investors, and their free negotiability on secondary and tertiary markets was entirely normal and within Argentina's contemplation from the outset, and describes as "outrageous" the argument that Argentina never received any funds from the ultimate bondholders, when it was they who suffered the loss resulting

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<sup>52</sup> *Mihaly International Corporation v Sri Lanka*, ICSID Case No. ARB/00/2, Award, March 15, 2002, *Hussein Nuaman Soufraki v United Arab Emirates*, ICSID Case No. ARB/02/7, Award, July 7, 2004, (hereinafter "Soufraki").

from Argentina's repudiation of its debt. The Counter-Memorial specifically rejects the argument according to which, for a system of indirect holdings, there must be a cut-off point beyond which investor claims would not be permissible. It denies the applicability to the present case of the decisions in *PSEG v Turkey* and *Enron v Argentina*, which were on a different point, namely the standing to bring claims by minority or collateral interests; but invokes instead the *dictum* of the *Enron* tribunal that "in the present case the participation of the Claimants was specifically sought and that they are thus included within the consent to arbitration given by the Argentine Republic ..[and].. are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty-rights and not merely contractual rights related to some intermediary." <sup>53</sup>

115. The Counter-Memorial likewise denies the pertinence of the fact that the Claimants may have a right of action against the seller banks, which some of them may have exercised. It asserts that, even though in any case only a minority of the Claimants have brought actions of this kind, many of which remain undecided and the outcomes of which differ from one case to another, the underlying relationships (with the seller banks and with Argentina) are different as are the rights accruing under them. It concedes that no Claimant would be entitled to recover more than its total loss resulting from Argentina's unlawful actions, but asserts that that is an issue going only to quantum, not to jurisdiction.

### 3.III Article 8 of the BIT

116. The Counter-Memorial rejects Argentina's argument that Article 8 provides for a "multi-layered, sequential dispute resolution system," failure to comply with which results in a bar to ICSID jurisdiction. It asserts that similar clauses are commonplace in investment treaties, and that the prevailing view is that they do not lay down any jurisdictional requirement but merely provide for "a reasonable prior step to avoid an international arbitration which could prove useless if other simpler or less costly solutions to the dispute could be found."<sup>54</sup> They represent no more than an opportunity for the parties to reach an agreed settlement, but need not be pursued when attempts at a negotiated solution prove futile. For ICSID cases following this

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<sup>53</sup> *Enron v Argentina*, para. 56.

<sup>54</sup> At para. 381, citing in support also *The Oxford Handbook of International Investment Law*.

approach, the Counter-Memorial cites *Ethyl Corp. v Canada*,<sup>55</sup> *Lauder v Czech Republic*,<sup>56</sup> *Bayindir v Pakistan*,<sup>57</sup> and *SGS v Pakistan*,<sup>58</sup> while rejecting the two authorities relied upon by the Respondent, because in one of them (*Enron*<sup>59</sup>) it had been held that the consultation period in the relevant BIT had actually been complied with, and in the other (*Wintershall*) there was a significant difference in the BIT, which provided that a dispute “shall” be submitted to the local courts, whereas here the word used was “may”<sup>60</sup>.

117. The Counter-Memorial submits that the Respondent’s attempt to evade the issue by invoking the general rules of treaty interpretation backfires in the light of the express wording of Article 8: under paragraph (1) amicable settlement is to be pursued only “insofar as possible”<sup>61</sup>; whereas under paragraph (2) (see above) it is merely the case that disputes “may” be submitted to local courts. The Counter-Memorial submits specifically that resort to the prior mechanisms of Articles 8(1) and 8(2) would have proved “of the utmost futility,”<sup>62</sup> and is in any case rendered beside the point by the most-favoured-nation clause contained in Article 3.

118. The Counter-Memorial cites as evidence of the pointlessness of any attempt at negotiation by bondholders, including the Claimants, on the one hand, the strategy adopted by Argentina during the POE process, and on the other, the terms of Law 26,017. It recalls, in connection with the POE, its allegations as to how the terms of the offer were elaborated unilaterally by Argentina and imposed on bondholders. It recalls also the express provision in the POE that securities not offered for exchange would ‘remain in default indefinitely,’ showing that this was clearly a take-it-or-leave-it offer incompatible with involving bondholders in drawing up its terms. It recalls also Article 3 of Law 26,017, passed on the initiative of the executive branch even while the POE was open for acceptance by creditors, which prohibited Argentina

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<sup>55</sup> *Ethyl Corp. v Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction, 24 June 1998, (hereinafter “*Ethyl Corp. v Canada*”), para. 85.

<sup>56</sup> *Ronald S. Lauder v Czech Republic*, UNCITRAL, Award, 3 September 2001, (hereinafter “*Lauder v Czech Republic*”), para. 187.

<sup>57</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, (hereinafter “*Bayindir v Pakistan*”), para 100.

<sup>58</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, (hereinafter “*SGS v Pakistan*”), para. 184.

<sup>59</sup> *Enron v Argentina*.

<sup>60</sup> ‘podrá’ in Spanish, and ‘potrà’ in Italian.

<sup>61</sup> ‘en la medida de lo posible’ in Spanish, and ‘per quanto possibile’ in Italian.

<sup>62</sup> At para. 390.

from entering into any form of settlement with bondholders who declined to accept the POE, as well as Article 2 of the same Law which barred the POE from being reopened. Under the Argentine Criminal Code, non-compliance with this by any public official would constitute a crime punishable with imprisonment and disqualification from office. It followed from this that, even if (as Respondent now says) amicable consultations remained theoretically possible, they could not have led anywhere. Proof of this is provided by the failure in the attempts by other groups of bondholders, as reported in the press, to achieve a negotiation. The Counter-Memorial calls it paradoxical that Argentina, after adopting a law as harsh as the *Ley Cerrojo*, should now criticise the Claimants for not attempting to negotiate.

*a. The most favoured nation clause*

119. The Counter-Memorial invokes the provisions of Article 3 of the BIT, inasmuch as they guarantee to an investment and to “all other matters” regulated by the Treaty treatment by the host State no less favourable than that accorded to its own investors or investors from third States, as entitling the Claimants to pray in aid Article VII(2) and (3) of the BIT between Argentina and the USA of October 1994. Article VII(2) and (3) read, in relevant part, as follows:

“(2) In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

(3) (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph e (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ... ..”

The consequence is, according to the Counter-Memorial, that there is no need for the Claimants to satisfy an 18-month waiting period before the local courts in Argentina, but merely to show that six months had elapsed before the dispute arose, which is plainly satisfied since the dispute arose on the enactment of the *Ley Cerrojo*.

120. The Counter-Memorial rejects the Respondent's counter-argument that an MFN clause cannot extend to a dispute resolution mechanism on the grounds that this "is contradicted by constant ICSID case-law which admits that MFN clauses also apply to dispute resolution mechanisms unless this is ruled out by their wording."<sup>63</sup> It invokes in support the *Gas Natural SDG, S.A. v Argentine Republic* (ICSID Case No. ARB/03/10), *Emilio Agustín Maffezini v Kingdom of Spain* (ICSID Case No. ARB/97/7), and *Suez v Argentina* cases, which held that dispute settlement was an essential element of investor protection which could not be severed. It argues further that, accepting the proposition that much depends on the wording of the particular MFN clause, in the present case Article 3(1) calls for a broad interpretation since it contains no exceptions (e.g. for dispute settlement); this contrasts sharply with the specific exceptions laid down in Article 3(2).

*b. The futility of resort to the local courts*

121. The Counter-Memorial finally asserts that resort to legal action in the local courts for payment of the amounts due under the Bonds would (apart from being costly) have been doomed to failure in view of the categorical terms of the *Ley Cerrojo*, as confirmed in clear terms by the reversal, by the Argentine Supreme Court in April 2005, of an appellate court decision ordering the Argentine government to pay the amounts due under the bonds to certain Argentine nationals,<sup>64</sup> on the grounds that the restructuring process was a policy question not subject to judicial review, and that in any event non-participation in the POE was a conscious act, the consequences of which were clear at the time. This was then reaffirmed by the Supreme Court in two subsequent terse judgments relying on the *Galli* precedent.<sup>65</sup> In one of these cases (*Lucesoli*), the Argentine Government had argued expressly before the Supreme Court

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<sup>63</sup> At para. 406.

<sup>64</sup> *Galli, Hugo G. y otro c Poder Ejecutivo Nacional s/amparo*, Corte Suprema de Justicia de la Nación, Final Decision of 5 April 2005 (Fallos:328:690), Case No. G. 2181 XXXIX (CLA-37).

<sup>65</sup> In the *Lucesoli, Daniel Bernard c Poder Ejecutivo Nacional s/amparo*, Corte Suprema de Justicia de la Nación, Decisión of 9 September 2008, Case No. L. 542. XL III (CLA-38), and *Rizzuti, Carlos Pablo c. Poder Ejecutivo Nacional s/amparo*, Corte Suprema de Justicia de la Nación, Decisión of 22 December 2008, Case No. R. XLIV (CLA-39).

that the bonds not surrendered in 2005 no longer represented Argentine debt and that claims under them had been rendered unenforceable, which sat ill with the present insistence that the Claimants ought to have brought an action in the local courts. It was, moreover, in any case unrealistic in the light of actual experience to imagine that a suit of that kind could have been brought to judgment within the 18-month time frame laid down in Article 8(2) of the BIT, as, in the cases just mentioned, where the remedy was the speediest one known under Argentine law, the time taken had been between three and six years; some other cases were still outstanding after seven years. To argue, on the other hand, that cases merely had to be ‘submitted’ to the courts, without any expectation of an outcome, would be a pointless vexation. Finally, Argentinian law put barriers in the way of foreign litigants, who were required, in addition to paying the judicial tax at the rate of 3% of the amount claimed, to offer a costly *garantía de arraigo* and moreover would be liable for the cost of the entire proceedings if, after 18 months had elapsed, they abandoned them to go to arbitration.

122. The Counter-Memorial accordingly asks the Tribunal to reject all of the Respondent’s objections and to decide that it has jurisdiction over the Claimants’ claims.

4. The Respondent’s Reply Memorial on Jurisdiction and Admissibility

123. On 5 February 2010, the Respondent submitted its Reply Memorial on Jurisdiction and Admissibility, accompanied by Witness Statements from Enrique H Boilini, Noemi C La Greca, and Federico Molina.

4.1 The background to Argentina’s default

124. The Reply Memorial begins by recapitulating the essential elements of the Respondent’s argument. It asserts that the Claimants underestimate the sheer scale of the debt crisis that overwhelmed Argentina, and distort reality by portraying it as a problem of Argentina’s own making. It reiterates that Argentina’s sovereign default was not a case without precedent, but followed the example set by previous sovereign debt restructurings, adding that the way in which it was managed laid the ground for a cycle of renewed growth together with a greater prospect of the ability to face up to the current financial crisis. It rejects the Claimants’ ‘take-it-or-leave-it’ description of the POE and claims that Argentina held a number of meetings with groups and associations representing both institutional and retail holders of security entitlements,

to a total of at least 61 meetings with at least 21 separate creditor groupings between May 2002 and April 2004. These were good faith efforts to arrive at the formulation of a framework for the restructuring of Argentina's debt, and included taking expert advice from both the public and private sectors and discussions with (amongst others) the IMF, and a policy of the greatest possible clarity and transparency towards both the Argentine public and foreigners. It was a cardinal point of policy not to raise false expectations by promising more than Argentina would be able to deliver, so that, although the attempt was made to accommodate creditors, Argentina resisted the temptation to offer overly generous terms that would not be sustainable in the long run. Some of the proposals put forward on behalf of Italian (or other European) bondholders were indeed incorporated into the exchange offer, such as including of par bonds, avoiding language that might have been interpreted as a waiver of claims against the selling banks, and the removal of certain discrepancies between bonds and interests sold on in Europe and in the United States. The result was that, although the POE was 'unilateral' in the sense that it did not represent agreement with any particular bondholder group, it had in fact been "the subject matter of frequent consultations with Argentina's creditors."<sup>66</sup>

*a. The Exchange Offer and Law 26,017*

125. The Reply Memorial sets out the circumstances of the POE, in order to demonstrate that, contrary to the assertion of the Claimants, it was feared that the holders of eligible securities "could attempt to impede the progress or completion of the Offer by seeking an injunction or resorting to other legal remedies," thus demonstrating that the offer was "simply a stage of a process that would only be successful upon the completion of later stages,"<sup>67</sup> in other words that its purpose was not to satisfy everyone but to achieve as much as possible so that the process could move forward. In the Respondent's view, this disposes of the Claimants' assertions, such as that the discount was the lowest in history, past interest was repudiated, Argentina did not pay all that it could, etc., which can be seen not to be true when the outcome of the 2005 POE is assessed today.

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<sup>66</sup> At para. 56.

<sup>67</sup> At paras. 64-65.

126. Coming to the subject of Law No. 26,017, the Reply Memorial points out in the first place that its enactment had no effect on negotiations that had taken place beforehand; moreover it neither sought to or was capable of barring negotiations or legal action based on the BIT. Nor indeed did it oblige any creditors to accept the offer, providing merely that the Executive Branch could not unilaterally reopen the exchange offer process but would first have to seek suspension of the Law.

*b. Italian law*

127. The Reply Memorial next reverts to the Respondent's criticism of the serious defects in the sale of the security interests by Italian banks to unsophisticated retail holders, which it says has not been denied by the Claimants, but none of which can be laid at the door of Argentina, which had no responsibility of any kind for the placement of the bonds in the secondary market. The Reply Memorial goes on to describe how the sale of the security entitlements to unsophisticated investors infringed not only the terms expressly agreed with Argentina at the time of the issuance of the Bonds, but also infringed a number of Italian legal provisions laid down in the Italian Financial Act<sup>68</sup> and Intermediaries Regulations.<sup>69</sup> These infringements have been established by a number of legal decisions handed down in the Italian courts, and have led to judgments ordering the reimbursement of the purchase price to the banks' customers. It alleges that infringements also took place of Italian securities regulations, and of the general duty of the banks to inform their customers. It further alleges that there is evidence that some Italian banks deliberately offloaded a large portion of their own exposure to Argentine bonds onto unsuspecting customers once they became aware of the increased risk of an imminent default. None of these actions was known to Argentina, which had itself taken steps to avoid the entanglement of inexperienced purchasers, as explained in the expert evidence of Daniel Marx.

4.II Jurisdiction and Admissibility

*a. The collective nature of the claim*

128. The Reply Memorial recalls the Respondent's earlier submissions relating to the nature of the claim as a collective action which, it alleges, the Claimants have not rebutted. It rejects the Claimants' description of the action by countering that the

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<sup>68</sup> Legislative Decree No. 58 of 24 February 1998.

<sup>69</sup> Regulation No. 11522.

Claimants are not acting personally for the enforcement of their rights, as it is in fact NASAM which is acting on their behalf, and that that is not a “regular or permissible feature of discretionary joinder” either in Argentine national law or before international tribunals. Moreover the NASAM mandate itself talks in terms of an ‘*azione di gruppo*,’ which will only proceed if a sufficient group can be assembled. It should therefore be understood to mean a ‘collective’ or ‘class’ action; although that does not correspond to any recognized legal category in international law or in the laws of Italy or Argentina, it shows that it is at the least not an individual action. In the Respondent’s submission, it is a collective proceeding without precedent and amounts to a representative action (class action) that is not valid under the ICSID Convention. The Reply Memorial asserts further that a whole list of factors goes to contradict the Claimants’ assertions; among others: that the Claimants were actively recruited by NASAM; that they have become no more than passive onlookers in a proceeding which they cannot influence or modify; that their counsel, Sig. Parodi, was chosen for them; that NASAM claims to be acting as their ‘agent’ although they have no ability to direct or control its actions.

129. As regards the identification of the Claimants themselves, the Reply Memorial takes issue with the lists submitted, drawing attention to the fact that the Counter-Memorial states their number as 120, whereas 177 names appear in the Request for Arbitration,<sup>70</sup> a discrepancy of 57. It surmises that, if there has not been an arithmetical mistake, it must be either that the Claimants’ side did not in fact know how many Claimants were included in the arbitration, or else that one-third of the Claimants have unilaterally (and therefore inadmissibly) withdrawn from the proceedings. It sets out further discrepancies of a more minor character which, whatever the explanation for them may be, go to show that “from the very beginning, it has been entirely unclear who the true Claimants bringing a claim against the Argentine Republic are, an issue that undoubtedly affects the guarantee of due process and the right to defence”<sup>71</sup> and, it asserts, amounts to an abuse of process.
130. The Reply Memorial then returns to the Respondent’s argument that the silence of both the ICSID Convention and the BIT on the subject of collective proceedings is enough on its own to demonstrate that Argentina has not consented to them; consent

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<sup>70</sup> At para. 96.

<sup>71</sup> At para. 101.

to international jurisdiction has to be both clear and express, given its voluntary nature. The cases cited by the Claimants support, at most, the proposition that in some instances ICSID tribunals have entertained single proceedings at the instance of a small number of claimants who were intimately linked in some concrete way – but only provided that the respondent’s consent had been given. That is however entirely different from saying that the ICSID Convention authorizes class, group, or collective proceedings.

131. As to the correct interpretation of the ICSID Convention, its text regularly uses singular nouns (e.g. ‘national’ or ‘party’), and there is no justification for looking beyond the text in the absence of ambiguity. The silence of the Convention in respect of collective proceedings does not mean that such proceedings are permitted, but the opposite, a contrast that can readily be seen by comparison with the express language in other treaties such as the Inter-American Convention on Human Rights. There is no evidence that the drafters of the ICSID Convention ever considered including collective claims within its scope, and the absence of specific procedural rules to deal with the issues that would arise in the case of multiple claims is an additional reason for saying that they do not fall within the scope of the Convention.
132. As regards the BIT, the Reply Memorial submits that the same conclusion follows from the absence of any reference to mass, class, or collective proceedings; specifically, Article 8(1) defines the category of disputes where Argentina has given its consent to arbitration as those relating to investments “that may arise between an investor from one of the Contracting Parties and the other Party”. Article 8(1) thus limits Argentina’s consent to arbitrate to claims filed by a single investor. Conversely, in the present case there are over 100 separate disputes, each of them with a different object, because each Claimant acquired the security entitlement in issue at a different time, in a different amount and a different currency, governed by different domestic laws and created under different programmes, with the result that – except for the case where more than one Claimant jointly acquired the same security entitlement – each Claimant is involved in a different and independent legal relationship. The consequence must be, the Reply Memorial submits, that the claim is inadmissible even under the BIT itself.

133. The Reply Memorial argues further that, in the rare cases where collective proceedings are permitted, they are provided for by explicit decision, embodied in detailed procedural mechanisms, and that this is designed to put the parties on notice that they may be subjected to class actions or other collective proceedings and specifically to allow a State to decide whether it wishes to be bound by such provisions. It draws attention to the fact that collective proceedings remain highly controversial except in the USA, and contrasts the case where States wish to establish a single tribunal to adjudicate on classes of claims or multiple unrelated claims, in which case they do so explicitly by way of a tailored instrument, such as the Iran-US Claims Tribunal. That Tribunal declined to allow multiple claimant actions except where there was a pre-existing close relationship between the claimants, and that practice was in turn similar to that followed in the limited examples of prior ICSID practice. Nor is the absence of procedural rules just a gap that could be filled ambulando as there is nothing in the ICSID Convention to authorize a tribunal to develop on its own the procedures for mass claims; that would stand in the sharpest contrast with the exhaustive formal processes employed for the 2006 changes to the ICSID Rules, and moreover those changes only applied to subsequent proceedings where the date of consent came after the rule change. At precisely the same period, what is more, other arbitral institutions were considering formal rule revisions to permit consolidation of claims under properly defined circumstances. The Reply Memorial submits that none of the ICSID cases on which the Claimants rely involved a collective claim with the features of the present one.
134. The Reply Memorial further invokes the context and circumstances surrounding the conclusion of the ICSID Convention and the BIT; it points to the limitation or outright prohibition at the time of mass or class claims in the domestic legal systems of many of the States concerned as evidence that the ICSID Contracting Parties could not have intended to give their tacit consent to such proceedings, and points further in this respect to the expert evidence of Professor Kielmanovich that the joinder of the present parties would not have been permitted in Argentina as their action does not derive from a single legal relationship linking them to the defendant and to one another. So far as Italy is concerned, it points out that class actions have only very recently become available by virtue of new legislation post-dating the Respondent's Memorial, but even then standing to sue depends on specific authorization by the

court, and the procedure is limited moreover to business claims of specified types. It thus draws the conclusion that there is no basis for any suggestion that either Italy or Argentina tacitly consented to collective arbitrations of the present type in signing the Convention or the BIT, and rejects in this connection the Claimants' response based solely on insisting that the arbitration is not a 'class action'.

135. As regards the claim that there is nothing extraordinary or unprecedented in the present procedure, the Reply Memorial assumes that this must be a reference to the *Giovanna a Beccara v Argentina* arbitration<sup>72</sup> but that that case was at that stage still only at its first phase and could therefore hardly be cited as a precedent.<sup>73</sup> Conversely, the Reply Memorial asserts that the proceeding in *Alpi v Argentina*<sup>74</sup> may be less exceptional, but there is no rational economic explanation for it, whereas the other ICSID arbitrations cited by the Claimants are not factually similar. The first edition of the Schreuer Commentary on the ICSID Convention indicates that multi-party claims should arise from one investment operation, and are normally the consequence either of joint claims by companies within a corporate group or of partial assignment of an original investor's rights. The Reply Memorial notes the concession by the Claimants that there should be a reasonable and significant link between the individual claims, but contests that this condition is actually satisfied in the present case for the reasons already stated and refers in this connection to the evidence of Professor Kielmanovich.
136. In particular, the Reply Memorial contests the comparability of the *Funnekotter v Zimbabwe* and *Goetz v Burundi* cases, on the basis that the number of claimants in *Funnekotter* was much smaller and the respondent State raised no objection; and that in *Goetz* the number was smaller still, the claimants were all co-shareholders, and again there was no objection by the respondent. As to the NAFTA cases of *Bayview* and *Canadian Cattlemen*, in *Bayview* the tribunal denied jurisdiction and was not therefore required to look into other aspects of the respondent's objections; whereas in *Cattlemen* (in fact a case under the UNCITRAL Rules) there was agreement between the Parties to consolidate 109 arbitrations that had been initiated separately.

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<sup>72</sup> *Abaclat*.

<sup>73</sup> The *Beccara* (now *Abaclat*) tribunal has since given a decision upholding its jurisdiction which is extensively discussed below.

<sup>74</sup> *Ambiente Ufficio*.

137. The Respondent therefore maintains its submission that in no case had a State been forced by an ICSID tribunal to participate in a consolidated or multiparty proceeding without its consent, and asserts that the underlying reason is supported by general opinion, and that it would be a substantial departure from currently accepted practice to extend consolidation from the case of a single investment operation with closely related parties to a case in which unrelated operations and claimants are linked only by the State measure or measures against which they complain.
138. The Reply Memorial finally takes issue with what it terms the Claimants' policy arguments designed to appeal to the Tribunal "to legislate in support of what is claimed to be a desirable policy goal,"<sup>75</sup> and asserts that these arguments must fail in law against the background of ICSID as a consent-based institution. That said, it takes issue equally with the Claimants' assertions on the factual level, submitting to the contrary that the proceedings will be hugely inefficient and unmanageable and would raise serious concerns about due process.<sup>76</sup> Pursuing the question of inefficiency, the Reply Memorial asserts that it is not merely a question of comparing one number of claimants against another, but rather that on the facts the present arbitration would appear to involve 177 claims which are neither identical nor even similar (for the reasons already given). It asserts further that the attendant complications, even in ascertaining the critical facts in respect of each Claimant, as well as leading to costly inefficiencies would impair Argentina's fundamental right to analyse and address each claim individually, in a way that would touch not only the merits but also threshold questions as to whether the Tribunal has jurisdiction at all, e.g. whether the investments were made in accordance with applicable law and the issue of nationality. As regards due process, the prejudice to Respondent's rights arises out of the interposition of NASAM as the entity which is in complete control of the claimant's side of the arbitration, yet is insulated from discovery as a nominal 'non-party' to the action. The Reply Memorial denies further the supposed cost efficiency of the proceedings, pointing out that action in the relevant national fora, where jurisdiction is explicitly stipulated, would by definition save litigation costs, and is the reason why claims over sovereign debt have always been resolved there in

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<sup>75</sup> At para. 144.

<sup>76</sup> It cites in this context the Decision on the Admissibility of Ancillary Claims of 4 December 2009 in *Itera International Energy LLC and Itera Group NV v Georgia*, ICSID Case No. ARB/08/07, holding that efficiency considerations could not in themselves be decisive for admitting an ancillary claim.

the past; in other words, it is the exact converse of the situation in which a foreign investor is forced to sue nationally because ICSID arbitration is not available.

*b. The NASAM Mandate and the Power of Attorney*

139. The Reply Memorial next addresses the Claimants' answers to the questions raised as to the status and effect of the NASAM Mandate and the Power of Attorney. It denies that the Request for Arbitration in fact represents valid consent by the Claimants since the Request was filed without individual Claimants' signatures despite the fact that the NASAM Mandate requires them, and the Request itself in turn states that the Claimants accepted ICSID arbitration "by signing and filing" the Request. It denies moreover that counsel had, in the particular circumstances, been validly authorized to consent to arbitration on their behalf, since the Power of Attorney which the Claimants' assert governs exclusively their relationship with their Counsel, mentions neither ICSID nor the BIT, and there is nothing else in the NASAM Mandate Package to provide a separate expression of Claimants' consent; in particular, the recitals relied on in the Counter-Memorial merely contain information which NASAM provided to the Claimants, not any expression of will on their own part, nor is there any evidence that the Claimants' individual payments of their shares of the expenses were in fact made with express reference to '*Arbitrato ICSID*' as the Counter-Memorial claims. The Reply Memorial submits that these are not matters of mere form, since the implication behind the requirement in the NASAM Mandate that the Claimants were expected to sign was, firstly, that they would have a further opportunity to decide whether to consent or not to any particular arbitration, and, secondly, that they would be duly informed that a Request for Arbitration was being signed in their names. The Reply Memorial alleges further that the Claimants' submissions have failed to furnish sufficient documentary evidence that the Mandates were in fact signed by the Claimants in the case.
140. The Reply Memorial repeats the Respondent's earlier allegations that both the Mandate and the Power of Attorney are legally defective, and that their defects infect one another as *negozzi collegati*. It asserts that this distinguishes the case from *AMTO v Ukraine*, as that case was under the Energy Charter Treaty, where the applicable law was therefore different. In the present case, following Article 42(1) of the ICSID Convention, the applicable law is determined by Article 8(7) of the BIT, under which

pride of place is given to the law of Argentina, including therefore its rules of private international law which refer the validity and nature of contracts to the law of the place where they were made. The application of Italian choice of law rules would lead to the same result.

141. The Reply Memorial cites commentaries on Italian civil law to show that it is normal, indeed expected, that a power of attorney should go hand-in-hand with some form of underlying contractual relationship or mandate. That, together with the factual and legal structure set up by NASAM, stands in the way of the attempt to characterize the Power of Attorney and NASAM Mandate as separate legal instruments; in the Respondent's submission, the two documents stand or fall together.
142. The Reply Memorial repeats the Respondent's earlier assertion that the Power of Attorney fails to meet the formal requirements laid down in Article 83 of the Italian Code of Civil Procedure. It marshals authoritative scholarly opinion against the assertion in the Counter-Memorial that there is complete freedom for the appointment of representatives in arbitration, arguing to the contrary that if a power of attorney is granted in writing to a lawyer, the signature requires authentication under Article 83, which means by a notary or public official. The consequence, it is submitted, that the Powers of Attorney do not provide a basis for consent, which is all the more important in a case in which the Claimants are unknown to the Respondent and to the Tribunal (never having appeared in person at any session) but are only names on a list.
143. The Reply Memorial further claims that the NASAM Mandate Package also falls foul of the substantive requirements of Italian law, in that it transfers to NASAM all of the powers a client should be able to exercise in an attorney-client relationship; the only basis under Italian law on which NASAM would be able to pursue a claim on behalf of third parties would be if it were a *procuratore generale* or a *preposto a determinati affari* under Article 77 of the Code of Civil Procedure, which is not the case. It asserts that the Respondent has never argued that, under Article 82 of the Code, a party must be represented by a lawyer in arbitration, but conversely that the Supreme Court judgment cited in the Counter-Memorial does not relate (as claimed) to Article 77, but rather to Article 75, paragraph 3, relating to the representation of companies in judicial proceedings. It denies that NASAM's role is as limited as the Counter-Memorial asserts, since it was NASAM, and NASAM alone, which decided to initiate

the present ICSID arbitration and instructed the Claimants' counsel accordingly. The question is therefore, not where the basis is for saying that the NASAM Mandate gives NASAM complete control over the Claimants' claims, but the converse: where is the basis for asserting (as in the Counter-Memorial<sup>77</sup>) that the Claimants "are in full control of the relationship with Counsel"? Indeed, how could it be possible for 178 different Claimants each to control the prosecution of the case?

144. The Reply Memorial denies further that this is a normal case of third-party funding, since the funder is anything but unconnected with the litigation and, under the Mandate Package, has become a real party in interest in the case. It points out that in fact the Claimants have irrevocably assigned to NASAM the right to collect on the claim in full, and to be paid out in fact, in return for a claim against NASAM by each Claimant for such amounts as remain after NASAM has retained its entitlement.
145. The Reply Memorial concludes finally that, even if the Mandate Package did constitute a valid consent in writing, that would still not represent Claimants' consent to a collective proceeding, as opposed to individual proceedings.

*c. The absence of an investment...*

146. The Reply Memorial further continues to dispute the jurisdiction of the Tribunal *ratione materiae*, on the basis that there is no investment, and therefore no dispute arising directly from an investment, for the purposes of the ICSID Convention and the BIT.
147. It begins by reverting to the question of the precise nature of 'bonds' and 'interests in security entitlements,' starting from the proposition that what the Claimants present as their investments are security entitlements acquired from third parties (not Argentina) in the secondary market and freely tradable in that market; conversely, Argentine State bond issues are typical transactions in which the State made a single issuance to the bond underwriter (or underwriters) in return for a single payment of a global amount equal to the agreed offer price, and the single payment was not transferred to the territory of Argentina but usually to an account in a foreign bank in the name of the Argentine Republic or its Central Bank; all responsibility and risk for the sale of the bonds on the open market passed to the underwriter(s). The consequence is that

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<sup>77</sup> At para. 97.

the Claimants are not themselves the bondholders, but at best holders of indirect interests in them, under a well-established system known as the ‘indirect holding system’. Under this system, recognized depositary entities act as registered holders of a single global bond representing the total amount of the bond issue, and banks and brokerage firms which take an individual position in them acquire a large number of fungible ‘security entitlements’, the effect of which is to grant each such participant an undivided and differential *pro rata* interest reflected (as is any subsequent change) in book entries to the credit or debit of the participant’s account with the depositary. These security entitlements are then generally the subject of repeated division and resale on the secondary market through other security intermediaries (usually other banks or brokerage firms) reflected once again in book entries without any change in the physical possession of the security. In consequence the eventual holders of security entitlements, such as the present Claimants, have no direct relationship with the sovereign bond issuer, or even with the bond underwriter, but only with the participant in the system from whom they acquired their interests, with the further result that neither the bond issuer, nor the underwriter, nor the depositary knows whether the participant is a holder for its own account, for the account of its clients, or for the account of clearing firms. Moreover the bonds themselves remain in the exclusive ownership of the depositary, and each new holder of a security entitlement does not replace its predecessor but acquires a new piece of property coined specifically for it; likewise, on sale or liquidation the security holding in question simply disappears. The Reply Memorial asserts that it is a necessary inference that the present Claimants acquired their security entitlements from banks as described above, in other words that they made no payment to Argentina and their purchases are represented only by the credits to their own accounts with their banks or with other securities intermediaries.

*i. ... under the ICSID Convention*

148. The Reply Memorial maintains that, because (in accordance with the above) there has been no loan by Claimants to Argentina, nor in fact any agreement between them and Argentina, the Claimants are wrong in their attempt to apply to the present case the decision in *Fedax* that promissory notes are equivalent to bonds, and fall within the scope of the term “investment” as used in the ICSID Convention, on the basis that a

promissory note is evidence of a loan.<sup>78</sup> It points out, moreover, that the *Fedax* tribunal held no more than that the purchase of bonds qualifies as an investment “under given circumstances” and that the question has to be examined in the context of the specific consent of the parties and other relevant circumstances; in that case, the definition of ‘investments’ in the relevant BIT was broader and expressly included rights deriving from bonds etc., and the tribunal specifically noted that the promissory notes were not ‘volatile capital’ advanced to take a quick profit before immediate departure.

149. The Reply Memorial then sets out at length and in detail the authorities supporting the proposition (contrary to what it says is the Claimants’ argument) that the establishment of an investment for the purposes of an ICSID arbitration is subject to a dual test, namely whether the particular asset falls within the overall concept of ‘investment’ under the ICSID Convention and whether it falls within the consent of the parties to arbitrate. It accuses the Claimants of inadmissibly attempting to elide the first limb of the test, by asserting tout court, without any reasoning, that the notion of ‘investment’ must be interpreted broadly, and that bonds, as financial instruments, qualify as an investment for the purposes of the Convention.
150. The Reply Memorial rejects the account given by the Claimants of the Respondent’s position as to the significance of the so-called ‘*Salini* criteria’ for the existence of an investment, pointing out that the Respondent’s argument was in fact that, when the situation in the present case is analysed under the prism of the ‘*Salini* criteria’ and the decision in *Joy Mining*, the conclusion had to be that the Claimants’ assets satisfied none of them, which led inexorably to the conclusion that they were not capable of qualifying as ‘investments’ for Convention purposes. More specifically: the Claimants’ individual holdings clearly do not amount to a substantial commitment or contribution to Argentina, and it is not admissible to aggregate the individual holdings so as to bring them across this threshold; the duration of these holdings is indeterminate, and it is not admissible to reckon the duration as running until the final maturity of the underlying bonds; there is no risk other than the risk of default or downgrade typical of an ordinary commercial transaction, when measured against Argentina’s record by comparison with other countries; there is no contribution to

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<sup>78</sup> *Fedax*, para. 29.

economic development quite simply because there was no transfer of funds to Argentina on the purchase of the security entitlements, as Argentina had already received the full proceeds from the bond issue at the time of issue.

ii. ... under the BIT

151. Coming to the concept of ‘investment’ under the BIT, the Reply Memorial submits that Claimants’ argument depends on the assertions that they are bondholders and these bonds are included in the definition of “investment” under the BIT; that the investment is a foreign investment made in the territory of Argentina; and that it was made in accordance with Argentine laws and regulations.
152. As to the question of ‘bonds’ under the BIT, the Reply Memorial suggests that the Claimants rely on the argument that “bonds” are expressly included within the BIT’s definition of “investment”, and that in support the Claimants seek to translate the Italian term “*obbligazioni*” into Spanish as “*bono*” and into English as “bond”, and at the same time to translate the Spanish term “*obligación*” the same way into English. It asserts that the two Spanish terms have distinct meanings, and gives examples of where only the one term, or the other, could properly be used, from which it draws the conclusion that, as the term “*bonos*” was not used in the BIT, the treaty cannot be understood as including bonds. It adds that, if it is correct (as the Claimants submit) that there is no specific word in Italian to refer to a ‘bond’, then the choice in the Spanish text of “*obligaciones*” should be determinative. It points out in this context that neither the NASAM Mandate nor the Power of Attorney makes use of “*obbligazioni*” to describe bonds, but on each occasion these documents say either “*titoli obbligazionari*” or just “*titoli*”.
153. The Reply Memorial dismisses as immaterial the Claimants’ argument that it would have been possible to have excluded bonds via Article 25(4) of the ICSID Convention. It likewise dismisses the Claimants’ arguments from the juxtaposition in the Spanish text of Article 1(1)(c) of the BIT of “*obligaciones*” with “*títulos públicos y títulos privados*”, since on the Claimants’ argument it would have been unnecessary to include the catch-all phrase “or any other right to benefits or services with an economic value” which would have duplicated “credits directly linked to an investment.” Each term used ought to be given its proper meaning in context, and in the light of the object and purpose of the treaty, which did not include bonds and

interests governed by a law other than that of the host State and which made no contribution to its economic development.

154. The Reply Memorial takes issue with the Claimants' argument that it is wrong to focus attention entirely on the transaction by which they acquired their individual security entitlements, to the exclusion of the overall transaction, i.e. the sale of the bonds by Argentina to the underwriters. That is shown to be false, the Reply Memorial asserts, once one considers the time at which each Claimant in fact acquired his investment, which coincides with what would be each Claimant's subjective understanding, and would clearly correspond to a date or dates later than the issue of the Bonds, and could in fact be several years later. This aspect would be particularly striking if (as for example in the case of the Claimant Bruno Turchi) the security entitlement was acquired at a time when the bonds were already in default, so that the investment could not under any circumstances have been thought of as a contribution to Argentina's economic development.
155. The Reply Memorial asserts that in general, however, the Claimants cannot be understood to have made 'foreign' investments, in that both the bonds and the security entitlements were governed by a law other than the law of Argentina and subject to the jurisdiction of non-Argentine courts; while the BIT offers no definition of a foreign investment, it should be understood as one governed by a law other than the law of the investor's State of nationality. A large body of precedent establishes that debt governed by foreign law, and payable and enforceable outside the debtor State in foreign currency is regarded as located outside the debtor State, and this stands in contrast to the case of a foreign investor acquiring shares in an Argentine company, even under a contract subject to non-Argentine law and jurisdiction, since the exercise of rights as a shareholder would be governed by Argentine law and jurisdiction.

*iii. ... lawfully made under the applicable law*

156. The Reply Memorial rejects the Claimants' denial that their investments were acquired in violation of the applicable law, on the basis that the Claimants' argument focuses only on the issue of the bonds, not on the onward sales of interests in them on the secondary market. It invokes in this respect Article 8(7) of the BIT with its choice of law provision that leads inexorably to the application of Italian law, and invokes as well the decision of the tribunal in *Inceysa v El Salvador* which shows that

provisions of this type apply at the jurisdictional stage, not merely on the merits. The ‘in accordance with law’ condition in Article 1(1) should be understood as “an expression of public policy, which embodies the principle of respect for law,”<sup>79</sup> and would therefore have been applicable in any case, even without the express reference in the BIT, as demonstrated by the Decision in *Plama v Bulgaria*.<sup>80</sup> The effect of the *renvoi* is that Argentine law was itself infringed by the breach of Italian law. The Reply Memorial denies that the three conditions put forward by the Claimants represent established law. It rejects specifically the Claimants’ contentions based on the wording of one of the Offering Circulars, since the disclaimer in the latter expressly indicated the suitability of the security entitlements only for speculative investors able to assess risk, and to bear it. It asserts that all the Offering Circulars for the Bonds denominated in Italian Lira contained selling restrictions of that type, noting in this context the actions by the Claimants who have sued their Italian financial intermediaries; and asserts further that it is irrelevant whether the illegalities were committed by third parties, not by Argentina, and whether it affected the legal relationship between the holders and the bond issuer, since what the BIT addresses is the illegality of the investment as such.

157. The Reply Memorial accuses the Claimants of inconsistency with their own Request for Arbitration in now excluding from the ‘true cause’ of their claim the default on the Bonds and focussing instead only on the POE and Law No. 26,017, in an attempt to show that this is a treaty claim not a contract claim, but asserts that, even so, it is still the case that no *prima facie* violation has been shown since it is well established that non-payment is not in itself a violation of international law. It asserts that it is not enough to say that Claimants may have been affected by Argentina’s acts unless there existed a relevant legal connection, which was in fact missing because the Bonds and rights derived from them were not governed by Argentine law and were not under the jurisdiction of the Argentine authorities. It reiterates that the POE was voluntary and no-one could oblige the Claimants to accept it.

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<sup>79</sup> At para. 332.

<sup>80</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, (hereinafter “*Plama v Bulgaria*”).

iv. ... 'in the territory of Argentina'

158. As to the matter of whether the security entitlements were investments made 'in the territory of Argentina,' the Reply Memorial contests the Claimants' argument that the relevant transaction was the issue of the bonds themselves, given the "entire series of intermediaries" between that transaction and the acquisition of the security entitlements by the Claimants themselves whose activities Argentina is not in a position to monitor, which in turn is why the issue documents contain an exclusion of any liability on Argentina's part.<sup>81</sup>
159. The Reply Memorial rejects the Claimants' reliance on the *Fedax* Decision for the proposition that an advance to finance governmental needs ranks of itself as an investment in the latter's territory, since in this case the injection of funds had already taken place, and in any event the Claimants could not demonstrate whether or not the proceeds offered any durable value to the economic development of Argentina since the moneys simply went into the general treasury from which point on their use could not be tracked. Conversely, as indicated in *SGS v Philippines* and *Mitchell v Congo*,<sup>82</sup> investments made outside the territory and not reinvested within the territory are not covered; the mere fact that there may be benefit to the recipient does not suffice against the explicit indication in the preamble to the BIT that its purpose is to promote investments by investors of one Contracting Party "in the territory" of the other.
160. The Reply Memorial describes the purpose of Law No. 26,017 as being no more than to state a commitment not to reopen the restructuring on better terms later on, so as to assure creditors who accepted it that their acceptance would not become a 'floor' from which holdouts would seek to better the terms on offer.
161. As to the Claimants' assertion that Argentina, as both the debtor and the holder of the sovereign power, cannot hide behind the fact that the bonds and the security entitlements are governed by foreign law, the Reply Memorial reiterates that the Claimants have failed to show how it would have even been possible for Argentina to have altered, modified, or extinguished Claimants' rights, since a State's sovereign power to prescribe and enforce legal rights is by definition limited to its own

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<sup>81</sup> Reply Memorial, para. 353.

<sup>82</sup> *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award, 1 November 2006, (hereinafter "*Mitchell v Congo*"), (AL RA 43), para. 33.

jurisdiction and does not extend to property rights located outside its borders. This is confirmed by the fact that holders of defaulted debt have received judgments in their favour in foreign courts.

162. The Reply Memorial rejects the allegation of inconsistency arising out of the Respondent's assertion that the Claimants should have resorted to the Argentine courts in lieu of arbitration, since this does not alter the fact that there is no proper link to investments protected by the ICSID Convention and the BIT; it asserts that Argentina has acted in the same way as any debtor unable to pay its debts, and (their colourful language set to one side) the Claimants' claim is for failure to pay, which is not a breach of the BIT but a contractual claim jurisdiction for which lies elsewhere. This is confirmed by the phraseology of the NASAM Mandate itself, with its reference to "*rights and interests in relation to the property and possession of the abovementioned bonds [and] ... the recovery of my/our credit with related interests and damages*", and the way in which the Mandate regulates its relationship with legal actions brought by individual Claimants in domestic courts.
163. The Reply Memorial reiterates the Respondent's earlier argument to the effect that the Claimants have not offered sufficient proof of nationality, invoking in support academic and other evidence that a State's claim as to the nationality of an individual is not determinative for an international tribunal. It reiterates likewise its earlier accusations as to the inconsistencies in the presentation of the Claimants' identities in their own pleadings which, it says, now amount to a difference of 60 when the Counter-Memorial is compared with the Request for Arbitration, and which in turn constitutes a violation of Article 36(2) of the Convention and Rules 2(1)(a) of the Institution Rules.
164. The Reply Memorial submits that the failure to show any investment in Argentina also raises an issue *ratione personae*, since Article 1(2) of the BIT itself incorporates the phrase "in the territory of the other Contracting Party" into the definition of "investor" itself.

*d. The Claimants' lack of standing*

165. The Reply Memorial finally submits that the Claimants in any event lack standing because of the remoteness of their connection with the underlying Bonds and their

underwriters. It asserts that the fact that Argentina was fully aware of the process by which entitlements in the Bonds would be sold on secondary markets does not change this situation, it merely demonstrates why Argentina never regarded the security entitlements as investments under the BIT or the ICSID Convention; the mere fact that Argentina may owe sums of money to the present Claimants does not of itself render them “investors”. It submits that arbitral awards, such as those in *PSEG v Turkey* and *Enron v Argentina*, recognize that there is a cut-off point beyond which claims become inadmissible as too remotely connected with the underlying investment, which is clearly passed in this case as the Claimants are not direct creditors of Argentina; cancellation of the Bonds would require payment to be made to the holder of the global bond which would then owe its own responsibilities to downstream investors. It draws attention to the fact that in *Fedax* there was only one layer of intermediaries, and the endorsements of the promissory notes had passed on the full rights of the original holder, quite unlike the present case where (as demonstrated in the Memorial) each holder acquired a newly-created item of property.

166. The Reply Memorial further submits that, if any amongst the Claimants seek to pursue their rights by legal actions against the seller banks in national courts (as some have already done), this would lead to the loss of any status to which they lay claim as investors under the BIT, and hence their standing in the arbitration. It cites as an example the Claimant Claudia Santi, whose action in the Italian courts has sought *inter alia* the voiding of her sales contract with the vendor bank; if that remedy were granted, it would have the consequence in law that she had never been the owner of her security interest and could not therefor *a fortiori* lay claim to being an investor under the BIT. It submits that this consequence cannot be avoided by the argument, put forward by Claimants, that their claims against the banks are separate from their claims against Argentina, since the latter can only have arisen in the first place out of a valid purchase and sale transaction with the bank. It rebuts the Claimants’ counter-argument that the Italian Supreme Court had ruled in 2007 that nullity was not a general remedy against the banks, by submitting that the Supreme Court had left the remedy open under specific statutory provisions, and that it was under these provisions that Sig. Santi had claimed. The Respondent does not accept that these are matters for later resolution, as Claimants say, as it is the Claimants’ burden to establish jurisdiction *ratione personae* over their claim.

167. Moving to the funding arrangements through NASAM, the Reply Memorial submits that the named Claimants are impermissibly pursuing claims on behalf of a third party. It cites a Judgment of the United Kingdom Privy Council, to the effect that, if the outside funder in addition substantially controls the proceedings or at any rate stands to benefit from them, it is not so much facilitating access to justice by others as itself gaining access to justice for its own purposes and is ‘the real party’ to the litigation, and lists the ways in which the arrangements with NASAM meet these criteria.

*e. The prerequisites under Article 8 of the BIT*

168. The Reply Memorial reiterates the Respondent’s earlier description of Article 8 of the BIT as creating a multi-layered and sequential system for the resolution of disputes between investors and the host State. It rejects the three excuses put forward by the Claimants for not resorting either to amicable consultations or to the local courts before requesting ICSID arbitration, as follows. In the first place, the Respondent insists that Articles 8(1) and 8(2) must be jurisdictional prerequisites or else they would be rendered meaningless, it cites in this regard the decision in *Maffezini*; in the second place, the argument that local recourse would be futile is rejected both factually and as legally irrelevant; in the third place, the MFN argument is rejected both because the clause does not apply to dispute resolution, and because it is improper to invoke the clause without having made any attempt at meeting the above prerequisites because, without that, Argentina’s consent to BIT arbitration has never come into operation at all.

169. As to the prerequisites under Articles 8(1) and 8(2), the Reply Memorial draws attention once again to the way in which their text is structured, in particular in the conditional form, and draws attention to what it says is a clear contrast between this and genuine ‘fork-in-the-road’ clauses such as in Article VII of Argentina’s BIT with the USA. It contests the relevance of the use of the word ‘may’ in Article 8(2), since the door to arbitration is opened by the next paragraph, Article 8(3), which in turn is conditioned on the initiation of proceedings before local courts, and in any event ‘may’ in Article 8(2) carries the sense of permission not that of optionality.<sup>83</sup> It

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<sup>83</sup> Citing the Award in *TSA Spectrum de Argentina, S.A. v Argentine Republic*, ICSID Case No. ARB/05/5, (AL RA 49), para. 101.

asserts further that the reading of Article 8(2) as a mandatory requirement is the only one that gives full effect to Article 8(4), under which the initiation of arbitration proceedings requires each party to the dispute to take the measures necessary to withdraw from the pending domestic lawsuit, and relies upon the award in *Wintershall v Argentina*.<sup>84</sup>

170. As to the ‘futility’ argument, the Reply Memorial points out that Article 8(1) is cast in mandatory terms,<sup>85</sup> and submits that the following phrase “insofar as possible”<sup>86</sup> plainly applies to the outcome of consultations not to their initiation; this does not mean that must lead to a result, but there is ample authority to show that clauses of this kind do mean that consultations cannot be sidestepped.<sup>87</sup>
171. The Reply Memorial asserts that the Claimants bear the burden of establishing that they complied with the requirement to pursue amicable consultations, and had done so in good faith, in pursuance of a general principle of international law. The conduct of creditors, in the event of a default, was to be evaluated against the agreed framework principles worked out under the aegis of the G-20 for sovereign debt restructurings and required debtors and creditors to cooperate “to ensure that the terms for amending existing debt contracts and/or a voluntary debt exchange are consistent with market realities and the restoration of growth and market access”.<sup>88</sup> The advocacy of obviously unsustainable restructuring terms would not represent good faith.

*f. Consultations would not have been futile*

172. The Reply Memorial denies that amicable consultation would have been futile, since Argentina had conducted consultations in good faith with innumerable purchasers and creditor groups since the 2001 default; conversely, the authorities relied on by the Claimants were cases where the respondent was unwilling to enter into consultations or where they were doomed from the outset, but in fact Argentina had made

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<sup>84</sup> *Wintershall v Argentina*, para. 115.

<sup>85</sup> ‘*será*’ in the original Spanish, ‘*sarà*’ in Italian, and ‘shall’ in the English translation.

<sup>86</sup> ‘*en la medida de lo posible*’ in Spanish, ‘*per quanto possibile*’ in Italian.

<sup>87</sup> At para. 475, citing the Decision in *Enron v Argentina*, para. 88, in which an ICSID tribunal found a similar requirement in the Argentina-U.S. BIT “very much a jurisdictional one”, such that “a failure to comply with that requirement would result in a determination of lack of jurisdiction”, and citing also the Judgment of the International Court of Justice in the case of *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Rwanda)*, ICJ Rep. 2006, 6, paras. 88-93.

<sup>88</sup> Principles Consultative Group, Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets: Report on Implementation by the Principles Consultative Group, October 2007, (A RA 346), p.18.

substantial efforts over several years and the POE was a product of these exchanges. As to Law No. 26,017, it merely established an internal process that would prevent the Executive Branch from reopening the POE without legislative authorization. The Reply Memorial asserts that, after the Law's enactment, there were very many meetings with groups of bondholders who wanted the POE reopened, and the Law was never thought to stand in the way of these meetings, which were still continuing at the time at which the Reply Memorial was being prepared.

173. The Reply Memorial likewise denies that a futility exception could be raised against the obligation to resort to the local courts, since the authorities relied on by the Claimants all look to the futility of the available remedies, not to the recourse itself, nor to the possibility that resort to the domestic courts might cost money and might not be completed within the 18 months stipulated under the BIT. The intention of the Contracting Parties had been to afford the judicial authorities the opportunity to review and correct governmental acts, not to guarantee that there would be a final resolution of the disputed issues within 18 months. Other tribunals had only been prepared to countenance avoidance of local remedies provisions where no remedy was available; none of the cases in the Argentine courts which were invoked by the Claimants involved allegations of treaty breach, but under Argentine law treaties rank higher in the legal hierarchy than domestic legislation, and the Argentine courts had the power to render a law inapplicable.

*g. The MFN clause does not apply*

174. Finally, the Reply Memorial denies the applicability of the MFN clause to procedural requirements, notably dispute resolution, while pointing out that in any case the clause only applies to investments 'in the territory of' Argentina, and asserting that the Claimants have not shown that the dispute settlement provisions of the Argentina-US BIT are in fact more favourable. It cites the statement by the *Wintershall* tribunal that the Germany-Argentina BIT contained no provisions allowing an investor to choose at will not to pursue local recourse, since that would simply fail to engage the terms of Argentina's consent to arbitration; as the tribunal put it "Argentina's integrated 'offer' for ICSID arbitration ... must be accepted by the investor on the same terms".<sup>89</sup> It refers also to the criticism that had followed the *Maffezini* Decision

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<sup>89</sup> At para. 162.

and submits therefore that the *Plama* line of cases ought to be preferred, as more accurately reflecting the intention of States when entering into BITs.

175. The Reply Memorial further denies that the addition in the MFN clause of the BIT of a reference to “all other matters regulated by this Agreement” is not apt to include the dispute resolution provisions, as is shown by the use of the self-same phrase in the very Article dealing with dispute resolution to describe its scope, therefore ‘matters regulated by [the] Agreement’ cannot mean both the matters subject to dispute resolution and dispute resolution itself. It asserts that the phrase, as used in the MFN clause, should be interpreted *eiusdem generis*, so as to cover only the treatment of investments, return on investments, associated activities, and the like, which it says is consistent with the conclusions reached in *Plama*, *Salini*, and *Wintershall*. It submits that the dispute resolution clause in the Argentina-US BIT constitutes a “different system of arbitration” by comparison with the present BIT, and therefore falls within the exception even in the *Maffezini* Decision. It recalls finally that the MFN clause only covers treatment by each Contracting Party within its own territory,<sup>90</sup> which therefore excludes the threshold conditions for ICSID arbitration, whereas other BITs do not include the same limitation. Last of all, the Reply Memorial denies that the requirement to have recourse to the local courts does not axiomatically constitute less favourable treatment, and recalls that the clause in the Argentina-US BIT in any case itself requires prior amicable consultations.

#### 4.III The relief sought

176. The Reply Memorial accordingly seeks the following relief:-
- (a) a determination that the Tribunal lacks competence and that ICSID lacks jurisdiction to entertain collective actions of this nature;
  - (b) in the alternative, a determination that it lacks competence and ICSID lacks jurisdiction because both Argentina and Claimants have not provided valid consent to this proceeding, and, further, that Claimants’ abuse of right in

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<sup>90</sup> “*en el ámbito de su territorio*” in Spanish, “*nel proprio territorio*” in Italian.

bringing the claims in this proceeding—in the name of a third party—renders invalid such consent as Claimants may have offered;

(c) in the alternative, a determination that there is no *prima facie* violation of the Argentina-Italy BIT;

(d) in the alternative, a determination that it lacks jurisdiction *ratione materiae*;

(e) in the alternative, a determination that it lacks jurisdiction *ratione personae* or that Claimants lack standing;

(f) in the alternative, a determination that Claimants have not satisfied necessary prerequisites to bringing a claim under the Argentina-Italy BIT;

(g) an order that Claimants pay all of Argentina's costs, expenses, and attorneys' fees (plus interest thereon); and

(h) any further relief that the Tribunal deems fit and proper.

#### 5. The Claimants' Rejoinder

177. The Claimants filed their Rejoinder on 1 September 2010. It reverts briefly to the account of the factual background offered by the Respondent in the Reply Memorial, and to the two witness statements submitted in support, all of which is asserted to be relevant only to the merits, and which does not therefore receive further comment by the Claimants, without prejudice to their right to do so later at the appropriate stage.

178. The Rejoinder begins by recapitulating the grounds for concluding that the Claimants have validly expressed their consent in writing to ICSID arbitration.

##### 5.I The NASAM Mandate Package

179. The Rejoinder submits that the Claimants gave their consent by filing the Request for Arbitration through their duly authorized Counsel, and that that consent was perfectly valid, as there are no grounds whatever for the Respondent's argument that the Powers of Attorney did not cover recourse to ICSID, since its wording extends to 'any notice of dispute', and 'any request of arbitration'. It likewise rejects any assertion of impropriety or invalidity in the Powers of Attorney under Italian law. While

agreeing that the relationship between the Claimants and their Counsel is governed exclusively by the Powers of Attorney, it submits that the NASAM Mandate is relevant for their interpretation, in indicating the intention of the Claimants in granting them, notably (in the present context) the express mention of ‘*arbitrato ICSID*’ in connection with the payment of the Claimants’ contributions to expenses. To rebut the Respondent’s assertions in this regard, the Rejoinder annexes five samples of money transfers showing a clear reference to ‘*arbitrato ICSID*’ and five samples of executed NASAM Mandates.

180. The Rejoinder submits further that the NASAM Mandate and the Power of Attorney are separate and unrelated instruments. It reiterates that NASAM is merely a third-party funder and not a party to the arbitral proceedings, that both the Powers of Attorney and the Request were executed and filed by the Claimants through their Counsel, not by NASAM, and that the NASAM Mandate is a valid contract, but one that regulates only the relationship between Claimants and NASAM and is irrelevant to the present proceedings (except to the extent that it evidences Claimants’ intention to bring ICSID proceedings); it points out in particular that the Counsel acting in the arbitration are not party to the NASAM Mandate and therefore not bound by it. While accepting the difference under Italian law between the ‘*procura*’ (conferring the power to represent) and the ‘*mandato*’ (the undertaking to perform an activity on behalf of another), it notes that the normal Italian practice is to combine the two into one in a single document referred to as the ‘power of attorney’ and that the present instance is no exception, pointing in that context to the explicit conferment of broad powers of representation and to the specific instructions to undertake a whole series of actions from signing and submitting any request for arbitration through to collecting any amount which is the outcome of the arbitral proceedings. Without conceding that Italian law is in fact the governing law in the present context, the Rejoinder says further that the attorney is not required to formalize his acceptance in any particular way, but simply proceeds to perform the specified tasks.
181. The Rejoinder denies that the NASAM Mandate and the Powers of Attorney constitute *negozi collegati* but says that, even if they did, that would have no impact on consent to ICSID arbitration, since both documents are valid and legitimate.

182. As to the Powers of Attorney, the Rejoinder reiterates that Italian procedural law is not applicable but only the self-standing provisions of Article 25 of the ICSID Convention; there is no valid distinction from the *Amto v Ukraine* case since Article 42 of the ICSID Convention covers only substantive law, not procedure. It accuses the Respondent of over-formalism in trying to suggest on the strength of academic commentary that, even though the Powers of Attorney would have ranked as perfectly valid for non-lawyer attorneys, there was a defect in authentication that rendered them invalid for attorneys who were members of the Italian bar; if that was intended to insinuate that some of the Claimants' signatures might have been forged, there was not a shred of evidence for it.
183. The Rejoinder rejects the allegation of an impermissible barrier between the Claimants and their Counsel, since this relationship is exclusively governed by the Powers of Attorney which in fact establish a "direct and transparent"<sup>91</sup> relationship between each Claimant and Counsel; it repeats the reasons for asserting the non-applicability of Italian law, and rejects the Respondent's arguments based on Articles 75 and 77 of the Italian Code of Civil Procedure. It denies specifically the claim that the Claimants have 'assigned' their rights to NASAM when, to the contrary, all that NASAM has been entrusted with is the function of collecting damages on Claimants' behalf, which in itself implies no control over the arbitration proceedings, and is in addition a practical solution given that individual Claimants would be quite unable to collect the amounts due themselves.

#### 5.II The question of multiple claimants

184. Moving to the subject of multiple claimants in one arbitration, the Rejoinder refers back to the Claimants' earlier written argument. It denies that the present arbitration is a class action, the characteristic feature of which is a class of unidentified plaintiffs, whereas here each Claimant is identified and is acting personally for the protection of his or her own rights. It repeats its refutation of the argument that NASAM is a party to the proceedings, and denies that the language used in the NASAM Mandate (*'azione di gruppo'*) can be dispositive for the nature of the proceedings, especially when it is used in a clearly non-technical sense which refers to the organization and funding of proceedings on condition that a minimum number of bondholders would

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<sup>91</sup> Rejoinder, para. 42.

agree to commence them. NASAM's role is a straightforward one in line with normal third-party funding practice; this includes the role in choosing Counsel which is "intrinsic to the role of a third party organizer funder"<sup>92</sup> and represents in fact a significant part of the service provided by NASAM to the Claimants. None of this detracts from the fact that Counsel's obligation is to follow the Claimants' instructions, not NASAM's, so that direct instructions, or even revocation of the mandate, would have to be given effect by Counsel. Although it is not contested that the individual Claimants do not take an active part in defining the arbitration strategy, this is no different from most legal proceedings, which tend to be conducted directly by the lawyers involved, with little or no client input. This is obviously the case in investor-State arbitration, even with sophisticated claimants, but inevitable where the claimants are small investors, and it is only in that very indirect sense that the present Claimants 'have no control over' the proceedings. The Rejoinder insists that it is simply not true that the strategy in the arbitration is dictated by NASAM; NASAM's financial interest in the outcome of the proceedings no more makes it a party to them than Counsel themselves.

185. The Claimants maintain their submission that the consent given under the ICSID Convention and the BIT covers the present arbitration; the fact that neither treaty explicitly mentions claims by multiple claimants does not preclude their interpretation by the standard rules in the Vienna Convention on the Law of Treaties so as to include such claims. No law or contract ever expressly mentions every possible situation that may fall under it, and the same goes for treaties, and the principles of 'good faith' and 'object and purpose' in the Vienna Convention support the inclusion of multiple claims inasmuch as the purpose of both the ICSID Convention and the BIT is to provide meaningful protection to investors, including those who could not support the financial and administrative burdens of bringing individual actions. The Rejoinder contests the relevance of the *Itera v Georgia* decision, and draws attention to the argument made by the dissenting arbitrator, which it finds convincing.

186. As regards the BIT, the Rejoinder rejects as beside the point whether or not collective actions are within the contemplation of the domestic legal systems of Italy or Argentina at the time of its conclusion, since the practice of investment arbitration is

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<sup>92</sup> Rejoinder, para. 54.

replete with situations that were arguably not contemplated at the time, and in any case the Vienna Convention approach focuses on ‘ordinary meaning’ without regard to the intention of the parties. Nor does the Rejoinder find the Respondent’s textual arguments convincing, notably because it is a common drafting convention that the singular (*in casu* “investor”) is deemed to include the plural. The same goes for the Respondent’s argument from the fact that the claims of the individual Claimants spring from a number of different bond issuances, since the question at issue in all cases is the same, namely the illegal interference with the rights of all bondholders by a single action on the part of Argentina; the case is therefore not one of ‘consolidation’ of claims. The Rejoinder further rejects the relevance of the *Plama* and *SOABI* decisions as these latter cases dealt with consent expressed in a number of successive agreements. Conversely, the cases of *Funnekotter*, *Goetz*, *Canadian Cattlemen*, and *Bayview*, despite their factual differences, all contain elements supporting the Claimants’ position.

187. The Rejoinder maintains that the Respondent’s argument as to the lack of consent by the Claimants to multiple proceedings is devoid of sense in circumstances in which each Claimant obviously knew that its claim would be prosecuted along with those of others, not to mention by the terms of the NASAM Mandate itself. It denies that any issues of manageability or of due process arise that could not be dealt with within the scope of the Tribunal’s powers to determine the appropriate procedural rules, without any violation of Argentina’s rights as respondent. It rejects the Respondent’s argument that the relevant facts at issue vary as between Claimants and are not even similar from one case to another, since the differences between the individual Bonds held by Claimants are totally immaterial to the issues in dispute; if any such difference were to become relevant it would “certainly not require a consideration of each single bond held by each Claimant, but at most consideration of some general issues which the Tribunal will certainly be in a position to address properly and with due respect for the rights of all concerned.”<sup>93</sup> Nor would the verification of the nationality of individual Claimants be particularly complex, in the light of the ample evidence already submitted.

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<sup>93</sup> Rejoinder, para. 77.

### 5.III Jurisdiction and Admissibility

#### *a. Jurisdiction ratione materiae under the ICSID Convention and the BIT*

188. When it comes to the question of jurisdiction *ratione materiae*, the Rejoinder reiterates the Claimants' acceptance that they need to satisfy a 'double-barrelled test' for the existence of an investment under both the ICSID Convention and the BIT; all the relevant approaches to this question have been applied. For the avoidance of doubt, the Rejoinder specifies that "the investment at issue here is the overall loans which made funds available to Argentina and which are represented by the bonds issued in respect thereof. Each Claimant holds a proportionate share of that investment corresponding to the face value of the bonds held by it."<sup>94</sup> The absence of a definition of the notion of "investment" in the ICSID Convention means that the notion should be interpreted broadly, having regard primarily to the consent expressed in the BIT by the Contracting Parties.<sup>95</sup> In particular, arbitrators should not impose fixed criteria, but should rather refer for guidance to the typical characteristics that have been identified in the case law and commentary, which may vary from one situation to another. The *Salini* criteria are not rules but only guidance, and experience shows them to have been interpreted with great flexibility, as demonstrated in particular by the recent Award in *Saba Fakes v Turkey*, where the Tribunal's detailed examination culminated in only three elements as being necessary, and at the same time sufficient, to define an 'investment' for the purposes of the ICSID Convention: a contribution, a certain duration, and an element of risk, all of which are clearly met in the present case.
189. The Rejoinder resumes the Claimants' conclusion, based on the *Fedax*, *CSOB*, *ADC*, and *CDC* precedents, that financial instruments are "investments" within the meaning of Article 25(1) of the ICSID Convention. While accepting the Respondent's description of the mechanisms for issuance and circulation of sovereign bonded debt, it contests strongly the Respondent's argument based on drawing a distinction in kind between bonds and security entitlements, which it regards as no more than a play on words. For the Respondent, the initial purchase of the Argentine Bonds by the banks and underwriters is indisputably an investment satisfying all of the necessary

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<sup>94</sup> Rejoinder, para. 83.

<sup>95</sup> Referring in this connection to the Decision of the *ad hoc* Committee of 16 April 2009 in *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10.

conditions, but the subsequent circulation of the bonds on the secondary market did not, and could not, deprive the initial investment of its quality as such, nor modify its nature; it follows that the individual ‘security entitlements’ held by the Claimants are evidence of entitlements to a proportionate share of the initial investment made in Argentina, undisturbed by the chain of transactions which led to the eventual purchases by the Claimants, and it is these shares of the initial investment that the Respondent has expropriated. The Rejoinder submits that there is no contradiction involved in looking at the individuals to identify them and determine the amount of their shares, and looking to the initial transaction as a whole to determine its nature as an ‘investment’; under investment treaty law, there is no limitation on the possibility of subsequent acquirers of an initial investment benefitting from BIT protection, as in *Fedax*. The Rejoinder claims that, had the original purchasers of the Bonds brought suit, the Respondent would have resisted on the argument that they were no longer the holders of the investment, but cannot at one and the same time deny liability towards the subsequent and eventual holders. The Claimants therefore rest on the demonstration in their Counter-Memorial that their holdings satisfy all of the necessary requirements to rank as ‘investments’ under both the ICSID Convention and the BIT.

190. The Rejoinder rejects as specious and absurd the Respondent’s attempt to argue that the terms ‘*obbligazioni*’ and ‘*obligaciones*’ in the original language versions of the BIT should be rendered in English not as ‘bonds’ but as ‘obligations’, citing various texts and publications that have used the terms interchangeably.
191. The Rejoinder refers back to the Counter-Memorial for a comprehensive demonstration that the Claimants’ investments were indeed made ‘in the territory of Argentina,’ reiterating in this context that, where an investment consists simply in the provision of funds, regard need only be had to the beneficiary of the funds, and that for this purpose it is correct to look to the initial payments to Argentina and not to the subsequent transfers on the secondary markets; it submits that cases like *SGS v Philippines* and *Mitchell v Congo* are not in point, as they involved the provision of services. Moreover the characterization of an investment as ‘foreign’ does not depend on the governing law, but on the nationality of the investor which, once again, refers

back to the initial provision of funds, not to questions such as the subjective consciousness of subsequent purchasers.

192. The Rejoinder once more rejects the Respondent's claim that the 'compliance with law' criterion is to be judged by reference to Italian law, and rejects the argument that Article 8(7) of the BIT brings into play the application of foreign rules of public law, citing in this context the *dictum* of the *Saba Fakes* tribunal that it would run counter to the object and purpose of investment protection treaties if one were to deny substantive protection to investments because they violated domestic laws if those laws were unrelated to investment regulation as such. It denies moreover that there is any contradiction between the position of those Claimants who have also brought actions before the Italian courts, since the nature of their claims there against financial intermediaries is totally different. It stigmatizes as malicious any attempt by Argentina to take advantage of reputed illegalities committed by third parties such as the banks, at the expense of the investors.

*b. A prima facie treaty violation*

193. The Rejoinder declines to accept that the Claimants have failed in their obligation to state a *prima facie* treaty violation, since it is preposterous to maintain that what Argentina had done was no different from the actions of an ordinary party which was unable to meet its debts; the actions – and specifically the take-it-or-leave-it exchange offer imposed by law – were indisputably sovereign acts; as shown in the previous pleadings, the illegality complained of was the sovereign actions that brought about and consolidated the taking of the Claimants' property, i.e. the POE and Law No. 26,017, and that position has never changed, which shows in turn that the subjection of the Bonds to foreign law did not put them beyond Argentina's reach.

*c. The 2010 POE*

194. The Rejoinder refers to the revised POE of April 2010 and the consequent suspension of the present proceedings granted by the Tribunal, and refers further in this connection to the NASAM press release invoking the terms of the NASAM Mandate and discouraging Claimants from accepting the revised POE without NASAM's prior consent. It asserts that this neither could nor did prevent Claimants from accepting the revised POE, and some had already communicated their intention to do so. It

refers also to the correspondence between the Parties on the discontinuance by some among the Claimants, which will be dealt with below.

*d. The nationality requirement*

195. The Rejoinder recalls the proofs previously furnished to demonstrate the Italian nationality of each of the Claimants. It rejects once more the discrepancies alleged by the Respondent in the number, names, and entitlements of the individual Claimants, pointing to the earlier explanation that the discrepancies (small in number) arose entirely out of the fact that, in the few cases where corporate entities were among the Claimants, the list annexed to the Request for Arbitration contained the names of the entity's legal representatives; but the detailed documentation submitted with the Request was accurate. The Respondent's other criticisms of the lists are rejected as unfounded, because they derive only from the fact that the tables in the Request for Arbitration were arranged by the currency denomination of the Bonds, with the result that a Claimant holding Bonds in more than one currency would appear in more than one table; but the number of Claimants set out in the Counter-Memorial was correct, as shown in a new table now attached.

*e. The Claimants' standing*

196. The Rejoinder maintains that the arguments set out in the Reply Memorial are mere repetitions which have been dealt with before, or are immaterial to the case.

*f. The domestic court proceedings in Italy*

197. Once again, the Rejoinder maintains that the points made in the Reply Memorial are mere repetitions<sup>96</sup> of earlier arguments. It annexes a list<sup>96</sup> which already takes account of those Claimants who had lost title to their Bonds for reasons other than acceptance of the 2010 POE and undertakes to produce bank certificates if required certifying the ownership of each Claimant, and reiterates that each Claimant is acting in his or her own name and not for any third party.

*g. Amicable consultations and recourse to the local courts*

198. The Rejoinder rehearses once again the Claimants' reasons for asserting that the failure to comply with Articles 8(1) and 8(2) of the BIT is not a bar to the Tribunal's

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<sup>96</sup> Exhibit CA-73.

jurisdiction. It submits in this connection that any negotiation with Argentina would have been not only futile, but also impossible once the *Ley Cerrojo* had been enacted. It presents the evidence for saying that between 2001 and 2004 there had been several attempts by bondholder groups to enter into negotiations, all of which failed since Argentina simply held to its own terms unilaterally imposed. The unreasonableness of the Respondent's present suggestion that the Claimants have not shown why they did not attempt to open consultations flies in the face of the Respondent's own argument in the Memorial that it is impossible to negotiate separately with each person who claims an interest under the bonds or even with groups of them.<sup>97</sup> The Respondent's claims that it negotiated with bondholder groups and put together the POE in the light of that is rebutted by the evidence that the meetings referred to were minimal in their content, consisting more of presentations or 'road shows' than actual negotiation, and the Respondent has declined to produce evidence such as minutes and records of these meetings to sustain its own account.

199. The Rejoinder further argues that the enactment of the *Ley Cerrojo* in February 2005 put the final seal on Argentina's refusal to negotiate, and that the Respondent's account of the effect of the law is inaccurate and misleading; it is not simply that Article 2 of the Law prohibits reopening the restructuring process and Article 3 forbids negotiation with holdout investors, but that Article 4 requires the Executive to do everything in its power to secure the de-listing of Bonds not surrendered, and that Article 6 brings about the exchange, by operation of law, of un-surrendered Bonds caught up in litigation for new par bonds denominated in Argentine pesos and maturing in 2038. It recalls that the *Ley Cerrojo* was enacted 14 days before the expiration of the 2005 POE, and that its aim was to coerce the remaining bondholders to accept the POE. It sees further confirmation of this analysis in the recent suspension of the *Ley Cerrojo* to permit the 2010 POE (not mentioned by the Respondent in the Reply Memorial) because of the condition in the new suspending law that the terms offered to non-acceptors of the 2005 POE had to be less favourable than the terms of that offer, and because of the wide-ranging waivers of right which it demanded. It adds that the new 2010 POE had nothing to do with any wish to make up for the illegalities suffered by bondholders, but was directed at speculation in

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<sup>97</sup> See Memorial, paras. 59-79.

Argentine bonds by banks against the possibility that the exchange process might be reopened.

200. The Rejoinder underlines the Claimants' earlier argument as to the futility of recourse to the Argentine courts, but repeats that recourse to the local courts was not mandatory in the light of the MFN clause in Article 3 of the BIT, and dismisses as irrelevant that this argument had not been expressly advanced in the Request. It cites the jurisdictional decision in *Rosinvest* as recent authority for the application of MFN clauses to dispute settlement, and dismisses out of hand the Respondent's attempt to give MFN treatment a limited geographical scope, by arguing that the 'less favourable treatment' that would be set aside by the MFN clause was the burden of pursuing fruitless litigation precisely within the territory of Argentina. It rebuts also the argument that Article VII(3) of the US-Argentina BIT invoked by the Claimants is not necessarily 'more favourable', by arguing that all that that Article requires is a pure lapse of time, a condition which was undoubtedly satisfied in the present case. It reiterates that the futility argument is not a purely empirical one based on time, trouble, and expense, but is squarely based on the effect of the *Ley Cerrojo* in shutting out any prospect of success in local litigation, as indicated by the seminal judgment of the Supreme Court in the *Galli* case, where the Court declared the question non-justiciable, thus ruling out *a fortiori* any later attempt to argue that international obligations overrode domestic statute law. It recalls also that the Respondent has not explained how its present arguments in the arbitration can be reconciled with the diametrically opposite argument it made before the domestic courts. It refers finally to an official survey carried out in 2007 of 1600 judicial proceedings of a similar character, which took on average 6 years and 1 month to reach judgment at first instance, and that none of the cases before the Administrative courts was resolved within 18 months. It adds that the Respondent's argument that proceedings must have been commenced, but not necessarily completed, within 18 months leads to an absurd result putting in question the purpose behind the clause.
201. The Rejoinder accordingly requests the Tribunal to dismiss all of the Respondent's objections, and to decide that it has jurisdiction and that the proceedings are admissible. It further requests an order for reimbursement of the Claimants' legal fees and the costs of the arbitration.

## **B. THE ORAL HEARING**

202. As indicated above, the Tribunal held a hearing on jurisdiction in Paris on 7 and 8 June 2011, during which the following witnesses for the Respondent were presented for cross-examination: Mr Federico Molina and Mr Daniel Marx. As the matters canvassed in the oral argument for both Parties consisted for the greatest part of a recapitulation of the arguments that had been set out at length in the written memorials described above, the Tribunal feels that it can properly dispense with an account of the legal argument, and concentrate instead on summarizing the tenor of the evidence of Messrs Molina and Marx. This is on the basis that the oral arguments have been taken fully into account by the Tribunal, which will refer to them specifically, so far as may be necessary, in the later parts of this Decision.

### **1. The evidence of Mr Molina**

203. Mr Molina had been the Director of Argentina's National Office for Public Credit until February 2004, after which he became the Financial Representative of the Ministry of Economy in the USA, a post he held until October 2006. He testified that the Public Credit Office was the financial agent of the Government, entrusted with the conduct of all public credit and debt operations, including the placement of Bonds or any other securities. He described the method used for the placement of Bonds in the international markets through contracts with the chosen investment Banks, on the basis of competitive proposals put forward by the Banks, which entailed that the Banks bore the sole responsibility to decide whether to retain the Bonds for their own portfolios or to sell them on to other institutions such as investment funds or in some instances to retail investors. All this would be specified in the prospectus for the particular Bond issue; he had never seen a prospectus containing a mention of investment protection treaties, nor to his experience had the question ever been raised. The terms used were standard ones and he had never seen the inclusion of an ICSID arbitration clause, and the standard pattern was to confer jurisdiction on the courts of the place where the issue was centred, such as New York, London, Frankfurt, or Tokyo. He referred to the many negotiations ("constant negotiations") that had taken place between 2003 and the 2005 POE, and the fact that creditor groups had put forward ideas of their own; this again was a standard procedure, not special to Argentina. Argentina had first retained Lazard Frères to try to locate the investors,

and after that had engaged three Banks to take the operation forward. After the expiry of the POE, bondholders who did not accept the exchange remained in the same situation as before, i.e. they continued to be the holders of securities that were in default. The 2005 POE was accepted by 76.1% of bondholders, and when it was reopened in 2010 the acceptance rate rose to about 92%.

204. Under cross-examination by Counsel for the Claimants, Mr Molina expanded on the reference in his witness statement to ‘candid discussions’ with creditors regarding Argentina’s initial outline proposals (“the Dubai Outline”), and explained that the essential element of this discussion, which took place with many groups because there were creditors practically all over the world, was Argentina’s capacity to pay over a 30-year period; the most active participants were the US mutual funds, but there were Italian groups, and at some point a group was formed by an association of Italian banks, claiming to represent Italian private persons, which for a while acted together and negotiated. There was also a group representing German creditors which was together for a time and then separated, and there were Japanese banks and American creditors. Two significant creditor demands eventually incorporated into the POE were the recognition of unearned interest and the determination of interest rates, but there were other elements as well, such as a most-favoured-creditor clause and the inclusion of a Par Bond (which was not subject to any discount in the capital amount) where there was much discussion of the total limit. Although different creditor groups had different priorities, when any recommendation was accepted it was applied throughout.
205. Mr Molina was unable to say whether there were ever negotiations with small groups of bondholders, *e.g.* of one hundred, because it was never clear how many creditors each group represented; the most organized group was the German group acting under a specific Mandate, whereas the Italian groups were much more heterogeneous and different groups were sometimes at odds with one another. He repeated that the mechanisms used for the original Bond issues were standard ones, very similar to those used by any other country or by large private debtors such as IBM or General Motors, since anything different from that generally did not work well.
206. Asked about the position of holdout creditors after the 2005 POE, in the light of the fact that the annual Argentine budget law no longer includes the bonded indebtedness,

Mr Molina confirmed that but pointed out that the *Boletín Fiscal*, an official publication of the Ministry of the Economy, sets out full debt statistics, which he could say from his own experience always mentioned the number of securities that had not been surrendered in the Exchange. He confirmed that the Bonds defaulted on before the POE continued to be defaulted on after the POE, but stated that he could remember some discussions with creditor groups happening after that, although they came to nothing. He referred also to the 2010 POE, which was the subject of negotiations at the specific initiative of Banks that had been involved in the 2005 POE and insisted that it be reopened.

207. In further examination, Mr Molina confirmed his evidence that channels had existed for discussion or negotiation with minority investors, and gave as examples contacts in Buenos Aires and during the touring roadshow with Dr Nielsen, the Secretary for Finance, as well as the existence of a network of financial advisers who were available to all retail or wholesale investors to convey their concerns, which to his knowledge included the London representation, which met with at least one Italian group claiming to represent retail bondholders, and the Washington representation (which he himself was in charge of) covering North America, though there were virtually no retail investors in that region. He confirmed also that some of the questions raised in these contacts, such as the par bonds and the most-favoured-creditor clause, had been of particular interest to minority investors, because of their anxiety that their inevitably weaker voice in the negotiations might lead to their being discriminated against in the outcome. There had also been the inclusion of interest as well as capital, in response to general investor feeling that the original proposals had been too hard-nosed. He confirmed also that the reopening of the Exchange process leading to the 2010 POE had originated out of negotiations initiated by the Banks, and that that had been after the passage of the *Ley Cerrojo*.
208. In answer to questions from the Tribunal, Mr Molina agreed that the annual budget law had not been including the defaulted Bonds, but that was because it only provided for payments that were foreseen for the budget year in question, and no payments were foreseen on the defaulted Bonds; conversely, the budget laws had been providing for payments in respect of the Exchange Bonds issued under the POE, and

interest under these was being regularly paid, though the principal had not yet matured.

209. As regards what he had referred to as the most-favoured-creditor clause, Mr Molina explained that it had been inserted to deal with the surrounding suspicion and mistrust about the possibility of a later, more favourable exchange offer, and the associated anxiety that this might impair the effectiveness of the Exchange if creditors held out waiting for that possibility; so the clause provided that if there were a further Exchange, and it was more favourable, participants in the first Exchange would also be eligible to benefit from the second Exchange. He clarified that this clause was put into operation in respect of the 2010 POE but very few creditors took it up, because it was not really better.
210. Mr Molina clarified further that the task given to Lazard Frères of locating the bondholders was completed around the early part of 2004, and it was after that that Merrill Lynch, UBS and Barclays had been retained to act as intermediaries, in the normal way, between Argentina and those who were potentially interested in an exchange and to bring about a rapprochement between the positions of both sides. Their task included looking at the degree of interest there was in the offer and at the claims of the various creditor groups, so as to act as intermediaries in orienting the negotiation.
211. In connection with the remark in his Witness Statement that the original Bonds were always considered high-risk investments whose ratings never approached ‘investment grade’ and carried an interest rate corresponding to that, Mr Molina explained that the decision on the interest rate the Bonds would bear had been taken in the usual way after consultation between the potential underwriters with potential institutional investors followed by ‘expressions of interest’ at a range of prices.
212. Mr Molina further explained how the securities laws of the countries where Bonds were to be marketed might encourage – or in some cases (e.g. the USA) actually require – that the Bonds be exclusively subject to their laws and jurisdiction, to the exclusion of that of the country of issue.
213. Mr Molina finally clarified that when he had referred in his evidence to Bonds being ‘in default,’ that meant that no payments were being made on the Bond, including

after maturity had been reached; that applied to all of the Bonds issued before 31 December 2001, though as already indicated approximately 92% had been surrendered for exchange, and only the remaining 8% remained in the same situation as obtained prior to the 2005 POE.

2. The evidence of Mr Marx

214. Mr Marx had been Argentina's Secretary of Finance in 1999-2001, and before that at one stage Argentina's Financial Representative in Washington and a member of the board of directors of the Central Bank. His expert evidence related on the one hand to the historical and economic background to and the strategy for Argentina's raising of international capital in the 1990s and until 2001, and the efforts to avoid a default in 2001, and on the other hand to the bond placement mechanism, both in the public and the private sector, with specific reference to the case of Argentina.
215. In his oral evidence, Mr Marx confirmed that, as was normal, the bond issuer was directly involved in the initial placement but had no control over the secondary market which is very fluid and also very diverse for bonds issued by emerging economies; this was true in Argentina's case as well. He made the point that the main reason why Argentina was issuing debt towards the end of the 1990s was to pay off debt that had previously been issued, most of it in foreign currency. He reiterated the fundamental principle of non-discrimination embodied in the *pari passu* rule, and also the central role played in debt restructurings of the debtor's capacity to pay.
216. Under cross-examination, Mr Marx explained both his public roles (including at the time of a particular bond issuance in 2000, when he was Secretary of Finance and Mr Molina the National Director of Research and Debt Negotiations of the National Office for Public Credit) and in the private sector. He declined to offer definitive answers to questions about the legal operations of the secondary bond market or the legal characterization of security entitlements, as these were legal questions lying outside the field of his expertise. He agreed however that the holder of a Bond from time to time would acquire by transmission the same rights as the initial underwriter, and that, when funds were paid on the issue of a Bond and placed in foreign accounts in the name of the Republic of Argentina, the accounts reflected these funds as assets of Argentina. Referring to the 'road shows,' Argentina targeted its presentations at those who it understood were qualified investors and never sought to make these

presentations to retail investors, but subsequently there were contacts with representatives of individual bondholders, whose adherence to the POE Argentina was seeking. In cases of restructuring the process always starts with an offer made by the debtor, but after consultations with interested parties, so as to gain a significant take-up of the offer. A restructuring obviously had, in the aggregate, negative consequences for those holding bonds at the time, but other investors might have bought up defaulted bonds at depressed prices and then made a profit out of a restructuring.

217. In further questioning, Mr Marx confirmed the essential differences between the role of the underwriter as principal purchaser of a bond and that of purchasers in the secondary market, including the due diligence obligations that apply to the underwriter would not apply to mere participants in the secondary market. He confirmed also that it was possible for a security to have a market value below face value, even well below, without any declaration of default, for a whole range of possible reasons. He confirmed finally that the market was not a single market, so that different operators might be working from different screens showing different prices, particularly when an unsophisticated operator resorting to an agent might find himself faced with a price different from (sometimes substantially so) the price that could have been available on a larger platform, and that the transfer of purchase price on the secondary market took place simply between the actual buyer and seller on that market.
218. In answer to questions from the Tribunal, Mr Marx referred to some of the circumstances under which, in the 'new financial architecture,' sophisticated investors might have protected themselves against losses through defaults, for example through credit default swaps, which would not necessarily have been acquired from insurance companies. He explained further that, in a secondary market, the price of an asset like a security interest in a bond might change for reasons other than the ability of the bond issuer to pay; that would depend largely on the transparency and liquidity of the particular market, but when those characteristics were not fully present in any given market, there could be any number of circumstances in which prices were neither clear nor obvious.

### 3. Closing statements of the Parties

#### a. *The Respondent*

219. In closing for Argentina, Counsel for the Respondent reiterated the arguments of law and fact that had been put before the Tribunal. They submitted that the testimony of Mr Molina demonstrated not only that Argentina conducted market surveys before making its restructuring proposals, but that it did hold numerous meetings with groups and associations representing the holders of different securities, both institutional and retail, which were conducted transparently and in good faith. They stressed that, under Article 75 of the Argentine Constitution, debt restructuring lies within the prerogatives of the national Congress, which had over the years delegated this power to the Executive under various legislative acts, such as the Budget Law and the Financial Administration Law; what Law 26,017 did, accordingly, was to reassume the exercise of that prerogative, but in no sense did it forbid the undertaking of consultations or negotiation with foreign creditors, it simply forbade the Executive to reopen the Exchange process without Congressional authority. As to the judicial decisions in cases such as *Galli* and *Ghiglino Zubilar*, they concerned the conversion into Pesos of public debt governed by Argentine law, not securities governed by foreign law and jurisdiction. In any case, judgments of the Supreme Court were binding only in respect of the case in hand, and the jurisprudence of the courts could subsequently be reversed, as indeed had happened precisely in respect of the emergency laws which laid down the pesification of bank deposits and the staggering of financial obligations. Moreover, the *Galli* case was an *amparo* action in which the claimant had indeed obtained favourable decisions both at first instance and on appeal within the 18-month period stipulated in the BIT, nor was it true to say that this case was eventually disposed of as non-justiciable, as the Supreme Court did go into the substantive merits.
220. As to the definition of ‘investment,’ the Respondent accepted that it was not decisive whether the word ‘*bono*’ (‘bond’) did or did not appear in the text of the BIT; the point was rather that, because the word ‘*bono*’ exists in Spanish, but was not used in the Spanish text of the BIT, there was no sound basis for the Claimants’ argument that ‘*obbligazioni*’ in the Italian text was intended to include bonds. The Parties were also in agreement that the ascertainment of an ‘investment’ had to meet a double-

barrelled test, under both the ICSID Convention and the BIT. But, even if one were to adopt an extreme position, and argue that the only thing that mattered was the agreement between the Parties expressed in the BIT, the numerous references in the BIT to ‘territory’ showed that territoriality was a fundamental criterion that had to be satisfied; this could be seen from Article 1(1), on definitions, Article 2, which included the provision on fair and equitable treatment, Article 3(1), on most-favoured-nation treatment, and Article 5(1), on expropriation. It remained therefore the Respondent’s position that the assets in this case, purchased as they were and paid for outside Argentina, and not purchased from or paid to Argentina but from persons unknown to Argentina, and subject to foreign law and jurisdiction, not that of Argentina, contained no element of territoriality. The ultimate argument by the Claimants, that if Argentina benefited from the securities it could not deny its link to them, could not stand in the face, for example, of the indication by the *SGS v Philippines* tribunal that a loan to a State to build an Embassy abroad could not qualify as an investment: “in accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT.”<sup>98</sup> The Claimants appeared however to recognize that the individual Claimants did not have an investment, but only shares in an investment, in which the actual investor was the underwriter bank. However the problem with that line of argument was that under the ICSID Convention any claimant had to have an investment at the time the arbitration procedure began and could not construct an artificial ‘investment’ by joining together with others, any more than a piece of an apple could be regarded as itself an apple. There was moreover no provision in the treaties, nor in customary international law, giving rise to a compulsory joinder of actions without the consent of the respondent State.

221. Finally, it remained the Respondent’s position that the Claimants had given no valid reason for ignoring the preconditions to arbitration laid down in Article 8 of the BIT. The factual evidence before the Tribunal showed that negotiations had been possible and had led to more generous offers to creditors. The point was, however, that the particular Claimants resorting to arbitration had to have satisfied these preconditions themselves.

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<sup>98</sup> *SGS v Philippines*, para. 99.

*b. The Claimants*

222. For the Claimants, Counsel drew attention to the formalistic approach which the Respondent was taking on many issues. He submitted further that Mr Marx, given his personal involvement in the questions at the centre of the dispute, should be regarded as an ordinary witness of fact, not as an expert.
223. Commenting generally on the evidence, Counsel submitted that, while it showed that there had been meetings and discussions with bondholders in some form before the 2005 POE, the witnesses had not been able to show that there had been any real substance to them leading to significant improvements for bondholders. He submitted further that the evidence showed that it would not have been possible for the present Claimants individually, or even as a group, to have entered into negotiations with Argentina to achieve the results sought in the arbitration. He objected to the Respondent's assertion that negotiations should have taken place before the 2005 POE, since it was precisely that event that had the most decisive detrimental effect on the Claimants' position. As to the supposed reopening of the offer post-2005, he submitted that all it had led to (in the 2010 POE) was a reiteration of the same absolutely unacceptable terms.
224. Commenting on the evidence that the issue of the Bonds on the international financial markets had followed a usual, standard procedure, Counsel submitted that this was further proof that they had to be understood as covered by the references to bonds in the BIT, if the latter was to have any meaning, and proof also that the Bonds were intended right from the beginning to have been indebtedness that would circulate in the market. Conversely, however, the fluctuation in their market price was irrelevant for the purposes of what is owed by the issuer, as the indebtedness remains throughout the Bonds' lifetime, until maturity. He noted Mr Marx's confirmation that the proceeds of the Bonds were considered to be part of Argentina's foreign reserves and general assets. He dismissed the argument that arbitration was intrinsically unsuited to investment arbitration, as breaching the *pari passu* principle, because, if so, the same argument would apply to legal action before national courts.
225. The Claimants' case was that the initial transfer of the funds made by the underwriters to Argentina was part of a gigantic outlay of money which was lent to Argentina for a very considerable duration of time, and it went straight to the benefit of Argentina for

the purposes of servicing its foreign debt etc., the Bonds being simply evidence of the loan. It was undisputed that loans are investments in the ICSID case law, and it was irrelevant that the investment was divided up into smaller bits and pieces and distributed, by reason of the universally accepted concept of the unity of the investment; nor could the mere size of individual holdings be decisive, or else it would be a licence to interfere with small investments, while large ones would be protected. There was a compelling analogy with the situation of shareholders, who would obviously be entitled, in the case of the expropriation of a company, to whatever protection the relevant BITs opened to shareholders, and this would be regardless of the number or size of each shareholding and the length of time for which it had been held. And the situation would have been the same had the company issued bonds instead of shares. The Respondent's argument as to territoriality was rejected as out of keeping with the realities of today's world, in which so many assets and interests are de-materialized; the argument would have the effect of ruling out most forms of financial protection.

226. The Claimants' position was, accordingly, that all that is relevant for the entitlement to protection under a BIT is the situation at the moment at which arbitration is brought, and that each holder of a portion of the total investment has a right to bring proceedings if it falls under a relevant BIT.
227. As to the Respondent's argument – that BIT protection and ICSID coverage was unsuitable for bond holdings and damaging to bond markets – it was largely an argument of policy not law, and was counter-intuitive; it would entail that a borrower like Argentina could escape liability simply by spreading the holders of a Bond amongst different nationalities. The case was in any event the same as for shareholders; the fact that claims might emerge under different BITs was an inherent feature of the system, but did not make it unworkable, nor would it affect the *pari passu* principle any more than lawsuits before national courts.
228. The Claimants accepted that the *Ley Cerrojo* did not prohibit negotiations, but regarded that as beside the point, because negotiations that were, by definition, doomed to failure could not in good faith be something that creditors were required to pursue. It was difficult to imagine that Argentina would have been particularly

impressed if 100-odd claimants had asked to negotiate for the modification of the exchange offer.

229. Coming to the case law of the Argentine Supreme Court, Counsel for the Claimants drew attention to the *Ghiglino Zubilar* and *Pico Estrada* decisions (not mentioned in the Respondent's oral argument) which had indeed held that the principle in the *Galli* case applied to foreign Bonds as well as those in local currency.<sup>99</sup> To litigate in the local courts would, the Claimants submitted, be utterly futile and in addition an expensive and complicated burden.
230. With reference to the fact, which featured so largely in the Respondent's argument, that the individual Claimants had not signed the Request for Arbitration, Counsel submitted that this argument addressed the NASAM Mandate, but that was a document that established the relationship between the individual Claimants and NASAM, and had nothing to do, therefore, with their consent to ICSID jurisdiction.
231. Finally, Claimants denied that Argentina was acting like any other debtor unable to pay its debts, as it had repudiated its liabilities by law, which was the archetypical case of State action and quite different from ordinary contractual behaviour; in their submission, it was pure sophistry for the Respondent to argue that the subjection of the bonds to foreign law and jurisdiction prevented the State from interfering with the enjoyment of the investment, irrespective of whatever consequences the foreign governing law might or might not attribute to that interference.

## C. POST-HEARING

### 1. The Post-Hearing Briefs

232. As indicated above (paragraph 22), the Tribunal authorized a single round of post-hearing briefs, which were duly submitted by each side on 8 August 2011.

#### a. *The Respondent*

233. In its post-hearing brief, the Respondent reiterated in summary form the arguments it had put forward (as recorded above) to sustain its preliminary objections. The Respondent submitted: that the proceedings were a collective action that fell outside

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<sup>99</sup> *Ghiglino Zubilar v Argentina*, Supreme Court decision of 20 April 2010, (hereinafter "*Ghiglino Zubilar*") and *Pico Estrada v Argentina*, Supreme Court decision of 4 August 2009, (hereinafter "*Pico Estrada*").

ICSID jurisdiction and the competence of the Tribunal; that the Claimants had not duly consented to ICSID arbitration in view of their failure to sign the Request, the specific invalidity of the Powers of Attorney, and the lack of a reference to ICSID in the NASAM Mandate Package, coupled with the absence of evidence of the Claimants' true identity; that the Claimants had in any case not complied with the specific requirements laid down in Article 8 of the BIT before resorting to arbitration, and were not entitled to rely on the most-favoured-nation clause in Article 3 to evade those requirements; that the Claimants had failed to state a *prima facie* treaty violation; that the Claimants' claims were not within the jurisdiction of the Tribunal *ratione materiae* as their assets did not qualify as investments under either the ICSID Convention or the BIT, and were in any case claims of a contractual nature not falling under the BIT; and that the Claimants' claims were not within the jurisdiction of the Tribunal *ratione personae* owing to the failure of the Claimants to demonstrate sufficiently that they met the nationality requirements of Article 25 of the ICSID Convention and Article 1(2) of, taken together with the Additional Protocol to, the BIT.

234. On that basis, the Respondent asked the Tribunal to:

(a) Decide that it lacks competence and that the ICSID lacks jurisdiction to entertain collective actions of this nature;

(b) Decide in the alternative that it lacks competence and that ICSID lacks jurisdiction because neither the Argentine Republic nor Claimants gave valid consent to these proceedings, and, further, that Claimants' abuse of rights in bringing these proceedings—in the name of a third party—renders any consent they may have given null and void;

(c) Decide in the alternative that there is no *prima facie* violation of the Argentina-Italy BIT;

(d) Decide in the alternative that it lacks jurisdiction *ratione materiae*;

(e) Decide in the alternative that it lacks jurisdiction *ratione personae* or that Claimants lack legal standing to institute these proceedings;

(f) Decide in the alternative that Claimants have not satisfied the conditions necessary to bring a claim under the Argentina-Italy BIT and, therefore, Argentina has not consented thereto;

(g) Order Claimants to pay all costs, expenses, and attorneys' fees incurred by the Argentine Republic (plus interest); and

(h) Grant any further relief against Claimants as may be deemed fit by the Tribunal.

*b. The Claimants*

235. In their post-hearing Brief, the Claimants limit themselves to some of the most important issues raised at the hearing. The Claimants reject as belated the Respondent's complaint about Sig. Parodi's not having taken an active part in all stages of the proceedings, against the background of its acceptance hitherto of Prof. Radicati as duly representing the Claimants. The Brief denies that there is any discrepancy in the listing of the Claimants' standing and identity other than a few clerical mistakes. It points to the efforts made after the hearing, at the Tribunal's request, to agree on a consolidated list of the remaining Claimants in the arbitration, and attaches an updated table containing their names and indicating separately those original Claimants who had accepted the 2010 POE and those who had sold their bonds, as a result of which there were now 79 individual Claimants (or 52 'centres of interest' if co-owners were taken into account). Copies of the passports and of the certificates of residence and citizenship for each of them are also attached. As regards NASAM, the Brief submits that its letter of 17 May 2010 inviting claimants not to accept the new POE, far from proving NASAM's control, shows exactly the opposite. It recites the steps that would have been taken by each Claimant, in order to demonstrate the consent of each of them to ICSID arbitration, and explains the inclusion in the preamble to the NASAM Mandate of the reference to signing the request for arbitration on the basis that NASAM understood only later that ICSID Rules did not require individual signatures, and the Claimants had been promptly informed of this. It reiterates its denial that the 'stigma of a class action' can be attached to the proceedings, which lack the representative nature characteristic of a class action, and asserts that to make the acceptability of multiple-claimant actions dependent on the consent or non-objection of the respondents would be to engraft a condition that is not present in Article 25 of the ICSID Convention; what counts, on

the contrary, “is that the Claimants are all pursuing identical relief for the same illegality on the strength of the same factual and legal grounds.” It rejects once more the Respondent’s due process objection “particularly ... now that the number of Claimants has dropped significantly,” and repeats the converse argument from consistency and efficiency.

236. The Brief recalls the Claimants’ earlier arguments as to the deliberate illegality of Argentina’s conduct, as to the breach of the provisions of the BIT, and as to the nature of each Claimant’s investment and its characterization within the terms of the BIT definitions, as confirmed by the fact that the 2010 POE itself described the assets at issue interchangeably as “Bonds” and “securities” in English (and correspondingly *obbligazioni* and *titoli* in Italian, and *títulos* and *bonos* in Spanish). It submits that the Respondent’s denial that the investment was made in the territory of Argentina falls to the ground once it is registered that both the purpose of the underlying transaction and its actual effect was to bring about a large flow of foreign currency into the Argentine Treasury, against the background of the widespread recognition that the physical location of investment has to be treated with a degree of flexibility especially in the case of financial instruments, whereas the Respondent’s arguments based on the breach of the conditions of resale would simply produce an unjustifiable windfall for Argentina as the debtor.

237. The Brief argues that the doctrine of the ‘general unity of an investment operation’ makes it wrong to focus solely on individual holdings to the exclusion of the broader picture; if (hypothetically) the entire bond issue had been underwritten by a single financial institution or a wealthy individual, it would never have been contested that there would be an ‘investment’ which met each one of the *Salini* criteria, but nothing in this picture changed if the ownership was split between a few or even several owners.<sup>100</sup> In the present case, all of the separate transactions involved in the initial underwriting and subsequent circulation of the Bonds were part of an interdependent whole, which is the whole nature of a bond issue. The Brief draws the analogy with shareholders who, like bondholders, hold individual interests in an investment, but it is uncontested that shareholdings are a form of investment under the ICSID Convention, whatever the number of shareholders or whether they are majority or

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<sup>100</sup> Citing the Award in *CSOB v Slovakia* at para.72, and a series of subsequent arbitral decisions, as well as Prof. Schreuer.

minority shareholdings,<sup>101</sup> and the latter can fall within the definition of ‘investment’ in a BIT which could extend also to portfolio investors. The Brief argues that, once there exists an ‘investment’, its legal nature does not change when entitlement to it (or to a share of it) circulates on the market, nor is there any limitation under investment treaty law to the possibility that a subsequent acquirer has standing as an investor,<sup>102</sup> and particularly so when the host State is aware of the assignment and accepts it in advance, which would lead to an assumption that the extension of jurisdiction *ratione personae* is approved.

238. The Brief contests that there was any violation of the preconditions to jurisdiction under Article 8 of the BIT, as the futility of recourse to local means of settlement is established by comparable local situations that are directly in point, and the Respondent’s argument fails to bring into account the practical and legal effects of the *Ley Cerrojo*, or the real consequences of the Argentine Supreme Court’s decision in the *Galli* case. Finally, as confirmed by the Award in *Impregilo v Argentina*, such obstacles as might remain would be set aside by the operation of the MFN clause.

239. On that basis, the Brief reiterates the Claimants’ earlier prayers for relief, and asks the Tribunal to:

- (a) Reject all of the Respondent’s objections to jurisdiction and admissibility;
- (b) Declare that it has jurisdiction over the case;
- (c) Order the Respondent to reimburse the Claimants’ costs and legal fees.

## 2. The *Abaclat* Decision

240. As indicated in paragraph 24 above, the respective comments of the Parties on the *Abaclat* Decision (hereinafter “the Decision”) were received on 29 November and 19 December 2011.

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<sup>101</sup> Citing *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8 and several subsequent cases, a number of them against Argentina.

<sup>102</sup> At para. 149, citing *Fedax and African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of the Congo*, ICSID Case No. ARB/05/21, Award on Jurisdiction, 29 July 2008 (AL RA 153).

a. *The Respondent*

241. In its comments, the Respondent indicates that, despite certain similarities, there are fundamental differences between the *Abaclat* case and the present case, and stigmatizes the *Abaclat* Decision as arbitrary and biased and as prejudging issues both of jurisdiction and substantive merits that were not for determination at that stage. It submits that the Decision confuses the question of the extent of an attorney's representative power with the separate question of the scope of a party's consent to arbitration, but alleges that (even on the analysis adopted in the Decision) it would not cover the situation of Avv. Parodi, who had never appeared before the present Tribunal. It takes issue also with the Decision's references to the 'spirit' of the ICSID Convention and objects to those areas in which (so it asserts) the tribunal decided *ex aequo et bono* without the consent of the parties. It criticizes the Decision's characterization of the nature of the proceedings since there was no separate filing of individual proceedings that were later aggregated, and takes particular issue with the Decision's reference to the acceptability under certain circumstances of the 'group examination of claims'. It rejects also the Decision's treatment of the 'silence' of the ICSID Convention with regard to multiple claims, where it points out that the majority's approach would use the supposed 'purpose' of the Convention and other treaties as a means of setting aside the jurisdictional limitations which they expressly include, preferring instead the way this issue is treated in the Dissenting Opinion. It insists that there is a qualitative difference, not merely a quantitative one, between individual and mass proceedings, from both the jurisdictional point of view and also that of due process. It criticizes the Decision's over-reliance on the economic aspects of the underlying transactions without properly considering their legal structure, as other tribunals had done in other cases, and in doing so the Decision "completely ignored the operation of sovereign debt placement", even while conceding that security entitlements have no value *per se* but at the same time failing to apply its own conclusion that the determinative factor was the place of performance, since the facts show that under this kind of security instrument the place of performance is invariably outside Argentina. If the forum selection clause is treated as a purely contractual stipulation which does not sound in a treaty-based BIT arbitration, it remains the case that a treaty claim has to be based on the violation of a right, which in this case is a debt, and that debt (and the rights

attached to it) were created and governed by the contract, from which it must follow that the alleged investment was not ‘in the territory of Argentina’. When it comes to the preconditions to arbitration under the BIT, the Respondent points to the differences between the *Abaclat* situation and the present one, in which no attempt was made either to negotiate or to resort to the local courts, even though these are part of the jurisdictional title and condition the consent to arbitration. The Respondent criticizes finally the *Abaclat* tribunal’s decision to engage in a weighing of interests, and the result to which that led in the way of striking out a clear treaty requirement, as pointed out by the dissenting arbitrator; at all events, however, that was a different basis for decision than the ‘futility’ argument being advanced in the present arbitration.

*b. The Claimants*

242. In their comments, the Claimants focus on what they consider to be the three most controversial issues, which, in their view, arise in almost identical terms in the present arbitration, namely whether the failure to engage in the prior steps set out in the BIT has an impact on the Tribunal’s jurisdiction or the admissibility of the Claimants’ claims; whether the bonds held by the Claimants constitute a protected investment under the BIT and the ICSID Convention; and whether the arbitration is a ‘mass’ or ‘collective’ proceeding which gives rise to problems in regard to the Tribunal’s jurisdiction; and argue in this connection in favour of consistency in arbitral decisions.
243. As to the prerequisites of amicable consultations and resort to local courts under Article 8 of the BIT, the Claimants support the Decision’s conclusion that these are not mandatory jurisdictional requirements, and contest the dissenting arbitrator’s view that such admissibility criteria have since become ‘conventionally jurisdictional’ in the light of Article 26 of the ICSID Convention because the BIT contains no exhaustion of local remedies requirement as a condition of consent to arbitrate. The Claimants associate themselves with the Decision’s finding that resort to these prior measures would have been futile in view of the *Ley Cerrojo*.
244. As to the status of bonds and security entitlements, the Claimants note the conclusions reached in the Decision that the BIT and the ICSID Convention focus on different, although complementary, aspects of what constitutes an ‘investment’; that both bonds

and security entitlements fit within the BIT definition and arise from a ‘contribution’ that satisfies the requirements of the Convention; and that the associated investment was “made in the territory of Argentina” because the funds generated were ultimately made available to Argentina, whereas the forum selection clauses were irrelevant for the purpose of determining the place of the investment. They criticise the dissenting arbitrator’s view as deriving from an unduly restrictive core notion of ‘investment’, and cite in this regard two recent Trade Promotion Agreements concluded by the USA to show that the restructuring of public debt can indeed be covered by ICSID unless expressly excluded. The Claimants further criticize the distinction adopted by the dissenting arbitrator between the initial bond issue and dealings on the secondary market, for the reason approved by the Decision itself, namely that, despite their technical differences, they are part of one and the same economic operation and only make sense together, recalling in this connection their argument that the instruments issued on the secondary market are simply portions of the initial global bond issue and are analogous to shares for the purpose of jurisdiction (the Claimants being assimilated to minority shareholders in this respect). The Claimants reject the dissenting arbitrator’s requirement that the investment be linked to some specific project in the host country as the interpolation into the BIT of an element it does not contain, and as met in any event on the facts given the requirements of Argentine law and the way in which receipt from the bond issues were dealt with in the Argentine national accounts.

245. As to the multiparty nature of the proceedings, the Claimants note the enormous difference between the present proceedings and those in *Abaclat* (74 claimants as against 60,000) and the Decision’s finding that the multiparty aspect relates solely to modalities and implementation, and therefore to admissibility not jurisdiction. The Claimants do not however accept that the Decision’s characterization of the *Abaclat* case as a hybrid collective proceeding applies to the present arbitration since – “possibly unlike the *Abaclat* case where the TAF perhaps plays a more intrusive role in directing the litigation” – in the present arbitration each bondholder acts individually and has a direct relationship with its attorneys. The Claimants repeat their argument that consent to multiple claims is automatically implied by acceptance of arbitral jurisdiction in respect of bonds, which by definition are mass instruments, and support in that regard the conclusion reached in the Decision; they reject the

dissenting arbitrator's analysis of the meaning of the 'silence' in this connection in the treaty instruments, and make the point that, if jurisdiction would undoubtedly exist had the proceedings been brought by the original underwriters, it is difficult to see why that jurisdiction would disappear as a result of the placement on the secondary market to a plurality of creditors. They finally accuse the dissenting arbitrator of exaggerating the extent of the procedural adaptations that the Tribunal might have to make in order to cope with the multiplicity of claimants, and especially in this case where the number of the latter is relatively small, and contests the dissenting arbitrator's view that in general prior multi-party arbitrations had proceeded with the express or implied consent of the respondent.

246. The Claimants finally deal briefly with a few less central issues on which the Decision, in their view, endorses the case put before them in the present proceedings, namely the irrelevance of Italian law to the Claimants' consent to arbitration, the role of NASAM, and the existence of a *prima facie* breach of the BIT (as opposed to a mere contractual claim).

3. The *BGS*, *ICS*, *Daimler*, and *RosInvest* arbitrations

247. As indicated in paragraphs 25 and 28 above, brief comments were admitted by the Tribunal on the *BGS*, *ICS*, *Daimler*, and *RosInvest* arbitrations.

a. *The Respondent*

248. By letter dated 17 February 2012, the Respondent invited the Tribunal's attention to the fact that, in a decision the previous month, a US Court of Appeals had vacated the award of the tribunal in the *BG Group plc v Republic of Argentina* arbitration for the claimant's failure to observe the 18-month period for resolution in the local courts, as laid down in the relevant BIT, before resorting to arbitration. It also asked the Tribunal to note that the tribunal in the *ICS v Argentine Republic* arbitration had rejected the claimant's argument that the requirement to resort in the first instance to the local courts was merely permissive and not mandatory, and had denied jurisdiction on that basis, holding in that connection that 'futility' was different from 'unlikelihood' and had not been established.
249. By further letter dated 14 September 2012, the Respondent drew attention to the emphasis laid by the tribunal in the *Daimler Financial Services AG v Argentine*

*Republic* arbitration<sup>103</sup> on the need to establish State consent to arbitration, and the scope of such consent, neither of which could be presumed, as well as to the tribunal's finding that, until the preconditions to consent to arbitration had been fulfilled, an appeal to the most-favoured-nation clause in the BIT was not properly before the tribunal. It drew attention also to the fact that the jurisdictional finding of the tribunal in the *RosInvestCo UK Ltd. v The Russian Federation* arbitration, based upon the application of a most-favoured-nation clause in a BIT, and referred to by the Claimants in their pleadings, had been set aside by the Swedish courts.<sup>104</sup>

*b. The Claimants*

250. In response, the Claimants, by letter of 5 March 2012, asserted that the *BG* decision was by a US court, applying US law, and related to a different BIT not identical in its wording to the present one. The *ICS* award, on the other hand, was distinguishable, not only as being under a different BIT with different wording in the jurisdictional and MFN clauses, but also because the effect of the *Ley Cerrojo* was not in issue.
251. By further letter dated 16 October 2012, the Claimants contested the relevance of the *Daimler* Award, which was also based on a different BIT with non-identical wording, including in its MFN clause, and drew attention to the dissenting arbitrator's criticism of the tribunal's requirement of 'affirmative evidence' of the respondent State's consent to arbitration. The letter asserted that the issue of the futility of pre-arbitration measures had not been decided in the case, which had been argued simply on the likelihood or otherwise of a decision from the Argentine courts within an 18-month period. As regards the *RosInvest* case, it pointed out that the Swedish court decision was in the form of a default judgment which did not enter into the merits of the issue, and asserted that the passages quoted by the Respondent were taken from the respondent's submissions to the Swedish court, not from the court's own judgment.

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<sup>103</sup> *Daimler* Award of 22 August 2012, upholding Argentina's objection to jurisdiction based upon the claimant's failure to comply with the condition of prior submission of the dispute to local courts.

<sup>104</sup> Stockholm District Court, Department 4, Case No. T 24891-07, Default Judgment, 9 November 2011.

### III. THE TRIBUNAL'S ANALYSIS

#### A. THE CIRCUMSTANCES OF THE ARBITRATION

252. The Tribunal recalls that the present Decision relates only to the Respondent's objections of a general character to the Tribunal's jurisdiction to hear the Claimants' claims and to the admissibility of those claims. As recorded in the Minutes of the First Meeting:

The parties agreed that there should first be a preliminary phase in the proceedings covering jurisdiction and admissibility. The preliminary phase would deal with preliminary objections of a general character only, but not with any jurisdictional issues that may arise in relation to individual claimants, which would be dealt with at a later stage as necessary and appropriate.

253. The Respondent's Memorial on Jurisdiction and Admissibility accordingly raised a series of formal objections to jurisdiction *ratione personae* as well as *ratione materiae*, based upon the nature of the proceedings brought by the Claimants, on the nature of Claimant's representation in the proceedings, on alleged defects in the consent to arbitration of both the Claimants and the Respondent, on whether the necessary preconditions to the bringing of proceedings had been fulfilled, and on whether the dispute, as brought before the Tribunal, is one that can lawfully and properly be heard by it under the schema of the ICSID Convention.<sup>105</sup>

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<sup>105</sup> Memorial, para. 304. The Respondent's Objections, which were maintained unchanged at the oral hearing and in the Respondent's Post-Hearing Brief, read in full as follows:

Respondent Argentine Republic respectfully requests that the Tribunal issue an award:

- (a) Determining that it lacks competence and that ICSID lacks jurisdiction to entertain collective actions of this nature;
- (b) In the alternative, determining that it lacks competence and ICSID lacks jurisdiction because both Argentina and Claimants have not provided valid consent to this proceeding, and, further, that Claimants' abuse of right in bringing the claims in this proceeding—in the name of a third party—renders invalid such consent as Claimants may have offered;
- (c) In the alternative, determining that there is no *prima facie* violation of the Argentina-Italy BIT;
- (d) In the alternative, determining that it lacks jurisdiction *ratione materiae*;
- (e) In the alternative, determining that it lacks jurisdiction *ratione personae* or that Claimants lack standing;
- (f) In the alternative, determining that Claimants have not satisfied necessary prerequisites to bringing a claim under the Argentina-Italy BIT;
- (g) Ordering Claimants to pay all of Argentina's costs, expenses, and attorneys' fees; and
- (h) Granting any further relief requested against Claimants that the Tribunal deems fit and proper.

254. The issues for decision by the Tribunal at this Preliminary Objections phase are not new. They (or some of them) have been canvassed in a whole series of recent arbitral decisions in proceedings brought by investors against the same Respondent, the Argentine Republic. The two most closely in point are the Decision on Jurisdiction and Admissibility of 4 August 2011 in *Abaclat and Others v Argentine Republic*,<sup>106</sup> and more recently still the Decision on Jurisdiction and Admissibility dated 8 February 2013 in the case of *Ambiente Ufficio SPA and Others v Argentine Republic*,<sup>107</sup> both of which concern assets of exactly the same type as those in issue in the present Arbitration, and both of which are taking place under the same treaty as the present Arbitration, namely the Agreement of 22<sup>nd</sup> May 1990 between the Argentine Republic and the Republic of Italy for the Encouragement and Protection of Investments. The Tribunal singles out for particular mention the *Ambiente Ufficio* case, since not only does it have these elements in common, but a further common feature is that the Claimants are represented both in that case and in this by the same Counsel, and the Respondent is in its turn defended by the same legal team in both cases. None of this is in any way confidential; the existence of these exactly parallel arbitration proceedings was well known to all concerned throughout the present case, and indeed Counsel on both sides acknowledged more than once during the oral proceedings that the arguments being advanced in the present arbitration were to all intents and purposes identical to those that had been advanced in *Ambiente Ufficio* (or, as it was then known, *Giordano Alpi*).
255. This state of affairs called forth the following comment from the *Ambiente Ufficio* tribunal (referring primarily to the earlier decision on jurisdiction rendered by the *Abaclat* tribunal):

10. In light of the substantial parallels between the present case and the *Abaclat* case, in particular of the fact that the Respondent used to a large extent the same or similar arguments to those it put forward in the present case, and given that both Tribunals have come to the same conclusion, i.e. to affirm that the Tribunal has jurisdiction and that the claims brought forward by the Claimants are admissible, it would be artificial for this Tribunal to ignore the Decision taken by its sister Tribunal.

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<sup>106</sup> Formerly *Giovanna a Beccara and Others v Argentine Republic*, ICSID Case No. ARB/07/5. See also the Dissenting Opinion of 28 October 2011.

<sup>107</sup> Formerly *Giordano Alpi and Others v Argentine Republic*, ICSID Case No. ARB/08/9.

11. Quite evidently, it is highly common for arbitral tribunals in general and ICSID tribunals in particular to take inspiration from the decisions of other tribunals having faced similar questions or situations. However, there can be no doubt that there is a special, particularly close relationship between the present and the *Abaclat* cases – most obviously, as has already been pointed out, due to the substantial overlap of the questions of fact and law the two Tribunals are confronted with in their respective cases.

12. The present Tribunal will therefore not hesitate to benefit, where applicable and appropriate, from the reasoning of the *Abaclat* Tribunal. Far from adhering to any doctrine of *stare decisis* or considering itself legally bound by the findings of the *Abaclat* Tribunal, this implies a process of critically engaging with the majority decision, but also with the counter-arguments contained in the dissenting Opinion of Professor Abi-Saab. It will become manifest throughout the subsequent reasoning that the present Tribunal agrees with many, though not all, considerations and views expressed in the *Abaclat* Decision, and the Tribunal will refer to these parallels in the pertinent context.

13. The Tribunal wishes to emphasize, however, that it is well aware that it is called upon to decide the case submitted to it by the Parties on its own needs and merits. The reasoning of the *Abaclat* Decision can thus be of relevance to that of the present Tribunal only if and to the extent that the Parties in the present case have submitted arguments similar to, and compatible with, those marshaled in the *Abaclat* case.

The Tribunal regards these comments as constituting simple wisdom, and has taken them duly into account in carrying out its own task in the circumstances that confront it.

256. These are unusual circumstances. It can hardly be doubted that, given these circumstances, it would have been more efficient, and would almost certainly have led to savings in time and expense, had the present case and the *Giordano Alpi* case been brought together as one single case, or, even if initiated separately, if the general issues presently under consideration had been joined into one single set of arbitration proceedings, or if arrangements had been made for the two tribunals to be composed identically, or at least for the two sets of identical arguments to have been heard together. All that transcends, however, the powers of an individual ICSID tribunal, and depends on the wishes and procedural rights of the parties; a tribunal can do no more than respond constructively in pursuit of its own autonomous duty of efficiency and economy within the boundaries of its own jurisdiction. Given, however, the

actual course of events, the Tribunal is of the opinion that it can dispense with the need to set out in detail the factual background to the present Arbitration or to recite at undue length the arguments advanced before it by the Claimant and Respondent Parties. As to the first (the factual background), the Tribunal can simply adopt for present purposes the description given by the *Abaclat* tribunal in paragraphs 8 - 97 of its Decision of 4 August 2011 both of the process by which the Argentine Republic placed bond issues on the market and the subsequent default and exchange offers in respect of those bonds. As to the second (the arguments of the Parties) the Tribunal notes the careful and comprehensive account given in paragraphs 68-110, 173-203, 279-296, and 355-414 of the Decision of 8 February 2013 by the *Ambiente Ufficio* tribunal, which corresponds closely to the way in which the argument has been presented in the present proceedings, give or take some small shades of emphasis to which no substantive significance attaches.

## **B. JURISDICTION AND ADMISSIBILITY**

257. The Tribunal, as appears above, is confronted in these proceedings with a series of preliminary objections of a general kind entered by the Respondent, on the basis that acceptance by the Tribunal of any or all of these objections as well-founded would bring the arbitration to an end. In the other comparable arbitral proceedings referred to repeatedly herein, the tribunal in question has debated at length whether some of these objections should be classed under the heading of ‘admissibility’ rather than that of ‘jurisdiction’. The present Tribunal is not convinced that the distinction between the two concepts, such as it may be, raises any major difficulty; but nor is it convinced that the distinction is of any particular importance in disposing of the issues presently before it.
258. The starting point is Article 41 of the ICSID Convention, read in conjunction with Rule 41 of the Arbitration Rules. Article 41, which appears at the head of the Section of the Convention dealing with the powers and functions of a tribunal, first makes the Tribunal into the judge of its own “competence”, before going on to provide for “[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the tribunal”. In elaborating on the procedural aspects, Rule 41 is cast in similar terms: “Any objection that the dispute or any ancillary claim is not within the jurisdiction of the

Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible etc. etc. etc.” In the French version, the equivalent texts refer to the Tribunal’s ‘compétence’, to a ‘déclinatoire de compétence ... fondé sur le motif que le différend n’est pas de la compétence du Centre ou, pour toute autre raison, de celle du Tribunal’, and to ‘Toute déclinatoire de compétence fondé sur le motif que le différend ou toute demande accessoire ne ressortit pas à la compétence du Centre ou, pour toute autre raison, à celle du Tribunal’. The Spanish texts talk about the ‘jurisdicción’ of the Centre and the ‘competencia’ of the Tribunal.

259. It will be seen that the terminology is not entirely uniform, nor is it consistent as between the languages. Nevertheless, these provisions taken as a whole, and appreciated within their context, serve plainly to reflect the two types of limiting factor that go to determine whether a particular case may properly be heard by a tribunal established under the ICSID system, the first being the overall scope of ICSID arbitration, and the second being the factors germane to the seizing of a specific tribunal to hear a specific dispute. The first refers, that is to say, to Article 25 of the Washington Convention, as the foundation text, which like Article 41 is also phrased in terms of the “competence of the Centre” (‘compétence’ and ‘jurisdicción’ in French and Spanish, respectively); the second, by contrast, bears primarily on factors such as the consent of the parties, the nature of the particular dispute and the like, which would normally be thought of, in common parlance in English, as the elements necessary to ground the ‘jurisdiction’ of the tribunal. The question that remains therefore is whether there exist other conditions, over and above these more strictly ‘jurisdictional’ ones, that can properly be invoked before an ICSID tribunal as grounds for it to decline to hear a case, even though the case falls within its ‘jurisdiction’. Whether any such ought usefully to be given the label of ‘admissibility’ is open to question. The term, as Schreuer points out, is not used either in the Convention itself or in the Rules;<sup>108</sup> moreover both Convention and Rules put the ‘other reasons’ on exactly the same footing as those relating to the Centre’s ‘jurisdiction’, and treat both as raising issues going to the tribunal’s ‘competence’.<sup>109</sup>

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<sup>108</sup> Schreuer Commentary (2nd ed.) at p. 86.

<sup>109</sup> See, in a similar vein, the Decision on Jurisdiction and Admissibility of 8 February 2013 of the *Ambiente Ufficio* tribunal at paras. 572-575.

260. The Tribunal will therefore make the following broad division in coming to a consideration of the barrage of preliminary objections that have been raised before it by the Respondent: between those objections that raise the issue whether the Parties have duly consented to the dispute being brought to ICSID arbitration (which fall more on the ‘jurisdictional’ side of the line) and those objections that raise the question whether, even if the Parties have duly consented, there nevertheless exist reasons why the Tribunal should decline to hear the dispute in the form in which the dispute is brought before it, even though it possesses the formal competence to do so (which thus fall more on the ‘admissibility’ side of the line). Once the position is stated in that way, logic dictates that the ‘jurisdictional’ objections be taken first.

1. “Mass claims”: the ICSID Convention

261. For the reasons given above, and benefitting from the comprehensive analyses on the record from the *Abaclat* and *Ambiente Ufficio* tribunals, the Tribunal does not consider it necessary to approach the ‘jurisdictional’ objections *seriatim* in the way in which they have been set out in the Respondent’s written pleadings, but has grouped and selected them as follows below. Before proceeding to that point, however, the Tribunal will deal with an objection put forward by the Respondent which is of a more fundamental character, namely that the continuation of the arbitration is precluded altogether, because it constitutes a form of mass or collective arbitral proceeding that is simply not within the scope of the ICSID Convention. This is an objection that has occupied a considerable part of the written and oral pleadings of the Parties on both sides. It is also one to which the *Abaclat* and *Ambiente Ufficio* tribunals devoted substantial attention. The Tribunal accordingly finds it better to deal with the matter at the very outset of its decision.

262. The conflicting arguments of the Parties are set out above and need not be repeated; the extensive pleadings have not led to any perceptible narrowing of the gap between them. The *Abaclat* and *Ambiente Ufficio* tribunals have both found against the Respondent on the point at issue.

263. In the view of the *Abaclat* tribunal, the fact that the case before it had been brought on behalf of 180,000 claimants, even though the number later reduced to 60,000, made it into a “mass claims” proceeding, and indeed the first such in the history of ICSID. It characterizes the case before it as “a sort of a hybrid kind of collective proceedings, in

the sense that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of Claimants involved”.<sup>110</sup> It finds that the failure of the ICSID Convention to mention proceedings of this kind should not be regarded as what the tribunal refers to as a ‘qualified silence’ but instead as a gap, and a gap which an individual ICSID tribunal is endowed with the inherent power to fill through making the necessary procedural dispositions under Article 44 of the Convention. It further finds that the respondent State’s consent to the jurisdiction of the Centre includes claims presented by multiple Claimants in a single proceeding, and that there was sufficient homogeneity between the claims before it<sup>111</sup> to justify treating them together by way of an adapted procedure.

264. These conclusions were vigorously contested by the dissenting arbitrator, who accuses the majority of evading the real issues as to the nature of the proceedings and the homogeneity or otherwise of the claims; of illegitimately invoking considerations such as the ‘spirit’ of the ICSID Convention; of failing to focus due attention on the critical question of the respondent’s specific consent to arbitrate, as well as the ‘strict and exacting’ requirements for consent at the international level; and of arrogating to itself unwarranted powers of ‘procedural improvisation’ without the consent of all parties, and without due regard to its impact on the due process rights of all parties, by adopting an inappropriate ‘balance of interests’ test.
265. In *Ambiente Ufficio* on the other hand, the tribunal, confronted with 119 original claims, later reduced to 90, approached the matter in a somewhat different way. It rejects the labels ‘mass claim’ or ‘class action’ in favour of the factually objective descriptions ‘multiple claimants,’ or ‘multi-party proceeding,’ and treats the matter as a question going, firstly, to the scope of the ICSID Convention and, secondly, to the extent of the respondent State’s specific consent under the BIT, and notes in this connection that the case was not one in which separate claims had first been brought individually (with the question of their formal joinder or consolidation arising

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<sup>110</sup> *Abaclat* Decision, para. 488.

<sup>111</sup> On the basis of: the identity of the rights and obligations at issue for all claimants; the fact that the claimants were claiming in respect of the same events, which affected them all equally; the fact that Argentine legislation and the POE arrangements affected all of the claimants in the same way (*Abaclat* Decision, para. 543). The tribunal makes a particular point in this connection of the fact that, in its view, the claims before it are treaty claims under the BIT, not contract claims (*Abaclat* Decision, para. 541).

subsequently), but rather one in which claims had been brought on a joint or collective basis from the outset. As to the significance of the fact that neither the ICSID Convention nor the BIT expressly addresses situations of this kind, the tribunal holds that the use in each of these treaty instruments of the term “investor”, in the singular, should not be taken, on normal principles of treaty interpretation, to exclude the plural, not least because it has never been read this way by past ICSID tribunals and because Article 8 of the BIT does indeed use the term in its plural version on two occasions. It reinforces this conclusion by marshalling some evidence that the possibility of (at least rudimentary) multi-party proceedings was known at the time the Convention was under discussion, and by the argument that multi-party proceedings must in any event have been known to both States when they subsequently negotiated the BIT, as is borne out by the large number of ICSID arbitrations involving multiple parties, on occasion more than 100 parties, and by the fact that in most of them no objection had even been raised on that score, whereas, in the few cases in which an objection had been raised, the tribunal had not upheld it. It refers in this connection specifically to the *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), *Goetz v Burundi*, *Bayview v Mexico*, *Alasdair Ross Anderson and others v Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), and *Canadian Cattlemen* cases, while at the same time noting that in none of these cases did the tribunal in fact find in favour of its own jurisdiction (though always on grounds other than the present issue); the converse had however been true in the *Funnekotter v Zimbabwe* case, involving 14 separate claimants, where the tribunal had investigated its own jurisdiction *proprio motu* and upheld it.

266. These conclusions were once again vigorously contested by a dissenting arbitrator, who, although he shares the view of the majority that the case is neither a ‘mass claim’ nor a ‘class action’, nor any kind of representative proceeding, parts company with them over its true nature, which in his view has to be recognized as “a ‘joinder of actions’ under the form of an ‘aggregate proceeding’” for which either the consent or at least the acquiescence of the Respondent is needed, as demonstrated by the *Wintershall* award.<sup>112</sup> He takes issue with the way the majority derives its

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<sup>112</sup> *Dissenting Opinion of Santiago Torres Bernárdez to the Ambiente Ufficio Decision*, para. 73, referring to the *Wintershall* award.

interpretation of the ICSID Convention as permitting collective proceedings simply because it does not exclude them, which he finds tantamount to the same reasoning as adopted by the majority in *Abaclat*. He is particularly critical of an interpretative approach which uses the terminology of a subsequent BIT as a means of illuminating the intention behind Article 25(1) of the ICSID Convention; in his view, the applicable ‘context’ (for the purposes of the Vienna Convention on the Law of Treaties) is the individual context of each of these two treaty instruments taken on its own. He gives a different interpretation to Article 8 of the BIT, since the one subparagraph (paragraph 3) that does use ‘investors’ in the plural nevertheless refers back to the earlier sense of ‘dispute’, and that is one involving an ‘investor’ in the singular; similarly for Article 5(1)(c) which also forms part of the relevant ‘context’. He analyses in detail the seven cases cited by the majority, which in his view fail to establish either that multi-party arbitration is a generally accepted practice in the ICSID system or that the specific additional consent of the respondent State is not a requirement.

267. The present Tribunal sees no advantage whatsoever in entering into a battle of terminology. None of the terms that have been bandied about in argument is to be found in the two treaties that govern this Arbitration or in the applicable procedural rules, and none of them has a recognized and defined technical meaning in international law. To some extent these terms may derive from national legal systems or practices, though even there not with any consistency or uniformity; moreover, even in the domestic context, some of the terms seem to be used descriptively, rather than normatively, as in the employment of ‘mass claims’ as an indicator of their very considerable quantity – though possibly with the underlying implication that the sheer number of claims demands special procedural arrangements without which they could not be satisfactorily handled. All that the Tribunal need note is, firstly, that the number of Claimants in this Arbitration, somewhere between 183 and 74 (see below) does not in ordinary usage fit the descriptor ‘mass’; whether in the specific circumstances the present claims would require special procedural arrangements is a different question which will be considered below. And, secondly, that (as the *Ambiente Ufficio* tribunal observed in relation to the circumstances of that case) the present proceedings are not of a representative character; each Claimant claims in his own name, advancing his own personal loss in respect of his own

identified investment. It is not a case in which a person claims to represent the interests of others, as well as his own, or in which an attorney claims or seeks authority to act on behalf of persons who have not instructed him.

268. As to the linked question of the consent required on the part of the respondent State, the Tribunal is not impressed by either of the two opposing arguments: either that a multi-party arbitration can only be brought where there has been a second, special consent to that effect; or (conversely) that the parties' (or the respondent's) specific consent is of no special relevance, in the particular context of a multi-party arbitration, to the establishment of the tribunal's jurisdiction.
269. The first of these two arguments (the need for a second, special consent) could either be conceived of as deriving from the general framework of the ICSID Convention or else as relating to the investment treaty or other instrument or instruments establishing the specific consent of the parties to arbitrate. The inference which the Tribunal draws from the way the argument is put forward by its proponents in these proceedings is that it attaches itself most naturally to the ICSID Convention. Even if so, however, the Tribunal fails to grasp its legal substance: if a particular proceeding does not, by reason of its nature, fall within the system set up by the ICSID Convention, then it could not by definition be brought within that system through the medium of an extra consent given to that effect by one of the States Party to the Convention, whether on its own or jointly with an investor or group of investors of another State Party. The law of treaties would not permit it, and the ICSID Convention, talking as it does in its Article 25 of "consent in writing" and "consent" nowhere lays down a staged process by which some kinds of consent are to be established differently from others. If, conversely, the argument attaches itself to the specific coincident consent of the parties to the arbitration, then it seems plain to the Tribunal that there is no separate question; the issue simply folds itself into the normal ascertainment of the parties' consent which is the bedrock of all arbitration. Either the actions of the parties establish "consent in writing" or they do not; consent is not more valid by being given twice, any more than it is less valid for having been given only once. In a BIT case, therefore, where the consent of the respondent State is in issue, the question for consideration remains simply: on the proper interpretation of the BIT, has the respondent, or has it not, given a consent which is wide enough in

scope to cover the proceedings brought (as in this case) by the multiple group of co-claimants?

270. Nor is the present Tribunal attracted by the approach taken by the *Abaclat* tribunal in posing itself the question whether the fact that neither the ICSID Convention nor the BIT deals in express terms with multi-party arbitrations constitutes what the tribunal termed a ‘qualified silence’ or instead was merely a ‘gap’ waiting to be filled. Having heard all of the arguments addressed to it by the Parties on the question, the Tribunal finds it hard to arrive at the conclusion that one of the essential points in contention at this preliminary phase of the Arbitration turns on whether the two treaties employ a particular noun in the singular rather than the plural. This is not simply because it is a well understood drafting convention at both the international and national level that the singular can be used to include the plural, and *vice versa*.<sup>113</sup> At a far more fundamental level, this singularly arid and formalistic approach to treaty interpretation finds no basis in the Vienna Convention on the Law of Treaties which the Tribunal, like the Parties in their argument before it and the tribunals in both *Ambiente Ufficio* and *Abaclat*, takes as the applicable standard. The standard set out in Article 31(1) of the Vienna Convention, that a treaty is to be interpreted in good faith ‘in accordance with the ordinary meaning to be given to the terms of the treaty’<sup>114</sup>, can by no stretch of the imagination be read as imposing a sort of lexicographical literalism. When the Article talks in terms of the ordinary meaning “to be given to” the terms of the treaty it is clear just on the face of it (without even resorting to the preparatory work of the International Law Commission which makes this explicit) that there can in a given case be more than one ‘ordinary meaning’, and the question for the interpreter is to decide which among them was intended by the negotiators, and for that purpose he must be guided by context (in its widest sense) and object and purpose, and also by the additional and where appropriate the supplementary means enumerated in Article 31(3) and (4) and Article 32. This means, to the mind of the Tribunal, that the question to be answered in this case is: are the words “dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State” as they appear in Article 25(1) of the ICSID Convention to be understood as meaning ‘dispute between a Contracting

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<sup>113</sup> See para. 186 above.

<sup>114</sup> In their context and in the light of the treaty’s object and purpose.

State and one, but only one, national of another Contracting State’? If the answer is no, no further question arises under the Rules (either the Institution Rules or the Arbitration Rules), since they are not able to change the scope of the Convention, but must instead be read in harmony with its terms. But finally, even if the answer is no, that would still not dispose of the separate question of what the Respondent had consented to in its ‘standing offer’ under the BIT. That follows from the fundamental fact that the procedure under the Convention can be employed only if the parties to the dispute have consented to submit their dispute to ICSID arbitration, so that in a case like the present the Respondent’s treaty-based consent must be matched by the consent(s) of the party or parties who seek such arbitration.

271. Once it is correctly posed, it seems to the Tribunal that the question at issue answers itself. The Tribunal can see no reasonable basis for implying into the text as it stands of Article 25(1) the additional words ‘but only one’. The Tribunal is of course aware that the question of disputes involving more than two parties was at one stage raised at a regional meeting during the Convention’s drafting process but was not reflected in terms in the text. It is also aware of anecdotal evidence from a former staff member of the World Bank that consideration was at one stage given to the possibility of collective claims but not pursued, and that in a meeting of the Administrative Council on 29 September 1969 the Secretary-General adverted to the desirability of developing rules and regulations to govern multi-partite disputes that might be put before the Centre.<sup>115</sup> The second of these items may not rank as ‘preparatory work’ at all, for the purposes of Article 32 of the Vienna Convention, but in any case none of these items is decisive enough to serve for the particular purpose stated in Article 32(a).<sup>116</sup> The Tribunal therefore concludes that there is nothing in the context – nor in the additional or supplementary materials described in the Vienna Convention – to support importing into the text of Article 25(1) the additional phrase mentioned above. The Tribunal reaches this conclusion by the application of the normal principles of treaty interpretation without the need to call in aid any general proposition culled from a potentially contestable assessment of the ‘object and

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<sup>115</sup> Remarks of Secretary-General Aron Broches to the Third Annual Meeting of the ICSID Administrative Council, 29 September 1969.

<sup>116</sup> “...to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure...”.

purpose’ of the ICSID Convention, still less to invoke concepts not mentioned in the Vienna Convention of which the Respondent in this case has been sharply critical.<sup>117</sup>

272. Nor does the Tribunal see that this conclusion would lead to any difficulty either in the direct application of Articles 27, 36, 38, or 39 of the ICSID Convention (each of which refers to “national” in the singular), or if those Articles are regarded (as they should be, following Article 31(2) of the Vienna Convention) as part of the ‘context’ for the interpretation of Article 25: in each case the application of the Article adjusts itself naturally to the fact of there not being simply one claimant party but more than one. Article 36, for example, concerns the request for arbitration, and is purely procedural, not substantive. Article 27, which contains the obligation not to give a claimant diplomatic protection, is more substantive; it would however operate seamlessly in the case of a plurality of claimants all holding the same nationality, since the parent State’s obligation would be equal and identical for all of them. That applies equally to Articles 38 and 39, so far as they regulate the nationality of the members of a tribunal, in a situation where (as here) all of the claimants present themselves as holding the same nationality.

273. The above having been said, the Tribunal is not unmindful of the essential point underlying the Respondent’s complaint. However, in the Tribunal’s view the key to this, and to related aspects of the preliminary objections, lies in the notion of ‘a dispute’, and this is an issue to which it will return in connection with the interpretation and application of the BIT.

## 2. The ‘jurisdictional’ objections

274. That question having been disposed of, the Tribunal will now analyse the Respondent’s remaining jurisdictional Objections according to the following schema:-

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<sup>117</sup> It appears also to be the case that, after the Convention’s entry into force, the then-Secretary-General, Aron Broches, informed the Administrative Council that consideration was being given to developing model clauses for insertion in investment contracts to cover multi-party disputes and that it would be “useful” for special rules and procedures to be developed for such cases. In the end, it appears that no such clauses or special rules and procedures were proposed to the Administrative Council for its approval. The fact that the Secretary-General considered that the Convention could support multi-party (albeit contractual) arbitration suggests that he for one did not see Article 25’s use of the wording “a national of another Contracting State” as barring such arbitrations. The very fact that the Secretariat was considering such clauses indicates its view that multi-party ICSID arbitration would turn on the consent of the parties.

- a. the Claimants have not properly authorized these proceedings, and therefore have not validly consented to arbitration;
- b. there is no consent to arbitration on the part of the Respondent;
- c. there is no jurisdiction *ratione materiae* as the Claimants' assets do not constitute 'investments' under the terms of the BIT, nor were they 'made in the territory of Argentina';
- d. the Claimants have not established a *prima facie* breach of the BIT;
- e. the Claimants have not duly met the preconditions to arbitration laid down in the BIT.

275. The Preliminary Objections are listed in that way for convenience only. They do not, moreover, exist in watertight compartments; in particular, there is an overlap between b. and e. Nevertheless, given the sheer mass of objections that have been raised by the Respondent, it will assist their rational disposition if the objections are dealt with in that pattern.

*a. No valid authorization or consent by the Claimants*

276. The root of this objection lies in the manner in which the arbitration proceedings were brought on behalf of a multiplicity of otherwise unrelated Claimants. The Respondent has mounted a spirited attack against what has come to be known as 'the NASAM Mandate package', on the grounds more fully described in paragraphs 45, 51-52 and 139-145 above. The essence of the Respondent's complaint, as the Tribunal understands it, is that, although the proceedings stand in the name of each of the Claimants individually, this is in reality a smoke-screen obscuring the facts that the Claimants were recruited into a joint proceeding under terms in which not only they had no effective voice over who would represent them and their interests in the arbitration, but they had also expressly renounced any control over the presentation or handling of their case. The Respondent further complains, in narrower and more specific terms, that the Powers of Attorney by which the individual Claimants are said to have authorized counsel to represent them in these proceedings contain defects which render them invalid under Italian law, so that they should not be accepted by this Tribunal for the purposes of ICSID arbitral proceedings according to Rule 1 of

the Institution Rules; and that the failure to procure the signature of the individual Claimants on the Request for Arbitration, as required by the terms of the NASAM Mandate package, and the fact that the documents in the package do not explicitly foresee ICSID arbitration, have as their combined effect that the Claimants have not validly given sufficient consent to arbitrate so as to satisfy the requirements of Article 36(2) of the ICSID Convention and Rule 2 of the Institution Rules.

277. These are not negligible objections, but the Tribunal does not regard them as strong enough to sustain the proposition that the Respondent seeks to derive from them, namely that the circumstances before it do not suffice to establish that the Claimants have given their formal consent to arbitrate. This is for two reasons. The first is that the Tribunal shares the concordant view of the *Abaclat* and *Ambiente Ufficio* tribunals that there is nothing in the terms of the ICSID Convention and Rules, nor in the evident intention underlying those terms, that would subject to the technical rules of any system of national law either the giving of claimant consent to arbitration or the capacity of counsel to appear before an ICSID tribunal. Nor indeed, other than the requirement that consent be in writing, do the Convention itself or the Institution Rules lay down any technical requirements as to consents or as to the authorization of counsel or other representatives of the parties to an arbitration. The inference must be that both ‘consent’ and ‘authorization’, as these concepts are used in the Convention and the Institution Rules, are to be given their natural and ordinary meaning – which is in any case what the Vienna Convention on the Law of Treaties requires as a matter of treaty interpretation. To take the sole word “duly”, as it appears in front of “authorized” in Institution Rule 1(1), and read into it the intention to incorporate technical incidents derived from any given system of national law seems to the Tribunal to strain credibility. That is an entirely different matter from the question whether qualified legal practitioners might find themselves, under their own national professional rules, subject to requirements defining the circumstances in which they were entitled to represent clients in legal proceedings; but, if such rules were to exist, neither their policing nor the question whether they applied to an international dispute settlement process are matters for an ICSID tribunal. Nor would it make sense, for example, to imagine an ICSID tribunal demanding that one party to an arbitration follow one set of legal rules, and the opposing party another set, for the purpose of validly establishing the capacity of their representatives to appear against

one another before it. All that the Convention requires is ‘consent’ and ‘authorization’, and there is nothing in the factual circumstances as presented to it that leads the present Tribunal to the conclusion that both are not present as a matter of fact, so far as the Claimants are concerned. In signing up to the NASAM Mandate package, and contributing the cash payment required from each of them under its terms, the Claimants must each have expected that some action would follow in pursuit of the vindication of their legal rights, and the Tribunal entertains no doubt that the field of action contemplated was amply wide enough to include the bringing of an ICSID arbitration. That is enough, in the Tribunal’s considered view, to dispose of the question of the Claimants’ consent to the present arbitration.

278. The above having been said, however, the Tribunal feels bound to make mention of some aspects of the arrangements for the representation of the Claimants in these proceedings. The Tribunal does not accept the full range of the criticisms made by the Respondent in this regard, since many of the aspects criticized are merely characteristic of the incidents of third-party funding in international investment arbitration. Individual views may differ as to whether third-party funding is or is not desirable or beneficial, either at the national or at the international level, but the practice is by now so well established both within many national jurisdictions and within international investment arbitration that it offers no grounds in itself for objection to the admissibility of a request to arbitrate. The present is not however a typical example of third-party involvement; the third party has neither bought up claims in order to pursue them, nor has its involvement come in response to an application by investors for funding in return for a success bonus. That the Claimants in this arbitration are not sophisticated international investors is admitted on both sides; that they were recruited by NASAM is equally common ground between the two sides; that Avv. Parodi has an interest, apparently of a financial nature, in NASAM, and at the same time appears as an individual bondholder on the list of Claimants, would appear to emerge from the documents submitted in the arbitration. None of that is of itself necessarily cause for concern. What does give rise to a degree of anxious concern in the mind of the Tribunal, however, is the combination of those features with the fact that the individual claimants, in giving their mandate to NASAM, at the same time not only sign away their right to obtain more than a percentage of the *pro rata* outcome of an eventual Award in their favour, but in

addition abandon any right of control over the conduct of the arbitration (including the potential settlement of their claims); and that they give their Power of Attorney to represent them for these purposes to a named individual who has never appeared before the Tribunal on their behalf nor played any part in the proceedings after the Request for Arbitration.<sup>118</sup> Instead, their representation as Claimants has been arranged for them through the designation of co-counsel by Avv. Parodi, and all submissions to the Tribunal thereafter<sup>119</sup> have been signed by the co-counsel (often signing for Avv. Parodi as well *per pro*); attendance at all hearings and meetings, from the first Session of the Tribunal onwards, has similarly been by the co-counsel, or some of them, alone. When this situation came under question from the Respondent at a fairly advanced stage in the proceedings, a letter of authority in favour of Profs. Radicati and Barra was produced by Avv. Parodi as an attachment to an e-mail, but was not in the event submitted as a numbered document in the arbitration until it was annexed to the Claimants' Post-Hearing Brief.

279. The Tribunal cannot refrain from expressing a degree of surprise at the above, including at the fact that a key document establishing the authority of the counsel before it was not produced as a matter of course by the Claimants' representatives at the very outset. The Tribunal's discomfort is not lessened by the fact that, although the Request for Arbitration cites, as one of the small number of key attachments to it, a "power of attorney accorded to the attorneys mentioned in para. 6 below,"<sup>120</sup> that is simply not correct, as the only attorney mentioned in the signed Power of Attorney is Avv. Parodi, and the authorization of Profs. Radicati and Barra (as indicated) results uniquely from a sub-delegation by Avv. Parodi in pursuit of one of the lengthy list of powers conferred on him under the Power of Attorney. Nothing in the papers submitted to the Tribunal shows whether the Claimants were in any way involved in this process, nor has any mention been made whether they had been informed of it; this notwithstanding the fact that the designation purports to confer on the co-counsel 'all of the powers' under the Power of Attorney to represent and defend the Claimants (including presumably, therefore, the powers to drop an action at law or abandon the dispute or discharge the debtor, and to dispose of moneys received), and permits these

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<sup>118</sup> With the exception of a limited amount of correspondence dated 24 June 2010, 21 and 26 July 2010, and a signature at the foot of the Claimants' Post-Hearing Brief (cf. the Decision in *Ambiente Ufficio* at para. 271).

<sup>119</sup> Except for the limited correspondence mentioned above.

<sup>120</sup> Request, para. 5.

delegated powers to be exercised jointly or severally. If one adds the facts that these far-reaching consequences are said to flow from the signature of the individual Claimants, who are presented as all being small investors of Italian nationality, and that the signed powers of attorney are in English, it is hardly surprising that the Respondent has probed hard to see whether these arrangements do meet the requirements for ICSID arbitration. Had it not been for the fact that there does exist among the papers submitted in the case an Italian language version of the power of attorney, and the fact that events have shown that individual Claimants did indeed retain the effective power to control their interests at least by discontinuance under Arbitration Rule 44,<sup>121</sup> the Tribunal might indeed have found itself confronted by a real question as to due authorization and therefore as to the solidity of the Claimants' consent to this arbitration.<sup>122</sup> As it is, the Tribunal is satisfied that any absence of real consent would have manifested itself in one way or another, and therefore sees no reason to deflect from its conclusion in paragraph 271 above. But it does feel bound to record its feeling that there has been in some respects a cavalier disregard of the niceties that falls below the standards normally expected in ICSID arbitration.

*b. No consent to arbitration on the part of the Respondent*

280. The Tribunal has already disposed above of the argument that some form of special consent from the Respondent is required on account of the allegedly 'mass' nature of the claims in the present Arbitration. As indicated in paragraph 270 however, that leaves intact the question of the Respondent's specific consent for the purpose of the present proceedings, and, as indicated in paragraph 273, that question is intimately wrapped up in the notion of a 'dispute'. To the mind of the Tribunal, that is one of the essential issues in this phase of the case.
281. The Claimants' argument is simply that, in bringing the Arbitration, they are availing themselves of the Respondent's standing offer conveyed by Article 8 of the Italy/Argentina BIT. The Respondent's reply is that the standing offer does not extend to the circumstances of this case. The relevant terms of Article 8, under the

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<sup>121</sup> Apparently by revocation of the power of attorney, Claimants' Post-Hearing Brief, para. 51.

<sup>122</sup> The Tribunal notes in this connection the comments of the *Abaclat* tribunal, at para. 466 of its Decision on Jurisdiction and Admissibility, on possible vitiating factors relating to the individual consent of individual claimants in that case.

heading ‘**Dispute Resolution between Investors and Contracting Parties**’ read as follows<sup>123</sup>:-

Any dispute relating to investments that arises between an investor from one of the Contracting Parties and the other Party, with respect to matters regulated by this Agreement shall be, insofar as possible, resolved through amicable consultations between the parties to the dispute.

If such consultations do not provide a solution, the dispute may be submitted to a competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment is located.

If a dispute still exists between investors and a Contracting Party, after a period of 18 months has elapsed since notification of the commencement of the proceeding before the national jurisdictions indicated in paragraph 2, the dispute may be submitted to international arbitration.

For this purpose, and in conformity with the terms of this Agreement, each Contracting Party hereby gives its advance and irrevocable consent that any dispute may be submitted to arbitration.

Subsequent paragraphs deal with the termination of domestic legal proceedings, the choice of arbitral framework, relationship to insurance compensation, applicable law, enforcement of arbitral awards, and the like.

282. It will be seen that the crux of this Article is the concept of a ‘dispute relating to investments that arises between an investor from one of the Contracting Parties and the other Party, with respect to matters regulated by this Agreement’.<sup>124</sup> The Respondent says that the concept does not extend to cover a collective or group claim; it says that in all cases in which investment tribunals have been prepared in principle to accept multiple claims, that has either been on the basis of express consent by the Respondent *in casu*, or at least tacit consent by the failure to raise express objection on that score. It adds more specifically that joinder of multiple claims could only enter into possible consideration if the claims derived from a single legal relationship linking the several claimants. The Claimants reply that it is a generally acknowledged principle that multiple actions can be brought in a single proceeding

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<sup>123</sup> In the joint translation submitted by the Parties.

<sup>124</sup> ‘*controversia relativa a las inversiones que surja entre un inversor de una de las Partes Contratantes y la otra Parte, respecto a cuestiones reguladas por el presente Acuerdo*’ in the original Spanish; ‘*controversia relativa agli investimenti insorta tra una Parte Contraente ed un investitore dell’altra, riguardo problemi regolati dal presente Accordo*’ in the original Italian.

having the same title and the same object, and that this is particularly appropriate to a BIT in which a State makes the offer of arbitration to an indefinite number of potential victims of its actions. They invoke the fact that Article 8(3) of the BIT covers ‘any dispute’ and say that what counts is that the Claimants are all pursuing identical relief for the same illegality on the same factual and legal grounds. They dismiss the relevance of the Respondent’s argument as to the presence of specific consent in previous arbitrations, on the grounds that it seeks to introduce an additional jurisdictional requirement that is nowhere to be found in the ICSID Convention or the case law.

283. The *Abaclat* and *Ambiente Ufficio* tribunals were faced with similar arguments. In its Decision on Jurisdiction and Admissibility, the *Abaclat* tribunal fails to confront the issue directly, and would appear to have treated it as largely subsumed in the argument over ‘mass claims’; to the extent that it does address the matter, it seems to have regarded the potentiality for multiple claimants as arising automatically out of the kinds of investment included in the coverage of the BIT. The *Ambiente Ufficio* tribunal deals with the matter in a more direct and satisfactory way. Having drawn attention *in limine* to the fact that the situation before it (like the one in the present Arbitration) is neither one of *ex post* joinder of separate claims nor one of consolidation of individual actions, the tribunal focuses on the question whether the proceedings before it were or were not covered by the Respondent’s consent to arbitration, and draws the conclusion that the proceedings did indeed fall within the terms of Article 8 of the BIT on a proper interpretation of that provision, as a matter both of its own terms and the relevant context. As between the two, the present Tribunal inclines more closely to the approach taken by the *Ambiente Ufficio* tribunal, although it feels that an even closer attention to the meaning and effect of Article 8 is needed, given the central significance of Article 8 as the locus of the Respondent’s specific consent to arbitrate.
284. The Tribunal begins with the point that it is not within the power of either a claimant or a respondent party in an ICSID arbitration to bring about, of its own sole volition, a joinder or consolidation of separate arbitral proceedings. As the *Ambiente Ufficio* tribunal pointed out, this is not provided for in the Convention or the Rules, nor does it correspond to general principles of international arbitration, based as it is on party

consent. But this is not, in any event, the situation in the present Arbitration, where there never existed a series of separate and parallel arbitral proceedings, but only one single proceeding instituted against the same Respondent by a multiple group of Claimants. If, all the same, joinder, or alternatively consolidation, would not be admissible as a unilateral move by a group of claimants in separate but parallel arbitrations, the question inevitably arises, in what way is the position different if the grouping takes place beforehand, *i.e.* at the stage of the initiation of the arbitral proceedings at the unilateral initiative of a number of individual claimants? In the Tribunal's view, the answer lies – as already indicated above – in the fundamental principle of consent that underlies the entire institution of arbitration. This does not however mean that consent should be understood in a simplistic or mechanistic way; consent can be manifested in numerous ways, and ascertained by various means. It is a commonplace, for example, in the law of treaties – which is equally based on the bedrock principle of consent – that the giving of consent is not limited to some unique formal process at the time of adhering to a treaty, but that valid mutual agreement can be construed from other sources, including acquiescence and events occurring after the conclusion of the treaty; the Vienna Convention on the Law of Treaties is replete with situations in which the necessary consent or mutual agreement is 'otherwise established'. That includes also cases in which the 'agreement' does not come about simultaneously, but is constructed in attenuated form out of disaggregated acts of consent by the different parties. This is a common process which is no stranger to investment arbitration; the entire institution of dispute settlement under bilateral and multilateral investment treaties is based on a standing offer made generally by host States of investment subsequently taken up after a dispute has arisen by individual investors, the whole then being understood to constitute the necessary mutual consent to arbitration or other settlement processes.

285. These basic principles apply themselves equally well, in the opinion of the Tribunal, to the legal situation before arbitral proceedings are brought as they do to the situation afterwards. This is why the Tribunal cannot accept the submissions of the Claimants according to which respondent consent is of no essential relevance in those prior cases in which arbitrations have proceeded on a multi-party basis; nor indeed does the Tribunal feel that the *Ambiente Ufficio* tribunal itself paid sufficient attention to the matter. In the Tribunal's judgement, there are three sets of circumstances in which

arbitration is possible with a multiplicity of parties. One is (hypothetically) when it is specifically provided for, e.g. in an applicable treaty or set of arbitration rules, or in the other instrument establishing the parties' consent to arbitration, as for example where NAFTA Chapter Eleven and several later treaties contain a specific provision under which a "consolidation tribunal" may order that claims be consolidated with others on the ground that there are common issues of law and/or fact. Another is when it receives the particular assent of both parties *ad casum*, which could be express, for example in the procedural arrangements made by the tribunal at the commencement of the arbitration, or it could be inferred, for example by the respondent answering the claimants' claim and continuing with the arbitration without raising objection to the fact that there is a multiplicity of claimants. This second possibility has been the most common in practice, and is what the Tribunal understands to have happened in the *Klöckner v Cameroon*, *Goetz v Burundi*, and *Funnekotter v Zimbabwe*, and also in the *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v United Mexican States* (ICSID Case No. ARB(AF)/04/3) and *Talsud, S.A. v United Mexican States* (ICSID Case No. ARB(AF)/04/4) Arbitrations. A variant on this possibility is the situation where, faced with multiple individual claims, a respondent agrees, at least for preliminary objection purposes, to have the individual claims heard in one proceeding (on the reasoning that if its objection is upheld, that will dispose of all of the claims). This is what occurred in *Bayview v Mexico* and *Canadian Cattlemen v United States* Arbitrations (and appears to have occurred in the *Anderson v Costa Rica* proceeding which, like *Bayview* and *Canadian Cattlemen*, was also dismissed after a jurisdictional hearing was held). In *Bayview*, although the Award does not record the fact, Mexico's pleadings (available on the internet<sup>125</sup>) show that notwithstanding Mexico's objection to the claimants' having unilaterally joined their claims in a single proceeding, it consented to having the tribunal's jurisdiction determined for all claims in a single proceeding. In *Canadian Cattlemen*, the tribunal's Procedural Order No. 1 recorded the fact that the jurisdictional phase was being conducted as a single proceeding by the consent of all parties.

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<sup>125</sup> Mexico's Memorial on Jurisdiction (cf. para. 126) is available at the Secretary of the Economy's website: [http://www.economia.gob.mx/files/comunidad\\_negocios/solucion\\_controversias/inversionista-estado/casos\\_concluidos/Bayview/esc\\_excep\\_mxbv\\_060419\\_ing.pdf](http://www.economia.gob.mx/files/comunidad_negocios/solucion_controversias/inversionista-estado/casos_concluidos/Bayview/esc_excep_mxbv_060419_ing.pdf).

286. In between those two classes of cases lies however a third. This is the case in which it is asserted that the instrument setting up the arbitration or establishing the Respondent's consent to it can properly be interpreted, on the particular facts of the case, as covering the particular multiplicity of claimants within that consent. This is the situation which the Tribunal finds itself facing here. It requires the Tribunal to analyse Article 8 of the BIT and apply it to the specific facts of the present case.
287. As appears above, the concept around which Article 8 revolves is a 'dispute relating to investments'. That is what is referred to at the beginning and end of Article 8(1), in article 8(2), and in both paragraphs within Article 8(3). Article 8(3) indicates, by the use of the term 'investors' in the plural in both the Spanish and Italian authentic versions, that it was within the contemplation of the Contracting Parties at the time that there might in appropriate circumstances be more than one investor involved in 'a dispute'. The Tribunal draws from this usage entirely the opposite inference from that propounded by the dissenting arbitrator in *Ambiente Ufficio*.<sup>126</sup> That there can be more than one investor does not, however, in and of itself determine whether that is so in any given case. Nevertheless, whether there is only one investor, or more than one, there must be 'a dispute'. In that respect, the terminology of Article 8 is uniform: the term 'dispute' appears in the singular, and its singular connotation is not altered by the fact that the word preceding it is sometimes 'a', sometimes 'the', and sometimes 'any'. Given the context, it is plain that – just like the situation under Article 25 of the ICSID Convention (paragraphs 266 above and 288 below) – the use of the singular must be read as presupposing a substantive unity in the 'dispute' submitted to arbitration.
288. The Tribunal must therefore proceed to determine whether what the multiple Claimants have brought before it in this case is 'a dispute'. In many cases that question (or its equivalent under the governing legal instrument) is one that answers itself. The cases are the ones referred to in Schreuer's Commentary<sup>127</sup> as being 'normally the consequence of companies claiming jointly with their parent companies or their subsidiaries and the assignment, in part, of the investor's rights to an additional investor'. Other cases, of which the present is an example as are the *Abaclat* and *Ambiente Ufficio* arbitrations, involve a series of claimants claiming in

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<sup>126</sup> See paras. 266-267 above.

<sup>127</sup> Second edition (2001) at §§25.277-280.

parallel under the assertion that their individual claims are identical, or so similar in their essence as to make it proper to treat them as a single dispute. The most striking examples are the *Bayview*, *Canadian Cattlemen*, and *Funnekotter* arbitrations. None of them are, however, of assistance in the present case: *Bayview* and *Canadian Cattlemen* because there was agreement between the parties at the outset on the consolidation of the claims, at least for the purposes of the jurisdictional phase, and *Funnekotter* because, as the tribunal recites in its Award, the respondent declared in its written pleadings that it took no objection to the jurisdiction, so that the case in fact fell within the second category described in paragraph 281 above.

289. The *Abaclat* tribunal failed to address its mind to the matter. It posed itself the question, “Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could lose [sic] such jurisdiction where the number of Claimants outgrows a certain threshold. First of all, what is the relevant threshold? And second, can the Tribunal really ‘lose’ a jurisdiction it has when looking at Claimants individually?”<sup>128</sup> As the present Tribunal sees it, that was the wrong question, since that way of addressing the matter presupposed that the existence of jurisdiction (= consent) in respect of each individual automatically entailed the existence of jurisdiction (= consent) in respect of a multi-claimant proceeding. By approaching the matter in this way, the *Abaclat* tribunal begged the question as to jurisdiction that required an answer, and sublimated it into an issue of mere ‘admissibility’.<sup>129</sup> The *Ambiente Ufficio* tribunal, likewise, although its treatment of the issues raised by multiple claims is more persuasive than that in *Abaclat*, did not address its mind directly to this central point either. Having disposed of the general arguments against the admissibility of multi-party proceedings under the ICSID Convention and the BIT, the *Ambiente Ufficio* tribunal moved on to the rubric, *The question of the need of a link between the claims in dispute*, in order to answer what it described as a further submission by the Respondent. The Tribunal has received a similar submission from the Respondent State in the present case,<sup>130</sup>

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<sup>128</sup> *Abaclat* Decision, para. 490, first tiret.

<sup>129</sup> *Ibid.*, paras. 515 ff.; see also paras. 256–260 above.

<sup>130</sup> “... there is no link among the Claimants. Owners of security entitlements are persons (physical or juridical) that have undertaken their transactions in a unilateral fashion. Neither the claims nor Claimants here share the characteristics that are typically required to permit joint treatment under collective action regimes. Claimants are suing on 50 different series of bonds, which have different governing rules, issuance dates, type of currency, and amounts. In addition, these bonds were acquired in different places, at very different prices, and on different dates”, Memorial on Jurisdiction, para.111.

and the Parties have reached agreement in their subsequent written argument that there ought to be a “reasonable and significant link” between the claims of the individual claimants, with the Claimants conceding that it would not be possible to adjudicate unrelated claims in a single arbitration. But they parted company at that point: for the Claimants, the applicable criterion is amply satisfied, because all of the claims arise out of what in their submission is a substantially identical legal and factual situation;<sup>131</sup> whereas for the Respondent, it would be a substantial departure from currently accepted practice to extend consolidation from the case of a single investment operation with closely related parties to a case in which unrelated operations and claimants who acquired their investments at different times and under different conditions are linked only by the State measure or measures against which they complain.<sup>132</sup>

290. The *Ambiente Ufficio* tribunal deals with the matter in a somewhat tentative way at paragraphs 152-163 of its Decision. At paragraph 153 it recites that it would “indeed have its doubts” whether completely unrelated claims could be brought by a plurality of persons in one and the same arbitral proceeding, referring in this context to the prerequisites normally encountered in domestic legal systems, but then appears immediately to set that aside as irrelevant to an international proceeding under the ICSID Convention. It records its conclusion in the following terms:

Whatever minimum standard may apply under Art. 25 of the ICSID Convention as to a necessary link between the claims in a multi-party proceeding, and whether such requirement exists at all, can be left open by the present Tribunal. In particular, it does not consider it necessary or useful to elaborate on the question *in abstracto* whether it is required that the claims be “homogeneous” or whether it suffices that they are “sufficiently comparable”, etc. and to try to devise a general standard or threshold in that regard.

That once said, the tribunal proceeds into a discussion of whether a contractual link between multiple claimants is a necessary requirement, which it determines not to be the case, citing in this connection the *Bayview v Mexico* and *Goetz v Burundi* arbitrations, and finding final confirmation in the Award of the *Funnekotter v Zimbabwe* tribunal. Its final conclusion is in two parts: that the necessary link between the parties before it lies in their treaty claim, based on the same allegation of

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<sup>131</sup> See para. 92 above.

<sup>132</sup> See paras. 132-133 above.

illegality, the same prayer for relief, and the same factual background; and that the differences between the situation of individual claimants stressed by the respondent State all relate to the claimants' potential contract claims, which are not relevant to the arbitral proceedings.

291. The majority of the present Tribunal does not however believe, with all the respect that is due to the *Ambiente Ufficio* tribunal,<sup>133</sup> that that is an adequate way of disposing of a question that it considers to be fundamental to the present phase of this case. In the first place, the question is one that calls for an answer; it is not, as the present Tribunal sees it, a question that can be set aside on the basis of 'doubts' nor one that can be left open within the context of a binding decision in favour of jurisdiction. Nor does it find that the distinction between treaty and contract claims, put together with the identity of the illegality alleged, the relief sought, and the factual background, offers an entirely adequate solution either. Indeed, the Parties' very agreement restricting the scope of this phase of the proceeding<sup>134</sup> recognizes that the circumstances of individual claimants can differ, and that such differences might have jurisdictional consequences. At this stage of the proceedings it cannot be ruled out, for example, that the timing and circumstances of a claimant's acquisition of its investment might raise issues going to the nature of the claimant's expectations which in turn might bear on a treaty claim. But leaving the facts of the instant case aside, if the *Ambiente Ufficio* tribunal's criterion were to be applied to a hypothetical situation in which a host State, in an act of conscious discrimination, decided to levy a penal tax on all investments of citizens of a particular foreign country, in retaliation for a political disagreement between the two States in an unrelated area, it would permit all of the affected but otherwise differently situated investors to join together in a common arbitration proceeding with the invocation of the anti-discrimination and fair and equitable treatment clauses in the bilateral investment treaty between the two States. Similarly for an alternative hypothetical scenario in which the host State simply expropriated all foreign property, and in response all the nationals of a given foreign State owning property in the first State brought joint arbitration proceedings against it. It is however common ground between the present Parties that these situations would not be admissible, nor, quite obviously, was that the intention of the

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<sup>133</sup> As indicated above, the Tribunal believes that the *Ambiente Ufficio* tribunal was mistaken in its view that the *Bayview* decision supported its finding.

<sup>134</sup> See para. 252 above.

*Ambiente Ufficio* tribunal either. It follows, in the present Tribunal's view, that the criterion is not fully up to the task it has to perform, and needs therefore to be strengthened. The Tribunal is reinforced in this conclusion by the consideration that the three arbitral decisions invoked by the *Ambiente Ufficio* tribunal do not in reality sustain the proposition it draws from them; as indicated in paragraph 288 above, in all three cases the tribunal was in the presence of consent, express or implied, by the respondent State to the hearing of the claims together. Moreover, to the extent that the *Funnekotter* tribunal went beyond that in the investigation of its own jurisdiction *propriu motu*,<sup>135</sup> its decision on the matter of jurisdiction appears as part and parcel of its Award on the merits – a point which the present Tribunal considers to be of some significance, as will appear below. Co-Arbitrator Böckstiegel, who is also a member of the *Ambiente Ufficio* tribunal, does not share the above criticism and considers the considerations of the *Ambiente Ufficio* tribunal as correct and sufficient.

292. In searching, therefore, for an element that more satisfactorily defines the link that must exist between a group of claimants and between their claims, in the absence of consent by the respondent to the hearing of their claims together, the Tribunal has come to the conclusion that the answer lies in the notion of a 'dispute'. To go back to basics, the jurisdiction created by Article 25(1) of the ICSID Convention 'extends to' (which in context means, is confined to) 'any legal dispute arising directly out of an investment'. ICSID tribunals have always treated this requirement with deliberate importance. They have considered whether the parties are in fact in dispute; whether the dispute is a legal dispute; whether the dispute arises out of an investment; and whether it arises 'directly' out of an investment. The cases are listed in Schreuer's Commentary at pp. 93 ff. The rubric in Article 25(1) contains however a further condition which may not be as immediately obvious, namely that it must be 'a' dispute. The focus on 'a' dispute is continued in both the ICSID Institution Rules (Article 2) and the ICSID Arbitration Rules (Rule 1). There is an exact match with the terms of the dispute settlement clause in Article 8 of the BIT, under which the Respondent issued its standing consent to arbitration, which refers sequentially to

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<sup>135</sup> A point that remains somewhat unclear, because the present issue was not one of those which the tribunal canvassed at paras. 91-95 of its Award, confining itself to the questions of nationality, the nature of investment, and timeliness.

‘any dispute’, ‘a dispute’ and ‘the dispute’.<sup>136</sup> The intention and effect are obvious. These treaty clauses provide a mechanism for the settlement of individual disputes; they do not (absent either special agreement to that effect or joinder) provide a mechanism for the joint settlement of a collection of separate disputes. This does not however mean that the concept of ‘dispute’ has to be given a narrow or over-technical meaning. The Tribunal has already indicated that it is perfectly possible, in its opinion, for ‘a dispute’ to have more than one party on the claimant’s side. But the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute. In most cases hitherto, that question has virtually answered itself. One reason is that there has normally been a single investment, even though more than one person or entity may have participated in that investment’s making or in its management. Another reason is that there has in most cases been some form of pre-arbitration discussion or negotiation with the respondent party, which has served the purpose of establishing with greater or lesser precision what the ‘dispute’ is, and therefore who are party to it. The problem in the present case is that neither of those factors is present: on the one hand, it is in contention between the Parties both whether the individual Claimants should be regarded as investors in their own right or as participants in an original investment or investments in Argentina, and also whether those rights of the individual Claimants that are relevant to this Arbitration, are effectively the same irrespective of which particular investment they bought into and of the terms of their individual purchase; and on the other hand it is common ground between the Parties that the steps prior to arbitration had not been pursued as foreseen in the literal terms of Article 8 of the BIT.

293. As and when the Tribunal were to come to the point of adjudicating on the merits of the ‘dispute’ brought before it in this Arbitration, it would have to consider the rights of the Claimants and how those rights were affected by the actions (or omissions) of the Respondent, in order to decide whether that effect was or was not contrary to entitlements which the Claimants possessed under the BIT. Where, as here, the essence of the Claimants’ claim is a deprivation of rights or a breach of expectations, the Tribunal would have to determine what those rights and expectations were and

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<sup>136</sup> ‘qualsiasi controversia’, ‘una controversia’ and ‘la controversia’ in the Italian; ‘toda controversia’ ‘una controversia’ and ‘la controversia’ in the Spanish.

whether or how far each of the Claimants had been deprived of them. In order to do so, the Tribunal would be required to apply to the facts of the case the law specified in Article 42(1) of the ICSID Convention, *i.e.* (unless otherwise agreed between the Parties) “the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” This is not, in the view of a Tribunal, a matter that can be pre-empted by invoking a supposed distinction between contract claims and treaty claims.<sup>137</sup> Nor can it merely be subsumed into the discussion of jurisdiction *ratione materiae* (see further below) by drawing a presumed inference as to party intent from the scope of the definition of ‘investment’.<sup>138</sup> Until it has been put into a position to do this, the Tribunal is unable to determine, with the force that a formal preliminary Decision requires, whether the actual rights of all of the Claimants (under Argentine law and such rules of international law as may be applicable) and whether the actual effect (under Argentine law and such rules of international law as may be applicable) on those rights (or associated expectations) of Argentina’s conduct were sufficiently the same as to amount to a single ‘dispute’ over Argentina’s obligations under the BIT, even within the broad and non-technical understanding of a ‘dispute’ that is appropriate to Article 8 of the BIT read in conjunction with Article 25 of the ICSID Convention. That is however merely a complicated way of saying that the substance of that jurisdictional issue is so closely entwined with the substantive disagreement between the Parties, both factual and legal, that it has to be joined to the merits. The Tribunal so decides pursuant to Article 41(2) of the Convention and Rule 41(4) of the Arbitration Rules.

294. Given the impact of that conclusion, the Tribunal has of course given anxious consideration to how it compares with the earlier cases – earlier, that is, than the present Argentine bond cases – in which investment tribunals had faced, not a single investment nexus, but bundles of parallel claims. Having done so, it finds no contradiction. The *Bayview* case, a NAFTA ICSID Additional Facility case, involved 46 claimants, some individuals, some public institutions, all alleging interference by Mexico in their water rights by diverting the waters of the Rio Grande. As noted above,<sup>139</sup> the jurisdictional phase of the *Bayview* case proceeded by the consent of all parties (the respondent otherwise reserving its objection to the

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<sup>137</sup> Cf. *Ambiente Ufficio* at para. 162.

<sup>138</sup> Cf. *Abaclat* at paras. 331-332.

<sup>139</sup> Para. 285.

claimants' self-consolidating their claims) and in any event the respondent succeeded in its jurisdictional objection. In the *Canadian Cattlemen* case, a NAFTA case under the UNCITRAL Rules, there were 109 claimant ranchers complaining against a US animal health measure, but there had been separate notices of arbitration by each claimant which were subsequently formally consolidated by agreement into a single proceeding, as recorded in #4 of the tribunal's Procedural Order No. 1,<sup>140</sup> and in any event the tribunal once again declined to uphold its jurisdiction on other grounds. A closer parallel may perhaps be found in the *Funnekotter* case, an ICSID case, involving 14 claimants complaining about separate acts of dispossession of their farms in Zimbabwe, since there the tribunal confirmed its jurisdiction and proceeded to an award on the merits. But, as noted above,<sup>141</sup> the *Funnekotter* tribunal expressly noted the respondent State's acceptance of its jurisdiction. More significant, however, is that the *Funnekotter* tribunal's *ex officio* confirmation of its own jurisdiction took place as part of its Award on the merits.<sup>142</sup> In other words, to the extent that the *Funnekotter* tribunal may be said to have decided to treat as unproblematic a joint claim by multiple unrelated claimants against the same government policy of the respondent, it did so only after it had put itself in a position, in the light of full factual and legal argument and evidence, to assure itself that the various claims before it did indeed constitute 'a dispute'. That is exactly on all fours with the approach which the Tribunal intends to follow in this case. In approaching the case in this fashion, the Tribunal must record its view that to be in a position to make the determination just discussed, it must have a sufficient appreciation of each Claimant's individual circumstances and any other potentially relevant claimant-specific evidence. This will be the subject of a procedural order to be issued after the Tribunal receives the Parties' views on the logistics of the combined jurisdictional and merits phase.

295. The fact that the Tribunal has joined this specific preliminary objection to the merits is without prejudice to whatever consequences would follow if it were in due course to find substantive merit in the objection. Nor, furthermore, does it dispense with the need to investigate the Respondent's remaining preliminary objections, each of which is theoretically capable, if upheld, of bringing the arbitration to an end.

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<sup>140</sup> See the *Canadian Cattlemen* Award, para. 14.

<sup>141</sup> See para. 288 above.

<sup>142</sup> See para. 291 above.

*c. No jurisdiction ratione materiae*

296. The central issue here is whether the Claimants' assets constitute 'investments' within the meaning of the BIT. It is not however a matter that need detain the Tribunal long, as it is one on which the Tribunal finds itself in agreement with the comprehensive treatment given to it by the *Abaclat* and *Ambiente Ufficio* tribunals. Nothing in the ICSID Convention itself presents an obstacle to considering that bonds are capable of constituting investments; the Tribunal notes in this regard that, when the Convention was under negotiation, sovereign bonds were actually used as an example of the potential breadth of the Convention's reach in terms of what sorts of future dispute could be put before an ICSID tribunal.<sup>143</sup> Insofar as the BIT is concerned, the Respondent's argument rests essentially on its wish to give decisive significance to the fact that neither of the authentic language texts of the definitions clause in Article 1 of the BIT uses a term referring expressly to 'bonds', even though such a term ("bonos") does exist in the Spanish language.<sup>144</sup> The Claimants argue, to the contrary, that the more general phrasing used in Article 1(1)(c) is entirely adequate to encompass bonds along with other similar forms of investment. The disagreement between the Parties on the point is encapsulated in the variant translations into English offered by them: for the Claimants, "bonds, public or private securities or any other right to performance or services having an economic value, as well as capitalized income", and for the Respondent, "obligations, public or private securities or any other right to benefits or services with an economic value, as well as capitalized income". The Tribunal, for its part, is unable to read either version of the phrase, taken on its own (*i.e.* including the version put forward by the Respondent), as containing an implicit restriction that would rule out investments taking the form of bonds,<sup>145</sup> assuming of course that the other criteria laid down in the BIT are satisfied. This conclusion, which is the same as that reached by the *Abaclat* and *Ambiente Ufficio* tribunals, is powerfully reinforced by the fact that the whole construction of Article 1(1) expressly treats the cases described in its subparagraphs (a) – (f) as illustrative examples only, which are stated not to be exclusive, and which are

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<sup>143</sup> During the consultations with legal experts in Bangkok, Thailand, in the context of a discussion of applicable law, the Bank's General Counsel, Aron Broches, observed: "There was no doubt that a foreign bond issue by a country constituted an investment by the foreign investors in that country but it would not necessarily be governed by local law," Documents Concerning the Origin and Formulation of the Convention, Volume II, Part 1, p. 514.

<sup>144</sup> Though not, apparently, in Italian.

<sup>145</sup> Whether issued by the State itself, or by other public or private institutions.

expressly placed under the broad rubric at the head of the paragraph: “independently from the legal form adopted or from any other connected legal system, any contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party in the territory of the other, in accordance with the laws and regulations of the latter”.<sup>146</sup> It seems to the Tribunal in any case that, with the whole issue remaining in dispute between the Parties whether what the Claimants hold are ‘bonds’ or instead some derivative asset of another kind, there would be no basis for it to rest its determination of the jurisdictional issue on whether the definition in the BIT did or did not expressly refer to ‘bonds’ as such. It is sufficient for the Tribunal to hold that the original asset held by the underwriting banks was undoubtedly capable *ratione materiae* of falling within the definitions in Article 1;<sup>147</sup> all further questions as to the precise nature of the individual assets of the individual Claimants fall under the same analysis as in paragraph 293 above, and could only be assessed by the Tribunal on the basis of full argument at the merits stage.

297. There is a further issue between the Parties as to whether the Claimants’ assets (even assuming them to be ‘investments’ within the meaning of both the ICSID Convention and the BIT) were investments ‘made in the territory of Argentina’ as Article 1(1) requires. The Respondent has made a number of substantial arguments in this regard (see paragraph 60 above). These are however matters that would need detailed evaluation on the basis of full argument. They are moreover so intimately linked with the question of the exact nature and classification of the property rights of the individual Claimants that, for the reasons already given in paragraph 293 above, this examination must be postponed to the merits.

*d. No prima facie breach of the BIT*

298. Relying on established arbitral jurisprudence, the Respondent argues that a claimant in an ICSID arbitration must show *prima facie* that the matters of which it complains, if duly established, are capable of constituting a breach of the BIT; for that purpose a tribunal will assume *pro tempore* the correctness of the claimant’s factual allegations, but without prejudice to the burden on the claimant to establish the facts on which it relies, to the appropriate standard of proof, if and when the proceedings come to a

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<sup>146</sup> Respondent’s translation; the Claimants’ translation is substantially similar.

<sup>147</sup> Even though most, if not all, of the underwriting banks would not have been entitled *ratione personae* to protection under the Italy-Argentina BIT, as not having Italian nationality.

merits phase. Likewise, the demonstration that the duly established facts do indeed constitute a breach of the BIT is also a matter for the merits. The Claimants do not contest this, but assert that in their arguments and evidence presented to the Tribunal, they have made the requisite *prima facie* showing.

299. The Claimants' principal argument in this connection (which the Tribunal accepts) is that the facts relating to the formal default by the Argentine Republic on its external bonded debt and the subsequent Exchange Offers are notorious and not seriously in dispute. On that basis they assert breaches of the guarantees under the BIT of fair and equitable treatment and of the prohibition on expropriation except against payment of adequate, effective and timely compensation.<sup>148</sup>
300. The Tribunal entertains no doubt that, simply on the admitted facts alone, and on the further assumption that the Claimants are indeed investors within the meaning of the BIT, the complaints raised by them in this arbitration are capable of constituting a breach of one or more of the provisions of the BIT referred to in the preceding paragraph. Whether in the specific circumstances they would in fact constitute a breach is pre-eminently a matter for the merits, and has no impact as a matter of jurisdiction. The Respondent's answer, summarized in its Post-Hearing Brief,<sup>149</sup> lies in the distinction it makes between contract claims and treaty claims; the present claims, it says, are claims for breach of contract, as shown by the fact that the underlying bonds were consciously and deliberately placed beyond Argentine jurisdiction; the Respondent adds that the Argentine State merely behaved in exactly the same way as any private debtor that was unable to meet its debts. The Tribunal is unconvinced by the conclusions which the Respondent seeks to draw. While the distinction between contract claims and treaty claims is undeniable and well established, the mere fact that there is a contractual remedy available to a claimant does not of itself rule out the existence of a treaty claim for actions by the State, in its capacity as such, that affect private rights in a way that implicates a treaty guarantee. Depending on the exact nature of their property rights in the underlying bonds, it may well be that some or all of the Claimants do have a contractual remedy in a particular non-Argentine jurisdiction under an exclusive jurisdiction clause in the bond

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<sup>148</sup> The Claimants assert also (via the most-favoured-nation clause in Article 3 of the BIT) a breach of the obligation to maintain full protection and security contained in the bilateral investment treaty between Argentina and the USA, Counter-Memorial, para. 403.

<sup>149</sup> At paras. 115-126.

instruments, as is indeed suggested by the references made in the pleadings to lawsuits brought in Italy by certain bondholders.<sup>150</sup> But there is no denying that, by a combination of governmental policy and legislative action – thus quintessentially sovereign acts – the Republic of Argentina went beyond a mere failure to pay the sums contractually due to its creditors, and that this happened under circumstances which lay outside the normal legal remedies and controls that exist for the benefit of creditors in the case of private bankruptcy. The Tribunal does not believe that it can seriously be argued that this combination of circumstances is not capable of constituting a breach of the treaty guarantees (whatever defences might in due course be advanced as a legal excuse) and that is all that is required at the jurisdictional phase. It goes without saying that, in the event of a successful treaty claim, a claimant would only be entitled to the remedies appropriate to a breach of treaty; the fact that the remedy the present Claimants are seeking is, in the eyes of the Respondent, a remedy of the same kind as that which they might seek in a domestic court under a contract claim, is neither here nor there.

*e. The preconditions to arbitration laid down in the BIT have not been duly met*

301. The standing Argentine offer to arbitrate is contained in Article 8(3) of the BIT, but is preceded by two paragraphs bearing on the settlement of disputes between an investor and the host State of the investment: under paragraph (1) any dispute shall be resolved through amicable consultations “insofar as possible”; under paragraph (2) if these consultations do not lead to a resolution, the dispute “may be submitted” to a competent administrative or judicial process of the host State. This leads on to paragraph (3), under the first part of which “If a dispute still exists between investors and a Contracting Party, after a period of 18 months has elapsed since notification of the commencement of the proceeding before the national jurisdictions indicated in paragraph (2), the dispute may be submitted to international arbitration.”, which is then completed by the second part of the paragraph under which each Contracting Party gives “its advance and irrevocable consent” to arbitration. On its face therefore Article 8 sets up three prior steps before opening the way to arbitration: amicable consultations – then domestic proceedings – then 18 months.

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<sup>150</sup> Though the Tribunal is not apprised of the exact nature of the cause of action or the remedies sought.

302. The Claimants concede that they have not made efforts to go through these prior stages. They justify this by arguing: in relation to amicable consultations, that on the evidence these would have proved fruitless and, after passage of the *Ley Cerrojo*, were effectively excluded by the actions of the Respondent; in relation to domestic proceedings, that there was (again on the evidence, citing in particular the *Galli* case before the Supreme Court of Argentina) no realistic prospect of redress from any Argentine administrative or judicial proceeding, and in any case not within a time span of 18 months. They also seek, via the most-favoured-nation clause in Article 3 of the BIT, to invoke the benefit of the dispute settlement clause in the Argentina-US BIT, which does not contain a requirement to have recourse to the local courts.<sup>151</sup> The Respondent rejects both the factual and legal basis for these explanations, pointing out that in addition the Claimants made “not even the slightest attempt” to meet the requirements of the Article. It rejects also the invocation of the most-favoured-nation clause both in itself and as out of time.
303. The prior requirements described above – either those laid down in this particular treaty or in other bilateral investment treaties with equivalent wording – have been the subject of consideration and decision in a lengthy series of arbitral decisions in recent years. Tribunals have divided on the question. Some tribunals have taken the view that the prior requirements are directory not mandatory and can therefore be overridden in appropriate circumstances; others have held that the requirements apply in all cases, but are subject to a general exception under international law that recourse to domestic remedies is not mandatory when it would be futile. The *Abaclat* tribunal finds there to be a difference between conditioning consent to ICSID jurisdiction on the fulfilment of a pre-condition, and conditioning the effective implementation of such consent on the fulfilment of such a pre-condition. Since it considers that there is no doubt as to Argentina’s acceptance of ICSID arbitration, the *Abaclat* tribunal finds that the preconditions relate merely to the effective implementation of Argentina’s consent, and therefore fall under the heading of admissibility not jurisdiction. Having done so, it finds that the failure to comply with the preconditions does not constitute a barrier to admissibility of the claims, on a mixture of factual findings and futility, invoking in this context broader considerations of ‘fairness and efficiency’ as a guide to the interpretation of Article 8

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<sup>151</sup> Claimants’ Post-Hearing Brief, paras. 165-185.

of the BIT. It rephrases the question for decision as being, ‘was Argentina deprived of a fair opportunity to address the dispute within the framework of its own domestic legal system because of Claimants’ disregard of the 18 months litigation requirement?’ and proceeds to answer that question through balancing what it finds to be the interests of the parties on each side of the dispute. This aspect of the tribunal’s Decision comes in for particularly strong criticism on the part of the dissenting arbitrator.

304. The *Ambiente Ufficio* tribunal, on the other hand, adopts an altogether more nuanced approach to the question, with which the present Tribunal aligns itself almost in its entirety. The *Ambiente Ufficio* tribunal begins by drawing attention to the different, and in some respects inconsistent, approaches taken by investment tribunals, and in international dispute settlement more generally, towards preconditions of the kind contained in Article 8, paragraphs (1) and (2), of the BIT, before recalling that the task of each individual tribunal or judicial body is to apply the particular legal provisions governing the case before it, and to do so within the context of those provisions, including the specific institutional and procedural framework within which they are embedded. The present Tribunal agrees. Its task is not to establish any general legal regime for provisions of this kind, but to decide the very specific question whether Argentina has or has not given its irrevocable consent to arbitrate in the circumstances in which the present Claimants have brought the present arbitration. That question is governed entirely by Article 8 of the BIT, which contains the offer to arbitrate by both of the States party to the treaty, and which (as the *Ambiente Ufficio* tribunal pertinently observes<sup>152</sup>) “does not differentiate between ‘mandatory’ and ‘non-mandatory’ requirements as well as ‘jurisdictional’, ‘admissibility’ or ‘procedural’ prerequisites.” The Tribunal is also clear in its own mind that the question for decision here is not affected one way or the other (as the *Abaclat* tribunal appeared to think) by the fact that both Parties to the BIT are Parties to the ICSID Convention. As the dissenting arbitrator in that case pointed out, the ICSID Convention cannot properly be interpreted as granting some form of pre-consent to arbitration – neither on its own terms nor, particularly, in the light of the categorical statements, both in its Preamble that “no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be

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<sup>152</sup> *Ambiente Ufficio* Decision, para. 572.

deemed to be under any obligation to submit any particular dispute to ... arbitration,” and in Article 25(4) that an indication by a State Party of the classes of dispute it would consider submitting to the jurisdiction of the Centre “shall not constitute the consent required by paragraph (1)”. It follows inexorably that the necessary operative consent has to be sought elsewhere; and that, in the present case, means Article 8 of the BIT, which is – to the Tribunal’s eyes – precisely drafted with that aim in view, notably in the second paragraph in Article 8(3), which reads: “For this purpose, and in conformity with the terms of this Agreement, each Contracting Party hereby gives its advance and irrevocable consent that any dispute may be submitted to arbitration.” This phrase puts it beyond any conceivable doubt that it is Article 8 which embodies the standing consent of each Contracting Party, as a potential respondent State, to the initiation of arbitration by investors. The wording establishes with equal clarity that the consent there given is ‘in conformity with the terms of the treaty’.

305. This does not, in the Tribunal’s view, entail that an investor is under any sort of ‘obligation’ to pursue the prior steps outlined in paragraphs (1) - (3) of Article 8; it is not the purpose of Article 8 to impose obligations on investors, who are by definition not parties to treaties of this kind. What the Article does is to generate and record the standing offer to arbitrate delineated in the paragraphs just mentioned. It is trite law that the jurisdictional link is then completed by the acceptance of the offer by an investor, manifested implicitly by the investor’s commencing arbitration proceedings in reliance on its terms. The process is a sequential one, but its legal effect is now universally recognized, on the basis that the claimant’s acceptance of the respondent’s offer brings into being the necessary legal relationship between them in the same way as if they had concluded between themselves a specific agreement to that effect. But it surely requires no further demonstration that this legal effect can only be produced if the investor accepts the offer on the terms specified by the host State; it cannot either re-write the offer or ‘accept’ an offer other than that which the host State has made. It is only in that sense that the conditions laid down in Article 8 are binding on a potential claimant. But it equally follows that, to the extent that the Claimants

argue that the prior steps in Article 8(1) and (2) are ‘not mandatory’, that argument must be rejected.<sup>153</sup>

306. The right conferred on Italian investors to take a dispute with Argentina to arbitration under Article 8(3) is in other words a contingent one, and it should be observed that the conditions attached to it are not the product of some unilaterally restrictive act of will on the part of Argentina, but are the outcome of an agreement between Italy and Argentina conditioning the resort to arbitration. Not merely is this a formal agreement, but it is a reciprocal one; exactly the same conditions would attach to an Argentine national wishing to commence arbitration against Italy over an investment dispute. The Tribunal can see no warrant for amending or setting aside any of the elements of their consent to arbitration which the Contracting Parties have expressed in the BIT, nor indeed does it consider itself to have been given any mandate in either the ICSID Convention or the BIT to do so. Yet this is what the *Abaclat* tribunal seems to have proceeded to do. It is also what the Claimants are in effect asking the present Tribunal to do when they argue that, when Article 8(2) of the BIT says that a dispute ‘may’ be submitted to a competent local jurisdiction,<sup>154</sup> this means only that that represents one possible course of action alongside others. The Tribunal does not find this line of argument convincing. The whole structure of Article 8 is against it; the Tribunal accepts the Respondent’s argument that Article 8 was plainly intended to set up a structured sequence of steps leading ultimately to arbitration. The Tribunal is unable to give any other meaning to the words which appear at the beginning of Article 8(3) and immediately before the consent to arbitration: “If a dispute still exists between investors and a Contracting Party, after a period of 18 months has elapsed since notification etc. etc.”.<sup>155</sup> The Tribunal notes that exactly the same

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<sup>153</sup> It is possible also to draw an analogy, as is done by the dissenting arbitrator in *Ambiente Ufficio*, with Article 36(2) of the Vienna Convention on the Law of Treaties, according to which a third State may only avail itself of a right conferred by a treaty *inter alios acta* if it complies with the conditions laid down for the right’s exercise, fn. 312 of the *Dissenting Opinion of Santiago Torres Bernárdez* to the *Ambiente Ufficio* Decision.

<sup>154</sup> ‘podrá ser sometida’ in the original Spanish, ‘potrà essere sottoposta’ in the Italian.

<sup>155</sup> The Tribunal has some difficulty in following the Claimants’ argument based on a distinction from ‘fork in the road’ provisions, since Article 8 is so clearly sequential. It likewise finds little assistance in the authorities cited by the Claimants (*Ethyl Corp. v Canada*, *Lauder v Czech Republic*, *Bayindir v Pakistan*, and *SGS v Pakistan*) all of which appear on closer examination, with due allowance made for their particular factual circumstances, to turn in reality on the question of the probability, or alternatively futility, of friendly settlement through consultations. The same is patently true of the *Joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge ad hoc Gaja* in the ICJ case *Georgia v Russian Federation*, Judgement of 1 April 2011, which the Claimants rely on in their Post-Hearing Brief, fn. 245.

phrase, ‘may be submitted to’ is used by the Contracting Parties in Article 8(3)<sup>156</sup> for the consent to arbitration itself. This double use of the phrase is therefore a relevant contextual element in its interpretation under the basic rule laid down in Article 31(1) of the Vienna Convention on the Law of Treaties; to put the matter another way, in the absence of any contrary indications, the phrase should be understood as having the same sense in both the first paragraph and the one that succeeds it. This is however a conclusion that would leave the Claimants floundering when they seek to rely on the phrase as the foundation for their argument that Article 8(3) gives them an indefeasible right to arbitration at their option. The Tribunal is in no doubt that Article 8(3) is the controlling provision, and that its meaning, in context, is: ‘once this condition is satisfied in respect of a given dispute, it is then legally possible for an investor to submit the dispute to international arbitration’. Similarly, paragraphs (1) and (2) of Article 8 mean, taken in context: ‘an attempt must be made to settle a dispute by amicable consultations but, if they do not succeed, the host State or its organs are not permitted to resist the investor’s referring it to a local court or administrative jurisdiction, on pain of recognizing that, if a settlement is not achieved via that route either, within the stated period, the matter may go on to international arbitration at the investor’s option’.

307. The Claimants’ substantive defence against their admitted failure to pursue the routes indicated in paragraphs (1) and (2) of Article 8 boils down, therefore, to two alternative arguments: first, that it is not compulsory to pursue those routes if it is sufficiently established that resort to them would be futile; second, in the alternative, that they are entitled to invoke, via the most favoured nation clause in Article 3 of the BIT, the benefits of arbitration clauses in other Argentine BITs which do not contain the same preconditions.
308. The first of these defences is an argument of treaty interpretation. It maintains that the underlying intention of the Contracting Parties cannot reasonably be understood, in good faith, as requiring an investor to exhaust an avenue of redress that would be (or had been proved to be) unavailing. The Claimants say that the futility of attempting a negotiated settlement before the 2005 POE has been amply demonstrated on the facts, and that after the passage of Law 26,017 (the *Ley Cerrojo*) a negotiated

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<sup>156</sup> In both of the authentic languages.

settlement became formally impossible. They dismiss as substantially immaterial that there may have been the theoretical possibility that the Argentine legislature might at some future time change its stance and approve a revised offer to bondholders, given in particular the criminal penalties brought in by the *Ley Cerrojo*. As to the question of recourse to the local courts, the Claimants maintained the position throughout that a series of actual judicial decisions in the courts of Argentina, reaching all the way up to the Supreme Court,<sup>157</sup> had established as early as 2005, not merely the improbability of legal proceedings being brought to a conclusion within the 18-month period stipulated in Article 8(2) of the BIT, but more importantly still had demonstrated the absence of any effective remedy for bondholders in the courts of Argentina. The Respondent's answers, as summarized in the Post-Hearing Brief, are: that the futility of negotiation cannot be established without it first having been tried; that the *Ley Cerrojo* precluded only settlement without Congressional approval, not negotiation leading up to it, as demonstrated by the revised POE; and that there was a difference before the Argentine courts between rights under law and rights under treaty.

309. Confronted with the same arguments, the *Ambiente Ufficio* tribunal dealt with the matter as follows. It classified the obligation to consult under Article 8(1) as an obligation of means not an obligation of result. It then assessed the significance of the inclusion of the qualifying phrase 'insofar as possible', and concluded that Article 8(1) should be so interpreted on its own terms that the obligation was not violated "if it is 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".<sup>158</sup> It found it to be established on the facts that, while there had indeed been attempts by bondholder groups to enter into negotiations with Argentina, the particular claimants in that arbitration had made no such attempt directly, and it therefore proceeded to consider whether meaningful consultations for resolving the dispute would have been possible; as to that, the tribunal concluded that the effect of Law 26,017 (the *Ley Cerrojo*), passed while the 2005 POE was open for acceptance, was "that no realistic possibility

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<sup>157</sup> *Galli, Pico Estrada, Ghigino Zubilar, and Claren Corporation v Argentina*, decision of the Court of First Instance of 2 March 2010, and *Claren Corporation v Argentina*, decision of the Court of Appeals of 15 February 2011.

<sup>158</sup> At para. 583.

of meaningful consultations to settle the dispute with the Argentine Government existed”.<sup>159</sup> It further found that it could not be held against the claimants in that arbitration that they had not initiated consultations under Article 8(1) before the Law was passed, since there was nothing in the Article to impose a temporal condition of that kind.

310. Given that the relevant factual circumstances are to all intents and purposes identical in the two arbitrations, the present Tribunal shares all of the above conclusions, subject to one small shade of difference, in that the present Tribunal is inclined to interpret the qualifying phrase ‘insofar as possible’ as relating more directly to the prospect of arriving at a friendly settlement of the dispute than to the possibility of bringing consultations into being. But that minor difference of assessment only goes to reinforce the conclusion reached by the *Ambiente Ufficio* tribunal that Article 8(1) of the BIT, properly interpreted, incorporates what might be called a ‘futility exception’.
311. To the mind of the Tribunal, once that conclusion is reached, it logically follows that a similar analysis pertains to Article 8(2), with its requirement of recourse to local courts or administrative jurisdictions. This is so even though Article 8(2) contains no phrase directly equivalent to the ‘insofar as possible’ of Article 8(1), since the absence is easily explained by the reason given in paragraph 306 above, namely that the limiting phrase attaches itself to the outcome of the process (*i.e.* the resolution of the dispute), and that is a concept that does not figure directly in Article 8(2). But the underlying logic is the same. On the one hand, it cannot be supposed that two sophisticated governments could have intended that foreign investors be required to begin an action before the local courts or administrative authorities just for show. The underlying assumption must logically have been that the local courts or administrative authorities would be in a position to pronounce a definitive and binding solution to the dispute; that much is evident from the opening words of Article 8(3) with their obvious implication that, within the specified time period, the dispute might have ceased to ‘exist’. On the other hand, the specification of the time period itself shows unambiguously, to the mind of the Tribunal, that the Contracting States had in

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<sup>159</sup> At para. 585.

view as the intervening step a process that would be potentially effective to settle the issue in dispute.

312. It remains, therefore, for the Tribunal to consider whether the evidence before it shows (as has been held on similar facts by the *Abaclat* and *Ambiente Ufficio* tribunals) that neither prior course of proceeding held out any realistic likelihood of a settlement of the dispute.
313. The Tribunal begins by noting that it is the Claimants who are advancing a justifying excuse for their admitted failure to pursue literally the course of action foreseen in Article 8, paragraphs (1) – (3), of the BIT. It follows on standard principles that the Claimants carry the burden of establishing to the Tribunal’s satisfaction the facts on which they base their justification as outlined in paragraph 307 above.
314. The Claimants’ argument is, firstly, that there was no realistic prospect of settling the dispute by amicable consultations in the light of the policies espoused by the Argentine government and (post-2005) of the legal effect of the *Ley Cerrojo*; secondly, that there was no realistic prospect of securing an effective remedy from the Argentine courts in light of the judicial decisions that had been handed down by those courts before the present arbitration was initiated. They base the first limb of this argument essentially on the assertion that the 2005 POE (like the revised POE of 2010) was presented on a take-it-or-leave it basis, with a very short time period for acceptance, and involved a sacrifice of alternative legal remedies, and was very soon set in stone by the *Ley Cerrojo*.<sup>160</sup> They accept that there had been discussions with bondholder interests in various formations before the POE was made, but point out that the POE was not the outcome of agreement with bondholder representatives, and involved only certain limited concessions to the interests that had been advanced on the part of bondholders.<sup>161</sup> They base the second limb of the argument squarely on the judgment of the Argentine Supreme Court in the *Galli* case, as reinforced by the other cases cited,<sup>162</sup> in which the Supreme Court declared that the restructuring of the national debt lay within the purview of the political power, to which the judicial power had to defer so long as the actions of the political power were reasonable and

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<sup>160</sup> Para. 34 above.

<sup>161</sup> Para. 223 above.

<sup>162</sup> See fn.157 above.

non-discriminatory, and held moreover that failure by a bondholder to accept the POE was a voluntary act which therefore entailed as a consequence that the entitlement to raise a claim in Argentina had been forfeited. The Respondent's answer depends on drawing a distinction of principle between contract claims (under the bond instruments themselves) and treaty claims (e.g. under the BIT). It maintains that Law 26,017 only affects contractual claims under the bond instruments but has "no impact on any negotiation that may be conducted in connection with such treaty claims" and adds that the Law merely took back for the Legislature the power to settle claims ('transar' in Spanish) but did not preclude the Executive from negotiating settlements that would then have to go back to the Legislature for approval – which is precisely what happened over the revised POE in 2010. It refers in this context to the evidence of its witness Dr Molina about the extensive contacts between the Government and bondholder interests.

315. Faced with similar, or indeed identical arguments, the *Abaclat* and *Ambiente Ufficio* tribunals dealt with the matter as follows. The *Abaclat* tribunal treated the discussions that had taken place prior to 2005 between the Argentine authorities and Task Force Argentina ('TFA') as in effect covering the interests of all Italian bondholders, whether or not the particular claimants in the arbitration were party to the TFA's formal mandate. On that basis, it held that Argentina was precluded from raising any failure of the claimants before it to pursue consultations under Article 8(1). As to the requirement for local litigation under Article 8(2), apart from various other considerations which are not here material, the tribunal reached the conclusion that actions before the courts of Argentina were doomed to fail in the light of the terms of the Emergency Legislation. The *Ambiente Ufficio* tribunal, on the other hand, found as a finding of fact that "at least since the adoption of [Law 26,017] it was clear that no realistic possibility of meaningful consultations to settle the dispute with the Argentine Government existed," and found equally that that result was not affected by the fact that the Argentine Congress could have at any time suspended or eliminated the ban on consultations and negotiations and that it actually did so in 2010 in order to open the way for the new Exchange Offer. It found the crucial consideration to be that the potential negotiating partner was not in a position so to act while the law was in force (i.e. from 2005 onwards), and that the very reason for the non-availability of meaningful consultations was above all the Argentine Congress's

adoption of Law No. 26,017.<sup>163</sup> As to the question of prior recourse to the local courts, the tribunal cites the Draft Articles of the International Law Commission (ILC) on Diplomatic Protection 2006 as evidence of a general rule that requirements of this kind are treated in international law as being subject to a futility exception. The tribunal finds a strong structural parallel between the typical clause found in the dispute settlement provisions of investment treaties and provisions for the exhaustion of local remedies, in that both are designed to allow the domestic legal system to correct a potential breach before the international legal responsibility of the State becomes engaged; the significant difference between the two is the existence in the former case of a time limit, where in the latter case there typically is none, but the tribunal concludes that the time limit only serves to reinforce the argument for applying a common futility exception. Putting this together with the facts of the case, and relying once again on the test enunciated by the ILC,<sup>164</sup> the tribunal declines to apply as a criterion either the trouble and expense a claimant would be put to, or the actual likelihood that judgment would be reached within the 18 months stipulated in Article 8(3), but focuses its attention on the main issue of substance, i.e. whether recourse to the Argentine courts would have offered the claimants a reasonable prospect of effective redress. Its conclusion that there would not in the circumstances have been such a prospect is based on the decision in the *Galli* case coupled with the further holding by the Supreme Court in the *Brunicardi* case that international responsibility is precluded in international law where a State suspends or modifies payment of the external debt for reasons of financial necessity.

316. The present Tribunal shares the analysis and the conclusions of the *Ambiente Ufficio* tribunal. While it finds there to be a slight inconsistency between the passages from the International Law Commission relied upon and the test actually applied by the tribunal, it considers that the test applied by the tribunal is the right one, and indeed the only meaningful one. In the particular circumstances, the effect of Law 26,017 as interpreted and applied in the *Galli* case shows that the Argentine judicial system is not (in the words of the ILC) ‘reasonably capable of providing effective relief’, with

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<sup>163</sup> *Ambiente Ufficio* Decision, paras. 585-586.

<sup>164</sup> “The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances.” (Commentary to draft Article 15).

the consequence that ‘a successful outcome is [not] likely or possible’; in other words, the two propositions collapse into one and there is no real contrast between them.

317. For the reasons given above, therefore, the Tribunal concludes that the Claimants have met the burden on them to show that no substantial purpose would have been served by attempting either to engage the Argentine authorities in amicable consultations or in bringing an action before the Argentine courts. The Tribunal therefore decides that the Claimants’ admitted failure to do so does not act as a jurisdictional bar to their commencing ICSID arbitration. That being so, there is no need for the Tribunal to give further consideration to the Claimants’ subsidiary claim to invoke the most-favoured-nation clause in Article 3 of the BIT, which has (understandably) been the subject of vigorous contestation between the Parties.

3. The ‘admissibility’ objections

318. The Tribunal accordingly moves to consider those of the Respondent’s preliminary objections which it has classed (paragraph 260 above) as falling more on the ‘admissibility’ than on the ‘jurisdictional’ side of the line, on the basis that they would entail the Tribunal deciding not to exercise – for a reason of judicial or other policy – a jurisdiction which it had found itself to possess. A reason of that kind would of course have to be a strong one, as an ICSID tribunal is under a duty to exercise a jurisdiction conferred upon it. The reasons which the Respondent has advanced under this head are the following, which will be considered in turn:-

- a. that investment arbitration is an inherently unsuitable and unacceptable way of dealing with default on sovereign bonded debt;
- b. that the multiplicity of Claimants and the variations between them will require procedural innovations that lie beyond the powers of an ICSID tribunal and will not be able to protect the due process rights of the Respondent.

*a. Sovereign default*

319. The Respondent’s argument under this head was not comprehensively articulated in its Memorial on Jurisdiction and Admissibility. It can however be summarized in the passage from the Memorial quoted at paragraph 43 above:

At the same time, the holders of interests in bonds who choose not to participate in a restructuring cannot reasonably expect that the sovereign debtor will be able to pay them a sum higher than that accepted by the creditors who did participate in the restructuring. Given that the whole process is voluntary in nature, no holder of interests would choose to participate if he knew, or even had the reasonable expectation, that another person, in a similar position, would later receive a better offer. This is why the essential premise of the debt restructuring process is that the sovereign state will accord the same treatment to all creditors who are in a similar position.

In the case of Argentina's 2005 Exchange Offer, this principle was reflected in a clause, which set forth that if Argentina offered better conditions to holdouts, it would have to provide the same improved terms to such creditors as had previously accepted the Offer. In view of the fact that the Exchange Offer was based upon terms that would make it possible for Argentina to pay its new debt in the long term, offering to pay a higher amount to any other creditor at a later time would have defeated the purpose of the initial restructuring and would have led Argentina once again to the position of unsustainable debt existing before the Exchange Offer.

320. As the argument was not subsequently elaborated in detail, the Tribunal does not feel obliged to treat it as a formal submission. The point at issue was however canvassed in some detail in the *Abaclat* decision and a brief comment on it may be in order. The Tribunal is sensible of the issues raised by the Respondent which it can well understand might be regarded as serious matters on the international bond markets. Even if so, that does not however answer the question of their relevance to this investment arbitration under the BIT between Italy and Argentina which defines the role and functions of this Tribunal. As a matter of basic principle, if a claim raised before an ICSID tribunal is found to lie within its jurisdiction, the tribunal is under a duty to exercise the jurisdiction. This is the necessary (though often unspoken) corollary to the principle reflected in the annulment provisions in Article 52 of the Convention that a tribunal may not exceed its powers. But it is given concrete reflection in the series of decisions by *ad hoc* committees that a failure to exercise jurisdiction can itself constitute a manifest excess of powers for the purposes of Article 52.<sup>165</sup> This means that the only relevant question for the present Tribunal is whether or not the assets of the Claimants constitute 'investments in the territory of Argentina' within the meaning of the BIT – a question on which the provisional

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<sup>165</sup> E.g. *Compañía de Aguas del Aconquija, Soufraki, Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v Republic of Peru*, ICSID Case No. ARB/03/4; see also the Schreuer Commentary (2nd ed.) at pp. 947-948.

analysis of the Tribunal is set out at paragraphs 296-297 above. If the answer is in the positive, then it is not for the Tribunal – nor indeed is it within the Tribunal’s powers – to write into the BIT an exception to its terms. What that would entail can be seen starkly illustrated when the proposition is set alongside the terms of Article 8 of the BIT, which expressly covers ‘any’ dispute relating to investments, and cannot be interpreted to convey on the Tribunal an implicit power to decide that ‘any’ means something less. As a fact of international economic life, sovereign bond issues were plainly within the normal field of contemplation of the Contracting Parties at the time when the BIT was under negotiation, and they could readily have introduced an exception in that regard into an appropriate place in the BIT if that had been what they wanted. The answer to the Respondent’s assertion lies in the first place therefore (with all due respect to the dissenting arbitrator in *Abaclat*), not in asking the Tribunal to import policy considerations into one area while vigorously rejecting them in others, but rather in a sober analysis of whether, given that the original Bond issues were plainly capable of falling within the concept of ‘investment in the territory of Argentina’ under the BIT<sup>166</sup>, the same necessarily applies to derivative rights of the kind held by the Claimants. And, in the second place, in the essential proposition that (as the Respondent itself has repeatedly insisted) it is not open to the Claimants to use this arbitration as a means for vindicating their contractual rights as ‘bondholders’, but only such rights (and the associated remedies) as they can properly lay claim to as ‘investors’ under the BIT.

*b. Procedure: Due Process*

321. The Respondent summarizes its objection under this head as being the unmanageability of the proceedings, given the large number of individual Claimants, the need to be able to investigate in each case whether the Claimant meets the nationality requirements of the BIT, and the differentiated nature of the asserted ‘investments’ in the light both of the variety of bond issues involved and the variety of times and circumstances at or under which individual Claimants can be assumed to have acquired their ‘investments’. It complains as well about the failure of the Claimants to respond to justified requests for relevant information in this regard, and asserts that the combined effect is to deprive the Respondent of its ability to defend

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<sup>166</sup> Subject to the point in fn.147 above.

itself adequately.<sup>167</sup> The particular point as to nationality requirements has to be seen against the background of the Additional Protocol to the BIT<sup>168</sup>, which incorporates additional criteria (both negative and positive) relating to domicile.

322. The Claimants' answer to the above is that sufficient information as to both citizenship and residence has been offered in respect of each Claimant and that, if the Respondent wishes to challenge the entitlement of any Claimant, it bears the onus of establishing the factual basis for any such challenge. Their Post-Hearing Brief describes the problems over identifying the exact numbers and identity of the Claimants as purely clerical, but complains also about a lack of full cooperation between the Parties over registering the discontinuance by some of the original Claimants. It dismisses the Respondent's due process concerns as being no more than questions of case management.
323. The Tribunal can begin by saying that, if it did find that the inherent circumstances of the case stood in the way of preserving the equality between the Parties or risked denying either one side or the other a full and ample opportunity to present its case, then it would have to give serious consideration to whether it could allow the arbitration to proceed, or to proceed in its present form. This is because – and quite irrespective of the fact that Article 52 of the ICSID Convention specifically includes 'a serious departure from a fundamental rule of procedure' among the grounds for annulment – both the principle of equality of arms and the right to be heard are fundamental to the judicial process. Both of these are legal principles which therefore distinguish themselves automatically from issues of financial or economic policy of the kind discussed in paragraph 320 above.
324. The above having been said, the Tribunal accepts the view put forward by the Respondent that mere convenience or cost saving for a claimant or claimants would not of itself be enough to justify proceedings that would otherwise be questionable – although the same proposition applies in the reverse direction, i.e. that mere inefficiency (as the Respondent here asserts) cannot justify depriving a claimant or claimants of a right to be heard that they would otherwise have. The prior question is however whether there is anything in the nature of the present proceedings that raises

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<sup>167</sup> Respondent's Post-Hearing Brief, paras. 37-41.

<sup>168</sup> Which forms an integral part of the treaty; see the introductory rubric to the Additional Protocol.

justifiable doubts from the point of view of due process. This is a question that, understandably, preoccupied the *Abaclat* and *Ambiente Ufficio* tribunals, both of which decided after due consideration that such particular problems as might arise could indeed be met (as the present Claimants have suggested) as matters of case management. The Tribunal is aware from extraneous sources that both arbitrations are proceeding in a merits phase and that, in the *Abaclat* case, numerous procedural orders have been made to regulate the proceedings.<sup>169</sup> The overall conclusion reached in this regard by the *Ambiente Ufficio* tribunal is expressed in the following terms in its Decision<sup>170</sup>:-

The Tribunal does not consider that the mere number of Claimants in the present case would make the proceedings “unmanageable”, as the Respondent has suggested, or would violate fundamental principles of due process or would be unfair to the Respondent, neither in the present jurisdictional phase nor in the merits phase of the proceedings.

In the First Session, the Parties have agreed that the “preliminary phase would deal with preliminary objections of a general character only, but not with any jurisdictional issues that may arise in relation to individual claimants, which would be dealt with at a later stage as necessary and appropriate”. Given this fact, the criticism on the part of the Respondent that the impossibility to look at the specific circumstances of each single Claimant already in the jurisdictional phase would entail a limitation of Argentina’s defense rights (R II § 149; R IV p. 11; R V p. 6) cannot be upheld by the Tribunal. Accordingly, in this preliminary phase of the proceedings, the Tribunal has to restrict itself to a general assessment whether there is jurisdiction to decide the dispute in question. The fact that there are several dozens of Claimants involved in these proceedings has no impact at all on the assessment to be made by the Tribunal at this stage of the proceedings.

But even in the subsequent merits phase of the proceedings, the Tribunal cannot see a fundamental problem in taking evidence regarding, and assessing, the individual case of each and every of the 90 Claimants remaining in the case. Whether it is necessary and appropriate to call every single Claimant into the witness stand and cross-examine them there in order to safeguard the fundamental principles of due process, as Respondent seems to suggest (R I § 109; R II § 148; R III § 35), is to be decided at the appropriate time on the basis of the relevant facts and according to the applicable rules of law. The Tribunal does not take a stand on this question at this moment.

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<sup>169</sup> Which in the *Abaclat* case have been published by the Centre.

<sup>170</sup> At paras. 166-170.

The Tribunal is in full agreement with the Respondent that, in the adjudication of the present dispute, it is fully bound by Art. 44 of the ICSID Convention and Arbitration Rule 19, and the Tribunal will be fully mindful of this legal framework when discharging its duty to control and direct the unfolding of the proceedings through procedural orders. In view of the circumstances of the present case, notably the considerable but nonetheless limited number of Claimants, the Tribunal would not consider that the specific controversy regarding the scope of an ICSID tribunal's power to devise "necessary adaptations" to the ICSID standard procedure which arose in the context of the *Abaclat* case<sup>92</sup> and to which the Parties have referred (C III § 88; R III § 26; R IV pp. 10, 11; Tr p. 224/17), would be relevant to the present case.

In particular, the Tribunal cannot see in which manner the obvious right of both Parties to the proceedings being conducted according to the principles of fairness and due process would be encroached upon or what defense right of the Respondent might be curtailed or otherwise negatively affected by the mere fact of the Tribunal admitting that 119 or 90 Claimants, respectively, may institute multi-party proceedings under Art. 25 of the ICSID Convention.

Given the essential similarity between that arbitral proceeding and the present one, including in respect of the number of claimants before the tribunal in each case, and taking into account as well that the arguments presented to the two tribunals on the question of due process were essentially the same, the present Tribunal sees no good reason for reaching a conclusion any different from that arrived at by the *Ambiente Ufficio* tribunal.

325. The Tribunal determines accordingly that – the still outstanding questions of jurisdiction aside – the claims as put forward in this arbitration are admissible. A procedural order will follow, after further consultation with the Parties, setting the framework for the next phase in this arbitration and in preparing that framework the Tribunal will carefully consider the views of all parties in order to ensure that the requirements of due process are fully observed.

**C. PARTIES, CASE TITLE, AND COSTS**

326. The Tribunal must finally deal with an issue that had also raised itself in the *Abaclat* and *Ambiente Ufficio* arbitrations, namely the identification of an accurate and reliable list of the Claimants who should be regarded as parties to the proceedings at the

current stage of the Arbitration, and the consequences that might have for determining a title by which the case can be known.

327. It would appear, as explained at the outset of this Decision in paragraphs 1 and 31 above, that at the initiation of the present Arbitration proceedings there were 183 Claimants in all. They are listed by name in a chart included in the Claimants' Request for Arbitration. According to the Claimants the number now remaining is 74. The reduction is attributable to a large extent, as in the *Abaclat* and *Ambiente Ufficio* arbitrations, to some amongst the original Claimants having accepted the 2010 POE and tendered their security entitlements in order to benefit from it; that accounts for 62 of the original 183 Claimants. To a lesser, though not insignificant, extent, though, the reduction is attributable to original Claimants having sold their security entitlements (42) or surrendered them to the issuing Bank (2). The documentary support for the Claimants' figure of 74 is contained in an annex to their Post-Hearing Brief and in the submission containing their comments on the Decision of the *Abaclat* tribunal.<sup>171</sup> There remain however certain discrepancies which the Tribunal is unable to resolve on the basis of the documentation before it, and will have to be taken up with the Parties in the next stage of the proceedings.
328. During the suspension of the proceedings on account of the 2010 POE recorded in paragraphs 14-18 above, the Tribunal issued a Direction on 29 July 2010 in which it required Counsel for the Claimants to indicate not later than 12 August 2010, on the instructions of the persons concerned, whether any of the Claimants wished to discontinue its claim in the proceedings, and to specify such persons by name. Counsel for the Respondent was then to confirm within two weeks thereafter whether the Respondent agreed, for the purposes of the ICSID Arbitration Rules, to the discontinuance of the claims in question. The Tribunal further indicated that it would then formally order those claims to be removed from the record for the subsequent stages of the proceedings.
329. In a further direction of 13 August 2010, the Tribunal indicated that, in the absence of any response to these requests, the proceedings would continue in the name of all of the Claimants on record, and that any future request for discontinuance would be handled in accordance with Rules 43-45 of the Arbitration Rules.

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<sup>171</sup> Paras. 242ff. above.

330. The Claimants' Rejoinder on Jurisdiction was filed on 1 September 2010. It included the following paragraph:

In response to [the Tribunal's Direction of 29 July 2014] Counsel for the Claimants attach hereto ... a list containing the names of the Claimants who have discontinued the proceedings as of September 1, 2010. Owing to the holiday period in Europe, during which also NASAM's offices have been closed for several weeks, which makes it impossible to verify the complete accuracy of this information, Counsel respectfully requests permission to update this list in the coming weeks based on the information they will receive from the Claimants directly or through NASAM.

It submitted also that the Respondent had already implicitly given its consent to discontinuance by requiring, as a condition for participation in the 2010 POE, that bondholders cease all legal proceedings against Argentina.

331. Having deliberated, the Tribunal decided to grant this request and ordered Counsel to submit by 21 September 2010 "a complete updated list of the Claimants who have decided to discontinue the proceeding". The Respondent was then given until 5 October 2010 to indicate "whether it opposes discontinuance by the Claimants on the updated list".
332. By letter of 21 September 2010, Counsel for the Claimants submitted an updated list (with identifying details) of Claimants "who have decided to discontinue the proceeding," and by letter of 5 October 2010 the Respondent indicated that, pursuant to Arbitration Rule 44, it did not oppose the discontinuance of the proceedings "in respect of those Claimants who, among those listed in the Updated List, have entered into the 2010 Exchange Offer" and in this context requested the Tribunal to instruct the Claimants to submit prompt information as to which among them had tendered into the POE. The Respondent's letter further indicated that, as the terms of the POE provided that Argentina would not be responsible for any costs in connection with any proceeding dismissed pursuant to acceptance of the POE, the Tribunal should in due course order that the discontinuing Claimants should share equally with the Respondent the costs of the arbitration and each of them should bear their own costs.
333. By letter of 22 March 2011, as part of the preparation for the oral hearing, the Tribunal invited the Parties to consult on a process for arriving at a final and agreed list of those Claimants who were still in the case, and those who had discontinued,

and on what changes (if any) should be made to the title of the arbitration given the withdrawal of Mr. Alemanni. The Parties were to report back to the Tribunal not later than the end of April. No response having been received, the Tribunal reminded the Parties during the course of the oral hearing that the matter was still outstanding, and the Respondent informed the Tribunal that it would react formally to the Claimants' list in due course. In the Post-Hearing Briefs, the Claimants submitted a further updated list and took the position that there was agreement between the two sides that those Claimants who accepted the 2010 POE were no longer party to the proceedings, but that an issue remained as to those Claimants who had sold their security interests to third parties in the intervening period; whereas the Respondent for its part (without addressing specifically the Claimants' lists) maintained that there continued to be "great uncertainty as to who the true Claimants are".

334. By letters of 9 September and 8 November 2011 and 11 April 2012, the Tribunal once again solicited the Parties' views as to the effect of the changes in the participants on the naming of the case. In a further letter of 18 June 2012, the Tribunal put on record its regret that, despite these repeated requests, there had been neither a response to that question nor any indication to the Tribunal that the Parties had reached agreement as to which of the original claimants should be regarded as having discontinued their claims in accordance with Rule 44 of the ICSID Arbitration Rules. The letter included the following ruling on the subject: "as regards the identification of the remaining Claimant Parties, if, in the event, the Tribunal's decision on the Respondent's Preliminary Objections has the effect that the case continues to the merits, the Tribunal will at an early stage thereafter lay down a procedure, after consultation with counsel, that will place it in a position to determine formally and conclusively the identities of the Parties to the substantive phase of the arbitral proceedings".

335. It will be apparent from the above that the Tribunal is still not in a position either to settle in its own mind certain unresolved discrepancies it has itself identified in the enumeration of those who are said to be the remaining and continuing Claimants in this arbitration. Nor is it in a position to assess what the 'great uncertainty' is to which the Respondent has referred on more than one occasion or what the exact nature of the disagreement is between the Parties on this matter, nor – more

importantly still – what the reasons behind any such disagreement are. The Tribunal remains, in other words, in the position foreshadowed in its letter of 18 June 2012, that it is not able to rule at present on who the Parties to these proceedings are on the Claimants’ side. This is however a matter of a primary nature that ought to have been settled with definitive effect at a much earlier stage. The evident difficulty that Claimants’ counsel have had from time to time in assembling accurate and reliable information about the persons they represent before the Tribunal must necessarily add further fuel to some of the anxieties which the Tribunal has expressed in paragraphs 278-279 above; conversely the failure by the Respondent to exert itself to resolve the outstanding questions over the lists as requested on repeated occasions by the Tribunal must necessarily raise questions as to how serious the vaunted difficulties really are. The Tribunal does not see how the interests of either side can be served by the perpetuation of this uncertainty, and cannot but express its disappointment therefore at the absence of the minimum degree of cooperation between the two sides that would have enabled them either to settle these elementary matters by agreement, or failing that to submit to the Tribunal (by agreement) defined questions on which the Tribunal was requested to rule. As it is, and even though it is contrary to good order for this to be so, the matter will have to remain unsettled until resolved in accordance with the Tribunal’s ruling of 18 June 2012 (paragraph 334 above).

336. The Tribunal turns finally to the question of costs raised by the Respondent (paragraph 332 above). Despite the continuing uncertainty over the precise listing of the continuing Claimants, it is at least accepted on all hands that a substantial number of the initial Claimants have fallen out of the proceedings on account of their acceptance of the 2010 POE. The Respondent bases its argument in favour of a partial costs order against them on the fact that it was the Claimants who initiated the arbitration and on a clause in the POE (paragraph 332 above). An argument of a similar kind appears to have succeeded before the *Abaclat* and *Ambiente Ufficio* tribunals. It seems however self-evident to this Tribunal that the question is premature in the present state of this arbitration; without an authoritative determination of whom among the original Claimants are to be regarded as having discontinued, a cost calculation would be difficult if not impossible except in the abstract, and it would not in any case be possible to make a costs order against unnamed persons.

337. Irrespective of the above, the Tribunal remains to be persuaded that it would be justifiable to make a *pro rata* cost apportionment as was done in the two arbitrations cited above. In the first place, the invocation by the Respondent of a clause in the POE is of no more than incidental relevance to the framework which governs this arbitration. The POE, like the bonded indebtedness which underlies it, is a contractual arrangement between creditors and debtor, the terms of which are not binding on this Tribunal and do not give rise in and of themselves to any right or remedy in this arbitration. The principles governing the allocation of costs by this Tribunal are autonomous and subject to the broad discretion which Article 61 of the ICSID Convention confers upon it. At a more fundamental level, however, the Tribunal considers that the assumption of a purely numerical proration of costs according to the number of discontinuing Claimants in relation to the number of original Claimants is conceptually flawed, given that this initial phase of the arbitration has been expressly designed to deal with general issues relating to all Claimants and to exclude the specific consideration of individual Claimants. Under those circumstances, it is by no means obvious what the marginal cost to the Respondent has been to fight these issues against 183 Claimants collectively than against (say) only 74 of them – if indeed there has been any marginal extra cost at all. These matters remain therefore at large, to be dealt with at the time the Tribunal rules definitively on the question of discontinuance, at which stage it will if necessary call for specific argument on costs from both sides.

#### IV. CONCLUSIONS

For the reasons set out above, the Tribunal decides as follows:-

- i. The Respondent's Preliminary Objection based on the absence of consent on the part of the Claimants is rejected.
- ii. The Respondent's Preliminary Objection based on the nature of the Claimants' legal representation is rejected.
- iii. The Respondent's Preliminary Objection based on the multiplicity of claimants is rejected in part and for the rest joined to the merits as more fully described in paragraphs 287-294 above.
- iv. The Respondent's Preliminary Objection based on the absence of an investment, within the meaning of the BIT, in the territory of Argentina is rejected in part and for the rest joined to the merits as more fully described in paragraphs 293 and 297 above.
- v. The Respondent's Preliminary Objection based on the absence of a *prima facie* showing of breach of the BIT is rejected.

- vi. The Respondent's Preliminary Objection based on the failure to pursue the prior steps laid down in Article 8 of the BIT is rejected for the particular reasons given in paragraphs 313-317 above.
- vii. The Respondent's Preliminary Objection based on considerations of due process is rejected.
- viii. A decision on the allocation of the costs of this phase of the proceedings is reserved.

Done in English and Spanish, both versions being equally authentic.

[SIGNED]

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Sir Franklin Berman KCMG, QC  
President of the Tribunal

[SIGNED]

[SIGNED]

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Professor Karl-Heinz Böckstiegel  
Arbitrator

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Mr J. Christopher Thomas QC  
Arbitrator

## Concurring Opinion of Mr J Christopher Thomas QC

1. I have found the issues raised by the multi-party nature of the proceeding to be very difficult indeed, but in the end have subscribed to the course charted by the Tribunal. Faced with a situation in which the Claimants all *prima facie* would have had a basis for invoking the BIT had they filed their claims individually, the issue presented to the Tribunal has been to decide whether the fact that they filed a single, collective action without the Respondent's consent fundamentally changes the nature of the claims such as to deprive the Tribunal of the jurisdiction to hear them.

2. The Tribunal has concluded that if in fact it is presented with a "single dispute", it falls within the Parties' written consent required by Article 25 of the Convention; the Tribunal sees no additional requirement for a special consent.<sup>172</sup> The claims either fall to be considered as a single dispute within the Tribunal's jurisdiction or they do not. Not without misgivings, I have come to agree with this decision.

3. To begin, in my view, the ICSID Convention is capable of supporting multi-party arbitration. At the Third Annual Meeting of the ICSID Administrative Council, in 1969, the then-Secretary-General, Aron Broches, discussed the Secretariat's intention to develop rules and procedures for such arbitrations.<sup>173</sup> The stated objective was to draft model "Special Consent Clauses" and to consider what "special Regulations and Rules" might be required for multi-party ICSID arbitrations.<sup>174</sup>

4. Although Mr. Broches' comments were made in contemplation of contractual, rather than treaty arbitration, they evince the view that the Convention is sufficiently broadly drafted so as to be able to encompass this type of arbitration and, on my reading of the Convention, this is the case. They also indicate his view, at least, that special consent clauses and perhaps special regulations and rules would be required to allow the Convention to provide proper support to such proceedings.<sup>175</sup> In the end, however, no such special clauses, regulations or rules were developed and approved by the ICSID Administrative Council and since the beginning of ICSID arbitration the various iterations of the ICSID Arbitration Rules have not departed from what appears to me to be an assumed predicate of bilateral disputes.

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<sup>172</sup> Decision, paragraphs 280-292.

<sup>173</sup> As noted by the Tribunal at paragraph 271 of the Decision.

<sup>174</sup> Address by A. BROCHES, Secretary-General, to the Third Annual Meeting of the ICSID Administrative Council (September 29, 1969): "...as I observed at our meeting last year, many significant international investment arrangements involve more than just two parties, and for these it would be desirable to insert into the related agreements provisions for the settlement of multipartite disputes. At that time I suggested that it might be useful to promulgate special Regulations and Rules to facilitate such proceedings, but pending such a step by this Council we are now formulating a set of Special Consent Clauses that parties could insert into multipartite investment contracts."

<sup>175</sup> I am aware that the statements of the Secretary-General do not fit within the normal interpretative sources set out in the Vienna Convention on the Law of Treaties. Allowance must be made, however, for the seminal role that Mr Broches played in the conception and elaboration of the Convention. His views are to be accorded special weight.

5. Various ICSID tribunals have since considered claims brought by more than one claimant; as noted by the Tribunal, most of these claims were proceeded on the basis that the co-claimants had different interests in the same investment vehicle.<sup>176</sup>

6. The possibility of arbitrating multi-party investment treaty disputes did not arise until the early 1990s. Then, starting with the NAFTA, pairs and groupings of states began to address the possibility of multiple claims by different parties with common issues of fact and/or law by including consolidation provisions in their treaties. Such provisions allow any party (one of a number of claimants or a respondent) to apply to a “consolidation tribunal” for the consolidation of separate claims that share common questions of fact and/or law.<sup>177</sup> Based upon the NAFTA example, many states have subsequently included consolidation provisions in their treaties.<sup>178</sup> The very existence of consolidation provisions recognizes that the commonalities between treaty claims may be so strong as to justify their being heard together in whole or in part and that this may dictate forcibly consolidating separate claims over the objection of one or more disputing parties.<sup>179</sup>

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<sup>176</sup> Decision, paragraph 285.

<sup>177</sup> NAFTA Article 1126, Consolidation.

<sup>178</sup> Consolidation provisions akin to NAFTA Article 1126 have since been negotiated in many bilateral investment treaties and free trade agreements entered into by each of the NAFTA Parties with other ICSID Contracting States and have been adopted by other non-NAFTA States in their treaty-making practice. States as diverse as Australia, Austria, Belarus, Belgium, Brunei, Chile, China, Costa Rica, the Dominican Republic, El Salvador, Germany, Guatemala, Honduras, Iceland, India, Italy, Korea, Japan, Jordan, Malaysia, Morocco, Nicaragua, the Netherlands, New Zealand, Oman, Panama, Peru, the Philippines, Rwanda, Thailand, Singapore, Slovakia, Sweden, Switzerland, the United Kingdom, and Uruguay have all entered into investment treaties with consolidation provisions. For example, the United States has included a power vested in the tribunal to consolidate proceedings in subsequent free trade agreements with investment chapters such as the CAFTA-DR, Chile, Korea, Morocco, Jordan, Oman, Panama, Peru, and Singapore. All are available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements>. See also, Article 33 of the 2012 U.S. Model Bilateral Investment Treaty. For the proliferation of consolidation clauses, variously labelled as "Consolidation" or "Consolidation of Multiple Claims" in Mexico's treaties, see various bilateral investment treaties entered into by Mexico with various members of the European Union and other states such as: Australia, China, Iceland, India, Korea, and Switzerland. All are available at: [http://www.unctadxi.org/templates/DocSearch\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_779.aspx). Likewise, Canada has entered into a number of post-NAFTA Foreign Investment Protection Agreements (FIPAs) and free trade agreements did provide for consolidation of claims. These can be seen at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?view=d>. The ASEAN Comprehensive Investment Agreement also includes a consolidation provision as does the Agreement establishing the ASEAN-Australia-New Zealand Free Trade Agreement (<http://www.asean.fta.govt.nz/>). The foregoing list of ICSID Contracting States that have agreed consolidation provisions in recent treaties does not purport to be exhaustive.

<sup>179</sup> In a Discussion Paper prepared for UNCITRAL by Jan Paulsson and Georgios Petrochilos, when UNCITRAL launched the process of revising its 1976 Arbitration Rules, NAFTA Article 1126 was described as “remarkably far-reaching” in going so far as to permit consolidation even when the parties are not the same and allowing consolidation to proceed over the objections of claimants. See “Revision of the UNCITRAL Arbitration Rules”, a Report by Jan Paulsson and Georgios Petrochilos, Freshfields Bruckhaus Deringer, Paris, paragraph 126 and footnote 138. Available at: [http://www.uncitral.org/pdf/spanish/tac/events/hond07/arbrules\\_report.pdf](http://www.uncitral.org/pdf/spanish/tac/events/hond07/arbrules_report.pdf). The authors’ description is an indication of how radically different a treaty-based consolidation provision was from the existing practices of international commercial arbitration. As the 1976 UNCITRAL Rules stood at the time of the revision process, “consolidation [was] possible only where the parties specifically so agree”. UN Commission on International Trade Law Working Group II (Arbitration), Settlement of Commercial Disputes: Revision of the UNCITRAL Arbitration Rules, U.N. Doc. A/CN.9/WG.II/WP. 143 (20 July

7. Such a process contains important procedural features. All parties – claimants and respondents alike – are able to make submissions to a tribunal in favour of or against consolidation. This strikes a balance, recognizes the equality of the parties, and takes into consideration the interests of all parties. Put another way, no party has a dominant say in whether the claims will be consolidated, because that determination rests in the hands of the tribunal. It will decide whether the claims will proceed separately or together, in whole or in part. (In essence, it decides whether there is a “single dispute” in the sense used by the present Tribunal.<sup>180</sup>)

8. However, there are many treaties – including the Treaty governing the present dispute – that lack such a provision, with the consequence that, faced with a decision by one side to present the claims collectively, they throw the parties and tribunals back to first principles.

9. In my view, the Claimants have effectively “self-consolidated” their individual claims by presenting them as one collective claim. As observed at paragraph 284 of the Decision, in the present Arbitration, there exist no separate sets of parallel proceedings, “but only one single proceeding instituted against the same Respondent by a multiple group of Claimants.” The logic and attractiveness of this approach from the Claimants’ perspective can be well understood given the issues of fact and law that are evidently common to their claims (for example, their acquisition of security entitlements derived from bonds issued by the Argentine Republic, the fact of sovereign default and the enactment of the *Ley Cerrojo*), as well as the cost and efficiency gains derived from such a process. It had the added advantage of presenting the Respondent with a *fait accompli* (or more precisely, in light of the Tribunal’s Decision, something close to being a *fait accompli*) on the proceeding’s unfolding as a collective one over the Respondent’s vigorously stated objections.

10. As the Tribunal has pointed out, in cases such as *Canadian Cattlemen* and *Bayview*, the respondents insisted that (in the absence of a formal application to a consolidation tribunal) they had to give their consent to the consolidation of individual claims that were sought to be heard together.<sup>181</sup> In practice, therefore, as the Tribunal has recognized, there are examples of respondents insisting on their claimed right to consent to individual claims

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2006), paragraph 68. (A RA 301.) The 2010 UNCITRAL Arbitration Rules continue to emphasise the central role of party consent. Garth Schofield in “The 2010 UNCITRAL Arbitration Rules: Changes and Implications for Practice,” p 5. Available at: <http://www2.americanbar.org/calendar/section-of-international-law-2011-spring-meeting/Documents/Friday/Changing%20the%20Rules/THE%202010%20UNCITRAL%20ARBITRATION%20RULES.pdf>, observed that the 2010 UNCITRAL Rules explicitly provide for the joinder of third parties, subject to the condition that any such additional parties were also party to the underlying arbitration agreement, but they did not incorporate more expansive proposals, including the non-consensual joinder of parties not party to the original arbitration agreement, or the consolidation of related arbitrations arising under different instruments.

<sup>180</sup> *In the Matter of: The North American Free Trade Agreement; And in the Matter of: A Request for Consolidation by the United In States of the claims in: Corn Products International, v. United Mexican States (ICSID Case No. ARB (AF)/04/1) and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/5)*, available at: <http://italaw.com/sites/default/files/case-documents/ita0242.pdf>; *Canfor Corporation v. United States of America and Tembec et al v. United States of America and Terminal Forest Products Ltd. v. United States of America*, Order of the Consolidation Tribunal, available at: <http://www.state.gov/documents/organization/53113.pdf>.

<sup>181</sup> Decision, paragraphs 285, 288.

being heard collectively (and this echoes Mr Broches' comment on the need for a Special Consent Clause for multi-party ICSID arbitrations). This is due to the fact that registering a group of individual claims as one single proceeding can conceivably have an impact, both positively and negatively, on each Party's ability to make its case.

11. In the absence of a consolidation provision, the Tribunal has dealt with the issue as follows. Having noted that there is only one single proceeding begun against the same Respondent by a multiple group of Claimants, it comments: "If, all the same, joinder, or alternatively consolidation, would not be admissible as a unilateral move by a group of claimants in separate but parallel arbitrations, the question inevitably arises, in what way is the position different if the grouping takes place beforehand, *i.e.* at the stage of the initiation of the arbitral proceedings at the unilateral initiative of a number of individual claimants?"<sup>182</sup> The Tribunal has answered this question by holding, at paragraphs 292-294, that a number of individual claimants can take the unilateral initiative of filing their claims together if there is a single dispute between the claimants and the respondent.

12. In my view, the Tribunal's search for the existence of a single dispute where, on the one hand, all Claimants have felt the effect of the Respondent's measures, but on the other hand, they have acquired different security entitlements in different bond issues at different times and in different circumstances, represents the best possible solution in the circumstances, having regard to: (i) the absence of a special consent clause and special rules and procedures on multi-party ICSID arbitrations; (ii) the absence of a consolidation provision in the Treaty; and (iii) the fundamental precepts of ICSID arbitration (*viz.* equality of arms and a full opportunity to make one's case). In the event that the Tribunal finds such a dispute, consent to this multi-party arbitration exists.

13. This leads to my final point, which is to underscore the Tribunal's recording, at paragraph 294, of the need to ensure that there is sufficient Claimant-specific evidence on the record in order to satisfy itself as to the existence, or not, of a single dispute and to ensure that all parties have a full opportunity to make their respective cases. This, in my view, is of seminal importance to the proper administration of justice in this case.

[SIGNED]

J. Christopher Thomas QC

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<sup>182</sup> Decision, paragraph 284.