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

ABACLAT AND OTHERS
(Case formerly known as **GIOVANNA A BECCARA AND OTHERS***)
(CLAIMANTS)

and

THE ARGENTINE REPUBLIC
(RESPONDENT)

DECISION ON JURISDICTION AND ADMISSIBILITY

ARBITRAL TRIBUNAL
Professor Pierre Tercier, President
Professor Georges Abi-Saab, Arbitrator
Professor Albert Jan van den Berg, Arbitrator

Secretary to the Tribunal:
Mr. Gonzalo Flores

Date of dispatch to the Parties: 4 August 2011

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* For the change of name, see § 641 below.

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Abbreviations

In this Decision, the Tribunal adopts the following abbreviations:

- "RfA" refers to Claimants' Request for Arbitration of 14 September 2006.
- "R-MJ" refers to Respondent's First Memorial on Jurisdiction and Admissibility filed on 8 August 2008.
- "C-MJ" refers to Claimants' Counter-Memorial on Jurisdiction filed on 7 November 2008.
- "R-R-MJ" refers to Respondent's Reply Memorial on Jurisdiction and Admissibility filed on 23 February 2009.
- "C-R-MJ" refers to Claimants' Rejoinder Memorial on Jurisdiction filed on 6 May 2009.
- "First Session Tr." refers to the transcript made of the First Session of 10 April 2008 (Tr. p. 1/1 means Transcript on page 1 on line 1).
- "First Session Minutes" refers to the Minutes of the First Session of 10 April 2008.
- "Exh. C[letter]-[N°]" refers to Claimants' exhibits.
- "Exh. R[letter]-[N°]" refers to Respondent's exhibits.
- "Hearing Tr." Refers to the transcript made of the Hearing on Jurisdiction held from 7 to 13 April 2010 (Hearing Tr. Day 1 p. 1/1 means Transcript of the Hearing Day 1, page 1 on line 1).
- "C-PHB" refers to Claimants' Post-Hearing Brief of 22 June 2010.
- "R-PHB" refers to Respondent's Post-Hearing Brief of 22 June 2010.

With regard to the witness and expert statements,:

- "BIANCHI I" refers to Legal Opinion of Dr. Alberto B. Bianchi of 5 November 2008;
- "BIANCHI II" refers to the Supplementary Legal Opinion of Dr. Alberto B. Bianchi of 6 May 2009;
- "BRIGUGLIO" refers to the Opinion of Prof. Avv. Antonio Briguglio of 13 February 2009;
- "CERNIGLIA" refers to the Declaration of Avv. Massimo Cerniglia of 4 May 2009;
- "COTTANI I" refers to the Expert Report by Joaquín A. Cottani of 7 November 2008;
- "CREMIEUX" refers to the Expert Report of Pierre-Yves Cremieux (Analysis Group, Inc.) of 18 February 2009;
- "HARDIE I" refers to the Expert Report of Iain Hardie of 6 November 2008;
- "ILLUMINATO" refers to the Declaration of Dott. Sergio Mario Illuminato of 10 February 2009;
- "MAIRAL I" refers to the Legal Opinion of Héctor A. Mairal of 6 November 2008;
- "NAGAREDA" refers to the Expert Opinion of Richard A. Nagareda of 19 February 2009;
- "NAVIGANT I" refers to the Expert Report of Brent C. Kaczmarek, CFA (Navigant Consulting, Inc.) of 7 November 2008;

- "PICARDI" refers to the Independent Legal Opinion of Prof. Nicola Picardi of 24 April 2009;

- "PINGLE I" refers to the Expert Report of Mr. Rex E. Pingle of 7 November 2008;

- "SLAUGHTER & BURKE-WHITE I" refers to the Expert Witness Statement of Anne-Marie Slaughter and William Burke-White of 8 August 2008;

- "SUSMEL" refers to the Legal Opinion of Francisco G. Susmel of 5 November 2008.

I. PARTIES

A. CLAIMANTS

1. Claimants, as presented by Claimants, are those described in the Annexes A, B and C to the Request for Arbitration, as substituted, the total number of whom at the time of initiation of the arbitration exceeded 180,000[1] (hereinafter referred to as "Claimants"). Annexes A and B to the Request for Arbitration contain a list of natural persons; Annex C to the Request for Arbitration contains a list of juridical entities.

2. Annex D to the Request for Arbitration contains a power of attorney and delegation of authority for each Claimant being a natural person to White & Case LLP (*see* page 1 above). Annex E to the Request for Arbitration contains a power of attorney and delegation of authority for each Claimant being a juridical person to White & Case LLP (*see* page 1 above).

3. According to Claimants, Claimants are mostly natural persons of Italian nationality or juridical persons incorporated and existing under the laws of Italy.

4. Claimants are represented in these proceedings by "*l'Associazione per la Tutela degli Investitori in Titoli Argentini*" (hereinafter "Task Force Argentina" or "TFA"). The nature of TFA's representation, its specific role and position in, and its impact on the present proceedings are disputed between the Parties and will be dealt with by the Tribunal in the relevant part of this Decision.

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[1] See C-MJ § 164, stating that the total number of Claimants at the time of filing the C-MJ is 180,285. See also Navigant I § 27 and Cremieux § 22.

B. RESPONDENT

5. Respondent is the Argentine Republic (hereinafter referred to as "Respondent" or "Argentina").

6. Respondent is represented in this arbitration by its duly authorised attorneys mentioned at page 2 above.

7. Claimants and Respondent are hereinafter collectively referred to as the "Parties."

II. FACTS

A. INTRODUCTION

8. This Decision concerns the jurisdictional phase of a dispute relating to Claimants' claims for compensatory damages due to Respondent's alleged breach of its obligations under the *Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments*, signed in Buenos Aires on 22 May 1990, in two original copies, in the Italian and the Spanish language, both texts being equally authentic (hereinafter "Argentina-Italy BIT" or "BIT" or "Treaty") in relation to bonds issued by Respondent, allegedly held by Claimants, on which payment Respondent defaulted.

9. Considering the matter of Argentina's sovereign debt restructuring on which Claimants' claims are based, the Tribunal finds it necessary and appropriate to set out in this Section II the factual background to Argentina's default and its debt restructuring, to the extent it is not disputed between the Parties, by describing the financial market in relation to bonds, followed by a general overview on sovereign debt restructuring, and subsequently setting forth Argentina's restructuring of its economy and of its debt in relation to bonds in order to eventually address the evolution/development of the dispute.

10. The following summary of the factual background is not meant to be exhaustive, and simply aims to lay down the general context of the dispute, while focusing on aspects relevant to this jurisdictional phase.

(1) General Concepts relating to Financial Market and Bonds

11. *(i) Bonds.* Generally, "bonds" are defined as a debt, in which an interested party loans money to an entity (corporate or governmental) that borrows the funds for a defined period of time at certain interest rates. Bonds are commonly referred to as fixed-income securities and are one of the three main asset classes, along with stocks and cash equivalents.

12. Bonds, generally, have a pre-set final date of repayment, the "maturity" date, and pay interest, "coupon," on pre-set dates until the maturity date, usually on an annual or semi-annual basis. Bonds are uniquely identified by a 12-character alpha-numerical International Securities Identifying Number or "ISIN." The ISIN allows electronic trade and settlement in the particular security in markets across the globe.

13. A set of bonds issued at the same time but having different maturity dates is referred to as "serial bonds." A single bond issue offered to the public on multiple dates is referred to as "series bonds."

14. "Sovereign bonds" have the same characteristics as the normal bonds described above, with the specificity that they are issued by governments and are usually denominated in a foreign currency. "International sovereign bonds" are bonds issued by governments denominated in a foreign currency in foreign markets (i.e., outside the country of the issuer). Bonds issued by governments in the country's own currency are referred to as "government bonds."

15. A popular example of sovereign debt security is the instrument of "Brady Bonds," first proposed in 1989. They are named after former U.S. Treasury Secretary Nicholas Brady, who supported the effort to restructure emerging market debt instruments, following the 1980s debt crisis. Brady Bonds were issued by governments in developing countries as a conversion of bank debts into loans. The key innovation behind the introduction of Brady Bonds was to allow commercial banks to exchange their claims vis-à-vis developing countries into tradable instruments, allowing them to get the debt off their balance sheets. Due to their classification as bonds, rather than bank loans, Brady Bonds were much easier to trade to a broader range of financial market actors. Given that Brady Bonds were in many cases very large by the standards of the bond markets at the time, they were seen as one of the most liquid emerging market securities. Brady Bonds were collateralized, i.e., the repayment of principal and, in some cases, part of the interest payments, was backed by U.S. government bonds ("Treasuries"), which the

debtor country purchased, using a combination of International Monetary Fund, World Bank, and the country's own foreign currency reserves. The collateral involved made Brady Bonds considerably more attractive to potential investors than ordinary, uncollateralized bonds of the issuing country. The two main types of Brady Bonds are (i) "par bonds," issued at the same value as the original loan, with the coupon on the bonds being below market rate and principal and interest payments are usually guaranteed; and (ii) "discount bonds," issued at a discount to the original value of the loan, with the coupon on the bonds being at market rate and principal and interest payments usually guaranteed.

16. Brady Bonds are the origin of the emerging sovereign bond market in its current form. The Brady Bond process ended during the 1990s.

17. *(ii) Process of Issuing Bonds.* The process of issuing new bonds involves a chain of sales in order to achieve distribution of the issued bonds to the final investor.

18. The bond issuer enters into an agreement with a group of banks, which undertake to subscribe to and purchase a bond. These banks, commonly referred to as the "Subscribers" or "Lead Managers," then organize together with other banks, the so-called "Underwriters" or "Co-Managers," a syndicate. The members of this syndicate, jointly referred to as the "Participants," each underwrite differing parts of this bond, depending on their status in the syndicate. These Participants then distribute their specific part of the bond to further "Intermediaries," such as commercial banks, pension funds and other financial institutions, which in turn may or may not distribute their own part to their clients, including individual investors. Thus, the purpose of the subscribers, underwriters and intermediaries is to act as a distribution conduit.

19. Originally, bonds were traded in the form of negotiable bearer instruments, imposing significant handling costs and security risks. As trading volume grew, systems were developed to "dematerialize" tradable securities, i.e., to eliminate

both the need for certificates and maintenance of a complete security register by the issuer. Therefore, centralized depository systems were established allowing electronic trading of the securities through electronic accounts (so-called "non-certified securities").[2] On a global scale, a system has developed whereby issuers deposit a single "global certificate" representing all the outstanding securities of a class or series with a "universal depository," such as The Depository Trust Company ("DTC"), Depository Trust & Clearing Corporation ("DTCC"), Euroclear or Clearstream. All securities traded through a universal depository are registered in electronic form, on the books of various Intermediaries (so-called "book-entry form") between the ultimate investor, e.g., a retail investor, and the banks participating in the universal depository, i.e., the Participants. The securities, e.g., bonds, are then traded and settled on the basis of changes in the registration of the accounts opened with the Participants for Intermediaries (i.e., Sub-Participants) and the sub-accounts opened with the Intermediaries for their clients.

20. Each global certificate is identified by a special number (CUSIP for DTC, ISIN for Euroclear) and each Participant's account is also identified. The system uses the global certificate's identification number to keep track of transfers and ownership of the relevant securities. The universal depository issues computer-generated position listing reports indicating the position of the relevant Participant in the global certificate and the amount thereof. Final investors' position on their securities is usually evidenced by account statements issued by one of the Participants or intermediaries. It is disputed between the Parties whether the use of such central depository systems creates different categories of holders or owners of the relevant categories (see §§ 374, 411, 415 below).

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2 SUSMEL, §§ 7 and 11.

21. The final investor can be anyone and anything from hedge funds, pension funds, central banks, to individuals. With respect to the investor, a distinction is made between "institutional" and "retail" investors.

22. "Institutional investors" are those that are themselves institutions.

23. "Retail investors" are those who are individuals, investing on their own behalf. A bond issued sold to "retail" means, thus, the bond issued is sold to an individual investor. Retail investors who are less-wealthy individuals prefer the certainty of investing in fixed-income bonds to the greater volatility of the stock market. Such retail investors tend to be "buy and hold" investors who buy the bond and hold it until maturity. Consequently, "buy and hold" investors trade little.

24. A "retail bank" is referred to when a bank purchases bonds from the larger banks which typically serves as underwriters and sells bonds to individual investors, usually through its branch networks.

25. *(iii) The Bond Market.* The bond market can be divided into a "primary market" and a "secondary market."

- The "primary market" is defined as the market for newly issued bonds.

- The "secondary market" is defined as the market where previously issued securities are bought and sold.

26. Thus, the distinguishing difference between the two markets is that in the "primary market," the money for the bonds is received by the issuer of the bonds from an investor, in principle the Underwriters, whereas in the "secondary market," the securities are simply assets held by one investor selling them to another investor.

27. *(iv) Rating of Bonds.* Usually, bonds issues are rated by agencies expressing an opinion as to the creditworthiness of bonds. One of the most important rating agencies is Moody's Investor Services (hereinafter "Moody's") assigning a rating

on a scale from AAA to C. Another important rating agency is Standard & Poor's, using a rating scale from AAA to D. The rating scales are based on the probability of default by the issuer in question.

(2) General Overview on Sovereign Debt Restructuring

28. *(i) Sovereign Default.* The reason for a State to engage in sovereign debt restructuring is the default of the State on its sovereign debt. In this connection, the Tribunal refers to the description of sovereign default as defined by Standard & Poor's:[3]

> Standard & Poor's generally defines default as the failure to meet a principal or interest payment on the due date (or within the specified grace period) contained in the original terms of a debt issue.
>
> Question can arise, however, when applying this definition in different situations and to different types of sovereign obligations. Standard & Poor's considers a sovereign to be in default under any of the following circumstances:
>
> For local and foreign currency bonds, notes, and bills issued by the central government and held outside the public sector of the country, a sovereign default occurs when the central government either fails to pay scheduled debt service on the due date or tenders an exchange offer of new debt with less-favorable terms than the original issue. While a central government's failure to service debt owed to public sector entities, to meet a lease or other nondebt obligation, or to pay on a guarantee may be indicative of significant political/economic stress and imminent default, such an event in and of itself does not constitute a sovereign default. If a debt issue is rated on the basis of payment of one of these nondebt financial obligations and the sovereign's failure to pay results in a default on the rated issue, the rating of that specific issue will fall to 'D'.
>
> For local currency issued by the central bank, a sovereign default takes place when notes are converted into a new currency of less than equivalent face value.
>
> For private sector bank loans incurred by the central government, a sovereign default occurs when the central government either fails to pay scheduled debt service on the due date, or negotiates with the bank creditors a rescheduling of

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[3] Exh. C-127, p. 19; see also PINGLE I, § 31.

> principal and/or interest at less-favorable terms than in the original loan. Such rescheduling agreements covering short- and long-term bank debt are considered defaults even where, for legal or regulatory reasons, creditors deem the rescheduling to be voluntary.
>
> In some cases, rescheduled sovereign bank loans are ultimately extinguished at a discount from their original face value. Typically, such episodes involve exchange offers (such as those linked to the issuance of Brady bonds), debt/equity swaps related to government privatization programs, and/or buybacks for cash. Standard & Poor's considers such transactions as defaults when they feature less-favorable terms than the original obligation.
>
> [...]

29. *(ii) Sovereign Debt Restructuring.* Sovereign debt restructuring has the aim of preserving the functioning of the defaulting State as well as the international financial system while equitably protecting the interests of the creditors.

30. The modern sovereign debt restructuring is rooted in the establishment of the International Monetary Fund (hereinafter "IMF") at the Bretton Woods Conference in July 1944. According to its Articles of Agreement, the IMF is to "[t]o promote exchange stability, to maintain orderly exchange arrangements among members, and to avoid competitive exchange depreciation."[4] Thus, the IMF's purpose is, *inter alia,* to prevent sovereign defaults through monitoring and lending, including providing emergency loans intended to assist sovereigns to avoid default in a time of potential crisis.

31. Considering that the size of defaulting government debt has increased exceptionally while the IMF resources have expanded only slightly, it became clear that negotiating an agreement with the IMF is not a central part of modern sovereign debt restructuring anymore.

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[4] Article 1§ 3 of the Articles of Agreement of the International Monetary Fund.

32. Rather, from the 1950s through the 1970s, the bigger part of lending to sovereigns was provided by other States or their agencies. The outcome was the establishment of the Paris Club in 1956, when Argentina agreed to meet its public creditors in Paris.

33. The Paris Club consists of a group of sovereign lenders "whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor countries."[5] The Paris Club considers itself as a "non institution," remaining strictly informal. However, its work is based on a number of rules and principles agreed by the creditor States in order to facilitate the decision making process and the conclusion of agreements between the member States of the Paris Club and the debtor State.[6]

34. The principles of the Paris Club are summarized as follows: (i) decision making on a case-by-case basis; (ii) consensus among the participating creditor States; (iii) conditionality upon the debtor State providing a precise description of its economic and financial situation, that it has implemented and is committed to implement reforms to restore its economic and financial situation, and that it has demonstrated track record of implementing reforms under an IMF program; (iv) solidarity among the creditor States of the Paris Club to agree to act as a group in their dealings with a given debtor State; and (v) comparability of treatment, i.e., that a debtor State in agreement with its Paris Club creditor States should not accept from its non-Paris Club creditors terms of treatment of its debt less favorable to the debtor than those agreed with the Paris Club.[7]

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5 http://www.clubdeparis.org/

6 *Ibid.*; http://www.imf.org/external/np/exr/facts/groups.htm.

7 http://www.clubdeparis.org. See also PINGLE I, § 83 and SLAUGHTER & BURKE–WHITE I, § 22.

35. In the late 1980s and early 1990s, the nature of sovereign borrowing changed to "emerging market debt," and ultimately led to the establishment of the London Club, given that the effectiveness of the Paris Club was limited in this market sector. The emerging debt market was rooted in flows of private capital from larger banks in developed, high-income States, which sought to take advantage of the higher interest rates available through loans to sovereigns in the developing world. Introduced by the Baker Plan, named after U.S. Treasury Secretary James Baker, both debtors and creditors understood that funding from international financial institutions depended on a rescheduling agreement with private creditors, i.e., commercial bank lending.

36. Generally, a debtor initiates a process in which a London Club "Advisory Committee" is formed, which is chaired by a leading financial firm and includes representatives from other exposed firms. Upon signing of a restructuring agreement, the Advisory Committee is dissolved.[8] Such restructuring agreement is based on three principles: (i) case-by-case approach, (ii) voluntary participation of the borrowing banks, and (iii) restructuring designed based on the market situation.[9]

37. In the mid-1990s, caused by the substantial issuing of Brady Bonds, mentioned in ¶ 15 above, the vast majority of sovereign borrowing from private sources came from bond issues by sovereign States. In the light of the ever growing number of holders of interests in or under a sovereign bond, the closed negotiating framework of the Paris and London Clubs showed its limits.[10] Thus, a new mechanism was developed in the form of an "exchange offer."

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8 http://www.imf.org/external/np/exr/facts/groups.htm.

9 See also PINGLE I, § 88 and SLAUGHTER & BURKE–WHITE I, § 25 referring to LEX RIEFFEL, *Restructuring Sovereign Debt: The Case For Ad Hoc Machinery* 27-29 (2003), § 108.

10 SLAUGHTER & BURKE–WHITE I, § 29 *et seq.*; PINGLE I, § 96.

38. While many elements of an exchange offer are disputed between the Parties, they do seem to agree on the main object of an exchange offer, which may be summarized as follows: In an exchange offer, the sovereign facing default develops a new issue of bonds that are within the sovereign's ability to pay and acceptable to most bond holders and offers such new bonds in exchange for the old bonds in the hope of securing the acceptance of a supermajority of the bondholders.

39. Although the Parties agree that the terms and conditions of an exchange offer should ideally aim to ensure an equitable balance between the interests of the sovereign in restructuring its debt according to its payment abilities and the interests of the creditors, they disagree on how and when such aim is best achieved.

40. Currently, there exists no formal legal framework establishing precise steps to be followed by the defaulting sovereign or the creditors. Nevertheless, an informal regime has developed consisting of the following principles: (i) sovereign to signal the need of debt restructure; (ii) communication between the sovereign and the creditors; (iii) consensus and consent on the terms of the restructure; and (iv) equitable burden sharing.[11]

41. Remaining inefficiencies in the sovereign restructuring practices, in particular with regard to the risk created by holdout creditors, continue to trigger a series of proposals for improvements. Existing proposals include the creation of an international bankruptcy mechanism modelled on U.S. domestic bankruptcy law, or the development of contractual "collective action clause" to be included in bonds in

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[11] SLAUGHTER & BURKE-WHITE I, §§ 42 *et seq.* and §§ 87 *et seq.* referring to a proposal of the IMF.

order to bind a holdout minority to new payment terms agreed upon by a supermajority of bondholders.[12]

(3) Argentina's Restructuring of Its Economy and Its Debt in relation to Bonds

42. After having laid down the basic concepts necessary to understand the general context of the dispute, the present section focuses on the economic context prevailing in Argentina preceding, during and following the issuance of the bonds at stake in the present dispute.

(a) Argentina's Restructuring of Its Economy in the 1990s

43. In the 1990s, following the 1980s debt crisis, Argentina embarked on an ambitious effort to restructure its economy in order to encourage growth and reduce debt and inflation by deregulating its economy and privatizing certain industries. Argentina's Convertibility Plan of 1991 was part of the strategy aimed at addressing inflation, by pegging the Argentine peso to the U.S. dollar and limiting the printing of additional currency to an amount necessary to purchase surpluses of U.S. dollars in the foreign exchange market.

44. *(i) Issuing of Sovereign Bonds.* Issuing sovereign bonds was one of the pillars of restructuring Argentina's economy in the early 1990s. Thus, on 29 October 1992, Law No. 24,156, the Law on Financial Administration and Control Systems (hereinafter "LFA") was enacted,[13] being the legal foundation for Argentina to issue bonds. It contains several requirements as described below:[14]

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[12] See SLAUGHTER & BURKE-WHITE I, §§ 87 *et seq.* and §§ 90-91referring with regard to collective action clauses to a report of the IMF encouraging such clauses (report available on http://www.imf.org/external/np/g22/ifcrep.pdf).

[13] Exh. CLA-ARG-297.

[14] See MAIRAL I, §§ 39-44. These requirements are not disputed by Respondent.

- Legal Authorization: Either a specific law authorizes the loan, or the loan is included in a general authorization contained in the annual budget law. The relevant law may authorize either the Executive or the Secretary of the Treasury to execute relevant transactions. The annual budget law shall specify the type of debt, the maximum amount authorized for the transaction, the minimum repayment schedule, and the purpose of the financing.[15]

- Executive Decision: An executive decision (called a "Decree") is issued to approve the debt transaction specifically or to authorize the Ministry of Economy or the Secretary of the Treasury to execute transactions up to a certain amount. Alternatively, the enabling law may authorize the Ministry of Economy or the Secretary of the Treasury directly to enter into sovereign debt transactions.

- Central Bank opinion: The Central Bank issues an opinion as required by Article 61 of the LFA concerning the impact of the debt on Argentina's balance of payments.[16]

- Intervention of the National Office of Public Credit: This office certifies that the amount of the sovereign debt transaction is within the limits provided by the relevant budget law, and thus complies with Article 60 of the LFA that provides that Government agencies cannot execute debt transactions that are not authorized by the General Budget Law of the respective year or in another specific law.[17]

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15 Article 60 LFA.

16 Exh. CLA-ARG-297.

17 *Ibid.*

- Approval of the terms and conditions: A decision of the Ministry of Economy or of the Secretary of the Treasury approves the terms and conditions of the bonds, including the subscription agreement, the paying agency agreement, and the prospectus, and authorizes a Government officer to execute the appropriate documentation.

- Legal opinion by the *Procuración de Tesoro* or the Legal Office of the Ministry of Economy: The *Procuración de Tesoro* or, as the case may be, the Legal Office issues an opinion on the validity of the transaction at stake and certain other requirements. This opinion represents the official position of the Argentine State on the issue.

45. In addition to enacting a series of laws and decrees, Argentina also implemented various programs facilitating issuing sovereign bonds.

46. In particular, in order to raise capital, Argentina implemented the Brady Bond program and started issuing Brady Bonds in early 1993.

47. Argentina intended to develop a diversified market by issuing bonds in the international financial markets.

48. The process of Argentina issuing bonds in Europe was by relying on large investment banks as its lead managers, which studied the markets and competed with each other for Argentina's business. Argentina's choice of its lead managers were investment banks such as BNP Paribas, CS First Boston, Deutsche Bank, J.P. Morgan, and Morgan Stanley. Thereafter, banking syndicates were established to underwrite and distribute differing volumes of bonds, depending on the underwriters' status in the syndicate.

49. The lead managers would design, together with Argentina, a general bond issuance strategy. Based thereon, they would then suggest to Argentina which commercial banks would participate as co-managers, based, namely, on their ability to reach

investors with a profile fitting the bond issuance strategy. In this respect, while it is not disputed that Argentina participated in marketing efforts to banks and large institutional purchasers, the Parties disagree whether Argentina's bond issuance strategy targeted the Italian retail market, as submitted by Claimants.

50. In total, from 1991 through 2001, Argentina placed over US$ 186.7 billion in sovereign bonds across both domestic and international capital markets.[18] This included 179 bonds issued in the international capital markets that raised a total of approximately US$ 139.4 billion, of which 37% were denominated in US$, 22% were denominated in Euros, 11% were denominated in Yen, 11% were denominated in Deutsche Mark, 7% were denominated in Italian Lira, 3% in Argentine Pesos and 9% in other currencies.[19] Out of the 179 bonds issued by Argentina, 173 were denominated in foreign currencies; six were denominated in Argentine Pesos. Claimants allegedly purchased 83 of the 173 foreign currency bonds.[20]

51. The 83 bonds allegedly purchased by Claimants are governed by the laws of different jurisdictions, were issued in different currencies, and listed on various international exchanges, such as Buenos Aires, Frankfurt, Hong Kong, Luxembourg, Milan, Munich, and Vienna. These bonds generally paid a fixed coupon with the final maturity varying from three to thirty years.[21]

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[18] COTTANI I, § 22, referring to Chart "All Argentine External Bonds, 1991-2001," derived from Bloomberg and Ministry of Economy, "Títulos Públicos Emitidos en Moneda Nacional" and "Títulos Públicos Emitidos en Moneda Extranjera" (Charts of Argentine Government Bonds in Domestic and Foreign Currency), 31 December 2001. See also R-MJ § 11, and Exh. RE-195.

[19] NAVIGANT I, Table 2; see also C-MJ §§ 117-118.

[20] COTTANI I, § 22, See also R-MJ § 11, and Exh. RE-195.

[21] HARDIE I, § 19; CREMIEUX, §§ 9 *et seq.*

(b) Argentina's Financial Crisis and Default of 2001

52. By the late 1990s, Argentina began to suffer a severe economic recession and consequent reduction of fiscal revenues, leading Argentina to incur additional debt.[22]

53. The Parties disagree on the specific causes of this recession. Respondent emphasizes external factors such as the Asian, Russian and Brazilian financial crises in 1997, 1998 and 1999 respectively; the raising of interest rates in the US; the appreciation of the US dollar from 1995 to 1999 affecting export prices; etc.[23] In contrast, Claimants invoke failures on Argentina's side as important factors leading to the recession.[24]

54. These adverse economic developments reflected mainly in two ways on the Argentine economy:

(i) Substantial "capital flight": Many businesses and individuals fearing a devaluation of the peso started to withdraw money from the Argentine banking system. By the end of 2001, those withdrawals allegedly amounted to approximately US$ 15 billion,[25] endangering the entire banking system and forcing Argentina's central bank to expend substantial parts of its international reserve to defend the value of the peso, and forcing the Government to introduce restrictions on the withdrawal of bank deposits.

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22 R-MJ § 20.

23 R-MJ §§ 7 *et seq.* and 13 *et seq.*

24 C-R-MJ §§ 108 *et seq.*

25 R-MJ § 16, Ex. RE-132.

(ii) Decrease of capital inflow: As a result of a loss of confidence in the Argentine economy, capital inflows from foreign direct investment declined significantly.[26]

55. As the need for debt relief became clear, Argentina took in 2001 various measures in an attempt to restructure its economy and lighten its debt. Such measures included cutting both federal and provincial government spending, adopting a zero-deficit law, improving its tax administration system, and supporting competition with tax cuts for exporters, as well as global exchange offers in February, June and November 2001.[27]

56. These efforts apparently did not suffice to redress the situation. By December 2001, Argentina had allegedly come to a point where it was unable to avoid deferring interest and principal payments on all of its external bond debt owed to both foreign and Argentine creditors.[28]

57. These economic difficulties were accompanied by considerable political and social unrests, leading eventually to the resignation of the then President Fernando de la Rúa and his entire cabinet on 19 December 2001.

58. On 23 December 2001, Argentina defaulted by publicly announcing the deferral of over US$100 billion of external bond debt owed to both non-Argentine and Argentine creditors.[29]

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26 R-MJ § 17.

27 R-R-MJ §§ 22-23, and §§ 65-66, see also Exh. RE-195, RF-26.

28 R-MJ § 24.

29 R-R-MJ § 66.

(c) The Events following Argentina's Default of 2001

59. After President de la Rúa's resignation of 19 December 2001, various difficult attempts to appoint a new president were made. On 1 January 2002, Congress eventually elected Mr. Eduardo Duhalde as President.

60. In January 2002, Congress declared a public emergency in social, economic, administrative, financial and exchange matters with the passage of the Public Emergency and Reform Law of 2002 (the "Emergency Law").[30] The Emergency Law, among other things, terminated the parity between the peso and the dollar. This "pesification" was followed by a substantial devaluation of the peso.

61. The effects of the economic crisis on ordinary Argentine citizens were devastating. According to Argentina, by May 2002, unemployment had reached 21.5%, an 8% increase over 1998, the year the crisis began. Another 19% of the population was underemployed. The poverty level increased to 54.3% of the Argentine urban population and the indigence level reached 22.7%.[31]

(d) Argentina's Restructuring of Its Debt in relation to Bonds and Relevant Creditors' Reactions

62. The substantial devaluation of the peso further accentuated the weight of debt in foreign currencies, which constituted an important part of Argentina's total debt. This led Argentina to envisage the restructuring of its foreign debt.

63. Based on figures produced by Respondent, by the end of 2002, Argentina's total public debt burden was approximately US$ 137 billion, representing approximately

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30 R-MJ § 30.

31 R-MJ § 32.

130% of its GDP in 2002, and among which approximately US$ 76 billion was owed to resident and non-resident public bondholders.[32]

64. In relation to the restructuring of its foreign debt, according to figures brought forward by Respondent in 2003 and relied upon by Claimants, more than US$ 27.5 billion worth of bonds were held by European bondholders, of which approximately US$ 22.2 billion were held by retail bondholders, including US$ 13.5 billion owned by Italian bondholders (approximately 600,000 persons).[33]

65. On 18 September 2002, pursuant to a resolution of the Executive Committee of the Italian Banking Association (hereinafter "ABI"), eight major Italian banks (Banca Antonveneta, Banca Intesa, Banca Sella, BNL, Iccrea Banca, Monte dei Paschi di Siena, San Paolo, and UniCredito) established *l'Associazione per la Tutela degli Investitori in Titoli Argentini* or "Task Force Argentina" or "TFA" in Rome (see § 4 above). TFA is organized under Italian law as an *associazione non riconosciuta*, funded by its members' contributions and headed by Dr. Nicola Stock as its president.[34]

66. The aim of TFA is to "represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina."[35] Bondholders wishing to make use of this possibility and to be represented by TFA were requested to sign a "Mandate for the

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[32] R-MJ § 33.

[33] COTTANI I, § 46, referring to the presentation of the Secretariat of Finance, Ministry of Economy and Production "Argentina – From Stabilization to Economic Growth" of August 2003 at: http://www.argentinedebtinfo.gov.ar/documentos/europe_presentation_english_august.pdf.

[34] http://www.tfargentina.it/chisiamo.php.

[35] C-MJ § 180, which reflects the wording to be found in Italian on http://www.tfargentina.it/chisiamo.php. See also TFA's Bylaws 2002, Article 2, which provide that "to represent free of charge and on the basis of a mandate the interests of Italian investors in Argentinean securities within the framework of the debt restructuring operations to be negotiated with the Argentinean authorities or other Argentinean issuers" (translation provided by the Tribunal).

Protection of the Interests Connected with the Bonds involved in the 'Argentinean Crisis'" (so called "TFA Negotiating Mandate").[36] The specific role and the legitimacy of TFA's actions under this mandate is disputed between the Parties and will be subject to further examination (see §§ 449 *et seq.* below).

67. The TFA Negotiating Mandate provides – *inter alia* – as follows:

> The undersigned [...]
>
> HAVING ACKNOWLEDGED THAT:
>
> banks and financial intermediaries have created the Association for the Protection of Interests of the Investors in the Argentinean Bonds ("*Associazione per la Tutela degli Interessi degli Investiotori in Titoli Argentini*"), which has the following purposes:
>
> to represent, free of charge and on the basis of a mandate, the interests of the subscribers of Argentinean bonds in the frame of the restructuring of the debt, which will be subject to the negotiation with the Argentinean Authorities or with other Argentinean issuers;
>
> to make available its own consulting and assistance activity, to the above purposes;
>
> to handle the relationships with the Argentinean diplomatic and consular Authorities, with the central and local Authorities of such country, with the International Monetary Fund, with the European Central Bank and with the various National Central Banks, with the Italian Government and Parliament as well as, more in general, with each other economic and political, private and public, national and international authority, organisation and institution, with which the Association will deem necessary or appropriate to consult or co-operate;
>
> to attend the negotiations for the restructuring of the debt with the Argentinean Authorities or with other Argentinean issuers at any national or international seat, in accordance with the Bylaws of the Association and with the decisions taken by the management bodies of the Association;
>
> to make the requests and proposals which as might deem appropriate in the interests of the holders of the bonds represented by it and to obtain the necessary consent of such holders (the way and the timing thereof will be decided).
>
> DELEGATES

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[36] Exh. C-417.

> The aforementioned Association to represent himself during any stage of the negotiations in connection with the receivables of the bonds indicated in the exhibit hereof.
>
> The undersigned hereby undertakes to communicate promptly in writing to the bank any amendments which may occur in the holding the bonds indicated in the exhibit hereof.
>
> The undersigned may terminate this proxy, in writing, with a notice of 15 days, provided that the same proxy will be considere[d] terminated in the case of sale of all the bonds indicated in the same exhibit.
>
> (Emphasis in the original)

68. Allegedly, over 450,000 Italian persons and entities claimed to have held Argentine bonds for an aggregated nominal amount of US$ 12 billion and submitted their mandates to TFA.[37]

69. While the Parties are in agreement that discussions took place between TFA and Respondent in order to reach a solution for the outstanding debt, they disagree whether these discussions can be considered to constitute proper negotiations between TFA, on behalf of Claimants, and Respondent. The Tribunal will analyze the exchanges between TFA and Respondent in its findings where appropriate and necessary.[38]

70. In September 2003, Argentina reached an agreement with the IMF concerning a three-year credit package of approximately US$ 12.5 billion.[39]

71. On 22 September 2003, Argentina presented an initial debt restructuring strategy known as the "Dubai Proposal," focusing on the objective of obtaining a reduction in the face value of the unrestructured debt:[40]

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37 Exh. C-RA-11, 12 and 13; see further C-MJ § 182 and Exh. C-372.

38 See below §§ 559 *et seq*.

39 R-MJ § 36 and Exh. RE-137.

"[...]

We also have to ensure liquidity with a new maturity profile in line with Argentina's real repayment capacity.

Finally, although our decision is not to increase Argentina's debt, but to reduce it, we have to facilitate a responsible return to the capital markets to ensure compliance with the commitments assumed under the restructuring.

[...]

The debt to be restructured i[s] defined as "eligible debt". It includes all the bonds issued before the cutoff date, December 31, 2001. To have an idea of the size and complexity of Argentina's debt, the eligible debt encompasses 152 different bonds, issued originally in 14 different currencies, which have been reduced to seven thanks to the Euro, and subject to eight different legislations.

[...]

Undoubtedly, our proposal must be based on Argentina's repayment capacity in the medium and long term.

The bond swap and the amendment of the issuance conditions, in the cases in which such amendment is possible, will take place simultaneously. The menu will include comparable bonds, equivalent in terms of present value.

[...]

We would like to make clear again that there will be no discrimination among bondholders.

[...]

Summing up, we want to have a smaller number of bonds, a smaller number of currencies and jurisdictions so that the resulting bonds may have a higher liquidity.

[...]

The new bonds will be: Discount bonds, whose value evidences the haircut in the face value; Par bonds, which suffer no face value reduction or a small face value reduction, but that offer coupons and longer payment terms; and last of all Capitalized Bonds. Our offer will also include different alternatives for such bonds, with coupons including a lower fixed interest rate coupled with a variable rate indexed on the basis of the growth of Argentina's GDP. These indexed bonds reflect our intention to share the benefits of increased growth in the medium term and to pay a lower interest rate flow in the case of possible slowdowns of or drops in Argentina's GDP. It seems to be a reasonable

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[40] Exh. RE-138, pp. 14, 21, 22, 24.

> option since nobody knows which Argentina's economy growth rate will be in, let's say, five or ten years.
>
> [...]"

72. On 12 January 2004, the Global Committee of Argentina Bondholders (hereinafter "GCAB") was founded in Rome. Its founding members were three major bondholder groups, the Argentine Bond Restructuring Agency, the Argentine Bondholders Committee (hereinafter "ABC"), and TFA as well as two banks, Bank of Tokyo-Mitsubishi and Shinsei Bank. At the time of GCAB's founding, the members represented more than half a million retail investors and more than 100 institutions, including banks, funds, partnerships, and committees, with total holding of US$ 37 billion in nominal value.[41] Nicola Stock, chairman of TFA, and a representative of ABC were appointed as chairmen of GCAB.

73. The aim of GCAB was to allow a better coordination of the various members' efforts to negotiate with Argentina "in order to achieve an efficient and fair restructuring of the debt of Argentina."[42] To achieve this purpose, the Steering Committee of GCAB was to "establish a plan of action and guidelines for a single, global strategy."[43]

74. Following the publication of the Dubai Proposal, discussions were held between creditor groups, such as GCAB and TFA, and Respondent, whereby the Parties disagree on whether these discussions can be considered "good faith" negotiations or consultations, each of them accusing the other of a lack of good faith.[44] The

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41 Exh. C-163.

42 Exh. C-297.

43 Exh. C-297.

44 C-MJ §§ 197-198; R-MJ §§ 87-97, and 99 in which Respondent described GCAB as "TFA-dominated."

Tribunal will analyze any exchanges between such creditor groups and Respondent in its findings where appropriate and necessary.[45]

75. On 27 April 2004, Argentina issued a press release announcing its intention to file Form 18-K/A with the U.S. Securities and Exchange Commission in "early June 2004" concerning a proposal of a debt restructuring exchange offer.[46]

76. On 10 June 2004, Argentina filed Form 18-K/A with the U.S. Securities and Exchange Commission, describing the basic terms of its exchange offer.[47] In Autumn 2004, the Argentine Government filed further documents with the U.S. Securities and Exchange Commission and other relevant national securities regulators laying out details of the exchange offer (hereinafter "Exchange Offer 2005").[48] The Exchange Offer 2005 opened on 14 January 2005 and closed on 25 February 2005.

77. On 14 January 2005, Argentina launched the Exchange Offer 2005, pursuant to which bondholders could exchange 152 different series of bonds, on which Argentina had suspended payment in 2001, for new debt that Argentina would issue. The Exchange Offer 2005 provided to the beneficial owners of the roughly US$ 81.8 billion in eligible outstanding debt a choice of options from which to choose the form of their new debt. The bondholders could choose par bonds with the same principal but a lower interest rate than the non-performing debt, discount bonds with reduced principal but a higher interest rate, or quasi-par bonds with a principal and interest rate falling between the two other bond options. Each bond offered was accompanied by securities with payment conditioned upon Argentina's

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45 See below §§ 559*et seq.*

46 Exh. C-165.

47 Exh. RE-152.

48 See e.g. Exh. RE-155.

gross domestic product ("GDP-Linked Securities"). The first page of the Prospectus Supplement to the Prospectus of 27 December 2004 states:[49]

> "The Republic of Argentina
>
> Offers to Owners of
>
> Each Series of Bonds listed in Annex A to this Prospectus Supplement
>
> (collectively, the "Eligible Securities")
>
> To exchange Eligible Securities for its
>
> Par Bonds due December 2038 ("Pars"),
>
> Discount Bonds due December 2033 ("Discount"),
>
> Quasi-Par Bonds due December 2045 ("Quasi-pars") and
>
> GDP-linked Securities that expire in December 2035 ("GDP-linked Securities")
>
> collectively, the "New Securities," on the terms and conditions described in this prospectus supplement.
>
> The GDP-linked Securities will initially be attached to the Pars, Discounts and Quasi-pars.
>
> The aggregate Eligible Amount (as defined below) of all Eligible Securities currently outstanding is U.S.$81.8 billion, comprising U.S.$79.7 billion of principal and U.S.$21 billion of accrued but unpaid interest as of December 31, 2001, based on exchange rates in effect on December 31, 2003.
>
> [...]"

78. On 9 February 2005, Law 26,017 was enacted, referred to by Claimants as the "Cram Down Law," and hereafter referred to as "Emergency Law" or "Law 26,017." It was promulgated on 10 February 2005 and published in the Official Gazette on 11 February 2005. The Emergency Law provides, *inter alia*, that with regard to those bonds which were eligible for but were not exchanged in the Exchange Offer 2005 (i) the Executive Branch of the government shall not reopen

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[49] Exh. RF-28.

the exchange process; and (ii) the national government is prohibited from entering into any juridical, extra-juridical or private transaction:

> "**ARTICULO 1º** -- Sin perjuicio de la vigencia de las normas que resulten aplicables, los bonos del Estado nacional que resultan elegibles para el canje establecido en el Decreto N° 1735 del 9 de diciembre de 2004, que no hubiesen sido presentados al canje según lo establecido en dicho decreto, quedaran sujetos adicionalmente a las disposiciones de la presente ley.
>
> **ARTICULO 2º** -- El Poder Ejecutivo nacional no podrá, respecto de los bonos a que se refiere el artículo 1º de la presente, reabrir el proceso de canje establecido en el Decreto N° 1735/04 mencionado.
>
> **ARTICULO 3º** -- Prohíbese al Estado nacional efectuar cualquier tipo de transacción judicial, extrajudicial o privada, respecto de los bonos a que refiere el artículo 1º de la presente ley.
>
> **ARTICULO 4º** -- El poder Ejecutivo nacional deberá, dentro del marco de las condiciones de emisión de los respectivos bonos, y de las normas aplicables en las jurisdicciones correspondientes, dictar los actos administrativos pertinentes y cumplimentar las gestiones necesarias para retirar de cotización en todas las bolsas y mercados de valores, nacionales o extranjeros, los bonos a que se refiere el artículo anterior.
>
> **ARTICULO 5º** -- El Poder Ejecutivo nacional remitirá al Honorable Congreso de la Nación un informe que refleje los efectos del canje y los nuevos niveles de deuda y reducción de la misma.
>
> **ARTICULO 6º** -- Sin perjuicio de lo establecido precedentemente, los bonos del Estado nacional elegibles de acuerdo a lo dispuesto por el Decreto N° 1735/04, depositados por cualquier causa o titulo a la orden de tribunales de cualquier instancia, competencia y jurisdicción, cuyos titulares no hubieran adherido al canje dispuesto por el decreto antes citado o no hubieran manifestado, en forma expresa, en las respectivas actuaciones judiciales, su voluntad de no adherir al mencionado canje antes de la fecha de cierre del mismo, según el cronograma establecido por el referido decreto N° 1735/04, quedarán reemplazados, de pleno derecho, por los "BONOS DE LA REPÚBLICA ARGENTINA A LA PAR EN PESOS STEP UP 2038", en las condiciones establecidas para la asignación, liquidación y emisión de tales bonos por el Decreto N° 1735/04 y sus normas complementarias.
>
> [...]"

79. In the non-official English translation provided by Respondent, these articles provide as follows:[50]

> "Article 1 - Notwithstanding the validity of applicable rules, the national Government's bonds eligible for the exchange established in Decree No. 1735 of December 9th, 2004, which were not exchanged as established in said decree, shall be subject additionally to the provisions of the present law.
>
> Article 2 - The national Executive Branch shall not, with respect to the bonds to which Article 1 of the present law refers, reopen the exchange process established in said Decree No. 1735/04.
>
> Article 3 - The national Government is precluded from entering into any type of judicial, extra-judicial or private settlement with respect to the bonds to which Article 1 of the present law refers.
>
> Article 4 - The national Executive Branch shall, within the framework of the issuing conditions of the respective bonds and the applicable rules in the relevant jurisdictions, issue appropriate administrative acts and effect necessary steps to delist the bonds to which the previous article refers from all exchanges and markets, domestic and foreign.
>
> Article 5 – [not translated]
>
> Article 6 - Notwithstanding the above established, the bonds of the national Government eligible under the terms of Decree No. 1735/04, deposited pursuant to any cause or title on the order of any court of any venue, competence, and jurisdiction, whose depositary has not participated in the exchange provided for in the above-mentioned decree or who has not indicated, in express form, in their respective court proceedings, their desire not to participate in said exchange before its expiration date, according to the timeline established by said decree No. 1735/04, shall be replaced, by operation of law, with the 'BONDS OF THE ARGENTINE REPUBLIC AT PAR IN PESOS STEP UP 2038,' according to the terms established for the assignment, liquidation and issue of such bonds by Decree No. 1735/04 and its complementary norms."

80. On 25 February 2005, the period for submitting tenders pursuant to the Exchange Offer 2005 expired, 76.15% of all holdings having participated in the Exchange Offer 2005,[51] following which Argentina issued approximately an aggregate

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50 Exh. RD-121.

51 R-MJ § 40; C-R-MJ § 205.

principal amount of US$ 15 billion in par bonds, US$ 11.9 billion in discount bonds, ARG$ 24.3 billion (US$ 8.3 billion) in quasi-par bonds and US$ 62.3 billion in GDP-Linked Securities.[52] Forty-four percent of the new debt was denominated in indexed pesos.[53] The Exchange Offer 2005 settled on 2 June 2005.

81. The Claimants did not participate in the Exchange Offer 2005.

82. The announcement and filing of the Exchange Offer 2005 was followed by a series of court litigations initiated by creditors unsatisfied with the terms and conditions of the Exchange Offer 2005. According to Respondent, these series of court cases included the following lawsuits:

(i) Over 130 lawsuits brought in the US, mostly in New York, seeking repayment of approximately US$ 3.3 billion in principal and accrued interest.[54] These lawsuits include the *Urban* Case, in which a German corporation - H.W. Urban GmbH - and holder of two series of Argentine bonds initiated a class action,[55] the *Agritech* Case and the *Gandola* Case in which many of the plaintiffs are also Claimants in the present arbitration.[56] These cases were stayed by the New York District Court upon request of plaintiffs in favor of the pending ICSID proceeding.[57]

(ii) Over 470 court proceedings filed against Argentina in Germany, with claims amounting to a total of approximately EUR 106 million. Among these cases,

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52 Exh. RE-195, p. 135.

53 PINGLE I, § 254.

54 R-MJ § 53 *et seq.*

55 *H.W. Urban GmbH et al. v. The Republic of Argentina*, 02 Civ. 6699 (TPG) (SDNY), see Exh. C-193, p. 3.

56 *Agritech S.R.L. et al. v. Republic of Argentina*, 06 Civ. 15393 (TPG) (SDNY), see Exh. RD 143, and *Gandola & C. S.P.A., et al. v. Republic of Argentina*, see Exh. C-505.

57 Exh. RD-148 and RD-154.

judgment would have been entered against Argentina in 115 cases for a total amount of EUR 39 million plus interest.[58]

(iii) Thirteen lawsuits filed against Argentina in Italy before civil courts, with claims amounting to a total of approximately EUR 71 million. [59]

83. Except for the US litigations referred to below (see § 193), the Arbitral Tribunal has not been informed of the specific developments and status of these various litigations.

(4) Evolution of the Dispute following Argentina's Exchange Offer 2005

84. On 28 February 2006, TFA wrote a letter to the Argentine Ministry of Economy and Production, Minister Lic. Felisa Miceli:[60]

> "Dear Minister Miceli:
>
> As you are well aware, Associazione per la Tutela degli Investitori in Titoli Argentini – Task Force Argentina ("TFA"), is a member and co-founder of the Global Committee of Argentina Bondholders ("GCAB") and a member of the International Group of Rome for Argentina Bondholders ("IGOR"). Together with and as a member of the GCAB group, and separately, on its own, TFA has contacted repeatedly the Government of the Argentine Republic ("Argentina") in an effort to resolve amicably the dispute arising out of Argentina's default on and expropriation of TFA bondholders' investments, and lack of fair and equitable treatment of the TFA bondholders in violation of the Agreement between the Republic of Italy and the Argentine Republic on the Promotion and Protection of Investments signed in Buenos Aires on May 22, 1990 ("Bilateral Investment Agreement"), and Italian law.
>
> In furtherance of our efforts on behalf of hundreds of thousands of Italian bondholders/creditors to recover on defaulted Argentine debt we have engaged in several years of unceasing efforts to initiate meaningful negotiations with Argentina. We write to remind you that beginning around

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58 R-MJ § 59.

59 R-MJ § 60 and R-R-MJ §§ 95 *et seq.*

60 Exh. C-418.

November of 2002, we have continuously attempted, directly and through IGOR and GCAB, to recover the debt owed by Argentina to our constituents through negotiations and in this regard have notified Argentina of the bondholders' dispute on numerous occasions, including, *inter alia*, specifically that (1) we disapproved of the unilateral Argentine exchange offer and Argentina's obstructionist tactics with external creditors; and (2) we expected Argentina to engage in good faith negotiations with us to arrive at an acceptable debt restructuring plan. As you may recall, we have communicated often and repetitively in an attempt to resolve the bondholders' dispute amicably including, *inter alia*:

- November 28, 2002 meeting with Minister of the Economy Lavagna, Undersecretary of Finance Madcur and Ambassador Kelly in Rome.
- December 3, 2002 meeting with Secretary for Economic Policy Tangelson in Rome.
- February 7, 2003 meeting with new Argentine Ambassador Roggiero in Rome.
- February 10-14, 2003 meetings with Minister Lavagna, Undersecretary of Finance Nielsen, Undersecretary of Finance Madcur and Director General Mirrè of the Ministry of International Affairs in Buenos Aires.
- March 26, 2003 meeting with Undersecretary of Finance Nielsen and Undersecretary of Finance Madcur in Rome.
- May 23, 2003 letter from TFA to Minister Lavagna notifying him that we represented 400,000 Italian bondholders with holdings totaling Euro 13 billion, and expressing our hope that we would soon be able to begin negotiations to reach terms for Argentina's bond restructuring that would be acceptable to the TFA bondholders.
- July 17, 2003 letter from TFA to Secretary of Finance Nielsen attempting to confirm a consultative group meeting and informing that we would prefer to participate as a "negotiating group."
- July 25, 2003 meeting with Secretary Nielsen in Rome.
- August 25, 2003 letter from TFA to Secretary Nielsen reminding Argentina that it had given assurances at the prior meeting in Rome that Argentina's restructuring proposal "would not occur without the consultation with, and, if possible, the pre-agreement of, the representatives of the major creditors…." We further stated that we would not "stand idly by a situation which cannot reach a shared and acceptable solution."
- September 22, 2003 participation in a presentation by Minister Lavagna during the IMF meeting in Dubai.
- September 23, 2003 meeting with Secretary Nielsen in Dubai.
- October 22, 2003 meeting with Secretary Nielsen in Rome.

- November 10, 2003 letter from TFA to Secretary Nielsen reminding Argentina that we intend to be a "negotiating group," rather than simply a "consultative group."
- November 12, 2003 letter from IGOR to Minister Lavagna informing Argentina that its debt restructuring proposal had been "rejected by all the major investor groups." We further reiterated our ongoing desire to "negotiate in good faith with Argentina a fair and sustainable restructuring of the government's foreign debt." Finally, we prepared and included a set of parameters for sustainable debt restructuring for Argentina, and warned that "[i]f Argentina does not enter good faith negotiations with its major creditors and [instead] pursues the implementation of a debt restructuring along the lines the government has proposed, many bondholders will reject it and will resort to legal action in an effort to protect their interests." Secretary Nielsen's follow-up letter to creditors dated November 14, 2003 stated that Argentina was committed to pursuing "good faith negotiations toward a successful debt restructuring that attracts broad participation from creditors."
- November 26, 2003 meeting with Mr. Facundo Vila, representative in Italy of the Ministry of Economy of Argentina, in Rome.
- January 13, 2004 letter from GCAB to Minister Lavagna inviting formal negotiations with respect to defaulted Argentine debt.
- January 27, 2004 letter from GCAB to Minister Lavagna reiterating our hope that "you will be starting negotiations with the GCAB […]"
- February 18, 2004 letter from GCAB to Minister Lavagna stating that we "look forward to initiating this constructive [negotiation] process, a process that has not yet begun…."
- February 25, 2004 meeting with Mr. Federico Molina, representative of the Argentine Embassy to the United States, in New York and representatives of GCAB.
- February 27, 2004 meeting with new Argentine Ambassador Taccetti in Rome.
- April 16, 2004 meeting with representative of the Argentina Ministry of the Economy in Buenos Aires and representatives of GCAB.
- May 4, 2004 letter from GCAB to Minister Lavagna reconfirming that further to the April 16, 2004 meeting in Buenos Aires, "GCAB is prepared to initiate direct and good faith negotiations with the Argentine government…."
- May 13, 2004 letter from GCAB to Minister Lavagna informing Argentina that "GCAB is still waiting to be invited for the agreed technical meeting with the Argentine government…."

- May 26, 2004 letter from GCAB to Minister Lavagna requesting the proposed agenda and timing for the "previously discussed technical meeting and productive negotiations leading to an acceptable deal…."
- June 8, 2004 letter from GCAB to Minister Lavagna stating that "it is now essential to initiate the good faith negotiation process to which the government committed in order to reach an acceptable deal…."
- June 21, 2004 letter from GCAB press release announcing GCAB's retention of Bear Stearns as its financial advisor to assist it in negotiation with Argentina and stating that "GCAB remains fully committed to starting serious negotiations directly with Argentina."
- June 25, 2004 letter from GCAB to Minister Lavagna informing Argentina of GCAB's retention of Bear Stearns as its financial advisor and stating that "[w]e are hopeful that GCAB and Argentina, with the active assistance of our respective advisors, will be able to swiftly achieve an equitable, consensual and mutually beneficial solution…."
- August 18, 2004 letter from White & Case LLP on behalf of GCAB to Minister Lavagna stating that despite Argentina's assertions to the contrary, "there is no basis under U.S. law or market practice for you to assert that the Republic is prohibited from communicating or negotiating with GCAB at the present time…" and that "the need for negotiations between the Republic and GCAB is more urgent than ever."
- August 26, 2004 letter from GCAB to Minister Lavagna stating that "no negotiations [have occurred] between Argentina and GCAB…despite Argentina's commitment to the International Monetary Fund and the G-7 to do so" and reiterating "GCAB's desire that Argentina seek to resolve its external debt crisis in the proven and mutually beneficial way through negotiations…."
- February 3, 2005 GCAB press release condemning Minister Lavagna's announcement of a proposed law that would prohibit any future offer to bondholders who did not accept the current exchange offer commenced by Argentina on January 12, 2005, and stating that this proposal "ignores the various international legal systems under which the defaulted debt was issued", and that "Congressional action in Argentina will not supersede rights under international law."

In addition to such meetings and correspondence, GCAB delivered presentations at several meetings with creditors of Argentina, at which representatives of Argentina were present, setting forth our position concerning a strategy for resolving the dispute between Argentina and the bondholders/creditors. Additionally, GCAB notified representatives of Argentina that we did not "endorse Argentina's current unilateral offer, and [were] evaluating all other options, not excluding litigation, to protect investors' rights." Despite our clear warnings, our communicated disapproval of Argentina's strategy of avoidance and our repeated efforts to negotiate

> illustrated by the communications listed above, Argentina continues to refuse to negotiate with us in good faith.
>
> Given that Argentina has steadfastly failed to negotiate with us, and has defaulted on and expropriated the bonds of our constituents, we are left with little choice. Accordingly, we hereby provide you final notice that:
>
> we and TFA bondholders remain unsatisfied with Argentina's refusal to negotiate in good faith as we fully contemplated you would under Article 8 of the Bilateral Investment Agreement; and
>
> Argentina has sixty (60) days from receipt of this correspondence to pay the monies it owes to the hundreds of thousands of Italian bondholders/creditors TFA represents.
>
> If Argentina fails to resolve the dispute amicably and pay within sixty (60) days, the TFA bondholders will have no choice but to commence legal proceedings against Argentina in one or more appropriate for a ([*sic*]*)* to recover the amounts due. On behalf of the TFA bondholders, who are Italian nationals not domiciled in Argentina, and who acquired their bonds prior to Argentina's default, we hereby accept the offer of consent, expressed by Argentina in Article 8 of the Bilateral Investment Agreement, to submit the dispute to the International Centre for Settlement of Investment Disputes for settlement by arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
>
> If Argentina refuses to resolve the dispute amicably, we invite you to contact me and/or counsel for the anticipated litigation, Carolyn Lamm of White & Case LLP, to negotiate a memorandum of understanding on an agreed procedure that would facilitate the resolution of the hundreds of thousands of TFA bondholder claims in the most expeditious way for all parties.
>
> Sincerely,
>
> Associazione TASK FORCE ARGENTINA (TFA)
>
> (signed)
>
> Nicola Stock"

85. Unsatisfied with the situation, TFA seriously considered the initiation of an ICSID arbitration against Argentina. For this purpose and in order to be able to represent the concerned Italian bondholders, a new mandate (so-called "TFA Mandate Package") was designed by TFA in and consisting of the following documents:

- A Letter of Instructions to Bondholders ("TFA Instruction Letter"), explaining the object and modalities of the ICSID arbitration and setting forth instructions for the bondholders how to participate.[61]
- A Declaration of Consent, Delegation of Authority, and Power of Attorney ("Power of Attorney"), in favor of White & Case.[62]
- A Grant of Mandate to TFA ("TFA Mandate"), in which the signatory mandates TFA to act as coordinator of the ICSID arbitration.[63]
- A questionnaire, seeking information and documents related to nationality and ownership of the bonds. [64]
- Additional instructions regarding gathering of documents.[65]

86. In the TFA Instruction Letter, in addition to the specific instructions on how to participate in the ICSID proceedings, TFA set forth some basic rules of conduct for the bondholders. In particular it provided that:

> "8. SOME RULES OF THE LEGAL ACTION PLANNED BY TFA THAT SHOULD BE KEPT IN MIND
>
> In keeping with the transparency that has always been a hallmark of TFA's activities to protect Italian bondholders, we wish to highlight some basic rules that the conduct of the ICSID arbitration on behalf of numerous Italian Investors makes it necessary to impose on all of you.
>
> First of all, the ICSID arbitration is available only to persons who qualify as "investors", that is, to persons who can demonstrate that they purchased and have title to Argentine bonds. Failure to meet this requirement would not only jeopardize the position of the individual participant in the initiative, but could endanger the success of the legal proceeding for the other bondholders as well. It is therefore evident that, for anyone who intends to initiate the ICSID arbitration, it will not be possible to bring a legal action in Italy against the credit institution that sold the bonds to them and at the same time demand the right to continue the proceedings before ICSID; likewise, those who have already filed a claim against their banks may not participate in the ICSID arbitration. Indeed, a final judgment issued by an Italian court of last resort declaring null and void or voiding the agreement for the purchase of the

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61 Exh. RA-1.

62 Exh. RA-3.

63 Exh. RA-2.

64 Exh. RA-4.

65 Exh. RA-7.

security would cause your status as an investor to cease to exist, whereas such status is indispensable to bring an ICSID arbitration.

Does this mean that participating in the ICSID arbitration will prevent you from suing the credit institutions at a later day ? Not at all! Anyone who wants to change his/her mind and abandon the ICSID arbitration can do so freely: it will be sufficient to withdraw from the ICSID proceeding, revoke White & Case's power of attorney *ad litem* and TFA's mandate in order to initiate whatever legal proceedings is deemed most appropriate. **It is not possible, however, to conduct at the same time two different legal proceedings that are incoherent with one another.**

Finally, we note that the proceedings before ICSID will not toll the running of the statute of limitations to bring your claims, if any, against the banks.

[…]

The peculiarity and complexity of the case to be presented before ICSID on behalf of TFA make it necessary, for reasons of coherence and uniformity of the representation of all Italian bondholders, to have a single attorney in the proceedings (White & Case) and that the latter have a single interlocutor (TFA). This also requires compliance with certain rules that make it possible for the representation of bondholders, taken as a group, to remain logical and coherent. Accordingly:

(a) it will not be possible to give instructions directly to the attorneys at "White & Case" (or the Italian lawyers at "Grimaldi e Associati", who will act solely as TFA's out of court advisors): they will coordinate directly with TFA, which, as mentioned before, will act as your sole agent;

(b) in lum [sic!], TFA, acting in the collective interest of all bondholders, will operate autonomously, taking into consideration their general interest without being able to adopt different conducts for each or only some of the various bondholders at their request;

(c) nor will it be possible to conduct autonomously the proceeding initiated jointly with all the bondholders; accordingly, any revocation of TFA's mandate or of the power of attorney *ad litem* of the American lawyers must necessarily be preceded by withdrawal from the ICSID proceeding; in other words, it will not be possible to revoke TFA's mandate so as to deal individually with your American lawyer or to appoint other agents. Revoking the mandate or the power of attorney without having previously withdrawn from the proceeding will result in renunciation of the mandates received by TFA and "White & Case", respectively.

[...]"

(Emphasis in the original)

87. In the Power of Attorney, the signatory makes the following declarations and statements:

"Each of the Undersigned […]

hereby […]

1. Declares that he/she owns the following bonds issued by the Argentine Republic, as described on Tab 1.

2. Declares his/her irrevocable consent to submit, jointly with other similarly situated bondholders, the dispute arising under the […] [BIT] due to the nonpayment by the Argentine Republic […] of amounts owed under the above-mentioned bonds, including inter alia, the full face amount of the bonds plus interest, fees and damages, for settlement by arbitration to the International Centre for Settlement of Investment Disputes ("ICSID") in Washington […], and/or other related litigation outside Italy to assert claims and/or enforce rights of the Undersigned arising as a result of the non-payment of the Argentine bonds. The Undersigned further declares his/her acceptance of the Argentina's offer of consent to ICSID jurisdiction, which is contained in Article 8 of the Agreement [ie the BIT], as of January 1, 2006 and reconfirms any such acceptance and notification of the dispute previously provided. The Undersigned's consent also covers such other actions that may be deemed necessary or useful to pursue the Undersigned's rights in this dispute.

Delegates to the law firm of White & Case LLP […], in particular Carolyn B. Lamm, Esq. and any other attorney of White & Case LLP outside of Italy that she designates, the authority and confers the power of attorney to represent the Undersigned, jointly with other similarly situated bondholders, in the furtherance of their interests with respect to their above-described bondholdings. Such delegation of authority and power of attorney includes without limitation the authority and power:

(i) to accept Argentina's offer of consent to ICSID arbitration under the Agreement, as of January 1, 2006, and to reconfirm any such consent and/or notice of dispute previously provided;

(ii) to initiate and conduct for the Undersigned and on his/her behalf an ICSID arbitration against Argentina and any related litigation or other proceedings outside Italy to protect and further the Undersigned's interests in relation to the above-mentioned dispute.

[…]

Further instructions regarding this delegation may be made from time to time by any duly appointed agent of the Undersigned.

1. Acknowledges and agrees that this power of attorney is conferred pursuant to the laws of the District of Columbia to lawyers practicing in the District of Columbia, […]"

88. In the TFA Mandate, the object of TFA's mandate is described as follows:[66]

> **"OBJECT**
>
> Subject to all legal requirements that may from time to time be applicable, the Agent is hereby entrusted with the assignment of providing for the coordination of any arbitral and judicial proceedings of the kind described in the premises hereto that may be undertaken in the name and on behalf of the holders of Bonds pursuant to the Power of Attorney and this Mandate, for the recovery of their investment in the Bonds. In particular, and solely by way of examples, it shall be the Agent's responsibility:
>
> - to give to the attorneys appointed pursuant to the Power of Attorney any instructions that the Agent, in its role as coordinator, deems useful or appropriate for the purpose of bringing about a positive outcome of the proceedings;
> - to appoint other attorneys directly, in addition to es [sic!] replacements for those appointed pursuant to the Power of Attorney, so that they may represent the Principals in proceedings filed outside Italy, in judicial or other venue, including, but not limited to, ICSID arbitral tribunals;
> - to revoke the mandates granted to the attorneys identified in the Power of attorney and those appointed pursuant to the preceding paragraph. Accordingly, consistently with the Agent's role as sole coordinator of legal proceedings commenced by the Agent, it is understood that the Principal(s) may revoke the powers of attorney *ad litem* granted to the above-mentioned attorneys only through the Agent, by instructing it in writing to that effect;
> - to perform organizational functions entrusted to it using the Italian banking system or any other means that may be necessary or appropriate for the initiation and conduct of the legal proceedings described in the Power of Attorney and this Mandate. […]
> - to appoint arbitrators, experts and advisors;
> - if it deems it appropriate, to bring against Argentina, outside Italia, in judicial venues having jurisdiction, or before domestic or international arbitral tribunals, or before any conciliation and mediation body, any additional proceeding that may be necessary for the purposes of obtaining reimbursement of principal and payment of interest on the Bonds, or proceedings seeking damages arising out of the failure to

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[66] Exh. RA-2.

comply with the Bonds, or out of the measures adopted by the Argentine Authorities;

- to negotiate and enter into settlement agreements with Argentina, in judicial venues or otherwise, […]
- to participate in any type of bondholders' meeting or similar collective decision-making body and to vote in the name and on behalf of the Principal(s);
- to send any communication or notice on behalf of the Principal(s), in order to toll the running of the statute of limitation or other time limits, in relation to the Republic of Argentina, […];
- to collect on behalf of the Principal(s) the payments received from Argentina and to transfer them through the credit institutions serving as depositaries for the Bonds to the current accounts that will be specified by the Principal(s);
- to obtain recognition and enforcement outside Italy of the arbitration awards issued by the ICSID arbitral tribunal – as well as of any other awards or judgments that may be issued by any adjudicating body outside Italy with respect to the object of this Mandate – […];
- to withdraw from any actions in any legal proceedings contemplated by the Power of Attorney and/or this Mandate, in the name and on behalf of all bondholders who have granted an identical power of attorney *ad litem* and an identical mandate, or to withdraw from any actions in the name and on behalf of the Principal(s), in any of the instances described in Article 4 below;
- to arrange for the banks serving as depositaries for the Bonds to subject the same to transfer restrictions; […]
- in general, to take any step that it deems useful for the recovery of the amounts due under the Bonds, subject always, as an absolute priority, to equal treatment of all of the owners of bonds issued by Argentina who have signed an identical power of attorney or attorney *ad litem* and an identical mandate."

89. The TFA Mandate further provides for following terms and conditions of revocation:

"EXCLUSIVITY, REVOCATION AND RENUNCIATION

Principal also grants this Mandate in the interest of all of the other bondholders who have granted an identical power of attorney *ad litem* and an identical mandate; such interest arises out of the need to coordinate the arbitral and judicial proceedings mentioned in the premises hereto. Accordingly:

> (i) This Mandate, pursuant to Article 1723 of the Civil Code, will not terminate if revoked by the Principal(s), unless there exists a just cause for such revocation; such revocation will become effective upon expiration of the fifteen day period following the time when the Agent became aware of the same;
>
> (ii) even in the absence of just cause, the Principal(s) may validly revoke this Mandate if he/they has/have previously withdrawn from every judicial and arbitral proceeding referred to in the premises hereto which are pending at the time of such revocation; such revocation will become effective upon expiration of the fifteen day period following the time when the Agent became aware of the same;
>
> (iii) if the Principal(s) should initiate any legal action conflicting with the interests pursued by TFA on behalf of all of the bondholders who have granted an identical power of attorney *ad litem* and an identical mandate, by means of any legal proceedings contemplated by this Mandate or the Power of Attorney, with particular reference to the consolidated proceeding before the ICSID: (a) White & Case, as specified in the Instructions to Bondholders, may without any notice whatsoever renounce the mandate granted to them by means of the Power of Attorney; (b) the Agent may renounce this Madate;
>
> […]
>
> (v) if the Principal(s) revoke the Power of Attorney without the prior agreement of the Agent, the Agent may renounce this Mandate.
>
> In any event, the Agent shall have the right to renounce this Madate at any time, by giving at least fifteen (15) business days written notice to the Principal(s).
>
> […]"
>
> (Emphasis in the original)

90. TFA's member banks arranged for the distribution and collection of the Mandate Package among their clients during March and April 2006, which was – according to Claimants' figures – accepted by over 180,000 Italian bondholders.[67]

91. On 14 September 2006, White & Case filed the Request for Arbitration with ICSID on behalf of these Italian bondholders, Claimants to the present arbitration.

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[67] C-MJ § 261, see also NAVIGANT I, § 27 and CREMIEUX, § 22.

(5) New Exchange Offer 2010

92. In April 2010, Respondent announced the launching of a new Exchange Offer (hereinafter the "Exchange Offer 2010").

93. This offer was launched on 3 May 2010 and aimed to "restructure and cancel defaulted debt obligations of Argentina represented by Pre-2005 Eligible Securities, to release Argentina from any related claims, including any administrative, litigation or arbitral claims and to terminate legal proceedings against Argentina in respect of the tendered Eligible Securities in consideration for the issuance of New Securities and, in certain cases, a cash payment."[68]

94. In this offer, Respondent invited "the Owners of each Series of Bonds listed in Annexes A-1 and A-2 and related claims (collectively, the 'Eligible Securities') to submit offers to exchange Eligible Securities for New Securities and, in certain cases, cash, on the terms and conditions described [t]herein." [69] The bonds listed in Annexes A-1 and A-2 are bonds in which Claimants hold security entitlements, and Claimants were thus eligible to tender into this Exchange Offer 2010.

95. The launching of this Exchange Offer 2010 required the temporary suspension of certain effects of the Emergency Law until the earlier of two dates – 31 December 2010 or the date on which the Executive Branch, through the Ministry of Economy and Public Finance, announces the conclusion of the second restructuring process of Argentina's nonperforming debt securities.[70] In addition, Argentina further took administrative and legislative steps in connection with the Exchange Offer 2010, approving the budget providing the amount of debt that Argentina may issue,

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68 See Exchange Offer Prospectus (Exh. C-999B), p. 6; see also Annex A to R-PHB § 76.

69 *Idem*

70 See Annex A to R-PHB § 79.

namely through the Exchange Offer 2010, and authorizing the necessary administrative registrations and issuance of new securities, etc.[71]

96. Whilst in Claimants' view this Exchange Offer 2010 was just another punitive offer imposing harsh exchange terms,[72] even less favorable than the Exchange Offer 2005, Respondent contends that it merely reflected the result of adequate consultations with creditors' groups.[73]

97. A considerable number of Claimants eventually tendered into this Exchange Offer 2010, which led to their withdrawal from the present proceedings (see §§ 216 *et seq.* below).

B. PROCEDURAL HISTORY

(1) Request for Arbitration and its Registration by ICSID

98. On 14 September 2006, Claimants filed their Request for Arbitration, accompanied by Annexes A through E.

99. On 26 September 2006, ICSID transmitted to Respondent the Request for Arbitration.

100. On 20 October 2006, Respondent sent a letter to ICSID requesting the latter not to register the case arguing that Claimants lack standing to sue and that the nature of this "group claim" entail Respondent's defense right. Respondent therefore concluded that ICSID has no jurisdiction over the dispute.

101. On 20 November 2006, Claimants responded to Respondent's letter dated 20 October 2006 arguing that ICSID must register the case according to Article 36(3)

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71 See Annex A to R-PHB § 80.

72 CL-PHB §§ 139 *et seq.*, § 144.

73 Annex A to R-PHB § 76.

ICSID Convention. It based its position on two legal opinions rendered by Prof. Christoph Schreuer and Prof. Rudolf Dolzer dated 2 and 16 November 2006, respectively.[74]

102. On 18 December 2006, Respondent responded to Claimants' letter of 20 November 2006. Respondent again requested ICSID not to register the case alleging that ICSID lacks jurisdiction and that Respondent never consented to an arbitration concerning such kind of claims initiated by "groups of people" or "class action."

103. On 19 and 22 December 2006, Claimants submitted supplemental Annexes in relation to information contained in Annexes A through E, and submitted Annexes K and L. The substitute annexes reflect: (i) an addition of certain Claimants (separately listed in Annex K), (ii) the withdrawal of certain Claimants (separately listed in Annex L), (iii) limited corrections and substitutions to the information on Claimants (Annexes A-E), (iv) the revision of the aggregate amounts (Annex I), and (v) the addition of one new bond series (Annex J).

104. On 6 January 2007, Claimants responded to Respondent's letter of 18 December 2006 insisting that ICISD register the case and arguing (i) that it is up to the Tribunal to decide on the jurisdiction, and (ii) that the claim at stake is not a "class action" but a joint claim in which each Claimant initiates arbitration on its own behalf, and therefore covered by ICSID's jurisdiction.

105. On 24 January 2007, Respondent responded to Claimants' submissions of 19 and 22 December 2006 opposing the incorporation of new Claimants in the arbitration. According to Respondent, the changes made to the Request for Arbitration

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[74] See letter from Prof. Christoph Schreuer of 2 November 2006 and letter from Prof. Rudolf Dolzer of 16 November 2006 both attached to Claimant's letter of 20 November 2006 addressed to the Secretary-General of ICSID.

regarding the identity and number of Claimants is inadmissible. Further, Respondent reiterated its request that the case be refused registration.

106. On 1 February 2007, Claimants responded to Respondent's letter of 24 January 2007 insisting that the case be registered "as soon as possible."

107. On 5 February 2007, Claimants submitted "substituted versions" of Annexes A through E, K, L, I and J. The substitute annexes reflect: (i) the withdrawal of certain Claimants (listed separately in Annex L), (ii) certain corrections and substitutions to the documentation for other Claimants, and (iii) the revision of certain aggregate amounts based on the foregoing adjustments (Annexes I and J).

108. On 7 February 2007, concluding that the dispute is not manifestly outside the jurisdiction of ICSID, the Secretary-General of the ICSID registered Claimants' Request for Arbitration with accompanying Annexes A through L, and issued the Notice of Registration.

(2) Constitution of the Arbitral Tribunal

109. On 7 February 2007, the Secretary-General of ICSID invited the Parties to communicate any provisions agreed by them regarding the number of arbitrators and the method of their appointment.

110. On 9 March 2007, Claimants suggested that the arbitral tribunal be composed of three arbitrators, one arbitrator to be appointed by each Party and the third, who shall be the President of the Tribunal, to be appointed by agreement of the Parties, and appointed Prof. Albert Jan van den Berg, a national of The Netherlands, as arbitrator.

111. On 12 March 2007, ICSID confirmed receipt of Claimants' letter of 9 March 2007 and further stated that no further steps regarding the appointment of Prof. van den Berg could be taken until the Parties inform the Centre of their agreement regarding the method for the constitution of the arbitral tribunal. It therefore invited

Respondent to accept Claimants' proposals or make other proposals regarding the constitution of the arbitral tribunal.

112. On 27 April 2007, Claimants sent a letter to the ICSID informing that the Parties have not reached agreement on the method of constituting the Tribunal, and therefore requested that the Tribunal be constituted according to Article 37(2)(b) ICSID Convention, given that more than 60 days had passed since the registration of the Request for Arbitration. Claimants then confirmed the appointment of Prof. van den Berg and suggested the name of a person to serve as President of the Tribunal.

113. On 7 May 2007, Respondent opposed Claimant's suggestion for President and suggested instead another candidate. Respondent further appointed Prof. Georges Abi-Saab, a national of the Arab Republic of Egypt, as arbitrator.

114. On 14 May 2007, ICSID informed the Parties that Prof. van den Berg and Prof. Abi-Saab accepted their appointments as arbitrators and enclosed copies of their signed declarations according to Rule 6(2) ICSID Arbitration Rules.

115. On 25 August 2007, Claimants informed ICSID that the Parties have not been able to reach an agreement regarding the appointment of the third, presiding arbitrator and therefore requested ICSID to make the appointment in accordance with Article 38 ICSID Convention and Rule 4 ICSID Arbitration Rules.

116. On 28 August 2007, ICSID confirmed receipt of Claimants' letter of 25 August 2007 and announced that it would proceed with the appointment after consultation with both Parties in accordance with Rule 4(4) ICSID Arbitration Rules.

117. On 8 November 2007, the Secretary-General of the ICSID proposed a candidate to serve as President of the Tribunal and invited the Parties to comment before 19 November 2007.

118. On 16 and 19 November 2007 respectively, Respondent and Claimants both objected to the appointment of the person proposed by the Secretary-General of the ICSID. On 29 November 2007, the Secretary-General informed the Parties of its intention to propose to the Chairman of ICSID's Administrative Council the appointment of Dr. Robert Briner, of Switzerland, as the President of the Tribunal.

119. On 6 February 2008, the Secretary-General of the ICSID informed the Parties and the arbitrators that the Tribunal is deemed to be constituted by (i) Professor Albert Jan van den Berg (appointed by Claimants), (ii) Professor Georges Abi-Saab (appointed by Respondent) and (iii) Dr. Robert Briner (appointed by ICSID pursuant to Article 38 ICSID Convention). Further, the Tribunal was informed that Mr. Gonzalo Flores, Senior Counsel at ICSID, would serve as the Secretary to the Tribunal.

120. On 26 February 2008, Respondent requested further information from Dr. Briner on his past experience and his positions in companies and financial institutions.

121. On 28 February 2008, Dr. Briner provided further information on his past experience and current positions. On the same day, Respondent acknowledged and thanked Dr. Briner for his response.

122. On 27 July 2009 Dr. Robert Briner resigned as President of the Tribunal due to health reasons. On 2 September 2009 Prof. Pierre Tercier, a Swiss national, was appointed, by agreement of the parties, as the new President of the Tribunal.

(3) Arbitral Procedure

123. On 10 March 2008, ICSID sent a letter to the Parties and the Tribunal with organisational details concerning the First Session to be held on 10 April 2008 at the seat of the Centre in Washington D.C. The Parties were invited to comment on the proposed draft provisional agenda before 3 April 2008.

124. During March 2008, various exchanges of correspondence took place concerning Respondent's request that the information contained in Claimants' Annexes be provided to it in an appropriate form. On 31 March 2008, the ICSID informed the Parties that the Tribunal had taken note of the Parties' correspondences and had decided to defer its ruling on the matter until the First Session of 10 April 2008.

125. On 3 April 2008, both Parties sent their comments on the provisional agenda for the First Session (see § 123 above). Whilst Respondent had "no comment to make," Claimants made several comments and suggestions regarding the various items of the agenda.

126. On 9 April 2008, Claimants sent a letter expressing their concerns about Respondent's statement that it "has no comments to make" on the provisional agenda for the First Session. Claimants feared to be prejudiced if Respondent was to raise any such comments during the First Session.

127. On 10 April 2008, the First Session was held at the seat of the Centre in Washington, D.C. at which a procedural calendar for the further conduct of the proceedings was established. During the First Session it was agreed that the arbitration will be bifurcated in a jurisdictional and a merits phase. With regard to the jurisdictional phase, the Tribunal invited the Parties to agree on a joint list of preliminary issues to be submitted before 2 May 2008. The Tribunal stated that it would then decide over any remaining divergence and communicate its decision on 9 May 2008.

128. On 2 May 2008, both Parties sent letters announcing that they could reach an agreement on only very limited issues and laid down their respective position concerning the remaining divergences on the scope of the jurisdictional phase. Respondent further requested that Claimants submit the list of the members of Task Force Argentina, and that that the schedule discussed at the First Session be amended to account for document discovery.

129. On 5 and 8 May 2008 respectively, each Party commented on the other Party's submission of 2 May 2008.

130. On 9 May 2008, after receiving and considering the Parties' submissions on the scope of the jurisdictional phase and in the light of the Parties' disagreement, the Tribunal submitted a "List of issues to be addressed during the jurisdictional first phase of the proceedings" (hereafter "List of 11 Issues of 9 May 2008"), listing the following 11 issues covering Claimants and Respondent's main positions and objections:

> "(1) Does the consent of Argentina to the jurisdiction of the Centre include claims presented by multiple Claimants in a single proceeding? If so, are the claims admissible?
>
> (2) Is the Declaration of Consent signed by the individual Claimants submitted in this proceeding valid; and what is the role and relevance of Task Force Argentina (if any) in this proceeding?
>
> (3) Is the submission of substitute annexes to the Request for Arbitration permissible? Is it possible to add further Claimants after the filing of the claim?
>
> (4) Were the Claimants entitled to initiate ICSID arbitration in light of the 18-month domestic litigation clause at Article 8(2) of the Argentina-Italy BIT?
>
> (5) What are the consequences (if any) of the Most-Favored-Nations-Clause (MFN) contained in Article 3(1) of the Argentina-Italy BIT?
>
> (6) Does the Tribunal have jurisdiction to hear Claimants' claims for violation of the MFN provisions contained in Article 3(1) of the Argentina-Italy BIT with reference to the so-called umbrella clause contained in Article 7(2) of the Argentina-Chile BIT?
>
> (7) Are the Claimants' claims contract claims or Treaty claims and what (if any) are the consequences of this determination?
>
> (8) Does the Tribunal have jurisdiction over claims where the relevant bond contains a forum selection clause which refers to national courts, but not to ICSID?
>
> (9) Do the bonds in question satisfy the definition of "Investment" under Article 1(1) of the Argentina-Italy BIT with respect to the provisions on investment "in the territory" of Argentina and in "compliance with the laws and regulations of Argentina"?
>
> (10) Without making a determination with respect to any individual Claimant, does the Tribunal have jurisdiction *ratione personae* pursuant

to Article 25 of the ICSID Convention and Article 1(2) of the Argentina-Italy BIT, and its Additional Protocol, over each Claimant who is a natural person and who ultimately is found to have the following characteristics: (i) a natural person with Italian nationality on September 14, 2006 (*i.e.*, the date of the filing of the Request for Arbitration) and February 7, 2007 (*i.e.*, the date of registration of the Request); (ii) who on either date was not also a national of the Argentine Republic; and (iii) who was not domiciled in the Argentine Republic for more than two years prior to making the investment?

(11) Without making a determination with respect to any individual Claimant, does the Tribunal have jurisdiction *ratione personae* pursuant to Article 25 of the ICSID Convention and Article 1 of the Argentina-Italy BIT over each Claimant that is a juridical person with Italian nationality on September 14, 2006 (*i.e.*, the date of the filing of the Request for Arbitration)?"

131. An amended procedural calendar was further agreed upon. Also, the Tribunal invited Claimants to submit by 23 May 2008 a complete list of all present members of Task Force Argentina.

132. On 23 May 2008, Claimants submitted the list of current members of Task Force Argentina, according to the Tribunal's request of 9 May 2008, but nevertheless raised certain concerns, in particular regarding the submission of documents on behalf of a third party.

133. On 8 August 2008, Respondent filed its First Memorial on Jurisdiction and Admissibility, accompanied by exhibits and expert reports by Prof. Barry J. Eichengreen, Prof. Anne-Marie Slaughter and Prof. William Burke-White.

134. On 8 October 2008, after discussions concerning a possible rescheduling of the hearing and after having heard and taken into account both Parties' positions as well as the availability of all participants, the Tribunal decided that the hearing date would not be changed and still take place on the week of 22 June 2009, as agreed upon on 9 May 2008.

135. On 7 November 2008, Claimants filed their Counter-Memorial on Jurisdiction, accompanied by substitute versions of Annexes A through E, K and L; exhibits; witness statements by Mr. Stefano De Grandi, Mr. Mario Flagella, Mr. Richard Liebars, Mr. Raffaele Martino, Mr. Ajata Mediratta, Mr. Fabrizio Modoni, and Mr. Roberto Ranieri; and expert reports by Dr. Alberto B. Bianchi, Ms. Elizabeth J. Cabraser, Dr. William R. Cline, Dr. Joaquín A. Cottani, Prof. Rudolf Dolzer, Dr. Pablo E. Guidotti, Prof. Geoffrey C. Hazard, Prof. Natalino Irti, Mr. Brent Kaczmarek, Prof. Salvatore Maccarone and Prof. Fabrizio Maimeri, Dr. Héctor A. Mairal, Prof. Annibale Marini, Mr. Rex Pingle, Prof. W. Michael Reisman, Mr. Stephen Schaefer, Prof. Christoph Schreuer, Dr. Francisco G. Susmel, and Dr. Guillermo O. Teijeiro.

136. On 17 November 2008, the Parties exchanged their requests for document production pursuant to the schedule set forth in the letter of 9 May 2008.

137. On 18 November 2008, Respondent sent a letter stating that Claimants had not complied with the deadline for submission of their Counter-Memorial on Jurisdiction. It argued that the transmittal letter sent to ICSID was received on 8 November 2008, 12:02 am and that subsequent emails were received at 02:31 am. It further complained that it received the Spanish version of the Counter-Memorial on Jurisdiction only on 11 November 2008, i.e., four days after the deadline set forth in the Tribunal's letter of 9 May 2008 (see § 130 above). Respondent therefore requested that the deadline for submission of its Reply Memorial on Jurisdiction scheduled for 20 February 2009 be extended to 24 February 2009. It further expressed its wish that the Tribunal would not allow further failures to comply with the established deadlines, absent special circumstances under the terms of Rule 26 ICSID Arbitration Rules.

138. On 18 November 2008, the Tribunal advised the Parties that the hearing would take place from Friday, 19 June 2009, through Wednesday, 24 June 2009.

139. On 24 November 2008, Claimants responded to Respondent's letter of 18 November 2008 asking the Tribunal to reject Respondent's request for extension of time and giving further explanations on why its Counter-Memorial on Jurisdiction and related documents were sent out late. Claimants further stressed that while Respondent had 15 weeks to prepare its Reply Memorial on Jurisdiction, Claimants were only given 10.5 weeks to prepare their Rejoinder Memorial on Jurisdiction.

140. On 5 December 2008, the Parties submitted their respective "Redfern Schedules" listing their specific requests for document production by the other Party and their objections to the other Party's requests.

141. On 10 December 2008, the Tribunal granted Respondent's request for extension of the deadline for submission of its Reply Memorial on Jurisdiction to 23 February 2009.

142. On 12 December 2008, the Tribunal issued Procedural Order No. 1 ruling on the Parties' production for document requests.

143. Subsequently, correspondence was exchanged between the Parties with regard to (i) Respondent's compliance with Order No. 1, referred to in § 142 above; and (ii) the progress on reaching a conclusion on a confidentiality agreement. None of the issues could be solved among the Parties who requested the Tribunal's directions.

144. On 22 December 2008, the Parties exchanged documents in accordance with Annex A of the Tribunal's Procedural Order No.1. Respondent's submission of documents appeared to be incomplete.

145. On 9 February 2009, Respondent completed its document production as ordered in Procedural Order No. 1 (see § 142 above).

146. On 12 February 2009, the Tribunal directed Respondent to provide an accompanying table to the produced documents which contained references to each

specific request that the Tribunal had ordered Respondent to comply with in Procedural Order No. 1, referred to in § 142 above. Further, the Tribunal invited the Parties to continue their discussions in order to arrive at a Confidentiality Agreement and stated that if the Parties cannot come to such an agreement and if so requested by a Party, the Tribunal will hear the Parties on this matter at the occasion of the June 2009 Hearing and then take the necessary steps.

147. On 23 February 2009, Respondent filed its Reply Memorial on Jurisdiction and Admissibility, accompanied by exhibits; witness statements by Mr. Enrique H. Boilini, Avv. Gianluca Fontanella, Dr. Sergio Mario Illuminato, Ms. Noemi C. La Greca, Mr. Federico Carlos Molina, Ambassador Guillermo Nielsen, and Hon. Luigi Olivieri; and expert reports by Prof. Avv. Guido Alpa, Prof. Avv. Antonio Briguglio, Dr. Pierre-Yves Cremieux, Avv. Remo Danovi, Prof. Barry J. Eichengreen, The Forensic Document Examination Division of the Argentine Federal Police, Ms. Rachel Hines, Prof. Jorge Kielmanovich, Prof. Daniel Marx, Abog. Ismael Mata, Prof. Arthur R. Miller, Prof. Richard A. Nagareda, Prof. Nouriel Roubini, Prof. Alessandro Penati, Prof. Avv. Andrea Perrone, Mr. Héctor Jorge Petersen and Mr. Héctor Jorge Petersen (h), Prof. Anne-Marie Slaughter and William Burke-White, and Prof. Charles W. Wolfram.

148. On 9 March 2009, Respondent submitted the table of documents referencing each specific document according to the Tribunal's directions of 12 February 2009 (see § 146 above).

149. On 22 April 2009, Claimants requested that Respondent be ordered to submit documents complementing its previous production, i.e., charts and proposals and other pages accompanying the Analysis Memoranda relating to the bonds issued by Respondent.

150. On 6 May 2009, Respondent responded to Claimants letter of 22 April 2009 and requested that Claimants' request for further document production be rejected.

151. On 6 May 2009, Claimants filed their (English) Rejoinder Memorial on Jurisdiction, accompanied by exhibits; witness statements by Mr. Massimo Cerniglia, Mario Flagella, Richard Liebars, Ajata Mediratta, and Fabrizio Modoni; and expert reports by Alberto B. Bianchi, Elizabeth J. Cabrazer, Dr. William R. Cline (second expert opinion), Joaquín A. Cottani, Professor Dr. Dr. Rudolf Dolzer (supplemental expert opinion), Mrs. Cristiana Franco, Mr. Mario Franco, Mr. Alberto Bravo, Pablo E. Guidotti (supplemental expert report), Mr. Iain Hardie (supplemental expert report), Geoffrey C. Hazard JR (supplemental legal opinion), Prof. Natalino Irti (supplemental pro veritate legal opinion), Salvatore Maccarone and Fabrizio Maimeri (supplemental legal opinion), Héctor A. Mairal (supplemental legal opinion), Prof. Annibale Marini (supplemental pro veritate legal opinion), Mr. Brent C. Kaczmarek (supplemental expert report), Prof. Nicola Picardi, Rex E. Pingle (supplemental expert opinion), and Prof. W. Michael Reisman (second opinion).

152. Subsequently, correspondence was exchanged between the Parties with regard to Respondent's requests to amend the schedule of 9 May 2008 with regard to the designation of witnesses and experts and the submission of documents relating to direct and cross-examination of such witnesses and experts for the forthcoming hearing and to hold a pre-hearing conference.

153. On 11 May 2009, the Tribunal announced that it would, for the time being, not make any decision with respect to the designation of witnesses and experts for the forthcoming hearing and invited the Parties to confer and try to reach an agreement, reverting to the Tribunal by 15 May 2009. It further stated that it would be prepared to hold a pre-hearing conference call during the first week of June 2009.

154. On 14 May 2009, Respondent reiterated its concerns already raised in its letter of 8 May 2009 concerning Claimants' late submission of their Rejoinder Memorial on

Jurisdiction and related documents. Whilst electronic copies of the documents were received by ICSID only after the midnight deadline of 6 May 2009, Respondent received the Spanish version of the Rejoinder Memorial on Jurisdiction only on 9 May 2009. Respondent consequently requested the Tribunal to disregard Claimants' late submissions in application of Rule 26(3) ICSID Arbitration Rules.

155. On 15 May 2009, in accordance with the deadline set in the Tribunal's letter of 11 May 2009 (see § 153 above), the Parties submitted to the Tribunal their respective positions concerning the various pre-hearing and hearing matters. Respondent further requested that an additional hearing of 10 days be set.

156. On 18 May 2009, Claimants provided certain explanations on the delay in submitting their Rejoinder Memorial on Jurisdiction and requested that Respondent's request to disregard such Rejoinder Memorial on Jurisdiction be rejected.

157. On 20 May 2009, the Parties exchanged further correspondence concerning the various pre-hearing and hearing matters. While Respondent insisted that each Party be given the right to cross-examine every witness and expert presented by the other Party and that additional hearing time be arranged, Claimants requested that Respondent's requests be denied.

158. On 20 May 2009, Claimants requested the Tribunal to order Respondent to immediately produce the complementary documents requested in their letter of 22 April 2009 (see § 149).

159. On 21 May 2009, the Tribunal ruled that it accepted Claimants' Rejoinder Memorial on Jurisdiction despite its delayed submission. It further set forth certain principles for conduct of the forthcoming Hearing on Jurisdiction confirming, among others, that the hearing would last 5.5 days, defining the scope of direct examination of witnesses and experts and setting new deadlines for the designation

of witnesses and experts and submission of documents for direct and cross-examination.

160. On 26 May 2009, the Tribunal requested Respondent to produce the documents requested by Claimants in their letter of 20 May 2009 or to otherwise give specific reasons for not producing such documents before 5 June 2009.

161. On 28 May 2009, in accordance with the deadline set in the Tribunal's letter of 21 May 2009 (see § 159 above), the Parties submitted their designation of witnesses and experts relevant to the jurisdictional phase. Whilst Claimants did not directly designate witnesses or experts from Respondent for cross-examination, it reserved the right to do so in case Respondent would designate any such witnesses or experts for direct examination and to expand the scope of redirect examination of Claimants' witnesses or experts accordingly. Respondent submitted a list of witnesses and experts from Claimants for cross-examination and a list of its own witnesses and experts for direct examination.

162. On 29 May 2009, Respondent objected to Claimants position in its letter of 28 May 2009 contending that Claimants had not complied with the Tribunal's request to designate the witnesses and experts for direct and cross examination and that Claimants should not have the right to further designate such witnesses or experts or to expand the scope of their re-direct examination.

163. On 31 May 2009, Claimants objected to Respondent's position in its letters of 28 and 29 May 2009. With regard to Respondent's designation of witnesses and experts for direct examination, Claimants objected to the examination of Respondent's handwriting experts and experts on US and Italian tax law. With regard to Respondent's designation of witnesses and experts for cross-examination, Claimants objected to the examination of Mr. Stock and of their own handwriting experts. Claimants further objected to Respondent's request to extend the daily hearing schedule.

164. On 2 June 2009, the Tribunal ruled that (i) the Parties' handwriting experts shall not be examined at the hearing because the issue of authenticity of the Claimants' signatures related to circumstances concerning individual Claimants and were thus not covered by this jurisdictional phase and (ii) Mr. Stock shall not be called as a witness because he has not submitted any statement, opinion or report (i.e., he is not a witness or expert). Regarding the daily hearing schedule, the Tribunal decided not to change it but remained open to discuss the issue during the Hearing. This decision was taken by majority, as communicated to the Parties on 3 June 2009.

165. On 3 June 2009, the deadline set in the Tribunal's letter of 21 May 2009 (see § 159 above), Respondent submitted its documents for direct and cross-examination accompanied by an index, and requested disclosure of documents regarding the direct testimony by Prof. Briguglio and Prof. Nagareda.

166. On 5 June 2009, the deadline set in the Tribunal's letter of 26 May 2009 (see § 160 above), Respondent explained why it deemed that it should be relieved from any obligation to produce any documents called by Claimants in their letter of 20 May 2009 (see § 158 above).

167. On 7 June 2009, Claimants insisted that Respondent be ordered to produce the documents as requested in their letter of 20 May 2009 (see § 158 above).

168. On 7 June 2009, Claimants also responded to Respondent's submission of 3 June 2009 and raised the following two main objections: (i) Claimants consider Respondent's submission of its "Supplemental Exhibits" as untimely, abusive and partly in disregard of confidentiality obligations, and (ii) Claimants objected to Respondent's designation of Prof. Nagareda and Prof. Briguglio for direct examination because such direct examination would exceed the scope of examination set forth in the Tribunal's letter of 21 May 2009 (see § 159 above).

169. On 8 June 2009, the Tribunal communicated the organizational details of the Hearing on Jurisdiction to be held from 19 June 2009 through 24 June 2009.

170. On 8 June 2009, Respondent reacted to the Tribunal's decision of 2 June 2009 (see § 164) expressing concerns that "two of the members of the Tribunal have simply taken an incomprehensible decision" by not admitting to call the handwriting experts as experts during the Hearing on Jurisdiction and requested that the Tribunal reconsider its decision of 2 June 2009.

171. On 9 June 2009, Claimants responded to Respondent's letter of 8 June 2009 and requested that the Tribunal reject Respondent's requests.

172. On 9 June 2009, the President of the Tribunal informed the Parties that in light of certain recent health problems, he would not be allowed to travel to Washington, D.C. for the Hearing on Jurisdiction.

173. On 9 June 2009, Claimants acknowledged that the Hearing on Jurisdiction was postponed and understood that related deadlines were presently suspended, including with respect to the submission of examination documents, etc.

174. On 17 June 2009, the Tribunal decided on several issues regarding the Hearing: (i) with respect to the issues raised by the Parties in relation to the Hearing, in particular to the testimony of fact and expert witness, the Tribunal reserved its decision for a later stage during the proceedings, once the new dates for the Hearing have been established; (ii) with respect to Claimants' request for the production of documents as contained in their letter of 20 May 2009, it was denied; (iii) with regard to Claimants' objection of 7 June 2009 regarding Respondent's submission of 3 June 2009, the Tribunal invited Respondent to state its position, especially with regard to Claimants' objection relating to confidential material, before 24 June 2009.

175. On 24 June 2009, Respondent responded to Claimants' letters of 7 and 9 June 2009 (see §§ 168 and 171 above) in accordance with the Tribunal's instructions (see § 174 above). Respondent insisted on the relevance of the question of the authenticity of some of the Claimants' signatures for this jurisdictional phase. With regard to

the confidentiality issue, Respondent stressed that it had not submitted any document filed in sealed proceedings and that there was no general rule of confidentiality governing ICSID arbitration proceedings. It therefore requested that Claimants' objections be rejected. Respondent further complained about Claimants' position, as reflected in their letter of 9 June 2009 (see § 173 above), to suspend the deadline for submission of documents for cross-examination and requested that the Tribunal order Claimants to immediately present such documents.

176. On 6 July 2009, Claimants responded to Respondent's letter of 24 June 2009 requesting once again that the Tribunal (i) exclude the use of confidential documents and (ii) refuse to undo its decision of 2 June 2009 concerning the handwriting experts. Claimants further requested that the Tribunal issue a confidentiality order protecting the confidentiality of the current proceedings. Claimants also stressed that the suspension of the deadline for submission of documents for witnesses' and experts' examination was in accordance with the Tribunal's communication of 9 June 2009.

177. On 8 and 16 September 2009, Claimants suggested new dates concerning pre-hearing issues and the Hearing on Jurisdiction. It further requested anew that the Tribunal reject Respondent's request to reconsider the Tribunal's decision of 2 June 2009 and asked the Tribunal to strike Respondent's supplemental exhibits and confidential material as submitted by Respondent on 3 June 2009. It also insisted on its request for a confidentiality order.

178. On 16 September 2009, Respondent requested the Tribunal to set an entirely new calendar, including dates for witnesses and experts hearings, and considering an additional two weeks for the Hearing on Jurisdiction. It further insisted on the examination of the handwriting experts during the Hearing and on the admission of its documents submitted on 3 June 2009.

179. On 17 and 23 September 2009, Claimants responded to Respondent's letter of 16 September 2009 and formulated the following requests: (i) with regard to the Hearing, that Respondent's requests to overturn previous decisions on hearing days be denied; (ii) with regard to witnesses and experts, that Respondent's requests to re-open the designation of witnesses, to overturn the Tribunal's decision on handwriting experts, and to refuse the direct examination of Prof. Briguglio and Prof. Nagareda be denied; (iii) with regard to the documents for the Hearing, that the admission of Respondent's "Supplemental Exhibits" be limited to those relating expressly to the scope of direct testimony of Claimants' experts and witnesses; and (iv) that Claimants' request for a confidentiality order be granted.

180. On 14 October 2009, after the procedure had been staying still due to the unfortunate circumstances affecting Dr. Briner and eventually leading to his resignation, the procedure was actively resumed through a joint telephone conference between the Tribunal (with Prof. Pierre Tercier as new President of the Tribunal (see § 122 above)), the Secretary and the Parties. During the conference call, new pre-hearing deadlines and hearing dates, as well as other organisational aspects were discussed. At the conclusion of the telephone conference, four procedural matters were left open for decision by the Tribunal: (i) whether or not to allow direct and cross-examination of the handwriting experts, (ii) whether or not to allow direct examination of Professors Richard A. Nagareda and Antonio Briguglio, (iii) dates for the hearing on jurisdiction and admissibility and thereto related, pre-hearing dates, as well as (iv) the standard of confidentiality to be applied in the present proceeding.

181. On 1 December 2009, the Tribunal issued its Procedural Order No. 2, in which (i) it admitted – under certain restrictions – the direct and cross-examination of the handwriting experts; (ii) it admitted the direct examination by Respondent of Professors Richard A. Nagareda and Antonio Briguglio, and by Claimant of Professor Nicola Picardi; and (iii) it set the dates for the Hearing on Jurisdiction to 7 April 2010 to 13 April 2010.

182. On 11 December 2009, Claimants requested some further clarifications concerning Procedural Order No. 2 with regard to the procedure for examination of the handwriting experts and the scope of examination in general.

183. On 28 December 2009, the Tribunal provided the Parties with further clarifications on Procedural Order No. 2 and enclosed a draft hearing agenda inviting the Parties to comment thereon by 22 January 2010. It further invited Claimants to submit by 22 January 2010 the documents to be used for its direct, cross and re-direct examination and not yet in the record while Respondent was given a deadline until 19 February 2010 to comment thereon.

184. On 19 January 2009, Claimants requested clarifications regarding its duty to submit any supplemental exhibits not yet in the record for use during direct, cross and re-direct examination, alleging that the outstanding decision of the Tribunal concerning the admissibility of part of Respondent's Supplemental Exhibits played a role on the scope of Claimants' submission.

185. On 21 January 2010, the Tribunal decided on Claimants' enquiry of 19 January 2010, postponing (i) Claimants' deadline for submitting any additional exhibits for witness and expert examination until the issuance of the imminent Procedural Order No. 3 and (ii) Respondent's deadline for commenting on Claimants' submission.

186. On 22 January 2010, the Parties submitted their comments on the draft Agenda for the Hearing on Jurisdiction:

    (i) Respondent informed the Tribunal that it had no objection to the draft agenda. Nevertheless, due to scheduling issues, it requested a change in the examination order of certain expert witnesses. It further designated the specific handwriting experts to be examined during the Hearing on Jurisdiction.

(ii) Claimants requested to be given more time for their opening and closing statements and to amend the hearing schedule accordingly. They further requested a change in the order of examination of certain expert witnesses due to their limited availability.

187. On 27 January 2010, the Tribunal issued its Procedural Order No. 3 ruling on the standard of confidentiality to be followed in the present proceeding and rejecting the admissibility of Respondent's Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528, as well as of any other exhibit relating to an expert report or to a transcript of expert examination issued in another arbitration.

188. On the same day, according to the Tribunal's directions of 21 January 2010 (see § 185 above), the Tribunal invited Claimants to submit any additional exhibits not yet in the record for use during direct, cross- and re-direct examination by 1 February 2010. Respondent was invited to comment on Claimants' submission by 22 February 2010. This latter deadline was subsequently corrected by the Tribunal to 1 March 2010.

189. On 1 February 2010, Claimants filed their supplemental exhibits not yet in the record for use during direct, cross- and re-direct examination, as requested by the Tribunal in its letters of 28 December 2009 and 27 January 2010.

190. On 2 February 2010, Respondent informed the Tribunal that on 26 January 2010, Dr. Osvaldo César Gugliemino had resigned from his position as Attorney General of Argentina and that the President of the Argentine Republic had appointed Dr. Joaquín Pedro da Rocha as his successor. On 27 December 2010 Dr. Joaquín Pedro da Rocha was replaced by Dr. Angelina María Esther Abbbona as Argentina's Attorney General .

191. On 1 March 2010, Respondent filed its comments on Claimants' submission of 1 February 2010, including a series of additional documents (see § 189 above).

192. On 2 March 2010, Claimants reacted to Respondent's submission of 1 March 2010 raising various objections against the submission of additional documents by Respondent. Claimants requested that the Tribunal issue an immediate order directing that the documents submitted by Respondent not be admitted to the record and announced that they would respond in full to Respondent's submission within one week.

193. On 8 March 2010, Respondent sent a letter to the Tribunal concerning a new claim that Claimants would allegedly have initiated before the Federal Court of the Southern District of New York, including as Plaintiffs some of the Claimants, as well as two other litigation procedures initiated in the US. Respondent consequently asked the Tribunal to invite Claimants (i) to inform whether or not these three proceedings "are the only one initiated in New York or in any other jurisdiction relating to security entitlements in Argentine bonds that comprise individuals or companies that are also Claimants in this arbitration" and (ii) to confirm whether or not all the Claimants in any of these proceedings are also Claimants in this arbitration.

194. On 9 March 2010, ICSID forwarded directions from the Tribunal to the Parties dated 5 March 2010 and 9 March 2010 regarding (i) an updated hearing agenda and (ii) the question of the submission of documents for expert and witness examination.

195. On 9 March 2010, Claimants submitted a letter in which they substantiated their previously raised objections (see § 192 above) against Respondent's submission of documents of 1 March 2010.

196. On the same day, Respondent submitted a second expert report from Hector Jorge Petersen and Hector Jorge Petersen (h) concerning the authenticity of signatures

attributed to Claimants and appearing in the powers of attorneys, together with an accompanying note.

197. On the same day, Claimants objected strongly to the submission by Respondent of such report and accompanying note.

198. On 10 March 2010, ICSID sent out a letter to the Parties conveying a message from the Tribunal stating as follows:

> "Counsel shall not send any further documents until the Arbitral Tribunal has issued its upcoming Procedural Order on the admissibility of all documents relating to the expert and witness examination, including the latest submission by Respondent. In this respect, the Tribunal has taken due note of the Claimants' objection thereto. However, in order to prevent a further escalation of this issue preventing the Tribunal to focus on the substantial issues of the hearing, the Tribunal invites the Parties to refrain from any further comments until reception of the upcoming Procedural Order."

199. On 11 March 2010, notwithstanding the Tribunal's directions of 10 March 2010, Respondent submitted a letter insisting that Messrs. Petersens' report submitted on 9 March 2010 (see § 196 above) be admitted. On the same day, Claimants stressed that this submission was in violation of the Tribunal's directions of 10 March 2010 and reserved the right to respond in due course.

200. On 18 March 2010, the Tribunal issued its Procedural Order No. 4 in which it set forth certain principles on the admissibility and use of the documents submitted for witness and expert examination and invited the Parties to submit certain documents and information in view of the upcoming Hearing on Jurisdiction.

201. On 22 March 2010, the Tribunal held a pre-hearing joint telephone conference together with the Parties and ICSID concerning the organization and agenda of the Hearing on Jurisdiction scheduled on 7-13 April 2010. At the conclusion of the telephone conference, the following procedural matters were left open: (i) the specific order of examination of experts and witnesses, (ii) the presence of experts

and witnesses during the hearing, and (iii) the specific role and presence of TFA during the Hearing on Jurisdiction.

202. Between 25 March 2010 and 1 April 2010, correspondence was exchanged between the Parties and the Tribunal concerning various issues relating to the Hearing on Jurisdiction, such as the admissibility of documents to be used for expert and witness examination, Respondent's request for immediate access to Claimants' online database, information on the existence of parallel proceedings relating to Claimants' security entitlements and the role and presence of TFA during the Hearing on Jurisdiction.

203. On 29 March 2010, the Tribunal advised the Parties of its decision on the matters left open during the telephone conference of 22 March 2010 (see § 201 above). The Tribunal therein (i) confirmed the order of examination of experts as witnesses as set forth in the draft agenda circulated to the Parties on 5 March 2010, (ii) gave further specification as to the use of the time allocated to each Party, and (iii) set forth rules as to the presence of experts and witnesses during the Hearing on Jurisdiction.

204. On 2 April 2010, the Tribunal issued its Procedural Order No. 5, in which it ruled over the admissibility of the documents designated by the Parties for expert and witness examination and admitted TFA to attend the Hearing on Jurisdiction "as Claimants 'agent', without prejudice to the pending issue of the validity of its mandate." This Procedural Order was then complemented on 6 April 2010 by Procedural Order No. 6, in which the Tribunal ruled on the admissibility of further documents designated by Respondent for witness and expert examination.

205. From 7 April 2010 to 13 April 2010, the Hearing on Jurisdiction took place at the seat of the Centre in Washington D.C. After hearing the Opening Statements of Counsel to both Parties, the Parties proceeded with the examination of the following witnesses and experts: Prof. Richard A. Nagareda, Prof. Avv. Antonio

Briguglio, Subinspector Lucio Pereyra, Mr. Héctor Jorge Petersen, Mr. Massimo Cerniglia, Mr. Mario Franco, Mr. Brent C. Kaczmarek, Prof. W. Michael Reisman, Mr. Stefano De Grandi, Mr. Joaquín A. Cottani, Prof. Christoph Schreuer, Prof. Nicola Picardi, Mr. Héctor A. Mairal and Professor Dr. Dr. Rudolf Dolzer. The last two days were dedicated to the Parties' Closing Statements.

206. On 22 April 2010, the Tribunal sent a letter to the Parties with instructions concerning the submission of the Post-Hearing Briefs to be submitted by both Parties by 14 June 2010.

207. On 20 May 2010, the Tribunal issued its Procedural Order No. 7, in which it ruled on the admissibility of new documents not yet in the record and which both Parties wished to submit in order to use them in their upcoming Post-Hearing Briefs.

208. On the same day, the Tribunal sent a letter to the Parties listing nine questions that the Tribunal wished the Parties to address in the Post-Hearing Briefs.

209. On 25 May 2010, both Parties filed new documents admitted into the procedure under Procedural Order No. 7. These documents were submitted by the Parties as C-998 to C-1003 with regard to Claimants, and RD-484 and RF-92 with regard to Respondent.

210. On 9 June 2010, the Tribunal granted an extension of the deadline for the submission of the Post-Hearing Briefs to 22 June 2010.

211. On 22, 23 and 25 June 2010, the Parties submitted their Post-Hearing Briefs, together with their response to the Tribunal's nine questions raised in its letter of 20 May 2010 (see § 209 above).

212. On 25 June 2010, Respondent complained about the delay of the submission of some parts of Claimants' Post-Hearing Brief, which was received during the night of 22-23 June 2010 and requested that the Tribunal disregard such submission.

213. On 7 July 2010, after having given Claimants the opportunity to comment on Respondent's letter of 25 June 2010 and after considering both Parties' respective positions, the Tribunal accepted both Parties' Post-Hearing Briefs.

214. On 22 July 2010, Claimants requested the postponement of the deadline for the submission of the Parties' Statements of Cost due on 22 July 2010. After having invited Claimants to elaborate on the reasons for their request and after having given Respondent the opportunity to comment thereon, the Tribunal decided by Procedural Order No. 8 dated 3 August 2010, to reject Claimants' request for postponement of the deadline for the submission of the Parties' Statements of Cost and invited both Parties to submit their Statements of Cost within 24 hours upon receipt of Procedural Order No. 8

215. On 4 August 2010, the Parties filed their Statements of Cost.

216. On 5 October 2010, Claimants filed a letter submitting that certain Claimants, who tendered into the Exchange Offer 2010, would no longer participate in the present arbitration, thereby reducing the number of remaining Claimants to approximately 60,000. Claimants attached to their letter updated versions of Annexes A, B, C and L to the Request for Arbitration, the latter containing a list of all Claimants who have withdrawn from the arbitration since 14 September 2006.

217. On 22 October 2010, Respondent responded to Claimants' letter of 5 October 2010 and requested the Tribunal (i) to require Claimants to promptly inform which Claimants have tendered their security entitlements into the Exchange Offer 2010 and (ii) to order that the Argentine Republic and those Claimants with respect to which proceedings will be discontinued under the terms set forth in its letter, equally bear the arbitration costs, and each of them bear their own cost, and that such order of discontinuance be rendered in due course.

218. On 27 October 2010, Claimants requested that Respondent's requests raised in its letter of 22 October 2010 be denied based on the following main arguments:

(i) with regard to Respondent's request for information on the identity of Claimants having tendered into the Exchange Offer 2010, this request has been rendered moot because Respondent is already in possession of such information as Claimants already have submitted a complete list of all Claimants having withdrawn from the arbitration since 14 September 2006 and (ii) with regard to Respondent's request regarding costs issues as to withdrawn Claimants, this request constitutes an attempt to raise new issues regarding costs and should therefore be rejected and stricken from the record, or alternatively, Claimants should be given the opportunity to brief the Tribunal in full as to this issue.

219. On 2 November 2010, Respondent responded, contending that (i) Claimants' objections to its requests was based on old arguments; (ii) that the information as to the identity of Claimants having tendered into the Exchange Offer 2010 is necessary, since these Claimants would have accepted to abandon, dismiss, withdraw and/or discontinue any proceedings pending against Argentina whilst Claimants who have withdrawn irrespective of the Exchange Offer 2010 have not made such undertaking; (iii) that Claimants are in a better position than Respondent to provide such information; and (iv) that Respondent's request regarding costs was to be understood as a modality of the request for an order of discontinuance, which the Tribunal shall be free to issue when considered appropriate.

220. On 26 November 2010, the Tribunal issued its Procedural Order No. 9 in which it rejected Respondent's request for further specific information on the identity of the Claimants having tendered into the Exchange Offer 2010 and announced that the question of the allocation of the arbitration costs concerning the Claimants who withdrew would be dealt with in the Tribunal's upcoming determination on jurisdiction together with the question of the withdrawal of certain Claimants.

III. LAW

A. INTRODUCTORY REMARKS

(1) The Arbitral Procedure

221. The present procedure is subject to the ICSID legal framework, including the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (hereinafter "ICSID Convention"), the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter the "Institution Rules"), the Rules for Procedure for Arbitration Proceedings (hereinafter the "ICSID Arbitration Rules") and the Administrative and Financial Regulations, in their versions as amended in 2006.

222. The Arbitral Tribunal has been duly constituted on 6 February 2008 pursuant to Articles 37 and 38 ICSID Convention and Rule 4 ICSID Arbitration Rules (see § 119 above). Following the sudden and unfortunate death of the President of the Arbitral Tribunal, Dr. Robert Briner, Prof. Pierre Tercier was appointed by agreement of the Parties on 2 September 2009 as the new President of the Arbitral Tribunal according to Rule 11 ICSID Arbitration Rules. The Parties have not raised objections to the nomination and appointment of any of the present members of the Arbitral Tribunal.

223. Through the various rounds of exchange of written submissions and through the Hearing on Jurisdiction held in Washington D.C. from 7 to 13 April 2010, both Parties have been given wide and equal opportunity to present their case with regard to the jurisdictional and admissibility issues of the present case.[75]

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[75] Hearing Tr. Day 7 pp. 1941/14 –1942/10.

224. Having read the Parties' written submissions, having listened to the Parties, the testimony of their witnesses and experts during the Hearing on Jurisdiction, and based on the deliberations held among the members of the Tribunal, the Arbitral Tribunal considers itself in a position to render the present Decision on Jurisdiction.

(2) Object of the Present Decision

225. The main object and aim of the present decision is to examine the Centre's jurisdiction and the Tribunal's competence over the Claimants' claims against Argentina and, to the extent that there is competence and jurisdiction, to determine whether or not such claims are admissible. In what follows, the Tribunal will use for convenience the terms jurisdiction and competence interchangeably, without however ignoring the difference between the two concepts (see § 245 below).

226. During the First Session of 10 April 2008[76] (see § 127 above) and as further set forth in the Tribunal's letter of 21 May 2009 (see § 159 above), it was agreed that the present jurisdictional phase is limited to general issues and shall not include "issues touching specifically upon each individual claimant," except where the presentation of the general issue (of jurisdiction or admissibility) cannot be done without reference to a particular situation.

227. As such, the present decision does not aim at determining whether or not the Tribunal has jurisdiction with regard to each specific Claimant. Instead, it will set forth the general requirements for the Tribunal's jurisdiction regarding the present case and the admissibility of Claimants' claims, and will examine to what extent these requirements can be considered fulfilled without entering into issues touching specifically upon each individual Claimant. To the extent that the Tribunal considers that the general requirements for its jurisdiction and for the admissibility

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[76] First Session Tr. p. 140/17 and p. 141/3-9.

of Claimants' claims are fulfilled, it will determine how to address relevant jurisdictional issues touching specifically upon individual Claimants. These issues will then be dealt with in a later decision according to a procedure to be further determined.

228. With regard to relevant general issues of jurisdiction and admissibility, the Tribunal, in its letter of 9 May 2008, provided the Parties with a "List of issues to be addressed during the jurisdictional first phase of the proceedings" identifying 11 issues which are listed above (see § 130 above).

229. These 11 issues cover Claimants' and Respondent's main positions and objections with regard to the Tribunal's hearing and handling of the case, and address various issues including jurisdictional, admissibility and other procedural issues.

230. Whilst this decision will address the 11 issues listed above, it will not follow the order of such 11 issues.

231. After a brief summary of the Parties' positions (see section (3) below), the Tribunal will make a short presentation of the legal basis for the Tribunal's jurisdiction (section B below). The Tribunal will then set forth the requirements for ICSID's jurisdiction and determine to what extent these requirements can be deemed fulfilled without entering into issues specifically touching upon individual Claimants (section C below) and, to the extent these requirements are fulfilled, address relevant issues relating to the admissibility of the claims (section D below) and other procedural issues related thereto (section E below).

(3) Summary of the Parties' Positions and Relief Sought

232. The Parties hold opposing views with regard to the jurisdiction of the Arbitral Tribunal and the admissibility of the present proceedings. The Parties' respective positions and the requests for relief they seek from the Tribunal can be summarized as follows:

(a) Respondent's Position and Requests for Relief

233. In general, Respondent rejects Claimants' claims in their entirety and contends that Claimants have not asserted a plausible or *prima facie* case for violation of any of the protections of the Argentina-Italy BIT. According to Respondent, Respondent could not and consequently did not pay its external debts according to their terms, but offered Claimants, on a non-discriminatory basis, a voluntary exchange offer for new debt on other terms, which Claimants were free to reject with all their rights intact.[77]

234. With respect to the jurisdiction, Respondent objects to the ICSID's jurisdiction and the Tribunal's competence over Claimants' claims based mainly on the following arguments:

(i) Respondent contends that the conditions for ICSID jurisdiction are not fulfilled and that Claimants' claims are an unprecedented abuse of the investment treaty regime, brought without legal basis and for a fundamentally illegitimate motive. According to Respondent, this is a claim of approximately 180,000 unrelated Claimants, arising out of different purported investments acquired individually by each Claimant at different times and under different circumstances.[78] The ICSID Convention would not permit such collective claim, nor would the Argentina-Italy BIT. Therefore, Respondent submits that Claimants' claim is a legally unsupported attempt to turn a sovereign's non-payment of external debt that is governed by other States' laws which provide for remedies in the courts of those other States into a violation of investment treaty protection.[79]

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77 R-MJ § 4; R-PHB §§ 364 *et seq.*

78 R-MJ §1.

79 R-PHB §§ 363 *et seq.*

(ii) Further, Respondent declares that it has not consented to such a proceeding in any of the relevant instruments. Therefore, to force Respondent into such a proceeding without its consent would be a fundamental denial of due process, as well as a breach of the ICSID Convention's "outer limits."[80] In addition, even if jurisdiction was to be admitted, the way this proceeding has been initiated would not be in compliance with the requirements of the BIT with regard to preliminary conduct of amicable negotiations and court proceedings,[81] and would, in any event, be inefficient, unmanageable and contrary to Respondent's right to due process.

(iii) Respondent also contends that Claimants' purported consent is equally invalid because TFA, as the sole mover and controller of Claimants' claims, violated the duty of full and truthful disclosure by an un-conflicted representative and thereby vitiated any consent given by Claimants. TFA solicited Claimants' consents to instituting this arbitration, over which they have no control, by fraud and half-truths with the aim of diverting those customers from claiming against the TFA member banks, while prescription in Italy runs in favor of the TFA member banks.[82] In addition, the consent allegedly given by Claimants is not irrevocable as required by Article 25(1) of the ICSID Convention.[83]

(iv) Respondent further submits that the contractual entitlements created by and acquired by Claimants in secondary securities markets outside Argentina are not "investments made in the territory" of Argentina in the sense of the ICSID Convention or the Argentina-Italy BIT. Respondent also contends that

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80 R-MJ §1, R-PHB §§ 7-8, 19-59.

81 R-PHB § 267-291; R-PHB §§ 72-141.

82 R-MJ § 2; R-PHB § 142, §§ 158-200.

83 R-PHB § 227.

in most instances, the sales of the entitlements to Claimants by the members of TFA were not in accordance with Argentine law as they violated both contractual restrictions on such sales and relevant legal regulations. Respondent derives from this that the Tribunal lacks jurisdiction *ratione materiae*.[84]

(v) The Tribunal further lacks jurisdiction *ratione personae* as Claimants have not shown that they are "investors" or that they have satisfied the nationality requirements of the Argentina-Italy BIT.[85] Respondent also disputes Claimants' standing, contending that Claimants in their capacity as holders of security entitlements have only a remote and attenuated relationship to the underlying bonds through secondary market transactions that violated relevant law.[86]

(vi) Further, Respondent submits that Claimants' claims are not treaty claims because they depend fundamentally on non-performance of contractual payment obligations for which the relevant contractual instruments provide non-Argentine legal rights and remedies that could not be and were not affected by any act of Respondent.[87]

(vii) Finally, Respondent contends that Claimants listed in Annex L of the Request for Arbitration have not validly withdrawn from the arbitration and, since

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84 R-MJ § 3, R-PHB §§ 394-405, § 478.

85 R-MJ § 3, R-PHB § 500.

86 R-MJ § 3, R-PHB § 394-405.

87 R-MJ § 4, R-PHB § 363, §§ 366-371.

White & Case does not represent them, they have not submitted any of the required pleadings and face default.[88]

235. Based on these considerations, Respondent requests that the Tribunal issue an award:[89]

> "(a) Determining that it lacks competence and that ICSID lacks jurisdiction over this case;
>
> (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, TFA's abuse of right in bringing the claims in this proceeding renders invalid such consent as Claimants may have offered and inadmissible these proceedings;
>
> (c) In the alternative, determining that it lacks jurisdiction *ratione materiae*;
>
> (d) In the alternative, determining that it lacks jurisdiction *ratione personae* or that Claimants lack standing;
>
> (e) In the alternative, determining that Claimants have not satisfied the necessary prerequisites for bringing a claim under the Argentina-Italy BIT;
>
> (f) In the alternative, determining that Claimants listed in Claimants' Annex L have defaulted and ordering them to pay a *pro rata* share of Argentina's costs;
>
> (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."

236. The above Requests for Relief as contained in the Respondent's Post-Hearing Brief of 22 June 2010 (§ 501) and its Reply Memorial on Jurisdiction and Admissibility of 23 February 2009 (§ 730) are slightly different from the Requests for Relief it

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88 R-R-MJ §§ 638-639; R-PHB §§ 253-266.

89 R-PHB § 501.

formulated in its First Memorial on Jurisdiction and Admissibility of 8 August 2008 and providing as follows:[90]

> "(a) Determining that it lacks competence and that ICSID lacks jurisdiction to entertain this collective action;
>
> (b) In the alternative, determining that it lacks competence and ICSID lacks jurisdiction because Claimants have not provided valid consent, and, further, TFA's abuse of right in bringing the claims in this proceeding renders invalid such consent as Claimants may have offered;
>
> (c) In the alternative, determining that it lacks jurisdiction ratione materiae;
>
> (d) In the alternative, determining that it lacks jurisdiction ratione personae or that Claimants lack standing;
>
> (e) In the alternative, determining that Claimants have not satisfied necessary prerequisites to bringing a claim under the Argentina-Italy BIT;
>
> (f) Ordering Claimants to pay all of Argentina's costs, expenses, and attorneys' fees; and
>
> (g) Granting any further relief requested against Claimants that the Tribunal deems fit and proper."

237. In addition, in its letters of 22 October 2010 and 2 November 2010 (see §§ 217 and 219 above), Respondent requested the Tribunal to issue an order for discontinuance concerning the Claimants who had withdrawn from the proceedings.

(b) Claimants' Position and Requests for Relief

238. Claimants submit that throughout the 1990s, Respondent proceeded to issue over 170 sovereign bonds, intentionally targeting retail investors, including in particular Italian retail investors like Claimants. By virtue of Argentina's subsequent acts surrounding its default in late 2001 and directed at all Claimants collectively, Claimants were deprived of the value of their investments. In particular, Claimants raise the following allegations:

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[90] See R-MJ § 401.

(i) Respondent first repudiated its obligations under the bonds and, subsequently, refused to negotiate with bondholders thereby pursuing a unilateral, punitive exchange offer targeting, *inter alia*, Italian retail investors, including Claimants;

(ii) Thereafter, Respondent enacted legislation repudiating all obligations to Claimants, which destroyed the value of their investments;[91]

(iii) Respondent's acts as a rogue debtor violated its international treaty obligations, the reason why Claimants submitted claims pursuant to the "Argentina-Italy BIT" and under the auspices of the International Centre for Settlement of Investment Disputes (hereafter "ICSID"). [92]

239. In their Request for Arbitration of 14 September 2006, Claimants formulated the following Requests for Relief:

> "212. Claimants hereby request that the Arbitral Tribunal to be constituted in this case issue a final award:
>
> 1. Declaring that the Argentine Republic has breached its obligations under the Argentina-Italy BIT, and is liable to Claimants therefor;
> 2. Awarding Claimants compensatory damages in an amount to be specified at a later stage;
> 3. Awarding Claimants costs associated with these proceedings, including all professional fees and disbursements;
> 4. Awarding Claimants pre-award and post-award interest at a rate to be fixed; and
> 5. Awarding Claimants such further or other relief as the Tribunal may deem appropriate.
>
> 213. Claimants reserve the right to amend this Request for Arbitration and assert additional claims as permitted by the ICSID Convention and the ICSID Arbitration Rules."

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91 C-MJ §§ 2-10.

92 C-MJ §§ 7-8.

240. After the initiation of these proceedings, the Tribunal decided to deal first with issues of jurisdiction and admissibility and to deal with the merits of the case in a second phase (see §§ 127-130 above).

241. Within such context and with regard to the jurisdictional phase of the present proceedings as limited in scope to the extent described above (§§ 127-130), Claimants contend that ICSID and the Tribunal have full jurisdiction over Claimants' claims, which meet all relevant requirements set forth in the ICSID Convention, Arbitration Rules and the Argentina-Italy BIT.[93]

242. Consequently, Claimants request that the Tribunal decide as follows with respect to the 11 issues presented in this jurisdictional phase (see § 130 above):[94]

> "(1) Argentina consented to arbitrate claims by multiple Claimants, and those claims are admissible.
>
> (2) Claimants' consent to arbitrate pursuant to a valid declaration of consent, and the role of Task Force Argentina or any other alleged conflict does not vitiate such consent.
>
> (3) Claimants' submission of substitute annexes to the Request for Arbitration was permissible.
>
> (4) Claimants were entitled to commence arbitration and the 18-month domestic litigation clause in Article 8(2) of the Argentina-Italy BIT was not a barrier.
>
> (5) The MFN clause allows Claimants to bypass any requirement to resort to domestic court before commencing arbitration.
>
> (6) By operation of the MFN clause, Claimants can benefit from the protection of the umbrella clause in the Argentina-Chile BIT.
>
> (7) The Tribunal has jurisdiction over Claimants' prima facie treaty claims under the Argentina-Italy BIT.

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93 C-MJ § 15; C-R-MJ § 353, §§ 656, 675, §§ 788, 793 and 798; C-PHB § 6.

94 C-MJ Section IV § 22 ; C-R-MJ Section IV; see further C-PHB § 449.

(8) The Tribunal's jurisdiction over Claimants' treaty claims is unaffected by any forum selection clauses in Claimants' bonds.

(9) The bonds held by Claimants satisfy the definition of "investment" under Article 1(1) of the Argentina-Italy BIT and the ICSID Convention. Their investments were made "in the territory" of Argentina and "in compliance with the laws and regulations of Argentina."

(10) The Tribunal has jurisdiction *ratione personae* pursuant to Article 25 of the ICSID Convention over Claimants who are natural persons, provided certain requirements are met.

(11) The Tribunal has jurisdiction *ratione personae* pursuant to Article 25 of the ICSID Convention over Claimants that are juridical persons and had Italian nationality on September 14, 2007."

243. Claimants also request the Tribunal to order Respondent to bear all legal fees and expenses incurred by Claimants in connection with this arbitration.[95]

(4) Structure of the Present Decision

244. As mentioned above (see §§ 225 *et seq.* above), the present decision deals with general questions of jurisdiction, as well as admissibility.

245. The Convention does not define the concept of "jurisdiction" of the Centre or of "competence" of the Tribunal contemplated in Articles 25 and 41 ICSID Convention (see § 225 above).[96] Nevertheless, in their Report, the Executive Directors have interpreted the concept of "jurisdiction of the Centre" as a "convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for

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[95] C-MJ Section IV § 23.

[96] The differences between the concept of "jurisdiction" of the Centre compared to the concept "competence" of the arbitral tribunal seem to be more linked to the difference in the nature and role of the Centre compared to the arbitral tribunal rather then to a real difference of concept, see GEROLD ZEILER, "Jurisdiction, Competence and Admissibility," in: International Investment Law for the 21st Century, Essays in Honour of Christoph Schreuer, Oxford University Press 2009, pp 77-81.

conciliation and arbitration proceedings." In other words, the concept of jurisdiction under the Convention also covers issues which may usually be regarded as issues of "admissibility."[97] It is thus not surprising that some tribunals have questioned the usefulness of the term in the framework of ICSID.[98]

246. Within the context of the present dispute and its particularities, it is useful and important to distinguish issues of jurisdiction from issues of admissibility for the following reasons.

247. Although a lack of jurisdiction or admissibility may both lead to the same result of a tribunal having to refuse to hear the case, such refusal is of a fundamentally different nature[99] and therefore carries different consequences:[100]

(i) While a lack of jurisdiction *stricto sensu* means that the claim cannot at all be brought in front of the body called upon, a lack of admissibility means that the claim was neither fit nor mature for judicial treatment;[101]

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97 See e.g. *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility of 18 April 2008, §§ 11 *et seq.* (hereinafter "*Rompetrol*"). In contrast, some authors and tribunals have expressed a different view on this topic: see e.g. ZEILER, op. cit. fn. 96, pp. 90-91, who, referring to the Methanex case, supports the view that since the objections mentioned in Rule 41 ICSID Arbitration Rules do not include objections of inadmissibility of the claim, this provision does not confer to the Tribunal a separate power to rule on objections to admissibility.

98 CHRISTOPH SCHREUER, The ICSID Convention: A Commentary, Cambridge University Press, 2nd edition, 2009, Ad Art. 25 § 18 and references quoted therein.

99 See in this respect Paulsson, who called them "as different as night and day" (JAN PAULSSON, "Jurisdiction and Admissibility," in G. AKSEN, K. H. BÖCKSTIEGEL, M.J. MUSTILL, P.M. PATOCCHI, and A.M. WHITESELL (eds), Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner (2005), pp. 601 *et seq.*).

100 See also ZEILER, op. cit. fn. 96, pp. 81 *et seq.*

101 See PAULSSON, *op. cit.* fn. 99, and *The Société Générale de Surveillance v. Republic of the Philippines*, (ICSID Case ARB/02/6), Decision of 29 January 2004 (§ 153), 8 *ICSID Reports* 518 (hereinafter "*SGS v. Philippines*").

(ii) Whereby a decision refusing a case based on a lack of arbitral jurisdiction is usually subject to review by another body, a decision refusing a case based on a lack of admissibility can usually not be subject to review by another body;

(iii) Whereby a final refusal based on a lack of jurisdiction will prevent the parties from successfully re-submitting the same claim to the same body, a refusal based on admissibility will, in principle, not prevent the claimant from resubmitting its claim, provided it cures the previous flaw causing the inadmissibility.

248. Therefore, and in the light of the many objections raised in the present proceedings with regard to various aspects of ICSID's jurisdiction and proceedings, the Tribunal has deemed it not only appropriate but also necessary to distinguish issues relating to ICSID's jurisdiction *stricto sensu* and admissibility issues.

249. In this respect, the guiding thought of the Tribunal for distinguishing issues of jurisdiction from issues of admissibility has been the following cornerstone consideration:

> **If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim ? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction.**

250. This thought will be further developed along the Tribunal's analysis which is structured as follows:

(i) The Tribunal will start with a short presentation of the fundaments and scope of the Tribunal's competence as deriving from the relevant legal provisions of the BIT and the Convention (see section B below);

(ii) Based on this presentation, the Tribunal will then set forth the requirements for its jurisdiction as set forth by the relevant legal provisions and examine to what extent these requirements can be considered fulfilled without entering into issues specifically touching upon individual Claimants (see section C below);

(iii) To the extent these requirements can be considered fulfilled, the Tribunal will address relevant issues relating to the admissibility of the claims (see section D below); and

(iv) Finally, to the extent that the Tribunal comes to the conclusion that it has, in principle, jurisdiction and that the claims are, in principle, admissible, it will address other procedural issues relevant for the conduct of the present proceedings (see section E below).

B. LEGAL BASIS FOR THE TRIBUNAL'S JURISDICTION

251. It is not contested between the Parties that the Tribunal's jurisdiction must be based on the relevant provisions of the Argentina-Italy BIT as well as Article 25 ICSID Convention.[102] What is, however, disputed is the scope of jurisdiction as deriving from these instruments and provisions.

252. Before entering into the analysis of the various jurisdictional and other procedural requirements for ICSID arbitration, the Tribunal considers it useful to briefly discuss the scope of application and effect of the relevant legal provisions. This will facilitate the determination of the specific scope of ICSID's jurisdiction and the Tribunal's competence in the present dispute, which will serve as basis for the Tribunal's analysis of the jurisdictional requirements.

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[102] C-MJ § 308; R-MJ § 174, R-R-MJ § 241.

(1) Article 25 ICSID Convention

253. To recall, Article 25 of the ICSID Convention provides:

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
>
> [....]"

254. Article 25 ICSID Convention is generally understood as prescribing the following requirements for ICSID's jurisdiction:

255. *(i) Existence of a legal dispute*: The ICSID Convention does not provide for a definition of what constitutes a "legal dispute." ICSID tribunals have generally defined this concept as referring to "disputes regarding the existence or scope of a legal right or obligation, or to disputes regarding the nature or extent of the reparation to be made for the breach of a legal obligation."[103] Similarly, the

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[103] See REED/PAULSSON/BLACKABY, Guide to ICSID Arbitration, Kluwer International, 2004, p. 15. See also 2011 ed., p. 26.

International Court of Justice defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[104]

256. *(ii) A dispute arising directly out of an "investment"*: In order to be subject to ICSID's jurisdiction, the dispute must concern an "investment" and the claims put forward by either Party must arise directly from such investment. Again, the ICSID Convention does not provide for any definition or explanation of the terms "arising directly out of" or "an investment."[105] Attempts by tribunals to define the concept of investments are numerous and will be examined further below when determining whether an investment may be deemed to exist in the present case (see §§ 343 *et seq*. below).

257. *(iii) A dispute between a Contracting State and a national of another Contracting State*: The dispute must exist between a Host State having ratified the Convention and an investor of another State, having also ratified the Convention. With regard to the investor, the nationality requirement is understood to be two-fold, i.e., subject to a positive and a negative requirement: (i) the investor must possess the nationality of a Contracting State, and (ii) not simultaneously possess the nationality of the Host State. The fulfilment of the nationality requirement set forth in Article 25 is considered an objective condition to the Convention's application, which is not subject to the Contracting Parties' arrangement. Article 25(2) however, does not provide for a definition of the concept of nationality, which is according to general principles of international law left to the law of the State of which nationality is claimed. Article 25(2) merely provides certain clarifications as to the time at which the nationality requirement must be fulfilled, while drawing a distinction between natural persons and juridical persons. In addition, with regard

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104 See the case concerning East Timor, I.C.J. Reports 1995, pp. 89, 99. See also SCHREUER, *op. cit.* fn.98, Ad Article 25 § 42 and references quoted in footnote n. 44.

105 SCHREUER, *op. cit.* fn.98, Ad Article 25 § 85.

to juridical persons, Article 25(2) provides the parties with the possibility to take into account foreign control over a juridical person when determining its nationality for the purposes of the Convention.

258. *(iv) Existence of a written consent of both Parties*: In order for consent for ICSID's jurisdiction to be given, a State must not only have generally consented to ICSID's jurisdiction by becoming a party to the ICSID Convention, it must also have consented to ICSID's jurisdiction in the specific case at hand. This specific consent must then be matched by the consent of the concerned investor. Consent must be given in writing and be explicit. However, the Convention does not define the concept of written form, and in practice the form of such consent has evolved and may differ depending on the type, contractual- or treaty-based, of the dispute. Within the context of BIT-based arbitration, it is widely admitted that an arbitration clause contained in a BIT and providing for ICSID arbitration constitutes a valid written offer for ICSID arbitration by the relevant State. Actually, Article 8(3) of the BIT in the present case states with so many words: "With this purpose and under this Agreement, each Contracting Party grants its anticipated and irrevocable consent that any dispute may be subject to arbitration." Such an offer of consent may be validly accepted by an investor through the initiation of ICSID proceedings.[106]

(2) Argentina-Italy BIT

259. On 22 May 1990, the Republic of Italy and the Argentine Republic signed the Argentina-Italy BIT which entered into effect on 14 October 1990, and on which Claimants' claims as well as the Tribunal's competence are allegedly based.

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[106] SCHREUER, *op. cit.* fn. 98, Ad Art. 25 §§ 427 et seq., § 448; REED/PAULSSON/BLACKABY, *op. cit.* fn. 103, p. 35.

(a) General Scope and Aim of the Argentina-Italy BIT

260. With regard to the general purpose of the Argentina-Italy BIT, the preamble of the BIT provides as follows:

261. In its authentic Spanish version:

> "[…]
>
> Con el deseo de crear condiciones favorables para una mayor cooperación económica enre los dos Países y, en particular, para la realización de inversiones por inversores de una Parte Contratante en el territorio de la otra y;
>
> Considerando que la única manera de establecer y conservar un adecuado flujo internacional de capitales es a través del mantenimiento de un clima satisfactorio para las inversiones dentro del respeto a las leyes del país receptor;
>
> Reconociendo que la conclusión de un Acuerdo para la promoción y la reciproca protección de las inversiones contribuirá a estimular las iniciativas empresariales que favorezcan la prosperidad de las dos Partes contratantes.
>
> […]"

262. In its authentic Italian version:

> "[…]
>
> desiderando creare condizioni favorevoli per una maggiore cooperazione economica fra i due Paesi ed, in particolare, per la realizzazione di investimenti da parte di investitori di una Parte Contraente nel territorio dell'altra;
>
> considerando che l'unico modo per stabilire e mantenere un adeguato flusso internazionale di capitali consiste nell'assicurare un clima propizio agli investimenti, nel rispetto delle leggi del Paese ricevente;
>
> riconoscendo che la conclusione di un Accordo per la Promozione e la reciproca Protezione degli Investimenti contribuirà a stimolare iniziative imprenditoriali idonee a favorire la prosperità delle due Parti Contraenti,
>
> […]"

263. In its unofficial English translation by Claimants:

> "[…]
>
> Desiring to create favourable conditions for greater economic cooperation between the two States and, in particular, for the realization of investments by

> investors of one Contracting Party in the territory of the other Contracting Party;
>
> Considering that the only way of establishing and maintaining an appropriate international flow of capital is to ensure a favourable climate for investments, in compliance with the laws of the receiving State;
>
> Recognizing that entering into this Agreement on the Promotion and Protection of Investments will stimulate entrepreneurial intiatives which will increase the prosperity of both Contracting Parties.
>
> [...]

264. In accordance with this general aim of the BIT, the BIT is then construed as follows:

(i) Article 1 provides for definitions of various key terms used throughout the BIT, including the terms "investment," "investor," "returns" and "territory";

(ii) Articles 2 to 6 contemplate various standards of investment protection and promotion, including fair and equitable treatment to investors of the other Contracting Party (Article 2(2)), national treatment standard and most-favored nation principle (Article 3), compensation for damages or losses related to certain events (Article 4), protection against nationalization and expropriation (Article 5), assurance of the possibility to transfer and repatriate capital, revenues, considerations and compensation of damages (Article 6), while Article 7 extends such protection to subrogated parties;

(iii) Articles 8 and 9 provide for a mechanism of settlement of disputes, Article 8 applying to disputes between investors and a Contracting Party (see § 267 below), and Article 9 applying to disputes between the Contracting Parties, i.e., Argentina and Italy;

(iv) Article 10 contemplates the principle that if another applicable law or treaty provides for a more favorable treatment, such more favorable treatment shall apply;

(v) Articles 11 to 13 are of a more technical nature and address questions of entry into force and duration of the BIT.

265. In addition to the core of the BIT, Argentina and Italy further signed an "Additional Protocol," which provides specifications and clarifications concerning Articles 1 and 3 BIT:

(i) With regard to Article 1 BIT and the concept of "individual" investor defined therein, the Additional Protocol provides for specific domiciliation requirements for individuals of a Contracting Party to benefit from the protection of the BIT;

(ii) With regard to Article 3 (and Article 10) BIT and the principles of most favored nation and most favorable treatment contemplated therein, the Additional Protocol specifies the scope of application of these principles: (a) with regard to problems relating to the entry, stay, work and movement in each Contracting Party's territory of relevant citizens of the other Contracting Party and their families and (b) in general, by excluding from its scope of application "investments made within facilitated credit set forth in bilateral agreements" such as the Treaty signed in Rome on 10 December 1987 and establishing a Particular Association between Italy and Argentina and the General Treaty of Cooperation and Good Relationships signed in Madrid on 3 June 1988 between Argentina and Spain.

266. In summary, the Argentina-Italy BIT resembles other BITs concluded at that time and does not contain any "out of the ordinary" provision or principle.

(b) Article 8 BIT

267. As mentioned above (§ 264), in Article 8 BIT, Argentina and Italy set forth the principles for settlement of disputes arising between investors of one Contracting Party and the other Contracting Party, i.e., the Host State.

268. Articles 8(1) through 8(9) BIT in the Spanish authentic text provides as follows:

> "1. Toda 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 será, en la medida de lo posible, solucionada por consultas amistosas entre las partes en la controversia.
>
> 2. Sí esas consultas no aportaran una solución, la controversia podrá ser sometida a la jurisdicción administrativa o judicial competente de la Parte Contratante en cuyo territorio está situada la inversión.
>
> 3. Sí todavía subsistiera una controversia entre inversores y una Parte Contratante, luego de transcurrido un plazo de dieciocho meses desde la notificación del comienzo del procedimiento ante las jurisdicciones nacionales citadas en el párrafo 2, la controversia podrá ser sometida a arbitraje internacional.
>
> A ese fin, y de conformidad con los términos de este Acuerdo, cada Parte Contratante otorga por el presente su consentimiento anticipado e irrevocable para que toda controversia pueda ser sometida al arbitraje.
>
> 4. A partir del momento en que se inicie un procedimiento arbitral, cada una de las partes en la controversia adoptara todas las medidas necesarias a fin de desistir de la instancia judicial en curso.
>
> 5. En caso de recurrirse al arbitraje internacional, la controversia sera sometida, a elección del inversor, a alguno de los organos de arbitraje designados a continuación:
>
> a) Al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.) creado por el «Convenio sobre el arreglo de diferencias relativas a Inversiones entre Estados y nacionales de otros Estados », abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado parte en el presente Acuerdo haya adherido a aquel. Mientras dicha condición no se cumpla, cada una de las Partes Contratantes da su consentimiento para que la controversia sea sometida al arbitraje de conformidad con el reglamento del Mecanismo Complementario de Conciliación y Arbitraje del Centro Internacional de Arreglo de Diferencias Relativas a Inversiones.
>
> b) A un tribunal de arbitraje "ad hoc" establecido para cada caso. El Arbitraje se efectuara de acuerdo con el Reglamento Arbitral de la Comisión de la Naciones Unidas para el Derecho Mercanil Internacional (C.N.U.D.M.I.) al cual se refiere la Resolución de la Asamblea General de las Naciones Unidas No. 31/98 del 15 de diciembre de 1976. Los árbitros seran tres. Si los mismos no son nacionales de la Partes Contratantes, deberan ser nacionales de Estados que tengan relaciones diplomáticas con ellas.
>
> 6. Ninguna de la Partes Contratantes que sea parte en una controversia podra plantear, en ninguna etapa del proceso de arbitaje, ni de la ejecución de una sentencia arbitral, excepciones basadas en el hecho que el inversor, parte contratante en la controversia, haya percibido una indemnificación destinada a

cubrir todo o parte de la perdidas sufridas, en cumplimento de una poliza de seguro o de la garantia prevista en Articulo 7 del presente Acuerdo.

7. El tribunal arbitral decidirá sobre la base del derecho de la Parte Contratante parte en la controversia – incluyendo las normas de esta ultima relativas a conflictos de leyes -, las disposiciones del presente Acuerdo, los terminos de eventuales acuerdos particulares concluídos con relación a la inversión, como asi también los principios de derecho internacional en la materia.

8. Las sentencias arbitrales serán definitivas y obligatorias para las partes en la controversia. Cada Parte Contratante se compromete a ejecutar las sentencias de conformidad con su legislación nacional y de acuerdo a las conveniones internacionales en la materia vigentes para ambas Partes Contratantes.

9. Las Partes Contratantes se abstendran de tratar, a través de los canales diplomáticos, argumentos concernientes al arbitraje o a un proceso judicial ya en marcha hasta que los procedimientos correspondientes hubieran sido concluidos, salvo que las partes en la controversia no hubieran cumplido el laudo del tribunal arbitral o la sentencia del tribunal ordinario, según los términos de cumplimiento establecidos en el laudo o en la sentencia."

269. Article 8(1) through 8(9) BIT in the Italian authentic text provides:

"1. Qualsiasi controversia relativa agli investimenti insorta tra una Parte Contraente ed un investitore dell'altra, riguardo problemi regolati dal presente Accordo, sarà per quanto possibile risolta mediante consultazioni amichevoli tra le parti in controversia medesime.

2. Se tali consultazioni non consentissero una soluzione, la controversia potrà essere sottoposta alla competente magistratura ordinaria od amministrativa della Parte Contraente nel cui territorio si trovi l'investimento.

3. Ove tra un a Parte Contraente ed investitori sussista ancora controversia, dopo trascorso un periodo di 18 mesi dalla notifica di inizio di una azione avanti le magistrature nazionali indicate al paragrafo 2, tale controversia potrà essere sottoposta ad arbitrato internazionale. A tale effetto ed ai sensi del presente Accordo, ciascuna Parte Contraente conferisce fin d'ora consenso anticipato ed irrevocabile affinché qualsiasi controversia possa essere sottoposta all'arbitrato.

4. Fin dal momento in cui abbia avuto inizio un procedimento arbitrale, ciascuna delle parti nella controversia adotterà ogni utile iniziativa intesa a desistere dall'azione giudiziale in corso.

5. In caso di ricorso all'arbitrato internazionale, la controversia sarà sottoposta, a scelta dell'investitore, a uno degli organismi di arbitrato qui di seguito indicati:

a. al Centro Internazionale per la Risoluzione delle Controversie relative ad Investimenti (I.C.S.I.D.), istituito dalla Convenzione sul "Regolamento delle Controversie relative agli investimenti tra Stati e cittadini di altri Stati", aperta alla firma in Washington il 18 marzo 1965, qualora ognuno dei Paesi parte nel presente Accordo vi avesse aderito. Ove questa condizione non sussista, ciascuna delle Parti Contraenti conferisce il proprio consenso affinché la controversia sia sottoposta ad arbitrato, in conformità alla regolamentazione sui "meccanismi" aggiuntivi per la conciliazione e l'arbitrato del Centro Internazionale per il Regolamento delle Controversie relative ad Investimenti.

b. Ad un Tribunale arbitrale "ad hoc" istituito caso per caso. L'arbitrato si effettuerà secondo il Regolamento Arbitrale della Commissione delle Nazioni Unite sul Diritto Commerciale Internazionale (UNCITRAL), di cui alla Risoluzione dell'Assemblea Generale delle Nazioni Unite 31/98 del 15 dicembre 1976: Gli arbitri saranno in numero di tre e, se non cittadini delle Parti Contraenti, dovranno essere cittadini di Paesi che abbiano relazioni diplomatiche con le Parti Contraenti.

6. Nessuna delle Parti Contraenti, che sia parte in una controversia, potrà sollevare in una fase della procedura di arbitrato né in sede di esecuzione di una sentenza di arbitrato, eccezioni basate sul fatto che un investitore parte avversa abbia, per effetto di una polizza di assicurazione o della garanzia prevista all'Articolo 7 del presente Accordo, ricevuto un indennizzo destinato a coprire in tutto od in parte le perdite subite.

7. Il Tribunale Arbitrale deciderà sulla base del diritto della Parte Contraente parte nella controversia – comprese le norme di quest'ultima relativi ai conflitti di leggi -, delle disposizioni del presente Accordo, di clausole di eventuali particolari accordi relativi all'investimento, nonché sulla base dei principi di diritto internazionale applicabili in materia.

8. Le sentenze arbitrali definitive vincolanti per le parti nella controversia. Ciascuna Parte Contraente si impegna ad eseguire le sentenze, in conformità alla propria legislazione nazionale ed alle Convenzioni internazionali in materia vigenti per ambo le Parti Contraenti.

9. Le parti Contraenti si asterranno dal trattare per via diplomatica argomenti attinenti ad un arbitrato od un procedimento giudiziario già in corso, finché le procedure relative non siano concluse e le parti nella controversia non abbiano poi adempiuto al lodo del tribunale arbitrale od alla sentenza del competente tribunale interno, secondo i termini di adempimento stabiliti nel lodo o nella sentenza medesimi."

270. Article 8(1) through 8(9) BIT in Claimants' unofficial English translation provides:

"1. Any dispute in relation to the investments between a Contracting Party and an investor of the other Contracting Party in relation to the issues

governed by this Agreement shall be settled, if possible, by means of amicable consultation between the parties to the dispute.

2. If the dispute has not been settled in such consultation, it may be subject to the competent ordinary or administrative court of the Contracting Party in the territory of which the investment is located.

3. If, after 18 months from the notification of commencement of an action before the national courts indicated in the above paragraph 2, the dispute between the Contracting Party and the investors still continues to exist, it may be subject to international arbitration.

With this purpose and under this Agreement, each Contracting Party grants its anticipated and irrevocable consent that any dispute may be subject to arbitration.

4. Since the commencement of the arbitration proceeding, each disputing party will adopt any initiative suitable to desist from the judicial action in course.

5. In case of international arbitration, the dispute will be subject, upon choice of the investor, to one of the following arbitration bodies:

a) International Centre for Settlement of Investment Disputes (I.C.S.I.D.), established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature in Washington on March 18, 1965, provided that both Contracting Parties are parties to the said Convention. If this condition is not satisfied, each of the Contracting Parties agrees that the dispute shall be subject to arbitration in compliance with the Additional Facility Rules for conciliation and arbitration of the International Centre for Settlement of Investment Disputes.

b) Ad hoc arbitration tribunal. The arbitration will be carried out according to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), approved by the General Assembly Resolution 31/98 of December 15, 1976. There will be three arbitrators who, if not citizens of the Contracting Parties, must be the citizens of the countries with which the Contracting Parties have diplomatic relations.

6. No Contracting Party which is a party to the dispute is allowed to raise, during the arbitration procedure or while the arbitration decision is being enforced, exceptions based on the fact that the investor involved in the dispute received, in force of an insurance policy or security provided under Art. 7 hereof, a compensation which covers, in whole or in part, the losses suffered.

7. The arbitration tribunal will decide on the basis of the laws of the Contracting Party involved in the dispute – including its rules on the conflict of laws – and of the provisions of the Agreement, of clauses of any particular agreements relating to the investment, as well as on the basis of the applicable principles of international law.

8. The arbitration decisions will be definitive and binding on the parties to the dispute. Each Contracting Party undertakes to enforce the decisions in

> compliance with its national legislation and international conventions applicable to both Contracting Parties.
>
> 9. The Contracting Parties will refrain from diplomatic negotiations on issues relating to an arbitration or judicial proceeding in course, until the related proceeding has not been concluded and the parties have not complied with the arbitration decision or the decision of the competent internal court according to the terms of performance provided in such arbitration or judicial decision."

271. Thus, whilst Article 8(1) firstly defines the scope of its application by referring to "any dispute relating to the investments between a Contracting Party and an investor of the other Contracting Party in relation to the issues governed by this Agreement," Article 8(1) to (3) then provides for three different settlement mechanisms: (i) amicable consultations (Article 8(1)), (ii) proceedings before the competent ordinary or administrative court of the Host State (Article 8(2)), and (iii) international arbitration (Article 8(3)).

272. Article 8(4) to 8(8) further contains supplementary principles applicable where a party initiates international arbitration proceedings, providing for either ICSID or *ad hoc* arbitration upon the choice of the investor (Article 8(5)), as well as for a choice of law in favor of the law of the Host State, the provisions of the BIT, as well as the applicable principles of international law (Article 8(7)). Article 8(9) finally prohibits the Contracting Parties from conducting diplomatic negotiations on issues relating to an ongoing litigation or arbitration.

273. Article 8 BIT is at the heart of the Parties' controversy regarding the question of the Tribunal's jurisdiction: The Parties not only disagree on the scope and nature of the disputes subject to the settlement mechanisms set forth in Article 8, but also on how these three mechanisms interact, and in particular whether some of them are a mandatory prerequisite to the coming into play of other mechanisms, and if so, whether or not they have been duly complied with.

(3) Relationship between Article 25 ICSID Convention and Article 8 BIT

(a) In General

274. As mentioned above, Article 8(5) BIT provides that in case of an international arbitration initiated under Article 8(3) BIT, the dispute would be subject, upon the choice of the investor, to either ICSID or *ad hoc* arbitration under the UNCITRAL Arbitration Rules.

275. In other words, through the express designation of ICSID arbitration in Article 8 BIT, Italy and Argentina, which are both Contracting Parties to the ICSID Convention, express their consent required under Article 25 ICSID Convention to submit specific disputes with nationals of each other to ICSID arbitration. The scope of this consent is therefore defined by and must be determined according to the relevant provisions of the BIT, and in particular by Article 8.

276. In this respect, the Parties disagree on the actual and admissible scope of this consent. They disagree on how these two provisions - Article 25 ICSID Convention and Article 8 BIT - interact, and in particular on whether Article 25 ICSID Convention sets forth the outer limits of the consent given under Article 8 BIT and, if so, whether the Parties' consent as expressed in Article 8 goes beyond these outer limits.

(b) With regard to the Subject Matter of the Dispute

277. According to Article 8(1) BIT, the settlement mechanism provided for in Article 8, including ICSID arbitration, applies to "[a]ny dispute in relation to the investments between a Contracting Party and an investor of the other Contracting Party in relation to the issues governed by this Agreement."

278. Through this phrase, Argentina and Italy defined the nature and kind of disputes that the Contracting Parties wished to submit to the dispute settlement mechanisms

provided under Article 8, i.e., disputes "in relation to the investments" made "in relation to the issues governed by this Agreement."

279. Insofar as ICSID arbitration is concerned, this phrase arguably implements the requirements of Article 25 reserving ICSID jurisdiction to "legal disputes arising directly out of an investment." To recall, Article 25(1) ICSID Convention provides as follows (see § 253 above):

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."

(i) To the extent that the BIT provides an investor with specific rights for the protection of its investment, a dispute relating to the existence, scope or violation of such a right can be deemed a "legal dispute" in the sense of Article 25 ICSID Convention.

(ii) To the extent that Article 8(1) requires a "relation" between the dispute and the investment, it would appear to implement the requirement of Article 25(1) ICSID Convention that only disputes arising "directly out of an investment" is subject to ICSID's jurisdiction. Now, it is true that Article 8(1) does not expressly provide for the need of "directness" between the investment and the dispute and merely requires the existence of a "relation" between them. The question thus arises whether such less restrictive wording may be considered going beyond ICSID's outer limits and should therefore be interpreted with due regard to the requirement of "directness" of such relationship. This question will be addressed in more detail below when determining the existence of a legal dispute arising out of the BIT (below §§ 301 *et seq.)*.

(c) With regard to the Parties

280. As mentioned above (§257), Article 25 ICSID Convention requires that the dispute at stake exists between a Host State having ratified the Convention and an investor of another Contracting State. To this extent, ICSID arbitration initiated under Article 8 BIT may only take place between the Host State, i.e., Argentina or Italy, and an investor of the other State's nationality. This is duly reflected in Article 8(1) BIT, which applies only to disputes between "a Contracting Party and an investor of the other Contracting Party." As such, Article 8(1) BIT reflects the objective requirements of Article 25 ICSID Convention that the investor be of the nationality of a Contracting State other than the Host State.

281. With regard to the nationality of the investor, Article 25 ICSID does not provide for any specification as to when an investor is deemed to be of the nationality of a particular State. Thus, while the requirement that the investor be of the nationality of a Contracting State other than the Host State is an objective requirement, the criteria to determine whether such requirement is fulfilled are not set forth by the ICSID Convention and may therefore be further determined by the Contracting Parties to the Convention.

282. In this respect, the BIT contains the following provision with regard to the nationality of an investor:

- Article 1(2) BIT provides as follows:

> "2. "Investor" shall mean any individual or corporation of one Contracting Party that has made, makes or undertakes to make investments in the territory of the other Contracting Party.
>
> a) "individual" shall mean, for each Contracting Party, an individual who is a citizen of such Contracting Party, in compliance with the laws thereof;
>
> b) "corporation" shall mean, in relation to each Contracting Party, any entity incorporated in compliance with the legislation of a Contracting Party, having its office in the territory of such Party and being recognized thereby, such as public entities that conduct economic

activities, partnerships and corporations, foundations and associations, independent of whether liability is limited or not. "

- Par. 1 of the Additional Protocol provides as follows:

"1. With reference to Article 1:

a) Individuals of each Contracting Party who, when making an investment, maintained their domicile for more than two years in the Contracting Party in the territory of which the investment was made, cannot benefit of this Agreement.

If an individual of one Contracting Party maintains at the same time its registered residence in its State and domicile in the other State for more than two years, he/she will be considered equivalent, for the purposes of this Agreement, to individuals of the Contracting Party in the territory of which they made investments.

b) The domicile of an investor will be determined in compliance with laws, regulations and provisions of the Contracting Party in the territory of which the investment was made."

283. While Article 1(2) BIT focuses on the definition of the term of "investor," the Additional Protocol sets forth further eligibility criteria for an investor to benefit from the protection offered by the BIT. As such, these provisions aim to define the general scope of application *rationae personae* of the BIT, including but not limited to issues of nationality.

284. Within this context, Article 1(2) BIT requires that the investor be (i) with regard to physical persons, an individual having citizenship of the other Contracting Party, according to the latter's laws, and (ii) with regard to corporations, a corporation being incorporated in the other Contracting Party's territory in accordance with its legislation.

285. Thus, the BIT provides that the question of whether an investor is an "investor of the other Contracting Party" in the sense of Article 8(1) BIT is subject to the law of the Contracting State of which nationality is claimed. This can be said to reflect Article 25 ICSID Convention, which does not impose any criteria with regard to the determination of the nationality.

286. In addition thereto, the Additional Protocol to the BIT sets forth further criteria of eligibility for an investor to benefit from the protection offered under the BIT, in particular domiciliation requirements, which are to be examined under the laws of the Host State, i.e., Argentina.

287. In summary, under the BIT, an investor must not only be of the nationality of the other Contracting Party, but it must further fulfil the domiciliation requirements of Par. 1 of the Additional Protocol.

(d) With regard to the Procedure to Be Followed

288. As mentioned above (§ 271), Article 8 BIT provides for three different types of dispute settlement mechanisms and the Parties disagree on the scope and nature of the disputes subject to these mechanisms, as well as on the interaction of these three mechanisms. In particular, it is disputed between the Parties whether these three mechanisms are to be considered as mere alternatives or whether they provide for a sequential dispute resolution system implementing a mandatory three-steps mechanism, in which arbitration constitutes the ultimate step to be initiated only after completion of the first two steps.

289. Whilst Article 25 ICSID Convention sets forth the requirements for the Centre's jurisdiction, and the ICSID Arbitration Rules further set forth the specific rules to be followed in order to initiate arbitration proceedings falling under ICSID's jurisdiction, the ICSID framework is silent with regard to the question of whether such arbitration proceedings can be rendered conditional upon the fulfilment of further requirements, and if so, what are the effects of such additional requirements on ICSID's jurisdiction for handling of the case.

290. Whether or not Article 8 BIT provided for additional requirements and whether these requirements should be deemed of such nature and importance to be an inseparable part of the Parties' consent will be addressed below when examining

the existence and scope of the Parties' consent to ICSID jurisdiction (see §§ 423 *et seq.* and §§ 467 *et seq.* below).

(4) Other Relevant Legal Provisions and Principles

291. The Tribunal takes guidance from the Vienna Convention on the Law of Treaties ("Vienna Convention") in particular Article 31 ("General rule of interpretation") and 32 ("Supplementary means of interpretation").

292. As already mentioned in the Tribunal's Procedural Order No. 3 of 27 January 2010, this Tribunal shares the generally accepted view that the decisions of ICSID tribunals, like those of other investment dispute settlement mechanisms, are not legally binding precedents. Consequently, the Tribunal does not consider itself bound by previous decisions of other international tribunals.

293. However, the Tribunal is also of the opinion that, subject to the specific provisions of a treaty in question and of the circumstances of the actual case, it should pay due consideration to earlier decisions of international tribunals, where it believes that such consideration is appropriate in the light of the specific factual and legal context of the case and the persuasiveness of the legal reasoning of these earlier decisions.[107]

(5) ICSID, BIT and Mass Claims

294. The present proceedings are particular insofar as they gathered as of the date of their initiation, on Claimants' side, over 180,000 individuals and corporations. In the light of this figure, the present proceedings can be qualified as "mass claims" proceedings. The same remains true despite the recent withdrawal of several

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[107] On the precedential value of ICSID decisions, *see* GABRIELLE KAUFMANN-KOHLER, Arbitral Precedent: Dream, Necessity or Excuse? Freshfields lecture 2006, in Arbitration International Vol. 23 (2007) No. 3, pp. 368 *et seq.*; see also AUGUST REINISCH, The Role of Precedents in ICSID Arbitration, in Austrian Arbitration Yearbook 495-510 (2008).

thousands of Claimants, thereby reducing the number of remaining Claimants to approximately 60,000 (see § 216 above), subject to the Tribunal's decision on whether such "withdrawal" is admissible.

295. While it has happened in the past that multiple claimants initiated ICSID arbitration proceedings, this appears to be the first case in ICSID's history that "mass claims" are brought before it.

296. It is undeniable that the large number of Claimants raises a series of questions and challenges. In particular, the large number of Claimants makes it impossible to treat and examine each of the 180,000 claims (or 60,000 claims for that matter) as if it were a single claim, and certain generalisations and/or group examinations will be unavoidable. The question thus arises whether these or any other relevant characteristics of the present "mass claims" which will be addressed further below, may constitute a hurdle to ICSID's jurisdiction and/or to the admissibility of the claims (see §§ 480 and §§ 515 *et seq.*).

297. Neither the ICSID framework nor the BIT addresses the issue of such mass proceedings and therefore fail to provide a clear answer to this question. Also, the Parties disagree on how this silence should be interpreted and what it means with regard to the present mass proceedings. While Respondent argues that, in the light of their characteristics, mass proceedings are contrary to the system of ICSID arbitration and were not covered by Respondent's consent, Claimants, in contrast, hold the view that the "mass" aspect of the claim is a mere procedural aspect, which does not raise any issues of consent or jurisdiction, and which can thus be duly addressed by the arbitrators under their usual power to rule upon the procedure of the arbitration.

298. Consequently, the issue of the "mass claims" will have to be addressed under a two-fold approach: first, within the context of the Parties' consent (see §§ 480 *et*

seq. below), and secondly, within the context of admissibility of the present proceedings (see §§ 506, 515 *et seq.* below).

C. THE ARBITRAL TRIBUNAL'S JURISDICTION

(1) Introductory Remarks

299. As mentioned above (see § 250(ii) above), this section will deal with the question of the Tribunal's jurisdiction over the claims. In particular, it will focus on examining whether the four basic conditions for jurisdiction are given. If so, the Tribunal will deal with issues of admissibility in the next section.

300. Thus, after dealing with the nature of the dispute and examining whether it arises out of the BIT ((2)) and relates to an "investment" (jurisdiction *rationae materiae*) ((3)), the Tribunal will address relevant issues of nationality, capacity and characteristics of the Parties involved (jurisdiction *rationae personae*) ((4)), before examining the existence and scope of Claimants' and then Argentina's consent ((5) &(6)).

(2) Legal Dispute Arising out of the BIT – Issues 7 & 6

(a) Issues at Stake and Relevant Legal Provisions

301. It is uncontested between the Parties, that there is a dispute which can be considered a "legal dispute" in the sense of Article 25 ICSID Convention. What is contested between the Parties is whether this legal dispute arises out of rights and obligations contemplated in the BIT, or whether they are of a mere contractual nature arising out of the relevant bond documents relating to the Claimants' security entitlements. In other words, the Parties disagree whether the claims submitted to this Tribunal fall within the scope of protection of the BIT.

302. Thus, the issues to be determined by the Tribunal here are the following:

- Do the present claims arise out of the BIT, i.e., are they so-called treaty claims or, on the contrary, pure contract claims or claims of another nature? (see Issue No. 7 of the List of 11 Issues of 9 May 2008)

- What, if any, are the consequences of this determination? In particular:

  (i) If they are treaty claims, would the alleged facts, if proven, possibly constitue a treaty violation?

  (ii) If they are contract claims or claims of another nature, or in case of a treaty claim where the alleged facts would not constitue a violation of the treaty, can their case still be heard based on the MFN Clause of Article 3(1) BIT in connection with the Umbrella Clause contained in the Argentina-Chile BIT? (See Issue No. 6 of the List of 11 Issues of 9 May 2008)

303. In this context, it is to be recalled that according to generally accepted practice, the task of the Tribunal at the stage of determining whether it has jurisdiction to hear a claim under an investment treaty merely consists in determining whether the facts alleged by the claimant(s), if established, are capable of constituting a breach of the provisions of the BIT which have been invoked.[108] In performing this task, the Tribunal applies a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions invoked as well as to the assessment of whether the facts alleged may constitute breaches of these provisions on its face. In the words of the tribunal in *Saipem v. Bangladesh*: "If the result is affirmative,

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[108] *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007, §§ 84 *et seq.* (hereinafter "*Saipem*").

jurisdiction [rationae materiae] will be established, but the existence of breaches will remain to be litigated on the merits."[109]

304. The key legal provisions and documents in dealing with the above issues are the following: Articles 1, 2, 3, 4, 5 and 8 of the BIT, Article 7(3) of the Argentina-Chile BIT, as well as the relevant bond documents, including but not limited to the Subscription Agreements between the subscribers and Argentina,[110] the Syndication Agreements between the syndicate of banks and Argentina,[111] the sales contracts between the commercial banks and the final purchaser of the securities, as well as the Offering Circulars of the relevant bonds,[112] their Terms and Conditions, and other documents related to the bonds.[113]

305. In particular, Article 3 of the Argentina-Italy BIT in the unofficial English translation submitted by Claimants provides as follows:

> "1. Neither Contracting Party shall in its territory subject investments made by the investors of the other Contracting Party, returns and other assets relating to such investments, as well as all other issues governed by this Agreement, to treatment less favourable than that which it accords to its own investors or the investors of third States.
>
> 2. The provision of paragraph 1 hereof does not apply to advantages and privileges that one Contracting Party accords or will accord to third countries as a consequence of its participation in customs or economic unions, common market associations, free exchange zones or as a consequence of regional or sub-regional agreements, multilateral international economic treaties or treaties against double taxation, other tax treaties or treaties aimed at simplifying cross-border exchanges."

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109 *Saipem*, § 91.

110 See e.g. Exh. C-122 and RF-18.

111 See e.g. Exh. C-123, C-350 and C-353.

112 See e.g. Bond 1 Offering Circular Exh. C-1.

113 See e.g. Trust Deed Exh. C-93, Fiscal Agency Agreement Exh. C-95, etc.

306. Article 7(2) of the Argentina-Chile BIT in the unofficial English translation submitted by Claimants further provides as follows:

> "Each Contracting Party shall observe any other obligation that it has entered into in relation to the investments of nationals of companies of the other Contracting Party in its territory."

(b) Parties' Positions

307. *Respondent's Position.* Respondent contests that the present claims are "treaty claims" falling under the scope of protection of the BIT. Respondent supports this position with the following main arguments:

(i) The operative facts of which Claimants complain are simply those attendant to non-payment under the bonds, i.e., to a contractual claim, which do not fall under the scope of protection of the BIT. None of the sovereign acts Claimants rely upon is capable of falling within the substantive protection of the BIT, because those acts did not and could not impair the rights represented by Claimants' security entitlements since they were not created and are not governed by Argentine law and are enforceable outside Argentina.[114]

(ii) Under such circumstances the Tribunal simply lacks jurisdiction, and such jurisdiction may not be extended through an import of the Umbrella Clause contained in the Argentina-Chile BIT based on the MFN clause of Article 3(1) of the Argentina-Italy BIT.[115]

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114 R-PHB §§ 363 *et seq.*

115 R-R-MJ, §§ 543 *et seq.*

- First, the MFN clause cannot override core matters (such as an Umbrella Clause) which must be subject to specific negotiations between the Contracting Parties.

- Second, Articles 1, 3 and 8 BIT are limited to "matters regulated in this Agreement," and the tribunal would thus have no jurisdiction over claims based on standards not regulated in the BIT, such as an Umbrella Clause. The MFN clause in the Argentina-Italy BIT cannot be construed to extend the jurisdiction of an arbitral tribunal to categories of disputes beyond those set forth in the jurisdictional clause of the basic treaty. Claimants are seeking to establish jurisdiction over a type of claim not covered by the grant of jurisdiction of Article 8 of the Argentina-Italy BIT.

- Third, the MFN treatment granted in Article 3(1) of the Argentina-Italy BIT is limited to "treatment in Argentina's territory." Argentina's obligations under the bonds would not qualify as "treatment in Argentina's territory" in the light of the foreign forum selection clauses contained in the bond documents, and would therefore not qualify for MFN treatment.

- Finally, based on Article 8(7) BIT which requires to give due regard to "the terms of any particular agreement entered into regarding the investment," Claimants cannot rely on the Umbrella Clause of the Argentina-Chile BIT to override the contractually agreed fora contained in the bond documents.

308. Alternatively, in the event Claimants' claims were considered treaty claims, Respondent contends that Claimants have failed to establish a *prima facie* breach of the BIT by Respondent. In this respect, Respondent contends that a mere invocation of various BIT provisions, as done by Claimants, may not suffice to satisfy the

prima facie standard as otherwise the standard would be meaningless. [116] Respondent insists that Argentina is not a rogue debtor, that the 2001 crisis was unprecedented and could not be resolved merely through economic reform, that Argentina's actions were in accord with the actions of other sovereign debtors, and that there was no bad faith on Argentina's side. [117]

309. *Claimants' Position.* In contrast, Claimants contend that the present claims are sufficiently established as treaty claims deriving from violations of the BIT and arising from sovereign acts of Argentina: [118]

(i) Claimants need at this stage only present plausible treaty claims capable of falling within the scope of the BIT in order to establish jurisdiction.

(ii) Claimants' claims are directed at Respondent's failure to meet its international law obligations, and in particular its obligations under the BIT, based on Argentina's exercise of sovereign authority. This is duly reflected and supported in their submissions. These claims are therefore sufficiently established as treaty claims for the purpose of the jurisdictional phase.

(iii) These treaty claims are distinct from and their nature unaltered by any contract claims they may have against Argentina.

310. Alternatively, in the event Claimants' claims were considered contractual claims, Claimants contend that these claims would fall within the jurisdiction of the Tribunal and the scope of protection offered under the Argentina-Italy BIT through the operation of the MFN clause of Article 3(1) allowing Claimants to invoke the Umbrella Clause contained in the Argentina-Chile BIT: A breach of the Umbrella

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116 R-R-MJ §§ 528-529.

117 R-MJ §§ 46 *et seq.*, R-R-MJ §§ 68 *et seq.*

118 C-MJ §§ 656-661; C-PHB §§ 355 et *seq.*

Clause contained in the Argentina-Chile BIT would simultaneously constitute a breach of the MFN clause of Article 3(1) Argentina-Italy BIT, which in turn clearly constitutes a "matter regulated in this agreement" in the sense of Article 8 BIT and therefore falls within the scope of jurisdiction of the Tribunal.

(c) Tribunal's Findings

(i) Alleged Breaches of the BIT

311. As mentioned above (see §§ 302-303), for the Tribunal to have jurisdiction its task at the stage of determining whether it has jurisdiction to hear a claim under an investment treaty merely consists in determining whether the facts alleged by the claimant(s), if established, are capable of constituting a breach of the provisions of the BIT which have been invoked and that in performing this task, the Tribunal is to apply a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions invoked as well as to the assessment of whether the facts alleged may constitute breaches of these provisions on its face.

312. Claimants allege the following breaches by Respondent of various provisions of the BIT, in particular of Articles 2, 3 and 5:[119]

(i) The violation by Argentina of its obligations under Article 2(2) BIT to accord Claimants fair and equitable treatment, by ignoring any concept of proportionality in responding to its temporary financial crisis and continuing to impose through arbitrary legislative and other regulatory actions an unjust excessive burden on Claimants long after the abatement of any issues;[120]

(ii) The violation by Argentina of its obligations under Article 2(2) BIT to abstain from adopting discriminatroy measures that impair the enjoyment of

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119 RfA, Section V, §§ 179-211.

120 RfA, Section V, § 186.

Claimants' investments, by discriminating between Claimants (and other international investors) on the one hand, and domestic investors in Argentine pension funds on the other hand, by shielding such domestic investors from the negative impact on their investments of Argentina's acts surrounding its financial restructuring;[121]

(iii) The violation by Argentina of its obligation under Article 3(1) BIT to provide national treatment to Claimants, by providing a more favorable treatment to its domestic investors, in particular its pension funds, than to Claimants, shielding the former from some of the economic effects of the moratorium whilst not extending these advantages to the Claimants;[122]

(iv) The violation by Argentina of its obligation under Article 5 BIT not to expropriate Claimants' investments without payment of adequate, effective and immediate compensation, by expropriating Claimants of their investment through the unilateral restructuring of its public debt and the enactment of legislation thereby destroying the value of Claimants' investment;[123]

(v) The violation by Argentina of its obligation under Article 3(1) BIT to accord most-favored nation treatment to Claimants' investments and in connection with Article 7(2) Argentina-Chile BIT, according to which Argentina undertook to observe any other obligation that it has entered into in relation to the investments of nationals of the other contracting party. By not respecting its obligations under the bonds, Argentina would have violated Article 7(2)

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121 RfA § 190.

122 RfA §§ 193-104.

123 RfA §§ 196-198.

Argentina-Chile BIT, which in turn, constitutes a violation of Article 3(1) Argentina-Italy BIT.[124]

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

314. The Tribunal considers that, *prima facie*, these facts, if established, are susceptible of constituting a possible violation of at least some of the provisions of the BIT invoked by Claimants, particularly:

(i) The arbitrary promulgation and implementation of regulations and laws can, under certain circumstances, amount to an unfair and inequitable treatment. It may even further constitute an act of expropriation where the new regulations and/or laws deprive an investor from the value of its investment or from the returns thereof.

(ii) The allegations by Claimants with regard to different treatment afforded to domestic investors, such as Argentine pension funds, are susceptible of constituting a discriminatory treatment in breach of the obligation to refrain from discriminatory measures and to provide for national treatment.

315. Consequently, it is sufficient to note – at this stage - that the facts as presented by Claimants, if proven, are susceptible of constituting a violation of the BIT provisions invoked by Claimants. Whether Claimants' presentation of the facts is

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124 RfA §§ 199 *et seq.*

accurate will, if necessary, be examined during the merits stage of these proceedings.

(ii) Contract Claims v. Treaty Claims

316. It is in principle admitted that with respect to a BIT claim an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. This is because a BIT is not meant to correct or replace contractual remedies, and in particular it is not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims. Within the context of claims arising from a contractual relationship, the tribunal's jurisdiction in relation to BIT claims is in principle only given where, in addition to the alleged breach of contract, the Host State further breaches obligations it undertook under a relevant treaty. Pure contract claims must be brought before the competent organ, which derives its jurisdiction from the contract, and such organ – be it a court or an arbitral tribunal – can and must hear the claim in its entirety and decide thereon based on the contract only.

317. As an exception to this principle, a BIT sometimes provides for a so-called "Umbrella Clause," which requires a State to observe any obligation arising from particular commitments it has entered into with regard to investments.[125] Under a broad - and not undisputed - interpretation of these clauses as adopted by some arbitral tribunals and scholars, a State's breach of contract with a foreign investor or breach of an obligation under another treaty or law becomes, by virtue of an Umbrella Clause contained in the relevant BIT, a breach of the BIT actionable through the mechanism provided in such treaty, i.e., through ICSID arbitration.[126]

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[125] ETHAN SHENKMAN / JASON FILE, Contract Claims in Investment Treaty Arbitrations: Recent Umbrella Clause Case Developments, in The International Comparative Legal Guide to: International Arbitration, Global Legal Group Ltd., 6th edition 2009, p. 1..

[126] See, e.g., SHENKMAN/FILE, *op. cit.* fn.125, p. 1 et seq.; KIM ROONEY, ICSID and BIT Arbitrations in China, in Journal of International Arbitration, Vol. 24, No. 6 (2007), p. 695; EDWARD BALDWIN / MARK KANTOR / MICHAEL NOLAN, Limits to Enforcement of ICSID Awards,

(footnote cont'd)

The present Argentina-Italy BIT does not contain such Umbrella Clause. Nevertheless, Claimants contend that, based on the MFN clause of Article 3 of the BIT, they are entitled to invoke and rely on the Umbrella Clause contained in the subsequent Argentina-Chile BIT. This theory, however, only applies in case the Tribunal considers that the claims at stake are pure contract claims.

318. A claim is to be considered a pure contract claim where the Host State, party to a specific contract, breaches obligations arising by the sole virtue of such contract. This is not the case where the equilibrium of the contract and the provisions contained therein are unilaterally altered by a sovereign act of the Host State. This applies where the circumstances and/or the behavior of the Host State appear to derive from its exercise of sovereign State power. Whilst the exercise of such power may have an impact on the contract and its equilibrium, its origin and nature are totally foreign to the contract.

319. It is undisputed that Claimants, as owners of security entitlements, have a potential contract claim against Argentina for payment of the principal amount and interest of such security entitlement.[127] This relationship is of a private and contractual nature, subject to the terms and conditions of the bonds, which vary depending on the bond series. The terms and conditions of the relevant bonds provide for forum selection clauses, whereby the specific fora again vary from one series of bond to another.

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in Journal of International Arbitration, Vol. 23, No. 1 (2006), pp. 3 et seq.; EMMANUEL GAILLARD, Investment Treaty Arbitration and Jurisdiction over Contractual Claims. The SGS Cases Considered, in TODD WEILER (ed.), International Investment Law and Arbitration, Leading Casese from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, Cameron May, 2005, pp. 325 et seq. and 336 et seq.

[127] See Annex A to R-PHB § 8, although the Parties disagree with regard to the conditions for the exercise of such claims..

320. It is undisputed that Argentina, as debtor of the bonds, has failed to perform its obligations under these bonds. Argentina may (or may not) thereby have breached contractual obligations towards Claimants or other owners of security entitlements; this question is not at stake here. What is, however, relevant is that Argentina justifies its failure based on the exceptional circumstances surrounding its public default and linked to its devastating financial situation at the end of 2001. The Emergency Law that Argentina enacted thereafter was a reaction to these circumstances and part of an attempt to redress the finances of Argentina.

321. The Emergency Law had the effect of unilaterally modifying Argentina's payment obligations, whether arising from the concerned bonds or from other debts. Argentina does not contend that it had any contractual right of doing so, such as for example, a force majeure provision. Argentina has not invoked any contractual or legal provision excusing its non-performance of its contractual obligations towards Claimants. In fact, Argentina relies and justifies its non-performance based on its situation of insolvency, which has nothing to do with any specific contract.

322. It is true that an insolvent debtor may in principle benefit from special regimes such as bankruptcy or other mechanisms of financial redress, and such mechanisms can very well affect the way a contract is performed by partially or fully liberating the debtor from its obligations thereunder. However, such a mechanism is subject to specific rules and conditions. First of all, it requires a legal basis contemplating the basic principle and then providing for its implementation through the designation of competent authorities, the formulation of a specific procedure taking into account both the debtor's and the creditors' interests, and the provision of distribution principles of the debtor's assets with regard to the entirety of the creditors' group and not just with regard to a specific contract or creditor.

323. In the present case, the situation is somewhat peculiar, since the debtor is a sovereign State. Argentina, which considered itself insolvent, decided to promulgate a law entitling it not to perform part of its obligations, which Argentina

had undertaken prior to such law, and fixing sovereignly the modalities and terms of such liberation. Such a behavior derives from Argentina's exercise of sovereign power. Thus, what Argentina did, it did based on its sovereign power; it is neither based on nor does it derive from any contractual argument or mechanism.

324. In other words, the present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors in general, encompassing but not limited to the Claimants.

325. Whilst it is true that there exists no international bankruptcy regime for States, certain principles have nevertheless been developed by the international community with regard to sovereign debt restructuring. The scope and content of these principles, as well as the question whether or not Argentina complied with these principles are matters relating to the merits of the present dispute and are, at this stage, not relevant. It is only relevant to note that the dispute, and in particular Claimants' claims and Argentina's defense thereto, relate to the actions Argentina took in order to remedy its financial insolvency. Such actions were based on a sovereign decision of Argentina outside of a contractual framework. Thus, Argentina's actions were the expression of State power and not of rights or obligations Argentina had as a debtor under a specific contract.

326. **Consequently**, the Tribunal considers that the claims brought forward by Claimants in the present arbitration are not pure contractual claims but treaty claims based on acts of a sovereign, which Claimants allege are in breach of Argentina's obligations under the BIT.

(iii) Potential Contract Claims against the Italian Banks

327. Respondent repeatedly brought forward that Claimants' claims against Argentina are "covered-up" contract claims, which should actually be directed against the

banks and not against Argentina. Whether or not Claimants may have any contractual or other claims against the Italian banks, who acted as Intermediaries or Participants in the bond distribution process (see § 18 above), is irrelevant.

328. The present proceedings focus solely on whether Argentina complied with its obligations of protection and promotion of Italian investments under the BIT. In other words, it only concerns the direct relationship between Argentina (the Host State) and the Claimants (the alleged investors) as arising out of the BIT, and not their relationship as arising out of the bond distribution process under the relevant contractual bond documents, which involve other actors such as the banks.

329. For the purpose of examining Claimants' rights and Argentina's obligations under the BIT, third parties such as banks intervening in the process of the bond issuance and distribution are to be considered auxiliaries of Argentina, who helped the latter create the basis for Claimants' alleged investment.

330. If such third parties, in particular the Italian banks, have breached any of their own obligations towards Argentina and/or the Claimants, redress can be sought by either Argentina and/or Claimants against these banks under the remedies provided for in the relevant contractual bond documents or in the applicable statutory laws and/or regulations concerning purchase and sale of securities. Such liability, however, does not seem to derive from the BIT and would therefore in principle have no place in the present proceedings.

(d) Conclusion

331. In conclusion, and in response to Issue No. 7 , the Tribunal holds that the claims at stake are treaty claims in nature and fall under the scope of the BIT and therewith under the jurisdiction *rationae materiae* of the Tribunal, and in particular:

(i) The allegations of Claimants and the facts on which these allegations are based are susceptible of constituting a violation of provisions of the BIT and establish the Tribunal's jurisdiction with regard to the present claims;

(ii) The claims brought forward by Claimants in the present arbitration are not pure contractual claims but treaty claims based on acts of Argentina, a sovereign, which Claimants allege are in breach of Argentina's obligations under the BIT;

(iii) If third parties, in particular the Italian banks, have breached any of their own obligations towards Argentina and/or the Claimants, redress can be sought by either Argentina and/or Claimants against these banks under the remedies provided for in the relevant contractual bond documents or in the applicable statutory laws and/or regulations concerning purchase and sale of securities. Such liability, however, does not seem to derive from the BIT and would therefore in principle have no place in the present proceedings.

332. Under these circumstances, the Tribunal considers that it is not necessary anymore to examine Issue No. 6, i.e., whether the Tribunal may also have jurisdiction based on the Umbrella Clause of the Argentina-Chile BIT in connection with the MFN Clause of the Argentina-Italy BIT. To the extent that the Tribunal's jurisdiction already derives from the treaty nature of the claims at stake, the question of the interaction between the Umbrella Clause of the Argentina-Chile BIT and the MFN Clause of the Argentina-Italy BIT becomes moot.

(3) Legal Dispute relating to an Investment – Issues 9 & 8

(a) Issues and Relevant Legal Provisions

333. It is uncontested between the Parties that Claimants' claims arise in connection with their security entitlements in the relevant Argentine bonds. However, the Parties disagree whether these claims can be considered arising out of an investment within the meaning of Article 1 of the BIT and Article 25(1) ICSID Convention, since Respondent contests that the security entitlements at stake constitute investments in the sense of Article 1 of the BIT and Article 25(1) ICSID Convention.

334. Thus, the issues to be determined by the Tribunal here are the following:

- Analyzing the term "investment" as defined in Article 1(1) BIT and establishing whether bonds and thereto related security entitlements fall within the scope of such definition (see Issue No. 9 of the List of 11 Issues of 9 May 2008).

- If so, it may possibly have to be determined whether such definition is in line with the spirit of the term "investment" in Article 25 ICSID Convention.

- If so, determining whether the investment was made:

  (i) "in compliance with the law,"

  (ii) "in the territory of Argentina," and

  (iii) in this respect determining whether the forum selection clauses influence the place where the alleged investment is deemed to have been made (see Issue No. 8 of the List of 11 Issues of 9 May 2008).

335. The key legal provisions in dealing with the above issues are the following: Articles 1(1), 8 BIT (see §§ 268-270 above), Article 25 ICSID Convention, as well as the forum selection clauses contained in the relevant bond documents.[128]

336. In particular, Article 1(1) BIT in the unofficial English translation submitted by Claimants provides:

> "Article 1
> Definitions
> For the purposes of this Agreement:

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[128] See e.g. RF-5, Trust Deed § 17.2; see also Exh. RF-6, 1993 FAA § 20; Exh. RF-7, 1994 FAA § 22, Exh. RF-8, Swiss Bond Prospectus § 13, etc..

> 1. "Investment" shall mean, in compliance with the legislation of the receiving State and independent of the legal form adopted or of any other legislation of reference, any conferment or asset invested or reinvested by an individual or corporation of one Contracting Party in the territory of the other Contracting Party, in compliance with the laws and regulations of the latter party.
>
> In particular, investment includes, without limitation:
>
> (a) movable and immovable property and any other property rights such as collateral securities over the property of third parties – to the extent they may be used for investment;
>
> (b) shares, quotas and other holdings, including minority or indirect holdings, in companies incorporated in the territory of one of the Contracting Parties;
>
> (c) bonds, private or public financial instruments or any other right to performances or services having economic value, including capitalized revenues;
>
> (d) credits which are directly related to an investment, lawfully created and documented pursuant to the legislation in force in the State where the investment is made;
>
> (e) copyrights, intellectual or industrial property rights – such as patents, licenses, registered trademarks, secrets, industrial models and designs – as well as technical
>
> (f) processes, transferrals of technological know-how, registered business names and goodwill;
>
> (g) any right of economic nature conferred under any law or agreement, as well as any license and concession granted in compliance with the applicable provisions governing the performance of the related economic activities, including prospecting, cultivating, extracting and exploiting of natural resources." [129]

337. In comparison thereto, Article 1(1) BIT as published in the Boletín Oficial de la República Argentina No. 27,480 of 25 September 1992 provides as follows:

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[129] The English text of the BIT differs from the Italian and Spanish text of the BIT in that Article 1(g) in the English text of the BIT is equal to Article 1(f) in the Italian and Spanish text and a part of Article 1(e) of the Italian and Spanish text, namely, "processes, transferrals of technological know-how, registered business names and goodwill" is included in the English text of the BIT as Article 1(f). In the Tribunal's view the omission in Article 1(e) and addition of a further sub-paragraph in Article 1 of the English text BIT appears to be a mistake. Therefore, the Tribunal relies on the Italian and Spanish text of the BIT as being equally authentic.

"ARTICULO 1

Definiciones

A los fines del presente Acuerdo:

1. El término "inversión" designa, de conformidad con el ordenamiento jurídico del país receptor e independientemente de la forma jurídica elegida o de cualquier otro ordenamiento jurídico de conexión, todo aporte o bien invertido o reinvertido por personas físicas o jurídicas de una Parte Contratante en el territorio de la otra, de acuerdo a las leyes y reglamentos de esta última.

En este marco general, son considerados en particular como inversiones, aunque no en forma exclusiva:

(a) bienes muebles e inmuebles, como también cualquier otro derecho "in rem", incluidos–en cuanto sean utilizables para inversiones—los derechos reales de garantía sobre propiedad de terceros;

(b) acciones, cuotas societarias y toda otra forma de participación, aun minoritaria o indirecta en las sociedades constituidas en el territorio de una de las Partes Contratantes;

(c) obligaciones, títulos públicos o privados o cualquier otro derecho a prestaciones o servicios que tengan un valor económico, como también las ganancias capitalizadas;

(d) créditos directamente vinculados a una inversión, regularmente contraídos y documentados según las disposiciones vigentes en el país donde esa inversión sea realizada;

(f) derechos de autor, de propiedad industrial o intelectual –tales como patentes de invención; licencias; marcas registradas; secretos, modelos y diseños industriales--, así como también procedimientos técnicos, transferencias de conocimientos tecnológicos, nombres registrados y valor llave;

(g) cualquier derecho de tipo económico conferido por ley o por contrato y cualquier licencia o concesión de acuerdo con las disposiciones vigentes que regulan estas actividades económicas, incluyendo la prospección, cultivo, extracción y explotación de los recursos naturales."

338. As to the official Italian version of Article 1(1) BIT, it provides as follows:

"Articolo 1

Definizioni

Ai fini del presente Accordo:

1. Per investimento si intende, conformemente all'ordinamento giuridico del Paese ricevente ed indipendentemente dalla forma giuridica prescelta o da qualsiasi altro ordinamento giuridico di riferimento, ogni conferimento o bene

> investito o reinvestito da persona fisica o giuridica di una Parte Contraente nel territorio dell'altra, in conformità alle leggi e regolamenti di quest'ultima.
>
> In tale contesto di carattere generale, sono considerati specificamente come investimenti, anche se non in forma esclusiva:
>
> a. beni mobili ed immobili, nonché ogni altro diritto in rem, compresi - per quanto impiegabili per investimento - i diritti reali di garanzia su proprietà di terzi;
>
> b. azioni, quote societarie e ogni altra forma di partecipazione, anche se minoritaria o indiretta, in società costituite nel territorio di un delle Parti Contraenti;
>
> c. obbligazioni, titoli pubblici o privati o qualsiasi altro diritto per prestazioni o servizi che abbiano un valore economico, come altresì redditi capitalizzati;
>
> d. crediti direttamente collegati ad un investimento, regolarmente assunti e documentati secondo le disposizioni vigenti nel Paese in cui tale investimento sia effettuato;
>
> e. diritti d'autore, di proprietà industriale od intellettuale - quali brevetti di invenzione; licenze; marchi registrati; segreti, modelli e designs industriali - nonché procedimenti tecnici, trasferimenti di conoscenze tecnologiche, denominazioni registrate e l'avviamento;
>
> f. ogni diritto di natura economica conferito per legge o per contratto, nonché ogni licenza e concessione rilasciata in conformità a disposizioni vigenti per l'esercizio delle relative attività economiche, comprese quelle di prospezione, coltivazione, estrazione e sfruttamento di risorse naturali."

339. To recall (see § 270 above), Article 8(7) BIT provides as follows:

> "The arbitration tribunal will decide on the basis of the laws of the Contracting Party involved in the dispute – including its rules on the conflict of laws – and of the provisions of the Agreement, of clauses of any particular agreements relating to the investment, as well as on the basis of the applicable principles of international law."

340. The relevant bond documents contained forum selection clauses, according to which disputes arising out of the bonds and thereto related titles, such as coupons, were submitted to the jurisdiction of specific courts of various different countries and cities. Below are two examples of such forum selection clauses:

- From the Swiss Bond Prospectus (RF-8, § 13):

> "Any dispute which might arise between Bondholders and/or Couponholders on the one hand and the Republic on the other hand regarding the Permanent Global Certificate, the Bonds and/or the Coupons shall be settled in accordance with Swiss law and falls within the jurisdiction of the Ordinary Courts of the Canton of Geneva, the place of jurisdidion being Geneva, with the right of appeal to the Swiss Federal Court of Justice in Lausanne, where the law permits, whose decision shall be final. Only for that purpose and for the purpose of execution in Switzerland, the Republic elects legal and special domicile at the Embassy of the Republic of Argentina, Jungfraustrasse 1, 3005 Bern, Switzerland, which has agreed forthwith to notify the Republic of any communication received under this Section.
>
> The above-mentioned jurisdiction is also exclusively valid for the declaration of cancellation of Bonds and Coupons.
>
> The Republic hereby irrevocably submits to the nonexclusive jurisdiction of the above mentioned Swiss courts and any Federal court sitting in the City of Buenos Aires as well as any appellate court of any thereof, in any suit, action or proceeding against it arising out of or relating to the Bonds."

- From the Trust Deed with Chase Manhattan Trustees Limited (RF-5, § 17.2):

> "17.2 Jurisdiction: The Republic irrevocably submits to the jurisdiction of the courts of England; any New York State or Federal court sitting in the Borough of Manhattan, New York City; and the courts of the Republic of Argentina (the "Specified Courts") over any suit, action, or proceeding against it or its properties, assets or revenues with respect to the Notes, the Coupons or the Trust Deed (a "Related Proceeding"). The Republic waives any objection to Related Proceedings in such courts whether on the grounds of venue, residence or domicile or on the ground that the Related Proceedings have been brought in an inconvenient forum. The Republic also agrees that a final non-appealable judgment in any-such---Related Proceeding (a "Related Judgment") shall be conclusive and binding upon it and may be enforced in any Specified Court or in any other courts to the jurisdiction of which the Republic is or may be subject (the "Other Courts"), by a suit upon such judgment."

(b) Parties' Positions

341. Respondent contends that the security entitlements purchased by Claimants do not constitute an investment within the meaning of Article 25(1) ICSID Convention. Respondent bases its position on the following main arguments:

(i) *No investment in the sense of Article 25(1) ICSID*: In order to qualify as "investment" under Article 25(1) ICSID, a specific economic transaction or operation must meet certain objective criteria known as the "*Salini* factors," including typically (a) a substantial contribution of the investor, (b) a certain duration, (c) the existence of an operational risk, (d) a certain regularity of profit, and (e) a contribution to the economic development of the host State. [130] According to Respondent, these criteria are not met (or the information provided by Claimants is not sufficient to determine whether they are met). Respondent further contends that the concept of investment in Article 25(1) ICSID Convention, as defined by the *Salini* factors, determines the outer limits of ICSID's jurisdiction with regard to the nature of the disputes. As such, parties cannot override such outer limits by providing for a broader definition of the term "investment." In addition to *Salini*, Respondent relies upon a number of other ICSID arbitrations. [131]

(ii) *No investment "made within the territory of Argentina"*: Respondent contends that even if Claimants' security entitlements were to be considered investments, they are not made within the territory of Argentina as required by Article 1 BIT. According to Respondent, these security entitlements do not show a sufficiently significant physical and legal connection to Argentina because (i) they did not cause any transfer of money into the territory of Argentina, (ii) they are located outside of Argentina and are beyond the

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[130] R-MJ §§ 266-270; R-R-MJ §§ 425-468, referring, *inter alia*, to *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001, § 52, 42 ILM 609,622 (2003) (hereinafter "*Salini*"). See also R-PHB §§ 406 *et seq.*

[131] R-R-MJ §§ 425-432, referring, *inter alia*, to *Joy Mining Machinery Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction of 6 August 2004, § 50, 19 ICSID Rev. 486, 499; *Mitchell v. Democratic Republic of Congo* (ICSID Case No. ARB/99/7), Decision on Annulment of Award of 1 November 2006, § 25; *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10), Decision on Jurisdiction of 17 May 2007, § 55.

latter's scope of territorial jurisdiction based on the foreign law and forum selection clauses contained in the relevant bond documents, and (iii) the indirect holding systems of these entitlements implicates a cut-off point beyond which claims are not permissible because they have only a remote connection with the investment.[132]

(iii) *Investment not "in compliance with Argentinean law"*: Respondent further contends that Claimants' security entitlements were not purchased in compliance with the laws and regulations of Argentina as required by Article 1 BIT. According to Respondent, the terms "in compliance with the laws and regulations of [Argentina]" must be read in connection with Article 8(7) BIT, which refers not only to Argentine law but also to Italian and European law, as well as to "the terms of any particular agreements entered into regarding the investment," i.e., to the specific selling restrictions contained in the relevant bond documents, and general principles such as the principle of good faith. Respondent contends that where any relevant provisions or principles are violated, the investment becomes illegal and cannot be protected by the BIT. Based on the alleged violation by the Italian banks of various European laws and regulations, of the specific selling restrictions allegedly prohibiting the sale to retail purchasers, and of the principle of good faith, Respondent contends that Claimants' security entitlements have been purchased in violation of applicable laws and regulations and do therefore not qualify for protection under the BIT.[133]

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132 R-PHB §§ 455 *et seq.*

133 R-R-MJ §§ 500-508, referring to *Plama Consortium Ltd. v. Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, §§ 140, 143-144, 146; *Inceysa v. El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006, §§ 219 *et seq.*. See also R-PHB §§ 461 *et seq.*

342. In contrast, Claimants bring forward that their security entitlements in Argentine bonds constitute an investment in the sense of Article 25(1) ICSID Convention and the Argentina-Italy BIT. Claimants justify their position based mainly on the following arguments:[134]

(i) *"Investments" in the sense of Article 25(1) ICSID Convention and Article 1 BIT*: Claimants bring forward that Article 25(1) ICSID Convention does not define the concept of investment, and leaves this definition to the Contracting Parties. In this respect, Article 1 BIT contains a definition of what is to be considered an investment. Claimants contend that Claimants' security entitlements clearly constitute investments in the sense of Article 1 BIT because they duly qualify as "bonds, private or public financial instruments or any other right to performances or services having economic value" and/or "any right of economic nature conferred under any law or agreement" within the meaning of Article 1(1) lit. c and lit. f BIT. In addition, Claimants further contend that the security entitlements fulfill all necessary *Salini* factors, while these factors are not to be seen as rigid but need to be appreciated adopting a flexible and pragmatic approach and giving due consideration to the economic reality of the investment at stake.[135] Looking at the economic reality of the bond issuance process, and the role therein of Claimants' security entitlements, Claimants' investment constitute a substantial contribution, carry a certain risk, produce regular profits, are of a certain duration and contributed to Argentina's economic development.

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134 See C-PHB §§ 376 *et seq.*

135 C-MJ §§ 699-719, referring, *inter alia*, to *Salini*, 622; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, §§ 312, 314, 316-318 . See also C-PHB §§ 391 *et seq.*

(ii) *Investment "made within the territory of Argentina"*: Claimants contend that Claimants' investment were made within the territory of Argentina, because that is where the bonds funds were ultimately made available. In this respect Claimants bring forward that *(a)* it is not necessary that funds be physically transferred to the Host State, as long as the funds are made available to the Host State; *(b)* even Argentine tax law considers these bonds as located in Argentina for tax purposes; *(c)* the bonds have a strong connection to Argentina, since they were issued by the Argentine Government pursuant to Argentinean law; and *(d)* Argentina knew and supported the sales of security entitlements to retail investors and are therefore estopped from claiming that Claimants are too remotely connected to the bonds.[136]

(iii) *Investment made in compliance with Argentinean law*: According to Claimants, the terms "in compliance with the laws and regulations of [Argentina]" of Article 1 BIT refer to Argentinean law only. In this respect, Argentina does not dispute that the bonds were issued in compliance with Argentine sovereign debt legislation, so that the requirement of compliance with Argentinean law is met. Claimants contend that a potential breach by the Italian banks of other laws and regulations is irrelevant to the qualification of the bond and/or security entitlements as protected investment. Further, even if any non-Argentinean laws or regulations were to be considered, Claimants contend that Argentina is estopped from relying on the breach of such laws or regulations, since Argentina fully knew and controlled the bond issuance process and thereby knew and accepted such breaches.[137]

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136 See C-PHB §§ 431 *et seq.*

137 See C-PHB §§ 436 *et seq.*

(c) Tribunal's Findings

(i) Definition and Role of an Investment – In General

343. In order for the Tribunal to have jurisdiction *rationae materiae* over the dispute, it is necessary that a dispute, as defined by the terms of the claims, relate to an investment. Thus, the question of the definition of the concept of investment is to this extent relevant for the stage of the jurisdiction.

344. In this respect, a number of arbitral tribunals hold the view that whether or not a dispute at stake relates to an investment is subject to a two-fold test, i.e., a sort of "double barrelled" test:

- On the one hand, the alleged investment must fit into the definition of investment as provided by the relevant BIT, which reflects the limits of the State's consent;

- On the other hand, the alleged investment must also correspond to the inherent meaning of investment as contemplated by the ICSID Convention, which sets the limits of ICSID's jurisdiction and the Tribunal's competence.

345. Looking at the definition of investment provided in Article 1(1) BIT (see §§ 336-338 above), it corresponds largely to the definition of other contemporaneous BITs, such as the BIT between Italy and Bangladesh of 1990 (Article 1), between Italy and Bolivia of 1990 (Article 1), between Italy and Kuwait of 1987 (Article 1), between Italy and Uruguay of 1990 (Article 1), between Argentina and Belgium/Luxembourg of 1990 (Article 1), between Argentina and the United Kingdom of 1990 (Article 1). [138]

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[138] Regarding BITs signed by Italy, see Volume RB to R-MJ. These BITs are also available on http://www.unctadxi.org/templates/DocSearch____779.aspx.

346. Analysing the concept of an investment, one can identify two different aspects thereof: (i) the contribution that constitutes the investment, and (ii) the rights and the value that derive from that contribution.

347. These two aspects are addressed somewhat differently by the BIT and the ICSID Convention as interpreted by a number of arbitral tribunals:

(i) The definition provided at Article 1(1) BIT, and in particular the list of examples of what is considered an investment under the BIT, is drafted in a way describing the rights and values which may be endangered by measures of the Host State, such as an expropriation, and therefore deserve protection under the BIT. Thus the focus here is on the rights and the value that potential contributions from investors may generate. Nevertheless, this definition is of course based on the premise of the existence of such contribution. This namely derives from the wording of other provisions such as for example Article 2 of the BIT which provides that "[E]*ach Contracting Party shall encourage investors of the other Contracting Party to invest in its territory*."

(ii) In contrast, the concept of investment as contempated by the ICSID Convention relates more to the contribution itself. As mentioned above (see § 256), Article 25 ICSID Convention does not provide for any specific definition of the concept of investment, and this silence was intended by the drafters of the Convention in order to leave certain room to further develop this notion. Thus, a number arbitral tribunals have attempted to further define the concept of investment under Article 25 ICSID Convention. This has been regularly done by reference to some or all of the so-called *Salini* factors, developed in the *Salini* decision (see § 341 above). According to these *Salini* factors, for a transaction or activity to qualify as "investment" in the sense of Article 25 ICSID Convention, it would require (i) a contribution, (ii) of a certain duration, (iii) of a nature to generate profits or revenues, (iv) showing a particular risk, and (v) of a nature to contribute to the economic

development of the Host State. This definition focuses on the nature of the contribution constituting the investment, and not on the rights and value deriving therefrom.

348. At this juncture, it may be recalled that whilst BITs in general, including the present BIT, address both substantive investment protection rules and dispute resolution procedure, the ICSID Convention is concerned mainly with dispute resolution rules. Bearing this distinction and the above considerations in mind, the Tribunal makes the following analysis.

349. If it is obvious that the definition of Article 1(1) BIT and the criteria developed by a number of arbitral tribunals with regard to Article 25 ICSID Convention do not coincide, this is so because they can be said to focus each on a different aspect of the investment, i.e., they each look at the investment from a different perspective.[139] The two perspectives can be viewed to be complementary, and to merely reflect a two-folded approach of the BIT and the ICSID Convention towards investment: At first, it is about encouraging investments, i.e., creating the frame conditions to encourage foreign investors to make certain contributions, and once such contributions are made, it is about protecting the fruits and value generated by these contributions. Following this interpretation, the double approach can also be considered as being illustrated in the Preamble of the ICSID Convention as well as in the BIT:

- According to the Preamble of the ICSID Convention, one of the key considerations of the Convention is "the need for international cooperation for economic development, and the role of private international investment therein" combined with the recognized need to establish international dispute

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[139] See *Malicorp Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Award of January 2011, § 110.

settlement mechanisms ensuring effective protection of such private international investments;

- According to the Preamble of the BIT, it aims to "create favorable conditions for greater economic cooperation between the two States, in particular, for the realization of investments,"[140] which presupposes the implementation of material standards of protection of such investments as set forth in Articles 2 to 5, combined with effective procedural remedies as established in Articles 8 and 9.

350. Thus, within this interpretation, as it arises further from the wording of Article 1(1) and the aim of the BIT, the definition of investment provided in the BIT focuses on what is to be protected, i.e., the fruits and value generated by the investment, whilst the general definitions developed with regard to Article 25 ICSID Convention focus on the contributions, which constitute the investment and create the fruits and value. In summary, a certain value may only be protected if generated by a specific contribution, and – vice versa – contributions may only be protected to the extent they generate a certain value, which the investor may be deprived of.

351. In other words, if it is to be applied, the "double barrelled" test does not mean that one definition, namely the definition provided by two Contracting Parties in a BIT, has to fit into the other definition, namely the one deriving from the spirit of the ICSID Convention. Rather, it is the investment at stake that has to fit into both of these concepts, knowing that each of them focuses on another aspect of the investment.

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[140] Translated by the Tribunal from the Italian version "creare condizioni favorevoli per una maggiore cooperatzione economica fra i due Paesi ed, in particolare, per la realizzazione di investimenti." The Spanish version has the same meaning "crear condiciones favorables para una mayor cooperación económica entre los dos Países y, en particular, para la realización de inversiones."

(ii) Investment under Article 1(1) BIT

352. According to the Tribunal's own English translation of Article 1(1) BIT, the term "investment includes, without limitation":

- lit. (a): "movable and immovable goods, as well as any other right in rem, including – to the extent usable as investment – security rights on property of third parties;"

- lit. (b): "shares, company participations and any other form of participation, even if representing a minority or indirectly held, in companies established in the territory of a Contracting State;"

- lit. (c): "obligations, private or public titles or any other right to performances or services having economic value, including capitalized revenues;"

- lit. (d):"credits which are directly linked to an investment, which is constituted and documented in accordance with the provisions in force in the State where the investment is made;"

- lit. (e):"copyrights, intellectual or industrial property rights – such as invention patents, licenses, registered trademarks, secrets, industrial models and designs – as well as technical processes, transfer of technology, registered trade names and goodwill;"

- lit. (f): "any right of economic nature conferred under law or contract, as well as any license and concession granted in compliance with the applicable provisions applicable to the concerned economic activities, including the prospection, cultivation, extraction and exploitation of natural resources."

353. Analysing the structure of the various subsections of Article 1(1), it appears that they reflect a categorization of various types of investments from the perspective of rights and values that they generate: lit. (a) refers to property rights on movable and

immovables, lit. (b) relates to participations into companies, lit. (c) refers to financial instruments, lit. (d) refers to credits, lit. (e) to rights on immaterial property and technology transfer, and lit. (f) to all kinds of further rights of economic value.

354. Firstly, this list covers an extremely wide range of investments, using a broad wording and referring to formulas such as "independent of the legal form adopted," or "any other" kind of similar investment. It even contains a residual clause in lit. (f), encompassing "any right of economic nature conferred under law or contract." In other words, the definition provided for in Article 1(1) is not drafted in a restrictive way. Based on its wording, as well as on the broader aim of the BIT as described in the Preamble, Article 1(1) cannot be seen to have intended to adopt a restrictive approach with regard to what kind of activity or dealing was meant to qualify as an investment.

355. Secondly, lit. (c) specifically addresses financial instruments. It is true that the term "obligations" is a broad term and can refer to any kind of contractual obligation, i.e., debt, and it is also true that the term "title" is also very broad. However, put in the context of the further terms listed in lit. (c) such as "economic value" or "capitalized revenue," as well as considering that lit. (f) already deals with the more general concept of "any right of economic nature," lit. (c) is to be read as referring to the financial meaning of these terms. Thus, the term "obligation" may be understood as referring to an economic value incorporated into a credit title representing a loan. This kind of obligations would in the English language more commonly be called "bond," rather than "obligation." Similarly, the term "title" in Spanish and Italian would be more accurately translated into the English term of "security," which means nothing more than a fungible, negotiable instrument representing financial value.

356. Thus, the Tribunal finds that the bonds, as defined above in § 11, constitute "obligations" and/or at least "public securities" in the sense of Article 1(1) lit. (c) of the BIT.

357. With regard to the security entitlements that Claimants hold in these bonds, they also represent "securities" in the sense of Article 1(1) lit. (c), since they constitute an instrument representing a financial value held by the holder of the security entitlement in the bond issued by Argentina.

358. The question now is whether the connection between the security entitlements and the bonds could be seen as so remote as to consider that the dispute is not "directly" related to an investment, since the dispute related primarily to the rights arising from Claimants' security entitlements. The Tribunal sees no valid reason that would support such conclusion:

- The bonds at stake were always meant to be divided into smaller negotiable economic values, i.e., securities. It has been sufficiently demonstrated by Claimants that the underwriters would not have subscribed to any of the bonds, without having previously ensured that the bonds were re-sellable to the Intermediaries and their end customers;

- The security entitlements are the result of the distribution process of the bonds through their division into a multiude of smaller securities representing each a part of the value of the relevant bond. The security entitlements have no value per se, i.e., independently of the bond;

- The fact that the distribution process happens electronically, without the physical transfer of any title, does not change anything to the fact that rights effectively passed on to acquirers of security entitlements in the bonds.

359. In other words, whatever the technical nuances between bonds and security entitlements may be, they are part of one and the same economic operation and they make only sense together.

360. This is confirmed by the scope and the terms of the Exchange Offer 2010. Although Respondent insists that under the underwriting agreements, the underwriter committed to a single lump-sum payment to Argentina for the issuance of the bonds and after that took all responsibility for selling the bonds on the open market,[141] Argentina at the same time admits that the tendering of holders of security entitlements into the Exchange Offer 2010 was necessary to discharge Argentina in connection with the issuance of the bonds, including the payment in connection with security entitlements.[142] Whilst it is true, as contended by Argentina,[143] that the requirements for eligibility under the Exchange Offer 2010 have no relationship whatsoever to the requirements for ICSID jurisdiction or the question whether BIT protection exists under the BIT, they are relevant to understand the relationship between the security entitlements and the bonds. In this respect, it cannot be ignored that by considering holders of security entitlements, such as Claimants, a necessary component of the Exchange Offer 2010, Argentina admitted their importance within the broader context of the bond issuance and distribution process. If the Underwriters were really the sole purchasers of the bonds and thereby the sole "bondholders," why would it be necessary to "engage [into the Exchange Offer 2010] all parties that had beneficial interests in the bonds"[144]? Why would that not bear on the Underwriters' shoulders? Because this is not the way an

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141 Annex A to R-PHB § 3.

142 Annex A to R-PHB §§ 69-70. "In particular, in order to retire some or all of the defaulted bonds through the Exchange Offer, Argentina had to find a way to engage all parties that had beneficial interests in the bonds" (§ 70).

143 Annex A R-PHB § 67.

144 Annex A R-PHB § 70.

Exchange Offer is meant to work, and this evidences that bonds and security entitlements therein cannot be regarded as two separate investments relating to different rights or values.

361. Consequently, the bonds and Claimants' security entitlements therein are both to be considered "investments" in the sense of Article 1(1) lit. (c) BIT.

(iii) Investment under Article 25 ICSID Convention

362. Under Article 25 ICSID Convention, the relevant question is whether the bonds and the security entitlements therein were generated by a contribution that is in line with the spirit and aim of Article 25 ICSID Convention.

363. One approach would be to follow the *Salini* criteria and check whether the contribution made by Claimants fulfil all these requirements. However, and irrespective of the adequacy of the individual *Salini* criteria, the Tribunal finds that this would not be the right approach, for the following main reason.

364. If Claimants' contributions were to fail the *Salini* test, those contributions – according to the followers of this test – would not qualify as investment under Article 25 ICSID Convention, which would in turn mean that Claimants' contributions would not be given the procedural protection afforded by the ICSID Convention. The Tribunal finds that such a result would be contradictory to the ICSID Convention's aim, which is to encourage private investment while giving the Parties the tools to further define what kind of investment they want to promote. It would further make no sense in view of Argentina's and Italy's express agreement to protect the value generated by these kinds of contributions. In other words – and from the value perspective – there would be an investment, which Argentina and Italy wanted to protect and to submit to ICSID arbitration, but it could not be given any protection because – from the perspective of the contribution – the investment does not meet certain criteria. Considering that these criteria were never included in the ICSID Convention, while being controversial

and having been applied by tribunals in varying manners and degrees, the Tribunal does not see any merit in following and copying the *Salini* criteria. The *Salini* criteria may be useful to further describe what characteristics contributions may or should have. They should, however, not serve to create a limit, which the Convention itself nor the Contracting Parties to a specific BIT intended to create.

365. The other approach consists in verifying that Claimants made contributions, which led to the creation of the value that Argentina and Italy intended to protect under the BIT. Thus the only requirement regarding the contribution is that it be apt to create the value that is protected under the BIT.

366. In this respect, there is no doubt that Claimants made a contribution: They purchased security entitlements in the bonds and thus, paid a certain amount of money in exchange of the security entitlements. The value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued. As mentioned above (see §§ 352-361), this right is protected under Article 1(1) lit. (c) of the BIT.

367. Consequently, the Tribunal finds that Claimants' purchase of security entitlements in Argentinean bonds constitutes a contribution which qualifies as "investment" under Article 25 ICSID Convention.

(iv) Two Alternative Views on "Investment" Lead to the Same Result

368. If the so-called "double-barrelled" test is not applied in the present case and no distinction is made as is stated in §§ 346-351 above, the result is the same.

369. According to one alternative view, it is argued that, in the case of a BIT arbitration under the ICSID Convention, the "double barrelled" test need not be applied since the ICSID Convention does not contain a definition of "investment" and the State Parties to the BIT have agreed to such a definition in a treaty between them, i.e., the

BIT.[145] That view leads also to the conclusion that there is an "investment" in the present case because, as mentioned above (§§ 352-361), the bonds and Claimants' security entitlements therein are both to be considered "investments" in the sense of Article 1(1) lit. (c) BIT.

370. A third view on this question also leads to the same result. Pursuant to that view, the term "investment" has an objective meaning in itself. Accordingly, the term "investment" *under the BIT* has an inherent meaning, irrespective of whether the investor resorts to ICSID or UNCITRAL arbitration. As it is observed by the tribunal in *Romak S.A. v. Uzbekistan*, conducting its proceedings on the basis of the UNCITRAL Arbitration Rules:

> The term "investment" has *a* meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the [Germany – Ukraine] BIT.
>
> . . . . The Arbitral Tribunal therefore considers that the term "investments" under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk . . . . By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of "investment," the fact that it falls within one of the categories listed in Article 1 does not transform it into an "investment." In the general formulation of the tribunal in *Azinian*, "*labelling ... is no substitute for analysis*."[146]
>
> (Emphasis in original)

371. The term "investment" *per se* in Article 1(1) of the Argentina – Italy BIT can indeed be analysed in the same manner as the term "investment" in Article 25 of the ICSID Convention (see §§ 362-367 above). That analysis is similar to the

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[145] See for an overview regarding this issue, *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16 (Germany/Ukraine BIT), Award of 31 March 2011, §§ 137-143.

[146] *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. AA280), Award of 26 November 2009, § 180 and § 207.

analysis on the basis of the criteria identified above in *Romak* (i.e., a contribution that extends over a certain period of time and that involves some risk). The conclusion is again that Claimants' purchase of security entitlements in Argentinean bonds constitutes a contribution which qualifies as "investment" *per se* under Article 1(1) of the BIT.

(v) Made in Argentina

372. In order to determine whether Claimants' investment was made in Argentina, the Tribunal will first determine the place where an investment is generally considered to be made (i), and then examine whether the presence of forum selection clauses in contractual documents relating to the investment may influence such a determination (ii).

373. *(i) With regard to the place where the investment is considered made*, Respondent contends that the investment cannot be considered "made in the territory of Argentina," because the purchase price paid by Claimants for their security entitlements never ended up in Argentina. Instead, only the lump sum payment made by the underwriters to Argentina can be considered made in the territory of Argentina, whilst payments for purchases of security entitlements were made to the various Intermediaries.

374. The Tribunal finds that the determination of the place of the investment firstly depends on the nature of such investment. With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the

relevant question is where the invested funds ultimately made available to the Host State and did they support the latter's economic development? This is also the view taken by other arbitral tribunals.[147]

375. A further question is whether it is necessary that investment of purely financial nature be further linked to a specific economic enterprise or operation taking place in the territory of the Host State. Based on the above consideration (see § 355) that in Article 1 BIT Argentina and Italy designated financial instruments as an express kind of investment covered by the BIT and thereby intending to provide such investment with BIT protection, the Tribunal considers that it would be contrary to the BIT's wording and aim to attach a further condition to the protection of financial investment instruments.

376. Respondent makes an additional argument out of the fact that the payment of the purchase price occurred after the payment of the lump sum price by the underwriters, and that only the latter payment can be considered to have been made available to Argentina. The Tribunal is of the opinion that such argument ignores the reality of the bond issuance process. Indeed, although the payment of the lump sum price for the bonds and the payment of the purchase price by the individual holders of security entitlements happened at different points in time, the latter constitutes the basis for the former. As mentioned above (see § 359), the bonds and the security entitlements are part of one and the same economic operation and they make only sense together: Without the prior insurance to be able to collect sufficient funds from the individual purchasers of security entitlements, the

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147 See e.g. *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, § 41. See also *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 of 6 August 2003, §§ 136-140, where emphasis was led on the fact that the aim of SGS's activity was to "raise the financial revenue of the State" (§ 139); *SGS v. Republic Philippines*, §§ 111.

underwriters would never have committed to the payment of the lump sum payment. In other words, the lump sum payment is an advance made by the underwriters to Argentina on the future payments of individual investors.

377. Thus, the funds generated by the purchase of the relevant security entitlements are – for the purpose of establishing where they were made – no different than the lumps sum payment paid by the underwriters for the bonds.

378. There is no doubt that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina's economic development. Whether the funds were actually used to repay pre-existing debts of Argentina or whether they were used in government spending is irrelevant. In both cases, it was used by Argentina to manage its finances, and as such must be considered to have contributed to Argentina's economic development and thus to have been made in Argentina.

379. *(ii) With regard to the question whether the presence of forum selection clauses in contractual documents* relating to the investment may influence the determination of the place of investment, Respondent contends that based on the forum selection clauses contained in the bond documents, the bonds must be considered located outside of Argentina and beyond the latter's scope of territorial jurisdiction. The Tribunal considers Respondent's argument inapposite for two main reasons:

- Following Respondent's line of argumentation would mean that forum selection clauses determine the place where contractual performance is supposed to take place. *In casu*, Claimants' purchase of security entitlement would be considered made at the place of the selected forum. The Tribunal disagrees with this view. Rather, forum selection clauses are clauses of a procedural nature aiming to determine the place of settlement of a dispute

relating to a contractual performance. They have nothing to do with the place where a party is supposed to perform its obligations;

- Even if forum selection clauses had an influence on the place of contractual performance, they would not be relevant to determine the place where the investment, pursuant to Article 1(1) BIT and Article 25 ICSID Convention, was made. As mentioned above (see §§ 319 *et seq.*), rights and obligations deriving from the BIT have an independent basis from rights and obligations deriving from the contract, and may as such – in principle – not be affected by contractual provisions dealing only with contractual rights and obligations.

380. Consequently, the Tribunal finds that the relevant bonds and Claimants' security entitlements therein are both to be considered 'made in the territory of Argentina'.

(vi) In Compliance with the Law

381. Respondent contends that Claimants' investment, i.e., the purchase of security entitlements, were not made in compliance with the law, because these purchases would have been done in violation by the Italian banks of certain selling restrictions applicable to the bonds, as well as to local regulations regarding the marketing of such financial instruments and the principle of good faith. According to Respondent, these violations would be relevant to appreciate the legality of the investment in the light of Article 8(7) of the BIT.

382. At the stage of the jurisdiction, the Tribunal's examination is limited to verifying the existence of a dispute relating to an investment, and focuses thus on the definition of the investment (see §§ 343 *et seq.* above). It is not concerned yet with the question whether the investment was validly made, i.e., whether it fulfils the necessary requirements to enjoy full protection under the BIT. This will be a matter to be dealt at the merits stage of the present dispute, subject to the Tribunal's findings on jurisdiction.

383. Thus, at this stage the Tribunal's examination is limited to the question whether the investment fits into the definition of Article 1(1). In contrast, Article 8(7) of the BIT deals with the law applicable to the merits of the dispute, and may be relevant when appreciating the validity of the investment. It may however not serve as a basis to extend the definition of an investment as provided for in Article 1(1) of the BIT. These two provisions have different contexts and different purposes.

384. With regard to the "lawfulness" of the investment, which forms part of the definition of the concept of investment under Article 1(1) BIT, Article 1(1) par. 1 merely requires that the investment be made "in compliance with the laws and regulations of the [Host State]," i.e., Argentina. It is undisputed between the Parties that the bonds have been issued by Argentina in accordance with the relevant laws and regulations (see § 44 above).[148] As such, they were made "in compliance with the laws and regulations of Argentina."

385. The alleged breach of applicable regulations Respondent relies on, concerns breaches allegedly committed by the Italian banks and not by Claimants. As mentioned above (see § 327 *et seq.*), such breaches should not be relevant for the purpose of examining Claimants' rights and Argentina's obligations under the BIT. As such, an alleged misconduct of the Italian banks may not render the security entitlements unlawful pursuant to Article 1(1) BIT. Whether it may render such investment invalid under the laws applicable to the dispute according to Article 8(7) BIT is an issue to be dealt with at the merits stage of the present dispute, subject to the Tribunal's findings on jurisdiction.

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[148] See R-MJ §§ 521 "the issuances of the bonds were in conformity with Argentine Law."

386. Consequently, the relevant bonds and Claimants' security entitlements therein are both to be considered made "in compliance with the laws and regulations of [Argentina]" pursuant to Article 1(1) BIT.

(d) Conclusion

387. In conclusion, and in response to Issue No. 9 and 8, the Tribunal holds that the present dispute arises out of an investment pursuant to Article 1 BIT and (if needed) Article 25(1) ICSID Convention. In particular:

(i) According to one view, the "double-barrelled" test developed with regard to the concept of "investment" does not mean that the definition of investment provided by two States in a BIT has to fit into the definition deriving from the spirit of the ICSID Convention. Rather, arguably, it is the investment at stake that has to fit into both of these concepts, knowing that each of them focuses on another aspect of the investment;

(ii) In any event, the relevant bonds and Claimants' security entitlements therein are both to be considered "investments" pursuant to Article 1(1) lit. (c) BIT;

(iii) If needed to be applied, Claimants' purchase of security entitlements in Argentinean bonds constitute a contribution which qualifies as "investment" under Article 25 ICSID Convention;

(iv) The relevant bonds and Claimants' security entitlements therein are both to be considered made "in compliance with the laws and regulations of [Argentina]" pursuant to Article 1(1) BIT;

(v) The bonds and Claimants' security entitlements therein are both to be considered "made in the territory of Argentina."

(4) Between Argentina and Italian Investors - Issues 10 & 11

(a) Issues and Relevant Legal Provisions

388. It is uncontested that Argentina has the necessary capacity to be a party to the present arbitration. Therefore, the present section will focus on determining relevant issues concerning Claimants. These issues appear to be threefold: (i) the issue of nationality, whereby it is contested whether Claimants qualify as "Italian" in the sense of the BIT; (ii) the issue of legal capacity, whereby it is disputed whether those Claimants which are corporations have the necessary capacity to be a party to the BIT and can be protected thereunder; and (iii) the issue relating to the "investor" status of Claimants, whereby it is disputed whether Claimants, who have purchased their security entitlements through various layers of intermediaries, can still be classified as the "investor," i.e., the party having made the investment.

389. In this regard, it should be recalled that according to the First Session of 10 April 2008[149] and the Tribunal's letter of 21 May 2009, the present analysis is limited to general issues and shall not include "issues touching specifically upon each individual claimant," except where the presentation of the general issue (of jurisdiction or admissibility) cannot be done without reference to a particular situation.[150]

390. Consequently, the present decision will not decide on whether Claimants have the Italian nationality or necessary capacity, but it will merely confirm which are the conditions which Claimants must fulfil so as to qualify as a party under the BIT. With regard to the issue relating to the investor status of Claimants, the present decision will not address the individual investor status of each Claimant. Rather, it will be limited to address from a general perspective whether a party purchasing a

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149 First Session Tr. p. 140/17; p. 141/3-9.

150 See Conference Call of 14 October 2009.

security entitlement in the way Claimants allege they purchased their security entitlements would qualify as investor in the sense of the BIT.

391. Thus, the issues to be determined by the Tribunal here are the following:

- What are the conditions under which physical persons may benefit from the protection of the BIT, and thereby be a party to the present arbitration? (see Issue No. 10 of the List of 11 Issues of 9 May 2008)

- What are the conditions under which juridical entities may benefit from the protection of the BIT, and thereby be a party to the present arbitration? (see Issue No. 11 of the List of 11 Issues of 9 May 2008), and in particular, do corporations established under Italian law and which do not have "legal personality" benefit from such protection and capacity?

- Does a party which acquires a security entitlement in a bond through similar mechanisms as used in the present case for the purchase by Claimants of their security entitlements still qualify as the party making the investment, i.e., as the investor?

392. The key legal provisions and documents in dealing with the above issues are the following: Article 1 BIT, Article 1 of the Additional Protocol to the BIT, Article 25(2) ICSID Convention, and Articles 36, 75, 78 Italian Civil Procedure Code.

393. Articles 1(2) and (3) BIT in the unofficial English translation submitted by Claimants provides:

> "2. "Investor" shall mean any individual or corporation of one Contracting Party that has made, makes or undertakes to make investments in the territory of the other Contracting Party.
>
> (a) "individual" shall mean, for each Contracting Party, and individual who is a citizen of such Contracting Party, in compliance with the laws thereof.
>
> (b) "corporation" shall mean, in relation to each Contracting Party, any entity incorporated in compliance with the legislation of a Contracting

> Party, having its office in the territory of such Party and being recognized thereby, such as public entities that conduct economic activities, partnerships and corporations, foundations and associations, independent of whether their liability is limited or not.
>
> 3. For the purposes of this Agreement, legal deeds and capacity of corporations in the territory of the Contracting Party receiving the investment will be governed by the legislation of that Contracting Party."

394. In comparison thereto, the relevant parts of Article 1(2) BIT as published in the Boletín Oficial de la República Argentina No. 27,480 of 25 September 1992 provide as follows:

> "2. El término "inversor" comprende toda persona física o jurídica de una Parte Contratante que haya realizado, realice o haya asumido la obligación de realizar inversiones en el territorio de la otra Parte Contratante.
>
> - Por "persona física" se entiende, con relación a cada una de las Partes Contratantes, toda persona física que tenga la ciudadanía de ese Estado, de acuerdo a sus leyes.
> - Por "persona jurídica" se entiende, con relación a cada una de las Partes Contratantes, cualquier entidad constituido de conformidad con la legislación de una Parte Contratante, con sede en el territorio de esa Parte y por esta ultima reconocida, tales como entidades públicas que realizan actividades económicas, sociedades de personas o de capitales, fundaciones y asociaciones, independientemente de que su responsabilidad sea limitada o no.
> - A los efectos del presente Acuerdo, los actos jurídicos y la capacidad de cada persona jurídica en el territorio de la Parte Contratante donde se efectúa la inversión serán regulados por la legislación de esta última."

395. As to the official Italian version of Article 1(2) and 3 of the Italian text of the Argentina-Italy BIT, it provides as follows:

> "2. Per "investitore" si intende ogni persona fisica o giuridica di una Parte Contraente che abbia effettuato, effettui o abbia assunto obbligazione di effettuare investimenti nel territorio dell'altra Parte Contraente.
>
> a. Per "persona fisica" si intende, per ciascuna Parte Contraente, una persona fisica che abbia la cittadinanza di tale parte, in conformità a le sue leggi.
>
> b. Per "persona giuridica" si intende, con riferimento a ciascuna Parte Contraente, qualsiasi entità costituita conformemente alla normativa di una parte Contraente, con sede nel terrtorio di tale Parte e da questa

ultima riconosciuta, come Enti publlici che esercitino attività econonmiche, società di persone o di capitali, fondazioni, associazinoe e, questo, indipendentemente dal fatto che la loro responsabilita sia limitata o meno.

3. Agli effetti del presente Accordo, gli atti giuridici e la capacità di ciascuna persona giuridica nel territorio della Parte Contraente destinataria di un investimento, saranno regolati dalla legislazione di quest'ultima."

396. In addition, Article 1 Additional Protocol to the BIT provides as follows in the various languages:

(i) In the unofficial English version:

"1. With reference to Article 1:

a) Individuals of each Contracting Party who, when making an investment, maintained their domicile for more than two years in the Contracting Party in the territory of which the investment was made, cannot benefit of this Agreement.

If an individual of one Contracting Party maintains at the same time its registered residence in its State and domicile in the other State for more than two years, he/she will be considered equivalent, for the purposes of this Agreement, to individuals of the Contracting Party in the territory of which they made investments.

b) The domicile of an investor will be determined in compliance with laws, regulations and provisions of the Contracting Party in the territory of which the investment was made."

(ii) In the official Spanish version:

"Con referencia al Articulo 1:

a) No podrán prevalerse del Acuerdo las personas fisicas de cada Parte Contratante que, al momento de efectuar la inversión, hubieran tenido su domicilio por más de dos años en el territorio de la Parte Contratante donde la inversión se realizó.

En caso que una persona física de una Parte Contratante tuviera simultaneamente residencia registrada en su país y domicilio por más de dos años en el de la otra Parte Contratante se equiparará, a los fines del presente Acuerdo, a las personas físicas nacionales de la Parte Contratante en cuyo territorio se realizó la inversión.

b) El domicilio de un inversor será determinado de conformidad con las leyes, reglamentos y disposiciones de la Parte Contrante en cuyoterritorio se realizó la inversión."

(iii) In the Italian official version:

"1. Con riferimento all'Articolo 1:

a) Non potranno beneficiare dell'Accordo le persone fisiche di ciascuna Parte Contraente le quali, al momento di effettuare un investimento, abbiano mantenuto il loro domicilio per più di due anni nella Parte Contraente nel cui territorio l'investimento sia stato realizzato.

Qualora una persona fisica di una Parte Contraente mantenga contemporaneamente la residenza anagrafica nel proprio Paese ed il domicilio per più di due anni nell'altro, essa verrà equiparata, ai fini del presente Accordo, alle persone fisiche della Parte Contraente nel cui territorio abbia realizzato investimenti.

b) Il domicilio di un investitore sarà determinato in conformità alle leggi, regolamenti e disposizioni della Parte Contraente nel territorio della quale l'investimento sia stato realizzato."

397. Article 36 Italian Civil Code in its original Italian version provides as follows:

"**Art. 36 Ordinamento e amministrazione delle associazioni non riconosciute**

L'ordinamento interno e l'amministrazione delle associazioni non riconosciute come persone giuridiche sono regolati dagli accordi degli associati.

Le dette associazioni possono stare in giudizio nella persona di coloro ai quali, secondo questi accordi, e conferita la presidenza o la direzione (Cod. Proc. Civ. 75, 78)."

398. Partly based on the translation provided by Prof. Picardi,[151] which the Tribunal considers to be a fair reflection of the Italian version, Article 36 can be translated as follows:

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[151] PICARDI, § 229.

"**Art. 36 Organisation and administration of non-recognized associations**

The internal organization and administration of associations not recognized as juridical persons are regulated according to the association agreement.

Said associations may stand in court through the person who, in accordance with such agreement, hold the office of president or director (Civil Procedure Code 75, 78)."

399. Article 75 and 78 Italian Civil Procedure Code in their original Italian version provide as follows:

"**Art. 75. (Capacita' processuale)**

Sono capaci di stare in giudizio le persone che hanno il libero esercizio dei diritti che vi si fanno valere. Le persone che non hanno il libero esercizio dei diritti non possono stare in giudizio se non rappresentate, assistite o autorizzate secondo le norme che regolano la loro capacita'. Le persone giuridiche stanno in giudizio per mezzo di chi le rappresenta a norma della legge o dello statuto. Le associazioni e i comitati, che non sono persone giuridiche, stanno in giudizio per mezzo delle persone indicate negli artt. 36 e seguenti del codice civile.

[…]

Art. 78. (Curatore speciale)

Se manca la persona a cui spetta la rappresentanza o l'assistenza, e vi sono ragioni di urgenza, puo' essere nominato all'incapace, alla persona giuridica o all'associazione non riconosciuta un curatore speciale che li rappresenti o assista finche' subentri colui al quale spetta la rappresentanza o l'assistenza.
Si procede altresi' alla nomina di un curatore speciale al rappresentato, quando vi e' conflitto d'interessi col rappresentante."

400. These provisions can be translated as follows:

"**Art. 75**. (Capacity to stand in a legal proceeding)

Those who can freely exercise rights as object of a claim can stand in a corresponding legal proceeding. Those who cannot freely exercise rights cannot stand in a corresponding legal proceeding if they are not represented, assisted or authorized according to the rules governing their legal capacity. Legal entities stand in a proceeding through the person that legally represents them according to the law or their articles of association. Associations and committees, who are not a legal entity, stand in a legal proceeding through the individuals indicated by Articles 36 et seq. of the Civil Code.

[…]

Art. 78. (Guardian *ad litem*)

As long as the person entitled to the representation or assistance is and remains absent and there are grounds for urgency, a guardian *ad litem* can be appointed to represent individuals who are lacking legal capacity, legal entities or non-recognized associations. The guardian *ad litem* will leave its office upon intervention of the person entitled to the representation or assistance. A guardian *ad litem* is also appointed in case of conflict of interests between the legal representative and the individual or entity which is represented in the proceeding."

(b) Parties' Positions

401. Respondent submits that the Tribunal lacks jurisdiction *rationae personae* with regard to Claimants who are natural persons. Respondent's main arguments are as follows:

(i) Claimants are not investors within the meaning of Article 1(2) BIT because (i) Claimants did not make an investment in the territory of the Argentine Republic, and (ii) Claimants lack standing because in their capacity as holders of security entitlements acquired through multiple intermediaries they are only remotely connected with the underwriters and the underlying bonds;[152]

(ii) Claimants have failed to provide any evidence whatsoever of compliance with the nationality requirements of Article 25 ICSID Convention and the nationality and domicile requirements of the BIT and its Additional Protocol. Referring to arbitral tribunals, Respondent contends that the nationality requirement of a claim before an ICSID tribunal has in each case to be satisfied before an ICSID proceeding can be initiated or even registered. With regard to natural persons, Respondent has serious doubts that the individual Claimants listed in Annexes A and B meet the nationality and

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152 R-MJ §§ 271-283; 365; 374-475; R-R-MJ §§ 590-600; 642-651.

domicile requirements and submit that there is a high likelihood of the existence of thousands of cases of dual nationality.[153] With regard to juridical persons, Respondent contends that to qualify as a "juridical person" under Article 1(2) BIT the concerned entity must have legal personality, which is not the case of apprpoximately 40% of the Claimants listed in Annex C such as "assoziani non-recognosciuta," ecclesiastical associations, local branches of national associations, trade unions, political parties, etc. [154]

402. In contrast, Claimants contend that the Tribunal has jurisdiction *rationae personae* pursuant to Article 25 ICSID Convention and Article 1(2) BIT and its Protocol over each and every Claimant who (i) is a natural person and who was an Italian national on 14 September 2006 and 7 February 2007, was not an Argentine national at either of those dates, and was not domiciled in the Argentine Republic for more than two years prior to making his or her investment;[155] and (ii) is a juridical entity that on 14 September 2006 was duly organized under Italian law with its principal place of business in Italy and that did not have Argentine nationality on that date.[156]

403. With regard to Respondent's objections, Claimants requests the Tribunal to reject them based on the following main arguments:

(i) Respondent does not contest the principle that the Tribunal has jurisdiction over the Claimants fulfilling the above mentioned requirements, but raises

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153 R-MJ § 365; R-R-MJ §§ 590-600, referring to *Mihaly International Corporation v. Democratic Republic of Sri Lanka* (ICSID Case No. ARB/00/2), Award of 15 May 2002, § 120; *Champion Trading Company and Ameritrade International Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9), Decision on Jurisdiction of 21 October 2003, §§ 3.1-3.4. See also R-PHB §§ 480 *et seq*.

154 R-MJ § 366, R-R-MJ §§ 602-611, referring to C-MJ § 863.

155 C-MJ §§ 830; 853. See also C-PHB §§ 443 *et seq*.

156 C-MJ §§ 854; 865. See also C-PHB §§ 446 *et seq*.

objections based on the standing of individual Claimants and lack of specific evidence;

(ii) These objections are improper at this stage of the proceedings. Respondent is trying to arbitrate the factual issues pertaining to each Claimant's standing contesting the *prima facie* evidence of nationality. The task of establishing nationality is a task that the Tribunal expressly postponed until after it has made a determination that it has jurisdiction over the claim;

(iii) Claimants contend that they will submit adequate evidence of nationaliy in due time, such information being already available in Claimants' database;

(iv) With regard to juridical persons, Respondent's objection regarding the alleged lack of legal personality is inapposite. Claimants contend that legal personality is not a prerequisite to qualify as juridical person under Article 1(2) BIT. Since the definition of "juridical person" of Article 1(2) lit. b BIT expressly includes foundations and associations, independent of whether their liability is limited or not, Claimants contend that the term "juridical person" does not solely refer to entities with legal personality. According to Claimants, the relevant element to determine whether a Claimant is a juridical person under Article 1(2) lit. b BIT is whether it has the right to litigate. All entities involved have such right.

(c) Tribunal's Findings

(i) Jurisdiction *Rationae Personae* – In General

404. As already set forth above (see §§ 280-287 and 392-396), the Tribunal's jurisdiction *rationae personae* derives from, Article 1(2) BIT and Article 1 Additional Protocol to the BIT, Article 25 ICSID Convention and has to be established based on the requirements set forth therein.

405. In other words, as called to decide on a dispute arising out of the BIT, the Tribunal has jurisdiction *rationae personae* over any person, who is entitled to claim protection under this BIT and who has the capacity to conduct arbitration thereunder.

406. The question thus is under what conditions Claimants can be considered to be entitled to claim protection under the BIT and have capacity to be a party to the present arbitration.

(ii) With regard to Natural Persons

407. Based on the relevant legal provisions and as described above (see §§ 280-287 and 392-396), in order to benefit from the protection of the BIT and be a party to the present ICSID arbitration conducted thereunder, a physical person must:

(i) Have the Italian nationality on the relevant date, such date being the date on which the Parties consented to arbitration (*in casu* the date of filing of the Request for Arbitration, see § 49 above), i.e., 14 September 2006, as well as the date of registration of such Request, i.e., 7 Frebruary 2007. The question of whether a person has on such date the Italian nationality is subject to Italian law;

(ii) Not have the Argentinean nationality on neither of the relevant dates. The question of whether a person has Argentinean nationality is subject to Argentinean law;

(iii) Not have been domiciled in the Argentine Republic for more than two years prior to making the investment. The question of whether a person has been domiciled in Argentina is subject to Argentinean law;

(iv) Have made an investment, which falls within the scope of the BIT.

408. It appears that these conditions are actually not contested by Respondent, whose objections relate to whether these conditions are fulfilled.

409. Whilst it is true that in order to establish the Tribunal's jurisdiction *rationae personae* these conditions need to be fulfilled with regard to each Claimant, the present decision does not aim at making a determination with respect to any individual Claimant and only aims to determine the general conditions for its jurisdiction over such Claimants. Insofar, it is not necessary at this stage to determine whether the information submitted by Claimants so far sufficiently evidences the fulfilment of these conditions.

410. Thus, Respondent's doubts as to the nationality or domicile of certain Claimants are irrelevant at this stage.

411. With regard to Respondent's objection as to the quality of investors of Claimants, it is based on the allegedly remote connection between the security entitlements and the original underwriters and underlying bonds. This objection has to be rejected for the Tribunal has come to the conclusion, in the preceding section (see § 358 above), that not only the bonds themselves, but also any security entitlement held in those bonds and distributed by the Participants and other Intermediaries to Claimants constitute an investment in the sense of Article 1 BIT and Article 25 ICSID Convention. Thus, to the extent that Claimants are holders of such security entitlements, they are to be considered "investors" under the terms of the BIT and subject to the Tribunal's jurisdiction *rationae personae*.

412. **Consequently**, at this stage of the proceedings, it is sufficient to establish that pursuant to the relevant legal provisions, the Tribunal has jurisdiction *rationae personae* over each and any Claimant being a natural person (i) with Italian nationality on 14 September 2006 and 7 February 2007, (ii) who on either date was not also a National of the Argentine Republic, (iii) who was not domiciled in the Argentine Republic for more than two years prior to making the investment, and

(iv) has made an investment falling under the scope of the BIT, whereby Claimants having purchased a security entitlement in one of the concerned bonds issued by Argentina are to be considered "investors."

(iii) With regard to Juridical Persons

413. Based on the relevant legal provisions and as described above (see §§ 280-287 and 392-396), in order to benefit from the protection of the BIT and be a party to the present ICSID arbitration conducted thereunder, a juridical person must:

(i) Have the Italian nationality on the relevant date, such date being the date on which the Parties consented to arbitration (in casu, the date of filing of the Request for Arbitration, see § 91 above), i.e., 14 September 2006. The question of whether a person has on such date the Italian nationality is subject to Italian law.

As transposed into the BIT, this requirement of "nationality" means that the concerned juridical person must be an Italian "corporation" in the sense of Article 1(2)(b) BIT, i.e., an entity incorporated in compliance with the legislation of Italy, having its office in the territory of Italy and being recognized thereby.

(ii) Have made an investment, which falls within the scope of the BIT.

414. Respondent's objections are manifold. Insofar as they do not relate to the basic principles, but rather to whether the above-mentioned conditions have been fulfilled, they will be disregarded at this stage of the proceedings. Respondents however also contends that the concept of corporation set forth in Article 1(2)(b) BIT applies only to corporations possessing legal personality under Italian law, and further reiterates its objection as to the quality of investors of Claimants due to the allegedly remote connection between the security entitlements and the bonds.

415. With regard to the latter objection, it has to be rejected for the same reasons as mentioned above (see § 411).

416. With regard to the nature of the capacity necessary for corporations to benefit from the protection of the BIT and be a party to the present arbitration, the Tribunal is of the opinion that neither Article 1(2)(b) BIT nor Article 25 ICSID Convention limits the scope of eligible entities to those having full legal capacity, and also encompasses entities which enjoy limited civil capacity to the extent that such entities have the capacity to make an investment under the BIT and further to sue and to be sued.

417. The reasons are the following:

(i) Based on the wording of Article 1(2)(b) BIT and the situation under Italian law, it has to be concluded that not only entities with full legal capacity qualify as "juridical persons" under Article 1(2)(b) BIT. Under Article 36 Italian Civil Code (quoted at § 397 above), associations not recognized as legal entities (hereinafter "non-recognized associations") have the procedural capacity to stand in court and to be represented by their president or director. In other words, whilst non-recognized associations may not have legal personality, they possess certain attributes of legal personality and in particular the right to sue and to be sued.[157] To the extent that the relevant Claimants had the capacity to make the relevant investment, and that they also have the statutory right to litigate in their own names, and that their constituents all have the requisite nationality, the "juridical person" requirement of Article 25(2)(b) ICSID Convention must be considered satisfied.

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157 See PICARDI, §§ 228 *et seq.*

(ii) The ICSID Convention does not define the concept of juridical person, and does in particular not expressly require a non-natural investor to have specific legal personality.[158] Thus, although this question is controversial, the Tribunal finds that the ICSID Convention does not provide for a clear "yes or no" answer and that the specific requirements regarding the legal personality of a non-natural investor therefore eventually depends on the scope *rationae personae* of the relevant BIT and the legal capacity required for a non-natural investor to acquire an investment protected by the BIT under the law applicable to such investor and to sue or be sued in its own name with regard to such investment.[159]

(iii) Where a non-natural investor falls within the definition of juridical persons provided for in the BIT, and where such investor has under the law applicable to it the legal capacity to acquire an investment protected under the BIT and to sue and to be sued, it would be contrary to the purpose of the BIT and the ICSID Convention to deny such investor the capacity to initiate ICSID arbitration. Indeed, it would make no sense to allow on one hand an investor to make an investment protected under the BIT, and deny on the other hand such investor the right to invoke protection under the BIT for violation of the rights attached to such investment.

418. Having regard to these considerations, the Tribunal finds that in order to qualify as "juridical person" under Article 1(2)(b) BIT it is sufficient that Italian law affords

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[158] See SCHREUER, op. cit. fn. 98, Ad Article 25 § 689, and references to the historical debate concerning the term of juridical person.

[159] See *Consorzio Groupement L.E.S.I.-DIPENTA v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/03/08), Award of 10 January 2005, §§ 37 et seq., where the Tribunal recognized the capacity of an "external" consortium to be a party to an arbitration, based on its capacity to act in its own name, to sue and to be sued. The Tribunal rejected its jurisdiction not because of a lack of legal capacity of the claimant, but because the claimant was not the party bound by the contract underlying the investment, see § 37(iii).

those Claimants who constitute entities or other forms of organizations with the capacity to make the investment and the right to litigate in their own name. It is not necessary that they be granted full legal personality under Italian law.

419. In the light of the limited scope of the present decision, it is not necessary at this stage to determine which of the Claimants constitute entities in the sense of Article 1(2)(b) BIT.

420. In addition, in order to benefit from the protection of the BIT and be a party to the present arbitration, these entities must fulfil the criteria of "Italian nationality." According to general international law, applied to corporate entities and other forms of organizations, the nationality requirement means that such entities and organizations must be duly constituted and organized under Italian law and/or have their '*siège social*' in Italy. [160] These requirements do not really seem to be disputed between the Parties, Respondent's objections focusing solely on whether they have been met.[161] This question is however premature at this stage and will be examined when dealing with questions relating to individual Claimants (see § 227 above).

421. **Consequently**, at this stage of the proceedings, it is sufficient to establish that pursuant to the relevant legal provisions the Tribunal has jurisdiction *rationae personae* over each and any Claimant being a juridical person with Italian nationality on 14 September 2006, meaning that it was on such date constituted in compliance with the legislation of Italy, had its *siège social* in the territory of Italy, and was recognized by Italian law in the sense that it had the civil capacity to make such investment and to litigate in its own name.

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160 See SCHREUER, *op. cit.* fn. 98, Ad Article 25 §§ 694 *et seq.*, and references quoted therein.

161 See R-MJ § 364 and R-PHB § 491, where Respondent states that "Claimants did not produce any *prima facie* evidence of being incorporated, having their seat in Italy and being recognized under Italian law," thereby implicitly admitting that the law of incorporation and/or recognition and the place of the seat are the relevant criteria to determine the nationality of non-natural investors.

(d) Conclusion

422. In conclusion, and in response to Issues Nos. 10 and 11, the Tribunal finds that without making a determination with respect to any individual Claimant, it has jurisdiction *rationae personae* pursuant to Article 1(2) BIT, and its Additional Protocol, and Article 25 ICSID Convention, over each Claimant:

(i) **who is a natural person** and who ultimately is found:

- to have had Italian nationality on 14 September 2006 and 7 February 2007;
- not to also have had Argentinean nationality on either of such dates;
- not to have been domiciled in the Argentine Republic for more than two years prior to making the investment;
- to have been an investor as of the date of the alleged breach by Argentina of its treaty obligations.

(ii) **who is a juridical person** and who ultimately is found to have had the Italian nationality on 14 September 2006, meaning that it:

- was on such date constituted in compliance with the legislation of Italy;
- had its *siège social* in the territory of Italy; and
- was recognized by Italian law in the sense that it had the civil capacity to make an investment under the BIT and to litigate in its own name, without necessarily having full legal personality.

(5) Subject to the Claimants' Written Consent – Issue 2

(a) Issues and Relevant Legal Provisions

423. It is contested between the Parties whether Claimants validly consented to submit the present dispute to ICSID jurisdiction. In particular, Respondent challenges the validity of the TFA Mandate Package and contends that the mandate given by Claimants in this TFA Mandate Package is not fit to constitute a consent in the sense of Article 25(1) ICSID Convention. Claimants, on the other hand, contest Argentina´s entitlement to challenge the validity of Claimants' consent.

424. Again, in accordance with the limits of the jurisdictional phase, the present decision will not decide whether each Claimant has validly consented to the present arbitration. The Tribunal will limit its analysis to the question whether Claimants' consent, as expressed in the relevant documents of the TFA Mandate Package, is fit to constitute a valid consent to the present ICSID arbitration taking into account the representation mechanism implemented by the TFA Mandate Package.

425. Thus, the specific issues to be determined by the Tribunal here are the following:

- What is the law applicable to the question of the validity of the Parties' consent?

- How far need the Tribunal go when examining the existence of consent to ICSID arbitration? In particular:

  (i) Is the Tribunal's scope of examination limited to the mere existence of a consent, or does it further extend to the validity of such consent?

  (ii) If extending the Tribunal´s scope of review also to the validity of such consent, what are the relevant validity requirements? In this respect, does the multiplicity of Claimants impose certain additional requirements as to the form and content of Claimants' consent to arbitration?

(iii) What is the relevance and consequence of the argument that Argentina lacks standing to challenge the validity of Claimants' consent?

- To the extent specific requirements apply to the validity of the consent, are these requirements fulfilled (see Issues 2(a) & 2(b) of the List of 11 Issues of 9 May 2008)? In particular:

(i) What is the role and effect of the TFA Mandate Package, other thereto related documents and the Request for Arbitration with regard to Claimants' consent?

(ii) What is the role and impact on Claimants' consent of the alleged conflict of interest allegedly affecting TFA?

(iii) Can the consent provided for in the TFA Mandate Package be considered "irrevocable" in the sense of Article 25(1) ICSID Convention.

426. The key legal provisions and other documents in dealing with the above issues are the following: Article 8 BIT, Article 25(1) ICSID Convention, the TFA Mandate Package, and Rule 18 ICSID Arbitration Rules.

427. As to the specific content and wording of the TFA Mandate Package, it is set forth above in §§ 86-89.

(b) Parties' Positions

428. Respondent contends that Claimants have not validly consented to the present ICSID arbitration, based mainly on the following arguments:

(i) Claimants' consent does not fulfill the applicable substantive requirements: First, Respondent contends that Claimants' consent is vitiated by TFA's conflict of interests (which aims to protect the Italian banks from their liability towards Claimants), and was obtained through TFA's

misrepresentations and non-disclosure of relevant information. As such, it was given in violation of the good faith principle and has been fraudulently obtained. TFA's improper conduct is evidenced by the existence of counterfeited signatures on the relevant documents of the TFA Mandate Package.[162] Second, the terms of the TFA Mandate Package provide TFA with full control over the arbitration and deprives Claimants' of basic procedural rights, which is inadmissible. Claimants can therefore not be considered to be legitimately represented by TFA and White & Case in these proceedings and may therefore not be deemed to have validly consented to the present arbitration.[163] Third, Claimants have not agreed to the "irrevocability" of the purported consent represented in the TFA Mandate, and can therefore not perfect an ICSID arbitration agreement.[164]

(ii) Claimants' consent does not fulfill the applicable form requirements: Respondent contends that according to Italian law, the Powers of Attorney issued to TFA and White & Case should have been executed in front of a notary. This has not been done. In addition thereto, there exist strong doubts about the authenticity of the Claimants' signature on the relevant documents of the TFA Mandate Package, including the Power of Attorneys. Thus, the relevant Powers of Attorney are invalid and Claimants can therefore not be considered to have validly consented to the present ICSID arbitration.[165]

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162 R-PHB §§ 144 *et seq.*

163 R-PHB §142, §§ 201 *et seq.*

164 R-PHB §§ 225 *et seq.*

165 R-MJ § 205, R-PHB § 144.

429. In contrast, Claimants contend that they have validly consented to submit a dispute like the present one to ICSID arbitration. Claimants submit that their consent is fully valid, based on the following main arguments: [166]

(i) Claimants validly consented in writing to arbitrate this dispute (through the signature of the Power of Attorney), which is all that is required as a matter of international law. The documentation Claimants submitted is more than sufficient to demonstrate Claimants' consent and there is no ground for the Tribunal to second-guess Claimants' consent;

(ii) The role of TFA is irrelevant in determining whether Claimants consented to arbitrate;

(iii) In any event, TFA's role is entirely proper. Argentina's allegation of fraud is wrong and based on the speculative assertion that Claimants have a claim against the Italian banks. Further, there is no conflict of interest; on the contrary, TFA and Claimants have a convergent interest to win these proceedings;

(iv) Formal requirements of Italian law are not applicable to the Powers of Attorneys, which are subject to the law of the District of Columbia;

(v) Respondent's policy argument as to the impact of an ICSID arbitration on sovereign debt restructuring are irrelevant and inaccurate.

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166 C-MJ §§ 390 *et seq*., C-R-MJ §§ 355 *et seq*. See aso C-PHB §§ 104 *et seq*, and §§ 244 *et seq*.

(c) Tribunal's Findings

(i) Law Applicable to the Question of Consent

430. As mentioned above (see § 274), Article 8 and in particular Article 8(3) contemplate the Parties' consent required under Article 25(1) ICSID Convention. It is widely acknowledged that the question of the existence and validity of consent in the sense of Article 25(1) ICSID Convention is not subject to the law applicable to the merits designated in Article 42 ICSID Convention, but rather to Article 25 ICSID Convention itself and the instruments expressing such consent.[167] This is also the view of the present Tribunal, which considers that questions of consent under Article 25 ICSID Convention are subject to principles of international law, and not pursuant to any particular national law.[168] This applies not only with regard to the material content of the consent, i.e., to its substantive validity, but also with regard to its form, i.e., to its formal validity. In this respect, Article 8(7) BIT, which refers to the law applicable to the merits of the dispute in the sense of Article 42 ICSID Convention, is irrelevant for the determination of the existence of consent.

(ii) Scope of Examination of the Tribunal

431. It is undisputed that the Tribunal must verify the existence of a consent, as an objective condition to its jurisdiction (see § 258 above). However, the question of the scope of such examination arises: How far does the examination of the Tribunal need to go in order to verify the existence of consent? And, in particular, is such examination limited to the existence of consent, or should it extend also to the formal and substantive validity of such consent? What, if any, are the documents or other evidence that may be required from Claimants to verify the existence and/or validity of such consent?

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[167] See e.g. SCHREUER, op. cit. fn. 98, § 578 *et seq.* and references quoted therein.

[168] See also *Ceskoslovenska Obchodni Banka, A.S. v. the Slovak Republic* (ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, § 35.

432. With regard to the formal requirements, Article 8 BIT does not appear to impose any specific form requirement, whilst Article 25(1) ICSID Convention only requires the consent to be in "written" form. No notarization or supplementary other procedure is requested.

433. With regard to the substantive requirements, both Article 8 BIT and Article 25(1) ICSID Convention are silent and there are no internationally recognized specific rules regarding such requirements. In addition, Article 25(1) ICSID Convention does not require the submission of any particular document or evidence. This question is therefore to be assessed by the Tribunal.

434. As such, one could argue that a tribunal's role is limited to the examination of the existence of a written document, incorporating the parties' consent to submit the dispute to ICSID arbitration, without further examination regarding other aspects of such consent.

435. However, the Tribunal's view is that such an approach may – depending on the circumstances – not give sufficient regard to the crucial role of consent, which constitutes the cornerstone of ICSID and BIT arbitration. Under the particular circumstances of the present case and the nature and scope of Respondent's objections, the Tribunal considers that it not only has the duty to examine the existence of a written document incorporating a consent to submit the present dispute to ICSID arbitration, but it should also ask itself whether such consent reflected Claimants' sincere intention.

(iii) Relevant Substantive Validity Requirements

436. As mentioned above (see § 435), the Tribunal believes that in the present case its examination regarding consent should go beyond the mere formal existence of the consent. In this respect, the Tribunal finds that reference should be made to international law and in particular the general principles of law requiring that any

consent be genuine and intended, i.e., free from coercion, fraud and/or from any essential mistake.

437. Thus, consent that was not freely given, i.e., given under threats or coercion, was in fraudulently induced,[169] or was based on an essential mistake[170] may not constitute a valid consent under general principles of law. It is generally admitted that under such circumstances the party, who is victim of coercion, fraud or mistake may avoid the contract. The Tribunal holds that the same principle should apply to the concept of consent under Article 8(3) and Article 25(1) ICSID Convention.

438. At this point, a distinction should be drawn between the genuine character of the consent and the motivations lying behind this consent. The reasons why a person decides to give its consent to a specific commitment are in principle irrelevant for it to be valid, provided they are based on a correct understanding of the underlying facts and law. In other words, an investor who consents to ICSID arbitration must understand and want to initiate ICSID arbitration as a dispute resolution means for the dispute at stake. The reasons why such investor opts for ICSID arbitration, the question whether or not the decision to give its consent is a "good" decision, e.g., whether it is the best way to get the sought redress or whether there may be further more suitable options, is in contrast irrelevant for the validity of the consent, provided such consent was free and informed.

439. With regard to the "irrevocability" of the consent, this irrevocability is not a prerequisite of a valid consent but rather a consequence of the existence of a valid consent: If a party has validly consented to ICSID arbitration, such consent is

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169 A consent is fraudulously induced when it is based on a willfully inaccurate representation on a willful concealment of information, which in accordance with good faith and fair dealing should have been disclosed.

170 A mistake is considered essential, where the party would not have given it consent had it known about the mistake.

irrevocable. Thus, although irrevocability and validity go hand in hand, irrevocability does not constitute a separate validity requirement. Thus, whilst it is necessary, it is also sufficient that the party giving its consent be aware of and agrees with such irrevocable nature.

440. Consequently, the Tribunal shall examine not only the existence of a written document incorporating consent, but also the validity of such consent, whereby the only relevant validity requirement is that such consent be given in a free and informed manner. Other validity requirements which may apply under national laws to specific kinds of contracts or actions are however irrelevant and will not be taken into account by the Tribunal.

(iv) Argentina's Standing to Challenge Claimants' Consent

441. Claimants contend that Argentina does not have standing to challenge Claimants' consent and that such challenge could only be raised by Claimants themselves.

442. Indeed, the avoidance of a contract based on a coercion, fraud or mistake is in principle reserved to the party whose consent is affected by such flaw. It can in principle not be invoked by the other party, who has validly consented to the contract.

443. However, the particularity of the case is that the alleged fraud and/or mistake is alleged to have been caused by a third party, TFA. The question therefore arises whether the party, validly bound by its own consent, can invoke the other party's flawed consent to challenge the validity of the contract.

444. Considering (i) the crucial role of consent in ICSID and BIT arbitration, (ii) the relevant third party, i.e., TFA's role in the present dispute, and (iii) the fact that Argentina had no link with or control over TFA, the Tribunal considers that Argentina is not precluded from invoking a lack of consent from Claimants in relation to TFA's role and behaviour.

445. However, this does not mean that all of Respondent's arguments are admissible or otherwise fit to establish a lack of consent. The Tribunal shall stick to the scope of examination and the validity requirements described above (§§ 431-440) and address only those arguments which fall within the scope of such examination. In addition, when proceeding to such examination, the Tribunal shall give due regard to the fact that Claimants themselves do not invoke such lack of consent, which may impose a higher standard of proof than if the mistake or fraud is invoked by the affected party itself.

(v) Existence and Validity of Claimants' Consent

446. As mentioned above (§ 258), within the context of BIT based arbitration, it is widely admitted that consent is given through the initiation of ICSID proceedings, which constitutes the acceptance by an investor of the Host State's offer to arbitrate. Thus, it is the Request for Arbitration that embodies the consent of the investor, unless the investor has otherwise previously expressed its consent, e.g. in a notice of dispute. Where such Request is filed by a lawyer, that lawyer must be duly authorized to do so, based on an appropriate power of attorney. In other words, in such a circumstance, it is the power of attorney instructing the lawyer to launch the arbitration proceedings on behalf of the investor and the request thereby filed by the empowered attorney which contain and simultaneously constitute the consent of the investor.

447. As mentioned before (see § 430 above), the validity of such power of attorney as embodiment and expression of an investor's consent is thus subject to general principles of international law. Indeed, one must distinguish the validity of the power of attorney itself and the validity of the consent embodied therein. While the former is a matter of procedure (and thereby of admissibility) and is regulated in Rule 18 ICSID Arbitration Rules, the latter is a matter of jurisdiction and subject to the law applicable to the consent itself, i.e., international law.

448. Therefore, objections regarding the formal invalidity of a power of attorney would – if at all – be relevant under Rule 18 ICSID Arbitration Rules. In this respect, it should be stressed that the filing of ICSID arbitration is not an action reserved to lawyers admitted to practice in a specific jurisdiction or bar. It is open to any investor, irrespective of its legal qualifications and such investor is not required to resort to the assistance of a lawyer, although such assistance may in practice be highly recommended. Consequently, even if lawyers are asked to intervene by preparing and participating to the ICSID proceedings on the investor's behalf, there is no reason to impose on such lawyers and their principal specific limitations or restrictions existing in their home jurisdiction and applicable to domestic court or arbitration proceedings. This is so irrespective of whether or not lawyers are, under the locally applicable professional rules, prevented from representing or limited in the way of representing such an investor in ICSID arbitration, and may engage their liability towards their client and/or relevant authorities in their home jurisdiction. It may, under certain circumstances, further raise questions with regard to the admissibility of the arbitration proceedings initiated by such lawyers (see §§ 506 *et seq.* below). It may however in principle not affect the validity of Claimants' consent to ICSID arbitration, unless the circumstances at hand simultaneously constitute a fraud, a coercion or a mistake in the sense described above (see §§ 436-440) and being the basis for the investor's consent.

449. Thus, the core question in order to determine the validity of Claimants' consent is the following:

> **In view of the content and specificities of the TFA Mandate Package, the alleged circumstances surrounding its signature and the representation mechanism implemented by such Package, can Claimants' consent to ICSID arbitration still be considered a free and informed consent?**

450. The TFA Mandate Package is composed of (i) the TFA Instruction Letter, (ii) the Power of Attorney, (iii) the TFA Mandate, and (iv) additional questionnaires and instructions, as further described above (see §§ 85-89).

451. The TFA Instruction Letter provides in section 8 thereof some "basic rules that the conduct of the ICSID arbitration on behalf of numerous Italian Investors makes it necessary to impose on all of [the bondholders]."[171] These rules focus mainly on two issues: (i) the eligibility of a person to participate in the ICSID arbitration, and (ii) rules concerning the conduct of such arbitration:

- With regard to the eligibility requirements, the TFA Instruction Letter requires that a person wishing to participate in the ICSID arbitration must be an "investor," i.e., hold a security entitlement in the relevant Argentine bonds. In addition thereto, the TFA Instruction Letter sets forth that anyone who intends to initiate ICSID arbitration may not bring – as long as the arbitration proceedings are ongoing – any legal action in Italy against any credit institution, i.e., bank, that sold the bonds to them. The TFA Instruction Letter justifies this restraint by an alleged risk that legal proceedings against the banks may lead to the annulment of the purchase of the bonds, which in turn would annihilate the status of "investor" of the concerned person. Nevertheless, the TFA Instruction Letter also provides that it is possible for the "investors" to change their mind and revoke the mandates related to the ICSID arbitration, whereby a revocation of these mandates in principle triggers the investor's withdrawal from the ICSID proceeding. It is further mentioned that the running of the statute of limitations for claims against the banks will not be tolled by the participation to the ICSID proceeding.

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171 See TFA Instruction Letter (Exh. RA-2), Section 8, first paragraph.

- With regard to the rules concerning the conduct of the arbitration, the TFA Instruction Letter introduces and explains the role of TFA and the appointed lawyers White & Case, further described in the TFA Mandate. Based on these two documents, TFA is given all powers to take any action necessary to conduct the arbitration and/or settle the dispute, without direct consultation with Claimants, who are deprived of the right to give instructions either to TFA or to White & Case. The TFA Instruction Letter and the TFA Mandate justify this restraint as necessary for reasons of coherence and uniformity of representation of all Italian bondholders, and base it on the principle that TFA's role is to act in the collective interest of all bondholders.

452. Based on the TFA Instruction Letter and the TFA Mandate, as well as the supplementary documentation included in the TFA Mandate Package, each Claimant then had to sign a Power of Attorney, in which it (i) declared being a holder of relevant Argentine bonds, (ii) declared giving its irrevocable consent to submit to ICSID arbitration and to accept Argentina's offer to arbitrate contained in Article 8 BIT, and (iii) conferred to White & Case the power to initiate and conduct on its behalf the ICSID arbitration and other actions necessary to manage the Claimant's rights as deriving from its status as bondholder.

(vi) Existence of a Clear Consent to ICSID Arbitration

453. The Tribunal holds that the Power of Attorney constitutes a written power of attorney and contains a clear and unambiguous expression of irrevocable consent by the relevant Claimant to initiate ICSID arbitration against Argentina in relation to its non-payment of amounts due under the relevant bonds, and to entrust White & Case with the conduct of such arbitration. Based thereon, this Power of Attorney constitutes a written consent in the sense of Article 25(1) ICSID Convention.

454. Further, the Tribunal finds that:

- Whether or not this Power of Attorney also complies with Italian law or law of the District of Columbia is irrelevant for the purpose of assessing its validity under Article 8 BIT and Article 25(1) ICSID Convention. This conclusion is based on the assumption that the Powers of Attorney were signed by the relevant Claimants. The argument of a possible falsification of certain signatures is irrelevant at this stage, and will – if necessary – be examined when dealing with issues relating to individual Claimants.

- Further, objections relating to the validity of the Power of Attorney itself fall under Rule 18 ICSID Arbitration Rules and are not of a nature to challenge the validity of the consent embodied therein (see § 448 above).

- In addition, Claimants' intention to participate to the ICSID proceedings is further confirmed by the series of further documents, such as copies of identification documents and documents establishing the holding of the security entitlement, which each Claimant had to submit together with the TFA Mandate Package.

(vii) Validity of Claimants' Consent to ICSID Arbitration

455. Thus, the question now is whether the consent of the Claimants, who signed this Power of Attorney, may have been truncated by coercion, fraud or an essential mistake caused by TFA and/or White & Case. Respondent alleges that the restraints set forth in the TFA Mandate Package preventing Claimants from freely pursuing the banks is fraudulent, to the extent that it is based on a misrepresentation of key facts and legal issues aiming at unduly protecting the banks from law suits and with the effect of depriving Claimants of a redress against such banks. In other words, Respondent's argument suggests that these documents concealed TFA's real purpose, i.e., protecting its banks, and that had Claimants known such real purpose, they would not have given their consent to the TFA Mandate Package and thereby to ICSID arbitration.

456. The system put in place by the TFA Mandate Package provides for certain restrictions, such as the waiver of Claimants to sue the Italian banks for the duration of the ICSID proceedings, limitations related thereto imposed on the revocation of the TFA Mandate Package, and the principle that Claimants are passive participants to the arbitration, all relevant decisions being made by TFA and White & Case on behalf of these Claimants,. With regard to these restrictions and limitations the Tribunal finds as follows:

457. *(i) With regard to Claimants' inability to give instructions and make decisions regarding the conduct of proceedings*, the Tribunal holds that this restriction was clearly set forth in the TFA Mandate Package. In this respect, Claimants were aware that by accepting the TFA Mandate Package, they would be unable to exercise themselves certain procedural rights individually, and in particular they would not be in a position to instruct the lawyers and direct the proceedings individually. In addition, it is also understandable that proceedings involving several thousand claimants cannot be conducted in the same manner as proceedings with a handful of claimants, and that the coordination and management of such proceedings may therefore affect the scope of power and freedom of the parties to decide on how to conduct the proceedings. The question may arise whether this cutting into Claimants' rights may have gone too far. This question is however not a question of consent: Claimants knew what they were doing. It is a question of admissibility: Is it admissible for Claimants to entrust a third party with rights as extensive as those of TFA? This question will thus be addressed together with other issues of admissibility (see §§ 536 *et seq.* below).

458. *(ii) With regard to Claimants' inability to sue the banks whilst ICSID arbitration is ongoing*, the Tribunal finds that this restriction (rightfully or wrongfully) indeed benefits the banks. Under the TFA Mandate Package scheme, banks are protected from being sued by Claimants as long as the ICSID arbitration is ongoing and Claimants participate thereto. Based thereon, Respondent alleges that TFA, whose membership is composed of such banks, is affected by a conflict of interest which

truncates Claimants' consent. The Tribunal holds that the restriction imposed on Claimants with regard to the temporary limitation to sue the banks is neither fraudulent, nor does it attach Claimants' consent with any essential mistake. The reasons are the following:

- Whilst the representation mechanism implemented by the TFA Mandate Package does impose certain restrictions on Claimants, it should not be forgotten that it also actually entitles Claimants to conduct ICSID arbitration, at the cost and expense of the TFA's member banks. Indeed, it is very unlikely that many of the Claimants would individually be in a position to initiate and conduct ICSID arbitration, if they had to finance the arbitration themselves.

- It is further true that the TFA member banks may indirectly benefit from this scheme, since there is a likelihood of reducing the risks that they get sued by Claimants. However, there is no certainty regarding the existence of scope of any claims against the TFA member banks and these banks are actually paying a certain price for this "risk reduction," since they are financing the ICSID proceedings. In other words, from TFA's perspective, the TFA Mandate Package is a sort of a risk insurance, for which they pay a premium (the cost of the ICSID arbitration), in return for which they are protected to a certain extent against a risk (lawsuits from Claimants).

459. This scheme may appear uncommon and it raises questions relating to TFA's role in the proceedings, such as issues of conflict of interests between TFA and Claimants. However, these are more considerations of admissibility of the proceedings, rather than of consent of Claimants (see §§ 529 *et seq.* below). The key factor with regard to Claimants' consent is not related to the motivations of TFA, but rather to the question whether through the TFA Mandate Package Claimants' were fraudulently induced in doing something they did not want to do, or whether they unconsciously waived a right or lost an option, which – if

conscious thereof – they would not have been willing to concede at the price of being able to conduct ICSID arbitration.

460. Respondent argues that Claimants would not have agreed to ICSID arbitration had they been better aware of the risks related to such ICSID arbitration, in particular the alleged risk of losing their potential claims against the TFA member banks. The Tribunal finds that Respondent has failed to bring sufficient evidence supporting such contention.

461. The Tribunal holds that the TFA Mandate Package contains sufficient information to allow Claimants to make an informed consent. It clearly sets forth that during the ICSID arbitration Claimants cannot simultaneously initiate legal claims against the TFA member banks and that the statute of limitation for such claims is not tolled. Further, it is also comprehensive with regard to the way the proceedings will be conducted, restricting Claimants from exercising themselves a number of decisional and procedural rights. Of course, one could argue that some information of the TFA Mandate Package could have been better explained or should have been more comprehensive. However, one should also take into account that the present dispute is not a consumer dispute, although a number of the Claimants may have a consumer like profile. It is a dispute surrounding multi faceted financial investments. Thus, the degree and nature of the information provided did not need be of the same extent and nature than in the context of pure consumer transactions, and TFA was entitled to assume a certain level of sophistication and knowledge of the investors.

462. Thus, based on the information contained in the TFA Mandate Package the Tribunal finds that it allowed Claimants to make an informed choice between (i) ICSID arbitration at the cost of TFA and at the temporary detriment of Claimants' potential claims against TFA's member banks, or (ii) civil litigation against the banks, at Claimants' own expense and without the option of simultaneous ICSID arbitration against Argentina.

463. In addition, even if the TFA Mandate Package did not contain sufficient information or did to some extent misrepresent certain information, such a flaw would have been cured by the subsequent events. Indeed, various associations started to assist Italian purchasers of Argentinean bonds by disseminating information on available legal means and even by supporting them in the revocation of the TFA Mandate Package, the tolling of the prescription period and/or the filing of legal claims against the banks.[172] Thus, even if at the time of signature of the TFA Mandate Package, some of the Claimants did not have a full picture of what they were doing, they were able to get such a full picture afterwards through the various actions of associations, legal proceedings and news reports on the ongoing ICSID arbitration. Given that Claimants themselves do not invoke a lack of consent, it is sufficient that they were in a position to appreciate the scope of their commitment to ICSID arbitration, and it is irrelevant whether or not they eventually really understood such commitment.

464. Thus, whilst the Tribunal does not take a position on TFA's representation scheme resembling a "seduction operation," there is no indication that such operation was systematically fraudulent, coercive or otherwise caused Claimants to agree to ICSID arbitration based on an essential mistake.

465. **Consequently**, the Tribunal considers that there is at this stage no indication that Claimants' consent to ICSID arbitration through the TFA Mandate Package and the initiation of the present proceedings by White & Case in accordance with such package would be invalid.

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[172] See CERNIGLIA, §§ 4 *et seq.*, see also Hearing Tr. Day 4 pp. 933/10-939-22, and pp. 952/8-953/21; and ILLUMINATO, §§ 3-5, 9.

(d) Conclusion

466. In conclusion and in response to Issue No. 2, the Tribunal holds that the way in which Claimants consented to the ICSID arbitration through the relevant documents contained in the TFA Mandate Package is – as a matter of principle – valid. In particular:

(i) Based on the circumstances leading to the execution of the documents embodying Claimants' consents, in particular, the Declaration of Consent and the Power of Attorney, there is at this stage no indication that such execution would have been achieved based on systematical fraud, coercion or essential mistake vitiating Claimants' consent;

(ii) Whether or not such fraud, coercion or mistake may exist with regard to individual Claimants based on the specific circumstances of the individual case remains open and will be addressed, to the extent necessary and appropriate, when dealing with issues concerning individual Claimants;

(iii) Questions regarding TFA's specific role and relevance, as well as issues relating to conflict of interests or breach of professional obligations by White & Case are issues relating to the admissibility of the proceedings, and not to the validity of Claimants' consent. They will be addressed, to the extent necessary and appropriate, when dealing with the issue of admissibility (see § 642 *et seq.* below).

(6) <u>Subject to Argentina's Written Consent – Issues 1(a), 4 & 8</u>

(a) Issues and Relevant Legal Provisions

467. It is uncontested that through Article 8(3) BIT, Argentina, in principle, consented to ICSID arbitration with regard to a dispute falling within the scope of the BIT and according to the terms and conditions set forth therein. Whilst the principle is not contested, the scope and the modalities of this consent are disputed. In particular, it

is disputed between the Parties whether Respondent's consent, as expressed in the BIT, covers "mass claims" within the context of sovereign debt restructuring.

468. Thus, the specific issues to be determined by the Tribunal here are the following:

- What is the scope of Argentina's consent under Article 8, and in particular:

  (i) Does the fact that the dispute relates to sovereign debt restructuring somehow exclude Argentina's consent to ICSID arbitration?

  (ii) Which are the elements of the dispute that must be covered by Argentina's consent, and in particular:

    - Is the multiplicity of Claimants an element that must be covered by Argentina's consent or is it only a procedural modality? (see Issue 1(a) of the List of 11 Issues of 9 May 2008)

    - Is the previous negotiation and litigation requirement an element which draws the limits of the consent, or is it a modality of the consent? (see Issue 4 of the List of 11 Issues of 9 May 2008)

  (iii) Based thereon, can Argentina be considered to have consented to the present proceedings? (see Issue 1(a) of the List of 11 Issues of 9 May 2008)

- What are, if any, the effects of the contractual forum selection clauses in the relevant bond documents on Argentina's consent? (see Issue 8 of the List of 11 Issues of 9 May 2008)

469. The key legal provisions and other documents in dealing with the above issues are the following: Articles 1 and 8 BIT in connection with Article 25(1) ICSID

Convention, (see §§ 336 and 268 *et seq.* above), as well as the forum selection clauses contained in the relevant bond documents.[173]

(b) Parties' Positions

470. With regard to Argentina's consent, Respondent contends that it has not and cannot be considered to have consented in any of the relevant instruments to ICSID arbitration over a dispute relating to sovereign debt restructuring and taking the form of an unprecedented mass action.

471. Respondent bases its position on the following main arguments:[174]

(i) The ICSID framework is silent concerning the possibility of collective proceedings;

(ii) At the time of the conclusion of ICSID Convention and BIT, collective claims were allowed neither in Italy nor in Argentina, and could therefore not have been envisaged by Argentina;

(iii) The present proceeding is an unprecedented proceeding, neither Party could have expected;

(iv) The present proceeding would change the nature of ICSID claims as it was envisioned, from one focused on studied analysis of the grievances brought by an individual investor for a singular, precise harm, to one focused on mass or class claims in which the circumstances of each Claimants can no longer be realistically examined and the peculiarities of each investment are ignored in favor of the lowest common denominator;

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173 See above § 340.

174 R-MJ §§ 136 *et seq.*, R-R-MJ §§ 138 *et seq.*, 159 *et seq.*, 168 *et seq.*, §§ 183 *et seq*, R-PHB §§ 11 *et seq*.

(v) The opening of ICSID arbitration with regard to sovereign debt restructuring would be counterproductive and go against current efforts to modernize foreign debt restructuring process;

(vi) The forum selection clauses contained in the bond documents clearly show that Argentina did not consent to submit the disputes arising from the bonds to ICSID arbitration;

(vii) Argentina's consent to ICSID arbitration is, in any event, conditional upon the compliance with the preliminary negotiation and litigation requirement set forth in Articles 8(1) and (2).

472. In contrast, Claimants contend that Argentina validly consented to submit a dispute like this one to ICSID arbitration:[175]

(i) Claimants contend that Respondent gave its express consent to ICSID arbitration in the BIT and its consent contains no limitation on the number of Claimants who may submit such dispute. This is evidenced by the use of the plural in Article 8 BIT, as well as by the nature of some of the types of investment listed in Article 8(1) BIT, which necessarily implies a plurality of investors;

(ii) Claimants further submit that the existence of forum selection clause contained in the contractual documents may not influence the validity of the consent given by Argentina with regard to treaty claims;

(iii) Claimants finally contend that Article 8 sets forth three alternative dispute resolution mechanisms, none of them being a pre-condition to the others. Consequently, the non-compliance with the negotiation or litigation

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175 C-MJ §§ 113 *et seq.*, C-R-MJ §§ 292 *et seq.*, C-PHB §§ 147 *et seq.*,

mechamism provided in Article 8(1) and Article 8(2) has no bearing on Respondent's consent to arbitration.

(c) Tribunal's Findings

(i) In General

473. As mentioned above (§ 258), within the context of BIT based arbitration, it is widely admitted that consent of the Host State is given through the provision in the relevant BIT of a dispute resolution clause providing for ICSID arbitration. This is the case of Article 8, in particular Articles 8(3) and 8(5) BIT, in which Argentina consented to submit "disputes relating to investments" and "in relation to the issues governed by this Agreement" to ICSID arbitration, if so chosen by the investor.

474. As arises from sections(2) and (3) above, the present dispute is a dispute arising out of the BIT and relating to an investment. So far, it is a dispute falling within the scope of Argentina's consent as expressed in Article 8 BIT.

475. In view of the specificities of the present arbitration, the question arises whether Respondent's consent covers all relevant elements of the present dispute.

(ii) Regarding Foreign Debt Restructuring

476. With regard to Respondent's argument that ICSID arbitration should be excluded concerning disputes arising from foreign debt restructuring, the Tribunal finds that this argument is without merit.

477. It is to be recalled that a State has the possibility under Article 25(4) ICSID Convention to notify the Centre of the class or classes of disputes from that it would not consider submitting to the jurisdiction of the Centre. No such notification has been made by Argentina.

478. In the absence of such notification, the core question with regard to ICSID's jurisdiction is whether the investment at stake is protected under the concerned BIT

providing for ICSID arbitration in case of breach of such protection. If this is the case, then the State's consent must be considered to extend to such investment and the dispute falls within the scope of ICSID's jurisdiction.

479. To the extent that the Tribunal has accepted that actions of Argentina relating to its foreign debt restructuring may, in principle and under certain circumstances, affect Claimants' rights and are therefore susceptible of constituting a violation of provisions of the BIT (see §§ 311-330, 331 above), there is no reason to exempt foreign debt restructuring situations from the scope of application of the BIT.

(iii) Regarding "Mass Claims"

480. It should be stressed that there is no uniform terminology concerning the various kinds of proceedings involving a high number of parties, and that various jurisdictions, courts and authors refer to different terms and meanings. For the sake of simplicity and clarity, the Tribunal will refer to "mass proceedings" as a qualification for the present proceedings, whereby this term should be understood as referring simply to the high number of Claimants appearing together as one mass, and without any prejudgment on the procedural classification of the present proceedings as a specific kind of "collective proceedings" recognized under any specific legal order.

481. Respondent contends that its consent does not extend to disputes taking the form of "mass proceedings," mainly because the "mass" aspect of the proceedings is not possible within the normal ICSID framework and implies adaptations to such framework, which cannot be done by the Tribunal itself and are of such importance that they must be specifically covered by Respondent's consent.

482. In order to determine whether the "mass" aspect of the present arbitration should be subject to the express consent of Respondent, it is first necessary to examine more in detail the nature and characteristics of such proceedings, which fall under the more general concept of "collective proceedings."

483. *(i) Types of Collective Proceedings and their Key Features.* It is impossible to list all the various types of collective proceedings existing worldwide within the context of court litigation or arbitration. A certain categorization into two main types of collective proceedings is, however, possible:[176]

- *Representative proceedings*: Some jurisdictions address collective injuries by creating mechanisms allowing claims to be brought for representative relief. Whilst forms of representative relief vary greatly, they have in common that a high number of claims arise as one single action. The mechanism in which these claims are brought together vary and can be categorized by reference to their approach to three different issues: (i) the nature of the claim, with regard to which representative relief can take the form of a purely procedural device available regardless of the type of substantive law at issue, or be limited to certain fields of law (e.g., consumer law, antitrust, etc.); (ii) the nature of the representative, who can be a private named individual on behalf of a large group of unnamed others or an approved intermediary entity on behalf of all injured individuals; (iii) the nature of the relief, which can take the form of individual damages or representative relief (e.g., declaratory or injuctive relief).

- *Aggregate proceedings*: Some jurisdictions address collective injuries through judicial aggregation of claims, such as, for example, the English Group Litigation Order (GLO), which results in the creation of a judicial registry of individual claims that arise out of the same fact pattern, and then are assigned to the same judge for management purposes. Whilst this sort of

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[176] For a quick overview see STACY I. STARCK, From Class to Collective: The De-Americanization of Class Arbitration, in Arbitration International, Vol. 26 No. 4 (2010), pp 493-548, pp 501-508, which refers further to a third type, i.e., "settlement-only proceedings," which permit parties to a mass dispute to create a collective for settlement purposes only.

collective proceeding is relatively uncontroversial in the context of court proceedings, where courts can simply apply pre-existing rules of procedure regarding joinder, intervention or consolidation to create the necessary procedure, the situation is more delicate in the context of arbitration. Although certain principles and mechanisms have developed through the concept of "multiparty and multicontract arbitrations," typically involving a handful of parties, many issues remain where the number of parties reaches the "mass" level.

484. The Tribunal will refrain from trying to identify and give a name to further sub-categories in order to avoid endless discussions over the correct terminologies. Suffice is to say that although various legal systems have developed certain types of collective proceedings, their scope, modalities and effects remain different from one jurisdiction to another, and that there is, as of today, no harmonized approach towards such collective proceedings. Nevertheless, it appears that all these various forms of collective proceedings share a common "raison d'être": Collective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law; in other words, collective proceedings were seen as necessary, where the absence of such mechanism would *de facto* have resulted in depriving the claimants of their substantive rights due to the lack of appropriate mechanism.[177]

485. The issues raised by the development of collective proceedings are manifold and depend on the type of collective proceedings. In the context of arbitration, these issues arise in slightly different terms and focus mainly around the following problems: Representative proceedings raise issues relating to consent, especially for those who subscribe to a view of arbitration that requires the parties' explicit

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[177] See STARCK, *op. cit.* fn.176, pp 183-212, pp 195-196.

consent not only to arbitration of the dispute but also to the procedure to be used in the arbitration. In contrast, aggregate proceedings raise issues of a more technical nature, in particular the question whether ordering the parties to proceed collectively is within the scope of the Tribunal's discretion and authority.

486. Looking at the way the present arbitration was initiated, the present proceedings appear to be aggregate proceedings, in which each individual Claimant is aware of and consented to the ICSID arbitration. As such, the present proceedings cannot be compared to US class-actions, in which a representative initiates a proceeding in the name of a class composed of an undetermined number of unidentified claimants. In the present arbitration, the number of Claimants is established and so is their identity.

487. However, one cannot ignore that some features of the present proceedings, in particular the way it is conducted, resemble representative actions: Although Claimants made the individual and conscious choice of participating to the arbitration, their participation is thereafter limited to a passive participation in the sense that a third party, TFA, represents their interests and makes on their behalf all the decisions relating to the conduct of the proceedings. The high number of Claimants further makes it impossible for the representative to take into account individual interests of individual Claimants, and rather limits the proceedings to the defense of interests common to the entire group of Claimants.

488. In summary, the present proceedings seem to be 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.

489. *(ii) "Mass" Aspect and Consent.* As mentioned above (see §§ 453-455 and § 474), both Parties have consented to ICSID arbitration as dispute resolution method for disputes arising out of the BIT. The only remaining question is whether a specific

consent regarding the specific conditions in which the present arbitration would be conducted is required, i.e., regarding the form of collective proceedings.

490. This question led the Tribunal to the conclusion that the answer should be in the negative, mainly for the following reasons:

- Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could loose 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 'loose' a jurisdiction it has when looking at Claimants individually ?

- In addition, the collective nature of the present proceeding derives primarily from the nature of the investment made. The ICSID Convention aims at promoting and protecting investments, without however further defining the concept of investment and leaving this task to the parties through relevant instruments such as BITs (see §§ 257 and 362 *et seq.* above). Thus, where the BIT covers investments, such as bonds, which are susceptible of involving in the context of the same investment a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration. In such cases, consent to ICSID arbitration must be considered to cover the form of arbitration necessary to give efficient protection and remedy to the investors and their investments, including arbitration in the form of collective proceedings.

491. Thus, with regard to the "mass" aspect of the present proceedings, the Tribunal considers that the relevant question is not "has Argentina consented to the mass

proceedings?", but rather "can an ICSID arbitration be conducted in the form of 'mass proceedings' considering that this would require an adaptation and/or modification by the Tribunal of certain procedural rules provided for under the current ICSID framework?" If the answer is in the affirmative, then Argentina's consent to ICSID arbitration includes such mass aspect. If the answer is in the negative, then ICSID arbitration is not possible, not because Argentina did not consent thereto but because mass claims as the ones at stake are not possible under the current ICSID framework.

492. **Consequently**, the Tribunal is of the opinion that the "mass" aspect of the present proceedings relates to the modalities and implementation of the ICSID proceedings and not to the question whether Respondent consented to ICSID arbitration. Therefore, it relates to the question of admissibility and not to the question of jurisdiction. It will thus be addressed below when dealing with admissibility issues (see §§ 515 *et seq.* below).

(iv) Regarding the Negotiation and 18 Months Litigation Requirement

493. Respondent argues that the requirement of negotiation and litigation set forth in Articles 8(1) and 8(2) are of such a nature and importance that they constitute an essential part of and motive for Respondent's consent to ICSID arbitration. In other words, Respondent contends that it would not have consented to ICSID arbitration if such arbitration had not been made conditional upon the implementation of a prior mechanism of negotiation and 18 months litigation.

494. The present issue comes down to the following question: What is conditional? Respondent's consent to ICSID jurisdiction or the implementation of such consent in a case as the present one? Indeed, there is a difference between conditioning its consent to ICSID jurisdiction to the fulfilment of a pre-condition, and conditioning the effective implementation of such consent, i.e., the possibility to resort to ICSID arbitration, to the fulfilment of such a pre-condition.

495. In the case at hand, the question is not as much "has Argentina consented to ICSID jurisdiction?" This would make little sense in the light of Argentina´s adherence to the Washington Convention and its acceptance of ICSID arbitration under Article 8 BIT for the present type of dispute (see § 474 above). The question is rather "under what circumstances will ICSID arbitration be possible under the terms of Argentina's consent?"

496. The Tribunal is of the opinion that the negotiation and 18 months litigation requirements relate to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim, and will thus be addressed when dealing with issues of admissibility (see §§ 567 *et seq.* below).

(v) Regarding the Forum Selection Clauses

497. Respondent further argues that the introduction of forum selection clauses in the relevant bond documents is to be interpreted as an exclusion of consent to ICSID arbitration for disputes deriving from such bonds.

498. The Tribunal cannot follow Respondent in this respect as it conflates contract claims and treaty claims. As explained above (see §§ 316 *et seq.*), even though Claimants claims relate to the bonds, they are based on alleged breaches by Argentina of the BIT and not on contractual rights provided to Claimants under the bond documents. The forum selection clauses apply only to claims based on contractual rights, and may not affect treaty claims, which the bond documents did neither anticipate nor deal with.

499. Consequently, the presence of forum selection clauses in the contractual bond documents is irrelevant for the assessment of the existence and/or validity of Argentina's consent to ICSID arbitration.

(d) Conclusion

500. In conclusion and in (partial) response to Issues Nos. 1(a), 4 and 8, the Tribunal finds that Argentina validly consented to submit the present dispute to ICSID jurisdiction and arbitration. In particular:

(i) The fact that the present dispute relates to foreign debt restructuring is *per se* irrelevant to the determination of Argentina's consent to ICSID arbitration;

(ii) Argentina's consent to ICSID jurisdiction includes claims presented by multiple Claimants to the extent that such claims are admissible under the ICSID framework;

(iii) The negotiation and litigation requirement provided in Articles 8(1) and (2) of the BIT does not condition Argentina's consent to ICSID jurisdiction and arbitration, and merely relates to the circumstances under which such consent is to be given full effect and be implemented;

(iv) The presence of forum selection clauses in the contractual bond documents are irrelevant to the determination of Argentina's consent to ICSID arbitration.

(7) Conclusion on Jurisdiction

501. Based on the above considerations, the Tribunal concludes that it has jurisdiction over the present claims as follows:

(i) The claims at stake are treaty claims in nature and fall under the scope of the BIT and therewith under the jurisdiction *ratione materiae* of the Tribunal (see §§ 331-332 above). In particular:

- The allegations of Claimants and the facts on which these allegations are based are susceptible of constituting a violation of provisions of the

BIT and establish the Tribunal's jurisdiction with regard to the present claims;

- The claims brought forward by Claimants are not pure contractual claims but treaty claims based on acts of Argentina, a sovereign, which Claimants allege are in breach of Argentina's obligations under the BIT;

- If third parties, in particular the Italian banks, have breached any of their own obligations towards Argentina and/or the Claimants, redress can be sought by either Argentina and/or Claimants against these banks under the remedies provided for in the relevant contractual bond documents or in the applicable statutory laws and/or regulations concering purchase and sale of securities. Such liability, however, does not seem to derive from the BIT and would therefore in principle have no place in the present proceedings;

- Under these circumstances, the Tribunal considers that it is not necessary anymore to examine Issue No. 6, i.e., whether the Tribunal may also have jurisdiction based on the Umbrella Clause of the Argentina-Chile BIT in connection with the MFN Clause of the Argentina-Italy BIT. To the extent that the Tribunal's jurisdiction already derives from the treaty nature of the claims at stake, the question of the interaction between the Umbrella Clause of the Argentina-Chile BIT and the MFN Clause of the Agrentina-Italy BIT becomes moot.

(ii) The present dispute arises out of an investment pursuant to Article 1 BIT and Article 25(1) ICSID Convention (see § 387 above). In particular:

- According to one view, the "double-barrelled" test developed with regard to the concept of "investment" does not mean that the definition

of investment provided by two States in a BIT has to fit into the definition deriving from the spirit of the ICSID Convention. Rather, arguably, it is the investment at stake that has to fit into both of these concepts, knowing that each of them focuses on another aspect of the investment;

- In any event, the relevant bonds and Claimants' security entitlements therein are both to be considered "investments" pursuant to Article 1(1) lit. (c) BIT;

- If needed to be applied, Claimants' purchase of security entitlements in Argentinean bonds constitute a contribution which qualifies as "investment" under Article 25 ICSID Convention;

- The relevant bonds and Claimants' security entitlements therein are both to be considered made "in compliance with the laws and regulations of [Argentina]" pursuant to Article 1(1) BIT;

- The bonds and Claimants' security entitlements therein are both to be considered "made in the territory of Argentina."

(iii) With regard to the jurisdiction *rationae personae* and without making a determination with respect to any individual Claimant (see § 422 above), the Tribunal has jurisdiction *rationae personae* pursuant to Article 1(2) of the Argentina-Italy BIT, its Additional Protocol and Article 25 ICSID Convention, over each Claimant:

- **who is a natural person** and who is ultimately found:

  • to have had Italian nationality on 14 September 2006 and 7 February 2007;

- not to also have had Argentinean nationality on either of such dates;

- not to have been domiciled in the Argentine Republic for more than two years prior to making the investment;

- to have been an investor as of the date of alleged breach by Argentina of its treaty obligations.

- **who is a juridical person** and who is ultimately found to have had the Italian nationality on 14 September 2006, meaning that it:

  - was on such date constituted in compliance with the legislation of Italy;

  - had its *siège social* in the territory of Italy; and

  - was recognized by Italian law in the sense that it had the civil capacity to make an investment under the BIT and to litigate in its own name, without necessarily having full legal personality.

(iv) The way in which Claimants consented to the ICSID arbitration through the relevant documents contained in the TFA Mandate Package is – as a matter of principle – valid (see § 466 above). In particular:

- Based on the general circumstances leading to the execution of the documents embodying Claimants' consents, in particular the Declaration of Consent and the Power of Attorney, there is at this stage no indication that such execution would have been achieved based on fraud, coercion or essential mistake vitiating Claimants' consent;

- Whether or not such fraud, coercion or mistake may exist with regard to individual Claimants based on the specific circumstances of the

individual case remains open and will be addressed, to the extent necessary and appropriate, when dealing with issues concerning individual Claimants;

- Questions regarding TFA's specific role and relevance, as well as issues relating to conflict of interests or breach of professional obligations by White & Case are issues relating to the admissibility of the proceedings, and not to the validity of Claimants' consent. They will be addressed, to the extent necessary and appropriate, when dealing with the issue of admissibility (see § 642 *et seq.* below).

(v) Argentina validly consented to submit the present dispute to ICSID jurisdiction and arbitration (see § 500 above). In particular:

- The fact that the present dispute relates to foreign debt restructuring is *per se* irrelevant to the determination of Argentina's consent to ICSID arbitration;

- Argentina's consent to ICSID jurisdiction includes claims presented by multiple Claimants to the extent that such claims are admissible under the ICSID framework;

- The negotiation and litigation requirement provided in Articles 8(1) and (2) of the BIT does not condition Argentina's consent to ICSID jurisdiction and arbitration, and merely relates to the circumstances under which such consent it to be given full effect and implemented;

- The presence of forum selection clauses in the contractual bond documents are irrelevant to the determination of Argentina's consent to ICSID arbitration.

502. **Consequently**, with regard to the relevant issues set forth in the List of 11 Issues of 9 May 2008, the Tribunal finds as follows:

(i) **Issue 1(a)**: Argentina's consent to the jurisdiction of the Centre includes claims presented by multiple Claimants in a single proceeding;

(ii) **Issue 2(a)**: The Declaration of Consent signed by the individual Claimants submitted in this proceeding is in principle valid, whereby the potential existence of a fraud, coercion or essential mistake invalidating the consent of a specific individual Claimant based on the specific circumstances of the individual case remains open and will be dealt with in a later stage of the proceedings;

(iii) **Issue 5**: The MFN clause has no consequences on the ICSID's jurisdiction and the Tribunal's competence;

(iv) **Issue 6**: Whether the Tribunal may also have jurisdiction based on the Umbrella Clause of the Argentina-Chile BIT in connection with the MFN Clause of the Argentina-Italy BIT is irrelevant to the extent that the Tribunal's jurisdiction already derives from the treaty nature of the claims at stake;

(v) **Issue 7**: Claimants' claims are to be considered Treaty Claims arising out of the BIT and therewith fall under the jurisdiction *ratione materiae* of the Tribunal;

(vi) **Issue 8**: The presence of forum selection clauses referring to national courts in the bond documents do not apply to Treaty Claims and do thereby not affect the Tribunal's jurisdiction over such Treaty Claims;

(vii) **Issue 9**: The bonds in question, and in particular the security entitlements held by Claimants in these bonds, qualify as "Investment" under Article 1(1) BIT made "in the territory of Argentina" and "in compliance with the laws and regulations of Argentina";

(viii) **Issue 10**: The Tribunal has jurisdiction *rationae personae* over each Claimant who is a natural person to the extent set forth above in § (7) (iii);

(ix) **Issue 11**: The Tribunal has jurisdiction *rationae personae* over each Claimant who is a juridical person to the extent set forth above in § (7) (iii).

503. The remaining Issues 1(b), 2(b), 3(a), 3(b), 4 and 5 are issues of admissibility and will be dealt with in the section below.

D. ADMISSIBILITY OF THE CLAIM

(1) Introductory Remarks

504. In section C above, the Tribunal has established that it has – as a matter of principle and without making a determination with respect to any individual Claimants – jurisdiction over the present dispute. However, in order for the Tribunal to hear the present case, it is further necessary that the claims raised by Claimants be admissible.

505. As mentioned above (see §§ 245 *et seq.*), the difference between jurisdictional and admissibility issues is not always clear. Consequently, some of the issues addressed in this section may have been invoked by the Parties within the context of the Tribunal's jurisdiction. However, the Tribunal considers that these issues are not matters of jurisdiction but of admissibility. Where this applies, any argument raised by the Parties with regard to these issues and aiming to establish a lack of jurisdiction is addressed below as an argument of lack of admissibility.

(2) Mass Action – Issue 1(b)

(a) Issues and Relevant Legal Provisions

506. Although the Tribunal considers that the "mass" aspect is not a hurdle to its jurisdiction, it must further examine whether this "mass" aspect is – as it is a point of dispute between the Parties – admissible under the current ICSID framework.

507. Thus, the specific issues to be determined by the Tribunal here are the following:

- Is a "mass action" like the present one compatible with the current ICSID framework and spirit, also giving due regard to the existing framework for sovereign debt restructuring?

- If so, what are the procedural adaptations that the Tribunal would need to implement in order to make such a "mass action" workable in an ICSID arbitration. In particular:

  (i) With regard to admissibility requirements, should the Tribunal refer to principles applicable to "class actions" and other aggregate litigations as known under certain legal regimes?

  (ii) With regard to modalities of the procedure, may the Tribunal limit procedural rights of one Party where such limitation is necessary to ensure the other Party's procedural rights?

- Are such adaptations covered by the Tribunal's power to decide on procedural issues?

508. The key legal provisions in dealing with the above issues are the following: Article 44 ICSID Convention and Rule 19 ICSID Arbitration Rules.

509. Article 44 ICSID Convention provides as follows:

> "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

510. Article 19 ICSID Arbitration Rules provides as follows:

> "The Tribunal shall make the orders required for the conduct of the proceeding."

(b) Parties' Positions

511. Respondent contends that mass proceedings as the present one are not admissible under the current ICSID framework. To support its position, Respondent brings forward the following main arguments:[178]

(i) The ICSID framework does not provide and does not allow mass claims. Article 44 ICSID Convention simply permits the Tribunal to decide procedural questions with respect to matters over which it already has jurisdiction. It does not provide a basis for the Tribunal to exercise jurisdiction over proceedings that are not authorized by the ICSID Convention and to which the parties did not consent in the relevant BIT;

(ii) The present mass action cannot be compared to a multi-party arbitration, and resembles more a type of class action. Even if such mass claim was considered allowed under the current ICSID framework, the way this arbitration was initiated and conducted is not in compliance with generally recognized principles applicable to class actions and similar collective proceedings (e.g., regarding the role and position of the representative);

(iii) Such mass claim proceedings are unmanageable because individualized facts and circumstances are relevant not only for the merits but also for the jurisdiction (e.g., whether the specific investment was made in accordance with applicable laws, whether the Claimants' signature are all authentic, etc.) and could not be duly ascertained.

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[178] See R-MJ §§ 138 *et seq.*, 154 *et seq.*, 264; R-R-MJ §§ 159 *et seq.*, 178 *et seq.*, 184 *et seq.*; R-PHB §§ 22 *et seq.*

512. In addition, Respondent contends that the opening of ICSID arbitration with regard to sovereign debt restructuring would be counter-productive in so far as it would encourage hold outs.[179] As such, it would go against current efforts to modernize foreign debt restructuring processes. Consequently, in order to preserve the efficiency of foreign debt restructuring mechanisms, the Tribunal should deem the present claims inadmissible.

513. In contrast, Claimants contend that the present mass proceedings are within the jurisdictional limits of ICSID, the question of its management being a question of mere procedure covered by Article 44 ICSID Convention and thereby within the power of the Tribunal. Claimants' main arguments are as follows:[180]

(i) This proceeding is not different from any other multi-party arbitration, the only particularity being the unusually high number of Claimants. Multi-party proceedings are widely admitted under current ICSID arbitration practice, and since the ICSID framework contains no limitation on the number of possible parties, there is no reason to treat this claim differently from any other multi-party arbitration;

(ii) Collective proceedings are further consistent with the purpose and object of the BIT, since the high number of Claimants is inherent to the nature of the investments protected by the BIT (see § 490 above);

(iii) The present claims are proper and manageable: (a) Claimants are from a single jurisdiction, they have identical claims arising out of the same State measures under the same BIT and stand in an identical posture vis-à-vis Respondent; (b) the individual facts and issues detailed by Respondent (i.e.,

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179 R-MJ §§ 62.

180 C-MJ §§ 313 *et seq.*, 333 *et seq.*, 350 *et seq.*; C-R-MJ §§ 316 *et seq.*, C-PHB §§ 125 *et seq.*, §§ 190 *et seq.*

the individual circumstances of the purchase of the bonds) are not material to the Tribunal's core task of determining whether a specific set of actions taken by Argentina constituted a violation of the BIT; (c) Argentina's due process rights would not be infringed; and (d) the Tribunal is well-equipped to adopt procedures to handle the claims under Article 44 ICSID Convention. Consequently, it is only just and efficient to hear these cases jointly.

514. With regard to the policy argument raised by Respondent, Claimants contend that Respondent's view is outdated and irrelevant. The major threat to the efficiency of foreign debt restructuring would be rogue debtors, such as Argentina. Consequently, opening the door to ICSID arbitration would create a supplementary leverage against such rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring.

(c) Tribunal's Findings

515. As mentioned above (see §§ 489-492), the Tribunal finds that the issue of whether or not the present mass proceedings could be conducted in the form of collective proceedings is an issue of admissibility and not of consent.

516. To recall, Respondent contends that arbitration in the form of collective proceedings is not provided for by ICSID, that this silence is a "qualified silence" that should be interpreted to mean that collective arbitration is not possible and not admissible under the current ICSID framework, and in particular that the Tribunal cannot rely on Article 44 ICSID Convention or Rule 19 ICSID Arbitration Rules to create its own solution to the problems raised by the high number of Claimants.

517. It is undisputed that the ICSID framework contains no reference to collective proceedings as a possible form of arbitration. The key question here is how to interpret this silence. In particular, the Tribunal is tasked with the assessment of whether this silence should be considered a "qualified silence," meaning an intended silence indicating that it does not allow for something that is not provided,

or whether it is to be considered a "gap," which was unintended and which the Tribunal has the power to fill. In the latter case, the Tribunal shall further determine whether the adaptations which would be needed to fill this gap, i.e., to manage the present proceedings, fall within the scope of its powers as deriving from Article 44 ICSID Convention and/or Rule 19 ICSID Arbitration Rules.

(i) Interpretation of the Silence of the ICSID Framework

518. As mentioned above (see §§ 489-492), the Tribunal finds that, in the light of the absence of a definition of investment in the ICSID Convention, where the BIT covers investments which are susceptible of involving a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT, and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration.

519. For these same reasons and as further developed below, the Tribunal finds that it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a "qualified silence" categorically prohibiting collective proceedings, just because it was not mentioned in the ICSID Convention:

- First, at the time of conclusion of the ICSID Convention, collective proceedings were quasi inexistant, and although some discussions seem to have taken place with regard to multi-party arbitrations, these dicussions were not conclusive on the intention to either accept or refuse multi-party arbitrations, and even less so with regard to the admissibility of collective proceedings;

- ICSID sets forth a standard arbitration mechanism. Insofar as investments can be of a varying nature and scope, it is possible that the current ICSID procedure may not be fully adapted to resolve a dispute arising out of any kind of investment. Indeed, where an investment, protected under a BIT

providing for ICSID arbitration, shows certain particular characteristics, these characteristics may influence the way of conducting the arbitration, and lead the Tribunal to make certain adaptations to the standard procedure in order to give effect to the choice of ICSID arbitration. The need for certain adaptations to the standard ICSID arbitration procedure merley derives from the impossibility to anticipate all kinds of possible investments and disputes, and is certainly not a sufficient motive to simply close the door of ICSID arbitration to investors who are not "standard investors" having made "standard investments." However, it is understood that adaptations made to the standard procedure must be done in consideration of the general principle of due process and must seek a balance between procedural rights and interests of each party.

520. Thus, the silence of the ICSID framework regarding collective proceedings is to be interpreted as a "gap" and not as a "qualified silence." Consequently, the Tribunal has, in principle, the power under Article 44 ICSID Convention to fill this gap. However, this does not mean that the scope of this power is unlimited. Rather, the Tribunal is bound by the limits set forth by Article 44 ICSID Convention.

(ii) Powers of the Arbitral Tribunal under Article 44 ICSID Convention and Rule 19 ICSID Arbitration Rules

521. As mentioned above (see § 509), Article 44 ICSID Convention provides that where the ICSID framework is silent on a procedural question, which is also not subject to the parties' agreement, the Tribunal shall decide the question. Within the context of arbitration proceedings, this rule is further complemented by Rule 19 ICSID Arbitration Rules, according to which "the Tribunal shall make the orders required

for the proceeding." These provisions are the mere expression of the inherent power of any tribunal to resolve procedural questions in the event of lacunae.[181]

522. As a matter of principle, the power of a tribunal is limited to the filling of gaps left by the ICSID Convention and the Arbitration Rules. In contrast, a modification of existing rules can only be effected subject to the parties' agreement, in accordance with minimum standards of fair procedure and to the extent that the rules to be modified are not mandatory (in the sense that they restate mandatory provisions of the Convention).[182]

523. A tribunal's power is further limited to the filling of gaps left by the ICSID framework in the specific proceedings at hand, and a tribunal's role is not to complete or improve the ICSID framework in general. As such, a tribunal's power to fill gaps will usually be limited to the design of specific rules to deal with specific problems arising in the proceedings at hand.

524. Considering the above, the Tribunal cannot:

- modify the current arbitration rules without the Parties' consent. A revision of the ICSID Arbitration Rules can only be done by the Administrative Council, which is the body competent to adopt the Arbitration Rules under Article 6(1)(c) ICSID Convention; or

- adopt a full set of rules of procedure unless the Parties have agreed that the Arbitration Rules adopted by the Administrative Council should not apply without substituting their own rules.

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181 See e.g. SCHREUER, *op. cit.* fn. 98, Ad Article 44 § 54.

182 See e.g. SCHREUER, *op. cit.* fn. 98, Ad Article 44 §§ 20 *et seq.*

525. The Tribunal, however, can and ought to fill gaps left where the application of existing rules are not adapted to the specific dispute submitted to ICSID arbitration. In such a case, the filling of the gap does not consist of an amendment of the written rule itself, but rather of an adaptation of its application in a specific case.

526. As mentioned above (see §§ 518-520), the Tribunal finds that the silence of the ICSID Convention concerning collective proceedings is to be seen as a "gap." As such, the Tribunal has, in principle, the power to fill this gap. The key question at hand thus, is the following:

> **Can the Tribunal fill the gap created by the collective aspect of the claim on an *ad hoc* basis and through the design of specific rules, or would this require the creation and/or modification of general rules which are under the competence of the Administrative Council?**

527. This question cannot (and should not) be answered in the abstract. Not only would this imply creating general principles thereby relying on a terminology, which is as diverse and varied as the currently existing forms and modalities of collective proceedings, but it would also go beyond the powers of the Tribunal to fill a specific gap regarding the conduct of specific proceedings. What the Tribunal however can (and should) do is to analyse this question in a concrete manner, i.e., asking itself (i) what are the specific rules that would be necessary in order to be able to conduct the present proceedings under the ICSID framework, and (ii) can these specific rules, in the light of their nature and scope, be considered to fall within the power of the Tribunal as deriving from Article 44 ICSID Convention and Rule 19 ICSID Arbitration Rules.

528. When answering these questions, the Tribunal shall, in accordance with the principles of interpretation of treaties, not only ask itself whether, from a technical perspective, it can make such adaptations, but also whether, based on the object and purpose of the ICSID Convention, it should do so.

(iii) Nature of the Necessary Adaptations to the ICSID Standard Procedure

529. Notwithstanding the high number of Claimants involved, the Tribunal must examine not only the elements necessary to determine its jurisdiction (i.e., the nationality of the Claimants, their status of investor and the existence of their investment, etc.), but also those necessary to establish Claimants' claims and relating to the merits of the case (i.e., the existence of a breach by Argentina of its obligations under the BIT, the effect of such breach on Claimants' investment, etc.). Thus, the high number of Claimants may not serve as an excuse not to examine such elements and adaptations to the procedure may therefore not affect the object of the Tribunal's examination.

530. However, it appears that adaptations to hear the present case collectively would concern not that much the object of the examination, but rather (i) the way the Tribunal will conduct such examination, and/or (ii) the way Claimants are represented.

531. With regard to the examination, it is undeniable that the Tribunal will not be in a position to examine all elements and related documents in the same way as if there were only a handful of Claimants. In this respect, the Tribunal would need to implement mechanisms allowing a simplified verification of evidentiary material, while this simplification can concern either the depth of examination of a document (e.g. accepting a scanned copy of an ID document instead of an original), or the number of evidentiary documents to be examined, and if so their selection process (i.e. random selection of samples instead of a serial examination of each document) (see §§ 668 *et seq.* below). However, such a simplification of the examination process is to be distinguished from the failure to proceed with such examination.

532. With regard to the mechanism of representation, it is true that TFA has been provided with powers which may go beyond the power granted to a normal agent under Rule 18 ICSID Arbitration Rules (see §§ 455 *et seq.* above). Admitting the

present collective proceedings would thus also mean accepting TFA's role as due representative of Claimants.

533. **In conclusion**, the procedure necessary to deal with the collective aspect of the present proceedings concerns the method of the Tribunal's examination, as well as the manner of representation of Claimants. However, it does not affect the object of such examination. Further, the Tribunal remains obliged to examine all relevant aspects of the claims relating to Claimants' rights under the BIT as well as to Respondent's obligations thereunder subject to the Parties' submissions. Thus, it is the manner in which the Tribunal will conduct such examination which may diverge from usual ICSID proceedings.

(iv) Admissibility of the Necessary Adaptations

534. Considering the above (§§ 529-533), the adaptations required to deal with the collective aspect of the claims are issues which relate strictly to the manner of conducting the present proceedings, and in particular, how to collect and weigh evidence. In other words, the nature of these measures and their scope do not exceed the powers of the Tribunal as deriving from Article 44 ICSID Convention and Rule 19 ICSID Arbitration Rules.

535. The Tribunal is entitled to proceed with such adaptations under the relevant provisions of the ICSID framework. As mentioned above (see § 528), the Tribunal is, however, of the opinion that it should not only examine whether it can do so but also whether it should do so based on the aim and purpose of the ICSID Convention and in particular, with regard to the equilibrium established by the Convention with regard to the Parties' respective rights.

536. For this purpose, the Tribunal will firstly examine the implications of the intended adaptations. These implications are twofold: (i) It will not be possible to treat each Claimant as if he/she was alone and certain issues, such as the existence of an expropriation, will have to be examined collectively, i.e., as a group; and (ii) the

implications will likely limit certain of Claimants' and Argentina's procedural rights to the extent that Claimants have to waive individual interests in favor of common interests of the entire group of Claimants, while Argentina will not be able to bring arguments in full length and detail concerning the individual situation of each of the Claimants.

537. The Tribunal finds it appropriate to compare the consequences of these implications to the consequences of rejecting the claims for lack of admissibility and requesting each Claimant to file an individual ICSID claim. In this regard, the Tribunal finds that not only would it be cost prohibitive for many Claimants to file individual claims but it would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations. Thus, the rejection of the admissibility of the present claims may equal a denial of justice. This would be shocking given that the investment at stake is protected under the BIT, which expressly provides for ICSID jurisdiction and arbitration.

538. Thus, the question arises whether in the light of the present circumstances it would be justified to set strict boundaries to certain of the Parties' procedural rights, while adapting a method of examination so as to give actual effective protection to the investment. The challenge lies in finding the right balance.

539. In the search for the right balance, the Tribunal considers the following issues to be relevant: (i) under what conditions is it acceptable to change the method of examination from individual to group treatment; (ii) to what extent are Argentina's defense rights affected in comparison to 60,000 separate proceedings; and (iii) is it admissible to deprive Claimants of certain procedural rights, such as provided for under the TFA Mandate Package?

540. *(i) Pre-conditions for group treatment*: The Tribunal is of the opinion that group examination of claims is acceptable where claims raised by a multitude of claimants are to be considered identical or at least sufficiently homogeneous. The

question is thus whether Claimants' claims are to be considered identical or sufficiently homogeneous.

541. In this respect, it is important to recall that the present proceedings concern only potential treaty claims and do not deal with any contractual claims Claimants may have against Argentina and/or the banks (see §§ 316-332 above). Thus, the identity or homogeneity requirement applies to the investment and the rights and obligations deriving therefrom based on the BIT and not to any potential contractual claims. In other words, in the present case, it is irrelevant whether Claimants have or do not have homogeneous contractual rights to repayment by Argentina of the amount paid for the purchase of the security entitlements. The only relevant question is whether Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT.

542. Therefore, the specific circumstances surrounding individual purchases by Claimants of security entitlements are irrelevant. If Italian or other banks have breached any obligations they had towards Claimants or Argentina, such a breach is to be addressed in a recourse action against the relevant banks (see §§ 327-330 above) and is foreign and external to the present arbitration which concerns solely Argentina's behavior with regard to Claimants' investment.

543. With regard to the nature of the claims deriving from the BIT, it appears to be homogeneous:

- The rights deriving from Claimants' investment and Argentina's obligations to protect these rights are the same with regard to all Claimants to the extent that they derive from the same BIT and the same provisions. Indeed, first, the provisions of the BIT invoked by Claimants are identical for all Claimants; second, the rights allegedly affected all derive from Claimants' purchase in

Italy of security entitlements in Argentinean bonds; third, all these security entitlements were subject to the Exchange Offer 2005 (see § 312 above);

- The events leading to the alleged disregard of such rights and obligations, i.e. to the breach by Argentina of the relevant provisions, are the same towards all Claimants. They all relate to the acts of Argentina preceding and following its public default in December 2001, and in particular the way it consulted with its creditors, the way it reached a decision on how to deal with its foreign debt, as well as the way it implemented such decision, namely through its Exchange Offer 2005 and the legislation and regulations relating thereto. In doing so Argentina treated all Claimants in the same manner and did not differentiate between different kinds of Claimants (see § 313 above).

- The legislation and regulations promulgated and implemented by Argengina, together with the implementation of its Exchange Offer 2005, affected all Claimants in the same way. Thus, the potential damage caused to Claimants is, by nature the same for all Claimants although the scope of such damage will of course depend on the scope of their individual investment.

544. Consequently, Claimants' claims are to be considered sufficiently homogeneous to justify a simplification of the examination method and procedure.

545. *(ii) Effects on Argentina's defense rights*: It appears that the effect of such examination method and procedure on Argentina's defense rights is limited and relative. Whilst it is true that Argentina may not be able to enter into full length and detail into the individual circumstances of each Claimant, it is not certain that such approach is at all necessary to protect Argentina's procedural rights in the light of the homogeneity of Claimants' claims. In addition, the only alternative would be to conduct 60,000 separate proceedings. The measures that Argentina would need to take to face 60,000 proceedings would be a much bigger challenge to Argentina's

effective defense rights than a mere limitation of its right to individual treatment of homogeneous claims in the present proceedings.

546. *(iii) Deprivation of Claimants' procedural rights*: It is undeniable that the TFA Mandate Package has the effect to depriving Claimants of a substantial part of their procedural rights, such as the decision on how to conduct the proceedings, the right to instruct the lawyers, etc. However, as mentioned above (see §§ 457-465), the setting of strict boundaries in relation to Claimants' procedural rights has been consciously accepted by Claimants in order to benefit from the collective treatment of their claims before an ICSID tribunal. In addition, the Tribunal did not find that such agreement was affected by any vice which would render it invalid. Consequently, the Tribunal sees no reason to disregard – as a matter of principle – Claimants' conscious choice.

547. **In conclusion**, under the present circumstances, the procedure necessary to deal with Claimants' claims in a collective way is admissible and acceptable under Article 44 ICSID Convention, Rule 19 ICSID Arbitration Rules, as well as under the more general spirit, object and aim of the ICSID Convention.

(v) Policy Considerations

548. To recall (see § 476 above), the Tribunal found that Respondent's arguments regarding the appropriateness of ICSID proceedings in the context of sovereign debt restructuring are not an impediment to the Respondent's consent to ICSID arbitration.

549. Similarly, the Tribunal finds that those policy arguments are also not an impediment to the admissibility of Claimants' claims. In the Tribunal's view, such policy arguments are inapposite. As mentioned above (§ 478), the real question is whether the investment at stake is protected under a BIT providing for ICSID arbitration in case of breach of such protection. If this is the case, then ICSID has jurisdiction, and it would be wrong to hinder the effective exercise of such

jurisdiction through the rejection of the admissibility of the claims based merely on policy considerations. This is all the more the case here as the present policy considerations are controversial and based on Respondent's assumption that the biggest threat to the stability and fairness of sovereign debt restructuring are holdout creditors.

550. Policy reasons are for States to take into account when negotiating BITs and consenting to ICSID jurisdiction in general, not for the Tribunal to take into account in order to repair an inappropriately negotiated or drafted BIT. The present BIT is clear, it includes bonds and security entitlements (see §§ 352-361 above). Whether or not ICSID is the best way to deal with a dispute relating to these bonds and security entitlements in the context of foreign debt restructuring is irrelevant. The Parties chose ICSID arbitration for this kind of dispute. They, as well as the Tribunal, are bound by such choice and cannot evade it based on controversial policy reasons.

(d) Conclusion

551. In conclusion and in (partial) response to Issue No. 1(b), the Tribunal holds that the mass aspect of Claimants' claims does not constitute an impediment to their admissibility. In particular:

(i) The silence of the ICSID framework regarding collective proceedings is to be interpreted as a "gap" and not as a "qualified silence;"

(ii) The Tribunal has, in principle, the power under Article 44 ICSID Convention to fill this gap to the extent permitted under Article 44 ICSID Convention and Rule 19 ICSID Arbitration Rules;

(iii) The procedure necessary to deal with the collective aspect of the present proceedings concern the method of the Tribunal's examination, as well as the manner of representation of Claimants. However, it does not affect the object of such examination. Thus, the Tribunal remains obliged to examine all

relevant aspects of the claims relating to Claimants' rights under the BIT as well as to Respondent's obligations thereunder subject to the Parties' submissions;

(iv) Such procedure is admissible and acceptable under Article 44 ICSID Convention, Rule 19 ICSID Arbitration Rules, as well as under the more general spirit, object and aim of the ICSID Convention;

(v) Respondent's policy arguments regarding the appropriateness of ICSID proceedings in the context of sovereign debt restructuring are irrelevant for the determination of the admissibility of the claims.

(3) Consultation Requirement – Issue 4

(a) Issues and Relevant Legal Provision

552. Article 8(1) BIT provides that the investor and the Host State shall in case of a dispute try first to settle their dispute through the means of amicable consultation. The Parties hold diverging views as to the nature of this consultation requirement and the consequence of a non-compliance therewith on the admissibility of the present claims.

553. Thus, the specific issues to be determined by the Tribunal here are the following:

- Is the requirement of preliminary amicable consultation a mandatory requirement, which constitute a hurdle to the admissibility of a claim introduced without fulfilling such requirement? (connected with Issue 4 of the List of 11 Issues of 9 May 2008)

- If so, can the consultation requirement be considered to have been met in the present case?

- If not, should Claimants be considered to have been released from such consultation requirement based on the futility rule?

554. The key legal provision concerning the above issues is Article 8(1) BIT, which in its unofficial English version provides as follows (see § 267 *et seq.* above):

> "1. Any dispute in relation to the investments between a Contracting Party and an investor of the other Contracting Party in relation to the issues governed by this Agreement shall be settled, if possible, by means of amicable consultation between the parties to the dispute."

(b) Parties' Positions

555. In Respondent's view, Article 8 BIT articulates a multi-layered, sequential dispute resolution system setting forth mandatory requirements which Claimants have not complied with and therefore, constitute a jurisdictional bar.

556. In particular, Respondent submits that Article 8 provides for a mandatory three-step dispute resolution as further supported by the wording and spirit of Article 8(3) and 8(4) BIT.[183]

557. With regard to the consultation requirement, Respondent contends that Claimants have not complied therewith because (i) it is unclear how far TFA actually represented Claimants at the time of the talks between TFA and Respondent, (ii) TFA's attitude was one of bad faith, and (iii) the talks with TFA concerned Argentina's default and not any alleged treaty violation.

558. In contrast, Claimants contend that Article 8 BIT may not constitute a bar to the present arbitration based mainly on the following arguments:[184]

(i) Based on the permissive language used, Article 8 BIT aims to provide the parties with different options of dispute resolution and does not institute a compulsory multi-layered, sequential dispute resolution system;

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183 R-MJ §§ 382 *et seq.*; R-R-MJ §§ 652 *et seq.*; R-PHB §§ 267 *et seq.*

184 C-MJ §§ 544 *et seq.*; C-R-MJ §§ 543 *et seq.*; C-PHB §§ 323 *et seq.*

(ii) Even if the Tribunal considered that Article 8 instituted a mandatory multi-layered sequential dispute resolution system, Claimants have complied with the various requirements. With regard to the requirement of amicable consultation, Claimants have complied with this requirement through TFA and it is Argentina which refused to negotiate with TFA. In order to conduct adequate consultation talks in the sense of Article 8(1) BIT it is not necessary to identify the specific legal basis of the dispute during the consultations, but it is sufficient that the talks relate to the facts at the basis of the dispute;

(iii) Any further attempt at consultation would have been futile in the light of the Emergency Law, which prohibits the Argentinean Government from entering into a settlement agreement.

(c) Tribunal's Findings

(i) Existence of Consultations

559. According to the Parties, after the announcement of Argentina's default, talks took place between TFA and the Argentinean Government and continued until 2005.[185] TFA conducted these talks in the name of Italian bondholders, who signed the TFA Negotiating Mandate with the aim to "represent the interests of the subscribers of Argentinean bonds in the frame of the restructuring of the debt, which will be subject to the consultation with the Argentinean Authorities or with other Argentinean issuers." [186]

560. Thus, based on the wording of the TFA Negotiating Mandate, the object of the consultations to be conducted by TFA were not limited to contractual claims and encompassed all "interests" of the Italian bondholders in relation to the

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185 See above § 84.

186 See above § 66.

restructuring of Argentina's debt. It further arises from the correspondence between TFA and the Argentinean authorities that TFA's complaints towards Argentina did not only focus on the mere non-payment of its debt by Argentina but also on the way Argentina was handling these issues through its restructuring plan and its attitude towards creditors. As such, TFA's talks with Argentina also encompassed the main facts on which Claimants based their present claims. For consultation talks to be conducted in accordance with Article 8(1) BIT, it is not necessary to identify or name specific legal issues. Rather, it is sufficient that the context of the dispute be the same as the context of the dispute brought forward under Article 8 BIT. Consequently, the talks conducted by TFA with the Argentine authorities can be considered talks aiming at a settlement of the present claims.

(ii) TFA's Role in the Consultations

561. The remaining question is whether TFA can be considered to have been representing Claimants during these talks. Indeed, it is not entirely clear how many of the Italian bondholders who signed the TFA Negotiating Mandate are also Claimants to the present arbitration. However, this question can remain open for the following reason: Whilst Argentina contends that it is unclear how far TFA actually represented Claimants at the time of the talks, Respondent did not contend having otherwise tried to contact Claimants to conduct separate talks.[187] Thus, although it may be unclear how many of the Claimants signed the TFA Negotiating Mandate, it is undeniable that TFA did represent to a certain extent the interests of some of the Italian bondholders and that Argentina could not have been unaware that a considerable number of Italian bondholders had not accepted its Exchange Offer and that a dispute had arisen in this respect. Thus, Argentina cannot allege that Claimants failed to fulfil the consultation requirement of Article 8(1) based on the

[187] Respondent actually contends that "Argentina has no way of even knowing who such owners [of security entitlements] are," see Annex A to RSP PHB § 6.

denial of TFA's authorities without trying to engage in talks with such Italian bondholders or at least setting up conditions under which Argentina would recognize TFA's authority.

562. Under these circumstances, the Tribunal finds that Argentina is precluded from invoking a failure on Claimants' side to fulfil the consultation requirement under Article 8(1) BIT.

(iii) Consultations Requirement as Expression of Good Will

563. In addition, even if it considered the present circumstances not sufficient to comply with the consultation requirement of Article 8(1) BIT, this would still not constitute a hurdle to the admissibility of Claimants' claims for the following reason:

564. In the view of the Tribunal, the consultation requirement set forth in Article 8(1) BIT is not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way:

- This derives first from the wording of Article 8(1) BIT which provides that consultations should be conducted "*en la medida del possible*" or "*per quanto possibile*," i.e., "to the extent possible." Indeed, Article 8(1) BIT is not drafted in any way as to impose the consultation requirements upon the Parties under any circumstances. It is only refers to the possibility of such amicable settlement talks, whereby such term is to be reasonably understood as referring not only to the technical possibility of settlemen talks, but also to the possibility, i.e. the likelyhood, of a positive result.

- It also derives from the general purpose and aim of such provision, which is to allow amicable settlement where such settlement is wanted and supported by both Parties. Where one or both Parties did not have the good will to resort to consultation as an amicable means of settlement, it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from

the outset. Willingness to settle is the *sine qua non* condition for the success of any amicable settlement talk.

565. As such, the Tribunal considers that a potential non-compliance with the consultation requirement set forth in Article 8(1) BIT would simply express that the premises for an amicable settlement were not given because one or both of the Parties were not willing to give the dispute an amicable end. As such, it could not be considered to constitute *per se* a hurdle to the admissibility of the claim, thereby preventing any other dispute resolution means provided in Article 8 BIT to come to play.

(d) Conclusion

566. In conclusion and in (partial) response to Issue No. 4, the Tribunal holds that the prior consultation requirement set forth in Article 8(1) BIT does not constitute an impediment to the admissibility of Claimants' claims. In particular:

(i) Consultations did take place between TFA, as representative of Italian bondholders, and Argentina;

(ii) Argentina is precluded from invoking the non-fullfilment by Claimants of the consultation requirement; and

(iii) Even if Claimants were considered not to have fulfilled this requirement, this non-compliance would simply express that the premises for an amicable settlement were not given and cannot be interpreted as constituting a hurdle to the admissibility of Claimants' claims.

(4) <u>18 Months Litigation Requirement – Issues 4 & 5</u>

(a) Issues and Relevant Legal Provisions

567. To recall, Article 8(2) BIT provides for a requirement to resort to local courts for a duration of 18 months in case the previously-conducted consultations have failed.

The Parties hold diverging views as to the nature of this litigation requirement and the consequence of a non-compliance therewith on the admissibility of the present claims.

568. On the basis of the Parties' submissions, the specific issues to be determined by the Tribunal in this regard are the following:

- Is the 18 months litigation requirement a mandatory prior prerequisite for the conduct of arbitration proceedings, the non-fulfillment of which constitutes a hurdle to the admissibility of a claim? (see Issue 4 of the List of 11 Issues of 9 May 2008)

- If so, can Claimants be considered to have been released from the 18 months litigation requirement, either

  • based on the futility rule or

  • based on the MFN clause of Article 3(1) BIT in connection with the "more favorable" arbitration clause contained in the Argentina-Chile BIT? (see Issues 4 and 5 of the List of 11 Issues of 9 May 2008).

569. The key legal provisions and other documents in dealing with the above issues are the following: Articles 3(1) and 8(2)-(4) BIT and Article 10 Argentina-Chile BIT.

570. The wording and content of Articles 3(1) and 8(1) to (4) BIT is reproduced above at §§ 305 and §§ 267 *et seq.*

571. Article 10 Argentina-Chile BIT provides as follows in its Spanish authentic version:

> "(1) Toda controversia relativa a las inversiones en el sentido del presente Tratado, entre una Parte Contratante y un nacional o sociedad de la otra Parte Contratante será, en la medida de lo posible, solucionada por consultas amistosas entre las dos partes en la controversia.

(2) Si la controversia no hubiera podido ser solucionada en el término de seis meses a partir del momento en que hubiera sido planteada por una u otra de las partes, será sometida, a pedido del nacional o sociedad.

-- o bien a jurisdicciones nacionales de la Parte Contratante implicada en la controversia;

-- o bien al arbitraje internacional en las condiciones descriptas en el párrafo 3.

Una vez que un nacional o sociedad haya sometido la controversia a las jurisdicciones de la Parte Contratante implicada o al arbitraje internacional, la elección de uno u otro de esos procedimientos será definitiva.

(3) En caso de recurso al arbitraje internacional la controversia podrá ser llevada ante uno de los órganos de arbitraje designados a continuación a elección del nacional o sociedad;

Al Centro Internacional de Arreglo de Diferencias Relativas a inversiones (CIADI), creado por el "Convenio sobre Arreglo de Diferencias Relativas a las Inversiones sobre Estados y Nacionales de otros Estados", abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado parte en el presente Convenio haya adherido a aquél. Mientras esta condición no se cumpla, cada Parte Contratante da su consentimiento para que la controversia sea sometida al arbitraje conforme con el Reglamento del Mecanismo Complementario del CIADI;

A un tribunal de arbitraje ad hoc establecido de acuerdo con las reglas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI)."

(b) Parties' Positions

572. As mentioned above (see §§ 555 *et seq.*), Respondent contends that Article 8 BIT articulates a multi-layered, sequential dispute resolution system setting forth a three-step mandatory process which Claimants have not complied with and therefore, constitutes a jurisdictional bar. Accordingly to Respondent, this is in particular true with regard to the 18 months litigation requirement, which Claimants have not fulfilled.[188]

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188 R-R-MJ §§ 661 *et seq.*, 694 *et seq.*

573. Respondent further contends that the arguments invoked by Claimants in order to circumvent the 18 months litigation requirement are not convincing: [189]

(i) The mere argument that resort to domestic courts would involve time or money may not render such litigation "futile."

(ii) The Emergency Law does not prevent Claimants from submitting a dispute before the Argentinean courts under the BIT.

(iii) Claimants may not invoke the MFN clause to circumvent the mandatory consultation requirement for the following reasons: (a) the MFN clause applies only to investments, not to dispute resolution mechanisms; (b) the MFN clause concerns only treatment "in the territory" of Argentina whereas arbitration is to be conducted abroad; (c) it cannot be stated that the resort to Argentinean courts is necessarily a "less favorable" treatment; and (d) even if the MFN clause operates to incorporate the dispute resolution clause under the Argentina-Chile BIT, Claimants have still failed to conduct adequate consultations so that the necessary requirements for arbitration under the Argentina-Chile BIT are not met either.

574. In contrast and as mentioned above (see § 558 above), Claimants contend that Article 8 BIT aims to provide the Parties with different options of dispute resolution and does not institute a compulsory multi-layered, sequential dispute resolution system. In other words, the 18 months litigation requirement is not a mandatory prior prerequisite for the initiation of arbitration proceedings and its non-compliance is therefore irrelevant.[190]

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189 R-MJ §§ 387 *et seq.*; R-R-MJ §§ 661 *et seq.*, 694 *et seq.*; R-PHB §§ 267 *et seq.*

190 C-MJ §§ 544 *et seq.*; C-R-MJ §§ 543 *et seq.*; C-PHB §§ 323 *et seq.*

575. Even if considered a mandatory preliminary requirement, Claimants submit that they should be relieved from having to comply with such requirement for the following two main reasons: (i) because conducting litigation before the Argentine courts would have been futile and would have defeated the very object and purpose of the BIT, and (ii) even if not considered futile, Claimants would be exempted from any potential obligation to go before local courts based on the broad wording of the MFN clause of Article 3(1) BIT, which entitles Claimants to invoke the more favorable dispute resolution clause contained in the Argentina-Chile BIT and which does not require prior court litigation.[191]

(c) Tribunal's Findings

576. It is undisputed that Claimants did not submit their dispute to the Argentine courts before initiating the present arbitration. Thus, the first question is whether Claimants should have done so.

(i) The System Put in Place by Article 8 BIT

577. Article 8 BIT provides for three different types of dispute resolution means: amicable consultations (Article 8(1)), proceedings before the ordinary or administrative courts of the concerned State (Article 8(2)), and international arbitration (Article 8(3)). As to the relationship between these three mechanisms, the Tribunal finds that both the structure of Article 8 BIT as well as its wording indicate a certain order among these three means:

- Article 8(1) establishes the core principle of amicable consultations as the first and foremost means of dispute settlement;

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[191] C-MJ §§ 557 *et seq.*, §§ 594 *et seq.*; C-R-MJ §§ 556 *et seq.*, §§ 643 *et seq.*; C-PHB §§ 330 *et seq.*, §§ 347 *et seq.*

- Article 8(2) then introduces the second means, i.e., the submission of the dispute to the ordinary or administrative courts, applicable under the following circumstance: "if the dispute has not been settled in such consultations." Thereby, the recourse to courts is linked to some extent to the absence or failure of amicable consultations;

- Article 8(3) then introduces the method of international arbitration whereby it is introduced within a specific context: "[i]f, after 18 months from the notification of commencement of an action before the national courts indicated above in paragraph 2, the dispute between the Contracting Party and the investors still continues to exist […]";

- Article 8(4) then provides that in case of commencement of arbitration proceedings, each disputing party shall take any appropriate measures to desist from the judicial action in course.

578. Thus, the order, structure and wording of Article 8 clearly indicate that these three dispute resolution means were, to some extent, interconnected, with the underlying idea that it is the failure of one of them that would trigger the next one. In other words, Article 8 did not provide for a mere "pick and choose" solution, leaving the disputing parties free to pick any of the means at any time. Article 8 provided for an integrated system, built upon a certain hierarchy or order of the three interconnected means of dispute resolution.

(ii) General Consequences of a Disregard of the System

579. At the same time, the wording of Article 8 BIT itself does not suffice to draw specific conclusions with regard to the consequence of non-compliance with the order established by Article 8. In this respect, regard should be given to the context, as well as to the purpose and aim of Article 8. The system put in place by Article 8 is a system aimed at providing the disputing parties with a fair and efficient dispute settlement mechanism. As such, the idea of fairness and efficiency must be taken

into account when interpreting and determining how the system is supposed to work and what happens if one part of the system fails or is otherwise disregarded by one party.

580. Thus, the Tribunal is of the opinion that Claimants' disregard of the 18 months litigation requirement is in itself not yet sufficient to preclude Claimants from resorting to arbitration. The real question is whether this disregard, based on its circumstances, can be considered compatible with the object and purpose of the system put in place by Article 8, or whether it goes against it.

581. Answering this question requires to examine more in detail the object and purpose as well as the meaning of the 18 months litigation requirement and the interests at stake. According to Respondent, the 18 months litigation requirement was put in place to give the Host State the opportunity to address the allegedly wrongful act within the framework of its own domestic legal system and to provide a chance to resolve the dispute in a potentially shorter period than international arbitration.[192] In this respect, it would be irrelevant whether the 18 months time frame is a realistic time frame for the reaching of a final decision, the purpose of this paragraph being merely to provide the Host State with an opportunity to address the issue before resorting to international arbitration. Thus, the relevant question is not "could the dispute have been efficiently settled before the Argentine courts?", but "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?"

582. This question in turn requires a weighting of the interests of the Parties, i.e., of Argentina in being given the opportunity to address the dispute through the

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192 R-PHB § 290.

framework of its domestic legal system, and of Claimants in being provided with an efficient dispute resolution mechanism. Thus, the Tribunal is of the view that the disregard of the 18 months litigation requirement can only be considered incompatible with the system of Article 8 where it unduly deprived the Host State of a fair opportunity to address the issue through its domestic legal system. In this respect, the Tribunal considers that this opportunity must not only be a theoretical opportunity, but there must be a real chance in practice that the Host State, through its courts, would address the issue in a way that could lead to an effective resolution of the dispute.

583. Where, based on the overall circumstances of the case, it appears that such opportunity was only theoretical and/or could not have led to an effective resolution of the dispute within the 18 months time frame, it would be unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement. The reason is that such disregard would not have caused any real harm to the Host State, whilst in contrast, the deprivation of the investor's right to resort to arbitration would, in effect, deprive him of an important and efficient dispute settlement mean.

584. This conclusion derives more from a weighting of the specific interests at stake rather than from the application of the general principle of futility: It is not about whether the 18 months litigation requirement may be considered futile; it is about determining whether Argentina's interest in being able to address the specific claims through its domestic legal system would justify depriving Claimants of their interests of being able to submit it to arbitration.

(iii) Consequences of Claimants' Disregard of the 18 Months Litigation Requirement

585. By not resorting to the Argentine courts, Claimants disregarded the 18 months litigation requirement. It is further established that Claimants had the possibility to bring claims before the Argentine courts. However, looking at the nature of the

claims that were available to Claimants, the Tribunal finds that none of them would have been suited to address the present claims in such a way as to effectively resolve the dispute:

- *Claims for compensation*: Claims for compensation for the damage caused to Claimants by Argentina's actions surrounding its default were deemed to fail in view of the Emergency Law and other relating decrees and budget laws,[193] which prohibited the Argentine government from entering into any juridical, extra-juridical or private transaction. Thus, even in the case that Claimants would have won the case before the courts, the government would still have been under the impossibility to pay out the compensation.[194]

- *Claims for unconstitutionality of the Emergency Law*: Claimants could have initiated proceedings aiming at declaring the Emergency Law unconstitutional for breach of the BIT. However, claims for compensation could only be filed once the Emergency Law would have been considered unconstitutional, which is highly unlikely to have been possible within the 18 months time frame.

586. In addition, the Tribunal finds that in the light of the uproar created by Argentina's Emergency Law, the Argentinean Government could have arranged for an examination of the constitutionality of the Emergency Law. Such examination could have brought clarity on the effectiveness of claims before the Argentinean courts against the Argentinean Government. However, Argentina did apparently not see the need to proceed with such examination.

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193 See also Law 25,561 of January 2002 and Resolution 73/2002, by which Argentina deferred the repayment of its sovereign debt, and the subsequent decrees and budget laws maintaining such deferral, see BIANCHI I, § 42 and BIANCHI II, §§ 59 *et seq.*

194 See BIANCHI I, §§ 42 *et seq.* and BIANCHI II, §§ 59 *et seq.*

587. In addition, it should be noted that Argentina's legal system does generally not provide for mass claims mechanisms,[195] and that Claimants would therefore have needed to initiate separate claims.[196] This would have been incredibly burdensome for them and for the courts, and would very likely have caused substantial delay in the handling of the cases by the courts.

588. In the light of the Emergency Law and other relevant laws and decrees, which prohibited any kind of payment of compensation to Claimants, the Tribunal finds that Argentina was not in a position to adequately address the present dispute within the framework of its domestic legal system. As such, Argentina's interest in pursuing this local remedy does not justify depriving Claimants of their right to resort to arbitration for the sole reason that they decided not to previously submit their dispute to the Argentinean courts.

589. Under these circumstances, the Tribunal considers that it is not necessary anymore to examine Issue No. 5, i.e., whether the MFN clause contained in Article 3(1) BIT may have entitled Claimants to rely on the allegedly more favorable dispute resolution clause contained in Article 10(1) Argentina-Chile BIT.

(d) Conclusion

590. In conclusion and in (partial) response to Issues Nos. 4 and 5, the Tribunal holds that the disregard by Claimants of the 18 months litigation requirement does not preclude them from resorting to ICSID arbitration. In particular, the Tribunal finds that:

(i) Article 8 provides for an integrated dispute resolution mechanism built upon a certain hierarchy or order of three interconnected means whereby the

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195 See NAGAREDA, §§ 8, 15-16; MATA, §§ 52 *et seq.*, R-R-MJ § 152.

196 See MATA, §§ 35 *et seq.*, 49 *et seq.*

wording of Article 8 itself does not suffice to draw specific conclusions with regard to the consequences of non-compliance with the order established by Article 8.

(ii) The question whether Claimants' disregard of the 18 months litigation requirement justifies precluding them from resorting to arbitration requires a weighting of interests between Argentina's interest to be given the opportunity to address the dispute through the framework of its domestic legal system and Claimants' interest in being provided with an efficient dispute resolution means.

(iii) Based on the circumstances of the present case and in particular the Emergency Law and other relevant laws and decrees, Argentina's interest in pursuing the 18 months litigation requirement does not justify depriving Claimants of their right to resort to arbitration for the sole reason that they decided not to previously submit their dispute to the Argentinean courts.

591. In view of the above conclusions, the question whether Claimants could have relied on the MFN clause of Article 3(1) BIT in connection to Article 10(1) Argentina-Chile BIT in order to evade the 18 months litigation requirement (Issue No. 5 of the List of 11 Issues of 9 May 2008) is moot.

(5) Withdrawal and Addition of Claimants - Issues 3(a) and 3(b)

(a) Relevant Facts

592. The following facts may be recalled in connection with the issues relating to the withdrawal and addition of Claimants:

- Claimants, as presented by Claimants, are those described in the Annexes A, B and C to the Request for Arbitration, the total number of whom at the time

of initiation of the arbitration exceeded 180,000.[197] Annexes A and B to the Request for Arbitration contain a list of natural persons; Annex C to the Request for Arbitration contains a list of juridical entities.[198] (see § 1 above)

- On 19 and 22 December 2006, Claimants submitted supplemental Annexes in relation to information contained in Annexes A through E, and submitted Annexes K and L. The substitute annexes reflect: (i) an addition of certain Claimants (separately listed in Annex K), (ii) the withdrawal of certain Claimants (separately listed in Annex L), (iii) limited corrections and substitutions to the information on Claimants (Annexes A-E), (iv) the revision of the aggregate amounts (Annex I), and (v) the addition of one new bond series (Annex J). (see § 103 above)

- On 5 February 2007, Claimants submitted "substituted versions" of Annexes A through E, K, L, I and J. The substitute annexes reflect: (i) the withdrawal of certain Claimants (listed separately in Annex L), (ii) certain corrections and substitutions to the documentation for other Claimants, and (iii) the revision of certain aggregate amounts based on the foregoing adjustments (Annexes I and J). (see § 107 above)

- On 7 February 2007, the Secretary-General of the ICSID registered Claimants' Request for Arbitration with accompanying Annexes A through L, and issued the Notice of Registration. (see § 108 above)

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[197] See C-MJ § 164, stating that the total number of Claimants at the time of filing the C-MJ is 180,285. See also Navigant I § 27 and Cremieux § 22.

[198] Annex D to the Request for Arbitration contains a power of attorney and delegation of authority for each Claimant being a natural person to White & Case LLP (*see* page 1 above). Annex E to the Request for Arbitration contains a power of attorney and delegation of authority for each Claimant being a juridical person to White & Case LLP.

- On 7 November 2008, Claimants filed their Counter-Memorial on Jurisdiction, accompanied by substitute versions of Annexes A through E, K and L. (see § 135 above)

- On 5 October 2010, Claimants filed a letter submitting that certain Claimants, who tendered into the Exchange Offer 2010, would no longer participate in the present arbitration, thereby reducing the number of remaining Claimants to approximately 60,000. Claimants attached to their letter updated versions of Annexes A, B, C and L to the Request for Arbitration, the latter containing a list of all Claimants who have withdrawn from the arbitration since 14 September 2006. (see § 216 above)

- On 26 November 2010, the Tribunal issued its Procedural Order No. 9 in which it rejected Respondent's request for further specific information on the identity of the Claimants having tendered into the Exchange Offer 2010 and announced that the question of the allocation of the arbitration costs concerning the Claimants who withdrew would be dealt with in the Tribunal's upcoming determination on jurisdiction together with the question of the withdrawal of a number of Claimants. (see § 220 above)

(b) Issues and Relevant Legal Provisions

593. As summarized in the preceding section, between the filing of the Request for Arbitration and its registration, as well as thereafter, the number of Claimants has changed and, from time to time, Claimants have submitted substitute annexes with updated information on the number and identity of Claimants. It is disputed between the Parties whether it is admissible to change the number of Claimants once the Request for Arbitration has been filed, and what the consequences of such changes are.

594. Thus, the specific issues to be determined by the Tribunal in this regard are the following:

(i) To what extent is it admissible to add new Claimants to the present arbitration proceedings? And if so, what are the consequences of such addition? (see Issue No. 3(b) of the List of 11 Issues of 9 May 2008);

(ii) To what extent is it admissible to withdraw existing Claimants? And, to the extent possible, what are the conditions for withdrawing existing Claimants? In addition, what are the consequences of a withdrawal of a Claimant?

595. The key legal provisions and other documents in dealing with the above issues are the following: Articles 36, 44 and 45 ICSID Convention; Rules 24, 25 and 44 ICSID Arbitration Rules; and Rules 1 *et seq*. ICSID Institution Rules.

596. Article 36 ICSID Convention provides as follows:

> "(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.
>
> (2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.
>
> (3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dis- pute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register."

597. To recall, Article 44 ICSID Convention provides as follows:

> "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

598. Article 45 ICSID Convention provides as follows:

"(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so."

599. Rules 24 and 25 ICSID Arbitration Rules provide as follows:

"Rule 24
Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 25
Correction of Errors

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered."

600. Rule 44 ICSID Arbitration Rules provide as follows:

"Discontinuance at Request of a Party

If a party requests the discontinuance of the proceeding, the Tri- bunal, or the Secretary-General if the Tribunal has not yet been consti- tuted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue."

601. Articles 1 and 2 ICSID Institution Rules provide as follows:

"Rule 1
The Request

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation or arbitration proceedings under the Convention shall address a request to that effect in writing to the Sec- retary-General at the seat of the Centre. The request shall indicate whether it relates to a conciliation or an arbitration proceeding. It shall be drawn up in an official language of the Centre, shall be dated, and shall be signed by the requesting party or its duly authorized represen- tative.

(2) The request may be made jointly by the parties to the dispute.

Rule 2
Contents of the Request

(1) The request shall:

(a) designate precisely each party to the dispute and state the address of each;

(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;

(c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdi- vision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;

(d) indicate with respect to the party that is a national of a Contracting State:

(i) its nationality on the date of consent; and

(ii) if the party is a natural person:

(A) his nationality on the date of the request; and

(B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or

(iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contract- ing State for the purposes of the Convention;

(e) contain information concerning the issues in dispute indi- cating that there is, between the parties, a legal dispute aris- ing directly out of an investment; and

(f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.

(2) The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.

> (3) "Date of consent" means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted."

(c) Parties' Positions

602. Respondent contends that Claimants' repeated use of substitute annexes to unilaterally change the identity of Claimants is incompatible with the ICSID Convention and Rules. In particular:

(i) The addition of new Claimants after the filing of the Arbitration Request is not permissible without Argentina's consent. It is in breach of Article 36 ICSID Convention and may not be justified by Rule 25 ICSID Arbitration Rules, which does not apply to corrections concerning the number and identity of the parties themselves.[199]

(ii) The withdrawal of Claimants is not admissible without the consent of Argentina or the permission by the Secretary-General according to Rule 44 ICSID Arbitration Rules. This derives from the irrevocable nature of a State and/or investor's consent to ICSID arbitration. Claimants cannot rely on Article 44 ICSID Convention to override the irrevocable nature of the parties' consent, which constitutes a prerequisite for ICSID's jurisdiction. Consequently, the Claimants listed in Annex L remain parties to the present arbitration without however being represented by White & Case and are thus, without adequate representation.[200] In their latest correspondence, Respondent has stated that it does not oppose the discontinuance of the proceedings in respect of those Claimants who, among those listed in Claimants' Annex L, have entered into the Exchange Offer 2010, and that it

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199 See R-PHB §§ 240 *et seq.*

200 See R-PHB §§ 258 *et seq.*

would agree to the discontinuance as to Claimants having withdrawn for other reasons, provided they agree to discontinuance on the same terms as those applicable to those who have tendered into the Exchange Offer 2010.[201]

603. Claimants contend that the addition and withdrawal of Claimants through the submission of substitute annexes is fully consistent with the ICSID framework and that the Tribunal has full authority to accept these annexes under Article 44 ICSID Convention. Claimants support their position with the following main arguments:[202]

(i) *Before the Registration:* Claimants contend that the admissibility of annexes submitted before the registration is part of the Request for Arbitration accepted by ICSID Secretary-General and is thus not reviewable by the Tribunal. It has already been admitted.

(ii) *After the Registration:* The submission of substitute annexes is fully consistent with ICSID framework and their amendment is further authorized by Rule 25 ICSID Arbitration Rules.

(iii) *No prejudice to Respondent:* In addition, Claimants contend that the changes to the annexes do not prejudice Respondent because most of them were submitted before the constitution of the Arbitral Tribunal so that none of Respondent's defense rights were affected. While Claimants assert that no new Claimants were added after the registration of the Request for Arbitration, they contend that the withdrawal of certain Claimants after the registration actually benefit Respondent so that it cannot claim any prejudice in this respect.

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201 See letter from Respondent of 22 October 2010 (see above §217)

202 See C-MJ §§ 503 *et seq.*, C-R-MJ §§ 507 *et seq.*,C-PHB §§ 309 *et seq.*

(d) Tribunal's Findings

604. The question of the addition and withdrawal of Claimants was addressed by the Parties together with the issue of the admissibility of substituted annexes to the Request for Arbitration. The Tribunal considers that, whilst the addition and withdrawal of Claimants has been effected through the submission of specific substitute annexes, questions regarding the additions and withdrawal of Claimants are to be distinguished from questions regarding the admissibility of modifications to instruments or supporting documents filed in the form of the substitute annexes. Indeed, the question of being a claimant is one of the cornerstones of ICSID's jurisdiction and not just part of any instrument or supporting document in the sense of Rule 25 ICSID Arbitration Rules submitted in support of allegations made in the Request for Arbitration or other written submissions. The question concerning the admissibility of the substitute annexes as "any instrument or supporting document" will therefore be addressed separately (see §§ 672 *et seq.* below).

(i) Addition of Claimants

605. It appears that all additions of Claimants have been made by means of Annex K, as substituted, before the Notice of Registration of the Request for Arbitration of 7 February 2007. Claimants therefore contend that the admissibility of such additions, as contemplated in the submission of substitute Annex K, has already been accepted by the ICSID Secretary-General when registering the Request for Arbitration.

606. It is true that the ICSID Secretary-General reviews the request for arbitration and takes the decision whether to accept or refuse to register it. However, this examination is limited to making sure that the request for arbitration in question contains all information requested in Article 36 ICSID Convention in connection with Rules 1 *et seq.* ICSID Institution Rules, including information on the identity of the parties, and that the request for arbitration is not "manifestly outside the jurisdiction of the Centre." Where certain documents or information are missing,

the ICSID Secretary-General will prompt the parties to submit the additional information or documents before accepting the request. Only where the ICSID Secretary-General considers that a request for arbitration is manifestly outside ICSID's jurisdiction he or she will refuse to register a request. Thus, the scope of examination of the ICSID Secretary-General is limited and cannot be considered to cover all aspects relevant to ICSID's jurisdiction and/or to the admissibility of the case as such.

607. As mentioned above, the addition of Claimants is to be distinguished from other corrections or additions to supporting information or documents. The identity of Claimants is a core element of ICSID's jurisdiction. Consequently, the question of who are the actual Claimants to the present arbitration cannot be considered to have been definitely dealt with by the ICSID Secretary-General and is subject to the examination of the Tribunal. This question includes the question of who duly initiated the arbitration.

608. Article 36 ICSID Convention requires as a matter of principle that relevant information on the parties' identity be submitted with the request for arbitration. In this regard, two issues arise in connection with the present arbitration:

- Firstly, the timing of the information relating to Claimants: The identity of Claimants was changed, in the sense that Claimants were added, after the filing of the Request for Arbitration;

- Secondly, the form in which information on Claimants' identity was submitted: Instead of inserting relevant information in the Request for Arbitration, Claimants submitted information on their identity in the form of annexes to such Request.

609. With regard to the timing of the submission of the annexes, the Tribunal does not consider it problematic for the following two main reasons: (i) Article 36 ICSID Convention does not prohibit that the lack of relevant information in the request for

arbitration may be cured before its registration; it actually conforms to ICSID's practice and the powers of the Secretary-General to give parties the opportunity to complement their request for arbitration before its registration if any core information is missing; and (ii) since the question of the identity of the Claimants is subject to the Tribunal's competence, it can only be finally examined once the Tribunal is constituted. When the Tribunal took over the case and started with the examination, all new Claimants had already been added, and the examination of "old" and "new" Claimants jointly did not cause any particular prejudice to Respondent.

610. One further point is Respondent's argument that the subsequent addition of Claimants in fact constituted the filing of new requests for arbitration, which should have been the object of separate proceedings. However, the Tribunal finds that this does not lead to the inadmissibility of the addition of Claimants for two main reasons:

- First, it is possible to unilaterally withdraw a request for arbitration before its registration and one could easily consider the withdrawal of one among several Claimants through the withdrawal of its request for arbitration. This would not lead to any particular problem and would just reduce the number of Claimants. Conversely, under the circumstances of the present case, it is also possible to add claimants prior to the registration of the request for arbitration.

- Second, the question of addition of Claimants to a claim is closely related to the question of whether "mass proceedings" are admissible under the ICSID framework. The Tribunal considers that such proceedings were admissible (see §§ 515-551 above), and the nature of such mass proceedings may require making certain adjustments to the number and identity of Claimants.

611. In conclusion, the Tribunal considers that the addition of Claimants after the filing of the Request for Arbitration and before its registration through the submission of Annex K, as substituted, is admissible and does not contravene any of the provisions of the ICSID Convention and Rules.

612. **Consequently**, the Tribunal rules that the present arbitration proceedings were validly initiated by all the Claimants mentioned in Annex K as being in the record before the date of the Notice of Registration of the Request for Arbitration, i.e., 7 February 2007.

(ii) Withdrawal of Claimants

613. Since the filing of the Request for Arbitration on 14 September 2006, Counsel for Claimants informed ICSID, the Tribunal and Respondent on various occasions of the "withdrawal" of several thousands of Claimants from the proceedings. This "withdrawal" happened in several stages, namely, on 19/22 December 2006, 5 February 2007, 7 November 2008, and 5 October 2010 (see §§ 103, 107, 135 and 216 above, as summarized in § 592 above) and was effected through the submission of substitute versions of Annex L, listing each time the Claimants who were withdrawing. All in all, it is common ground between the Parties that out of approximately 180,000 Claimants about 120,000 have purportedly withdrawn.

(a) Withdrawal, Discontinuance and Default

614. With regard to "withdrawals" announced before the Notice of Registration of the Request for Arbitration on 7 February 2007, they are unproblematic since it is admitted under Rule 8 ICSID Institution Rules that a claimant may unilaterally withdraw its request for arbitration before its registration. As such, Claimants listed in Annex L of 19 and 22 December 2006 and the substitute Annex L of 5 February 2007 are deemed to have validly withdrawn their Request for Arbitration.

615. With regard to "withdrawals" announced after the date of the Notice of Registration, the situation is different. After the registration of a request for

arbitration, a claimant may not unilaterally withdraw its request for arbitration without the consent of the other party. In other words, once a request for arbitration is registered, a unilateral withdrawal by a party is no longer possible and a party may only be excluded from the proceedings through the mechanism of discontinuance under Rules 43 and 44 ICSID Arbitration Rules.

616. Thus, the notices by which Counsel for Claimants informed the Tribunal and Respondent of the withdrawal of further Claimants on 7 November 2008 and 5 October 2010 in the form of substitute versions of Annex L cannot, by themselves, effect the withdrawal of the concerned Claimants from the proceedings.

617. However, as an expression of the desire of these Claimants not to participate anymore in the proceedings, these notices may be interpreted in a twofold manner: (i) as requests for discontinuance of the proceedings pursuant to Rule 44 ICSID Arbitration Rules and/or (ii) as announcement of default by the concerned Claimant in the sense of Article 45 ICSID Convention.

618. In order to determine whether the concerned Claimants' "withdrawal" is to be considered a request for discontinuance or a default, the Tribunal has to consider the following: Did the concerned Claimants wish to withdraw from the ICSID proceedings, i.e., not participate anymore, or did they merely wish to revoke the TFA Mandate Package and continue to be part of the proceedings but without being represented by TFA and White & Case.

619. Based on Claimants' submissions, it appears that the intention of the concerned Claimants was to withdraw from the proceedings in the sense of not being anymore part thereof, contrary to the wish to continue the proceedings in a different setting of representation. The latter would anyway not be possible under the terms of the TFA Mandate Package, which interlinks the withdrawal from the ICSID arbitration and the revocation of the TFA Mandate Package (see §§ 86 *et seq.*).

620. **Consequently**, the Tribunal holds that the concerned Claimants' "withdrawal" is to be considered a request for discontinuance pursuant to Rule 44 ICSID Arbitration Rules, thereby subject to the conditions and modalities set forth in Rule 44.

(b) Conditions for Discontinuance

621. According to Rule 44 ICSID Arbitration Rules (quoted at § 600 above), the Tribunal may only issue an order for discontinuance where the other party has not objected thereto. In case of objection, Rule 44 provides that "the proceedings shall continue," meaning that the Tribunal shall issue an award on the dispute as initially commenced.

622. Respondent's position regarding the concerned Claimants' withdrawal is the following: Initially, Respondent objected to the withdrawal of Claimants and insisted that these Claimants be considered in default, that the proceedings be continued and that any award be considered binding on these Claimants.[203]

623. In its communication of 22 October 2010 (see § 217 above), Respondent changed its position stating as follows:

> "[…] the Argentine Republic does not oppose discontinuance of the proceedings in respect of those Claimants who, among those listed in Claimants' Annex L, have entered into the 2010 Exchange Offer.
>
> […]
>
> In any event, the Argentine Republic would consider agreeing to discontinuance as to Claimants wishing to withdraw for other reasons, provided they agree to discontinuance on the same terms as those applicable to those who tendered into the 2010 Exchange Offer."

624. With regard to the terms of discontinuance "applicable to [the Claimants] who tendered into the 2010 Exchange Offer," Respondent refers to the acceptance by

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[203] R-MJ § 372, R-R-MJ § 638.

such Claimants "to abandon, dismiss, withdraw and discontinue such proceedings (with each party to bear its own attorney fees and costs, except that Argentina shall not bear any court fees)."[204] The full paragraph of the relevant part of the Exchange Offer 2010 prospectus provides as follows:

> "[…] your tendered Eligible Securities are not the subject of any administrative, litigation, arbitral, or other legal proceedings against Argentina or the trustee or fiscal agent of such Eligible Securities (including claims for payment of past due interest, principal or any other amount sought in connection with your tendered Eligible Securities or for compensation of lawyers' costs and court fees), except that, to the extent that your tendered Eligible Securities are the subject of such proceedings, (a) **you agree to abandon, dismiss, withdraw and discontinue such proceedings (with each party to bear its own attorney fees and costs, except that Argentina shall not bear any court fees) in full and final settlement** thereof if and to the extent that cancellation of the tendered Eligible Securities and settlement (including delivery of your New Securities and payment of cash, if applicable) occur pursuant to the terms of the Invitation, and you agree to promptly take any necessary or appropriate steps to implement such withdrawal and dismissal, including, without limitation, the termination of any power of attorney or agency agreement, (b) you hereby authorize Argentina (or its legal counsel) to file any document with any administrative body, court, tribunal or other body before which any such proceedings are pending or that has issued or recognized any payment order, judgment, arbitral award or other such order in order to have the proceedings withdrawn, dismissed and discontinued with prejudice and (c) you agree to deliver and hereby authorize your legal counsel to deliver to your custodian, the information agent and Argentina (or its legal counsel) without undue delay following the Early Settlement Date or the Final Settlement Date, as applicable, all additional documents, court filings or further authorizations as requested by Argentina to withdraw, dismiss and discontinue with prejudice any pending administrative, litigation, arbitral or other legal proceeding against Argentina in full and final settlement thereof." (Emphasis added)

625. In its letter of 22 October 2010, Respondent simplifies the above cost requirements as follows:

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[204] See Respondent's letters of 2 November 2010 and C-999B, p. 88 § 20.

> "In addition, we note that the terms of the 2010 Exchange Offer provide that the Argentine Republic would not be responsible for any costs in connection with any proceeding dismissed pursuant to acceptance of the 2010 Exchange Offer. Accordingly, the Argentine Republic respectfully requests the Tribunal to order that **the Argentine Republic and those Claimants with respect to which proceedings will be discontinued under the terms of this letter, equally bear the arbitration costs, and each of them bear their own costs.**"
>
> (Emphasis added)

626. As mentioned above (§623), Respondent also extends those conditions to Claimants who have purportedly withdrawn for other reasons.

627. In summary, the terms of the discontinuance under the Exchange Offer 2010 as simplified in Respondent's letter of 22 October 2010 are two-fold:

- They imply the acceptance of a specific allocation of costs relating to present arbitral proceedings, and

- They imply the "full and final" character of the discontinuance, i.e., with prejudice to reinstatement.

(c) Terms of Discontinuance

628. The Tribunal can only order discontinuance to the extent it is accepted by Respondent, i.e., to the extent that such discontinuance would be "full and final" and that costs be allocated as requested by Respondent.

629. The Tribunal finds Respondent's conditions acceptable. It considers that in the present case a discontinuance under Article 44 ICSID Arbitration Rules is of a "full and final" character:

- It is "final" in the sense that the discontinuance bears prejudice to reinstatement and that the Claimants affected by the discontinuance may neither "resume" the present proceedings nor institute new proceedings based on the same claim. Based on the circumstances of the present case, in particular the fact that it is Claimants who decided to withdraw – after several

years and without specifying any particular reason - from proceedings which they themselves initiated and which required substantial defense work and efforts from Argentina, it would not be fair to allow them to withdraw now and to re-file the same claim later.

- Further, it is "full" in the sense that it applies to the entirety of the claims of the concerned Claimants and not only to some of them or to some aspects thereof.

630. With regard to the allocation of costs, Rule 44 ICSID Arbitration Rules does not provide for any specific rule. The Tribunal therefore refers to Article 61(2) ICSID Convention, according to which, the tribunal has, unless otherwise agreed by the parties, the power to determine the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses shall be paid.

631. In the exercise of such power and discretion, the Tribunal considers that the terms of the discontinuance concerning the costs as suggested by Respondent are reasonable. After all, Claimants are the ones who initiated the present proceedings, and Claimants, or at least the majority of them, are the ones who decided not to pursue the proceedings any longer. Thus, it is reasonable that they bear, at least partly, the arbitration costs. On the other hand, it is also likely that Respondent's overall behavior in 2010 with regard to Claimants' claims played a certain role in Claimants' decision to continue or withdraw from the present proceedings. For example, one of the aims of the Exchange Offer 2010 was to provide a way to release Argentina from claims related to the bonds; another one was to terminate legal proceedings against Argentina in respect of the tendered Eligible Securities in consideration for the issuance of New Securities (see § 93 above). Thus, the Tribunal finds that both sides bear an equal share of the cost burden. Therefore, the Tribunal accepts the cost allocation as suggested by Respondent.

632. In summary, Respondent and the Claimants subject to discontinuance shall each bear half of the arbitration costs (i.e., the fees and expenses of the Tribunal members and the charges for use of the Centre's facilities) and bear their own cost. In other words, the concerned Claimants and Respondent shall not be held liable for each other's cost, which include in particular legal costs.

633. The manner in which those costs are to be attributed is addressed in Chapter IV below ("Costs").

634. Based on the foregoing, the Tribunal issues the cost order in the Dispositive part of this Decision (see § 713 below).

635. **In conclusion**, the terms of a discontinuance of the proceedings pursuant to Rule 44 ICSID Arbitration Rules with regard to Claimants listed in Annex L as substituted at 5 October 2010 are not subject to any relevant objection from Respondent.

(d) Consequences of the Discontinuance

636. For the sake of clarity, the Tribunal finds it useful to specify the consequences and implications of a discontinuance of the proceedings with regard to the withdrawing Claimants.

637. With regard to the proceedings, discontinuance means that the proceedings involving the Claimants who are withdrawing will terminate. Within the context of a claim involving multiple Claimants, and in which only a certain number of the Claimants withdraw, discontinuance does not mean the termination of the entire proceedings. Rather, only those Claimants who are withdrawing will stop being parties to the present proceedings. Thus, as long as one Claimant remains, the present proceedings will continue. Only once the number of withdrawing Claimants

is equal to the number of Claimants having filed the Request for Arbitration as adjusted in Annex K before the date of the Notice of Registration of the Request, it would mean the end of the entire proceedings.[205]

638. With regard to the scope of application of the present Decision, it means that Claimants having withdrawn from the proceedings will not be subject to nor bound by the Decision, except for the considerations in the present section (5) and subject the cost order at § 713 below.

639. As mentioned before (see § 629 above), the discontinuance by the concerned Claimants is in the present case with prejudice to reinstatement.

(e) Conclusion

640. In conclusion and in (partial) response to Issues Nos. 3(a) and 3(b), the Tribunal finds that the present arbitral proceedings have been effectively initiated by all Claimants listed in Annex K as substituted before the Notice of Registration of the Request for Arbitration of 5 February 2007. The Tribunal further finds that the present arbitral proceedings are discontinued as of the date of dispatch of the present Decision with regard to all Claimants listed in Annex L as substituted by Claimants on 5 October 2010. In particular:

(i) The addition of Claimants after the filing of the Request for Arbitration and before its Notice of Registration through the submission of substitute versions

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[205] See also *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic* (ICSID Case No. ARB/03/19), Procedural Order No. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A. of 14 April 2006 and *Aguas Provinciales de Santa Fe S.A., 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), Procedural Order No. 1 *Concerning the Discontinuance of Proceedings with Respect to Aguas Provinciales de Santa Fe S.A.* of 14 April 2006.

of Annex K is admissible and does not contravene any of the provisions of the ICSID Convention and Rules;

(ii) The withdrawal of Claimants before the date of the Notice of Registration of the Request for Arbitration is admissible and these Claimants are thus deemed to have validly withdrawn their Request for Arbitration;

(iii) The withdrawal of Claimants after the registration of the Request for Arbitration is to be considered as a request for discontinuance pursuant to Rule 44 ICSID Arbitration Rules, which is to be granted to the extent that Respondent does not object thereto;

(iv) The terms of a discontinuance of the proceedings pursuant to Rule 44 ICSID Arbitration Rules with regard to Claimants listed in Annex L as submitted by Claimants on 5 October 2010 are not subject to any relevant objection from Respondent;

(v) The request for discontinuance is therefore granted and the proceedings are herewith discontinued with regard to all Claimants listed in Annex L as substituted, the latest one have been submitted by Claimants on 5 October 2010;

(vi) The Tribunal issues the cost order set forth below at § 713 below (see also § 682 *et seq.* below).

641. As an administrative measure, the present proceedings are herewith renamed "*Abaclat et al. v. Argentine Republic*," Ms. Giovanna a Beccara being one of the Claimants having withdrawn and Ms. Abaclat being the next Claimant in alphabetical order.

(6) Abuse of Rights – Issue 2(b)

(a) Issues

642. It is disputed between the Parties whether the Tribunal should refuse to hear the case based on the argument that the initiation of the present proceedings would constitute an abuse of rights by TFA which should not be entertained by the Tribunal.

643. Thus, the specific issues to be determined by the Tribunal are the following:

- As a matter of principle, can the alleged abuse of rights by TFA constitute an impediment to hearing the case?

- If so, has there been an abuse of rights by TFA in the present case?

(b) Parties' Positions

644. Respondent contends that the Tribunal should refuse jurisdiction on the grounds of abuse of process. In Respondent's view, the initiation of this proceeding constitutes an abuse of rights by TFA which is pursuing hidden interests, foreign to Claimants' interest in the present arbitration.[206] The Tribunal should not exercise its powers for purposes other than those established by the consent of the Contracting Parties to the ICSID Convention.

645. Opposing Respondent's submissions in this regards, Claimants contend that the abuse of rights theory is not applicable in international proceedings. Further, according to Claimants, even if applicable, there is no relevant abuse of rights in the present case because the alleged abuse of rights would be committed by TFA

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206 R-MJ §§ 241 *et seq.*, R-R-MJ §§ 394 *et seq.*, R-PHB §§ 230 *et seq.*

and not by Claimants. Such abuse of rights is not imputable to Claimants and would therefore be irrelevant.[207]

(c) Tribunal's Findings

646. The theory of abuse of rights is an expression of the more general principle of good faith. The principle of good faith is a fundamental principle of international law, as well as investment law.[208] As such, the Tribunal holds that the theory of abuse of rights is, in principle, applicable to ICSID proceedings and has, in fact, been previously applied by several ICSID and non-ICSID tribunals in investment cases.[209] The question is thus whether the conditions of an abuse of rights are met, and – if so – what the consequences of such abuse may be.

(i) Good Faith in the Context of Treaty Claims

647. Within the context of treaty claims, a breach of the good faith principle can be invoked with regard to two main aspects of the claim:

(i) With regard to the context and the way in which the investment was made, and for which the investor seeks protection ("material good faith"); and

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[207] C-MJ §§ 473 *et seq.*, C-R-MJ §§ 483 *et seq.*, R-PHB § 216 *et seq.*

[208] See e.g. HERSCH LAUTERPACHT, Development of International Law by the International Court, London, 1958, p. 164. "There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused." See also *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction of 10 June 2010, §§ 169 *et seq.* (hereinafter "*Mobil*") and references quoted therein.

[209] *Mobil*, §§ 169 *et seq.; Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 34877), Interim Award of 1 December 2008, §§ 125-149, § 141 (hereinafter "*Chevron*"); *Phoenix Action Ltd v.The Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009, §§ 107 (hereinafter "*Phoenix*"); *Aguas del Tunari S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction of 21 October 2005, § 321 (hereinafter "*Aguas del Tunari*"); *Tokios Tokelés v.Ukraine* (ICSID Case No. ARB/02/18), Decision on Jurisdiction of 29 April 2004, § 56 (hereinafter "*Tokios Tokelés*"). Comp. with *Rompetrol*, § 115.

(ii) With regard to the context and the way in which a party, usually the investor, initiates its treaty claim seeking protection for its investment ("procedural good faith").

648. With regard to breaches of material good faith, different tribunals have followed two different approaches.[210] Either they have dealt with the question of material good faith within the context of the examination of the Tribunal's jurisdiction or within the context of the examination of the legality of the investment:

(i) It can be seen as an issue of consent and thus of jurisdiction, where the consent of the Host State cannot be considered to extend to investments done under circumstances breaching the principle of good faith;

(ii) It can be seen as an issue relating to the merits, where the key question is whether the circumstances in which the relevant investment was made are meant to be protected by the relevant BIT.

649. With regard to breaches of procedural good faith, there are also two approaches possible. Either one addresses the issue within the context of jurisdiction or within the context of admissibility:

(i) It can be seen as an issue of consent and thus of jurisdiction, where one party considers procedural aspects to be key components of the consent of the Host State; or

(ii) It can be seen as an issue of admissibility, where the key question is whether the way in which the investor initiated the proceedings, although in

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[210] Compare for example *Mobil* and *Phoenix*, where the issue was considered one hindering jurisdiction, with *Rompetrol, Aguas del Tunari* and *Chevron*, where the tribunals touched upon the issue at the jurisdictional phase but considered it had its place at the stage of the merits.

accordance with the applicable provisions, aim to obtain a protection, which he is – under the principle of good faith – not entitled to claim.

650. The difference between these various approaches carries important practical consequences and ought to be carefully examined. There are certainly good reasons in support for each of these approaches, and the choice of the appropriate approach will eventually depend on the circumstances of the case at stake.

(ii) Qualification of the Alleged Abuse of Rights

651. At present, Respondent's contentions with regard to abuse of rights are mainly threefold: [211]

(i) Respondent contends that Claimants did not acquire the investment in accordance with the principle of good faith due to the Italian banks' alleged behavior consisting in the breach of various selling restrictions and other related obligations;

(ii) Respondent contends that the way these proceedings were initiated and are conducted amount to an abuse of rights by TFA, who is pursuing its own interests to the detriment of Claimants' real interests;

(iii) Respondent has never consented to ICSID proceedings being conducted under such circumstances.

652. With regard to Respondent's first contention referred to in § 651 above, the Tribunal considers it to relate to the merits of the case. The Tribunal has already set forth above (see §§ 381-386) that for the purposes of jurisdiction, the Claimants' investment were to be considered made in accordance with the applicable law and that any misconduct of the Italian banks could not be imputed to Claimants.

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[211] R-MJ §§ 241 *et seq.*, R-R-MJ §§ 394 *et seq.*, R-PHB §§ 230 *et seq.*

653. The only remaining question is whether the circumstances invoked by Respondent could lead to the conclusion that Claimants' investments do not deserve the protection of the BIT. The Tribunal finds that this issue requires to be addressed in relation to the merits of Claimants' claim for the following reasons:

- Based on the principle of severability of the arbitration clause: Even if the investment was considered to be invalid, it would not *per se* invalidate the jurisdiction of the Tribunal to decide on its validity;

- The circumstances invoked require a more detailed factual analysis than what is usually conducted at the stage of jurisdiction (see § 303 above), which justifies dealing with these issues together with the relevant allegations of breaches of the BIT by Respondent.

654. With regard to the second and third contentions referred to in § 651 above, the Tribunal has already found above (see §§ 489 *et seq.*) that Respondent's consent covered the mass aspect of the proceedings and that TFA's role therein was not of such a nature as to vitiate Claimants' consent (see §§ 455 *et seq.*). Consequently, a potential abuse of rights allegedly committed by TFA would not relate to the jurisdiction of the present Tribunal and could only – if at all – relate to its admissibility.

655. **Consequently**, the Tribunal will limit its analysis to the question whether Respondent's allegation that TFA abused the ICSID process to pursue hidden interests, foreign to the interests of Claimants with regard to their investment, may render the present proceedings inadmissible.

(iii) Lack of Relevant Abuse of Rights

656. Respondent's allegations of abuse of rights and abuse of process are directed against TFA. Respondent submits that the Tribunal should not allow the present proceedings because TFA is pursuing its own interests, which conflict with

Claimants' interests, and which are foreign to the interests that the BIT and the ICSID Convention aim to protect.

657. The Tribunal finds that, even if TFA was pursuing interests which conflict with Claimants' interests, this would not lead to the inadmissibility of Claimants' claims for the following reasons:

- For ICSID proceedings to be dismissed based on an abuse of rights, it would be necessary that the abuse concerns the very rights that ICSID proceedings aim to protect, i.e., the investors' rights under the relevant BIT.

- In the present arbitration, the alleged abuse of rights does not concern Claimants' rights as arising out of the BIT but TFA's interests as arising out of Claimants' pursuit of ICSID proceedings.

- Respondent has not alleged that Claimants themselves were in any way abusing their right to resort to ICSID arbitration in order to protect their investment.

- Dismissing Claimants' claims would mean depriving them of a remedy they are entitled to invoke, because of the alleged behaviour of a third party on which Claimants have no influence.

658. **In conclusion**, the fact that a third party, such as TFA, may allegedly have taken a certain advantage from the conduct by Claimants of the present ICSID arbitration may be morally condemnable, but it cannot lead to the inadmissibility of Claimants' claims to the extent that the rights Claimants intend to seek protection for are rights protected under the BIT, which are not claimed in an abusive manner by Claimants.

(d) Conclusion

659. In conclusion and in (partial) response to Issue No. 2(b), the Tribunal finds that TFA's role in the proceedings does not amount to an abuse of rights which would justify dismissing Claimants' claims for lack of admissibility.

(7) Conclusion on Admissibility

660. Based on the above considerations, the Tribunal concludes that Claimants' claims are admissible to the following extent:

(i) The mass aspect of Claimants' claims does not constitute an impediment to their admissibility. In particular:

- The silence of the ICSID framework regarding collective proceedings is to be interpreted as a "gap" and not as a "qualified silence;"

- The Tribunal has, in principle, the power under Article 44 ICSID Convention to fill this gap to the extent permitted under Article 44 ICSID Convention;

- The procedure necessary to deal with the collective aspect of the present proceedings concern the method of the Tribunal's examination, as well as the manner of representation of Claimants. However, it does not affect the object of such examination. Thus, the Tribunal remains obliged to examine all relevant aspects of the claims relating to Claimants' rights under the BIT as well as to Respondent's obligations thereunder subject to the Parties' submissions;

- Such procedure is admissible and acceptable under Article 44 ICSID Convention, Rule 19 ICSID Arbitration Rules, as well as under the more general spirit, object and aim of the ICSID Convention; and

- Respondent's policy arguments regarding the appropriateness of ICSID proceedings in the context of sovereign debt restructuring are irrelevant for the determination of the admissibility of the claims.

(ii) The prior consultation requirement set forth in Article 8(1) BIT does not constitute an impediment to the admissibility of Claimants' claims. In particular:

- Consultations did take place between TFA, as representative of Italian bondholders, and Argentina;

- Argentina is precluded from invoking the non-fullfilment by Claimants of the consultation requirement; and

- Even if Claimants were considered not to have fulfilled the consultation requirement, this non-compliance would simply express that the premises for an amicable settlement were not given and cannot be interpreted as constituting a hurdle to the admissibility of Claimants' claims.

(iii) The disregard by Claimants of the 18 months litigation requirement does not preclude them from resorting to ICSID arbitration. In particular:

- Article 8 provides for an integrated dispute resolution mechanism built upon a certain hierarchy or order of three interconnected means whereby the wording of Article 8 itself does not yet suffice to draw specific conclusions with regard to the consequences of a non-compliance with the order established by Article 8;

- The question whether Claimants' disregard of the 18 months litigation requirements justifies precluding them from resorting to arbitration requires a weighing of interests between Argentina's interest to be given the opportunity to address the dispute through the framework of

its domestic legal system and Claimants' interest in being provided with an efficient dispute resolution means;

- Based on the circumstances of the present case and in particular the Emergency Law and other relevant laws and decrees, Argentina's interest in pursuing the 18 months litigation requirement does not justify depriving Claimants of their right to resort to arbitration for the sole reason that they decided not to previously submit their dispute to the Argentinean courts; and

- Consequently, the question whether Claimants could have relied on the MFN clause of Article 3(1) BIT in connection to Article 10(1) Argentina-Chile BIT in order to evade the 18 months litigation requirement is moot.

(iv) In conclusion and in (partial) response to Issues Nos. 3(a) and 3(b), the Tribunal finds that the present arbitral proceedings have been effectively initiated by all Claimants listed in Annex K as substituted before the Notice of Registration of the Request for Arbitration of 5 February 2007. The Tribunal further finds that the present arbitral proceedings are discontinued as of the dater of dispatch of the present Decision with regard to all Claimants listed in Annex L as substituted by Claimants on 5 October 2010. In particular:

- The addition of Claimants after the filing of the Request for Arbitration and before its Notice of Registration through the submission of substitute versions of Annex K is admissible and does not contravene any of the provisions of the ICSID Convention and Rules;

- The withdrawal of Claimants before the date of the Notice of Registration of the Request for Arbitration is admissible and these

Claimants are thus deemed to have validly withdrawn their Request for Arbitration;

- The withdrawal of Claimants after the registration of the Request for Arbitration is to be considered as a request for discontinuance pursuant to Rule 44 ICSID Arbitration Rules, which is to be granted to the extent that Respondent does not object thereto;

- The terms of a discontinuance of the proceedings pursuant to Rule 44 ICSID Arbitration Rules with regard to Claimants listed in Annex L as submitted by Claimants on 5 October 2010 are not subject to any relevant objection from Respondent;

- The request for discontinuance is therefore granted and the proceedings are herewith discontinued with regard to all Claimants listed in Annex L as submitted by Claimants on 5 October 2010;

- The Tribunal issues the cost order set forth below at § 713 below.

(v) TFA's role in the proceedings does not amount to an abuse of rights by Claimants which would justify dismissing Claimants' claims for lack of admissibility.

661. **Consequently**, with regard to the relevant Issues of the List of 11 Issues of 9 May 2008, the Tribunal holds:

(i) **Issue 1(b)**: Claimants' claims are admissible to the extent described in § 660 above;

(ii) **Issue 2(b)**: In the proceedings, TFA is to be seen as Claimants' agent pursuant to Rule 18 ICSID Arbitration Rules, and its role in the proceedings does not amount to an abuse of rights which would justify dismissing Claimants' claims for lack of admissibility;

(iii) **Issue 3(b)**: It is possible to add further Claimants after the filing of the claim, to the extent that additions are made before the date of the Notice of Registration of the Request for Arbitration, i.e., 7 February 2007;

(iv) **Issue 4**: Claimants were entitled to initiate ICSID arbitration notwithstanding the 18-month domestic litigation clause under Article 8(2) BIT;

(v) **Issue 5**: The MFN Clause contained in Article 3(1) BIT has no consequences on the admissibility of the present proceedings.

662. The remaining Issue 3(a) concerning the admissibility of substitute annexes is an issue of procedure and will be dealt with in the section below (see §§ 672-680).

E. OTHER PROCEDURAL ISSUES

663. In sections C and D above, the Tribunal has established that it has – in principle – jurisdiction over the present dispute and that the claims raised by Claimants are – in principle – admissible. In particular, the Tribunal has established that it has the power to model and design the present procedure so as to make it workable to the "mass" nature of the present claims.

664. This section aims at dealing with general and more specific procedural modalities of such mass proceedings.

(1) In General: Managing the Procedure

(a) Introduction

665. As mentioned before (see § 537 above), the present case involves a number of Claimants, which makes it *de facto* impossible to deal with all them *seriatim*. Based thereon, as well as on the homogeneity of the claims (see § 541 above), the Tribunal considers that it has the power to deal with the present proceedings in the form of collective proceedings as the Tribunal's method of examination (see § 529-533). The Tribunal now needs to determine which specific method of examination would be appropriate in the light of the circumstances of the case.

666. During the Hearing the Parties and the Tribunal briefly discussed so-called "sampling procedure," also referred to sometimes as "bell weather proceedings," "pilot case proceedings," etc. The Tribunal contemplates the possibility to resort to such form of collective proceedings in order to deal with certain aspects of the present case.

667. However, in order to decide whether, and if so, to what extent such sampling procedure constitutes an appropriate approach to the present mass claims, the Tribunal is of the view that it should first obtain an overview with regard to the merits of the present case.

(b) Splitting of the Merits Phase

668. Therefore, similarly to the jurisdictional phase, the Tribunal rules that the merit phase shall be split in two phases:

- *Phase 1:* In a first phase, the Tribunal will establish which isssues are the core issues regarding the merits of the case, and, in particular, which conditions would need to be required in order to further resolve Claimants' claims;

- *Phase 2*: In a second phase, and based on the result of the first phase, the Tribunal will determine how to best address these issues and conditions.

669. In this respect, the following case scenarios are possible:

(1) Some issues and/or conditions may be of a general nature and thus apply to all Claimants uniformly. Such issues and/or conditions could be established at once with regard to all Claimants;

(2) Some issues and/or conditions may, while being generally applicable to all Claimants, present certain objective features that would require making certain distinctions among various groups of Claimants. Such issues and/or conditions could then be established through the putting into place of a sampling procedure;

(3) Some issues and/or conditions may be so Claimant-specific that their establishment would require a case-by-case analysis, similarly to the specific and individual jurisdictional requirements (see § 227 above).

670. Consequently, the next phase of the proceedings will be dedicated to determining the core issues regarding the merits of the case, and, in particular, establishing what conditions must be fulfilled for the granting of Claimants' claims. This phase would be implemented through the exchange of written submissions by the Parties, in

which each Party will be invited to comment on whether, and if so to what extent, these conditions can be established with regard to all Claimants (scenario 1), or whether they require the putting into place of a specific procedure for their examination (scenario 2 and/or 3). The exchange of written submissions may be followed by a hearing, if so required by Claimants and/or Respondent or considered necessary by the Tribunal.

(c) Conclusion

671. In the light of the above consideration, the Tribunal rules that the merit phase of the present case shall be split in two phases. The first phase will be a general phase aimed at determining the core issues regarding the merits of the case, and in particular establishing what conditions must be fulfilled for further resolving Claimants' claims and determining the best method to examine these issues and conditions. A second phase during which the Tribunal will rule on how to examine the relevant issues and conditions, will put in place an appropriate mechanism of examination and will proceed with such examination.

(2) Specific Procedural Aspects

(a) Admissibility of Substitute Annexes – Issue 3(a)

672. While the issue of the addition and withdrawal of Claimants has been dealt with above (see §§ 592 *et seq.*), this section addresses the amendments to the Annexes which concern other information relevant to individual Claimants, such as contact data, bond information, etc.

673. Thus, in this connection, the specific issue to be determined by the Tribunal is the following:

> **To what extent, if any, were Claimants entitled to amend the information contained in the substitute annexes with regard to Claimants' personal information and bond information?**

674. The key legal provisions in dealing with the above issue are the following: Article 36 ICSID Convention, Rule 2 ICSID Institution Rules and Rules 24, 25 and 44 ICSID Arbitration Rules. The wording of these provisions is reproduced in § 596 *et seq.* above.

675. Respondent submits that Claimants have violated the ICSID Convention and ICSID Rules by misusing the substitute annexes to their Request for Arbitration and contends that (i) Claimants violated Article 36(2) ICSID Convention by unilaterally altering the terms of their Request for Arbitration through the substitute annexes and (ii) Claimants' repeated revisions of the Annexes violated Article 36 ICSID Convention.[212] Respondent further contends that the information compiled in Claimants' Annexes are unreliable and unmanageable, thereby preventing Respondent from duly defending its rights.

676. Claimants contend that the use of the substitute annexes is fully consistent with the ICSID framework and in particular, authorized by Rule 25 ICSID Arbitration Rules. In addition, Claimants submit that their Annexes and database are well-organized, thereby facilitating the searching and management of Claimant-related information.[213]

677. To the extent that the Tribunal has found that the addition and/or withdrawal of Claimants was admissible (see § 640 above), changes to the information relating to the identity of added and withdrawn Claimants is admissible under Rule 25 ICSID Arbitration Rules.[214] Changes and corrections to the contact information of some Claimants and/or to other supporting information are further also admissible under

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212 R-R-MJ §§ 612-641.

213 C-MJ §§ 509 *et seq.*, C-R-MJ §§ 515 *et seq.*

214 Rule 25 of the ICSID Arbitration Rules provides: "An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered."

Rule 25 ICSID Arbitration Rules. For both cases, the Tribunal grants hereby leave for the corrections. These corrections do not violate Article 36(2) of the ICSID Convention.

678. In addition, even if – when examining whether individual claims fulfil all necessary requirements - certain information contained in the Annexes and/or database appeared to be missing, erroneous and/or unreliable, this would not justify rejecting at this stage the admissibility of the Annexes. Indeed, it is Claimants who bear the burden to prove that all conditions for the Tribunal's jurisdiction and for the granting of the substantive claims are met. In case relevant information in the Annexes is missing, erroneous or unreliable, this would be taken into consideration by the Tribunal when deciding whether Claimants complied with their burden of proof with respect to the concerned claims and/or Claimants.

679. With regard to the manageability and reliability of the information contained in the Annexes, the Tribunal sees no reason why the Annexes and the information contained therein should – as a matter of principle - be deemed unmanageable or unreliable. At this stage of the proceedings it is sufficient to note that the Annexes appear to contain all the information required under Article 36 ICSID Convention and Rules 1 *et seq.* ICSID Institution Rules. Further, in conjunction with the online and the Excel database reproducing the information contained in the Annexes, such information is presented in a way sufficiently manageable for the examination of Claimant specific information. The Tribunal considers that this was satisfactorily demonstrated during the Hearing on Jurisdiction by Mr. Brent Kaczmarek.[215]

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[215] See Hearing Tr. Day 4 p. 1043/1 – 1051/15; see also NAVIGANT I, §§ 11-24 and NAVIGANT II, sections III & IV.

680. **Consequently**, the Tribunal holds that the Annexes submitted by Claimants are in principle admissible and the latest version of the Annexes as submitted by Claimants on 5 October 2010 is hereby accepted into the record.

(b) Other Procedural Aspects

681. Any further procedural aspect not addressed in the present Decision, as well as the details of the next phase of the proceedings (see § 671 above) will be discussed at a procedural meeting by telephone or in person with the Parties to be organized shortly after the issuance of the present Decision.

IV. COSTS

682. Claimants submitted the following cost claim in their cost submission of 4 August 2010:

	INCURRED COSTS (€)	INCURRED COSTS (US$)
WHITE & CASE LEGAL FEES & EXPENSES		
White & Case LLP Procedural Categories		
Claimants' Request for Arbitration		US$1,057,563.33
Registration of Claimants' Request for Arbitration		US$350,000.00
Constitution of the Tribunal and First Session of the Tribunal with Attention to Preliminary Procedural Issues; Strategy; and Defense to Challenges to the Tribunal		US$2,474,546.30
Claimants' Counter-Memorial on Jurisdiction		US$3,328,452.02
Confidentiality Order Issue		US$52,638.75
Respondent's Late Document Production		US$109,011.38
Claimants' Rejoinder on Jurisdiction		US$2,092,369.68
Handwriting Expert Preparation and Testimony		US$94,821.00
Respondent's Supplemental Exhibit Document Dumps		US$114,370.50
June 2009 Hearing Preparations		US$300,663.75
April 2010 Hearing Preparations & Hearing		US$3,036,387.16
Arbitration Expenses		US$1,421,773.20
Total White & Case Fees & Expenses		**US$14,432,597.05**
LOCAL COUNSEL FEES & EXPENSES		
Total Grimaldi e Associati Fees & Expenses	**€3,196,101.93**	
Total Pérez Alati, Grondona, Benites, Arntsen & Martínez de Hoz (Jr.) Fees & Expenses		**US$653,403.71**
EXPERT & CONSULTANT FEES & EXPENSES	**€3,973,024.00**	**US$2,796,678.41**
ICSID COSTS		**US$825,000.00**
TOTAL INCURRED COSTS	**€7,169,125.93**	**US$18,707,679.17**

683. At 4 August 2010 the exchange rate between the Euro and the US Dollar was 1.31.[216] At that date, Claimants' costs therefore amounted to approximately US$ 28,134,604, and after deduction of the ICSID cost (US$ 825,000, including the registration fee) US$ 27,309,604.

684. In its cost submission of 4 August 2010, Respondent submitted the following cost claim:

COSTS OF THE ARGENTINE REPUBLIC

ITEM	Argentine Pesos	U.S. dollars	EUROS
TRANSLATIONS			
various	162,078.58		
EXPERTS	382,065.00	17,950.00	20,600.00
Fees Cleary Gottlieb Steen & Hamilton LLP		9,497,846.59	
AIR TICKETS, HOTELS & PER DIEMS		1,492,000.00	
		87,304.24	
CCA		27,428.00	
PHOTOCOPIES	5,631.00		
AIR MAIL			
DHL's air mails costs		1,526.00	
STATIONARY			
Stationary Expenses	870.00		
COMMUNICATIONS COSTS			
Communications (land lines)	2,500.00		
Communications (Nextel-Movistar-Claro)	24,107.00		
ICSID COSTS			
Note SPTN No. 034/AI/08		125,000.00	
Note SPTN No. 025/AI/09		225,000.00	
Note SPTN No. 055/AI/10		200,000.00	
Note SPTN No. 137/AI/10		250,000.00	
PTN's Costs of the staff	1,241,200.00		
SUBTOTALS	**1,818,451.58**	**11,924,054.83**	**20,600.00**
TOTALS IN U.S. DOLLARS	469,884.13	11,924,054.83	26,401.63
TOTAL COSTS IN U.S. DOLLARS		**12,420,340.59**	

[216] http://www.xe.com

685. At 4 August 2010, Respondent's cost amounted to US$ 12,420,340, and after deduction of the ICSID cost (US$ 800,000) US$ 11,620,340.

686. Claimants and Respondent each claim to be entitled to the cost of the proceedings to date on various grounds. However, the Tribunal has come to the conclusion that it is too early in the present proceedings to rule on costs, except with respect to the Claimants who are subject to discontinuance of the arbitration. In that regard, it may be recalled that, on 26 November 2010, the Tribunal issued its Procedural Order No. 9 in which it announced that the question of the allocation of the arbitration costs concerning the Claimants who withdrew would be dealt with in the Tribunal's upcoming determination on jurisdiction together with the question of the withdrawal of a number of Claimants.

687. In §§ 628-635 above, the Tribunal held that Respondent and the Claimants subject to discontinuance shall each bear half of the arbitration costs (i.e., the fees and expenses of the Tribunal members and the charges for use of the Centre's facilities) and bear their own cost.

688. The fees and expenses of the members of the Tribunal until 15 June 2011 amount to US$ 1,331,960.45 (see Article 60(2) ICSID Convention; Regulation 14(1) ICSID Administrative and Financial Regulations; Rule 28(1)(a) ICSID Arbitration Rules; Rule 14 Administrative and Financial Rules).

689. The charges for use of the Centre's facilities until 15 June 2011 amount to US$376,641.95 (see Article 59 ICSID Convention; Rule 28(1)(a) ICSID Arbitration Rules.

690. The arbitration cost as defined above, therefore, amount to US$ 1,708,602.4 until 15 June 2011.

691. It is common ground that out of approximately 180,000 Claimants about 120,000 Claimants are subject to discontinuance. Accordingly, two thirds of the arbitration

costs are to be attributed to the proceedings between the Claimants who are subject to discontinuance and Respondent, being US$1,139,068.3. They are to be shared equally between Claimants subject to discontinuance and Respondent. As Claimants and Respondent have advanced equal amounts on account of the arbitration costs and those costs are paid out of the advances, neither side has a cost claim on the other on account of the costs of arbitration.

692. Similarly, the share of each Party's own cost that is to be deemed to be attributable to the proceedings between the Claimants who are subject to discontinuance and Respondent is two thirds.

693. The result of the foregoing is that the reserved portions of the costs between the remaining Claimants and Respondent are insofar as the present phase of the arbitration leading to the Decision on Jurisdiction and Admissibility are concerned with respect to

- the arbitration costs: US$ 569,534.1,
- Claimants' costs: US$ 9,103,200[217] and
- Respondent's costs: US$ 3,873,447.[218]

694. The Tribunal would like to emphasize that its decision on the amounts mentioned in the preceding paragraph, including the reasonableness of the claimed Parties' costs and the allocation (if any), is reserved until a later stage of the proceedings.

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[217] I.e., one third of US$ 27,309,604.

[218] I.e., one third of US$ 11,620,340.

V. THE 11 ISSUES *SERIATIM* - ANSWERS AND REFERENCES

695. The Issues set forth in the List of 11 Issues of 9 May 2008 have been addressed in this Decision not *seriatim* for reasons of completeness and consistency (see §§ 225-231 above). In the present section, the Tribunal will summarize its findings with respect to the Issues set forth in the List of Issues of 9 May 2008 *seriatim* for reasons of convenience. The summary will include cross-references to the conclusions at the relevant paragraphs.

696. **Issue 1(a)**:

> "Does the consent of Argentina to the jurisdiction of the Centre include claims presented by multiple Claimants in a single proceeding?"

- *Answer:* Argentina's consent to the jurisdiction of the Centre includes claims presented by multiple Claimants in a single proceeding.

- *References:* § 500 above. See also the findings in relation to Issues Nos. 4 and 8 below.

697. **Issue 1(b)**:

> "If so, are the claims admissible?"

- *Answer:* Claimants' claims are admissible to the extent described in § 660 above.

- *References:* §§ 551 and 660 above.

698. **Issue 2(a)**:

> "Is the Declaration of Consent signed by the individual Claimants submitted in this proceeding valid[?]"

- *Answer:* The Declaration of Consent signed by the individual Claimants submitted in this proceeding is in principle valid, whereby the potential existence of a fraud, coercion or essential mistake invalidating the consent of a specific individual Claimant based on the specific circumstances of the individual case remains open and will be dealt with in a later stage of the proceedings.

- *References:* § 466(i)-(ii) above.

699. **Issue 2(b)**:

> "[A]nd what is the role and relevance of Task Force Argentina (if any) in this proceeding?"

- *Answer:* In the proceedings, TFA is to be seen as Claimants' agent pursuant to Rule 18 ICSID Arbitration Rules, and its role in the proceedings does not amount to an abuse of rights which would justify dismissing Claimants' claims for lack of admissibility.

- *References:* §§ 466(iii) and 659 above.

700. **Issue 3(a)**:

> "Is the submission of substitute annexes to the Request for Arbitration permissible?"

- *Answer:* The Annexes submitted by Claimants are admissible and the latest version of the Annexes as submitted by Claimants is hereby accepted into the record.

- *References:* § 640 above.

701. **Issue 3(b)**:

> "Is it possible to add further Claimants after the filing of the claim?"

- *Answer:* It is possible to add further Claimants after the filing of the claim, to the extent that additions are made before the registration of the Request for Arbitration.

- *References:* § 640 (i) above.

702. **Issue 4**:

> "Were the Claimants entitled to initiate ICSID arbitration in light of the 18-month domestic litigation clause at Article 8(2) of the Argentina-Italy BIT?"

- *Answer:* Claimants were entitled to initiate ICSID arbitration notwithstanding the 18-month domestic litigation clause under Article 8(2) BIT.

- *References:* §§ 500(iii), 566 and 590 above. See also the findings in relation to Issues Nos. 1(a) above and 8 below.

703. **Issue 5**:

> "What are the consequences (if any) of the Most-Favored-Nation-Clause (MFN) contained in Article 3(1) of the Argentina-Italy BIT?"

- *Answer:* The MFN Clause contained in Article 3(1) BIT has no consequences on the ICSID's jurisdiction and the Tribunal's competence or on the admissibility of the present proceedings.

- *References:* § 591 above.

704. **Issue 6**:

> "Does the Tribunal have jurisdiction to hear Claimants' claims for violation of the MFN provisions contained in Article 3(1) of the Argentina-Italy BIT with reference to the so-called umbrella clause contained in Article 7(2) of the Argentina-Chile BIT?"

- *Answer:* Whether the Tribunal may also have jurisdiction based on the Umbrella Clause of the Argentina-Chile BIT in connection with the MFN Clause of the Argentina-Italy BIT is irrelevant to the extent that the Tribunal's jurisdiction already derives from the treaty nature of the claims at stake.

- *References:* § 332 above.

705. **Issue 7**:

> "Are the Claimants' claims contract claims or Treaty claims and what (if any) are the consequences of this determination?"

- *Answer:* Claimants' claims are to be considered Treaty Claims arising out of the BIT and therewith fall under the jurisdiction *ratione materiae* of the Tribunal.

- *References:* § 331 above.

706. **Issue 8**:

> "Does the Tribunal have jurisdiction over claims where the relevant bond contains a forum selection clause which refers to national courts, but not to ICSID?"

- *Answer:* The presence of forum selection clauses referring to national courts in the bond documents do not apply to Treaty Claims and do thereby not affect the Tribunal's jurisdiction over such Treaty Claims.

- *References:* §§ 387(v) and 500(iv) above. See also the findings in relation to Issues Nos. 1(a) and 4 above.

707. **Issue 9**:

> "Do the bonds in question satisfy the definition of 'Investment' under Article 1(1) of the Argentina-Italy BIT with respect to the provisions on investment 'in the territory' of Argentina and in 'compliance with the laws and regulations of Argentina'?"

- *Answer:* The bonds in question, and in particular the security entitlements held by Claimants in these bonds, qualify as "Investment" under Article 1(1) BIT made "in the territory of Argentina" and "in compliance with the laws and regulations of Argentina."

- *References:* § 387(i)-(v) above.

708. **Issue 10**:

> "Without making a determination with respect to any individual Claimant, does the Tribunal have jurisdiction *ratione personae* pursuant to Article 25 of the ICSID Convention and Article 1(2) of the Argentina-Italy BIT, and its Additional Protocol, over each Claimant who is a natural person and who ultimately is found to have the following characteristics: (i) a natural person with Italian nationality on September 14, 2006 (*i.e.*, the date of the filing of the Request for Arbitration) and February 7, 2007 (*i.e.*, the date of registration of the Request); (ii) who on either date was not also a national of the Argentine Republic; and (iii) who was not domiciled in the Argentine Republic for more than two years prior to making the investment?"

- *Answer:* The Tribunal has jurisdiction *rationae personae* over each Claimant who is a natural person to the extent set forth above in § 501 (iii).

- *References:* §§ 422(i) above.

709. **Issue 11**:

> "Without making a determination with respect to any individual Claimant, does the Tribunal have jurisdiction *ratione personae* pursuant to Article 25 of the ICSID Convention and Article 1 of the Argentina-Italy BIT over each Claimant that is a juridical person with Italian nationality on September 14, 2006 (*i.e.*, the date of the filing of the Request for Arbitration)?"

- *Answer:* The Tribunal has jurisdiction *rationae personae* over each Claimant who is a juridical person to the extent set forth above in § 501(iii).

- *References:* §§ 422(ii) above.

710. **Discontinuance:**

- *Answer:* The request for withdrawal, being a request for discontinuance, is granted and the proceedings are herewith discontinued with regard to all Claimants listed in Annex L as substituted, the latest one have been submitted by Claimants on 5 October 2010.

- *References:* § 640(ii)-(vi) above.

711. **Costs:**

- *Answer:* It is too early in the present proceedings to rule on costs, except with respect to the Claimants who are subject to discontinuance of the arbitration. In §§ 632-639, the Tribunal held that Respondent and the Claimants subject to discontinuance shall each bear half of the arbitration costs (i.e., the fees and expenses of the Tribunal members and the charges for use of the Centre's facilities) and bear their own cost.

- *References:* §§ 628-635 above; 682-694 above.

712. **Procedure:** See §§ 663-670 above.

VI. DECISIONS

713. FOR THE FOREGOING REASONS, and in response to the relief sought by the Parties as quoted in §§ 235-236 above, the Arbitral Tribunal renders the following decisions:

(1) With regard to the Issues of the List of 11 Issues of 9 May 2008:

(i) **Issue 1(a)**: Argentina's consent to the jurisdiction of the Centre includes claims presented by multiple Claimants in a single proceeding;

Issue 1(b): Claimants' claims are admissible to the extent described in §660 above;

(ii) **Issue 2(a)**: The Declaration of Consent signed by the individual Claimants submitted in this proceeding is in principle valid, whereby the potential existence of a fraud, coercion or essential mistake invalidating the consent of a specific individual Claimant based on the specific circumstances of the individual case remains open and will be dealt with in a later stage of the proceedings;

Issue 2(b): In the proceedings, TFA is to be seen as Claimants' agent pursuant to Rule 18 ICSID Arbitration Rules, and its role in the proceedings does not amount to an abuse of rights which would justify dismissing Claimants' claims for lack of admissibility;

(iii) **Issue 3(a)**: The Annexes submitted by Claimants are in principle admissible and the latest version of the Annexes as submitted by Claimants is hereby accepted into the record.

Issue 3(b): It is possible to add further Claimants after the filing of the claim, to the extent that additions are made before the date of the Notice of Registration of the Request for Arbitration, i.e., 7 February 2007;

(iv) **Issue 4**: Claimants were entitled to initiate ICSID arbitration notwithstanding the 18-month domestic litigation clause under Article 8(2) BIT;

(v) **Issue 5**: The MFN Clause contained in Article 3(1) BIT has no consequences on the ICSID's jurisdiction and the Tribunal's competence or on the admissibility of the present proceedings.

(vi) **Issue 6**: Whether the Tribunal may also have jurisdiction based on the Umbrella Clause of the Argentina-Chile BIT in connection with the MFN Clause of the Argentina-Italy BIT is irrelevant to the extent that the Tribunal's jurisdiction already derives from the treaty nature of the claims at stake;

(vii) **Issue 7**: Claimants' claims are to be considered Treaty Claims arising out of the BIT and therewith fall under the jurisdiction *ratione materiae* of the Tribunal;

(viii) **Issue 8**: The presence of forum selection clauses referring to national courts in the bond documents do not apply to Treaty Claims and do thereby not affect the Tribunal's jurisdiction over such Treaty Claims;

(ix) **Issue 9**: The bonds in question, and in particular the security entitlements held by Claimants in these bonds, qualify as "Investment" under Article 1(1) BIT made "in the territory of Argentina" and "in compliance with the laws and regulations of Argentina";

(x) **Issue 10**: The Tribunal has jurisdiction *rationae personae* over each Claimant who is a natural person to the extent set forth above in § 501(iii);

(xi) **Issue 11**: The Tribunal has jurisdiction *rationae personae* over each Claimant who is a juridical person to the extent set forth above in § 501(iii).

(2) The request for withdrawal, being a request for discontinuance, is granted and the proceedings are herewith discontinued with regard to all Claimants listed in Annex L as substituted, the latest one have been submitted by Claimants on 5 October 2010;

(3) With regard to costs:

(i) The total amount of arbitration cost, comprising the fees and expenses of the members of the Tribunal and the charges for use of the Centre's facilities, until 15 June 2011 amounts to US$ 1,708,602.4;

(ii) Two thirds of the arbitration costs referred to in paragraph 713(3)(i) above, being US$1,139,068.3, will be borne in half by the Claimants who are subject to discontinuance on the one hand and Respondent on the other other;

(iii) The Claimants who are subject to discontinuance on the one hand and Respondent on the other other shall bear their own cost, which are quantified at two thirds of the cost claimed by Claimants and Respondent each in their Cost Submissions of 4 August 2010;

(iv) The decision regarding the remaining one third of the cost of the present phase is reserved as between the remaining Claimants and Respondent until a later stage of the proceedings.

(4) With respect to the further conduct of the procedure:

(i) The merit phase of the present case shall be split in two phases. The first phase would be a general phase aiming at determining the core

issues regarding the merits of the case, and in particular establishing what conditions must be fulfilled for the granting of Claimants' claims and determining the best method to examine these issues and conditions. A second phase during which the Tribunal will rule on how to examine the relevant issues and conditions and will then proceed with such examination (see § 671 above).

(ii) The Annexes submitted by Claimants are in principle admissible and the latest version of the Annexes as submitted by Claimants on 5 October 2010 is hereby accepted into the record (see § 680 above).

(iii) Any fruther procedural aspect not addressed in the present order, as well as the details of the next procedural step (see § 671 above) will be discussed at a joint conference call with the Parties to be organized shortly after the issuance of the present Decision.

[Dissenting Opinion Forthcoming]

Professor Georges Abi-Saab
Arbitrator

Professor Albert Jan van den Berg
Arbitrator

Professor Pierre Tercier,
President