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Chapter 9. Mass Claims in Investment Arbitration: Jurisdiction and Admissibility

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(1)

Jurisdiction and Admissibility

Abaclat and others v Argentina, the ICSID arbitration brought under the Italy-Argentina Bilateral Investment Treaty ("BIT") in 2006 by tens of thousands of Italian retail holders of Argentine sovereign bonds, has become known as a landmark case for addressing novel issues in international investment arbitration. (1) In its 2011 Decision on Jurisdiction and Admissibility, the *Abaclat* tribunal concluded that Argentina's consent in the BIT to ICSID jurisdiction "includes claims presented by multiple Claimants in a single proceeding" and that "Claimants' claims are admissible." (2) This conclusion sparked a heated debate about how investment treaty-based tribunals should deal with mass claims, in particular whether and under what circumstances the numerosity of claimants should affect the tribunal's jurisdiction and/or the admissibility of claims. (3)

In subsequent decisions, the tribunals in two other ICSID arbitrations, *Ambiente and others v Argentina* (4) and *Alemanni and others v Argentina*, (5) which likewise concerned claims by multiple claimants based on the Italy-Argentina BIT with respect to Argentine sovereign bonds, reached similar conclusions as to the numerosity issue.

While all three arbitrations involved claims brought under the same BIT by multiple Italian claimants holding Argentine sovereign bonds and basing their claims on the same actions of Argentina, the *Abaclat* arbitration is unique because it alone involves 'mass claims.' In the *Abaclat* tribunal's words, "this appears to be the first case in ICSID's history that 'mass claims' are brought before it." (6) With approximately 180,000 claimants at the time the arbitration was initiated, and 60,000 claimants at the time of the Decision on Jurisdiction and Admissibility (due to a second Exchange Offer made by Argentina immediately following the jurisdictional hearing in April 2009), (7) the *Abaclat* arbitration differs substantially from both the *Ambiente* arbitration, which involved initially 119 claimants, later reduced to 90 claimants, and the *Alemanni* arbitration, which involved initially 183 claimants, later reduced to 74 claimants. (8) In this respect, the *Abaclat* tribunal has contributed to the international law jurisprudence by directly and comprehensively addressing the novel issue of mass claims in investment arbitration with key determinations on jurisdiction and admissibility, as well as the distinction between these two fundamental concepts in the context of a mass claim.

In this article, we will discuss the key findings of the *Abaclat* tribunal on jurisdiction and admissibility, with a particular focus on how these fundamental concepts are affected in
P 115 the context of a mass claim. Before doing so, it is useful to begin with a brief examination of how the tribunals defined the term 'mass claim.'

1 Definition of 'Mass Claim'

In an age where business streams around the world integrate and businesses offer products and services on a global basis, it is not surprising that a group of individuals with similar claims against a global actor will come together to seek a remedy. Thus, the International Bar Association has defined 'collective redress' as "a procedure designed to allow a group of individuals with similar claims to combine their claims in a single action, rather than require each individual to file his or her own lawsuit." (9)

Different forms of collective actions have developed in various legal systems. The two most common forms of such actions are representative proceedings, in which a named representative acts on behalf of a class of unnamed claimants, and aggregate proceedings, in which a group of individually named claimants jointly files a claim. (10)

Representative proceedings can be further divided into 'opt-in' and 'opt-out' actions. In an opt-in action, the class representative is required to inform the potential individual claimants that they must consent to participate in the collective action. If the potential individual claimants do not consent to participate, then any prospective judgment with respect to that action will not be binding on them, or on the defendant as to their claims. In an opt-out action, conversely, potential individual claimants are informed that they must specifically state their desire not to participate in the collective action. If the potential individual claimants do not make a statement refusing to participate, then any judgment in that action will be binding on them and on the defendant.

The term 'mass claim' has been used in international law to describe claims processes before international claims commissions and other international adjudication tribunals that were historically established to remedy the consequences of major international

crises, such as the United Nations Compensation Commission, the Iran-United States Claims Tribunal, and the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina. (11) Distinct features of mass claims have been found to be, first, a high number of claimants and claims, ranging from thousands to millions of claims and, second, sufficient similarity of the issues raised, such that it is more efficient to resolve the claims jointly rather than separately. (12)

In the investment arbitration context, the *Abaclat* tribunal, which to date has remained the only investment tribunal to rule on a mass claim, decided to qualify the proceedings as 'mass proceedings' based on "the high number of Claimants appearing together as one mass." (13) The tribunal found that "the present proceedings seem to be a sort of a hybrid kind of collective proceedings, in that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of Claimants involved." (14) In reaching this conclusion the *Abaclat* tribunal considered that each individual Claimant was aware of, consented to, and was identified in the arbitration, thus distinguishing the proceeding from a class action. (15) It also considered, however, that each Claimant's participation in the proceeding was passive in that each
P 116 Claimant had delegated the right ● to make all decisions relating to the conduct of the proceeding to an agent who, due to the high number of Claimants could not take into account the particular interests of individual Claimants, but was limited to representing the interests that were common to all Claimants as a group. (16)

By contrast, the *Ambiente* and *Alemanni* tribunals considered that the significantly lower number of claimants before them did not warrant characterizing their claims as mass claims, regardless of where one might draw the line between mass claims and 'ordinary' multi-party claims. (17)

2 Jurisdiction And Admissibility In General

Although there is not always a clear distinction between the two concepts, in general, as Keith Highet put it, "[j]urisdiction is the power of the arbitral tribunal to hear the case; admissibility is whether the case itself is defective — whether it is appropriate for the tribunal to hear it." (18) In *Hochtief v Argentina*, the tribunal stated that "jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal." (19) In *PIATCO v Philippines*, the tribunal explained the "subtle distinction between jurisdiction and admissibility" as follows:

> A decision that a Tribunal lacks jurisdiction and a decision that a claim is not arbitrable both prevent the claim proceeding. However, the former is only a determination that the chosen Tribunal cannot hear the claim. In contrast, a decision of lack of admissibility is a decision that the claim should not be heard at all. Inadmissibility, therefore, encompasses those situations where the Tribunal possesses jurisdiction (as it does here) but where there is a substantive obstacle to the enforcement of the claim, such as illegality, or a procedural obstacle such as where a mandatory pre-condition to enforcing the claim, such as the giving of notice, has not been complied with. (20)

Admissibility thus concerns the appropriateness of a specific claim for adjudication, or, in other words, whether the "tribunal can exercise its adjudicative power in relation to specific claims submitted to it." (21)

The tribunal similarly explained the concepts as follows:

> 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 and therefore carries different consequences:
>
> 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;
>
> 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. (22)

Objections based on admissibility are frequently considered as "alleged impediments to consideration of the merits of the dispute which do not put into question the investiture of the tribunal as such." (23) In practice, it is critical for an international arbitral tribunal first to draw the boundaries of its jurisdictional power based on the parties' consent or
P 117 agreement to arbitrate, ● and then to determine whether the specific claim submitted to it can be processed and resolved under the applicable procedural framework. A failure of an international arbitral tribunal to carefully determine the issues of

jurisdiction and admissibility exposes its decisions to invalidation and unenforceability, although the specific legal consequences attached to a successful challenge to jurisdiction and a successful challenge to admissibility of the claim may vary. (24)

In ICSID arbitration, "[c]onsent of the parties is the cornerstone of ... jurisdiction." (25) Thus, under Article 25(1) of the ICSID Convention, each party to a dispute must "consent in writing" to submit the dispute to ICSID arbitration.

Where the host State's consent to submit investment disputes to ICSID arbitration is expressed in an investment treaty, such expression is generally interpreted as a standing offer of consent, which any investor that qualifies as such under the investment treaty may accept, thereby perfecting the consent. (26) In a recent decision, the tribunal in *Ickale v Turkmenistan* (27) took a somewhat different view of the nature of a State's consent to arbitrate contained in investment treaties. The *Ickale* tribunal criticized the concepts of 'standing offer' and 'perfection' as being based on privity of the parties under a contractual analogy. Rather, the *Ickale* tribunal explained, "the State's consent, which is addressed to an anonymous class of foreign investors meeting the relevant nationality requirements, and not specifically to any particular foreign investor, is expressed in a binding manner even before any dispute has arisen." (28) In comparison, "the investor's consent is usually ... expressed only after the dispute has arisen, often with a considerable time interval ...." (29) Based on this distinction, the tribunal concluded that a State's unilateral consent to arbitrate expressed in an investment treaty is binding on the State "without any further 'perfecting,' as a unilateral undertaking vis-à-vis a class of foreign investors." (30) The *Ickale* tribunal further concluded that the State's consent to arbitrate "can be invoked by a qualified investor once it has complied with and taken the procedural steps set out in the [dispute resolution] provision [of the investment treaty]." (31) Accordingly, "[a]n investor taking these steps in order to be able to invoke the State's consent does not affect the consent itself in any way; it only affects the investor's right to invoke it." (32) Under either interpretation, the terms of the investment treaty become part of the parties' agreement to arbitrate and, as such, may establish the terms and scope of the tribunal's jurisdiction. (33)

The ICSID Convention does not specifically mention any type of collective redress proceedings, nor does it contain any rules on multi-party proceedings. Article 25 merely requires the parties' written consent to submit the dispute to ICSID arbitration. While this requirement arguably bars opt-out representative proceedings, in which members of the class have not expressed their consent in writing, or may not even be aware of the proceeding, it does not exclude multi-party proceedings in which each party has consented in writing.

The practice of investment tribunals confirms this understanding. Thus, various tribunals have affirmed jurisdiction over claims of multiple and unaffiliated parties: in *Goetz v Burundi*, the ICSID tribunal accepted jurisdiction over a claim brought by six individual
P 118 Belgian shareholders in a ● Burundian company; in *Suez et al. v Argentina*, the ICSID tribunal found jurisdiction over a claim brought under two BITs by a French and two Spanish shareholders in an Argentine water company; in *Urbaser et al. v Argentina*, the ICSID tribunal heard a claim of two Spanish shareholders in an Argentine water company; in *OKO Pankki Oyj et al. v Estonia*, the ICSID tribunal exercised its jurisdiction over a claim brought under two BITs by a German and two Finnish banks; and in *Funnekotter et al. v Zimbabwe*, the ICSID tribunal decided a claim brought by fourteen unaffiliated Dutch investors in different farms in Zimbabwe. (34) In *Amco Asia v Indonesia*, there were three claimants from three different jurisdictions. (35) Similarly, arbitral jurisdiction was not precluded by the number of claimants in the investment treaty cases of *Anderson et al. v Costa Rica*, where there were 137 claimants; in *Bayview Irrigation District et al. v Mexico*, with 46 claimants; or in Canadian Cattlemen for *Free Trade v United States*, with 109 claimants, although each of these three cases was dismissed on grounds other than the claimants' numerosity. (36)

3 Jurisdiction And Admissibility As Applied In The *Abaclat* Decision

The *Abaclat* tribunal found that each of the approximately 60,000 Claimants was individually named in the request for arbitration and had executed a written consent to ICSID arbitration accompanied by a power of attorney and delegation of authority. (37) Each Claimant also presented information on, and evidence of, his or her bond holdings and nationality. The request for arbitration in *Abaclat* thus contained each claimant's evidence of nationality, investment, and consent.

Given the large number of Claimants and the resulting high volume of information and documentation submitted to the tribunal, all documents relating to consent, nationality, and investment of each Claimant, including millions of pages of documents, were reviewed and organized in an electronic database that enabled the parties, the tribunal, and the experts to search, group and produce in spreadsheets the various groups of Claimants, and also to review the underlying evidence the Claimants submitted with regard to their consent, nationality and investment.

The *Abaclat* tribunal rejected Argentina's objection that its offer of consent expressed in the Italy-Argentina BIT did not extend to disputes in the form of mass proceedings, and that the tribunal lacked jurisdiction absent Argentina's specific consent to the conduct of

mass proceedings. (38) The tribunal did so on the following two grounds: First, the tribunal reasoned that, assuming it had jurisdiction over the claims of a single Claimant or several Claimants, looking at them individually, it was "difficult to conceive why and how the Tribunal could [lose] such jurisdiction where the number of Claimants outgrows a certain threshold." (39) Second, the tribunal found that "the collective nature of the present proceeding derives primarily from the nature of the investment made," which in this case was bonds "which are susceptible of involving in the context of the same investment a high number of investors." (40) Given that the Italy-Argentina BIT expressly covered investments in bonds, (41) the tribunal concluded:

> [W]here such investments require a collective relief in order to provide effective protection to such investment[s], it would be contrary to the purpose
P 119 of the BIT and to the spirit of ICSID [to promote and protect ● investments] 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. (42)

Additionally, the language of the Italy-Argentina BIT, including its dispute settlement clauses, is replete with references to "investors" in the plural form:

- Article 8: "Settlement of disputes between the investors and the Contracting Parties"
- Article 8(3): "If a dispute still exists between investors and a Contracting Party, ..."
- Preamble: "[F]or the making of investments by investors of one Contracting Party ..."
- Article 2(1): "Each Contracting Party shall encourage investors of the other Contracting Party ..."
- Article 2(2): "Investments of investors of each Contracting Party shall at all times ..."
- Article 3(1): "Neither Contracting Party shall in its territory subject investments made by the investors ..."
- Article 4: "Investors of one Contracting Party ..."
- Article 5(1)(a): "Each Contracting Party undertakes not to adopt provisions limiting ... the rights of ownership ... relating to the investments made by the investors ..."
- Article 5(1)(b): "The investments of the investors of ..."
- Article 6(1): "Upon satisfaction by investors of all tax obligations ... each Contracting Party shall guarantee to investors ..."
- Article 6(4): "[E]ach Contracting Party shall, at any time, guarantee to investors ..."
- Article 10(1): "[T]he Contracting Parties and their investors ..."
- Article 10(2): "In the event that one Contracting Party, ... has adopted for investors of the other Contracting Party ..."
- Article 11: "This Agreement shall also apply to investments ... by investors of one Contracting Party ..."

The Italy-Argentina BIT thus clearly contemplated that multiple investors might act jointly with respect to their investments.

Having established that Argentina's consent to ICSID arbitration as expressed in the Italy-Argentina BIT "includes claims presented by multiple Claimants in a single proceeding," (43) and that the numerosity issue thus was one of admissibility and not of consent, (44) the *Abaclat* tribunal proceeded to interpret the silence of the ICSID Convention and Arbitration Rules with respect to collective proceedings. The tribunal found that it would be contrary to the purpose of the BIT and the spirit of the ICSID framework to interpret this silence as one that prohibited collective proceedings given that collective proceedings were virtually unknown at the time the ICSID Convention was concluded and that the ICSID procedure could be adapted to ensure due process and a balance of the
P 120 parties' procedural rights and ● interests. (45) The tribunal also found that it had the power, under Article 44 of the ICSID Convention and ICSID Arbitration Rule 19, to fill the gap left by the ICSID framework's silence. (46)

The *Abaclat* tribunal adopted a practical approach to determine whether the numerosity of Claimants was an obstacle for it to hear the case. The Tribunal simply asked itself whether an ICSID arbitration could be conducted in the form of "mass proceedings." (47) Implicitly drawing a line between jurisdiction and admissibility, the *Abaclat* tribunal determined that in the event the ICSID arbitration could be conducted as a mass proceeding by adapting certain procedural rules under the ICSID framework, then Argentina's consent to ICSID arbitration included arbitration of mass claims; but in the event the ICSID arbitration could not be conducted as a mass proceeding, then "ICSID arbitration [would not be] 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." (48) On this basis, the *Abaclat* Tribunal found 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." (49)

Based on ICSID Arbitration Rule 19, the *Abaclat* tribunal decided that it could conduct the proceeding as it deemed proper and sufficient for processing and resolving each individual claim of the investors while safeguarding both parties' due process rights. Indeed, the tribunal mentioned the possibility that denying jurisdiction on these grounds might leave the Claimants with no choice but to bring tens of thousands of separate claims, which would result in a *de facto* deprivation of Claimants' substantive and due process rights:

> 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. (50)

The tribunal found that this also would present a greater challenge for Argentina to exercise its due process rights: "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." (51)

The tribunal accordingly examined the implications of making the adaptations required to deal with the collective aspect of the claims. It noted the implications were 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 will have to waive individual
P 121 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." (52)

In determining whether the claims could be subjected to 'group treatment, ' the *Abaclat* tribunal focused on whether the Claimants had 'homogeneous' claims. (53) In this regard, the tribunal emphasized that the claims before it concerned only treaty claims under the Italy-Argentina BIT, and not any contractual claims that individual Claimants might have against Argentina under the bond instruments. (54) The tribunal concluded that, as a result, "the specific circumstances surrounding individual purchases by Claimants of security entitlements are irrelevant." (55) The tribunal found that "[t]he 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." (56) In this regard, the tribunal found that the nature of each Claimant's claims was homogenous because all claims were based on the same alleged conduct by Argentina in connection with its default on its sovereign bonds. Likewise, the tribunal found that "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." (57)

Recognizing the difficulties in examination of the voluminous elements and evidence underpinning the Claimants' claims, the tribunal emphasized the need for a special mechanism for efficient and fair examination of evidence. The tribunal pointed out that it 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) …." (58) Then, to address any concerns about this mechanism, the *Abaclat* tribunal appointed an independent expert to examine and verify every single piece of information that was contained in the Claimant database, including documentation related to Claimants' forms of consent to ICSID arbitration and power of attorney, documents of nationality and residency of Claimants on various key dates, and bank certificates confirming each Claimant's bond ownership, value, and purchase date. (59)

By enabling utilization of an electronic claimant database for organization of claims and underlying evidence and appointing an independent expert to examine and verify the database and the evidence contained therein, the *Abaclat* tribunal implemented the mechanism necessary to effectively adjudicate a mass claim within the ICSID framework while safeguarding the parties' due process rights. In 2013, the independent expert found that "[t]he information contained in the Claimants' Database and the documents relating thereto are comprehensive and are organized in a way which allows a reliable verification of the information in the Claimants' Database against the documents on

which this information is based." (60)

By contrast, when the *Ambiente* tribunal affirmed jurisdiction and admissibility, it expressly avoided "draw[ing] a neat dividing line between these two concepts" or "giv[ing] an answer as to whether the legal issues at stake are to be classified as questions of jurisdiction or admissibility." (61) The *Ambiente* tribunal adopted a result-oriented approached concluding that "all claims of lack of jurisdiction and admissibility ... will have to be perused and, if considered as not justified, rejected before the dispute could proceed to the merits phase. In no way would the distinction between jurisdictional and admissibility issues suggest a different degree of 'bindingness'." (62)

P 121

The *Alemanni* tribunal, having reviewed the decisions of the *Abaclat* and *Ambiente* tribunals, concluded that it remained unconvinced that "the distinction between the two concepts, such as it may be, raises any major difficulty; but nor is it convinced that the distinction is of any particular importance in disposing of the issues presently before it." (63) Nonetheless, the *Alemanni* tribunal drew a fine line between jurisdiction and admissibility. It stated that while jurisdictional objections "raise the issue whether the Parties have duly consented to the dispute being brought to ICSID arbitration," admissibility objections "raise the question whether, even if the Parties have duly consented, there nevertheless exist reasons why the Tribunal should decline to hear the dispute in the form in which the dispute is brought before it, even though it possesses the formal competence to do so." (64)

4 Conclusion

While the increased globalization of investment flows may entail a greater need for investment tribunals to effectively adjudicate collective redress actions, the answer to the question of whether mass claims are permissible as a matter of jurisdiction or as a matter of admissibility may vary depending on the language of the particular investment treaty that applies. Generally, so long as the parties' consent to arbitrate is established and the applicable arbitral procedures do not expressly disallow adjudication of a mass claim, it would be contrary to the fundamental notions of justice and fairness to effectively preclude an otherwise legitimate claim merely because the arbitral mechanism requires some adjustment. Thus, as the *Abaclat* tribunal held, "[c]ollective 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." (65) It is important to keep in mind, however, that the *Abaclat* tribunal reached its decision in the context of a particular type of investment that was specifically geared by the host State to a large number of investors and that was expressly covered by the applicable BIT's definition of investment. While most investment treaties contain very similar language, there are subtle differences, which may cause a tribunal to reach divergent conclusions.

References

1) Carolyn B. Lamm: Partner, White & Case LLP, Washington, United States; Member, ICC Institute of World Business Law
1) OGEMID named the Decision on Jurisdiction and Admissibility the "Most Influential Award," "The Arbitration Decision of the Year 2011," and "The 'most controversial or surprising' Arbitration Decision of the Year 2011," Transnational Dispute Management, OGEMID Awards, *available at* https://www.transnational-dispute-management.com/ogemidawards/. Carolyn Lamm was lead counsel for the Claimants in *Abaclat*, and Eckhard Hellbeck and Onur Saka were members of the Claimants' legal team in that case.
2) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011), ¶ 713, *available at* http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf. The Tribunal did not render an award on the merits of the dispute as the proceeding was suspended until 19 July 2016 pursuant to the parties' agreement on 21 March 2016, as noted on the ICSID website. *See* https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/5. On 21 April 2016, the Argentine Republic signed a final settlement agreement with Task Force Argentina acting on behalf of the Claimants. *See* Global Arbitration Review, *Argentina pays out to end sovereign debt claim* (25 Apr. 2015), *available at* http://globalarbitrationreview.com/news/article/35261/argentina-pays-end-sovereign-debt-claim/.
3) Indeed, this was one of the issues on which Arbitrator Abi-Saab based his dissent. *See Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab (28 Oct. 2011), ¶¶ 122-127, *available at* http://www.italaw.com/sites/default/files/case-documents/ita0237.pdf.

4) *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf. The proceeding was discontinued on 28 May 2015.
5) *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 Nov. 2014), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw4061.pdf. The proceeding was discontinued on 14 December 2015.
6) *Abaclat et al. v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶¶ 294, 295.
7) A considerable number of Claimants accepted Argentina's 2010 Exchange Offer and withdrew from the proceeding. *See Abaclat et al. v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶¶ 97, 216.
8) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 294; *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) ¶ 113; *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 Nov. 2014) ¶¶ 1, 267.
9) IBA Legal Practice Division, *Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress* (2008) ¶ 2.
10) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 483; Strong, SI, Class, Mass, and Collective Arbitration in National and International Law 6 (2013).
11) Hans Das, "The Concept of Mass Claims and the Specificity of Mass Claims Resolution", in *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* 3, 6-7 (International Bureau of the Permanent Court of Arbitration, ed. 2005); *see also International Mass Claims Processes: Legal and Practical Perspectives* (Howard M. Holtzmann and Edda Kristjàhsdòttir, eds. 2007); Veijo Heiskanen, *Arbitrating Mass Investor Claims: Lessons of International Commissions*, in Multiple Party Actions in International Arbitration 297 (B. MacMahon and Permanent Court of Arbitration staff eds., 2009).
12) Hans Das, "The Concept of Mass Claims and the Specificity of Mass Claims Resolution", in *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* 6-7 (International Bureau of the Permanent Court of Arbitration, ed. 2005).
13) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 480.
14) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 488.
15) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 486.
16) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 487.
17) *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) ¶¶ 119-121; *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 Nov. 2014) ¶ 267.
18) *Waste Management, Inc v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Dissenting Opinion of Keith Highet (8 May 2000) ¶ 58.
19) *Hochtief AG v Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011) ¶ 90.
20) *Philippine International Air Terminals Co., Inc. [PIATCO] v The Government of the Republic of the Philippines*, ICC Case No. 12610/TE/MW/AVH/JEM/MLK, Award (22 July 2010) ¶ 572 (citing Jan Paulsson, *Jurisdiction and Admissibility*, in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner 601, 617 (Gerald Aksen *et al*., eds. 2005)).
21) Zachary Douglas, *The International Law of Investment Claims* ¶ 293 (2009).
22) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 247.
23) Jan Paulsson, *Jurisdiction and Admissibility*, in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner 601, 617 (Gerald Aksen *et al*., eds. 2005).
24) Jan Paulsson, *Jurisdiction and Admissibility*, in Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner 601 (Gerald Aksen *et al*., eds. 2005).
25) Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 Mar. 1965) ¶ 23.

26) *See* Jeswald Salacuse, The Law of Investment Treaties 422-423 (2d ed. 2015) ("Unlike the arbitration clauses used in contracts, these treaty provisions could not be considered an arbitration agreement with the investor because the investor, while a national of a contracting state, was not a party to the treaty. Conceptually, such a provision constitutes an irrevocable offer to arbitrate disputes concerning the interpretation and application of the treaty. An investor may accept that offer in different ways, including the submission of a request for arbitration or some other mechanism offered in the treaty. The offer includes the various terms and conditions contained in the applicable investment treaty.").
27) *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016).
28) *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016) ¶ 244.
29) *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016) ¶ 244.
30) *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016) ¶ 244.
31) *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016) ¶ 244.
32) *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case No. ARB/10/24, Award (8 Mar. 2016) ¶ 244.
33) *See* Carolyn B. Lamm, *Jurisdiction of the International Centre for Settlement of Investment Disputes*, 6 ICSID Rev.-Foreign Inv. L.J. 462, 464, 466 (1991).
34) *See Goetz v Burundi*, ICSID Case No. ARB/95/3, Award (10 Feb. 1999); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006); *OKO Osuuspankkien Keskuspankki Oyj and others v Republic of Estonia*, ICSID Case No. ARB/04/6, Award (19 Nov. 2007); *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 Apr. 2009).
35) *See Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 Sept. 1983) (the three claimants were: Amco Asia Corporation (incorporated in Delaware, U.S.), Pan American Development Limited (established in Hong Kong), P.T. Amco (established in Indonesia)).
36) *See Alasdair Ross Anderson v Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010) ¶ 15 (dismissing on other jurisdictional grounds, without any objection to or discussion of the number of claimants); *Bayview Irrigation District et al. v United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007); *Canadian Cattlemen for Fair Trade v United States of America*, (UNCITRAL), Award on Jurisdiction (28 Jan. 2008).
37) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶¶ 1-2.
38) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 490.
39) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 490.
40) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 490.
41) *See* Italy-Argentina BIT, Art. 1(1) ("'Investment' shall mean, in compliance with the legislation of the receiving State and independent of the legal form adopted or 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 Contracting Party. In particular, investment includes, without limitation ... bonds, private or public financial instruments or any other right to performances or services having economic value, including capitalized revenues ....").
42) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 490.
43) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶¶ 500-502.
44) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 515.
45) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 519.
46) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶¶ 520-528; *see* ICSID Convention, Art. 44 ("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."); ICSID Arbitration Rule 19 ("The Tribunal shall make the orders required for the conduct of the proceeding.").
47) *See Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶¶ 491-492.

48) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 491.
49) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 492.
50) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 537.
51) *See Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 545.
52) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 536.
53) *Abaclat and others. v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶¶ 540-544.
54) *Abaclat and others. v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 541.
55) *Abaclat and others. v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 542.
56) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 541.
57) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 543.
58) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 531.
59) *See Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Procedural Order No. 15 (20 Nov. 2012) and Procedural Order No. 17 (8 Feb. 2013).
60) Task Force Argentina Press Release, *Independent Expert Report Verifies Bondholder Claim Procedure and Individual Claims Before World Bank* (1 Oct. 2013), *available at* http://www.tfargentina.it/download/TFA%20Comunicato%201%20ottobre%202013_eng.pdf.
61) *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) ¶¶ 573-574.
62) *Ambiente Ufficio S.p.A. and others v Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) ¶ 575.
63) *Giovanni Alemanni et al. v Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 Nov. 2014) ¶ 257.
64) *Giovanni Alemanni et al. v Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 Nov. 2014) ¶ 260.
65) *Abaclat and others v Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) ¶ 484.