

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

**AMBIENTE UFFICIO S.P.A. AND OTHERS**  
(Case formerly known as **GIORDANO ALPI AND OTHERS**<sup>1</sup>)  
(CLAIMANTS)

and

**THE ARGENTINE REPUBLIC**  
(RESPONDENT)

(ICSID Case No. ARB/08/9)

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**DECISION ON JURISDICTION AND ADMISSIBILITY**

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**ARBITRAL TRIBUNAL**

Judge Bruno Simma, President  
Professor Karl-Heinz Böckstiegel, Arbitrator  
Dr. Santiago Torres Bernárdez, Arbitrator

*Secretary of the Tribunal:*  
Mrs. Anneliese Fleckenstein

*Assistant to the President of the Tribunal*  
Dr. Andreas Th. Müller

*Representing the Claimants:*

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*Date:* February 8, 2013

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<sup>1</sup> For the change of name, see *infra* para. 354.

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**ABBREVIATIONS OF THE SUBMISSIONS OF THE PARTIES**

Claimants' Counter-Memorial on Jurisdiction and Admissibility	C I
Claimants' Rejoinder on Jurisdiction	C II
Claimants' Post-Hearing Brief	C III
Claimants' Comments on the Decision on Jurisdiction and Admissibility and the Dissenting Opinion of Professor Abi-Saab in the <i>Abaclat</i> case	C IV
Request for Arbitration	Request
Respondent's Memorial on Jurisdiction and Admissibility	R I
Respondent's Reply Memorial on Jurisdiction and Admissibility	R II
Respondent's Post Hearing Brief	R III
Respondent's Comments on the Decision on Jurisdiction and Admissibility and the Dissenting Opinion of Professor Abi-Saab in the <i>Abaclat</i> case	R IV
Respondent's Comments to Claimants' Comments on the Decision on Jurisdiction and Admissibility and the Dissenting Opinion of Professor Abi-Saab in the <i>Abaclat</i> case	R V
Transcript of the Hearing on Jurisdiction	Tr



## FURTHER ABBREVIATIONS USED IN THE DECISION

Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention
Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings	Institution Rules
Rules of Procedure for Arbitration Proceedings	Arbitration Rules
Agreement between the Argentine Republic and the Republic of Italy for the Encouragement and Protection of Investments of 22 May 1990 <sup>2</sup>	Argentina-Italy BIT <i>or</i> BIT
Vienna Convention on the Law of Treaties of 23 May 1969	VCLT
North Atlantic Société d'Administration	NASAM
Incarico (Retainer Agreement) on behalf of NASAM <sup>3</sup>	NASAM Mandate
Procura speciale (Special Power of Attorney) on behalf of Avv. Piero Giuseppe Parodi <sup>4</sup>	Power of Attorney
Prospectus Supplement to Prospectus for US Investors dated December 27, 2004 <sup>5</sup>	Exchange Offer 2005
Invitation of 27 April 2010 to tender Certain Eligible Securities for New Securities <sup>6</sup>	Exchange Offer 2010
Ley 26.017 (Law 26.017) of 9 February 2005 <sup>7</sup>	Law No. 26.017

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<sup>2</sup> As to the Spanish version and English translation by the Respondent see Annex RA 147.

<sup>3</sup> As to the Italian original and the English translation provided by the Respondent see Annex RA 108.

<sup>4</sup> Italian original, as attached as Annex 3 (Annex RA 111) to the Letter of 8 May 2006 by NASAM regarding “Procedura arbitrale CIRDI-ICISD – UNCITRAL contro il governo argentino” (Annex RA 107); English translation, as attached as Annex *3bis* (Annex RA 112) to the afore-mentioned letter. Exhibit C-2 as attached to the Request contains copies of the Power of Attorney signed by the individual Claimants.

<sup>5</sup> Exhibit C-3b as well as Annex RA 61.

<sup>6</sup> Annexes CA 74 as well as RA 305.

<sup>7</sup> Boletín Oficial de la República Argentina, Núm. 30.590, 11 February 2005; as to the Spanish original and translation into English see Annex RA 72; for the English translation of the Claimants see *Request* § 29.

## INTRODUCTION

### *Subject-matter and legal framework of the present dispute*

1. The present case deals with the claims of Mr. Giordano Alpi and others (hereinafter “Claimants”) for declaring that the Argentine Republic (hereinafter “Respondent”) has breached its international obligations under the *Agreement between the Argentine Republic and the Republic of Italy for the Encouragement and Protection of Investments of 22 May 1990*<sup>8</sup> (hereinafter “Argentina-Italy BIT” or “BIT”) and for compensatory damages for these breaches in regard to bonds issued by the Respondent and in view of which it defaulted.
2. The procedure is subject to the ICSID legal framework, notably including the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965* (hereinafter “ICSID Convention”) as well as the *Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings* (hereinafter “Institution Rules”), the *Rules of Procedure for Arbitration Proceedings* (hereinafter “Arbitration Rules”) and the *Administrative and Financial Regulations*, all in their versions as amended effective 10 April 2006.

### *Preliminary phase on jurisdiction and admissibility*

3. In the First Session of the Tribunal on 24 February 2009, Claimants and Respondent (hereinafter “the Parties”) “agreed that there should first be a preliminary phase in the proceedings covering jurisdiction and admissibility” (see Minutes of the First Session, point 14). The Parties further agreed on a calendar for their written pleadings in the preliminary phase and on a Hearing on Jurisdiction which was held from 25 to 27 January 2011 in Paris.
4. In the various rounds of exchange of written submissions and in the Hearing on Jurisdiction, both Parties have been given wide and equal opportunity to present their case in regard to the questions of jurisdiction and admissibility before the Tribunal.

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<sup>8</sup> As stated in the Agreement itself, the Argentina-Italy BIT was done in two originals, in the Spanish and Italian languages, with both versions being equally authentic.

Having considered the evidence and arguments submitted by the Parties and based on the deliberations held among the Members of the Tribunal, the Tribunal considers itself in a position to render the present Decision on Jurisdiction and Admissibility which concludes the first phase of the proceedings in the present dispute.

*Limitation of the first phase of the proceedings to questions of a general character*

5. In the afore-mentioned First Session of the Tribunal, the Parties further agreed, as follows (see Minutes of the First Session, point 14):

The preliminary phase would deal with preliminary objections of a general character only, but not with any jurisdictional issues that may arise in relation to individual claimants, which would be dealt with at a later stage as necessary and appropriate. In the event of disagreement as to whether a given objection is of a “general character only” the matter will be decided by the Tribunal.

6. By virtue of the mandate with which the present Tribunal has been entrusted by the Parties, the Tribunal does not aim at determining whether or not it has jurisdiction in respect to each single Claimant. Instead, the Tribunal will set forth the general prerequisites for its jurisdiction and the admissibility of the Claimants’ claims in the present case. Accordingly, relevant jurisdictional issues touching specifically upon individual Claimants are not to be dealt with in the present Decision, but are joined to the examination of the merits of the case.

*Relationship of the present Decision to the Abaclat case*

7. Before explaining the structure of the present Decision on Jurisdiction and Admissibility, the Tribunal would like to point out that currently two other ICSID proceedings are under way concerning issues closely related to the present dispute. In fact, in these two cases, in analogy to the present one, Italian nationals seek compensation from the Argentine Republic for purported violations of the latter’s obligations under the Argentina-Italy BIT in connection with Argentina’s default on paying its sovereign debt in 2001.
8. The older of these two cases is *Abaclat and others (Case formerly known as Giovanna a Beccara and others) v. Argentine Republic*, ICSID Case No. ARB/07/5 which was registered by ICSID on 7 February 2007 (hereinafter “*Abaclat case*”). As in the present case, Argentina challenged the jurisdiction of the Tribunal and the admissibility of the

Claimants' claims. In its *Decision on Jurisdiction and Admissibility* of 4 August 2011 (hereinafter "*Abaclat* Decision"), the Tribunal, by majority decision, held that it had jurisdiction to hear the case in question and that the Claimants' claims were admissible. The dissenting arbitrator, Professor Georges Abi-Saab, issued his Dissenting Opinion to the Tribunal's Decision on 28 October 2011 (hereinafter "Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case").

9. The other case is *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8 which was registered on 27 March 2007. While Argentina has raised preliminary objections concerning jurisdiction and admissibility also in this dispute, the pertinent tribunal has not yet reached a decision in this regard.
10. In light of the substantial parallels between the present case and the *Abaclat* case, in particular of the fact that the Respondent used to a large extent the same or similar arguments to those it put forward in the present case, and given that both Tribunals have come to the same conclusion, i.e. to affirm that the Tribunal has jurisdiction and that the claims brought forward by the Claimants are admissible, it would be artificial for this Tribunal to ignore the Decision taken by its sister Tribunal.
11. Quite evidently, it is highly common for arbitral tribunals in general and ICSID tribunals in particular to take inspiration from the decisions of other tribunals having faced similar questions or situations. However, there can be no doubt that there is a special, particularly close relationship between the present and the *Abaclat* cases – most obviously, as has already been pointed out, due to the substantial overlap of the questions of fact and law the two Tribunals are confronted with in their respective cases.
12. The present Tribunal will therefore not hesitate to benefit, where applicable and appropriate, from the reasoning of the *Abaclat* Tribunal. Far from adhering to any doctrine of *stare decisis* or considering itself legally bound by the findings of the *Abaclat* Tribunal, this implies a process of critically engaging with the majority decision, but also with the counter-arguments contained in the Dissenting Opinion of Professor Abi-Saab. It will become manifest throughout the subsequent reasoning that the present Tribunal

agrees with many, though not all, considerations and views expressed in the *Abaclat* Decision, and the Tribunal will refer to these parallels in the pertinent context.

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

*Structure of the present Decision*

14. As regards the structure of the present Decision, the reasoning will proceed as follows: The Tribunal will first provide an overview over the procedural history of the case (paras. 16 *et seq.*), the facts relevant to this phase of proceedings (paras. 56 *et seq.*) as well as the relief sought by the Parties (paras. 63 *et seq.*).
15. Subsequently, the Tribunal will address the preliminary objections as to jurisdiction and admissibility as raised by the Respondent (see *R I* §§ 87 *et seq.* and the following submissions). However, the Tribunal will not precisely follow the order of issues as set out by the Respondent, but will proceed in the following manner: First, the Tribunal will deal with the issue of the consent of the Respondent (Chapter I.; paras. 68 *et seq.*), then with the consent of the Claimants (Chapter II.; paras. 173 *et seq.*) and subsequently with the problem of the nationality and standing of the Claimants (Chapter III.; paras. 279 *et seq.*). After that, it will address the question of whether there exists a legal dispute arising out of an investment in the present case (Chapter IV.; paras. 355 *et seq.*) and then turn to the further issues of the existence of a *prima facie* treaty claim (Chapter V.; paras. 521 *et seq.*) and whether Claimants have complied with Art. 8 of the Argentina-Italy BIT and the prerequisites of amicable consultations and recourse to Argentine courts contained therein (Chapter VI.; paras. 552 *et seq.*). In each one of the Chapters, the Tribunal will first briefly set out the arguments submitted by the Respondent and the Claimants and then present its own findings on the issues at stake.

## **PROCEDURAL HISTORY**

16. On 26 June 2008, the International Centre for Settlement of Investment Disputes (hereinafter “ICSID” or the “Centre”) received a Request for Arbitration dated 23 January 2008 (hereinafter “Request”) from Claimants against Respondent. On 1 July 2008, the Centre acknowledged receipt of the Request. On 3 July 2008, the Centre transmitted a copy of the Request and its accompanying documentation to Respondent and its Embassy in Washington, D.C.
17. On 28 July 2008, pursuant to Art. 36(3) of the ICSID Convention and in accordance with Rules 6(1)(a) and 7(a) of the Institution Rules, ICSID’s Acting Secretary-General registered the Request, and on the same date, notified the Parties of the registration, inviting them to constitute an arbitral tribunal as soon as possible.
18. By letter of 22 September 2008, Claimants informed ICSID that the Parties had reached an agreement on the method for the appointment of the Tribunal. It stated that each Party was to appoint an arbitrator, with Claimants appointing Professor Karl-Heinz Böckstiegel, a national of Germany. The two party-appointed arbitrators would submit to the Parties a list of five candidates for the position of President of the Tribunal. The Parties would then attempt to reach an agreement on the designation of the President of the Tribunal from the list of candidates. If the party-appointed arbitrators were unable to agree on a list of candidates for the designation of the President, either Party could request that the President be appointed by the Chairman of ICSID’s Administrative Council in accordance with the method set forth in Rule 4 of the Arbitration Rules. Professor Böckstiegel accepted his appointment on 25 October 2008.
19. On 22 September 2008, Respondent appointed Dr. Santiago Torres Bernárdez, a national of Spain, as arbitrator. Dr. Torres Bernárdez accepted his appointment on 29 October 2008.
20. By letter of 23 September 2008, but received 24 January 2008, Respondent confirmed to ICSID its agreement with Claimants as to the method for appointing the President of the Tribunal.

21. On 5 November 2008, ICSID sent to both Parties the co-arbitrators' proposed list of candidates for the position of President of the Tribunal.
22. By letters of 17 and 18 November 2008, the Parties informed the Centre that they had agreed to the appointment of Judge Bruno Simma, a national of Austria and Germany, as the President of the Tribunal.
23. On 5 December 2008, the Centre informed the Parties that the Arbitral Tribunal was deemed constituted by (i) Professor Karl-Heinz Böckstiegel (appointed by Claimants), (ii) Dr. Santiago Torres Bernárdez (appointed by Respondent), and (iii) Judge Bruno Simma (appointed by agreement of the parties), President of the Tribunal. Further, the Tribunal was informed that Mr. Gonzalo Flores, Senior Counsel, would serve as the Secretary to the Tribunal. Mr. Flores was replaced as Secretary of the Tribunal by Mrs. Anneliese Fleckenstein, Legal Counsel, on 4 October 2011.
24. On 24 February 2009, the First Session was held via telephone conference. During the session a procedural calendar for the further conduct of the proceedings was agreed by the Parties. The agreements reached were recorded in the Minutes of the First Session.
25. On 16 March 2009, Respondent filed its request for the production of documents, as per the schedule agreed upon by the Parties. On 30 March 2009, Claimants filed their objections to Respondent's request for the production of documents. On 13 April 2009, Respondent filed a *Redfern Schedule*. On 17 April 2009, Claimants responded to Respondent's letter of 13 April 2009 and the attached *Redfern Schedule*. On 15 May 2009, Respondent filed observations to Claimants' letter of 17 April 2009. On 18 May 2009, Claimants responded to Respondent's letter of 15 May 2009.
26. On 11 June 2009, Respondent filed its Memorial on Jurisdiction and Admissibility ("R I").
27. On 29 June 2009, the Tribunal issued Procedural Order No. 1 ruling on Respondent's request for the production of documents.

28. On 16 July 2009, Claimants' filed their request for the production of documents. On 23 July 2009, Respondent requested that the Tribunal dismiss Claimants' request objecting to its tardiness and raising other objections to the request. On 3 August 2009, Claimants responded to Respondent's objections of 23 July 2009, and filed their *Redfern Schedule*. On the same date, Respondent submitted its observations to Claimants' letter.
29. On 18 September 2009, the Tribunal issued a decision concerning Claimants' request for the production of documents and Respondent's objections.
30. By letter of 15 October 2009, Claimants informed the Tribunal that together with Respondent, they had agreed to amend the schedule.
31. On 26 November 2009, Claimants submitted their Counter-Memorial on Jurisdiction and Admissibility ("C I").
32. On 15 December 2009, Respondent filed its second request for the production of documents. On 22 December 2009, Claimants filed their objections to Respondent's second request for the production of documents. On 11 January 2010, Respondent filed a *Redfern Schedule* on its second request for the production of documents.
33. By letter of 17 February 2010, the Tribunal reiterated its decisions in Procedural Order No. 1.
34. On 12 March 2010, Respondent submitted its Reply Memorial on Jurisdiction and Admissibility ("R II").
35. On 22 March 2010, Claimants filed their second request for the production of documents. On 29 March 2010, Respondent filed its objections to Claimants' second request for the production of documents.
36. By letter of 28 April 2010, Claimants requested from the Tribunal a suspension of the present proceedings in light of the publicly announced New Exchange Offer by the Argentine Government.



37. By letter of 30 April 2010, Respondent informed the Tribunal that it had no objection to Claimants' request for suspension.
38. By letter of 4 May 2010, Respondent further informed the Tribunal that the Parties, having conferred on the issue of suspension, had agreed to suspend the proceedings as of that date without the need for Claimants to file their Rejoinder on the scheduled date.
39. By letter of 5 May 2010, Claimants confirmed the agreement as conveyed by Respondent on 4 May 2010.
40. By letter of 31 May 2010, Respondent objected to North Atlantic Société d'Administration's ("NASAM") communication to Claimants with respect to the New Exchange Offer.
41. By letter of 10 June 2010, Claimants responded to Respondent's letter concerning NASAM and requested an extension of the suspension of the proceeding as well as the submission of its Rejoinder.
42. By letter of 16 June 2010, the Tribunal issued a decision on the Parties' respective letters concerning NASAM, dated 31 May 2010 and 10 June 2010 and granted the extension to the suspension of the proceeding.
43. The parties further exchanged letters on the issue concerning NASAM as well as Claimants' request for an extension on its Rejoinder. On 16 July 2010, the Tribunal informed the Parties that the suspension was terminated, and indicated a date for the submission of Claimants' Rejoinder.
44. On 8 October 2010, Claimants submitted their Rejoinder on Jurisdiction ("C II").
45. By letter of 26 November 2010, the Tribunal invited the Parties to indicate whether they would be agreeable to the appointment of an Assistant to the President of the Tribunal. By letters of 26 and 30 November 2010, Respondent and Claimants, respectively, agreed.
46. On 30 December 2010, the Parties agreed to the appointment of Dr. Michael Waibel as Assistant to the President of the Tribunal.

47. From 25 to 27 January 2011, the Tribunal held a hearing on jurisdiction in Paris. Present at the hearing were, for the Tribunal: Judge Bruno Simma, President; Professor Karl-Heinz Böckstiegel, Arbitrator; Dr. Santiago Torres Bernárdez, Arbitrator; Dr. Michael Waibel, Assistant to the President of the Tribunal; and Mr. Gonzalo Flores, Secretary of the Tribunal. Claimants were represented by Professor Luca G. Radicati di Brozolo, Ms. Victoria Viñes, Mr. Michele Sabatini, Mr. Clemente Parodi and Mr. Giovanni Minuto. Respondent was represented by Dra. Angelina Abbona, *Procuradora del Tesoro de la Nación*; Dr. Gabriel Bottini, *Director Nacional de Asuntos y Controversias Internacionales de la Procuración del Tesoro de la Nación*; Ms. Silvina González Napolitano, Mr. Alejandro Turyn, Ms. Mariana Lozza, Ms. Verónica Lavista, Mr. Diego Gosis, Dr. Domenico Di Pietro, Mr. Julián Negro and Mr. Patricio Arnedo Barreiro from the *Procuración del Tesoro de la Nación*.
48. On 28 March 2011, Respondent filed its Post Hearing Brief (“R III”), and Claimants filed theirs the following day on 29 March 2011 (“C III”).
49. By letter of 11 July 2011, the President of the Tribunal informed the Parties that Dr. Waibel had resigned as Assistant and invited the parties to comment on his replacement by Dr. Andreas Th. Müller.
50. By letter of 21 July 2011, Dr. Müller’s appointment was confirmed.
51. By letter of 4 November 2011, as requested by the Parties, the Tribunal invited the Parties to submit simultaneous comments to the Decision on Jurisdiction and Admissibility and Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case.
52. On 25 November 2011, the Parties submitted their comments to the Decision on Jurisdiction and Admissibility and the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case (“C IV”; “R IV”). On 13 December 2011, the Parties submitted further comments to each other’s submissions of 25 November 2011 (“C V”; “R V”).
53. Upon request by the Tribunal, on 9 July 2012, Claimants submitted their Statement of Costs incurred from the filing of the Request until the date of the submission of the

statement. Respondent submitted its Statement of Costs the following day on 10 July 2012.

54. Upon request by the Tribunal, the Respondent stated, by letter of 17 September 2012, that it does not object to the discontinuance of proceedings in connection with those Claimants that, including those listed in Annex CA 73, tendered into the 2010 Exchange Offer. Subsequently, the Tribunal requested the Claimants to provide it with reliable information as to which Claimants among the 55 persons listed in Annex CA 73 meet the afore-mentioned requirements.
55. In their response dated 18 October 2012, the Claimants submitted an updated list of Claimants who have accepted the 2010 Exchange Offer. In particular, according to the Claimants, out of the 55 persons listed in Annex CA 73, 29 accepted the Exchanger Offer.

## **FACTS OF THE CASE**

56. In their written and oral submissions, the Parties have provided the Tribunal with a considerable amount of factual information (*RfA* §§ 13-37; *C I* §§ 21-79; *C II* §§ 5-7; *C III* §§ 35-41; *R I* §§ 7-86; *R II* § 22-81; *Tr pp.* 9/13-12/17, 157/19-162/12).
57. The Tribunal sees no need to express itself on these submissions in any detail at this stage of the proceedings and for the purpose of deciding, as the Tribunal is called upon, on Respondent's preliminary objections regarding jurisdiction and admissibility in the present dispute.
58. For one, a considerable part of the information provided by the Parties will only become relevant at the merits stage of the proceedings and will be addressed by the Tribunal at that time.
59. Secondly, inasmuch as certain factual claims made by the Parties are directly relevant for this Decision on Jurisdiction and Admissibility, the Tribunal will address these in the respective Chapters of the present Decision and assess the probative value of the Parties' submissions in the relevant context.
60. Thirdly, the Tribunal acknowledges that the *Abaclat* Decision, in its paras. 11-64, 70-71 and 75-80, contains a summary of the general factual background of the *Abaclat* case (see para. 10 of the *Abaclat* Decision), notably containing an explanation of general concepts related to financial markets and bonds, as far as relevant for the case, a general overview on sovereign debt restructuring and of Argentina's financial crisis and default in 2001 as well as Argentina's activities in terms of restructuring its economy and its sovereign debt (particularly including the Exchange Offer of 2005 and the adoption of Law No. 26.017 on 9 February 2005<sup>9</sup>).
61. In the eyes of the Tribunal, this succinct description of the factual background in the *Abaclat* Decision can also be usefully applied regarding the present case. The Tribunal

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<sup>9</sup> Ley 26.017 of 9 February 2005, Boletín Oficial de la República Argentina, Núm. 30.590, 11 February 2005 (hereinafter "Law No. 26.017").

has already stated<sup>10</sup> that it will refer to the *Abaclat* case, whenever appropriate, and it considers this a valuable opportunity to do so for reasons of expediency, namely in order not to reduplicate an effort that has already been made by its sister Tribunal.

62. The Tribunal would wish to point out at the same time that, while referring to the aforementioned paragraphs of the *Abaclat* Decision, it does not take a final stand on any of the facts stated therein. Inasmuch as it is necessary to set out specific facts to decide the legal questions pertinent to this first stage of the proceedings, i.e. the jurisdictional and admissibility phase, this will be done, as has already been stated<sup>11</sup>, in the respective Chapters of the present Decision.

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<sup>10</sup> See *supra* para. 12.

<sup>11</sup> See *supra* para. 59.

## **PRAYERS OF RELIEF**

63. In paras. 90 and 91 of the Request, the Claimants state that they

90. [...] seek an Arbitral Award:

- declaring that the Respondent has breached its international obligations under the BIT and international law by failing to ensure fair and equitable treatment and full protection and security to their investments and by expropriating such investments without prompt, adequate and immediate compensation;

- ordering the Respondent to refund to each Claimant the entire nominal value of the Bonds held by it, plus accrued interest until maturity, plus compounded interest from the date of expiry to the date of the Request for Arbitration, plus all other damages that shall be demonstrated to be a direct consequence of the Respondent's international law violations;

- ordering the Respondent to pay compounded interest on the total amount indicated above from the date of the present Request for Arbitration until the date of actual payment. [...]

91. [...] [T]he Claimants [further] request that the Respondent be ordered to reimburse them for all costs incurred and to be incurred by them in connection with the present arbitration, including legal fees, plus compounded interest at the normal commercial rate applicable from the payment of each bond until the date of effective reimbursement.

64. In the light of the Respondent's preliminary objections, the Claimants requested in their Counter-Memorial on Jurisdiction and Admissibility "that the Arbitral Tribunal dismiss all the Respondent's objections and decide that it has jurisdiction" (*C I* § 426).

65. In their Rejoinder on Jurisdiction, the Claimants requested "that the Arbitral Tribunal dismiss all the Respondent's objections and decide that it has jurisdiction and that the present proceedings are admissible" (*C II* § 218). Furthermore, Claimants requested "that the Respondent be ordered to reimburse the Claimants for the legal fees and the costs of this arbitration" (*C II* § 219; see similarly *Tr p. 521/11-17*).

66. Finally, in their Post Hearing Brief, Claimants "reiterate[d] their prayers of relief and request[ed] that the Tribunal declare that it has jurisdiction over the present case rejecting all Respondent's objections to jurisdiction and admissibility. They further request[ed]

that the Respondent be ordered to reimburse the Claimants for the legal fees and the costs of this arbitration.” (C III § 183)

67. The Respondent, on its part, requested in its submissions that the Tribunal issue an award (R I § 299; R II § 498; R III § 185; see also *Tr pp.* 441/5-442/13):

- a) Determining that it lacks competence and that ICSID lacks jurisdiction to entertain collective actions of this nature;
- b) In the alternative, determining that it lacks competence and ICSID [R III: “and that the ICSID”] lacks jurisdiction because both Argentina and Claimants have not provided valid consent to these proceedings [R III: “neither Argentina nor Claimants gave valid consent to these proceedings”], and, further, that Claimants’ abuse of right in bringing the claims in this proceeding [R III: “bringing these proceedings”] – in the name of a third party – renders invalid such consent as Claimants may have offered [R III: “renders any consent they may have given null and void”];
- c) In the alternative, determining that there is no *prima facie* violation of the Argentina-Italy BIT;
- d) In the alternative, determining that it lacks jurisdiction *ratione materiae*;
- e) In the alternative, determining that it lacks jurisdiction *ratione personae* or that Claimants lack standing [R III: “lack legal standing to institute these proceedings”];
- f) In the alternative, determining that Claimants have not satisfied the requirements for bringing [R II: “necessary prerequisites to bringing”; R III: “the necessary requirements for bringing”] a claim under the Argentina-Italy BIT;

[in *Tr p.* 442/8, the request was added “to order Claimants to cure the lack of legal personality of Claimants” which was clarified by the Respondent to mean that the Tribunal should “take into account full resolution at the proper procedural time the procedural request [...] presented by the Argentine Republic regarding the lack of legal representation in these proceedings by the Claimant Parties”; see *Tr p.* 443/3];<sup>12</sup>

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<sup>12</sup> Respondent confirmed upon request by one Member of the Tribunal that the Respondent’s Prayer of Relief, as presented at the end of the Hearing on Jurisdiction, was identical with that presented in its previous written submissions, complemented by the procedural issue that was raised at the beginning of the third day of the Hearing (*Tr p.* 443/13).

- g) Ordering Claimants to pay all of Argentina's costs, expenses, and attorney's fees [*R II*: "attorney's fees (plus interest thereon)"; *R III*: "attorney's fees incurred by the Argentine Republic (plus interest)"]; and
- h) Granting any further relief requested against Claimants that the Tribunal deems fit and proper [*R III*: "relief against Claimants as may have been requested by the Argentine Republic and deemed to be fit by the Tribunal"].



## I. CONSENT OF THE RESPONDENT

### A. Positions of the Parties

#### 1. Contentions by Respondent

68. Respondent submits that the present dispute involves an attempt by a great number of unrelated Claimants to jointly arbitrate their claims against a State. This way to proceed is unprecedented since the States Parties to the ICSID Convention did not consent to jurisdiction over collective actions. Both the ICSID Convention and the Argentina-Italy BIT are limited to single investor disputes and do not even allude to the possibility of collective actions, let alone do they establish the necessary and appropriate procedures for such proceedings (*R I* § 87).
69. In Respondent's submission, in order for Claimants to meet their burden for establishing jurisdiction, they must demonstrate both that the ICSID Convention permits arbitration of collective or mass claims and that Argentina consented to such arbitration in Art. 8 of the Argentina-Italy BIT (*R I* § 90). Since the Claimants concede themselves that "the ICSID Convention and Rules and the BIT do not expressly envisage actions brought by a plurality of claimants" (*C I* § 169), Respondent contends that the Tribunal should dismiss the present case for lack of jurisdiction (*R II* § 82).
- a) The ICSID Convention does not authorize collective actions nor did Argentina consent to such proceedings in the Argentina-Italy BIT*
70. Respondent contends that nothing in the ICSID Convention and Rules provides Claimants with any right to bring collective and mass claims before an ICSID tribunal (*R I* § 90). In particular, the text of the ICSID Convention, notably its Art. 25(1), consistently uses singular nouns when defining ICSID jurisdiction over investor claims (*R II* § 105; *R III* § 10). Moreover, Art. 8 paras. 1 and 5 of the Argentina-Italy BIT both use the expression "an investor" or "of the investor" in the singular form, thus limiting Respondent's consent to arbitrate to claims filed by a single investor (*R II* §§ 111, 112; *R III* § 11). Regarding Claimants' counter-argument that Art. 8 para. 3 of the BIT speaks of "investors", Respondent submits that the two afore-mentioned paragraphs are more

relevant than para. 3, because para. 1 is the chapeau on which the whole provision is based and because para. 5 includes the Respondent's consent to arbitration (*Tr p. 361/3*).

71. The absence of any express provisions for collective proceedings cannot be construed to implicitly allow for such actions (*R I § 91; Tr p. 51/11*), rather, the opposite is true (*R II §§ 101, 106*). The interpretation proposed by Claimants turns on its head one of the defining aspects of international law, i.e. international jurisdiction being voluntary, unlike domestic jurisdiction which is mandatory, and thus the former must be expressly consented (*R II § 102*). Hence, Respondent sharply disagrees with the finding in the *Abaclat* Decision that for admitting multi-party proceedings in ICSID a supplementary expression of consent in addition to the general consent given to ICSID arbitration is not necessary (*R IV pp. 6-8*).
72. Furthermore, international and domestic instruments allowing for collective or mass claim proceedings contain detailed legal provisions regarding whether a case is suitable for collective treatment and establish specific procedures to handle such cases (*R I §§ 88, 91*). In contrast, the absolute absence of procedural rules for collective proceedings within the framework of the ICSID Convention provides further evidence that such proceedings do not fall within the Convention's jurisdictional scope (*R II §§ 110, 114; R III § 9*).
73. In particular, in domestic jurisdictions where collective or mass claims are permitted (such as in the US legal system's class action mechanism and the related arbitral rules of the American Arbitration Association, but also in the UK as well as in Italy), these are typically authorized by specific legal provisions representing a policy choice by the jurisdiction to provide for such a means of conflict resolution in appropriate circumstances. These provisions set out detailed procedures established by a legislative-type body to ensure fairness of representation and due process of law to all participants before any case is permitted to proceed on a collective basis. Nowhere can a group of claimants unilaterally determine that their own particular claims are necessarily proper or suitable for aggregate treatment (*R I §§ 92-97; R II §§ 114, 124-126*).

74. In a similar vein, Respondent submits that the mass claim facilities that have occasionally been created by international instruments (e.g. the Iran-US Claims Tribunal and the UN Compensation Commission) likewise provide specially designed procedures for addressing these kinds of claims recognizing their unique nature. In each of the examples of such mass claim facilities, their establishment has involved careful and detailed drafting of rules and procedures by which to ensure the proper handling of collective or multiple claims (*R I §§ 98-100; R II § 116*).
75. The ICSID Convention and the Argentina-Italy BIT contain no such procedures, and this silence is itself powerful evidence of the absence of any intent by the parties to these instruments to permit such claims; in fact, mass or class proceedings were highly controversial, or entirely prohibited, at the time when those instruments were adopted (*R I §§ 91, 101-102; R II § 101, 108, 124; R III § 18; Tr p. 57/14*). Respondent criticizes the *Abaclat* Tribunal for interpreting its jurisdictional basis beyond “the horizon of foreseeability”, i.e. extending jurisdiction to what the parties could not have foreseen at the time consent was given (*R IV pp. 6, 8*). From this Respondent concludes that accepting jurisdiction over this collective action would manifestly disregard the jurisdictional limits imposed by the ICSID Convention and Argentina’s consent to arbitrate in Art. 8 of the Argentina-Italy BIT and that it is therefore not within the powers of an ICSID tribunal to do so (*R I § 103; R II § 100*).
76. Respondent does not disagree, however, that a limited multi-party proceeding between closely related investors may be possible if the parties offer their consent to it in the case of each individual proceeding (*R II § 140*). Yet, in no case has an arbitral tribunal on an *ad hoc* basis, without any previous authorization in the pertinent constitutive documents or institutional arbitration rules, created or permitted a mass claim procedure (*R II §§ 118, 129; R III § 24*). The multi-party proceedings cited by the Claimants at most support the proposition that in some instances, provided respondent’s consent had been given, ICSID tribunals have entertained unique proceedings involving a small number of claimants (generally two or three) who were intimately linked in some concrete way (*R II § 103*).

77. The claim at stake is fundamentally different from the afore-mentioned cases, since here the Claimants have divergent interests and their claims are thus not suited for collective treatment. In the Respondent's eyes, this dispute brings together contractually unrelated persons (*R I § 104*). It involves security entitlements regarding 55 different bond series [state as of March 2010] with different applicable laws, issuance dates, types of currency and amounts, and which were acquired in different places, at very different prices and on different dates, even including some Claimants having purchased after Argentina's default. Similarly, at least some Claimants have initiated lawsuits against the banks that sold them the security entitlements and taken the position that the sale contracts of their security entitlements should be terminated (*R I § 94; R II §§ 104, 135*). The fact that the link between the Claimants is the invocation of the same BIT or a common claim for damages is not enough in order to consolidate the claims of several Claimants. Otherwise, all claims invoking the same BIT brought before ICSID against a country could be consolidated. Arguing that all the persons involved have purportedly been affected by the same measure is not sufficient either (*R III §§ 19, 21; Tr p. 369/15*).
78. Moreover, Respondent contends that in existing multi-party ICSID cases there was not only a strong connection among claimants, but the respondent State in the dispute did not oppose such joinder. In the cases brought against Argentina before ICSID tribunals, Respondent decided to consent to multi-party proceedings only where there was a strong preexisting connection between claimants (*R I § 105*). Respondent emphasizes that there is not a single case in the ICSID Convention's history which was initiated by multiple unrelated parties without the respondent State's consent. The lack of any such jurisprudence reflects the absence of any provision in ICSID law that would remotely permit such a claim (*R I § 107*).
79. Following Respondent's submission, no ICSID case involved more than 14 Claimants, thus not raising any of the manageability and due process issues existing in the present proceedings (*R I § 104; R II § 129*). Concerning Claimants' contention that the discussion regarding collective claims in the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case is largely moot because in that case there are 60,000 claimants whereas in the present one there are only 64 (*C IV § 50*), Respondent insists that the conclusions

reached in the Dissenting Opinion apply both to a collective action involving 60,000 as well as one involving 120 or 64 Claimants (*R V p. 5*).

80. As regards, finally, Claimants' arguments that jurisdiction should exist because this is the most efficient, favourable, cost-effective way to proceed and would eliminate inconsistent decisions, from the point of view of the Respondent, these must fail as a matter of law. ICSID is a strictly consent-based institution and lack of consent is an absolute bar to jurisdiction that cannot be overcome by policy considerations (*R II § 142; Tr p. 55/1*). What Claimants do not say is that, if there are financial and administrative obstacles with ICSID arbitration, domestic law mechanisms are at their disposal, as provided for by each kind of bond series (*Tr p. 53/22*).

***b) Claimants' submission as to the nature of the action brought by them is not convincing***

81. Respondent disagrees with Claimants' argument (*C I §§ 156, 158*) that the present action is not a class action but one in which the individual Claimants personally act for the enforcement of their own rights and not on behalf of third parties (*R II § 83*). Respondent characterizes the action as an "atypical class action" because if it were a class action, it would not be admitted even in the most liberal States that accept class actions (*Tr p. 65/4*).
82. First, in Respondent's view, it is obvious that Claimants are not acting personally for the enforcement of their own rights, but it is in fact the *North Atlantic Société d'Administration* (hereinafter "NASAM") which is acting on their behalf. This third-party representation is not a regular or permissible feature of discretionary joinder in internal legal systems or before international tribunals (*R II § 84; Tr p. 61/13*).
83. Secondly, the *Incarico (Retainer Agreement) on behalf of NASAM* (hereinafter "NASAM Mandate")<sup>13</sup> refers twice to "azione di gruppo". Whether this is translated as "group", "collective" or "class" action, the fact remains that this is not an individual action. This result is corroborated by the fact that the filing of the action was conditioned upon

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<sup>13</sup> See *supra* reference note 3.

NASAM's ability to gather a certain number of members for the group of Claimants. Thus, the NASAM Mandate turns out to be a key document in confirming the true nature of the present action, contrary to Claimants' attempts to classify it otherwise (*R II §§ 85, 86; R III § 3; Tr pp. 65/10, 68/11*).

84. Thirdly, inasmuch as Claimants assert that this proceeding is not a class action because each Claimant has expressed its individualized consent, Respondent contends that Claimants' alleged acts of consent lack validity (*R II § 89*), as explained below.<sup>14</sup>
85. Fourthly, Claimants' collective action is in fact a representative or class action in which NASAM inadmissibly acts as Claimants' sole representative. This becomes manifest from the fact that NASAM "recruited" the Claimants and entrusted Avv. Parodi to bring and pursue arbitral proceedings and that Claimants have become simple passive onlookers in a proceeding they cannot influence or modify since they are required to leave the management of the arbitration proceedings in NASAM's hands (*R II § 90; Tr p. 63/16*).

***c) Violation of fundamental principles of due process***

86. Respondent further contends that, in the absence of anything like mass or collective claim procedures in the ICSID arbitration, the present proceeding violates fundamental principles of due process (*R I § 108; R II § 142*).
87. First, deciding more than a hundred claims [state as of March 2010] would be unworkable and unfair to the Respondent. As mentioned above<sup>15</sup>, the security entitlements in question relate to 55 different bonds issues [state as of March 2010] under different instruments and subject to different governing laws, and they were acquired by Claimants at different times and under different conditions. The Tribunal would be required to review individually all these cases to determine multiple factual and legal issues (for instance, the nationality and residence of the Claimants, the date of acquisition of the security entitlements, the purchase prices, the circumstances and terms and

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<sup>14</sup> For the Respondent's position on the issue of Consent of the Claimants see *infra* paras. 173 *et seq.*

<sup>15</sup> See *supra* para. 77.

conditions of each of the 55 bond issuances [state as of March 2010], including the existence of different choice of law and forum clauses and how the value of each bond evolved before and after the contested measures). In particular, there is no sensible way in which Argentina could, within any reasonable period of time, address all these issues in view of each Claimant in its written submissions, let alone in cross-examination and oral submissions in the course of a hearing. The possibility for Argentina to individually analyze and address the claim of each Claimant is, however, a fundamental feature of its rights of defense in the present case (*R I* § 109; *R II* §§ 147, 148; *R III* § 35). Furthermore, the Respondent contends that the individualized facts and circumstances regarding each holder of a security entitlement are relevant not only in the merits phase, but are also relevant to the threshold determination of whether the Tribunal has jurisdiction at all (*R II* §§ 149-152).

88. Secondly, the owners of security entitlements are persons who have undertaken their transactions in a unilateral fashion. Hence, there is no link among the Claimants and they thus fail to present the characteristics that are typically required to permit joint treatment under collective action regimes. Even under the permissive class action provisions of the US legal system, the New York District Court rejected a collective action brought by holders of a disparate collection of bonds issued by Argentina as the claims involved were “too large, too diverse, and too vaguely defined to be the basis for a manageable class action.” For the same reasons, the proposed collective action in the present case would be prohibitively unmanageable (*R I* § 110).
89. Thirdly, Respondent criticizes that absent from Claimants’ proposed collective action is a legal representative who can adequately and fairly represent the interests of the individual Claimants. In assessing a collective action such as the present one where the interests of the Claimants are represented by a sole representative, it is the Tribunal’s responsibility under any system that allows such claims to evaluate carefully the proposed representative in order to ensure that it has the incentive and ability to pursue vigorously the interests of each and every Claimant (*R I* § 112; *R II* § 155).

90. Fourthly, the Respondent points out that its pertinent submissions merely scratch the surface of the problems of fairness and manageability. Given the absence of rules on collective claims in the framework of the ICSID Convention and therefore given the lack of applicable legal standards, it is impossible to discuss, much less decide, whether such standards have been met. This collective claim simply ignores the lack of such standards and at best asks the Tribunal to develop a *sui generis* process that the ICSID Convention and Rules never contemplated (*RI* § 113).
91. Respondent further submits that Rule 19 of the Arbitration Rules, while stating the principle that the Tribunal controls and directs the unfolding of the proceedings through procedural orders, does not empower the Tribunal to create rules of procedure in order to pursue a collective or mass claim. Likewise, Art. 44 of the ICSID Convention allows for the replacement of a small missing element and not whole sets or chapters of rules that cover complete segments of procedure. In Respondent's view, the procedural adaptations envisaged by the Tribunal in the *Abaclat* case go beyond what is allowed for a tribunal within the framework of the ICSID Convention (*R IV pp. 10, 11*).

## **2. Contentions by Claimants**

92. Regarding Respondent's contention that Claimants have brought a "collective action" in the present case, the latter submit that the Respondent's argument is based on a three-fold assumption: that the Claimants' claims are a "mass claim", that they do not meet the requirements to be treated as a multiparty arbitration by an ICSID tribunal and that they cannot be dealt with by the Tribunal without violating fundamental due process principles (*CI* § 151). The Claimants seek to refute each of these arguments in their submissions and point out that the present arbitration is far from being "extraordinary" or "unprecedented", as suggested by the Respondent (*CI* § 153).

### ***a) The nature of the action brought by the Claimants***

93. Claimants criticize Respondent for seeking to present the claims at stake as a "mass claim", "collective claims", "collective actions" or even a "class action" (*CI* § 155; *CII* § 51). As Respondent itself admits, the main feature of mass proceedings or class actions is their representative nature. However, this does not hold true in the present dispute in



which the individual Claimants are directly and personally acting for the enforcement of their own rights and not on behalf of any third parties (*C I §§ 157, 158; C III § 74; Tr p. 215/8*). The action brought is thus one brought by a limited number of well-identified Claimants who hold substantially identical securities and who complain about the very same illegality (*C I §§ 160, 165; C II § 51; Tr p. 15/20*). Reliance on the Dissenting Opinion of Professor *Abi-Saab* in the *Abaclat* case cannot help Respondent in the present dispute due to the enormous difference between 60,000 claimants in the *Abaclat* case and 64 Claimants in the case at hand (*C IV §§ 50, 51*).

94. Moreover, according to the Claimants, Respondent's assimilation of the present action to the global claims settlement machinery (e.g. the Iran-US Claims Tribunal or the UN Compensation Commission) is misleading. Those mechanisms aimed to ensure the global consequences of a behavior of a State such as war, invasion, etc. and vis-à-vis victims whose number and identity could not be ascertained beforehand. The claims in the present case are of a different type, as this dispute deals with a very specific set of facts and Claimants (*C I §§ 163, 164; C III § 74*).
95. Inasmuch as Respondent contends that NASAM "recruited" the Claimants to participate in a class action, the latter refer to their characterization of NASAM's role in the present proceedings, as described in the following Chapter of the present Decision.<sup>16</sup> NASAM simply made available to the Claimants a mechanism to fund their action and acted on Claimants' behalf in choosing counsel, thereby providing them with a concrete opportunity to pursue their rights (*C I §§ 161, 162; C II §§ 54, 56*).
96. In addition, Claimants refute Respondent's argument that the NASAM Mandate itself speaks of a "class action". The term solely appears in the Mandate's English translation submitted by the Respondent. Insofar as the NASAM Mandate refers to "azioni di gruppo" (group actions), the term is manifestly used in a non-technical sense. Moreover, the language of the Mandate is not of itself dispositive of the nature of the proceedings and cannot affect the true nature of the action brought before the Tribunal (*C I § 162; C II § 53*).

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<sup>16</sup> See *infra* paras. 202, 203.

**b) *Possibility of bringing multi-party arbitrations before an ICSID tribunal without special consent of the Parties***

97. While Respondent submits that the rules governing ICSID arbitration do not contemplate the possibility of multi-party arbitrations and that these are therefore not allowed, Claimants insist that there is nothing in the ICSID Convention and Rules and the Argentina-Italy BIT nor in the factual set of circumstances of the present case which would stand in the way of the claims brought being adjudicated by the present Tribunal (*C I § 168*). The silence of the afore-mentioned legal instruments is not conclusive and cannot be construed as a prohibition of proceedings with multiple claimants (*C III § 77*).
98. According to Claimants, it is further irrelevant whether the contracting parties contemplated actions involving multiple claimants or not when they entered into the Argentina-Italy BIT, since the rules on treaty interpretation according to Art. 31 of the *Vienna Convention on the Law of Treaties* of 23 May 1969 (hereinafter “VCLT”) require agreements to be interpreted not in the light of the intention of the parties at the time of the treaty’s conclusion, but in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of the treaty’s object and purpose (*C II § 67*). In addition, the fact that most national procedural laws (including the Italian and the Argentine ones) permit the bringing of joint actions by more than one claimant suggests that the concept is not so alien that Respondent could not have conceived of its application (*C III §§ 84, 85; Tr p. 221/13*). Furthermore, the Claimants argue that the admissibility of actions brought by multiple claimants before international courts and tribunals is almost a general principle (*C III § 83*).
99. In particular, Claimants insist that the use of the singular in Art. 25(1) of the ICSID Convention is not intended to preclude the institution of proceedings by multiple claimants (*C I § 176; C III § 80*). In a similar vein, the use of the singular (“investor”) in Art. 8(1) of the Argentina-Italy BIT is no conclusive argument for Respondent’s position. First, terms used in the singular are usually interpreted to include the plural and *vice versa*. Most dispute resolution clauses in BITs use the term “investor” in the singular, and this has never been an issue in ICSID arbitration. Second, both the heading of Art. 8 and

Art. 8 para. 3 of the Argentina-Italy BIT use the plural “investors” (*C II § 69; Tr p. 223/2*).

100. In addition, ICSID practice displays many examples of proceedings with multiple claimants where these are linked by the same factual background, the same relief sought and the same legal basis (*C I § 170; C III § 80*). By the Claimants’ count, there have been more than 120 multi-party investment cases, including ICSID and NAFTA (*C IV § 60*). Moreover, Claimants point out that Respondent’s assertion that no ICSID case involved more than fourteen claimants is not correct (*C I § 194*) and that the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case fell victim to the same mistake (*C IV § 60*).
101. Inasmuch as Respondent contends that the present case is different from other multi-party arbitrations since it is brought by “contractually unrelated” parties, Claimants submit that there is no predetermined catalogue of types of cases that can form the subject of an arbitration brought by a plurality of claimants (*C I §§ 171, 172*). In their view, the sole requirement for setting in motion ICSID proceedings, including those with a multiplicity of claimants, is that all of them must have given their consent in writing (*C I § 173*).
102. If it were conceded that there ought to be a reasonable and significant link between the claims of the individual claimants and that it were not possible to adjudicate in the same arbitration totally unrelated claims, in the Claimants’ submission, these criteria would certainly be fulfilled for the present dispute (*C I § 177*). All the pertinent claims arise from and relate to a substantially identical factual and legal pattern. The differences between the positions of the Claimants (i.e. the fact that they hold bonds issued under different conditions, applicable law, currency and interest rate) are totally immaterial to the subject-matter. The identity of the illegality complained of, of the legal basis and of the relief sought is more than sufficient to establish a link between the claims that justifies their being treated in the same proceedings, as is illustrated by the *Funnekotter and others v. Zimbabwe* case.<sup>17</sup> Thus, the lack of a direct contractual link between the Claimants cannot be an obstacle to their claims being adjudicated in the same proceeding (*C I §§ 178, 179; C III §§ 75, 76; Tr pp. 220/16, 473/15*).

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<sup>17</sup> *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009.

103. Contrary to the Respondent's assumption, a specific consent on its part to have a plurality of claims brought under the umbrella of a single arbitration is not required (*C I § 174; C III § 81*). Insofar as Respondent contends that in the cases brought against Argentina which were cited by the Claimants Argentina had consented to multiple claims being brought in the same arbitration, Claimants argue that in the pertinent cases consent flowed simply from the offer contained in the BIT. The admissibility of a multipartite action was not even discussed by the respective ICSID tribunals. In any event, the fact of Argentina not contesting the admissibility of such actions can be of no relevance (*C I § 184; C IV § 59*). Respondent is, however, right to point out that consent is needed for the consolidation of cases, i.e. the joinder of two or more proceedings, but this a constellation very different from that in the present dispute (*C I § 186; C II § 71*).
104. Referring to the *Abaclat* case, Claimants contend that the majority decision was correct in finding that consent to multiple claims is clearly implied by the acceptance of jurisdiction in relation to bonds. Since bonds by definition are mass instruments, it would be counter-intuitive that ICSID protection would obtain in respect of them only if each bondholder acts individually (*C IV § 53*).
105. Inasmuch as Respondent points to Claimants' alleged lack of consent to bringing their proceedings in a single arbitration, it is submitted that each Claimant obviously knew that its claim would be prosecuted together with those of other bondholders. Respondent's reference to Italian law is misplaced, as explained in the following Chapter of the present Decision<sup>18</sup>, since Italian law does not govern these proceedings (*C II § 75; C III § 85; Tr pp. 221/5, 474/20*). Pursuant to the Claimants, referring to Italian or Argentine law which both permit the bringing of joint actions by more than one claimant regarding proceedings with similar factual or legal circumstances merely indicates that the possibility of bringing multiple actions is a generally acknowledged principle, notably by the two parties of the pertinent BIT (*C III §§ 83-85; Tr p. 474/22*).

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<sup>18</sup> See *infra* para. 194.

***c) No risk for due process by admitting multi-party arbitrations***

106. Claimants further criticize the Respondent for submitting that multi-party arbitrations cannot be properly and effectively managed due to the absence of specific rules and proceedings to deal with them and that due process would therefore be jeopardized when entertaining jurisdiction in regard to such arbitrations. In the Claimants' view, such erroneous reasoning essentially draws on Respondent's failed attempt to assimilate a case as the present one to a class action (*C I § 189*). The same holds true for the misplaced analogy regarding international claims settlements (*C I § 191*). Unlike those mechanisms, in the present case each one of the Claimants is clearly identified and properly before the Tribunal, and the numbers involved are very small compared to those in class action cases which typically amount to thousands or tens of thousands of persons (*C I § 190*).
107. As regards Respondent's submissions concerning the manageability of the case, Claimants contend that Respondent deliberately overblows the complexity of the case. The number of Claimants is not a particular concern, notably so that the number of Claimants has dropped significantly (*C III § 88; Tr p. 224/8*). The catalogue of questions lying on the table is not particularly impressive. The differences between the bonds held by the Claimants are immaterial to the present dispute. Thus, the overall number of issues, documents, expert reports, witnesses and other elements that the Tribunal will have to consider will not be greater than those which many international arbitral tribunals routinely have to deal with (*C I §§ 192, 193; C II § 77; C IV § 56*).
108. In the Claimants' eyes, the Respondent is unable to substantiate how its right to due process could be jeopardized in the present case. To refer to the difficulty in hearing all the Claimants as witnesses can be of no avail in that regard because it is difficult to see why the Respondent could in good faith seek to examine each and every Claimant. The vast majority of the pertinent issues can easily be disposed of by documents (*C I § 196*).
109. Moreover, Claimants contend that the present Tribunal must assess its jurisdiction on the basis of the requirements set forth in Art. 25(1) of the ICSID Convention and the Argentina-Italy BIT. The availability of suitable procedural rules is not among the conditions which allow an ICSID tribunal to dismiss an action on jurisdictional or

admissibility grounds. Once jurisdiction and admissibility are established, it will be for the Tribunal and the Parties to agree on the most appropriate procedure to deal with the issues at stake (*C I § 199*). It is manifestly false to state that adaptations of the procedure to deal with unprecedented situations can only occur through amendments to the ICSID Rules (*C II § 76*), as Art. 44 of the ICSID Convention empowers the Tribunal to adopt the proper decisions on the conduct of the procedure (*C III § 88; Tr p. 224/17*).

110. Finally, on a more practical level, Claimants submit that their decision to bring a single proceeding instead of separate arbitrations for each one of them is unquestionably the most efficient and advantageous course of action as it avoids countless parallel proceedings, reduces costs enormously and eliminates the risk of inconsistent decisions. This is also in Respondent's interest since its defense would have been much more complicated and costly, had the Claimants submitted separate requests for arbitration in each single case. In such scenario, Argentina would surely have moved to obtain the consolidation of the claims (*C I §§ 200, 201; C III § 89; Tr p. 225/11*).

## **B. Findings of the Tribunal**

### **1. The nature of the claim submitted to the Tribunal**

111. Respondent contends that neither the ICSID Convention nor the Argentina-Italy BIT provide a legal basis to the submission of the type of claims brought before the Tribunal by the Claimants and that Respondent, in any event, did never consent to such claims being brought to an ICISD tribunal.
112. The task of the Tribunal to decide on this jurisdictional objection is complicated by the fact that the Parties have used different terms, and have relied on various concepts, to characterize the claim brought by Claimants in the present proceedings: collective actions, mass claims, class action, multi-party or aggregate proceedings, etc. Also the *Abaclat* Tribunal has found 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."<sup>19</sup>

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<sup>19</sup> *Abaclat* Decision, para. 480.

113. The Tribunal must, for reasons of clarity of the subsequent reasoning, first of all identify what type of claim has been submitted to it in the present dispute. As a matter of fact, when the Request was filed on 23 June 2008, the claim in question was brought to the Tribunal by 119 Claimants. In the wake of the 2010 Exchange Offer<sup>20</sup>, this number dropped to 90 Claimants.<sup>21</sup> In that sense and without using these terms in any technical sense or in analogy to any type of procedures in domestic or international law bearing the same name, the Tribunal has to deal with *multiple* claimants or a *multi-party* proceeding.

**a) *The present action is not a “class action” and should not be referred to as a “mass proceeding”***

114. At the same time, the Tribunal does not consider that the action before it may adequately be referred to as (1) a “class action” or (2) “mass claim(s)”/“mass proceeding(s)”.

**(1) The “class action” issue**

115. As regards the first term, class actions are a procedural device provided for in different domestic laws such as in US law. There is no indication whatsoever, and both Parties are in agreement on this aspect, that a procedural mechanism comparable to the US class action system would exist within the framework of the ICSID Convention. Furthermore, the Parties agree that the main feature of a class action is its representative nature (*CI* § 157; *RI* § 112). As the *Abaclat* Decision has usefully pointed out in that regard,

[s]ome 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 mechanisms in which these claims are brought together vary and can be categorized by reference to their approach to three different issues: (a) 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.); (b) 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;

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<sup>20</sup> See in more detail *infra* note 156.

<sup>21</sup> See *infra* paras. 334 *et seq.*

(c) the nature of the relief, which can take the form of individual damages or representative relief (e.g., declaratory or injunctive relief).<sup>22</sup>

116. In contrast, in the present case each of the Claimants signed an individual Power of Attorney.<sup>23</sup> The subject-matter of the proceedings are the Claimants', and only their, claims. According to Art. 53(1) of the ICSID Convention, the decisions to be taken by the present Tribunal are binding upon the Claimants, and solely upon them. The Claimants are clearly identified individuals and act in their own names and not on behalf of any third party, notably not NASAM.<sup>24</sup> The current proceedings do therefore not have a representative character at all. Accordingly, since a class action mechanism in any technical meaning of the word neither exists under the ICSID Convention nor was it the Claimants' intention to submit such class action to the Tribunal, the Tribunal is certainly not in the presence of a class action or anything close to it.

117. This was also the conclusion of the Tribunal in the *Abaclat* case:

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.<sup>25</sup>

118. Respondent is correct to point out that the Claimants, by using the term “azioni di gruppo” twice in the NASAM Mandate<sup>26</sup>, have themselves contributed to a certain confusion in the matter. However, the NASAM Mandate is a contract between NASAM and the Claimants and has therefore no direct bearing on the present dispute.<sup>27</sup> In addition, even if the NASAM Mandate were to be deemed legally relevant in the sense of

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<sup>22</sup> *Abaclat* Decision, para. 483.

<sup>23</sup> See *infra* para. 230.

<sup>24</sup> See in more detail *infra* paras. 273 *et seq.*

<sup>25</sup> *Abaclat* Decision, para. 486.

<sup>26</sup> See *R II* §§ 85, 86 and *Tr p.* 66/8, referring to preambular para. N and para. 13 of the NASAM Mandate (Annex RA 108); see also the English translation (Annex RA 108) of preambular para. N of the NASAM Mandate (speaking of the undersigned persons “hav[ing] been informed that the actions to be brought [...] are ‘class actions’”) as well as of para. 13 of the NASAM Mandate (“[...] involved in the class action to be brought [...]”).

<sup>27</sup> See *infra* para. 226.



a need to interpret the Request in the light of the Mandate, without the Request in any manner referring to it, this could not be dispositive of the objective nature of the claim brought before the present Tribunal. It should be noted that the Respondent frames its objection in terms of a lack of its consent to the adjudication of such type of claim. This is, however, a challenge to the jurisdiction of ICSID and the competence of the present Tribunal to decide the case at hand which must be answered on the basis of the objective character of the claim in dispute between the Parties and not of the way it is denominated by them in their submissions, let alone in a document which has no direct relation to or bearing upon the present proceedings.

**(2) The “mass claim” issue**

119. As concerns, secondly, the characterization of the claim in the present dispute as “mass claim(s)” or “mass proceeding(s)”, the Tribunal considers that this is not a technical term. It cannot be precisely defined at what point a multitude of claimants turns into a “mass” of claimants. In principle, the Tribunal would not have objections to refer to the initial number of 119 Claimants in the present case, in terms of everyday speech, as a “mass”, compared to two or five claimants in other disputes. However, it would caution against drawing any specific conclusions from the use of this term.
120. In particular, the Tribunal would want to point out that the “mass claim” concept was commonly relied upon in the context of the *Abaclat* proceedings with its initially 180,000 and now still 60,000 claimants.<sup>28</sup> Whilst the Tribunal does not take any stand on the question of the appropriate terminology to be used in that case, it would emphasize that the dimension of the Claimants in the case to be decided by the present Tribunal can in no way be compared to the *Abaclat* case, being merely one thousandth of the latter. Especially insofar as the use of the term “mass claim” or “mass proceedings” might convey the connotation that already the sheer number of claimants in itself calls for modifications or adaptations of the procedural arrangements to guarantee the manageability or fairness of the case, the Tribunal strongly insists that it does not see any such implications arising from the number of initially 119 and now 90 Claimants as such.

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<sup>28</sup> See *Abaclat* Decision, paras. 1, 90, 640.

It is against this background of linguistic ambiguity and potential confusions and misunderstandings arising from it that the Tribunal would advise against the use of the concept of “mass claims” and “mass proceedings” in regard to the present dispute and will itself consequently abstain from relying on these terms in the following.

***b) The character of the present action as a “multi-party” proceeding***

121. The Parties have also referred to the present proceedings as “collective action” or “aggregate proceedings”. As these are again no technical terms with a fixed meaning, at least not in the framework of the ICSID Convention, the Tribunal has no principled objections against using them. It would only add two caveats in this regard: First, it should be understood at all times that to rely on such terms should not lead to introduce, through the “backdoor” as it were, elements characteristic of “class actions” or “mass claims” into the notion of collective or aggregate proceedings. This would risk to thwart or at least to undermine the efforts for terminological clarity in which the Tribunal engaged in the previous sub-section. Second, and with a similar intention, such terms should not be taken as a basis to import aspects into the ICSID framework which are associated with concepts deriving from the court litigation and arbitration regime of domestic laws (notably Argentine or Italian law) or other areas of international law, which might bear the same name but may well have a technical meaning different from, or even incompatible with, the legal framework set up by the ICSID Convention.
122. With these provisos in mind, the Tribunal will now proceed to the essence of the contention between the Parties in this section, i.e. the question whether a claim involving multiple Claimants such as the one presented to this Tribunal can find its legal basis in the ICSID Convention and the Argentina-Italy BIT and whether it may be deemed to be covered by Respondent’s consent to ICSID jurisdiction and thus to be within the competence of this Tribunal. For reasons of clarity and to avoid any confusion in this area which is highly prone to a “terminological imbroglio”, the Tribunal will in its subsequent reasoning stick to qualifying the present proceeding as a “multi-party action” or “multi-party proceeding”.

**c) *The present claim is not the result of a joinder of proceedings***

123. Having concluded that the present dispute constitutes a multi-party proceeding, a further conceptual clarification is in place: A multi-party proceeding can be the result of the initial submission of a certain number of separate individual arbitrations which are subsequently consolidated and joined with each other. There can be no doubt that such an *ex post* joinder or consolidation of proceedings is subject to a specific consent of the Parties.<sup>29</sup> One might refer to the *Wintershall* case in this regard which related to the *ex post* addition (viz. substitution<sup>30</sup>) of a claimant (i.e. the Wintershall Holding AG) to the proceedings, which indeed required the Respondent's consent.<sup>31</sup>
124. The present dispute is not a case of consolidation of proceedings, however, but the original submission of a claim by a plurality of Claimants in one single ICSID proceeding. This appears to be conceded by the Respondent itself when it states in relation to the *Abaclat* case – which is analogous in this regard to the present dispute – that there “the claims were not filed on a separate basis and later aggregated, but were filed on an aggregate basis from the beginning, and may not be treated as individual claims” (*R IV p. 4*).
125. Accordingly, the subsequent analysis does not deal with the question of what kind of consent is needed for a subsequent joinder or consolidation of proceedings, but whether, within the framework of the ICSID Convention, the original submission of a multi-party

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<sup>29</sup> See *G. Kaufmann-Kohler et al.*, Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently? Final Report on the Geneva Colloquium held on 22 April 2006, 21 ICSID Review-Foreign Investment Law Journal 59 (2006) (Annex AL RA 7). To be sure, the Final Report expressly noted that “the ICSID Convention and the ICSID Arbitration Rules are silent on consolidation. Failing an express provision, it is untenable to argue that the institution or the arbitration tribunal has the power to consolidate separate arbitrations” (*ibid.*, p. 91). However, it should be taken into account as well that the Final Report based itself on an understanding of consolidation as “the joinder of two or more proceedings that are pending before different tribunals” and which “does not cover multiparty and multicontract arbitrations” (*ibid.*, pp. 80, 81).

<sup>30</sup> See *Wintershall AG v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 31: “Meanwhile, the Claimant by a letter of May 18, 2007 notified the Centre of a ‘spin-off’: viz. regarding a corporate restructuring of all assets and liabilities of the Claimant including assignment of all rights and liabilities of the Claimant against the Argentine Republic [...] to a new legal entity: with a prayer for recognition by the Tribunal of this new entity, which would continue, as Claimant, the ICSID Claim that had been filed by the original Claimant.” See also *ibid.*, paras. 45 *et seq.*

<sup>31</sup> *Ibid.*, paras. 59 and 60.

claim requires an act of consent on the part of the Respondent beyond the general jurisdictional requirement of written consent pursuant to Art. 25(1) of the Convention.

**2. Consent to multi-party proceedings within the framework of the ICSID Convention and the Argentina-Italy BIT**

126. There is full agreement between the Parties that neither the ICSID Convention and Rules nor the Argentina-Italy BIT contain any provision that would specifically address the question, notably the lawfulness *vel non*, of multi-party proceedings in an ICSID arbitration such as the one which is presently before the Tribunal. The Parties disagree, however, as to what consequences should be drawn from this silence of the pertinent documents.
127. The Tribunal would recall in this context that the Tribunal in the *Abaclat* case was confronted with similar differences of opinions:

To recall, Respondent contends that arbitration in the form of collective proceedings is not provided for by ICSID [and] that this silence is a “qualified silence” that should be interpreted to mean that collective arbitration is not possible [...] under the current ICSID framework [...].

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 the Convention’s 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 [...].<sup>32</sup>

128. The submissions of the Parties in the *Abaclat* case mark the two ends of the spectrum of possible interpretations of the Convention’s silence on multi-party proceedings, and also in the present dispute the Parties have organized their arguments along these lines. Whereas Claimants contend that the silence of the pertinent legal instruments is not conclusive and cannot be understood as a prohibition of proceedings with multiple claimants (*C III § 77*), Respondent submits that the absence of express provisions for multi-party proceedings cannot be construed to implicitly allow for such actions, but that

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<sup>32</sup> *Abaclat Decision*, paras. 516, 517.

the absence of clear and express consent to multi-party proceedings leads to the opposite conclusion (*R I § 91; R II §§ 101, 106*).

**a) *Existence of the Parties' consent to multi-party proceedings***

129. In order to decide these questions, and the Parties are again in agreement on this aspect, the Tribunal must rely on the general rules of treaty interpretation as codified in arts. 31 and 32 of the VCLT. Pursuant to Art. 31 para. 1 of the Vienna Convention, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their consent and in the light of its object and purpose.”
130. First, the Tribunal considers that, at the level of interpretation according to the ordinary meaning of the relevant terms, the wording of Art. 25 of the ICSID Convention is susceptible to accommodate both interpretations. While it is true that the provision speaks of “a national of [a] Contracting State” in the singular, nothing would force the Tribunal to conclude that this wording could not also encompass a plurality of individuals. The argument that the use of the singular for “national” in Art. 25 of the ICSID Convention would bar multipartite arbitration was raised in the *Klöckner and others v. Cameroon* case but was not taken up by the Tribunal deciding that case and was apparently dropped by the respondent Government.<sup>33</sup>
131. Moreover, the same result follows from an analysis of Art. 8 of the Argentina-Italy BIT. This provision speaks interchangeably of “an investor” (paras. 1 and 5) and “investors” (heading and para. 3). The Tribunal is not able to follow Respondent’s argument that Art. 8 paras. 1 and 5 are somewhat more “relevant” than para. 3 or the title of this provision (*Tr p. 361/3*), at least not for the purpose of drawing the conclusion that the wording of Art. 8 of the BIT would *restrict* Respondent’s consent to arbitrate to claims filed by a single investor. In the Tribunal’s view, this rather underscores the opposite conclusion that the ordinary meaning of the term “national” in Art. 25(1) of the ICSID Convention, when viewed together with Art. 8 of the Argentina-Italy BIT, may well include the situation of a plurality of investors submitting a legal dispute to the Centre.

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<sup>33</sup> See C. Schreuer, *The ICSID Convention. A Commentary*, 2<sup>nd</sup> ed., Cambridge 2011, Art. 25, para. 279 (hereinafter “Schreuer, ICSID Convention Commentary”), referring to G.R. Delaume, *ICSID Arbitration*, in: J. Lew (ed.), *Contemporary Problems in International Arbitration* (1987), 23, 36, 37.

132. Secondly, the Tribunal notes that, while the *travaux préparatoires* can only provide supplementary means of interpretation in the sense of Art. 32 of the VCLT, some discussions took place at the time of conclusion of the ICSID Convention in regard to multi-party proceedings.<sup>34</sup> However, these discussions were not conclusive as to the intention to either accept or refuse multi-party arbitrations.<sup>35</sup> This might nonetheless weaken Respondent's claim that accepting multi-party arbitrations would extend the jurisdictional basis "way beyond the 'horizon of foreseeability' of the drafters of the ICSID Convention," i.e. to what the Parties could have foreseen at the time the treaty was concluded or consent was given.<sup>36</sup>
133. Thirdly, and related to the previous aspect, Claimants are right to point out that the domestic laws of both Argentina and Italy were familiar with multi-party proceedings at the time when these countries gave consent to the ICSID Convention and the Argentina-Italy BIT.<sup>37</sup> This is also confirmed by the statement of Professor Kielmanovich, the expert on Argentine procedural law nominated by the Respondent. According to him, Art. 88 of the 1981 Argentine Code of Civil and Commercial Procedure allows for *litisconsorcio facultativo* "where the different claims [...] are related to one another on account of their cause, purpose or both, i.e. where the claims rely on the same legal relationship or the same fact".<sup>38</sup> This reference is not meant to establish the possibility to

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<sup>34</sup> For instance, during the drafting of the Convention, the British expert mentioned that there might well be more than just two parties to a dispute and that he assumed that this was implicit in the draft (see *Schreuer*, ICSID Convention Commentary, Art. 25, para. 277, referring to Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1968), Vol. II, 400, 413.

<sup>35</sup> Professor Abi-Saab's Dissenting Opinion in the *Abaclat* case, in its para. 175, affirmatively refers to the majority opinion's statement that during the drafting of the ICSID Convention, the question of multi-party arbitrations was left open. He adds that "[i]t was debated during the latest revision of the Rules, but again was not expressly addressed in the revised Rules of 2006".

<sup>36</sup> *R IV pp. 6, 8*, endorsing para. 165 of Professor Abi-Saab's Dissenting Opinion and critically referring to para. 519 of the *Abaclat* Decision.

<sup>37</sup> See the references to Art. 88 of the Argentine Code of Civil and Commercial Procedure on "litisconsorcio facultativo" and Art. 103 of the Italian Code of Civil Procedure on "litisconsorzio facoltativo". Both Parties appear to agree on this aspect; see *Tr pp. 219/8; 365/20*.

<sup>38</sup> Opinion of Professor Jorge Kielmanovich, 26 February 2010, para. 12. The original text of Art. 88 of the 1981 Code reads, as follows: "Litisconsorcio facultativo. Podrán varias partes demandar o ser demandadas en un mismo proceso cuando las acciones sean conexas por el título, o por el objeto, o por ambos elementos a la vez." (in English translation: "Discretionary Joinder. One lawsuit may involve several plaintiffs or several defendants when the actions in question have the same cause, purpose, or both.") It is worth noting that Professor Kielmanovich deals

conduct multi-party proceedings as a general principle of law in the sense of Art. 38 para. 1 lit. c of the *Statute of the International Court of Justice*. The Tribunal would note in that regard that not even the Claimants' submissions make such a far-reaching claim when they state that it is "almost" a general principle that multiple claimants may bring actions before international courts and tribunals (*C III § 83*).

134. Similarly, the reference to Argentine and Italian law does not suggest that the present dispute is governed by either of these domestic laws. The Tribunal will explain in further detail below that questions of jurisdiction do not follow Art. 42 but Art. 25 of the ICSID Convention and are therefore exclusively governed by international law.<sup>39</sup> The Tribunal notes, however, that the admission of multi-party proceedings in the afore-mentioned sense does not come as a surprise to the Respondent, but that it is well accustomed from its own legislation and legal tradition that instituting multi-party proceedings is perfectly possible under certain circumstances. It deserves mention in this regard that when the Respondent (*R IV p. 8*) refers to the *Abaclat* Decision's statement that "at the time of the conclusion of the ICSID Convention, collective proceedings were quasi inexistant",<sup>40</sup> the reference is obviously to class action- or mass claim-type collective proceedings.<sup>41</sup> The reference is not to standard multi-party proceedings in the sense of claims submitted by a plurality of claimants, which is the case here and which was a ubiquitous phenomenon at the time of the adoption of the ICSID Convention.
135. Fourthly, in the history of ICSID, there are numerous examples of cases involving several or even multiple claimants.<sup>42</sup> Claimants submit that there have been more than 120 multi-party investment cases, including ICSID and NAFTA (*C IV § 60*). Whether this number is correct or not, a look at ICSID's case list<sup>43</sup> reveals that 38 out of the 398 reported cases

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with this issue under the heading "La acumulación subjetiva en el derecho argentino" (in English translation: "Joinder of Parties under Argentine Law"). The term "joinder" here has obviously a broader meaning than that in which it was used before; see *supra* para. 123.

<sup>39</sup> See *infra* paras. 233 *et seq.*

<sup>40</sup> *Abaclat* Decision, para. 519; see also Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 165.

<sup>41</sup> As to these concepts see *supra* paras. 114 *et seq.*

<sup>42</sup> See *Schreuer Commentary*, Art. 25, para. 278.

<sup>43</sup> As of 21 August 2012 (<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases>).

include the phrase “and others” on the claimant’s side, i.e. they are multi-party cases.<sup>44</sup> Already this simple fact manifests that multi-party arbitration is a common feature in ICSID arbitration. Regarding numbers, these cases involve a varying number of claimants ranging from 3 to 14<sup>45</sup> or 137 claimants<sup>46</sup>, respectively. To be sure, the *Abaclat* Tribunal stated that “[w]hile 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.”<sup>47</sup> This observation only holds true, however, for that very case with its initially 180,000 and currently still 60,000 claimants<sup>48</sup>, but not for the present case which, with its few dozens of Claimants, appears to remain well within the overall scale of previous ICSID and other arbitral proceedings.

136. Fifthly, the practice of having more than one party on the investor’s side was also accepted by a number of ICSID tribunals. As already mentioned before<sup>49</sup>, in the *Klöckner and others v. Cameroon* case, the respondent Government initially argued that the use of the singular for “national” in Art. 25 of the ICSID Convention would bar multipartite arbitration. However, this claim was not taken up by the Tribunal and was apparently dropped by the respondent Government subsequently.<sup>50</sup> Furthermore, in *Goetz and others v. Burundi*, six Belgian shareholders of a Burundian company jointly instituted proceedings, and the deciding Tribunal saw no problem in the fact that there was a group of claimants submitting the claim together.<sup>51</sup>

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<sup>44</sup> The phrase “and others” points to the existence of three or more claimants, since otherwise the case name includes the name of the two claimants, without the addition of “and others”.

<sup>45</sup> Both the Respondent (*R I § 104; R II § 129*) and the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 171 curiously refer to *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, with its 14 claimants as being the case with most claimants in ICSID history so far.

<sup>46</sup> See *Alasdair Ross Anderson and others v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010.

<sup>47</sup> *Abaclat* Decision, para. 295.

<sup>48</sup> See *supra* note 28.

<sup>49</sup> See *supra* para. 130.

<sup>50</sup> See *supra* note 33. The Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 175, n. 40 curiously relies on this aspect in support of the proposition that “the rule of ‘secondary consent’ was consistently upheld in multi-party arbitration”.

<sup>51</sup> *Antoine Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, para. 89; see also *Schreuer*, ICSID Convention Commentary, Art. 25, para. 280 in this regard.



137. If it were argued that these cases only involved a small number of claimants, as Respondent does (*R II § 137*), it must be acknowledged that meanwhile arbitral tribunals have dealt with much bigger numbers of claimants, for instance, with 46 claimants in the *Bayview and others v. Mexico* case<sup>52</sup>, with 137 claimants in the *Alasdair Ross Anderson and others v. Costa Rica* case<sup>53</sup> and with 109 claimants in the *Cattlemen* case.<sup>54</sup> As to the latter, while this case was not arbitrated under the ICSID Convention, but was a NAFTA case conducted under UNCITRAL Arbitration Rules, it should be pointed out that the pertinent provisions of the North American Free Trade Agreement are very similar to those relevant to the present dispute.<sup>55</sup>
138. It must be conceded to the Respondent, however, that in all the afore-mentioned cases the deciding tribunals eventually declared themselves lacking in jurisdiction – albeit never in relation to the fact that several or even many claimants had instituted the proceedings, as this aspect was not an issue in any of these disputes. The silence of both the respondent Governments and the deciding tribunals in all these cases as to the presence of a multitude of investors on the claimant’s side may be interpreted as an indirect acknowledgment that this was not an obstacle for the cases to proceed (*C I § 183*). Yet, it can also be understood as manifestation of the principle that, where a tribunal admits one of the objections put forward and determines that it has no jurisdiction, there is no need for the tribunal to elaborate on the rest of the (possible) objections. Accordingly, the fact that the remaining objections are not addressed does not indicate that the tribunal intended to reject them implicitly (*R II § 138*). Against this background, the present Tribunal would advise caution regarding attempts to draw definite conclusions from the afore-mentioned decisions in the one or the other direction.

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<sup>52</sup> *Bayview Irrigation District and others v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007.

<sup>53</sup> *Alasdair Ross Anderson and others v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010.

<sup>54</sup> NAFTA/UNCITRAL, *Canadian Cattlemen for Fair Trade v. United States*, Award on Jurisdiction, 28 January 2008.

<sup>55</sup> See notably Art. 1116 para. 1 of the *North American Free Trade Agreement*: “An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation [...]”.

139. In the *Funnekotter and others v. Zimbabwe* case<sup>56</sup>, however, there were fourteen Dutch investors, and the Tribunal confirmed its jurisdiction without seeing any problem concerning the multitude of claimants involved in this case. The argument that there was no objection on the part of the respondent State in this respect (*R II § 136*) is of no avail to the Respondent. In fact, after having initially contested the jurisdiction of the Tribunal due to a lack of proof of the claimants' Dutch nationality, the respondent State subsequently declared that it did not object to the jurisdiction of the Centre.<sup>57</sup> Yet, having taken note of the "current agreement between the parties" on jurisdiction, the Tribunal considered it nonetheless important, "[i]n light of the importance of jurisdiction as a foundation for arbitral decisions and the special competence granted to arbitral tribunals to determine their jurisdiction [...] to address [...] the question of jurisdiction".<sup>58</sup> It was only after and on the basis of this *proprio motu* assessment of the Tribunal's jurisdiction that the Tribunal concluded that all prerequisites for jurisdiction under the ICSID Convention were met.<sup>59</sup> While the *Funnekotter* Tribunal addressed a number of jurisdictional issues on its own initiative, in no way whatsoever was the question of the case having been instituted by a multitude of claimants brought up by the Tribunal as a potential obstacle or challenge to its jurisdiction. Had the Tribunal in the *Funnekotter* case harboured any doubts as to a multi-party proceeding requiring the specific consent on the part of the respondent Government, it would have certainly taken up the issue *sua sponte* and would have actively assured itself that there was jurisdiction to decide the case at hand.
140. Claimants are also right to point out that in the *LG&E and others v. Argentine Republic* case with its three claimants, the arbitral tribunal merely acknowledged that the "host State [i.e. Argentina] [...] has already given its consent"<sup>60</sup> by signing the BIT, without

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<sup>56</sup> *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009.

<sup>57</sup> See *ibid.*, para. 93.

<sup>58</sup> *Ibid.*, para. 94.

<sup>59</sup> See *ibid.*, paras. 94, 95.

<sup>60</sup> *LG&E Energy Corp. and others v. Argentina*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, 30 April 2004, para. 73.

any specific investigation into whether Argentina had specifically or separately consented to a multi-party arbitration (*C IV § 59*).

141. The Tribunal thus concludes from the review of the pertinent case-law that neither respondent Governments (with the exception of the afore-mentioned *Klöckner and others v. Cameroon* case, and even there only temporarily) nor arbitral tribunals have taken issue so far with the mere fact of a plurality of claimants jointly submitting a claim for arbitration, nor have they required or implied that a specific consent on the part of the respondent Government would be necessary to safeguard jurisdiction to decide the case at hand. In cases involving a plurality of claimants where the arbitral tribunals asserted their jurisdiction, the tribunals did not raise any jurisdictional doubts as to the existence of a multitude of claimants in the proceedings. The Respondent was not able to point to one single case, apart from the present one and its “sister cases”,<sup>61</sup> where the respondent Government, let alone the deciding tribunal, would have considered the mere fact of several claimants instituting arbitral proceedings jointly an obstacle to jurisdiction, unless the respondent Government gives it specific consent to do so. Accordingly, in the present Tribunal’s opinion, it is evident that multi-party arbitration is a generally accepted practice in ICSID arbitration, and in the arbitral practice beyond that, and that the institution of multi-party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration.
142. Sixthly, this view is also corroborated by the pertinent literature. Both Parties have referred to Professor Schreuer’s Commentary on the ICSID Convention in this context, but have relied on different editions of it in support of their respective positions. Respondent (*R II § 133*) cited the first edition for the proposition that multi-party claims in ICSID arbitration should “ar[i]se from one investment operation” and that they are “the consequence of companies claiming jointly with their parent companies or their subsidiaries” or of “the assignment, in part, of the investor’s rights to an additional investor.”<sup>62</sup> In contrast, Claimants (*C III § 78*) cite from the second edition of the

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<sup>61</sup> As to the *Abaclat* and *Alemanni* cases see *supra* paras. 8 and 9.

<sup>62</sup> *C. Schreuer Commentary*, *The ICSID Convention: A Commentary*, 1<sup>st</sup> ed., Cambridge 2001, Art. 25, para. 172 (hereinafter “*Schreuer*, *ICSID Convention Commentary*, 1<sup>st</sup> ed.”).

Commentary: “The Convention speaks of ‘a national of another Contracting State’ in the singular. But, it would be wrong to conclude that only one party may be admitted to ICSID proceedings on the investor’s side.”<sup>63</sup>

143. The Tribunal would point out that these two very sentences were already contained in the first edition of the Commentary.<sup>64</sup> In a similar vein, the Commentary states in both editions that the case-law “show[s] that having more than one party on the investor’s side in one set of proceedings is perfectly possible.”<sup>65</sup> Hence, as regards the possibility of multi-party proceedings as such, there is no ambiguity at all in the literature referred to by the Parties, and no requirement for a specific consent on the part of the Respondent can be derived from there. A different question is whether multi-party proceedings in ICSID arbitration presuppose a certain link or relationship between the would-be co-claimants; this question will be addressed below.<sup>66</sup>
144. Seventhly, having particular regard to the nature of the claim made in the present proceedings, the Tribunal agrees with the *Abaclat* Tribunal that “where a 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”<sup>67</sup> – which is the case with bonds, as will be set out in further detail below<sup>68</sup> –, this suggests that the authors of the BIT, by the very act of including these into the list of protected investments, were envisaging a high number of potential claimants. The Tribunal cannot see why in constellations involving mass instruments such as bonds several claimants finding themselves in an analogous situation should not be allowed to bring their claims together before one arbitral tribunal. Thus, multi-party proceedings appear to be a particularly typical course of action when the collective nature of the proceedings derives from the nature of the investment made.

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<sup>63</sup> *Schreuer*, ICSID Convention Commentary, Art. 25, para. 277.

<sup>64</sup> *Schreuer*, ICSID Convention Commentary, 1<sup>st</sup> ed., Art. 25, para. 170.

<sup>65</sup> *Ibid.*, Art. 25, para. 172; *Schreuer*, ICSID Convention Commentary, Art. 25, para. 279.

<sup>66</sup> See *infra* paras. 152 *et seq.*

<sup>67</sup> *Abaclat* Decision, para. 518; see also *ibid.*, para. 490 as well as *C IV* § 53.

<sup>68</sup> See Art. 1 para. 1 of the Argentina-Italy BIT as well as *infra* Chapter IV, in particular paras. 488 *et seq.*

145. Finally, the Tribunal is aware that the Parties have submitted a series of arguments regarding what would be the best course for the Tribunal to take in terms of efficiency considerations and policy goals underlying the ICSID Convention and the Argentina-Italy BIT. Not surprisingly, the views expressed by the Parties in this respect are conflicting and often diametrically opposed. In this regard, the Tribunal would wish to stress its conviction that the response to the pertinent question – i.e. whether, within the framework of the ICSID Convention, the original submission of multi-party claims requires a specific or additional act of consent on the part of the Respondent beyond the general consent requirement pursuant to Art. 25(1) of the Convention – must be given on the basis of the existing law and by applying the rules of treaty interpretation, as exemplified above.
146. In the Tribunal’s view, this interpretatory effort clearly points into one direction. Nothing has emerged from the preceding legal analysis that would militate in favour of interpreting the “silence” of the ICSID Convention as standing in the way of instituting multi-party proceedings. Quite the contrary, not only are multi-party arbitrations not excluded by the pertinent provisions of ICSID law, but they are perfectly compatible with them. The analysis of the relevant tribunal practice has not suggested any other outcome. In view of this unambiguous result, the Tribunal sees no benefit in engaging in a policy or efficiency reasoning of any kind, but concludes that the ICSID Convention, the Argentina-Italy BIT and other applicable rules in the present dispute are not opposed to a plurality of claimants jointly submitting a claim to the Centre. In particular, these provisions do not require a specific or additional consent on the part of the Respondent beyond the prerequisite of written consent under Art. 25(1) of the ICSID Convention.

***b) Scope of the Parties’ consent to multi-party proceedings***

147. Having reached the conclusion that multi-party proceedings are in harmony with the ICSID framework, the question remains whether this applies to all multi-party proceedings or whether there exists a limit to the consent the Contracting Parties have given in this respect.

**(1) The question of a maximum number of Claimants**

148. One issue raised by Respondent in this respect is that of a possible maximum number of claimants in a multi-party proceeding. Professor Schreuer has been cited by the Claimants in support of the proposition that no such limit exists: “Once the principle of multipartite arbitration is accepted, no question should arise by virtue only of the number of co-claimants.”<sup>69</sup> Whatever the merit of this statement, which was made with express reference to the *Abaclat* case, the Tribunal has already emphasized that the present dispute differs a lot from *Abaclat* in terms of the amount of Claimants involved.<sup>70</sup>
149. In addition, the Tribunal has referred to a number of arbitrations, inside and outside the ICSID framework, which dealt with a comparable or even higher number of claimants<sup>71</sup> than in the present case, and in none of these have any of the deciding tribunals, nor the respective respondents, taken issue with several or several dozens of claimants having instituted arbitral proceedings. In particular, the present Tribunal is not convinced by the Respondent’s argument that the number of 14 claimants in the *Funnekotter and others v. Zimbabwe* case is “substantially different” (*R II § 136*) from that in the present one. The Request was brought by 119 individual Claimants, and meanwhile 29 have withdrawn from the proceedings so that the present number of Claimants amounts to 90.<sup>72</sup>
150. The Tribunal can therefore not see in what way the present dispute when compared to the *Funnekotter* case could be deemed not only as a *plus* but an *aliud*. As the *Abaclat* Decision convincingly pointed out, it is difficult to conceive why and how an ICSID tribunal could “lose” jurisdiction when the number of claimants rises beyond a certain threshold.<sup>73</sup> If it is possible under the ICSID Convention to have multi-party proceedings with three, five or ten claimants, it is hard to accept the proposition that there is a certain limitation to the number of claimants which cannot be exceeded without jurisdiction being eliminated or forfeited.

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<sup>69</sup> Schreuer, ICSID Convention Commentary, Art. 25, para. 281.

<sup>70</sup> See *supra* para. 120.

<sup>71</sup> See *supra* paras. 135 *et seq.*

<sup>72</sup> See *infra* paras. 333 *et seq.*

<sup>73</sup> *Abaclat* Decision, para. 490, first indent.

151. The only argument to be raised in this context which has, in the Tribunal's eyes, its merit and thus deserves some attention is that of the manageability of the proceedings and the respect of due process vis-à-vis the Parties – even though there is, as will be seen, nothing to be gained for the Respondent from that argument under the circumstances of the present case. The Tribunal will come back to this issue shortly.<sup>74</sup>

**(2) The question of the need of a link between the claims in dispute**

152. The Respondent further submits that, even if multi-party proceedings were admitted, these would always have to relate to claimants being “intimately linked in some concrete way” (*R II § 103*). Yet, in the eyes of the Respondent, the present dispute brings together contractually unrelated persons (*R I § 104*). Accordingly, for the Respondent the fact that the link between the Claimants is the invocation of the same BIT does not suffice to combine the claims of several persons. Otherwise, all claims invoking the same BIT brought before ICSID against a country could be brought to the fore together (*R III §§ 19, 21; Tr p. 369/15*). While Claimants insist that the only requirement for setting in motion of ICSID proceedings, including those with a multiplicity of claimants, is that all of them must have given their consent in writing (*C I § 173*), they seem prepared, to a certain extent, to concede that there “ought to be a reasonable and significant link” between the claims of the persons seeking to bring a multi-party action and that it would therefore “not be possible to adjudicate in the same arbitration claims that are totally unrelated” (*C I § 177*). In addition, in the Hearing on Jurisdiction, Claimants stated that “[i]t is clear that there has to be some reasonable link regarding what is claimed” (*Tr p. 473/15*).

153. The Tribunal would indeed have its doubts whether completely unrelated claims could be brought by a plurality of persons in one and the same arbitral proceeding. It deserves mention that most domestic legal systems providing for multi-party proceedings require a certain link to exist between the claims in order to be brought jointly in one single claim. The Tribunal would, however, caution against importing domestic law standards in this respect and would recall, once again, that the decision on jurisdiction within the ICSID

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<sup>74</sup> See *infra* paras. 164 *et seq.*

framework is a question to be answered on the basis of international law.<sup>75</sup> Against that background, Claimants are right to emphasize that whatever prerequisites Art. 88 of the Argentine Code of Civil and Commercial Procedure may set forth for the lawful institution of a multi-party action under Argentine domestic law, this can be of no relevance to the answer to be given to the question here.<sup>76</sup>

154. Whatever minimum standard may apply under Art. 25 of the ICSID Convention as to a necessary link between the claims in a multi-party proceeding, and whether such requirement exists at all, can be left open by the present Tribunal. In particular, it does not consider it necessary or useful to elaborate on the question *in abstracto* whether it is required that the claims be “homogeneous” or whether it suffices that they are “sufficiently comparable”, etc. and to try to devise a general standard or threshold in that regard.
155. In order to tackle the issues at stake, the Tribunal would first state that it cannot see that a requirement would exist under the ICSID Convention, or could be deduced from it, that the claimants in a multi-party proceeding must be necessarily connected by a contractual link among themselves. Respondent draws upon the first edition of Professor Schreuer’s Commentary on the ICSID Convention in support of its contention that multi-party arbitrations can only be validly instituted by closely related investors such as shareholders of the same company or companies jointly with their parent or subsidiary companies (*R I* § 105; *R II* § 133).<sup>77</sup> The Tribunal takes note of the Claimants’ submission that this citation does not appear any more in the Commentary’s second edition (*C I* § 172). It will not, however, draw any particular conclusion from this fact, neither in the sense of identifying this as a change of opinion and thus as an “obvious recognition that the circumstances which justify the bringing of a plurality of claims within one and the same proceedings can vary greatly” (*C I* § 172) nor in the sense of

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<sup>75</sup> See *supra* para. 134 as well as in more detail *infra* paras. 233 *et seq.*

<sup>76</sup> *C III* § 85; *Tr pp.* 221/5, 474/6, referring to the Opinion of Professor Jorge Kielmanovich, 26 February 2010 in this regard; see already *supra* note 38.

<sup>77</sup> See *Schreuer*, ICSID Convention Commentary, 1<sup>st</sup> ed., Art. 25, para. 172: “Each of the[] [mentioned] cases [of multi-party arbitrations] arose from one investment operation.” These were cases where the multi-party character was “the consequence of companies claiming jointly with their parent companies or their subsidiaries” or of “the assignment, in part, of the investor’s rights to an additional investor.”



associating it with Professor Schreuer's purported engagement for the claimants in the *Abaclat* case, as suggested by the Respondent (*R II § 134; Tr p. 363/4*).

156. The Tribunal rather considers that, irrespective of this, there is no indication that the ICSID Convention and Arbitration Rules or the Argentina-Italy BIT give rise to any specific requirement in that regard or that the pertinent arbitral practice has seen an obstacle in the institution of multi-party proceedings by contractually unrelated claimants with similar claims. While in the *Bayview and others v. Mexico* case<sup>78</sup> 46 unrelated claimants instituted ICSID proceedings and had only in common the fact that they all contended to have been harmed by the same allegedly unlawful acts of the respondent State, the present Tribunal prefers not to rely on this case since the Tribunal declared itself lacking in jurisdiction. It was already pointed out that the conclusions to be drawn from such case-law are only of limited value for the purposes of the discussion here.<sup>79</sup>
157. However, in the *Goetz and others v. Burundi* case, six natural persons of Belgian nationality who were shareholders of a Burundian company had brought a joint claim and the ICSID Tribunal upheld its jurisdiction.<sup>80</sup> While the present Tribunal agrees with the Respondent (*R II § 137*) that Burundi in that case did not only fail to raise objections to jurisdiction, but also failed to answer the claimants' memorial, and the arbitration proceeded therefore in default pursuant to Arbitration Rule 42 para. 3<sup>81</sup>, the Tribunal considers that it cannot agree with the Respondent as to the conclusions to be drawn from that state of affairs. The Tribunal in the *Goetz* case was well aware that it was called upon to assure itself whether there was jurisdiction in the dispute in question, even more so in cases of default where the respondent State is not present to defend its rights. The *Goetz* Tribunal thus expressly referred<sup>82</sup> to Arbitration Rule 42 para. 4, also part of Rule 42 on "Default", according to which "[t]he Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute, and, *if it is satisfied*, decide whether the

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<sup>78</sup> *Bayview Irrigation District and others v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007.

<sup>79</sup> See *supra* para. 138.

<sup>80</sup> *Antoine Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, para. 89.

<sup>81</sup> *Ibid.*, para. 44.

<sup>82</sup> *Ibid.*, para. 79.

submissions are well-founded in fact and in law” (emphasis added). Accordingly, if the Tribunal had had doubts as to the lack of a sufficient link between the claimants as an obstacle to its jurisdiction, it would have had to bring them up. However, nothing of that kind occurred, and the Tribunal confirmed that it had competence *ratione materiae* and *ratione personae* to decide the case.<sup>83</sup>

158. This result is corroborated by the *Funnekotter and others v. Zimbabwe* case<sup>84</sup> which was instituted by fourteen Dutch nationals who directly or indirectly owned different large commercial farms in Zimbabwe. Claimants contended in that regard that “[t]he only existing link between the individual claimants and their respective claims was that all of them had suffered the same harm by virtue of the measures adopted by the host State, which deprived each one of them of its investment without a just compensation” (*C I § 180*). It was already mentioned above<sup>85</sup> that, in spite of the respondent State’s eventual acceptance of the Tribunal’s jurisdiction, the latter addressed the question of jurisdiction *proprio motu* and confirmed that all prerequisites for jurisdiction under the ICSID Convention were met.<sup>86</sup> While the *Funnekotter* Tribunal thus actively assured itself of its jurisdiction, in no way whatsoever was the issue of the claimants having no contractual relation between themselves or of their jointly brought claims not being sufficiently linked to each other addressed by the Tribunal. Against this background, the present Tribunal is therefore not convinced by the Respondent’s attempt to distinguish the *Funnekotter* case by (correctly) stating that the respondent State did not object to the Tribunal’s jurisdiction (*R II § 136*). The silence of the Tribunal carries more weight, in this case, than that of the respondent State.

159. Finally, the Tribunal finds it useful to turn to the *Abaclat* case. Even though the *Abaclat* Tribunal makes the following statement in the context of justifying the need for procedural adaptations in mass claims cases (which is a question different from that which the present Tribunal is dealing with here), the Tribunal would nonetheless endorse

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<sup>83</sup> *Ibid.*, para. 85.

<sup>84</sup> *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009.

<sup>85</sup> See *supra* para. 139.

<sup>86</sup> See the afore-mentioned *Funnekotter* case, para. 94.

the argument in order to underscore that a requirement of a contractual link between claimants seeking to institute joint proceedings cannot be derived from the ICSID legal framework.

[...] [I]t 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 [...]. 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.<sup>87</sup>

160. On the basis of this distinction, the *Abaclat* Decision, in para. 542, concludes that the “specific circumstances surrounding individual purchases by Claimants of security entitlement are irrelevant”.
161. On that basis, the present Tribunal considers that Claimants are correct in arguing that the necessary link among them exists in terms of the *treaty claim* they jointly submit in the present arbitration. Thus, they are right to point out that they complain about the same illegality which the Respondent is said to have committed against them all. They base their claim on the same provisions of the Argentina-Italy BIT as well as the ICSID Convention and they have made identical prayers of relief, i.e. indemnification under the BIT for the acts allegedly committed by the Respondent.<sup>88</sup> In addition, they claim that the factual background on the basis of which the Claimants seek to establish their claim is virtually the same for all Claimants.
162. In contrast, the fact – which Respondent has highlighted repeatedly and intensively – that there are certain differences between the Claimants as to the dates and the series of bonds under which the different security entitlements were acquired, or regarding the currency or interest rate which would apply to them, etc., are not relevant here since they relate to the *contractual* claims the Claimants may have, but not to the *treaty* claims with which

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<sup>87</sup> *Abaclat* Decision, para. 541.

<sup>88</sup> See *Request* § 91 as well as *supra* para. 63.

the Tribunal is dealing here.<sup>89</sup> In so far as they may become relevant to establish the quantum of claim for each individual Claimant, they will have to be examined in the following procedure on the merits of this case.

163. Hence, Respondent has not convinced the Tribunal that the claims in question would raise any relevant doubt as regards their ability to be treated, and decided upon, by the present Tribunal in one single multi-party arbitration. Under the circumstances of the present case, the Tribunal is therefore not able to conclude, as suggested by the Respondent, that its competence to decide the case would be called into question due to a presumed lack of the necessary link between the claims brought jointly in the dispute at stake here.

### **3. Due process and manageability concerns**

164. Inasmuch as Respondent's statement that the "claims are not even suited for collective treatment" intends to suggest that it would not be possible for a tribunal operating on the basis of the ICSID Convention to adjudicate a dispute such as the present one effectively and fairly, the Tribunal is not able to accept this argument.
165. As has already been stated, this is not a mass claim case.<sup>90</sup> Such a specific procedural device, as Respondent has consistently and correctly pointed out, does not exist within the ICSID regime. However, the absence of a specific mass claim regime in ICSID does not at all prevent the Tribunal from dealing with the present dispute as what it is, i.e. a multi-party proceeding including 119 or 90 Claimants respectively, which is governed by the procedural provisions of the ICSID Convention and Rules and other applicable norms of international law.
166. The Tribunal does not consider that the mere number of Claimants in the present case would make the proceedings "unmanageable", as the Respondent has suggested, or would violate fundamental principles of due process or would be unfair to the

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<sup>89</sup> As to this aspect see also *infra* para. 543.

<sup>90</sup> See *supra* paras. 119, 120.

Respondent, neither in the present jurisdictional phase nor in the merits phase of the proceedings.

167. In the First Session, the Parties have agreed that the “preliminary phase would deal with preliminary objections of a general character only, but not with any jurisdictional issues that may arise in relation to individual claimants, which would be dealt with at a later stage as necessary and appropriate”.<sup>91</sup> Given this fact, the criticism on the part of the Respondent that the impossibility to look at the specific circumstances of each single Claimant already in the jurisdictional phase would entail a limitation of Argentina’s defense rights (*R II § 149; R IV p. 11; R V p. 6*) cannot be upheld by the Tribunal. Accordingly, in this preliminary phase of the proceedings, the Tribunal has to restrict itself to a general assessment whether there is jurisdiction to decide the dispute in question. The fact that there are several dozens of Claimants involved in these proceedings has no impact at all on the assessment to be made by the Tribunal at this stage of the proceedings.
168. But even in the subsequent merits phase of the proceedings, the Tribunal cannot see a fundamental problem in taking evidence regarding, and assessing, the individual case of each and every of the 90 Claimants remaining in the case. Whether it is necessary and appropriate to call every single Claimant into the witness stand and cross-examine them there in order to safeguard the fundamental principles of due process, as Respondent seems to suggest (*R I § 109; R II § 148; R III § 35*), is to be decided at the appropriate time on the basis of the relevant facts and according to the applicable rules of law. The Tribunal does not take a stand on this question at this moment.
169. The Tribunal is in full agreement with the Respondent that, in the adjudication of the present dispute, it is fully bound by Art. 44 of the ICSID Convention and Arbitration Rule 19, and the Tribunal will be fully mindful of this legal framework when discharging its duty to control and direct the unfolding of the proceedings through procedural orders. In view of the circumstances of the present case, notably the considerable but nonetheless limited number of Claimants, the Tribunal would not consider that the specific

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<sup>91</sup> See Minutes of the First Session, point 14; *supra* para. 5.

controversy regarding the scope of an ICSID tribunal's power to devise "necessary adaptations" to the ICSID standard procedure which arose in the context of the *Abaclat* case<sup>92</sup> and to which the Parties have referred (*C III* § 88; *R III* § 26; *R IV pp. 10, 11; Tr p. 224/17*), would be relevant to the present case.

170. In particular, the Tribunal cannot see in which manner the obvious right of both Parties to the proceedings being conducted according to the principles of fairness and due process would be encroached upon or what defense right of the Respondent might be curtailed or otherwise negatively affected by the mere fact of the Tribunal admitting that 119 or 90 Claimants, respectively, may institute multi-party proceedings under Art. 25 of the ICSID Convention.
171. As the Tribunal already found that the present case is neither a class action nor a mass claim case<sup>93</sup>, the due process and fairness concerns raised by the Respondent regarding the representation of the Claimants are moot, and the Tribunal will therefore not address them in any detail.
172. Similarly, the Tribunal does not need to take a stand regarding Claimants' submission that the decision to institute one single proceeding for all Claimants jointly is the most efficient course of action because it avoids parallel proceedings, reduces costs, eliminates the risk of inconsistent decisions and even makes the Respondent's defense less complicated and costly. Whatever the truth of these considerations, they could not lead the Tribunal to approve the conduct of multi-party proceedings under the ICSID Convention if this were not permitted under the legal framework of ICSID as a matter of law. Conversely, as the Tribunal has concluded that the ICSID Convention is perfectly compatible with a plurality of Claimants jointly bringing claims in an ICSID arbitration, those policy considerations do not add to answering the question that the Tribunal has to address in the present preliminary phase of the proceedings.

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<sup>92</sup> See *Abaclat* Decision, paras. 529 *et seq.*; see in this regard also the Dissenting Opinion of Professor Abi-Saab, paras. 194 *et seq.*

<sup>93</sup> See *supra* paras. 114 *et seq.*

## II. CONSENT OF THE CLAIMANTS

### A. Positions of the Parties

#### 1. Contentions by Respondent

173. Respondent submits that Claimants' purported consent to ICSID jurisdiction does not constitute "consent in writing" in the meaning of Art. 25(1) of the ICSID Convention and falls outside Argentina's offer to arbitrate in Art. 8 para. 3 of the Argentina-Italy BIT (*R I* § 114; *R III* § 40). Argentina criticizes the Claimants for not paying sufficient regard to questions of form and emphasizes that formalities are necessary to preserve due process and the legality of arbitral proceedings (*Tr p.* 76/11).

##### *a) Lack of the signature of Claimants themselves*

174. Respondent emphasizes that the Request was not signed by Claimants *manu propria* (*R I* § 116) even though they allege, in the Request itself, to have submitted the dispute to ICSID jurisdiction by "signing" and filing the Request, and even though the NASAM Mandate provides that the Claimants themselves shall sign the Request to express their consent (*R I* § 120; *R II* § 164; *R III* §§ 66-68). Moreover, it was even made conditional upon each Claimant to sign the Request in Mr. Parodi's office for the NASAM Mandate to become effective (*R III* §§ 42-45; *Tr pp.* 79/11, 348/19).

175. As this did not happen, Respondent argues that the Claimants did not consent to ICSID jurisdiction in the announced manner and, more importantly, the NASAM Mandate never came into effect (*Tr p.* 80/8). Furthermore, if the NASAM Mandate instructed the Claimants that they were expected to sign the Request and they did not do so, they could reasonably have understood that they would have further opportunity to decide whether to consent to any particular arbitration. Thus, the alleged consent is not perfect. It was expected to be completed with the signature of the Request and this has not been done (*R II* § 167; *Tr p.* 83/2).

##### *b) Lack of consent for ICSID arbitration in the Power of Attorney*

176. In addition, regarding the Request's signing by Claimants' counsel, Respondent contends that nowhere in the *Procura speciale* (*Special Power of Attorney*) which the Claimants

supposedly signed in favour of Avv. Piero Giuseppe Parodi (hereinafter: “Power of Attorney”) did Claimants consent in writing to the Centre’s jurisdiction nor did they authorize their counsel to do so on their behalf. The Power of Attorney mentioned neither the Centre nor the Argentina-Italy BIT (*R I* § 117; *R II* § 165; *R III* § 71; *Tr p.* 89/6).

177. In particular, one passage in the Power of Attorney refers to the signing of “Terms of Reference” (in capital letters). However, these are a specific feature of ICC arbitration and thus a type of arbitration completely different from ICSID arbitration. In a similar vein, insofar as the Power of Attorney contains a reference to “whatever arbitration of whatever Country of the World”, this is clearly inconsistent with the nature and characteristics of ICSID arbitration (*R III* §§ 72, 73; *Tr p.* 92/4).
178. As far as the references to ICSID in the NASAM Mandate are concerned, Respondent contends that they only contain information that NASAM provided to the Claimants, not an expression of will and consent coming from them (*R I* § 119; *R III* §§ 77-80; *Tr pp.* 86/19, 347/10). Furthermore, there is no evidence that any Claimant actually paid the initial contribution to expenses to NASAM with the express reference to “Arbitrato ICSID” (*R II* § 166).

**c) *Purported legal defects of the Power of Attorney and the NASAM Mandate***

179. Assuming *arguendo* that the Power of Attorney and/or the NASAM Mandate contained Claimants’ consent in writing, Respondent further submits that this consent would be invalid because these documents violate formal and substantive requirements of Italian law (*R I* § 123). This is relevant because both the NASAM Mandate and the Power of Attorney are governed by Italian law (*R I* § 124). Contrary to Claimants’ submission, in the eyes of the Respondent, the reference to the *AMTO v. Ukraine* case is misplaced, since it was decided under the Energy Charter Treaty which directs the Tribunal to decide the case in accordance with international law. In contrast, Art. 42 of the ICSID Convention as well as Art. 8 (7) of the Argentina-Italy BIT require the Tribunal to decide on the basis of the laws of the Contracting Party involved in the dispute – including its rules on the conflict of laws – as well as applicable international law. In Respondent’s



view, in the present case Argentine law on the conflict of laws would point to the application of Italian law so that compliance of the Power of Attorney and the NASAM Mandate with the formal and substantive requirements of Italian and international law is highly relevant (*R II § 171*).

**(1) Purported legal defects of the Power of Attorney**

180. As regards the Power of Attorney, under Art. 83 of the Italian Code of Civil Procedure, the power of attorney enabling an attorney to represent a party in judicial proceedings must be granted before a notary public or, alternatively, the signature must be authenticated by the attorney. Since this did not happen in the present case, the respective Powers of Attorney do not comply with the requirements of Italian law and do therefore not provide a basis for consent (*R I §§ 127, 128*).
181. Furthermore, Respondent submits that the lawyer in whose favour the Power of Attorney was issued, i.e. Mr. Parodi, failed to sign the Request. The sole person who signed is Mr. Radicati di Brozolo. Mr. Parodi did not sign any of the Claimants' submissions nor did he take part in the First Session held by the Tribunal on 24 February 2009 (*Tr p. 329/21*). Mr. Parodi is the only person empowered by the Claimants to represent them, but Argentina has not been able to meet him (*Tr p. 329/12*) because he consistently failed to show up (*Tr p. 330/16*). Argentina asserts that the unjustified non-appearance of the main Counsel before the Tribunal is unprecedented (*Tr p. 340/1; R III § 40*).
182. The only link between Mr. Parodi and Mr. Radicati di Brozolo as acting Counsel emerged for the first time on the third day of the Hearing on Jurisdiction through a letter of questionable probative value (*R III § 40; Tr p. 335/10*). Respondent submits that it is not prepared to accept the letter allegedly written by Mr. Parodi which was provided to the Tribunal only as a photocopy (*Tr p. 335/16*). Furthermore, Respondent contends that because only Mr. Radicati di Brozolo signed the Request, the Claimants would have needed to attach the letter at that time to show that Mr. Radicati di Brozolo had been authorized to represent Claimants (*Tr p. 336/10*). As the date of signature on this letter is not authenticated, Respondent alleges that it is unproven that Mr. Radicati acted as authorized co-counsel when he signed the Request (*Tr p. 336/18*). Hence, Respondent

contends that Mr. Radicati di Brozolo lacks the capacity to represent the Claimants (*Tr pp.* 328/19, 336/2).

**(2) Purported legal defects of the NASAM Mandate negatively affecting the Power of Attorney**

183. Moreover, in the Respondent's submission, also the NASAM Mandate fails to meet substantive requirements of Italian law (*R I § 129*), and this in a twofold sense. First, Italian law is violated because NASAM is given full control over Claimants' claims in the arbitration, transferring to NASAM all the powers a client should have and be able to exercise in an attorney-client relationship. NASAM is set up as the exclusive representative of the Claimants and as a filter of all communications between Claimants and their attorneys. This violation of the right of defense is a breach of norms of public law and thus renders the NASAM Mandate void under Art. 1418 of the Italian Civil Code (*R I §§ 130, 132; R II § 188*).
184. Second, NASAM does not fulfill the requirements set forth by Italian law in order to pursue a claim on behalf of third parties. Pursuant to Art. 77 of the Italian Code of Civil Procedure, representation of another individual or entity in court is only allowed if the third person has the power to dispose of the legal relationship at stake or the capacity of being the general representative of such person or entity. Neither of the two is the case regarding NASAM (*R I §§ 130, 134, 135*).
185. Regarding the purported legal defects of the NASAM Mandate, Respondent submits that the NASAM Mandate and the Power of Attorney are linked to each other, designed together and structured to achieve a common purpose. In that regard, Claimants contradict themselves when they submit, on the one hand, that the NASAM Mandate and the Power of Attorney are separate and unrelated instruments but contend, on the other hand, that the NASAM Mandate is relevant for the interpretation of the intention of the Claimants in granting the Power of Attorney (*R III §§ 53, 54; Tr p. 84/18*). Under Italian law, when legal documents demonstrate a practical common intent of the parties to be interdependent, those documents are legally connected and in Italian legal terminology characterized as *negozi collegati*. As a consequence, the deficiencies of the one

necessarily affect the other, i.e. if one of the components is invalid also the other must be deemed invalid. In Respondent's opinion, this is the case regarding the NASAM Mandate whose illegality affects the Power of Attorney and *vice versa* (*R I* §§ 125, 126; *R II* § 179).

### **(3) The nature of NASAM's funding arrangement**

186. According to Respondent's submission, the problem is not NASAM's funding arrangement as such, but rather the fact that genuine third-party funding deals with the provision of funds by individuals and companies having no other connection with the litigation. NASAM does not fall in this definition, however, as its control goes as far as making NASAM a real party in interest in the present case (*R II* § 195). In particular, Respondent alleges that NASAM was the driving force behind the decision to initiate the present arbitration. The lawyers were selected by NASAM and it was NASAM who instructed Claimants' lawyers accordingly (*R I* § 73; *R II* §§ 178, 192). Furthermore, Respondent submits that NASAM has full control over the present arbitration and that it is its sole beneficiary (*R I* § 264). According to the Respondent, the NASAM Mandate therefore creates an impermissible barrier between Claimants and their lawyers (*R II* § 191).

## **2. Contentions by Claimants**

187. According to the Claimants, it is commonly admitted that their consent in writing, as required by Art. 25(1) of the ICSID Convention, can be manifested by filing a request for arbitration to ICISD. They thus declare that "[f]or these purposes, the Claimants hereby accept to submit the dispute to ICSID arbitration by signing and filing this Request for Arbitration" (*Request* § 84). Regarding Respondent's contention that the Claimants have not validly consented to ICSID jurisdiction, the latter offer a series of counter-arguments.

### ***a) Lack of the signature of Claimants themselves***

188. According to the Claimants, the fact that they did not sign the Request *manu propria* does not call into question the existence of Claimants' consent in writing in the meaning of Art. 25(1) of the ICSID Convention. First, it is generally recognized that an investor may accept an offer for ICSID arbitration contained in a BIT simply by starting ICSID

proceedings and the large majority of ICSID proceedings in recent years are based on consent established in this way (*C I § 140*). In addition, neither the Argentina-Italy BIT nor the ICSID Convention require a particular form for the expression of written consent by the investor (*C I § 142*). Moreover, it is common ICSID practice that requests for arbitration are signed by duly authorized counsel and not by the parties themselves. ICSID tribunals have never questioned that this way of expressing consent satisfies the requirement of “consent in writing” under Art. 25(1) of the ICSID Convention (*C I § 149; C III § 56*).

189. Furthermore, Claimants submit that while the NASAM Mandate provided for signing of the Request by each Claimant, when Counsel was appointed NASAM was made aware that the signing of the Request by each Claimant was not required by the ICSID Rules and that Counsel’s signature sufficed to express the Claimants’ consent. Therefore, NASAM decided to dispense the Claimants (most of whom are very elderly) from a burdensome and useless journey to Milan, informing all Claimants accordingly (*C III § 66; Tr p. 491/2*). Since NASAM was the entity prescribing the actions the Claimants were to carry out, it also had the power to dispense them from carrying out some of those actions. Thus, the lack of Claimants’ signature did not and could not affect the validity of the consent to the present arbitration (*C III § 67*).

***b) Lack of consent for ICSID arbitration in the Power of Attorney***

190. Claimants insist that the filing of the Request on their behalf through their duly appointed Counsel is the unequivocal manifestation of their consent to ICSID arbitration (*C I §§ 144, 147*). The Powers of Attorney authorize Counsel “to communicate any notice dispute in my/our name and on my/our behalf” and “to sign and forward any request of arbitration [...] and to make any other request to the Arbitral Tribunal and/or to any other competent Court of Authority of whatever Country in the world”<sup>94</sup> and, according to the Claimants, this reference unquestionably includes ICSID. In addition, the Power of Attorney must be read in conjunction with the NASAM Mandate which expressly refers

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<sup>94</sup> Power of Attorney, p. 2.

to ICSID (*C I § 145; C II § 12*).<sup>95</sup> Although the relationship between the Claimants and Counsel is governed exclusively by the Power of Attorney, the NASAM Mandate is relevant for the interpretation of the intention of the Claimants in granting the Power of Attorney and therefore also of the content of the powers granted to Counsel (*C II § 13; Tr p. 170/1*).

191. Moreover, when Claimants made their initial contribution to expenses to NASAM, they did so with the express reference to “Arbitrato ICSID”<sup>96</sup> which proves that they intended to bring ICSID proceedings (*C I § 146; Tr p. 171/11*). It is further contended that the Claimants actually made reference to “ICSID arbitration” when making their payments and that documents to that effect were produced (*C II §§ 14, 15*, referring to Annexes CA 49 and CA 50).

***c) Purported legal defects of the Power of Attorney***

192. Claimants uphold the validity of the Power of Attorney and thus refute Respondent’s arguments that (1) the Power of Attorney as such is illegal and that (2) the NASAM Mandate is null and void which, due to the legal relation between the two documents, would adversely affect the Power of Attorney.

**(1) Purported legal defects of the Power of Attorney**

193. In Claimants’ opinion, Respondent’s reliance on Art. 83 of the Italian Code of Civil Procedure is misplaced since this provision only applies to proceedings before Italian courts and not to arbitration, let alone to arbitration not governed by Italian law (*C I § 125; Tr p. 175/13*). Already under Italian law, a power of attorney issued in connection with arbitration proceedings is therefore valid irrespective of the nature of the act whereby it is granted, e.g. private or public, oral or written. No specific formal requirements have to be met (*C I § 128; C II § 34*).
194. Moreover, Claimants insist that Italian law is not applicable to establishing the requirements of a power of attorney issued in the context of an arbitration governed by

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<sup>95</sup> See NASAM Mandate, Preamble, lit. H, O and P, pp. 2, 5 and 6.

<sup>96</sup> *Ibid.*, Preamble, lit. P, p. 6.

international law such as ICSID arbitration (*C I* § 129; *C II* § 32). In order to decide on jurisdiction, ICSID tribunals are called to apply only the self-standing provisions of Art. 25 of the ICSID Convention as has been clearly held in the *AMTO v. Ukraine* case (*C I* §§ 130-132; *C II* § 32). Claimants are aware that Respondent seeks to distinguish this case which was decided on the basis of the Energy Charter Treaty from the present one inasmuch as Art. 42 of the ICSID Convention in combination with Art. 8 para. 7 of the Argentina-Italy BIT would lead to the application of Italian law. Claimants counter that Art. 42 of the ICSID Convention only addresses issues of substantive law, but not of procedural law and certainly does not determine the law applicable to the determination of the Tribunal's jurisdiction under Art. 25 of the ICSID Convention (*C II* § 33; *Tr p.* 174/3).

195. Neither the Argentina-Italy BIT nor the ICSID Convention contains any specific provision as to formal requirements needed for a power of attorney to be valid. The only provisions expressly addressing representation of the parties are Arbitration Rule 1 pursuant to which the Request "shall be signed by the requesting party or its duly appointed representative" as well as Arbitration Rule 18 providing that "each party may be represented or assisted by agents, counsel or advocates [...]". No formal or other particular requirement is established by the Arbitration Rules (*C I* § 131; *C II* § 16).
196. As to Respondent's objection to the manner of Claimants' representation, they submitted that, while it is true that the Request was only signed by Mr. Radicati di Brozolo, the Power of Attorney given to Mr. Parodi authorized him to engage other counsel in the defense of the present case (*C III* § 7; *Tr p.* 333/2). At the Hearing on Jurisdiction, a letter of 3 June 2008 by Mr. Parodi to Mr. Radicati di Brozolo and Mr. Barra was submitted appointing the latter two as co-counsel and conferring upon them all powers to represent the Claimants and to defend them jointly and severally (*Tr pp.* 334/4, 449/18). Mr. Radicati di Brozolo pointed out that he was in direct contact with Mr. Parodi who is in control of the proceedings (*Tr p.* 450/16). In any event, it is contended that Mr. Parodi's signature on the post-hearing brief marks his formal ratification of all Claimants' written and oral submissions in the arbitration (*C III* § 8).

197. Claimants further submit that the reason why the written submissions were signed with “p.p.” (i.e. “per procuracionem”) on behalf of Mr. Parodi was that those submissions went off in the middle of the night, and Mr. Parodi was not there physically to sign them (*C III § 11; Tr p. 338/21*). In addition, Claimants contend that it is standard practice in Italy, including before Italian courts, that one of the lawyers, be it the lead lawyer or one of the co-counsels, signs “anche per i colleghi”, i.e. “also for the colleagues” (*Tr p. 451/6*). It is further common in international arbitrations that English and American firms sign with the name of the firm, e.g. “Clifford Chance” or the like, and nobody has ever seriously contested the fact that there is an appropriate power of attorney (*Tr p. 454/4*).

**(2) Purported legal defects of the NASAM Mandate negatively affecting the Power of Attorney**

198. While agreeing with the Respondent that the NASAM Mandate is a contract governed by Italian law (*C I § 92*), the Claimants refute, first, Respondent’s argument that the NASAM Mandate is null and void. Even if it were so, they deny, secondly, that there is a legal connection between the NASAM Mandate and the Power of Attorney that would make the latter null and void (*C I § 94*).

199. As regards the first element, Claimants argue that the NASAM Mandate does not give NASAM complete control over the Claimants’ claims in arbitration, as alleged by the Respondent (*C I §§ 97-100*). The relationship between Claimants and their Counsel is governed only by the Power of Attorney signed by each individual Claimant, which leaves Claimants in full control of the relationship with Counsel. The Mandate does not confer on NASAM any power to instruct Counsel for the Claimants (*C I § 101*).

200. Moreover, Claimants contend that Respondent’s references to Italian law are totally unavailing since they do not relate to arbitration but to judicial proceedings before Italian courts. In particular, none of the restrictions and guarantees referred to by the Respondent that apply to the attorney-client relationship in judicial proceedings are pertinent in arbitral proceedings, including the right to delegate any third party to dispose of the main party’s substantive rights (*C I §§ 105-108; C II § 44*). Finally, even if such provisions could apply to arbitrations governed by Italian law (i.e. those having their seat in Italy),

they do not apply to foreign arbitrations and so much less can they apply to an ICSID arbitration (*C I §§ 110, 120; C II §§ 45-47*).

201. Concerning the second element, the argument relying on the doctrine of “negozi collegati” is of no avail to the Respondent because it is based on the serious misconception that Italian law can be applicable to decide issues of power of attorney in ICSID proceedings (*C I § 120*). Furthermore, even assuming that Italian law were applicable, the Powers of Attorney and the NASAM Mandate are not “negozi collegati”, but separate and perfectly self-standing agreements (*C II § 30*). In addition, there is no illegality which could impinge on the power of attorney in the light of the NASAM Mandate being perfectly valid, as pointed out before (*C I § 122*).

**(3) The nature of NASAM’s funding arrangement**

202. According to Claimants, the NASAM Mandate is a perfectly valid contract which does nothing more than provide assistance to Claimants in financing the proceedings (*C I § 111*). No one seriously contests the legality of third party funding in international arbitration, especially in a case like the present one where the claims are brought by the original holders of the rights subject of the litigation and where the benefits of the arbitration accrue for the most part to the Claimants (*C I § 113; Tr p. 153/20*). Without prejudice to the Claimants’ position on the complete irrelevance of Italian law, third party funding is perfectly in line with it (*C I §§ 115, 116*).
203. NASAM’s primary role in this arbitration is to coordinate and fund the arbitration (*C I § 92*). It also serves as a conduit for the transmission of information between the Claimants and their attorneys. Even though NASAM assisted Claimants with finding Counsel, these were appointed by Claimants themselves (*Tr p. 155/7*). Claimants submit that the NASAM Mandate does not create a barrier between them and their Counsel (*C II § 41; Tr p. 155/19*). In particular, the Mandate does not give NASAM complete control over their claim (*C I §§ 97 et seq.; C IV § 69*). Counsel is not bound by the terms and conditions of the NASAM Mandate. It is the Power of Attorney alone which governs the relationship between the Claimants and their Counsel (*C I §§ 101, 105; C II § 22*). In the Hearing on Jurisdiction, Counsel emphasized that he represents the Claimants rather than



NASAM and takes no instructions from the latter (*Tr pp. 156/8, 476/10*). In response to Argentina's allegation that NASAM sought to prevent the Claimants from participating in the 2010 restructuring offer, the Claimants point out that NASAM was powerless to influence Claimants since many of them felt completely free to disregard its suggestions and accepted the 2010 Exchange Offer (*C III § 32; Tr p. 157/5*).

## **B. Findings of the Tribunal**

### **1. The prerequisite of written consent of Claimants**

204. Pursuant to Art. 25(1) of the ICSID Convention to which the Parties have referred extensively in their submissions, both parties must submit the legal dispute in question to the Centre "in writing" in order for the dispute to fall within ICSID jurisdiction. Whereas Claimants are convinced that they have acted accordingly, Respondent upholds that the Claimants have not fulfilled this requirement, and this in several respects:

- due to the lack of Claimants' signatures on the Request (2.);
- due to the fact that the Power of Attorney given to Avv. Parodi by the Claimants is invalid and that its scope does not cover the initiation of ICSID proceedings, so that Avv. Parodi actually did not act as Claimants' "duly authorized representative" for the purpose of filing a request for the commencement of ICSID proceedings (3.);
- even in case of the said Power of Attorney being in good order, due to the failure of Avv. Parodi as the Claimants' only duly authorized representative to sign the Request *manu propria* and in view of the lack of authorization of Avv. Radicati di Brozolo as the only person having actually signed the Request (4.);
- and finally, in the light of the questionable role NASAM has played in the present case (5.).

205. Before delving into these questions in more detail, the Tribunal considers it useful to begin its reasoning in the matter with a general observation. The duty to approach the Centre "in writing" which figures so prominently in the present case, raises two interrelated, but conceptually distinct legal questions. In the Tribunal's opinion, this distinction should be borne in mind throughout the subsequent reasoning.

**a) The structure of the legal problem**

206. First, Art. 25(1) of the ICSID Convention requires “consent *in writing*” to submit a dispute to the Centre. At the same time, Art. 36(1) of the Convention states that 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. Hence, the Convention gives rise to a twofold requirement to approach the Centre “in writing”.

**(1) Written consent to submit the dispute pursuant to Art. 25**

207. The prerequisite, as laid down in Art. 25(1) of the ICSID Convention, that both parties express their consent in writing for a legal dispute to be submitted to the Centre, is a jurisdictional requirement *stricto sensu*. That “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre” and that “[c]onsent to jurisdiction must be in writing” are well-known and often-cited sentences from the authoritative Report of Executive Directors.<sup>97</sup> Consent is thus “an indispensable condition for the jurisdiction of the Centre”, and since the Convention’s “only formal requirement for consent is that it must be in writing”<sup>98</sup>, failure to provide written consent by any of the parties would have to lead to the dismissal of the case for lack for jurisdiction.

208. In this context, it is firmly established that under the regime of Art. 25 of the ICSID Convention consent may result from a unilateral offer of arbitration on the part of the host State in a BIT which is subsequently accepted by the investor.<sup>99</sup> The investor may accept such an offer of consent contained in a BIT simply by instituting ICSID proceedings.<sup>100</sup> The requirement of providing consent “in writing” is realized by the very

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<sup>97</sup> International Bank for Reconstruction and Development, Report of Executive Directors of the ICSID Convention, 18 March 1965, nr. 23.

<sup>98</sup> *Schreuer*, ICSID Convention Commentary, Art. 25, para. 379; see also *ibid.*, para. 374.

<sup>99</sup> *Ibid.*, paras. 378 and 427 *et seq.*

<sup>100</sup> *Ibid.*, para. 448; *C. Schreuer*, Consent to Arbitration, in: P. Muchlinksi et al., *The Oxford Handbook of International Investment Law*, Oxford 2008, 830, at 837 with extensive references to the pertinent case-law.

act of submitting the request of arbitration in written form to the Centre. It indicates a minimum of formality in accepting the host State's offer.<sup>101</sup>

**(2) Submission of the request in writing pursuant to Art. 36**

209. According to Art. 36(1) of the ICSID Convention, as already stated above, “[a]ny 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”. Pursuant to para. 2 of this provision, the request for arbitration shall contain information, *inter alia*, regarding 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”. This information covers the jurisdictional requirements as set out in Art. 25(1) of the ICSID Convention, notably including the requirement of consent.

**(3) Interplay of the two provisions in the case of expression of consent by instituting arbitral proceedings**

210. If consent is expressed, as is commonly the case nowadays, by instituting arbitral proceedings, the requirement that the request for ICSID arbitration must be in writing, as set forth by Art. 36 of the Convention, simultaneously guarantees that the claimant's consent becomes manifest in written form so that the standard of Art. 25 of the Convention is met, including the “minimum of formality” it requires as to the manifestation of consent. In such cases, the request for arbitration does not only contain information regarding the investor's consent to submit a legal dispute to the Centre, it *embodies* it.

211. In such constellations, Art. 36 assumes a *double* function which amounts to a sort of *dédoublement fonctionnel*: on the one hand, the *direct* or *genuine* function of Art. 36 of assuring that the request is submitted to the Centre in written form, and on the other hand,

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<sup>101</sup> C. F. Amerasinghe, Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes, 5 *Journal of Maritime Law and Commerce* (1974) 211, at 217; *id.*, The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation, 9 *Vanderbilt Journal of Transnational Law* (1976) 793, at 810; *id.*, The Jurisdiction of the International Centre of Investment Disputes, 19 *Indian Journal of International Law* (1979) 166, at 224; see *Schreuer*, ICSID Convention Commentary, Art. 25, para. 416.

the *indirect* or *derived* function of guaranteeing that the jurisdictional requirement of “consent in writing” is satisfied, as called for by Art. 25.

***b) Application to the present case***

212. The present case is obviously one of those – and neither of the Parties takes issue with it – where the requesting party seeks to express its consent to submit a legal dispute to the Centre by the very act of instituting proceedings, thereby accepting the offer of the host State as contained in Art. 8 paras. 3 and 5 of the Argentina-Italy BIT. Hence, the investors act to meet the jurisdictional requirement of providing written consent (Art. 25 of the ICSID Convention) through addressing a request for arbitration in writing to ICSID’S Secretary-General (Art. 36 of the ICSID Convention).
213. Correspondingly, the “Request for Arbitration” dated 23 June 2008 expressly declares itself to be based on Art. 36 of the ICSID Convention and Art. 8(5)(a) of the Argentina-Italy BIT (*Request § 1*). Paras. 81-84 of the Request explicitly refer to the generally accepted practice of a host State offering to submit disputes to ICSID in a BIT and the investor accepting that offer, *inter alia*, by filing a request for arbitration to ICSID. It is on this basis that para. 84, second sentence (whose exact meaning is subject to dispute between the Parties<sup>102</sup>) states: “For these purposes, the Claimants hereby accept to submit the dispute to ICSID arbitration by signing and filing this Request for Arbitration.”
214. Implementing the mandate contained in Art. 36(2) of the ICSID Convention, Rule 2(1)(c) of the Institution Rules requires that the request shall “indicate the date of consent and the instruments in which it is recorded”, with “date of consent” meaning the “date on which the second party acted” in terms of expressing its consent in writing (Institution Rule 2(3)). As in the present case this date coincides with the day of the submission of the Request, the date of consent is 23 June 2008. As required by Institution Rule 2, there is an explicit statement to this effect in para. 85 of the Request.
215. However, as explained above, the Respondent submits that the Request cannot effectively fulfill the function of providing valid consent to the arbitration, in the meaning of Art. 25

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<sup>102</sup> See in this regard *infra* paras. 222 *et seq.*

of the ICSID Convention, due to Claimants' failure to sign the Request themselves and/or their failure to duly appoint Avv. Parodi as their representative and/or the failure of the latter to sign the Request *manu propria* and/or to properly authorize Avv. Radicati di Brozolo to act as co-counsel in the present case. Accordingly, in the Respondent's eyes, against the first appearance of the case, the Claimants have never genuinely given their consent in writing. In view of the lack of a mandatory jurisdictional requirement, according to them, the case should therefore be dismissed by the Tribunal.

216. In fact, the Request bears three signatures (*Request*, p. 42). The Parties agree that none of them is from Claimants themselves. According to the Request, the signatures refer to the three individuals who, according to para. 6 of the Request, jointly represent the Claimants

[f]or the purposes of the present Request and of the arbitral procedure [...]

a) Avv. Piero G. Parodi, member of the Milan Bar, designated in the powers of attorney referred to in para. 5(iii) above;

b) Prof. Avv. Luca G. Radicati di Brozolo, member of the Milan Bar and professor of international law at the Catholic University of Milan designated as co-counsel by Avv. Parodi in accordance with the power conferred upon him by the Claimants in the powers of attorney;

c) Prof. Abogado Rodolfo Carlos Barra, member of the Buenos Aires Bar and professor of administrative law at the Universidad Católica Argentina designated as co-counsel by Avv. Parodi in accordance with the power conferred upon him by the Claimants in the powers of attorney.

217. Among these three, it seems that only Avv. Radicati di Brozolo signed the Request *manu propria* while in the place of Avv. Parodi's and Prof. Barra's signatures there are illegible signatures, preceded by the acronym "pp", standing for "per procuracionem". This indicates that someone signed the Request on their behalf (*Tr p. 329/21*), arguably Avv. Radicati di Brozolo himself (*C III § 11*).

218. This state of affairs gives rise to the question whether the Tribunal should follow the Respondent in declaring the Request not to validly express Claimants' written consent to the present arbitration and therefore in dismissing the case for lack of jurisdiction. To this effect, the aforementioned arguments are to be addressed in turn.

## 2. The question of the lack of Claimants' signatures from the Request

219. Pursuant to Institution Rule 1(1), a request for arbitration must be made

in writing to the Secretary-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 representative*. [emphasis added]

220. Hence, the Institution Rules expressly provide for the request for arbitration to be signed either by the requesting party itself (i.e. the Claimants) or by its “duly authorized representative.” From this follows that at least for the purposes of Art. 36 of the ICSID Convention (i.e. the requirement of submitting the request “in writing”) which expressly refers to the Institution Rules, signature by representatives is sufficient. Nothing suggests that, for the purposes of Art. 25 of the Convention, one should come to a different result. In the light of the afore-mentioned double function of Art. 36, the consent of the requesting party becomes manifest or is, for that matter, embodied in the written request. Accordingly, the jurisdictional requirement of written consent in Art. 25 is satisfied by discharging the procedural one of filing a written request in Art. 36, either by the party itself or by its duly appointed representative.

221. Apart from the clear wording of the Institution Rules in this regard, extensive ICSID practice shows that it is highly common that requests for arbitration, including those where the request has the function of providing written consent to arbitration in the meaning of Art. 25 of the ICSID Convention, are exclusively signed by the claimant's duly appointed lawyers.

222. There is no need to reach a different conclusion even when taking into account Claimants' purported “promise” in the present case to sign the Request themselves. This allegedly arises from the wording of para. 84 of the Request (“the Claimants *hereby* accept to submit the dispute to ICSID arbitration by *signing* and filing *this* Request for Arbitration”; emphasis added) as well as from para. 2 lit. f of the NASAM Mandate which instructs Claimants to sign the Request prepared by Avv. Parodi, in such numbers of copies as may be necessary (*R I* § 120; *R II* § 164; *R III* §§ 66-68). Respondent has even contended that, since lit. P of the Mandate's Preamble made it an express condition

upon each Claimant to sign the Request for the NASAM Mandate to become effective, the latter never came into effect. Yet, a number of reasons militate against qualifying the undisputed lack of Claimants' signatures from the Request as calling into question the jurisdiction of the Centre in the present case.

223. First, the Tribunal would consider it a rather artificial reading of para. 84 of the Request (on p. 38) to mean *verbatim* that Claimants thereby committed themselves to sign the Request *manu propria*. Such an understanding construes the Request so as to read into it an obvious contradiction, inasmuch as four pages later (on p. 42) what appears is only the signature of the lawyer who obviously signed on Claimants' behalf without any hesitation as to a purported commitment in para. 84 to reserve the signatures to Claimants. Accordingly, the phrase "by signing [...] this Request for Arbitration" is better understood to include Avv. Parodi (and, for that matter, Avv. Radicati di Brozolo and Avv. Barra) as acting on Claimants' behalf for the purposes of submitting the Request.
224. Secondly, this conclusion is corroborated by para. 6 of the Request, according to which the Claimants shall be represented by their lawyers "for the purposes of the present Request" which would obviously also encompass the very act of submitting the Request to ICSID. Parallel to that, the Power of Attorney expressly authorized Mr. Parodi "[t]o sign and forward any request of arbitration [...] in my/our name and on my/our behalf" (*ibid.*, p. 2). The Request and the Powers of Attorney (as part of Exhibit C-2) were submitted together to the Centre when instituting arbitral proceedings in the present case.
225. Thirdly, though this Tribunal need not rely thereon in view of the other reasons given, there appear to be quite a number of examples of ICSID cases where, according to the terms of the request for arbitration, claimants are referred to as "submitting the dispute" or "hereby accepting Respondent's offer" and "declaring consent", without them having signed the request for arbitration themselves and without the mere presence of the signature of their duly appointed legal representatives having led to a challenge of claimants' consent on the part of the Respondent.
226. Fourthly, the Tribunal cannot see in what way the fact that the afore-mentioned para. 2(f) of the NASAM Mandate contains a duty of the Claimants to "sign, when so required by

Counsel Parodi, the arbitration request to be prepared by him in English, in such number of copies as may be necessary” might affect the interpretation of para. 84 of the Request, as explained by the Tribunal above. The documents submitted to the Centre in order to institute the present arbitration were the Request accompanied by copies of the Powers of Attorney (made on the model of the form attached to the NASAM letter of 8 May 2006 and signed by the individual Claimants<sup>103</sup>)<sup>104</sup>, with the NASAM Mandate playing no role in that regard.

227. Fifthly, even if the NASAM Mandate should be attributed some relevance in this context, Claimants are correct to point out that NASAM was free to release the Claimants from a supposed commitment to sign the Request in person. This was a promise given by Claimants to NASAM in the NASAM Mandate which is a two-party contract. The Tribunal cannot see why the contracting party in whose favour such clause was introduced into the contract would not be able to waive it at a later stage. By doing this, it would simultaneously eliminate the condition under which the contract was arguably concluded. According to the submission of the Claimants (*C III § 66*), this is exactly what happened in the present case, and there is no reason for the Tribunal to challenge the truth of that statement. The Tribunal concludes on this matter that due to the waiver by NASAM of the requirement for the Claimants to sign in person, the lack of the signatures of the Claimants on the Request could have no adverse effect on the validity of the NASAM Mandate, let alone – what only counts here – on the validity of the Powers of Attorney and the Request they accompany as Exhibit C-2.
228. Sixthly and finally, the Tribunal finds it difficult to follow Respondent’s argument that Claimants might have expected to sign the Request in person and therefore to have further opportunity to decide whether to consent to any particular arbitration (*R II § 167; Tr p. 83/2*). After all, all Claimants signed a Power of Attorney which expressly

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<sup>103</sup> See Letter of 8 May 2006 by NASAM regarding “Procedura arbitrale CIRDI-ICISD – UNCITRAL contro il governo argentino” (Annex RA 107), with “Procura speciale” (“Special Power of Attorney” in the English translation) being attached as Annexes 3 and 3bis (Annexes RA 111 and RA 112).

<sup>104</sup> Pursuant to its para. 5(iii), the Request is accompanied by “a copy of the power of attorney accorded to the attorneys mentioned in para. 6 below”, and this is referred to again on p. 43 of the Request where it is stated that Exhibit C-2 contains “a copy of the power of attorney accorded to Counsel”; see also *infra* para. 230 in this regard.



authorizes Avv. Parodi “[t]o sign and forward any request of arbitration [...] in my/our name and on my/our behalf” (*ibid.*, p. 2). While already this element would suffice to dispel any doubt in this regard, in addition, the letter by NASAM to holders of Argentine bonds of 8 May 2006, i.e. more than two years before the submission of the Request, clearly spoke of instituting ICSID or UNCITRAL, i.e. arbitral proceedings against Argentina.<sup>105</sup> The Preamble, lit. P of the NASAM Mandate referred to a wire transfer to be operated by the Claimants with the subject “Arbitrato ICSID” (i.e. “ICSID Arbitration”), and, contrary to Respondent’s submissions (*R II § 166*), the Claimants acted accordingly.<sup>106</sup> In the light of this, it is hard to believe that Claimants were taken by surprise when the Request was filed on 23 June 2008.

### **3. The question of defects of the Power of Attorney given to Avv. Parodi**

229. As mentioned before, pursuant to Rule 1 para. 1 of the Institution Rules, a request for arbitration “shall be signed by the requesting party or *its duly authorized representative*” (emphasis added). Claimants submit that Avv. Parodi acted as such duly authorized representative of the Claimants when the Request was submitted to the Centre on 23 June 2008.
230. According to para. 6 of the Request, Avv. Parodi represents Claimants “[f]or the purposes of the present Request and of the arbitral procedure [... as ...] designated in the powers of attorney referred to in para. 5 (iii) above”. Pursuant to para. 5(iii), as has been mentioned before<sup>107</sup>, the Request is accompanied by “a copy of the power of attorney accorded to the attorneys mentioned in para. 6 below”. The Tribunal reiterates in that regard that the Claimants have signed Powers of Attorney on the model of the form attached to the afore-mentioned letter of 8 May 2006 in favour of Avv. Parodi<sup>108</sup>, thus

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<sup>105</sup> Letter of 8 May 2006 by NASAM (North Atlantic Société d’Administration) regarding “Procedura arbitrale CIRDI-ICSID – UNCITRAL contro il governo argentino” (“ICSID-UNCITRAL arbitration proceedings against the Argentine government”) (Annex RA 107).

<sup>106</sup> See the samples of money transfers made by Claimants with the reference to “Arbitrato ICSID” and of executed NASAM Mandates (Annexes CA 49 and CA 50). Furthermore, Claimants signaled to the Tribunal their readiness to produce copies of all the executed Mandates if the Tribunal should deem it necessary or useful (*C II § 15, n. 3*).

<sup>107</sup> See *supra* para. 226.

<sup>108</sup> See *supra* note 103.

empowering this individual to act on their behalf. These Powers of Attorney have been put at the disposal of the Tribunal in regard to all of the Claimants (see *Request*, pp. 8 and 43, referring to Exhibit C-2). In view of the fact that the present phase of the proceedings deals with preliminary objections of a general character only, but not with any jurisdictional issues that may arise in relation to individual claimants<sup>109</sup>, for the purposes of deciding this preliminary phase, the Tribunal is satisfied from its examination of Exhibit C-2 that these Powers of Attorney provide a valid link between the Claimants and the Request.

231. Respondent contends, however, that the Powers of Attorney given to Avv. Parodi by Claimants are defective, and this in a twofold sense: First, in the eyes of the Respondent, for a whole number of reasons they are legally invalid and could therefore not authorize Avv. Parodi to act on Claimants' behalf (a). Secondly, the scope of those Powers of Attorney does not cover the initiation of ICSID proceedings so that, on closer observation, Avv. Parodi actually did not act as Claimants' "duly authorized representative" for the purposes of filing a request for the commencement of ICSID proceedings (b).

*a) The purported invalidity of the Power of Attorney*

232. Respondent claims that both the Powers of Attorney given to Mr. Parodi and the NASAM Mandate violate a series of formal and substantive requirements of Italian law (*R I* §§ 123, 129). As the two sets of documents are intrinsically linked to each other, following the Italian law doctrine of "negozi collegati" upon which Argentina relies, the deficiencies of the one would necessarily affect the other. Claimants seek to counter each of the arguments based on Italian law, but above all they deny the applicability of Italian law in the first place.
233. The essence of the Parties' disagreement in this regard is whether Art. 42 of the ICSID Convention and Art. 8 para. 7 of the Argentina-Italy BIT which deal with the law applicable in ICSID proceedings would lead to the application of Italian law to the

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<sup>109</sup> See Minutes of the First Session, point 14; *supra* para. 5.

questions at stake here. This issue must be addressed by the Tribunal before entering into any analysis of Italian law with regard to the case at hand.

234. Pursuant to Art. 42(1) of the ICSID Convention

[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflicts of laws) and such rules of international law as may be applicable.

235. According to Art. 8(7) of the Argentina-Italy BIT

[t]he arbitral tribunal shall make its decisions based on the laws of the Contracting Party involved in the dispute – including its rules on conflict of laws –, the provisions of this Agreement, the terms of any particular agreements entered into regarding the investment, as well as applicable principles of international law.

236. Respondent submits that both provisions point to the law of the Contracting State which is party to the dispute, i.e. Argentina, and that Argentine rules on conflict of laws (to which also both provisions refer) would call for the application of Italian law for all questions pertinent in the present context (*R II § 171*). However, the Tribunal is not convinced by this argument and rather adheres to the predominant opinion in this field, namely that the afore-cited provisions address the question of the law applicable to the merits of the case, and not the law applicable to the determination of the Tribunal's jurisdiction for the purposes of Art. 25 of the ICSID Convention.<sup>110</sup>

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<sup>110</sup> See *Československa obchodní banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 35; see also *Schreuer*, ICSID Convention Commentary, Art. 25, para. 578, stating that “[t]ribunals have held consistently that questions of jurisdiction are not subject to Art. 42 which governs the merits of the case” and referring in this regard to *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, paras. 48-50; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 38; *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, paras. 29-31; *AES Corporation v. Argentina*, ICSID Case No. ARB/02/17; Decision on Jurisdiction, 26 April 2005, paras. 34-39; *Camuzzi International S.A. v. Argentina*, ICSID Case No. ARB/03/2, Decision on Jurisdiction, 11 May 2005, paras. 15-17, 51; *Jan de Nul v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paras. 65-68; see further *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 226.

237. In this context, Claimants have referred to the *AMTO v. Ukraine* case<sup>111</sup> (decided on the basis of the Energy Charter Treaty) where the respondent Government had challenged the validity of the power of attorney of the claimant's counsel. The Tribunal held that

[t]he applicable law in the present arbitration is the [Energy Charter Treaty] itself, and “applicable rules and principles of international law” (Article 26(6)). There is no requirement in the [Energy Charter Treaty] relating to powers of attorney, and nor has the Respondent identified any relevant principles of international law relating to powers of attorney. [...] Accordingly, the Arbitral Tribunal accepts the power of attorney [...] and finds that [...] the Request for Arbitration ha[s] [...] been fully authorized by the Claimant. The Respondent's objection based on lack of authority is therefore dismissed.<sup>112</sup>

238. Respondent is correct in pointing out that the provisions on applicable law are quite different when comparing the present to the *AMTO* case, with Art. 26(6) of the Energy Charter Treaty stating that the tribunal “shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.” However, the *AMTO* case still stands for the proposition that international law does generally not lay down formal requirements regarding powers of attorney, as opposed to domestic law which often contains precise rules on that matter.

239. More particularly, and this time precisely in regard to Art. 42(1) of the ICSID Convention and Art. 8(7) of the Argentina-Italy BIT, the *Abaclat* Tribunal convincingly concluded that

[i]t 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 itself and the instruments expressing such consent. 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. 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

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<sup>111</sup> Arbitration Institute of the Stockholm Chamber of Commerce, *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008.

<sup>112</sup> *Ibid.*, para. 56.

Article 42 ICSID Convention, is irrelevant for the determination of the existence of consent.<sup>113</sup>

240. In a similar vein, the present Tribunal considers that the question whether there is “written consent” for ICSID arbitration in the meaning of Art. 25(1) of the ICSID Convention must be assessed within the framework of the ICSID Convention itself. Pursuant to its Art. 36(1) in combination with Institution Rule 1(1), as laid out above, a request for arbitration must be submitted in writing and signed by the requesting party itself or its duly authorized representative. In the light of the double function of Art. 36 in cases of the present type<sup>114</sup>, these requirements are the necessary, but also sufficient conditions to realize “consent in writing” in the meaning of Art. 25 of the Convention.
241. As a consequence, the proper form of the request for arbitration and the legal provisions applicable to it are, in the eyes of the Tribunal, an *autonomous* question to be assessed exclusively on the basis of the ICSID Convention and, if available, pertinent principles of international law. In this regard, Art. 36 of the ICSID Convention and the Institution Rules based thereupon constitute a *lex specialis* vis-à-vis Art. 42(1) of the Convention inasmuch as the former contain a comprehensive, and exhaustive, set of formal requirements for a request for arbitration to be properly submitted to ICSID pursuant to Art. 36 and, accordingly, to meet the prerequisite of “consent in writing” of Art. 25 of the ICSID Convention. Given the fact that the pertinent provisions lay out the procedural requirements for initiating proceedings in quite some detail, the carefully crafted balance between desired accessibility of the ICSID arbitration system and necessary formalism becoming manifest therein should not be burdened by additional – and extraneous – elements.
242. On this basis, the formal requirements arising from Art. 36 of the Convention and the Institution Rules are 1) the written submission of the request for arbitration to ICSID and 2) its having been signed by the Claimants’ duly authorized representative. Upon a strict reading of the formal requirements, there would not even be a need for the Power of Attorney given to the representative to be in writing, let alone for a special form for this

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<sup>113</sup> *Abaclat* Decision, para. 430.

<sup>114</sup> See *supra* para. 211.

written authorization. Accordingly, form requirements established by domestic law for the validity of the Power of Attorney authorizing the representative to act can have no legal relevance here.<sup>115</sup>

243. The party submitting the request for arbitration must therefore be able to prove to the satisfaction of the Tribunal that its duly authorized representative acted on its behalf when submitting the request for arbitration, but no more than that. Hence, there must be proof, at the time of the submission of the request for ICSID arbitration, of the existence of an authorization by the claimant(s) to an individual which is sufficiently comprehensive and precise to empower that individual to act on claimant's behalf for the purpose of instituting ICSID proceedings.
244. The Tribunal thus concludes on this matter that the validity of the Request is to be exclusively assessed in the light of the formal requirements of Art. 36 of the ICSID Convention and the Institution Rules. Both pertinent requirements, i.e. written submission of the Request and its signature by the duly authorized representative, are met, as evidenced by the Request itself and the annexed Powers of Attorney given to Avv. Parodi by the Claimants. Regarding the latter requirement, however, a proviso must be added: The question whether the Powers of Attorney given to Avv. Parodi were sufficiently comprehensive and precise to empower him to institute ICSID proceedings on behalf of the Claimants will only be addressed in the following sub-section together with the pertinent arguments of the Parties.
245. Apart from the afore-mentioned provisions, under the pertinent rules of international law, no further formal requirements apply to the authorization of representatives by the requesting party so that there is no need for the Tribunal to enter into the diverse arguments raised as to the invalidity of the Powers of Attorney under Italian law.
246. As regards the question of the NASAM Mandate which, according to its own terms (*ibid.*, nr. 16), is governed by Italian law, the Tribunal considers that this has no bearing

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<sup>115</sup> See the similar conclusion in the *Abaclat* Decision, para. 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."

upon the validity of the submission of the Request to ICSID. Due to the inapplicability of Italian domestic law in the present context, neither would the Italian legal doctrine of “negozi collegati”, whatever its scope and status within the Italian legal order, be of relevance here. The Tribunal is not able to see therefore how the purported invalidity, under Italian law, of the NASAM Mandate (which is a contract between Claimants and NASAM) could have the effect of invalidating the Powers of Attorney. Accordingly, there is no need for the present Tribunal to further elaborate on the Parties’ arguments as to the validity *vel non* of the NASAM Mandate and as to the question whether the NASAM Mandate and the Powers of Attorney constitute “negozi collegati”.

**b) Purported defects in the scope of the Power of Attorney**

247. Respondent also argues that, even if the Power of Attorney were valid, nowhere in that document did the Claimants authorize their counsel to submit a request for arbitration to ICSID and that neither the Centre nor the Argentina-Italy BIT were mentioned in the Power of Attorney (*R I § 117; R II § 165*). The Respondent suggests that in the light of this defect the Claimants cannot be deemed to have consented to the jurisdiction of the Centre.
248. In the “Special Power of Attorney”, Avv. Parodi is given “every most ample authority and power to represent and to defend the undersigned in relation to all rights and faculties deriving to the undersigned from the property of the [...] bonds” mentioned in the respective document (*ibid.*, p. 1). In particular, such conferred authority and powers entitle Avv. Parodi “[t]o sign and forward any request of arbitration” (*ibid.*, p. 2) and to act in Claimants’ name and on their behalf “in front of Any Arbitral Tribunal, Ordinary Court and/or Authority of whatever Country of the World (with the exclusion of Italy) in relation to the said bonds” (*ibid.*, p. 2).
249. The Tribunal considers that this authorization is, in the afore-mentioned sense, both comprehensive and precise enough to empower Avv. Parodi to institute ICSID proceedings on Claimants’ behalf. The Power of Attorney uses sweeping language inasmuch as it speaks of “every most ample authority and power to represent” the Claimants and, in particular, of Avv. Parodi being entitled to sign and forward “any

request of arbitration” (emphasis added) “in front of *Any* Arbitral Tribunal [...] in relation to the said bonds” (emphasis added). From the Tribunal’s point of view, these paragraphs can only be reasonably understood as each Claimant signing such Power of Attorney having made Avv. Parodi his “duly authorized representative” for the purposes of submitting a request for arbitration to ICSID.

250. Any other construction of these provisions would entail a distortion of the language of the Power of Attorney. While the phrase “Terms of Reference” (in capital letters) (*ibid.*, p. 2) might refer to ICC arbitration, as Respondent has suggested (*R III* § 72), this cannot possibly lead to a different result, given the broad and repeated authorizations to sign *any* request for arbitration before *any* arbitral tribunal.
251. Likewise, inasmuch as Respondent contends that the wording “whatever arbitration of whatever Country of the World” is clearly inconsistent with the nature and characteristics of ICSID arbitration (*R III* § 73), the Tribunal disagrees. First, the citation in Respondent’s Post-Hearing Brief misstates the text of the Power of Attorney where the pertinent passage reads: “[T]he above conferred authority and powers shall specifically entitle Mr. PIER [*sic*] GIUSEPPE PARODI [...] [t]o sign and forward any request of arbitration [...] to the Arbitral Tribunal and/or to any other competent Court or Authority of whatever Country of the World (with the exclusion of Italy) [...]”. It is far from clear, already as a matter of construction of the sentence, whether the phrase “of whatever Country of the World” relates only to “any other competent Court or Authority” or also to “Arbitral Tribunal”; and the same holds true of the Italian version.<sup>116</sup> Second, and more importantly, the Tribunal would want to highlight once again that the sweeping authorization of Avv. Parodi to sign *any* request for arbitration before *any* arbitral tribunal would decide any remaining ambiguity of language in favour of Avv. Parodi having been authorized by Claimants to institute arbitral proceedings before ICSID on their behalf.

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<sup>116</sup> See Procura Speciale (i.e. the Italian original of the Power of Attorney, Annex RA 111), p. 2: “[L]’attività ed i poteri come sopra conferiti legittimano specificamente l’Avv. PIER [*sic*] GIUSEPPE PARODI [...] [a] firmare ed inoltrare ogni richiesta di arbitrato [...] ad ogni Tribunale Arbitrale e/o ad ogni altra Corte od Autorità competente di qualsiasi Paese del mondo (ad esclusione dell’Italia) [...]”.



252. Accordingly, the Tribunal concludes that there were no defects in the scope of the Power of Attorney signed by Claimants in favour of Avv. Parodi that would raise doubts as to the sufficiently comprehensive and precise character of the Power of Attorney to make Avv. Parodi the duly authorized representative of the Claimants for the purposes of submitting a request for arbitration to ICSID.
253. This result can be reached, as the Tribunal would want to emphasize, without a need to rely on the NASAM Mandate which is a contract concluded between the Claimants and NASAM. The Parties have used a lot of ink to establish, or refute, that the NASAM Mandate contributed to the authorization to institute ICSID proceedings. The Tribunal would agree in that regard with Respondent that a certain tension arises from arguing, on the one hand, that the Power of Attorney is a self-standing document for the purposes of assessing the latter's validity and, on the other hand, using the NASAM Mandate to interpret the scope of the Power of Attorney.
254. However, the Tribunal would not go as far as speaking of a contradiction in that respect. It would still admit that the repeated references in the NASAM Mandate to ICSID arbitration<sup>117</sup> may be used as an auxiliary argument to bolster up the main, and independent, argument that the Power of Attorney as such was broad enough to authorize Avv. Parodi to institute ICSID proceedings on Claimants' behalf. The references in the NASAM Mandate confirm that the Claimants were well aware that Avv. Parodi was preparing to take their claims to an international arbitral tribunal and that this would be done in the ICSID framework. In particular, as already mentioned above<sup>118</sup>, lit. P of the Preamble of the NASAM Mandate referred to a wire transfer to be operated by the Claimants with the subject "Arbitrato ICSID" (i.e. "ICSID Arbitration"), and the Claimants acted accordingly. Furthermore, the letter of 8 May 2006 by NASAM to holders of Argentine bonds clearly spoke of the intention to institute ICSID or

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<sup>117</sup> See NASAM Mandate, Preamble, lit. H, O and P, pp. 2, 5 and 6.

<sup>118</sup> See *supra* para. 228.

UNCITRAL proceedings against Argentina.<sup>119</sup> In the light of this, it is hard to believe that Claimants were surprised when the Request was filed on 23 June 2008.

**4. The questions of the lack of Avv. Parodi's signature from the Request and of the authorization of Avv. Radicati di Brozolo to sign on his behalf**

255. Having thus established that Avv. Parodi was the duly authorized representative of the Claimants for the purpose of submitting the Request on behalf of the Claimants, another issue has arisen in the proceedings, i.e. the lack of Avv. Parodi's signature from the Request. This fact has not been subject to dispute between the Parties. The same holds true for the fact that there is indeed a signature in the place where Avv. Parodi's signature should have been and that it is preceded by the abbreviation "pp", standing for "per procuracionem". Respondent submits in this regard that, due to the illegible signature, it is not known who signed on Avv. Parodi's behalf (*Tr p.* 329/22). The Tribunal has already found in that regard<sup>120</sup> that it follows the submission of the Claimants (*C III § 11*), which was not disputed by the Respondent, that it was Avv. Radicati di Brozolo who signed for Avv. Parodi.
256. The Parties are in fundamental disagreement, however, what legal consequences arise from the failure of Avv. Parodi to sign the Request himself. Different arguments have been marshaled by the Claimants to establish that, while Avv. Parodi did not sign *manu propria*, Avv. Radicati di Brozolo as the only person who signed the Request was authorized to act on Avv. Parodi's behalf when signing the Request. Respondent denies that such authorization existed on the relevant date.
257. The Tribunal considers in this regard that Claimants' contention as to the existence of a common practice in Italy of lawyers signing "anche per i colleghi" (*Tr p.* 451/6) can be of no relevance here since the Tribunal has already found, in a related context<sup>121</sup>, that

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<sup>119</sup> Letter of 8 May 2006 by NASAM regarding "Procedura arbitrale CIRDI-ICSID – UNCITRAL contro il governo argentino" ("ICSID-UNCITRAL arbitration proceedings against the Argentine government") (Annex RA 107).

<sup>120</sup> See *supra* para. 217.

<sup>121</sup> See *supra* para. 241.

questions of the jurisdiction of the Centre and of lawful representation before it are not governed by domestic law, but by international law.

258. On the third day of the Hearing on Jurisdiction, however, the Claimants submitted to the Tribunal a letter, dated 3 June 2008 and addressing itself to Avv. Radicati di Brozolo and Prof. Barra (*Tr p. 334/4*; Annex CA 77). Upon a question by the Respondent, Avv. Radicati di Brozolo confirmed that the signature on the letter is that of Avv. Parodi (*Tr p. 336/9*). In English translation, it reads, as follows:

Dear Colleagues,

In connection with the new arbitration that will be submitted to ICSID on account of Mr. Alpi and other holders of Argentine Bonds who have given me the Power of Attorney to defend them, and on the basis of the powers which are given to me on the basis of that mandate, I appoint you my co-counsel, conferring upon you all the powers to represent them and to defend them jointly and severally.<sup>122</sup>

259. If accepted, this letter would constitute a valid sub-delegation of the powers of representation in the present case by Avv. Parodi as Claimants' duly authorized representative to the benefit of Avv. Radicati di Brozolo and Prof. Barra as co-counsel. In fact, such sub-delegation is expressly authorized by the Power of Attorney according to which Avv. Parodi is empowered "[t]o delegate, totally or partially, any of the foregoing authorities and powers to any other lawyer or collaborator of his choice" (*ibid.*, p. 4).
260. It is not subject to dispute between the Parties that Avv. Radicati di Brozolo signed the Request dated 23 June 2008 *manu propria*. Assuming that the afore-mentioned letter, which is dated 3 June 2008, was actually signed on that date by Avv. Parodi, Avv. Radicati di Brozolo would have been authorized to sign the Request on behalf of Avv. Parodi and, consequently, also on behalf of the Claimants. From the point of view of international law on the basis of which questions of representation have to be evaluated, there can be no objection to such chain of authorization and sub-authorization as long as

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<sup>122</sup> The original Italian version reads: "Cari Colleghi, in relazione al nuovo arbitrato che sarà sottoposto all'ICSID per conto del Sig. Alpi e degli altri portatori di bonds argentini che hanno a me conferito mandato a difenderli, ed in virtù dei poteri conferitimi dal mandato stesso, vi nomino miei co-difensori attribuendovi tutti i poteri per rappresentarli e difenderli congiuntamente o disgiuntamente."

the chain is uninterrupted and existed at the time when the consent for arbitration needed to be perfected, i.e. in the present case 23 June 2008.

261. Yet, the late submission of the letter in question in January 2011 casts some doubt on the credibility of this document. Claimants informed the Tribunal that the letter was extracted from their files only at this time (*Tr p. 334/22*). The Respondent challenged the submission and the credibility of the document (*Tr p. 335/10*), qualifying it of being a “letter of questionable probative value” (*R III § 40*).
262. The Tribunal notes that Respondent makes two arguments in this regard – one on the legal level (a), the other one on the evidentiary level (b) – which must be dealt with in turn.
263. (a) First, Respondent makes the *legal* argument that the Claimants would have had to attach the letter at the time of filing the Request to show that Avv. Radicati di Brozolo had been authorized to represent them (*Tr p. 336/10*). The Tribunal is not convinced by this argument and considers the above-mentioned distinction between arts. 25 and 36 of the ICSID Convention<sup>123</sup> to be relevant to disentangle the legal issues at stake here. In this regard, the Tribunal deems it crucial to differentiate the question whether Avv. Radicati di Brozolo was *actually empowered* to act on behalf of Claimants on 23 June 2008 from the question whether this fact was *properly documented* at this time. While the former question is one of the jurisdiction of the Centre under Art. 25 of the Convention, the second relates to Art. 36 of the Convention.
264. As has already been stated above<sup>124</sup>, Art. 36 of the ICSID Convention and Rule 1(1) of the Institution Rules set forth 1) the written submission of the request for arbitration and 2) its having been signed by the requesting party or its duly authorized representative as formal requirements for the request for arbitration. Furthermore, Institution Rule 2(2) identifies those pieces of information to be included in the request for arbitration which shall also be supported by documentation; the document authorizing the signing

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<sup>123</sup> See *supra* paras. 206 *et seq.*

<sup>124</sup> See *supra* paras. 219, 240.

representative to act on behalf of the Claimants does not figure among those. On this basis, Institution Rule 5 entrusts the ICSID Secretary-General with sending an acknowledgment of having received the request for arbitration to the requesting party. Moreover, pursuant to Art. 36(3) of the ICSID Convention and Institution Rule 6 para. 1, the Secretary-General shall, as soon as possible, either register the request for arbitration or, “if he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre, notify the parties of his refusal to register the request and of the reasons therefor.”

265. To be sure, had there been doubts on the occasion of submitting the Request with regard to the signing of the Request by a duly appointed representative of the requesting party, the Secretary-General would have had to become active, under Institution Rule 6, since such lack of signature might, under the circumstances of the case, also put into question the very existence of the jurisdictional requirement of the consent of Claimants in writing. Yet, there are no indications that any such doubt existed or was raised at the time. Moreover, given the fact that Institution Rule 2(2) does not require the requesting party at the stage of submitting the request for arbitration to provide supporting documentation that the signing representative acted as a “duly appointed representative” in the meaning of Institution Rule 1(1), there was no basis for the Secretary-General to refuse to register the Request pursuant to Institution Rule 6(1)(b).
266. Even if it were to be concluded, however, that the Secretary-General should not have proceeded to the registration of the Request, this Tribunal considers and there is relevant authority that certain violations of Art. 36 of the ICSID Convention and Institution Rule 1 are essentially *procedural* in nature and do not create as such a bar to the jurisdiction of the Centre. As Professor Schreuer puts it: “[W]hen faced with any shortcomings in a request under Art. 36(2) and Institution Rule 2, the Secretary-General will not necessarily decline to register the request but may consult with the claimant with a view to the request’s supplementation or correction. Once the request is registered, deficiencies in the

request can no longer be raised and cannot operate as a bar to the Tribunal's jurisdiction."<sup>125</sup>

267. As mentioned before, the decision of the question whether there is jurisdiction *vel non* incumbent on the Tribunal must be based on Art. 25 of the ICSID Convention and its requirement of "written consent". In this regard, the Tribunal must decide whether written consent to ICSID arbitration in the meaning of Art. 25 objectively existed. Professor Schreuer notes in this regard: "Once a request has been registered, the tribunal must ascertain the existence of all jurisdictional requirements *on the basis of Art. 25* in the light of all available evidence. Omissions, errors and other deficiencies in the request for arbitration are not an independent basis for the tribunal to decline jurisdiction."<sup>126</sup>
268. The Tribunal would thus find that, even if the Secretariat had failed to become active with regard to the requirements of Art. 36 of the ICSID Convention and the Institution Rules, this would be without further consequence on the level of Art. 36 as soon as the Request was registered, which occurred on 28 July 2008. As regards Art. 25 of the Convention which relates to the pertinent question for the Tribunal to decide, the criterion must be whether the requirement of "written consent" was objectively met on the relevant date which is the date of the submission of the Request, i.e. 23 June 2008<sup>127</sup> – irrespective of whether there might have been a problem of documentation of that written consent on that date. Hence, the late appearance of the afore-mentioned letter in the proceedings cannot put into the question as such the jurisdiction of the Centre and the competence of the present Tribunal to decide the case at hand.

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<sup>125</sup> Schreuer, ICSID Convention Commentary, Art. 36, para. 43 (referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, paras. 22, 23, 45-49, 98-104 and *Metalpar v. Argentina*, ICSID Case No. ARB/03/5, Award, 6 June 2008, para. 11).

<sup>126</sup> Schreuer, ICSID Convention Commentary, Art. 36, para. 42; emphasis added.

<sup>127</sup> See *R. Dolzer/C. Schreuer*, Principles of International Investment Law, Oxford 2008, 41; *Schreuer Commentary*, Art. 25, paras. 36, 38: "It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are initiated. This means that on that date all jurisdictional requirements must be met. [...] ICSID Tribunals have applied this principle consistently," with references to *Antoine Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, para. 72; *Zhinvali Development Ltd. v. Georgia*, ARB/00/1, Award, 24 January 2003, para. 307; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 178; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction, 14 November 2005, para. 60.

269. (b) As regards the second question, Respondent challenges the *evidentiary* value of the afore-mentioned letter. The Tribunal considers in that regard that, while the circumstances of submission of the letter were quite peculiar indeed, there is no basis for the Tribunal to refuse to take the document to the case-file and to draw appropriate conclusions from it. First, the Tribunal has no reason to doubt that the signature on the letter is that of Avv. Parodi, since this was confirmed upon enquiry by the Respondent by Avv. Radicati di Brozolo in the Hearing on Jurisdiction (*Tr p. 336/9*). In addition, regarding the signatures on Claimants' letters of 10 June 2010 (pp. 1, 14) and of 21 September 2011 as well as on Claimants' Post-Hearing Brief (*C III p. 49*), it was not contested by Respondent that they come from Avv. Parodi. When compared to the signature on the letter of 3 June 2008, these appear similar enough to conclude that it was always Avv. Parodi who signed these documents. Second, concerning time issues, the letter bears the date of 3 June 2008 and there is no counter-evidence establishing that that document might have been created at a later date.
270. In the light of these findings, the Tribunal is held to conclude that the chain of authorization of the Claimants to Avv. Parodi (through the Power of Attorney) and from Avv. Parodi to Avv. Radicati di Brozolo (through the letter in question) is uninterrupted and complete and must be deemed to have existed at the time when the Request was submitted, i.e. on 23 June 2008. The jurisdiction requirement of written consent of the Claimants is thus met in the present case.
271. In this context, the Tribunal would also attach some relevance to the subsequent intervention of Avv. Parodi by letter of 10 June 2010<sup>128</sup> and in particular to his signature on Claimants' Post Hearing Brief (*C III p. 49*) and on Claimants' letter of 21 September 2011. To be sure, any intervention by Avv. Parodi after 23 June 2008 could not have, as a matter of law, cured a lack of authorization on the relevant date. Accordingly, the Tribunal cannot endorse the contention that Avv. Parodi's later signatures on Claimants' briefs constituted "his formal ratification of all Claimants' written and oral submissions in this arbitration" (*C III § 8*; see also Claimants' letter of 21 September 2011) inasmuch

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<sup>128</sup> The further letter of 24 June 2010 to which Claimants refer (*C III § 8, n. 6*) bears the name of Avv. Parodi, but not his signature.

as these were understood as “healing” a prior lack of authorization. Nonetheless, on the evidentiary level, the subsequent acts of Avv. Parodi indicate, as pointed out by Avv. Radicati di Brozolo (*Tr p. 450/16*), that Avv. Parodi knew about and consented to all the stages of the proceedings, namely including the initial stage of submitting the Request.

272. Whereas the Tribunal has already concluded at this point that consent in writing of the Claimants in the meaning of Art. 25 of the ICSID Convention existed at the appropriate time, there is an alternative argument by the Claimants which has some merit in the eyes of the Tribunal. Not only does it seem to be common in ICSID proceedings that the requesting party’s representative signs the request for arbitration instead of the requesting party itself<sup>129</sup>, it also appears to be a standard practice in cases before ICSID that the lawyer personally authorized by the Claimants does not sign the request for arbitration *manu propria*, but that his law firm colleagues sign for him. There even appears to be a practice in international arbitration, particularly by English and American law firms acting as counsel, to sign only with the name of the firm rather than putting the name of an individual lawyer.<sup>130</sup> To the Tribunal’s knowledge, no other ICSID tribunal has so far taken issue with this practice which would count as another indication that questions of representation must be analyzed in the context of pertinent international law and practice, and more specifically, relevant ICSID practice, and that the requirement of signature by the “duly authorized representative” in the meaning of Institution Rule 1 para. 1 is applied flexibly by ICSID tribunals. This arguably also reflects the needs of contemporary arbitration practice, notably in bigger law firms, where it is common that in view of the imminent expiry of time-limits for the submission of briefs other lawyers sign on the behalf of their colleagues.

### **5. The role of NASAM in the present proceedings**

273. In view of the prominent place given to NASAM in the Parties’ submissions, the Tribunal deems it appropriate to specifically address its role in the present case, though recognizing that NASAM is no party to the proceeding.

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<sup>129</sup> See *supra* para. 221.

<sup>130</sup> This was mentioned by one Member of the Tribunal during the Hearing on Jurisdiction (*Tr p. 454/9*).



274. It is undisputed that NASAM, i.e. the *North Atlantic Société d'Administration*, is a company active since 1978 in Monaco. In 1998, it was acquired by Guardian SA, a Swiss-based trust company. In 2006, NASAM decided to coordinate, organize and fund a legal action of holders of Argentine bonds against Argentina.
275. Furthermore, Claimants emphasize that NASAM is neither a bank nor a financial institution and that it was never in any way involved, directly or indirectly, in the placing of Argentine bonds with any investors, and in particular with the Claimants. Nor does NASAM have, at present or has it had in the past, any link with the Italian banks involved in the placing of such bonds with regard to such placing. In this regard, Claimants insist that the present dispute must clearly be distinguished from the *Abaclat* case where the third party funder is an association of Italian banks, the so-called “Task Force Argentina” (*C I* §§ 89, 90). Respondent has not challenged this aspect of Claimants’ submissions regarding NASAM.
276. As to NASAM’s role in respect to the present proceedings more specifically, Respondent’s main concern is not the funding arrangement as such, but that NASAM was the driving force behind the present arbitration and that it has full control over it. According to Respondent, the NASAM Mandate creates an impermissible barrier between Claimants and their lawyers (*R II* § 191). In Respondent’s opinion, NASAM is the “real party in interest” in the present dispute (*R I* § 264).
277. The Tribunal considers that, while NASAM has, without doubt, played a crucial role not only in financing the present proceedings on the Claimants’ side, but also in bringing them together and coordinating them to conduct the proceedings against the Respondent, this does not amount to putting NASAM in a position to “control” the present proceedings. The lawyers acting in this case are bound by the Power of Attorney which legally links them to the Claimants, and to the Claimants only. At the same time, these lawyers are not bound by the NASAM Mandate which is a contract between NASAM and the Claimants. Counsel for the Claimants specifically pointed out in the Hearing on Jurisdiction that he represents the Claimants rather than NASAM and takes no instructions from the latter (*Tr pp.* 156/8, 476/10). In addition, in spite of NASAM’s

letter to the Claimants of 17 May 2010 seeking to influence them not to accept Argentina's 2010 Exchange Offer, a relevant part of the original Claimants in the present case decided to accept it (*C III § 32; Tr p. 157/5*).

278. Hence, the Tribunal cannot conclude that NASAM is more than a third party which has a special relationship to the Claimants. It is not a party to the present proceedings. The NASAM Mandate does not interfere with the ability of the Claimants to conduct the present proceedings in their best interest and to instruct their counsel accordingly. In sum, in the Tribunal's opinion, there are no substantiated indications that there would be an external control of the present proceedings by an external actor or a conflict of interests which would undermine the proper exercise of jurisdiction by the Tribunal. Accordingly, no further analysis of the question of NASAM's involvement in the present dispute is required.

### III. NATIONALITY AND STANDING OF CLAIMANTS

#### A. Positions of the Parties

##### 1. Contentions by Respondent

###### *a) The nationality requirement under Art. 25 of the ICSID Convention and Art. 1(2) of the Argentina-Italy BIT*

279. The Respondent contends that the Claimants have failed to provide evidence of the nationality requirement under Art. 25 of the ICSID Convention and the nationality and domicile requirements of the Argentina-Italy BIT and the Additional Protocol (*R I* § 239). In particular, an investor (irrespective of whether it is a natural or a juridical person) must have the nationality of the Contracting State other than the State party to the dispute (positive nationality) and must not have the nationality of the host State (negative nationality) on the date of consent as well as on the date of registration in the case of natural persons. In addition, the Claimants must not have been domiciled in Argentina for more than two years prior to the acquisition of their security entitlements (*R I* §§ 245, 246; *R III* § 164).

280. Furthermore, in the eyes of the Respondent, it is undisputable that the burden of proving that Claimants fulfill the nationality and domicile requirements of Art. 25(2) of the ICSID Convention and Art. 1 para. 2 of the Argentina-Italy BIT and the Additional Protocol falls upon them (*R I* § 240; *Tr p.* 394/5).

281. However, according to the Respondent, the documents submitted by the Claimants do not satisfy the necessary requirements. Mere copies of certificates of residence and identification documents are insufficient to meet the standards of proving the aforementioned criteria (*R I* § 248; *R III* § 167). In particular, Claimants have failed to demonstrate that they do not possess Argentine nationality, that they are no dual nationals and that they meet the non-residency requirement (*Tr p.* 107/10).

###### *b) Number and identity of the Claimants*

282. According to the Respondent, the documentation submitted by Claimants regarding their number and identity contains incurable errors, contradictions and is incomplete. Thus,

neither Claimants nor their holdings may be accurately identified (*R III § 170; Tr p. 108/3*).

**c) *Lack of standing due to Claimants' legal proceedings against the seller banks***

283. Respondent submits that the Claimants remain free to pursue legal proceedings, in addition to the present one against Argentina, against the seller banks seeking *whatever* remedy they prefer, including restitution of the sale price following a declaration of nullity, annulment or termination of the sale contracts. According to the Respondent, Claimants have admitted that at least some of them have initiated such claims but they refused any discovery in that respect (*R I § 259; R II §§ 412, 413; R III § 180*).

284. The compensation which Claimants may get from the banks following a possible invalidation of the sale contracts conflicts with the claims put forward in the present proceedings. It would notably cause the Claimants to lose their purported status as investors under the Argentina-Italy BIT and their standing to bring the present ICSID claim (*R I §§ 259, 260; R II § 420*).

285. As regards Claimants' argument that this question relates to the individual position of the Claimants and does therefore not pertain to the present phase of the proceedings, Respondent disagrees and submits that it has shown a basis for believing that some, and conceivably all, Claimants may lack standing because they have obtained or may obtain a domestic judgment nullifying any claim they may have. Claimants have not established that this circumstance does not pertain to every Claimant (*R I § 262; R II § 424; R III § 183*).

**d) *Lack of standing due to Claimants' impermissible pursuing of claims on behalf of a third party in abuse of process***

286. Respondent further contends that the Claimants are conducting the present proceedings on behalf of a third party, namely NASAM, who is the real party in interest, since, under paras. 5 and 6 of the NASAM Mandate, it has an irrevocable right to recover the proceeds of the claims. This is impermissible and, as a consequence, the Claimants lack standing (*R I §§ 263, 264; R II § 427; R III § 184*).

287. Moreover, NASAM lacks standing to pursue a claim in its own right. First, it does not have Italian nationality because it is an administrative company incorporated in the Principality of Monaco and owned by Guardian SA, a Swiss trust company. Secondly, while NASAM hired attorneys, organized the Claimants, consolidated information about the disparate claims, undertook to finance the arbitration and while it exercises complete control over it, it has not accepted the obligations of a party. This situation prejudices Respondent's ability to defend itself. In the Respondent's submission, it is an abuse of process to permit the present arbitration to continue on behalf of a real party in interest that lacks standing under the Argentina-Italy BIT (*R I* §§ 263, 265-268; *R II* §§ 427, 428).

## **2. Contentions by Claimants**

### ***a) The nationality requirement under Art. 25 of the ICSID Convention and Art. 1(2) of the Argentina-Italy BIT***

288. The Claimants declare that they are all individuals of Italian nationality and entities incorporated in Italy (*Request* §§ 4, 79). They submit that Exhibit C-2 contains for each Claimant who is a natural person not only a copy of its passport and identity card, but also a certificate of Italian citizenship, residence and/or domicile, which reveal that all Claimants are of Italian nationality. In addition, Exhibit C-2 also contains documents which demonstrate the Italian nationality, and the absence of any link to Argentina, of the Claimants who are corporate identities (*C I* §§ 345, 346; *C III* § 28). The certificates of citizenship provide conclusive evidence that all Claimants had Italian nationality both at the date on which the Claimants' consent to arbitrate the present dispute was given and on the date on which the Request was registered (*C I* § 347; *C II* § 146).

289. According to the Claimants, the Respondent's allegations as to the Claimants' possible dual nationality and acquisition of Argentine nationality are mere speculation. Any hypothetical acquisition of Argentine nationality by a Claimant would have been recorded in the appropriate register of nationality in Argentina and would have been indicated in the further certificates of citizenship, which is not the case for any of the Claimants involved (*C I* § 353).

290. In addition, the birth and residence certificates filed by all the individual Claimants evidence the lack of merit of the Respondent's insistence that the Claimants should prove that, pursuant to the Additional Protocol to the Argentina-Italy BIT, the Claimants did not have a domicile in Argentina in the two years prior to the investment (*C I* § 354; *C III* § 28; *Tr p.* 459/16).
291. As regards the burden of proof, Claimants contend that it falls upon the Respondent to provide evidence to disprove what emerges from the documents submitted by the Claimants (*C I* §§ 349, 355; *C III* § 29). Accordingly, in the Claimants' opinion, it is incumbent on them to prove that they are Italian nationals, but Respondent bears the burden of proving that the Claimants have Argentine or dual nationality or have at some point resided in Argentina because this point is a "defense" or a "counterargument" (*Tr p.* 459/3). The burden of proof as to these negative circumstances rests on the Respondent also because it has easier access to the evidence. In particular, it would have been easy for Argentina to verify its own register of nationality (*C III* § 30).

***b) Number and identity of the Claimants***

292. While the Respondent argues that the different submissions of the Claimants show differences concerning their number and identity, the latter consider such argument not true (*C I* § 147). They notably insist that no change to the number and identity of the Claimants has ever been made by them (*C I* § 149). There have been a number of inconsistencies in the tables submitted before, but they have been corrected later on (*Tr p.* 477/18). Hence, according to the Claimants, there are 64 Claimants remaining in the present case. If one considers co-owners of the same entitlement as a single Claimant (or, for that matter, a single "center of interest"), there are 36 remaining centres of interest (*C III* §§ 13, 14).

***c) No lack of standing due to legal proceedings against the seller banks***

293. Insofar as the Respondent argues that the Claimants lack standing to bring the present action because they have pursued or are still pursuing legal proceedings against the banks selling the bonds/security entitlements, the Claimants submit that only a minority among

them have brought proceedings against the seller banks. In addition, the two legal relationships involved – one of Claimants with the banks from which they purchased the bonds/security entitlements, the other with the obligor under the bonds/security entitlements, i.e. Argentina –, and the claims to which each may give rise, are completely distinct (*C I §§ 369-371*).

294. Claimants concede that if one amongst them has obtained (or may obtain in the future) decisions from local courts declaring null and void the acquisition of the bonds/security entitlements from the selling banks, this may cause those bonds/security entitlements to revert back to the banks and the Claimant in question to lose its status as investor under the BIT and therefore its standing in the present proceedings. In this regard, counsel for the Claimants undertook to inform the Respondent and the Tribunal of any decisions or settlements in the cases currently pending as well as in any other proceedings which might be brought by any Claimant (*C II §§ 157, 158*).
295. It is further submitted by the Claimants that the precise consequences of the actions which some of the Claimants may have brought, can only be verified on a case by case basis, having regard to the specificities of the situation of each Claimant. In most cases, the outcome of such proceedings would only affect the quantum of the amount recoverable from the Respondent. The Claimants emphasize that, since all the issues have to do with the position of the individual Claimants, they are not relevant in the present phase of the proceedings (*C I §§ 373, 374*).

***d) No lack of standing due to Claimants' pursuing of claims on behalf of a third party***

296. The Claimants criticize the Respondent for relying on a deliberately distorted reading of the role of NASAM. They insist that NASAM is not a party to the present proceedings and that the fact that NASAM had a role in organizing and funding the proceedings in no way affects this conclusion (*C II § 52*). The Claimants are definitely not pursuing claims on behalf of a third party. The fact that a third party may have an interest in the outcome of the proceedings does not of itself make it a party to the proceedings. Hence, no lack of

standing can follow from the limited degree of involvement of NASAM in the present case (*C II § 59*).

## **B. Findings of the Tribunal**

### **1. The relevant provisions for the determination of jurisdiction *ratione personae***

297. In addition to jurisdictional requirements *ratione materiae*, there are also requirements of jurisdiction *ratione personae* of the Centre and, for that matter, of the competence of the present Tribunal to decide the case at hand. There is agreement between the Parties that these requirements, as far as they are pertinent in the present proceedings, are contained, on the one hand, in Art. 25 paras. 1 and 2 of the ICSID Convention, and on the other hand, in Art. 1 para. 2 of the Argentina-Italy BIT in combination with the Additional Protocol to this BIT.
298. Pursuant to Art. 25(1) of the ICSID Convention, the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State and “a national of another Contracting State”. This phrase is defined by the Convention itself in Art. 25(2) in the following terms:

“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.
299. In addition, the Argentina-Italy BIT contains a definition of the term “investor” in its Art. 1(2). Since, as opposed to the question of jurisdiction *ratione materiae*, the Parties have not raised objections as regards the proper translation of the pertinent passages into



English<sup>131</sup>, the Tribunal limits itself to refer to the authentic Spanish and Italian versions of that provision and to reproduce here only its English translation<sup>132</sup>:

2. The term “investor” means any physical or juridical person of one Contracting Party that has made, is making, or has assumed an obligation to make investments in the territory of the other Contracting Party.

- “physical person” means, for each Contracting Party, any physical person who has citizenship in that State, in accordance with its laws.

- “juridical person” means, for each Contracting Party, any entity organized in conformity with the laws of a Contracting Party, having its seat in the territory of such Contracting Party and being recognized by that Contracting Party, such as public entities engaged in economic activity, partnerships or stock corporations, foundations and associations, regardless of whether their liability is limited or not.

- For purposes of this Agreement, the juridical acts and the capacity of each juridical person in the territory of the Contracting Party in which the investment is made shall be regulated by the legislation of the latter.

300. Also the English translation of Art. 1 of the Additional Protocol to the Argentina-Italy BIT is not contested between the Parties.<sup>133</sup> This provision complements the definition contained in Art. 1 of the BIT with the following requirements:

With reference to Article 1 [of the BIT]:

a. Physical persons of each Contracting Party may not benefit from this Agreement if, at the time of making the investment, they have maintained their domicile for more than two years in the territory of the Contracting Party where the investment was made.

In the event that a physical person of one Contracting Party has, simultaneously, a registered residence in his country and a domicile for more than two years in the other Contracting Party, he shall be treated, for purposes of this Agreement, as a national of the Contracting Party in whose territory the investment was made.

b. The domicile of an investor shall be determined in conformity with the laws, regulations and provisions of the Contracting Party in whose territory the investment was made.

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<sup>131</sup> As to this see *infra* para. 418.

<sup>132</sup> As to the Spanish version and English translation by the Respondent see Annex RA 147; see *supra* note 2.

<sup>133</sup> As to the Additional Protocol's Spanish version and English translation by the Respondent see Annex RA 146.

## 2. The requirements of jurisdiction *ratione personae* in the present case

301. As regards the jurisdictional requirements *ratione personae* in the case at hand, the Tribunal would first note that – in analogy to the situation regarding jurisdiction *ratione materiae*<sup>134</sup> – both the pertinent prerequisites of the ICSID Convention and the Argentina-Italy BIT including its Additional Protocol have to be met by the Claimants in order for the case to pass the threshold of jurisdiction and to proceed to the merits.

### a) *The requirements under Art. 25 of the ICSID Convention*

302. As regards, first, the requirement that a legal dispute arise between a Contracting State and “a national of another Contracting State”, the definition in Art. 25(2) of the ICSID Convention is twofold inasmuch as it addresses natural or physical persons, on the one hand, and juridical or legal persons, on the other hand, separately. The definition applies positive and negative elements to determine what a national of another Contracting State is for the purposes of the Convention.

303. Accordingly, under this provision and applied to the case at hand, for a natural person to qualify as a “national of another Contracting State” for the purposes of the ICSID Convention, it

*must* have had Italian nationality (or that of another non-Argentine Contracting State of the ICSID Convention)

(a) on the date on which the parties consented to submit the dispute to arbitration, i.e. 23 June 2008<sup>135</sup>;

(b) on the date of the registration of the Request for Arbitration, i.e. 28 July 2008<sup>136</sup>;

and *must not* have had Argentine nationality

(c) on either the date of consent

(d) or on the date of registration of the Request for Arbitration.

304. Furthermore, for a juridical person to be a “national of another Contracting State” for the purposes of the ICSID Convention, it must have had Italian nationality (or that of another non-Argentine Contracting State) on the date of consent, i.e. 23 June 2008. Alternatively,

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<sup>134</sup> See *infra* paras. 435 *et seq.*

<sup>135</sup> See *supra* para. 16 in combination with para. 214.

<sup>136</sup> See *supra* para. 17.

but of no relevance to the present case, a juridical person having had the Argentine nationality on the date of consent is also covered by the definition if the Parties agree that, due to foreign control, it should be treated as a national of another Contracting State for the purposes of the ICSID Convention. Hence, as regards juridical persons, in the present case only a positive nationality requirement applies.

***b) The requirements under Art. 1 of the Argentina-Italy BIT and its Additional Protocol***

305. In addition, Art. 1(2) of the Argentina-Italy BIT also distinguishes between natural/physical and juridical/legal persons: it defines “for the purposes of this Agreement” investor as “any physical or juridical person of one Contracting Party that has made, is making, or has assumed an obligation to make investments in the territory of the other Contracting Party”.
306. On this basis, Art. 1(2) of the BIT determines that “physical person” means “for each Contracting Party, any physical person who has citizenship in that State, in accordance with its laws”. In contrast, “juridical person” means “for each Contracting Party, any entity organized in conformity with the laws of a Contracting Party, having its seat in the territory of such Contracting Party and being recognized by that Contracting Party, such as public entities engaged in economic activity, partnership or stock corporations, foundations and associations, regardless of whether their liability is limited or not”. The provision further states that “[f]or purposes of this Agreement, the juridical acts and the capacity of each juridical person in the territory of the Contracting Party in which the investment is made shall be regulated by the legislation of the latter”.
307. As already mentioned, the Additional Protocol to the Argentina-Italy BIT which was signed on the same day as the BIT itself (i.e. 22 May 1990) contains “with reference to Article 1 [of the BIT]” additional requirements regarding domicile if a natural/physical person were to qualify as such under Art. 1 para. 2 of the Argentina-Italy BIT.

**3. Allocation of the burden of proof regarding the nationality and domicile requirements**

308. While Respondent contends that the Claimants bear the burden of proving all aspects of the nationality and domicile requirements – i.e. (i) the positive nationality requirements, (ii) the negative nationality requirements as well as (iii) the negative domicile requirement –, Claimants argue that it only falls upon them to prove that they are Italian nationals, but that the Respondent bears the burden of proving that the Claimants have Argentine or dual nationality or have at some relevant point resided in Argentina.
309. The ICSID Convention or Arbitration Rules do not contain specific provisions on the allocation of burden of proof. ICSID tribunals have applied several rules regarding the burden of proof concerning facts upon which the parties rely.<sup>137</sup> These notably include rules that are well established in international adjudication, e.g. the general rule that the burden of proof is with the claimant and that the burden of proof lies with the party asserting a fact, whether it being the claimant or the respondent.
310. Against this background, it appears reasonable to adopt the view that the legal regime of the ICSID Convention follows general international law in this regard. The Tribunal would consider that it can usefully draw in this respect upon the finding of the International Court of Justice in the *Avena* case<sup>138</sup>, since the Court had a situation before it which is largely comparable to that in the present case.
311. In that case, Mexico and the United States disagreed on what each Party had to show as regards nationality in connection with Art. 36 para. 1 of the Vienna Convention on Consular Relations. Mexico accepted that it had to prove that the persons in question were Mexican nationals, but it contended that the burden of proof would lie with the United States should the Respondent in that case wish to contend that particular persons of Mexican nationality were also US nationals. The International Court of Justice emphasized “the well-settled principle in international law that a litigant seeking to

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<sup>137</sup> See as to this aspect, e.g., *Schreuer*, ICSID Convention Commentary, Art. 43, para. 116.

<sup>138</sup> *Avena and Other Mexican Nationals (Mexico v. USA)*, Judgment, ICJ Reports 2004, 12.

establish the existence of a fact bears the burden of proving it”.<sup>139</sup> On that basis, the Court endorsed Mexico’s position inasmuch as it took “the view that it was for the United States to demonstrate that this was so [i.e. that the persons in question were US nationals] and to furnish the Court with all information on the matter in its possession”.<sup>140</sup>

312. In the light of this, the present Tribunal concludes that the burden of proof that the Claimants are Italian nationals falls on the Claimants themselves, while the burden to disprove the negative elements – i.e. of not being Argentine (or, for that matter, dual) nationals and of not having been domiciled in Argentina for more than two years – would fall on the Respondent’s side.

#### **4. Application to the present case**

##### ***a) The Claimants’ duty to substantiate the nationality requirement***

313. Claimants contend that they are “individuals of Italian nationality and entities incorporated in Italy” (*Request* § 79). In view of the (initial) list of 119 Claimants, it is stated that it contains “individuals and entities – all of Italian nationality” (*Request* § 4). According to the Claimants’ submission, Exhibit C-2 contains, amongst others, a copy of each Claimant’s document of identification (Passport or Identity Document for individuals) or certificate of incorporation (for companies) (*Request p. 43*).

314. The Tribunal would note in that regard that it is *not* necessary that assertions on nationality – which are mandatory under Art. 36(2) of the ICSID Convention in combination with Rule 2(1)(d)(i) and (ii) of the Institution Rules<sup>141</sup>, and have accordingly been made by the Claimants – are substantiated by documentary evidence at the stage of filing the Request; such evidence may, however, have to be produced at a later stage.<sup>142</sup>

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<sup>139</sup> *Ibid.*, para. 55, with reference to *Military and Paramilitary Activities in and against Nicaragua, Jurisdiction and Admissibility, Judgment*, ICJ Reports 1984, 392, para. 101.

<sup>140</sup> *Avena and Other Mexican Nationals (Mexico v. USA), Judgment*, ICJ Reports 2004, 12, para. 57.

<sup>141</sup> Accordingly, “[t]he Request shall [...] (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 [...]”.

<sup>142</sup> *Schreuer Commentary*, Art. 25, para. 686 as well as Art. 36, para. 27, referring to Note D to Institution Rule 2, 1 ICSID Reports 53/4, and Note B to Institution Rule 6 of 1968, 1 ICSID Reports 58.

That there is no duty incumbent upon the Claimants to substantiate the nationality requirement already at the time of submission of the claim follows from the clear wording of Institution Rule 2(2) which requires documentation for nationality purposes only in one instance, i.e. with respect to an agreement of the parties to treat a juridical person as a national of another Contracting State for the purposes of the Convention (see Art. 25(2)(b) of the ICSID Convention and Institution Rule 2(1)(d)(iii) – an alternative which is not applicable here. *E contrario* no documentation requirement exists regarding the indications to be made under Institution Rule 2 para. 1 lit. d sublit. i and ii, i.e. the positive and negative nationality requirements. Accordingly, there is no parallelism between the duty of indicating certain states of affairs, on the one hand, and that of documenting or substantiating and proving that information, on the other hand.

315. This is also relevant in view of Regulation 30 of the Administrative and Financial Regulations which contains rules on “supporting documentation” within the meaning of Institution Rule 2(2). According to that Regulation, documentation shall include, unless otherwise agreed by the parties or ordered by the competent Tribunal, the complete document or a duly certified copy or extract, except if the party is unable to obtain such document or certified copy (in which case the reason for such inability must be stated). In addition, pursuant to para. 3 of Regulation 30, each document which is not in a language approved for the proceeding in question, shall, unless otherwise ordered by the competent Tribunal, be accompanied by a certified translation into such a language.
316. Yet, as has been explained before, no documentation obligation exists insofar as the nationality requirement is concerned. As a consequence, no formal documentation requirement can be derived from the ICSID legal regime in regard to the positive and negative nationality prerequisites. In particular, there is no duty to provide the Tribunal with the originals or certified copies of the documents substantiating that the Claimants are Italian nationals. In a similar vein, there is no obligation to furnish translations of Italian documents into English and/or Spanish.

317. Furthermore, as mentioned in the context of Claimants' consent to arbitration<sup>143</sup>, Institution Rule 2 is of a procedural nature. Even if there were deficiencies in the request for arbitration, once the request is registered, those deficiencies can no longer be raised and cannot operate as a bar to the Tribunal's jurisdiction. "Once a request has been registered, the tribunal must ascertain the existence of all jurisdictional requirements on the basis of Art. 25 in the light of all available evidence. Omissions, errors and other deficiencies in the request for arbitration are not an independent basis for the tribunal to decline jurisdiction."<sup>144</sup>
318. Accordingly, the question of the appropriate way for Claimants to meet the substantiation requirement for their having Italian nationality must be drawn from the general evidentiary regime of the ICSID Convention. The Tribunal will therefore have to decide whether an investor meets the Convention's nationality requirements in the same manner as with the other objective requirements for ICSID jurisdiction. A certificate of nationality will therefore be treated as part of the "documents or other evidence" to be examined by the Tribunal in accordance with Art. 43 of the ICSID Convention.<sup>145</sup> ICSID arbitration is not governed by formal rules nor by national laws on evidence. ICSID tribunals have full discretion in assessing the probative value of any piece of evidence introduced before them.<sup>146</sup> In general, the finding of the Annulment Committee in *Soufraki v. United Arab Emirates* that "[i]t is only in exceptional cases [...] that ICSID tribunals have to review nationality documentation issued by state officials",<sup>147</sup> may be taken as a guidance in that regard.
319. In sum, also photocopies of passports or identity documents or certificates of incorporation will suffice to adequately substantiate the Italian nationality requirement

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<sup>143</sup> See *supra* para. 266.

<sup>144</sup> *Schreuer*, ICSID Convention Commentary, Art. 41, paras. 38, 42 and 43. See also *ibid.*, Art. 36, para. 43 (as to the references to the pertinent case-law see *supra* note 125).

<sup>145</sup> *Ibid.*, Art. 25, para. 649.

<sup>146</sup> *Ibid.*, Art. 43, para. 104, referring to Arbitration Rule 34 para. 1 as well as to Note A to Arbitration Rule 33 of 1968, 1 ICSID Reports 95.

<sup>147</sup> *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, para. 28.

for natural and juridical persons – pursuant to Art. 1(2) of the Argentina-Italy BIT, the nationality of a juridical person depends on whether the entity in question is organized in conformity with the laws of a Contracting Party (in this case Italy), has its seat in this Party’s territory and is recognized by it –, as long as there are no relevant counter-indications and as long as the Tribunal is satisfied that the documents are in order. In view of the fact that the present phase of the proceedings deals with preliminary objections of a general character only, but not with any jurisdictional issues that may arise in relation to individual claimants<sup>148</sup>, for the purposes of deciding this preliminary phase, the Tribunal is satisfied from its examination of Exhibit C-2 that the documents supplied by the Claimants suffice to substantiate the nationality requirement.

***b) The Respondent’s claims regarding dual nationality and the lack of the domicile requirement***

320. The Respondent has raised doubts in the present proceedings as to whether (part of) the Claimants were not Argentine or dual nationals and as to whether they meet the domicile requirement, as laid down in the Additional Protocol to the Argentina-Italy BIT. The Tribunal has already concluded that the burden to disprove these negative elements falls on the Respondent.
321. The Tribunal notes, however, that the Respondent did not make any concrete claims in this regard. In sum, nothing has come to the fore during the proceedings which would indicate that any of the Claimants in the present case would have been a dual national (i.e. would have also Argentine nationality) at any point in time or would have been domiciled in Argentina at all, let alone for longer than two years. Hence, the Tribunal concludes that in terms of the negative nationality and domicile requirements, due to the lack of relevant concrete submissions and documentation from the Respondent’s side, no problems as to the jurisdiction *ratione personae* of the Centre and accordingly regarding the competence of the Tribunal arise.

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<sup>148</sup> See Minutes of the First Session, point 14; *supra* para. 5.



**c) Conclusion**

322. The Tribunal therefore concludes that no doubts regarding the jurisdiction *ratione personae* of the Centre in relation to the present case have become manifest.
323. This conclusion particularly holds true in view of the mandate given to the Tribunal in the present preliminary phase of the proceedings on jurisdiction and admissibility which shall “deal with preliminary objections of a general character only, but not with any jurisdictional issues that may arise in relation to individual claimants”.<sup>149</sup>
324. In that respect, Claimants have usefully pointed to the *Bayview* case where in regard to the same matter it was stated that “[i]t is clear that there are at least some claimants who meet the requirement that they be nationals or enterprises of a Party”.<sup>150</sup> Also in the dispute at hand, there can be no doubt that at least some of the Claimants qualify as “nationals of another Contracting State” in the meaning of Art. 25(2) of the ICSID Convention and as “investors” in the meaning of Art. 1(2) of the Argentina-Italy BIT. This suffices to establish the jurisdiction *ratione personae* in the present dispute and to allow the case to move forward to the merits stage.
325. At the same time, should the Respondent, in the further course of the proceedings, submit relevant information to the Tribunal regarding the nationality and domicile requirements which would raise doubts as to whether certain individual Claimants qualify as “nationals of another Contracting State” or “investors” under the afore-mentioned provisions, the Tribunal reserves the right to enter into a more detailed analysis of these individual cases “at a later stage as necessary and appropriate”<sup>151</sup> and to draw the necessary conclusions from it.
326. In a similar vein, having stated that the Claimants have, as a matter of principle, successfully substantiated that they have Italian nationality, the Tribunal reserves the

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<sup>149</sup> Minutes of the First Session, point 14; see *supra* para. 5.

<sup>150</sup> *Bayview Irrigation District and others v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, para. 89.

<sup>151</sup> Minutes of the First Session, point 14; see *supra* para. 5: “[...] jurisdictional issues that may arise in relation to individual claimants, which would be dealt with at a later stage as necessary and appropriate.”

right to go beyond this necessarily general finding and to individually examine the materials and documents made available to it by the Claimants in the further course of the proceedings, with a view whether Claimants actually were Italian nationals on the relevant dates.

**5. The Respondent's claims regarding the purported lack of standing of the Claimants**

327. The Tribunal now proceeds to the question of the purported lack of standing of the Claimants. To begin with, inasmuch as the Respondent has contended that the Claimants do not have *locus standi* since in their capacity as holders of security entitlements acquired through multiple intermediaries they are only remotely connected with the underwriters and the underlying bonds (*R I* §§ 253-258; *R II* §§ 400-411), the Tribunal would refer to the treatment of this question in the following Chapter of the present Decision.<sup>152</sup> In view of the fact that the issuance and the circulation of the bonds/security entitlements in the present case must be regarded as an economic unity, there is neither too remote a relation between the Claimants and Argentina nor does there exist, in the light of the numerous intermediaries involved, any “cut-off point” beyond which the Claimants could not rely on the bonds/security entitlements vis-à-vis the Respondent.
328. Similarly, the Respondent's related argument that the Claimants are not investors within the meaning of Art. 1 para. 2 of the Argentina-Italy BIT because they did not make an investment in the territory of the Respondent, as expressly provided for in that rule (*R I* §§ 251, 252; *R II* §§ 397, 398), will be dealt with in further detail, and disposed of, in the context of discussing the analogous territoriality requirement contained in Art. 1 para. 1 of the Argentina-Italy BIT regarding the concept of “investment”. Respondent itself concedes in that regard that “investors do not exist in isolation from their investments” so that, in relation to the question at hand, the Tribunal would refer *mutatis mutandis* to the pertinent Chapter in the present Decision.<sup>153</sup>

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<sup>152</sup> See *infra* Chapter IV, paras. 422 *et seq.*

<sup>153</sup> See *infra* paras. 496 *et seq.*

329. Yet, beyond that, the Respondent has marshaled two further arguments suggesting that the Claimants lack standing to bring the case at hand before the Tribunal.
330. For one, the Respondent is right to point out that decisions of domestic courts regarding claims brought by the Claimants against banks and financial intermediaries in connection with their purchases of the bonds/security entitlements in question may have repercussions as to how much compensation they might receive in the present case. In the extreme, if those Claimants' whole loss has been wholly compensated for, they would indeed lose standing to bring any claim against the Respondent before the present Tribunal.
331. The Tribunal would, however, follow the Claimants' argument that this is an issue to be addressed individually on a case by case basis. In accordance with the mandate with which the Tribunal has been endowed for this preliminary phase of the proceedings, these are questions to be dealt with at the merits stage. Insofar as the current phase is restricted to preliminary objections of a "general character only"<sup>154</sup>, the Tribunal would conclude that the Respondent (*R I* § 262; *R II* § 424; *R III* § 183) has not arrived at convincing the Tribunal that the afore-mentioned problem is an omnipresent or general one for all or most of the Claimants. The Respondent errs inasmuch as it insinuates that the Claimants have not established that this circumstance does not pertain to every Claimant. It would have been incumbent upon the Respondent to show that the limited number of cases it referred to in terms of possible implications of domestic proceedings for the case at hand amounts to a problem of "general character" that would not only imply a possible reduction of the compensation to be claimed, but completely deprive the Claimants of their *locus standi* before the present Tribunal.
332. Moreover, the Tribunal cannot endorse that the Claimants would lose standing because of the purported role which NASAM plays in the present proceedings. This issue has already been addressed, and disposed of, by the Tribunal<sup>155</sup>, and there is no need to revert to this discussion. The Claimants are not pursuing their claims on behalf of NASAM.

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<sup>154</sup> Minutes of the First Session, point 14; see *supra* para. 5.

<sup>155</sup> See *supra* paras. 273 *et seq.*

Accordingly, it can be of no relevance in the present case whether NASAM itself would qualify as a “national of another Contracting State” or an “investor” under Art. 25(2) of the ICSID Convention and Art. 1(2) of the Argentina-Italy BIT, respectively. Thus, the Tribunal cannot see any basis for the Respondent’s claim that present proceeding constitutes an abuse of process due to the role of NASAM.

**6. Discontinuance of proceedings, consolidated list of Claimants, implications for the allocation of costs and renaming of the proceedings**

333. Finally, there remain some matters to be dealt with in regard to the status of Claimants in the present proceedings. They relate to the fact that, in the wake of Respondent’s new Exchange Offer of April 2010<sup>156</sup>, a number of the persons constituting the initial 119 Claimants have decided to accept Argentina’s offer and have sought to discontinue the present proceedings.

*a) Discontinuance of proceedings in regard to several Claimants*

334. The Tribunal would recall in that regard that para. 4 of the Request provides a list of the 119 initial Claimants who were grouped in 68 segments (from no. 1 to no. 67, including no. 34*bis*), testifying to the fact that a number of individual Claimants are co-owners of the same entitlements (*C III § 14*). Later in the proceedings, those groups were referred to as “centers of interest” by the Claimants.

335. In view of certain ambiguities in that regard, “[i]n order to avoid any doubt about the correct number and identity of each original Claimant and their entitlements”, the Claimants attached a new table as Annex CA 51 (*C II § 150*). According to the Claimants, this table does not contain any new information, but is extrapolated from the documents already produced in Exhibit C-2 of the Request (*C II § 151*). In fact, the list of persons provided on 23 June 2008 (in the Request) is identical with that of 8 October 2010 (in the Claimants’ Rejoinder on Jurisdiction).

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<sup>156</sup> See Annexes CA 74 as well as RA 305.

336. As already mentioned, following Argentina’s 2010 Exchange Offer, some Claimants have sought to withdraw from the proceedings. Claimants have provided the Tribunal with a list of 55 individuals (grouped in 32 “centers of interest”)<sup>157</sup> “who have discontinued the proceedings as of October 8, 2010” (*C II § 144*). This would leave 64 Claimants (in 36 “centers of interest”) remaining in the proceedings. In a further effort of clarification, Claimants have confirmed this position in their Post-Hearing Brief (*C III § 14*)<sup>158</sup>, with Claimants agreeing with the Respondent that the co-owners of bonds shall not be considered a single Claimant (*C II § 149*).
337. As regards the 55 individuals listed in Annex CA 73 (*C II § 144*) who have, in the Claimants’ submission, discontinued the proceedings as of 8 October 2010, the present Tribunal shares the opinion of the Tribunal in the *Abaclat* case that in regard to withdrawals announced after the notice of registration, i.e. on 28 July 2008, “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”.<sup>159</sup> Accordingly, a mere notice of withdrawal by the Claimants to the Tribunal and the Respondent cannot by itself effect the discontinuance of the proceedings regarding the 55 individuals referred to above.
338. Again in accordance with the approach taken in the *Abaclat* case<sup>160</sup>, the present Tribunal interprets the Claimants’ notice as an expression of the desire of those Claimants not to be part of the proceedings any more in the sense of a request for discontinuance of the proceedings pursuant to Rule 44 of the Arbitration Rules. It has been accepted in

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<sup>157</sup> See Annex CA 73.

<sup>158</sup> See Annex CA 78.

<sup>159</sup> *Abaclat* Decision, para. 615.

<sup>160</sup> See *ibid.*, paras. 617, 619, and 620.

investment arbitration beyond the *Abaclat* case that discontinuance under Arbitration Rule 44 in respect of some, but not all of several parties is well possible.<sup>161</sup>

339. However, such discontinuance is subject to the conditions and requirements as spelt out in Arbitration Rule 44. In particular, the Tribunal may only issue an order taking note of the discontinuance of the proceeding if the other party has made no objection thereto. Inasmuch as the Claimants argue that “Argentina has already agreed to such discontinuance pursuant to Rule 44 of the Arbitration Rules by requiring, as a pre-condition to the participation in the 2010 [Exchange Offer], that each bondholder terminate all legal proceedings against Argentina and release Argentine [*sic*] from all administrative, judicial and arbitral claims” (*C II § 144*), the Tribunal cannot agree. Arbitration Rule 44 proscribes a certain procedure to be followed by the Tribunal, namely to fix a time limit within which the other party may state whether it opposes the discontinuance. Only the respect for, and the reliance on, such procedure may trigger the specific legal consequences attached to this provision, including that of the other party being deemed to have acquiesced in the discontinuance if no objection is made within the time limit.
340. Correspondingly, by letter of 10 September 2012, Respondent was requested to state by 17 September 2012 whether it opposes the discontinuance of the proceedings by the 55 Claimants contained in Annex CA 73 and was further adverted to the legal consequences provided by Rule 44 of the Arbitration Rules if no objection was made within the time limit.
341. By letter of 17 September 2012, Respondent submitted its observations in regard to Annex CA 73 and the list of 55 Claimants who intended to discontinue the proceedings as of 8 October 2010. Respondent stated that, pursuant to Arbitration Rule 44, it does not object to the discontinuance of the proceedings in connection with those Claimants that,

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<sup>161</sup> See *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, paras. 17, 18; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, paras. 17, 18; see further *Schreuer*, ICSID Convention Commentary, Art. 48, para. 84.

including those listed in Annex CA 73, tendered into the 2010 Exchange Offer.<sup>162</sup> In addition, Respondent requested the Tribunal to order that the Respondent and the Claimants subject to discontinuance under the terms of the afore-mentioned letter bear the costs of the proceedings equally and that each of them bear their own costs.<sup>163</sup>

342. By further letter of 1 October, the Tribunal requested the Claimants to provide it with reliable information which Claimants among the 55 persons listed in Annex CA 73 meet the afore-mentioned requirements. In their response dated 18 October 2012, the Claimants submitted an updated list of Claimants who have accepted the 2010 Exchange Offer. Pursuant to the Claimants, in particular, out of the 55 persons indicated in Annex CA 73, 29 accepted the Exchange Offer.

343. These 29 individuals (grouped in 19 “centers of interest”) are:

- 1)2) Alpi Giordano and Mazzetti Silvia,
- 3) Bartolomeoli Roberto,
- 4)5) Bellosi Angiolo and Paolini Cesarina,
- 6)7) Beretta Davide and Zorza Giuseppina,
- 8) Biti Roberta,
- 9) Borgogno Lidia,
- 10) Candini Daniele,
- 11)12) Carelli Natale and Savelli Anna,
- 13) D’Amico Massimino Ciro,
- 14) Di Caterina Pietro,
- 15) Gherardi Gabriele,
- 16) Gorini Mauro,
- 17)18) Iacovera Erminio and Moruzzi Clelia,
- 19) Novia Pietro,
- 20)21) Olmo Alessandrina and Zanzoterra Diego,
- 22)23) Pampagnin Enrico and Martellato Antonietta,
- 24)-27) Rosetti Lina, Quami Mario, Quami Alessandro and Quami Margherita,
- 28) Steinhauslin Carlo,
- 29) Viccei Cinzia.

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<sup>162</sup> The Spanish original of the Letter of 17 September 2010 reads: “La República Argentina informa que, en virtud de la Regla de Arbitraje 44 del CIADI, no se opone a la terminación de este procedimiento en relación con aquellos Demandantes que, entre los incluidos en el Anexo CA-73, entraron al Canje de 2010.”

<sup>163</sup> See *ibid.*: “En consecuencia, la República Argentina respetuosamente le solicita al Tribunal que ordene, oportunamente, que la República Argentina y aquellos Demandantes respecto de los cuales el procedimiento se ha terminado, en los términos de esta nota, soporten en forma equitativa los costos del arbitraje y que cada uno de ellos soporto sus propios costos.”

344. The Tribunal considers that, if it is to issue an order under Arbitration Rule 44 taking note of the discontinuance of the proceedings in regard to certain Claimants, it can only do so if and insofar as the Respondent has made no objection to the Claimants' request for discontinuance<sup>164</sup>, i.e. to the extent that the Claimants' request for discontinuance and the Respondent's non-objection to discontinuance overlap. As mentioned before, the Claimants' request includes the 55 individuals listed in Annex CA 73. According to the Respondent, it does not object to the discontinuance of the proceedings in regard to those Claimants who tendered into the 2010 Exchange Offer. In the light of Claimants' submission of 18 October 2012, the 29 individuals listed therein accepted the 2010 Exchange Offer; they are also all listed in Annex CA 73. They are therefore those Claimants in regard to whom the Parties' declarations of request for, and non-objection to, discontinuance overlap.
345. Hence, the Tribunal takes note, under Arbitration Rule 44, of the discontinuance of the proceedings in regard to the 29 Claimants listed in para. 343. The discontinuance takes effect as of the date of this Decision, i.e. 8 February 2013.
346. Accordingly, the proceedings involving the 29 afore-mentioned Claimants subject to discontinuance are terminated. The Claimants having withdrawn from the proceedings are not subject to or bound by the present Decision, except for the considerations in the present section a) and the subsequent section c) (on the implications of discontinuance for the allocation of costs) and the related parts of the *dispositif*<sup>165</sup> as well as the separate Procedural Order on the allocation of costs.

**b) Consolidated list of Claimants**

347. In the light of the discontinuance of the proceedings in regard to the afore-mentioned 29 Claimants, 90 individuals remain Claimants in the present proceeding. For reasons of clarity, the Tribunal enumerates them in the following:

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<sup>164</sup> See also *Abaclat* Decision, para. 628 in this regard.

<sup>165</sup> See *infra* para. 631.



<i>Remaining Claimants</i>	<i>“Centers of Interest”</i>	<i>Old Numbering</i>	<i>Names of Claimants</i>
1.	1.	2	Ambiente Ufficio S.p.A. Longo Mauro
2.			
3.	2.	3	Barbagini Attilio
4.	3.	4	Barnaba Giorgio Meoni Bernardo
5.			
6.	4.	9	Bonfissuto Girolamo Raimondo Patrizia
7.			
8.	5.	11	Briga Benedetto Salvatore Di Girolamo Maria Luisa
9.			
10.	6.	12	Burzi Luciano Re Romana Burzi Alberto Burzi Andrea
11.			
12.			
13.			
14.	7.	13	Buscaglia Fernanda
15.	8.	14	Buscaglia Giancarlo Garbarini Camilla
16.			
17.	9.	15	Butturini Angela
18.	10.	16	Caci Rosanna Bavagnoli Marco Bavagnoli Ariberto
19.			
20.			
21.	11.	17	Cambiè Attilio Cambiè Paola Seramondi Franca
22.			
23.			
24.	12.	20	Carlotti Luciano Carlotti Gabriele Carlotti Roberto
25.			
26.			
27.	13.	21	Casasola Enea
28.	14.	22	Cassin Mario
29.	15.	23	Catini Michela
30.	16.	24	Cavati Eugenio
31.	17.	25	Coppola Franco Mogliati Maria
32.			
33.	18.	26	D’Altilia Cinzia
34.	19.	29	Di Gregorio Giovanni
35.	20.	30	Di Lullo Arnaldo Di Lullo Maria Lucia Di Lullo Maria Letizia
36.			
37.			
38.	21.	31	Draghi Giuseppe Draghi Luigi Draghi Rosa
39.			
40.			
41.	22.	32	Edil Mari S.r.l - Carnaroli Celso
42.	23.	33	Evangelisti Michele

43.	24.	34bis	Ghezzi Francesco
44.			Conti Maria Luigia
45.	25.	35	Giana Marisa
46.			De Mattei Andrea
47.	26.	36	Giordano Francesco Paolo
48.			Capozzoli Rosa
49.	27.	38	Greuter Giovanni
50.			Lomonaco Giuseppina
51.	28.	40	Laurino Claudio
52.	29.	41	Marchi Guido
53.			Brunelli Valeria
54.	30.	42	Marini Piera
55.			Marini Marisa
56.	31.	43	Martelli Fabio
57.	32.	44	Marzi Iliana
58.			Bracchi Bruno
59.	33.	45	Mazzone Vito
60.			Uglietti Maria Cristina
61.	34.	46	Mengoli Cesarino
62.			Scazzieri Angela Gabriella
63.	35.	49	Padovani Piera
64.	36.	51	Paolini Colombo
65.			Paolini Giulio
66.	37.	52	Peschiera Claudio
67.			Gennari Silvia
68.			Peschiera Gabriele
69.			Peschiera Francesco
70.	38.	53	Podesti Alberto
71.			Striani Camilla
72.	39.	54	Protti Maria Teresa
73.			Santini Giancarla
74.	40.	55	Romoli Romano
75.	41.	56	Ronchi Teresa
76.			Valenti Ronchi Gianlucio
77.	42.	58	Salvatorelli Vincenzo
78.			Peschiutta Franca
79.			Salvatorelli Annarita
80.	43.	59	Salvi Renato
81.	44.	60	Saviotti Franco
82.			Boattini Ebe
83.	45.	61	Solitro Gabriele
84.	46.	62	Solitro Leonardo
85.	47.	64	Tedeschi Enos
86.	48.	65	Toccalini Sergio
87.			Maggioni Giuseppina

88.			Maggioni Carlo
89.			Giusertoli Angela
90.	49.	66	Tramontana Federico

*c) Implications of discontinuance for the allocation of costs*

348. Pursuant to the Respondent's letter of 17 September 2012, the Tribunal is requested to order that the Respondent and the Claimants subject to discontinuance under the terms of the afore-mentioned letter bear the costs of the proceedings equally and that each of them bear their own costs.
349. The Tribunal considers the allocation of costs proposed by the Respondent to be reasonable. As convincingly stated in the *Abaclat* case<sup>166</sup>, the Claimants were the ones who initiated the present proceedings; hence, they should bear, at least, partly the arbitration costs. At the same time, the Respondent's 2010 Exchange Offer played a certain role in Claimants' decision to continue, or to withdraw from, the present proceedings. Thus, both sides bear an equal share of the cost burden, and, therefore, the Tribunal accepts the cost allocation as suggested by the Respondent so that the Respondent and the Claimants subject to discontinuance shall each bear half of the arbitration costs and bear their own costs.
350. Given the fact that due to the discontinuance in regard to 29 Claimants, a quarter of the initial 119 Claimants leave the case while 90 Claimants, i.e. three quarters, remain in the proceedings, the Tribunal finds that the allocation of costs shall be based on the following principles.
351. As regards arbitration costs, the Tribunal finds it appropriate that a quarter (25 %) of the arbitration costs from the beginning of the proceedings until the taking effect of the discontinuance (i.e. 8 February 2013) are to be attributed to the proceedings between the Respondent and those Claimants subject to discontinuance, and thus should be equally borne by the Respondent and those Claimants. The Tribunal reserves the decision on the rest of the arbitration costs to the merits phase of the proceedings.

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<sup>166</sup> *Ibid.*, para. 631.

352. In a similar vein, the Tribunal finds that a quarter (25 %) of each Party's own costs from the beginning of the proceedings until 8 February 2013 is attributable to the proceedings between the Claimants who are subject to discontinuance and the Respondent, and thus should be borne by the Respondent and the Claimants subject to discontinuance, respectively, while reserving the decision on the rest of the Parties' costs to the merits phase of the proceedings.
353. The Tribunal will proceed to an exact allocation of the costs attributable to the Claimants subject to discontinuance and the Respondent in a separate Procedural Order.

***d) Renaming of the case***

354. In the light of the discontinuance of proceedings regarding several Claimants, notably including Giordano Alpi, i.e. the first original Claimant in alphabetical order, the Tribunal decides to rename the present proceedings "*Ambiente Ufficio S.p.A. and others v. Argentine Republic*", Ambiente Ufficio S.p.A. being the next Claimant in alphabetical order.

#### **IV. EXISTENCE OF A LEGAL DISPUTE DIRECTLY ARISING OUT OF AN INVESTMENT**

##### **A. Positions of the Parties**

##### **1. Contentions by Respondent**

##### ***a) The relationship of Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT***

355. Respondent submits that the term “investment” in Art. 25 of the ICSID Convention must be interpreted autonomously, i.e. independently of the definition of an investment in the respective clause of the applicable BIT. The criteria of Art. 25 of the Convention are objective in nature. These objective requirements cannot be overridden by the parties, whether by way of their consent under a BIT nor otherwise. Hence, there cannot be a broader definition of the term “investment” than that included in the ICSID Convention.

356. Thus, a *double-barreled test* regarding the notion of investment must apply in order to grant an ICSID tribunal jurisdiction *ratione materiae* (*R I §§ 144-146; R II § 224*). In order for a protected “investment” to exist, each and all of the requirements set forth in the ICSID Convention and – where appropriate – the applicable BIT have to be fulfilled. This is the double-barrelled test: an aggregate of the two sets of requirements (*R III §§ 118, 119*). Prior to the analysis under the BIT, the Tribunal must determine whether, under the ICSID Convention, there is an investment of the kind to which protection is afforded. The applicable BIT merely supplements Art. 25 of the ICSID Convention for the purpose of determining the competence of the Tribunal (*R II § 220*). Respondent points out in this regard that Claimants themselves have recognized the double-barreled test before the Tribunal even though they attempt to reduce the scope of such recognition (*R III § 119; Tr p. 126/4*).

##### ***b) The security entitlements in question do not qualify as investment under Art. 25 of the ICSID Convention***

357. Respondent contends that the Claimants’ alleged “investment” does not satisfy the objective criteria required under the ICSID Convention and is therefore not protected under this Convention (*R I § 143*).

**(1) The investment in the present case**

358. As a general matter, Respondent endorses the statement of Professor Abi-Saab in his Dissenting Opinion in the *Abaclat* case that an ICSID tribunal cannot only look at the economics of a transaction without taking into consideration its legal framework and structure in order to determine whether it qualifies as a protected investment or not (*R IV p. 13*).
359. In this context, Respondent insists that the Claimants hold “security entitlements” and not “bonds” (*R I § 140*). Argentina’s bond issuances are transactions typical and inherent to capital or securities markets where Argentina made a single issuance to the bond underwriters who made a single payment for a global amount to Argentina. As Claimants are not the bondholders themselves, they only have, at best, indirect interests in the globally registered bonds (*R II §§ 203, 204*). The individual participants’ positions with respect to globally registered bonds are known as “security entitlements”. The holders of security entitlements have no direct relationship with the bond issuer (in this case, the Respondent) or with the bond underwriter (*R II § 205*). That those people who purchase bonds in the retail market are generally called “bond holders” in common language does not change the fact that only parties that made contributions to the Argentine treasury were the initial purchasers, i.e. the underwriters (*R II § 261*).
360. In the Respondent’s opinion, when the Italian banks sold Claimants individual portions of their large security holdings, Claimants thus acquired a new security entitlement separate from the global bond, an entitlement which was created specifically at the time of such operation to which Argentina neither was nor could have been a party (*R II § 207*). Furthermore, the entitlements acquired by Claimants are not a loan by Claimants to the Argentine Republic or any other party since the Claimants have never entered into any agreement with Argentina (*R II § 209*).
361. Each Italian banks’ sales of security entitlements to Claimants were a matter entirely between themselves and Claimants and did not affect the bank’s previously purchased interests in Argentine bonds, which continue to be held unchanged in the bank’s account at the relevant depository or other financial intermediary. The banks’ sales of the

secondary entitlements to their customers may have been the consequence of their earlier decision to purchase interests in Argentine bonds, but only in the sense that one event – time wise – followed the other (*RI* § 214).

**(2) The concept of “investment” in Art. 25 of the ICSID Convention**

362. In the Respondent’s opinion, the fact that no definition of the term “investment” has been included in the ICSID Convention does not mean that the term is not to be interpreted (*RII* § 216). In this regard, most tribunals and international scholars have chosen the VCLT as a tool. Such interpretation should be made in good faith, taking into consideration the consequences of the undertakings that the parties may have reasonably and legitimately predicted or imagined (*RII* §§ 227, 228). In particular, the Respondent refutes Claimants’ position that the prevailing, and most reasonable, view is that the term “investment” in Art. 25 of the ICSID Convention must be interpreted broadly (*RII* § 234).

363. Inasmuch as Claimants rely on the *Fedax* case in support of the proposition that financial instruments are generally considered investments under the ICSID Convention, Respondent points out that the promissory notes at issue in *Fedax* were not the kind of investments that “come in for quick gains and leave immediately thereafter, i.e. ‘volatile capital’”. In contrast, the acquisition, sale or termination of Claimants’ security entitlements can be conducted instantaneously on secondary markets (*RII* § 213). Furthermore, the Respondent argues that including financial holdings which are traded on stock markets within the scope of protection of the ICSID Convention would be contrary to the aims and purposes of the Convention. In particular, causing any right deriving from the issuance of security entitlements related to debt securities traded on capital markets to be subject to the provisions of the extensive network of BITs would hinder the issuance, circulation, payment and restructuring thereof (*RIII* §§ 145, 148).

**(3) Relevance and application of the so-called “Salini test”**

364. Respondent urges the Tribunal to apply the so-called *Salini* test in order to determine whether the Centre has jurisdiction in the present case (*RII* § 236). The *Salini* and subsequent Tribunals have identified defining, and in their view mandatory, criteria of

“investment”, namely a certain duration, regularity of profits and return, risk, a substantial commitment, and a significant contribution to the host State’s economy (*R I § 151*). In the present case, in the Respondent’s opinion, these elements are not only deficient, but completely absent (*R II §§ 250, 288*).

365. First, Respondent contends that, according to the pertinent ICSID case-law, the minimum length of time that a project should take in order to be considered an investment under the ICSID Convention is between two and five years (*Tr p. 137/18*). Respondent points out that the alleged “investment” made by the initial purchasers lasted only a few seconds, however, because they only acquired the bonds when they were certain that these could give rise to security entitlements which could be sold immediately after the issuance thereof (*R III §§ 127, 128; Tr p. 138/12*). Furthermore, the nature of purchases of security entitlements on the secondary market is that they need not be held for any particular duration, but are readily tradable and are often bought and sold on the secondary market within seconds (*R I §§ 158-160*). While Claimants argue that the duration of the bond issuance should be taken into consideration, the Respondent submits that the time that must be considered is the alleged duration of the participation of each Claimant in a security entitlement, not the expiration date of the bonds (*R II §§ 263, 269*). More specifically, the Respondent points to at least eight Claimants who purchased their security entitlements after the payment date had passed (*R II § 305; Tr p. 140/17*).
366. Secondly, under ICSID case-law, the project should provide regularity of profit and return in order to qualify as an investment under the ICSID Convention. Although Respondent admits that the holder of security entitlements may have the right to periodically be paid certain amounts of principal and interest, the intrinsic characteristic of secondary market transactions and the fact that by nature security entitlements are easily and recurrently transferred, imply that there is no regularity of profit and return for Claimants (*R I §§ 167, 168; R II §§ 279, 280*). From the information provided by the Claimants, there are cases in which they have acquired security entitlements just a few months and even a few days before the maturity dates. If interests were paid annually, holders of these security entitlements did not enjoy of any kind of regularity of profits and returns. According to the Respondent, the most foreseeable source of profit for the



Claimants is speculation on the spread between the buying and selling prices (*R I* §§ 169, 170).

367. Thirdly, according to the Respondent, the payment obligations deriving from the Claimants' security entitlements are not tied to the success of any commercial undertaking or capital project. The risk which Claimants might have incurred when purchasing security entitlements in Argentina's foreign debt is inherent in the transaction and is no more than the ordinary commercial risk assumed by other persons involved in this kind of purely commercial transaction. Yet, an ordinary commercial contract cannot be considered an "investment" (*R I* §§ 163-165; *R II* §§ 272, 274). If the risk of default were sufficient to qualify as the risk necessary for the existence of an investment protected under the Convention, that would be tantamount to holding that mere non-payment of a contract gives rise to a claim under a treaty, a proposition that is unanimously rejected (*R II* § 272). In addition, in Respondent's eyes, major players of the financial world were well aware that Argentina had defaulted several times in the second half of the 20<sup>th</sup> century, and this issue was considered at the time of issuance of the bonds at stake in the present proceeding (*R II* § 275).
368. Fourthly, as regards the requirement of substantial commitment, Respondent criticizes that the Claimants only provided to the Tribunal the nominal value of the security entitlements they bought, but not the price paid by each Claimant when purchasing the security entitlements (*R I* § 156; *R II* § 258). Respondent further criticizes that Claimants seek to add up their individual contributions and that the time that should be considered in determining the existence of an investment is the duration of the financial instruments from the issuance of the relevant bonds up to their maturity (*R II* §§ 252, 254). In contrast, in the Respondent's submission, each Claimant must have an investment. This requirement may not be satisfied by the accumulation of claims of a group of several people that are not legally related (*R II* § 262).
369. Fifthly, in view of the requirement of a significant contribution to Argentina's economic development, the proceeds of secondary market transaction accrue to the selling dealers and investors, but no payment was made by the Claimants to the Respondent (*R I* § 175).

Claimants' purchases did not involve transfer of funds into the territory of Argentina nor benefited Argentina's economy. The alleged economic benefit of Argentina when issuing the bonds does not derive from Claimants' purchases of security entitlements, but from the contracts which Argentina executed with the issuing banks and the underwriters (*R I* § 177; *R II* § 283). Inasmuch as the majority decision in the *Abaclat* case considers that the funds transferred to the Respondent by placement agents are nothing but advances later transferred by individual investors and that the Claimants' funds were therefore ultimately made available to the Respondent, the majority, in the eyes of the Respondent, completely ignored the operation of sovereign debt placement, as described above (*R IV p. 14*).

370. Even if it were conceded that each Claimant had made, with its payment to the selling third party, a contribution, the latter would still be of too small a magnitude to qualify as a "contribution" to the economic development of the Respondent in any relevant sense (*R II* §§ 284, 285). In that regard, the Respondent argues that the Tribunal may not look to the whole global bond and regard it as a single investment (*R II* § 253). Rather the Tribunal needs to evaluate for each individual Claimant whether their purchase of security entitlements amounts to a significant contribution (*R II* § 262).
371. Furthermore, in the Respondent's submission, it is impossible to trace the proceeds which Respondent received from the underwriters buying the bonds. In particular, Claimants cannot prove if the proceeds of a particular bonds issuance were used to finance increasing interest payments which have no lasting value for the development of the economy (*R II* § 286).

**c) *The security entitlements in question do not qualify as investment under Art. 1 of the Argentina-Italy BIT***

**(1) The scope of the list in Art. 1 para. 1 lit. a-f of the BIT**

372. Respondent submits that, first of all, Claimants' translation into English of Art. 1(1)(c) of the Argentina-Italy BIT is inaccurate. Neither the authentic Italian nor the Spanish version of the BIT include the term "bond". There is no reference to the term "bond" or "security entitlement", but only to "obligations" (*R I* § 180; *R III* § 134). In the Spanish

language, “obligación” and “bono” are two different terms with different meaning, with the term “bono” having a similar meaning to the term “bonds” in English (*R II* § 292).

373. The rationale of this drafting of the provision is that the Contracting Parties’ intention was to exclude bonds from the scope of application of the Argentina-Italy BIT. Had Argentina and Italy considered bonds as an investment, they would have included them within the definition of investment in Art. 1 of the BIT and would have used the word “bonos” in Spanish and “titoli obbligazionari” in Italian (*R I* § 186; *R II* §§ 292, 296). If Claimants’ statement that in Italian there is no specific word to make reference to what in English is called a “bond” were correct, the fact that there is a distinction between the terms in Spanish and that the word for bonds in Spanish was not used, furthers the interpretation that “obbligazioni” should not be understood to be synonymous of “bond” (*R II* § 293).

**(2) The requirements of the investment being made “in the territory” of the Respondent and of it being a “foreign” investment**

374. Respondent states that, in the light of Art. 1 of the Argentina-Italy BIT, investments made outside the territory of the host State, i.e. Argentina, fall outside the scope of protection of the BIT (*R I* § 209). Respondent insists that the Claimants’ security entitlements are not physically located in the territory of Argentina. This conclusion is reinforced by the fact that the Claimants’ security entitlements were purchased and registered outside Argentine territory, that they are governed by foreign law and that they are enforceable in foreign jurisdictions. In this respect, Respondent contends that it did not, and could not, exercise any sovereign right in respect of Claimants’ alleged “investments” since they were subject to foreign laws and jurisdictions (*R I* § 215).
375. The proposition that there exists no investment in Argentina’s territory in the present case is, in the Respondent’s eyes, further corroborated by the fact that the proceeds of Claimants’ purchase of security entitlements did not accrue to the Respondent (*R I* § 213; *R II* §§ 351, 356). In particular, the fact that the issuance of bonds might have benefited the Respondent and allowed it to refinance part of its foreign debt, does not mean that there is an investment in the Argentine territory protected by the Argentina-Italy BIT (*R*

*II* § 357). Therefore, when acquiring security entitlements on the secondary market, Claimants did not make an investment in Argentine territory.

376. In sum, according to the Respondent, it is not possible for a bond that was issued outside Argentine territory, that is not subject to Argentine law, that is held by non-Argentine residents who acquired it in Italy, and registered in the accounts of banks located outside the Argentine Republic, to be considered as located within Argentine territory (*R III* § 139; *R V p.* 9). As all the criteria and connecting factors (e.g. the place of performance, the forum selection clauses, the currency of payment, the residence of the intermediaries, etc.) were deliberately structured so as to have their *situs* outside Argentina, the alleged investment was not made in the territory of the Respondent and thus falls outside the scope of the jurisdiction *ratione materiae* of the Tribunal (*R IV p.* 15).
377. Furthermore, Respondent contends that the Claimants' security entitlements are not an investment protected under the BIT because of the "governing law clause" in each bond prospectus, by virtue of which Claimants' securities are governed by different foreign (non-Argentine) domestic laws, and because the bonds were subject to the jurisdiction of foreign (non-Argentine) courts (*R I* § 188; *R II* § 308). At no time could Claimants have believed that they were making an investment in Argentina since their holding of security entitlements they acquired in Argentine debt was never governed by Argentine law or under the scope of Argentine authorities' jurisdiction (*R I* § 193; *R II* § 310). It is clear that the Argentina-Italy BIT only protects "foreign investment", i.e. investments made by a person of one Contracting Party in the territory of the other Contracting Party, and, as Respondent points out, the Claimants do not object to that proposition (*R I* § 190; *R II* § 303). Claimants' statement that foreign investment arises automatically in the event of a holding by a foreign person is wrong (*R II* § 318).

**(3) The requirement of the investment being made "in accordance with the laws" of the Respondent**

378. Respondent takes the position that the Claimants' purchases of security entitlements were in violation of Italian laws which govern the acquisition of the security entitlements at stake and were therefore not compatible with the "in accordance with" clause of Art. 1 of

the Argentina-Italy BIT (*R I* § 198). Even in the absence of such language in the relevant treaty, investments made in violation of domestic or international law are not protected (*R I* § 201; *R II* § 330; *R III* § 141).

379. According to the Respondent, the purpose of such clauses is not limited to excluding claims arising out of investments that were not recognized as legal under the host State's law when they were made. Rather, such clauses are an expression of international public policy which embodies the principle of the respect for law (*R II* § 329). That the illegality was committed by third parties, i.e. the banks, rather than the Claimants, is immaterial. What is decisive is not the investor's illegal conduct, but the illegality of the investment (*R II* § 344). It is further improper to distinguish between illegal investments made in good faith and those made in bad faith, since good faith investors may enforce their rights against the party who committed the illegality, i.e., in this case the Italian banks. The host State, however, is not obliged to protect investments that are in violation of the principle of conformity with law (*R II* § 345).
380. Italian law is applicable to the present case because, pursuant to the terms of Art. 8 para. 7 of the Argentina-Italy BIT, the Tribunal shall make its decisions on the basis of the laws of Argentina, including its rules on conflict of laws, and the pertinent provisions of international law (*R I* § 204; *R II* §§ 322, 324; *R III* § 143). Conversely, the Claimants' narrow statement that both Art. 8(7) of the BIT and Art. 42(1) of the ICSID Convention contemplate the law to be applied to the merits of the dispute and not the jurisdictional stage is wrong (*R II* § 327). In contrast, the Respondent underscores that Argentine law provides that the validity and nature of contracts executed outside the territory of Argentina, and the obligations that derive from those contracts, shall be governed by the laws of the place where the contract was executed, i.e. Italy (*R I* § 205; *Tr p.* 144/21).
381. Respondent argues that Claimants bought their security entitlements not only in violation of the selling restrictions in the bond documents prohibiting the sale of security entitlements to unqualified, unsophisticated buyers, but also of those contained in Italian statutes (*R I* § 207; *R II* §§ 335, 336). In particular, all the offering circulars concerning Italian Lira-denominated bonds contained selling restrictions relating specifically to the

Italian territory that prohibited sales to retail customers like the Claimants (*R II § 340*). To underscore this point, the Respondent refers to the various cases brought against Italian banks in which Italian courts found that purchases of security entitlements by retail purchasers violated selling restrictions (*R II § 341*).

## **2. Contentions by Claimants**

382. Claimants submit that the dispute in question is legal in nature, as required by Art. 25(1) of the ICSID Convention (*Request §§ 73, 74*). They further contend that the requirement of the legal dispute “arising directly out of an investment”, as laid down in the same provision, is met as well and that the instruments in question qualify as investments within the meaning of Art. 1 of the Argentina-Italy BIT (*Request § 78*).

### ***a) The relationship of Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT***

383. Claimants summarize the main thrust of their reasoning, as follows (*C II § 85*): First of all, the investment must fit within the meaning of both the ICSID Convention and the relevant BIT. Contrary to Respondent’s submission, Claimants do not ignore the need to meet the so-called *double barreled test*. Nor do the Claimants intimate that any transaction can be categorized as an investment (*C II § 81*). The notion of investment was not defined in the ICSID Convention since the drafters intended to avoid undue restrictions on the Contracting States’ understanding of what should constitute an investment. As a result, in the absence of an objective definition of “investment” under the ICSID Convention, the “investment” requirement under Art. 25(1) of the Convention is primarily controlled by the parties and should not be interpreted separately or autonomously from the definition of investment in the relevant BIT (*C I § 210*). Arbitrators should therefore not impose fixed criteria to determine the existence of an investment under the Convention, but should rather refer for guidance to the “typical characteristics” or “features” of an investment identified by case-law and scholars.

**b) *The bonds in question qualify as investment under Art. 25 of the ICSID Convention***

**(1) *The investment in the present case***

384. While the Claimants do not consider the Respondent's description of the mechanisms for the issuance and circulation of financial instruments in today's world of indirect and centralized holding of paperless securities to be incorrect, they qualify it as irrelevant for the present case (*C II § 96*). In that regard, the Claimants argue that, in their opinion, the investment at stake in the present dispute is the overall loan which made funds available to finance Respondent's budgetary needs and which is represented by the bonds issued in respect thereof. Each Claimant holds a proportionate share of that investment corresponding to the face value of the bonds held by it (*C II § 83; C III § 91; Tr p. 186/5*). The "security entitlements" held by each one of the Claimants are simply the evidence of their entitlement to a proportionate share of the initial investment made in Argentina. As holders of title to the capital and interest in their proportionate share in the overall investment, i.e. the bonds issued by the Respondent, the Claimants are investors within the meaning of the ICSID Convention and the BIT (*C II §§ 99, 103; C III § 93*).
385. The Claimants thus regard the issuance of negotiable bonds on the international financial markets, and not the subsequent purchases of security entitlements on the secondary market, as the relevant transaction for the purpose of qualification as an investment (*C I § 280*). Accordingly, the applicable doctrine is that of the "general unity of an investment operation" (*C III §§ 129 et seq.; Tr p. 499/3*). Claimants contend that the initial purchase by the banks and underwriters of the bonds issued by Argentina is indisputably an investment which satisfies all the requirements of the definition of investment. Even assuming that the purchase of a portion of the bond issues, taken alone, might not qualify as an investment under Art. 25 of the ICSID Convention, the present dispute would nonetheless "relate to" an investment, since each transaction is an integral part of the overall operation which qualifies as investment (*C III § 136*).
386. By its nature, when a bond is issued, it is underwritten by a multitude of underwriters and is placed on the secondary market on which it circulates. If placement and circulation of the bonds on the secondary market were not permitted, there would have not been no

issuance of a bond. The Respondent would never have been able to satisfy its need for foreign capital through the issuance of a bond, had there not been the opportunity for the initial purchasers to resell on the secondary market (*C III 134; Tr p. 184/1*). By specifically choosing to finance itself by issuing bonds, Respondent knew that its bonds would circulate and be transferred innumerable times in fractions of the initial amount of the issue (*C III § 151*).

387. The subsequent circulation of the bonds on the secondary market evidently did not deprive the initial “investment” of its quality, nor did it modify its nature (*C II § 97; C III § 148; Tr pp. 128/11, 506/19*). In particular, Claimants refute Respondent’s formalistic argument which would essentially imply that the initial investment loses its nature as an investment simply by virtue of one of its natural, essential and clearly intended features, i.e. circulation on the secondary market (*C II § 104*). In particular, it is immaterial that the banks and brokers which purchased the bonds upon their issue then resold them “in their own name and on their own behalf” to the subsequent purchasers. Under investment treaty law there is no limitation on the possibility for the subsequent acquirer of an initial investment to benefit from the protection of an investment protection treaty (*C II §§ 98, 102*).
388. In sum, Claimants emphasize that there is no contradiction, as suggested by the Respondent, in considering the position of the *individual* Claimants in order to identify them and to determine the amount owed to each one and, at the same time, in looking at the *overall* transaction and the initial investment as a whole for the purposes of establishing whether there exists an investment in terms of the ICSID Convention and the Argentina-Italy BIT (*C II § 101; C III § 123; Tr p. 512/19*).

**(2) The concept of “investment” in Art. 25 of the ICSID Convention**

389. The Claimants submit – and consider this to be the prevailing view both in the pertinent case-law and in academic writings – that, due to the lack of a definition of investment in the ICSID Convention, the investment requirement under Art. 25 must be interpreted broadly and having primary regard to the intention of the parties in each individual



circumstance (*C I* §§ 210, 219; *C III* § 119). According to the Claimants, ample ICSID jurisprudence and legal doctrine demonstrate that the notion of “investment” under the Convention encompasses a broad variety of situations, including acquisitions of shares, payments towards a potential concession as well as loans, including bonds (*Request* § 75).

390. In particular, Claimants contend that there can be no doubt that financial instruments, and hence the bonds held by the Claimants, are investments for the purposes of the ICSID Convention (*C I* §§ 237 *et seq.*; *C II* § 91; *C III* § 160). In Claimants’ view, the Respondent does not deny this conclusion nor does it challenge the relevance of the case-law or the doctrinal opinions relied upon by the Claimants (*C II* § 92). Inasmuch as the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case states that financial products such as bonds should be “excluded *per se*” from the protection granted by the ICSID Convention, this view, in the Claimants’ opinion, lacks any foundation and is unsupported by any authority (*C IV* § 30). Moreover, for purposes of jurisdiction, bonds are similar to portfolio investment in shares for which ICSID jurisdiction is uncontested (*C III* § 137).

**(3) Relevance and application of the so-called *Salini* test**

391. The Claimants do not consider fixed criteria to be compatible with the absence of an objective definition of “investment” from the ICSID Convention. In particular, they contend that the Respondent’s position according to which the criteria of the so-called *Salini* test – namely substantial commitment, duration, assumption of risk, regularity of profit and return, and significance for the host State’s economic development – should be elevated to jurisdictional requirements, is untenable for a variety of reasons (*C I* §§ 221, 222; *C III* § 90).
392. To begin with, ICSID tribunals are not bound by earlier decisions (*C I* § 223). Moreover, it is broadly recognized that the weight attached by certain tribunals to the *Salini* test is undeserved (*C I* §§ 224 *et seq.*). It is not considered the controlling test by the prevailing view in investment treaty jurisprudence and amongst scholars and, if used at all, is applied with considerable flexibility. In particular, it is not required that all of the test’s

elements be satisfied in each case (*C II § 87; C III §§ 118, 119*). For the overwhelming body of case-law and scholarly opinion, whether a particular transaction can be characterized as an investment depends on a more sophisticated and case-by-case approach taking into account a broader variety of elements (*C I § 235*). In particular, the agreement of the Contracting States of a BIT on the definition of investment is entitled to “great deference” (*C III § 118*).

393. Furthermore, even if the *Salini* criteria were, for the sake of argument, accepted as mandatory, they are satisfied in the present case (*C I §§ 244, 245; C II § 87; C III §§ 90, 121; Tr p. 496/22*).
394. First, the bonds in question are the result of a transaction whereby Argentina issued massive amounts of negotiable debt instruments (i.e. bonds) to finance its debt and placed them on the international markets. The individual Claimants have all acquired a portion of these issuances. The overall capital outlays by the bondholders constitute a gigantic financial commitment on the part of the bondholders and thus meet the prerequisite of a substantial commitment in capital. Respondent’s insistence at looking at the amount actually paid by each Claimant is patently absurd (*C I §§ 247, 248*).
395. Secondly, the Claimants argue that their investment satisfies the element of duration because the relevant parameter is not the period for which each individual Claimant has held the bonds purchased by it, but the duration of the relevant bond issue. The average interval between the bonds’ date of issuance and the date of maturity is approximately 8.2 years (*C I §§ 249, 251*).
396. Thirdly, Claimants refute Respondent’s argument that the purchase of the bonds only involved an ordinary commercial risk since Argentina’s obligations to repay the loans did not depend on the success of any commercial undertaking or capital project and since Claimants’ risk was no different from that of any commercial contract between creditor and debtor (*C I § 252*). In contrast, Claimants contend that the risks of sovereign borrowing are fundamentally different from those of dealing with an ordinary commercial counter-party, notably in the form of the State borrower altering the terms of its obligations to the detriment of the creditors by means of a sovereign act (*C I § 254*).

397. Fourthly, Claimants also object to the allegation that their bonds do not satisfy the condition of regularity of profits and returns, inasmuch as the investments provided for a regularity of returns, viz. the periodic interest payments. Claimants submit that it is irrelevant at which moment each Claimant acquired its respective bonds; they rather want to look to the overall conditions of the bond issues (*C I* §§ 258, 261).
398. Finally, Claimants deem it impossible to dispute that their investment contributed to Argentina's economic development. Accordingly, Respondent is mistaken when it contends that the amount paid by the Claimants to purchase the bonds was not invested in Argentina. Instead, regard must be had to the original proceeds of the issuance of the bond where there can be no doubt that those went entirely and directly to Argentina's Treasury (*C I* §§ 263, 264).

*c) The bonds in question qualify as investment under Art. 1 of the Argentina-Italy BIT*

**(1) The scope of the list in Art. 1(1)(a)-(f) of the BIT**

399. In the Claimants' view, Art. 1(1)(c) of the Argentina-Italy BIT ("bonds, public or private securities [...]") expressly contemplates that State-issued bonds and other public instruments of debt must be considered an investment for the purposes of the BIT (*Request* § 76). The Italian word "obbligazioni" is the (only) word for bonds, and "obligaciones" is the Spanish word for that term so that the proper English translation is "bonds" (*C I* § 269). This is confirmed by the most current and authoritative dictionaries (*C I* § 273; *C III* § 96). Furthermore, this becomes manifest in Directive 2004/39/EC on markets in financial instruments which uses, in its authentic texts, "bonds" in English, "obbligazioni" in Italian and "obligaciones" in Spanish (*C II* § 110).
400. Respondent errs in its submission that the correct translation of the term into English is "obligations" (*C I* § 271). While it is true that "obbligazioni" and "obligaciones" also have the broader meaning of "obligations", the provisions of the BIT must be read in context. This makes clear that the juxtaposition of the term "obbligazioni/obligaciones" to "titoli pubblici o privati/títulos públicos o privados" (public or private securities)

intended to refer to the other meaning of “obbligazioni”/“obligaciones”, i.e. “bonds” (*C I* § 274).

401. The Claimants see their position confirmed by the fact that the Respondent’s witnesses used the terms interchangeably (*C III* §§ 93, 96). Moreover, Argentina’s 2010 Exchange Offer specifically labels the bonds at issue interchangeably as “obbligazioni” and “titoli” in Italian, “bonds” and “securities” in English and “títulos” and “bonos” in Spanish. Furthermore, Respondent’s own counsel repeatedly referred to bonds as “títulos” and holders of security entitlements as “bondholders” (*C III* § 100).
402. Even if Respondent’s textual argument were conceded and the word did not mean “bonds” in this context, but simply “obligations”, bonds – as being obligations – would still be included in this term (*C III* § 98). Furthermore, in any case, they would be covered by the catch-all expression at the end of Art. 1(1)(c) of the BIT, i.e. “any other right to benefits or services of an economic value, as well as capitalized income” (*C I* § 276; *C III* § 96). Claimants emphasize that this argument was not contested by Respondent (*C II* § 112).
403. Finally, bonds are in any event covered by the language of the catch-all clause of Art. 1(1)(f) of the BIT which provides that the definition of investment includes “any right having an economic value conferred by law or contract” (*Request* § 77; *C I* § 277; *C III* § 96). Also this argument was not contested by the Respondent, as pointed out by the Claimants (*C II* § 112).

**(2) The requirements of the investment being made “in the territory” of the Respondent and of it being a “foreign” investment**

404. Claimants refute Respondent’s argument that the bonds are not protected by the BIT because they do not constitute an investment made “in the territory” of Argentina, as required by the chapeau of Art. 1(1) of the Argentina-Italy BIT as well as by its Preamble and Art. 1(2). In the Claimants’ view, what is relevant here is the initial transaction, i.e. the issuance of negotiable bonds on the international financial markets, not the subsequent purchases of the bonds on the secondary markets (*C I* § 280).

405. According to the Claimants, it is impossible to reason with regard to bonds as one would reason with reference to a piece of land or an industrial plant or a mine. When it comes to money, regard can only be had to who obtains the benefit of it. Hence, when considering where the investment was made, one must take into account the destination of the proceeds of the bond issuances, i.e. the beneficiary of the funds in question, and those undisputedly went to the benefit of the Respondent (*C I § 281; C II § 114; Tr p. 191/22*). Contrary to the position taken by Professor Abi-Saab's Dissenting Opinion in the *Abaclat* case, it is not merely an "assumption" that the funds made available to the Respondent contributed to the country's economic development, since the proceeds of the bonds issuances were included in Argentina's official budget and since the law of Argentina requires that the purpose of each financing must be authorized and specified by the law (*C IV §§ 45, 47*).
406. In that regard, Claimants consider it irrelevant that the Claimants' money did not go directly into Argentina's coffers since that is intrinsic to the circulation of securities on the secondary market and does not detract from Respondent being the sole beneficiary of the investment (*C III § 106*). In addition, it is irrelevant that the funds involved were not physically transferred into the territory of the beneficiary State (*C III § 107*) and that the bonds are not physically held in the territory of Argentina, since, even when represented by physical instruments, they are by definition held by the holder (*C I § 281*). It is further irrelevant whether the Claimants had, or could have, actually believed that they were making an investment in Argentina. For one, the investor's belief is not an element which comes into consideration for the purpose of determining whether an investment is protected under the BIT. Furthermore, regard must be had to the initial investment and not to the subsequent purchases on the secondary market (*C II §§ 116, 117*).
407. Moreover, Claimants do not agree with the analysis in Professor Abi-Saab's Dissenting Opinion in the *Abaclat* case that the territoriality requirement in Art. 1 of the Argentina-Italy BIT cannot be "proved or demonstrated, except by tracing [the investment] to a specific project, enterprise or activity in the territory". In contrast, the Claimants second the *Abaclat* majority decision's approach which states that such "specificity" requirement is not contained in the Argentina-Italy BIT (*C IV § 43*).

408. According to the Claimants, the provisions on governing law and jurisdiction over the bonds are not relevant for the determination whether the investment was made in Argentina. First, the law that governs the contractual relationship which is at the basis of the investment is immaterial for the purposes of determination whether an investment is covered by the BIT. Secondly, not even Respondent would probably dispute that an investment in a project physically located in Argentina was not made in its territory simply because the relevant contract was made subject to a foreign law or provided for the submission to the jurisdiction of foreign courts (*C I* § 287, 288; *Tr p.* 192/6). In spite of the applicable choice of law and forum clauses, the Claimants were very much subjecting themselves to the law of the sovereign issuer or at least running the risk that the foreign State would use its sovereign powers to interfere with their investment, as actually happened (*C I* § 290).
409. As regards the related argument that the investments in question are not “foreign”, Claimants insist that the only decisive criterion to identify a foreign investment is the nationality of the investors (*C I* § 293; *C II* § 115; *C III* § 109).

**(3) The requirement of the investment being made “in accordance with the laws” of the Respondent**

410. In Claimants’ view, the Respondent’s further defense that the investments in question are not “in accordance with the laws and regulations” of the host State, as required by the chapeau of Art. 1(1) of the Argentina-Italy BIT, is misconceived on several accounts (*C I* § 295).
411. First, the provision refers to the law of the host State, i.e. Argentina. The Respondent’s attempt to bring Italian law into play via Art. 8(7) of the BIT and its reference to the host State’s laws on conflict of laws is flawed since that provision contemplates the law to be applied to the merits of the dispute (similarly to Art. 42(1) of the ICSID Convention). Hence, the reference in Art. 1(1) of the BIT is to Argentine substantive law only, and Italian law is manifestly inapplicable (*C I* §§ 300, 302; *C II* § 120; *C III* § 112; *Tr p.* 195/18).

412. Moreover, even if it were conceded *arguendo* to the Respondent that Italian law applies, it is not relevant under Art. 1(1) of the BIT whether the sale of the bonds to the Claimants by Italian banks violated certain provisions of Italian law. What is relevant here is the legality of the investment, i.e. the “contribution or asset invested [...] in the territory” of the host State, not the transfers of the bonds on the secondary market (*C I § 296*).
413. Furthermore, Claimants contend that whenever the illegality of an investment under the host State’s law has been upheld, the illegality (i) was very serious, (ii) had been consciously committed by the investor at the expense of the host State, and (iii) had been committed upon admission of the investment in the host State, and not thereafter (*C I § 305*). According to the Claimants, none of these criteria is met in the present case. In particular, the purported illegality was committed at the expense of the Claimants and in no way harmed (or was intended to harm) the interests of the Respondent. The latter cannot now take advantage of a reputed illegality committed by a third party (*C I § 307; C II § 124; C III § 114*). Any violation of whatever rule which could have occurred in relation to the circulation of the investments remains entirely outside the scope of the present proceedings (*C I § 321*).
414. As regards, more specifically, the “selling restrictions” referred to by the Respondent, Claimants point out that the bonds themselves contained no limitation whatsoever as to legal or natural persons that can become the holders thereof. The only limitations were that the bonds could not be sold in Italy “in a solicitation to the public at large” which in fact never occurred and that the sale had to be conducted through appropriately authorized financial intermediaries (including banks) which was the case (*C I §§ 310, 311; Tr p. 198/11*). Accordingly, there was no across-the-board prohibition on the sale of the bonds by financial intermediaries to private investors in Italy, in spite of a certain amount of litigation in Italy which, however, related to the specific circumstances of individual cases (*C I §§ 312, 313*). In this context, Claimants contend that there is no contradiction between their position in this arbitration and their individual positions before the Italian courts, since the nature of the claims that the bondholders may have against the financial intermediaries is totally different from that of their claims against the Respondent (*C II § 122; C III § 115*).

## **B. Findings of the Tribunal**

### **1. The relevant provisions for the determination of the jurisdiction *ratione materiae***

415. The Parties agree that the jurisdiction *ratione materiae* of the Centre and, for that matter, the competence of the Tribunal in the present case must be based on Art. 25(1) of the ICSID Convention and Art. 1(1) of the Argentina-Italy BIT. The scope of jurisdiction as deriving from these instruments and provisions is, however, contested between the Parties, as was also pointed out by the *Abaclat* Tribunal<sup>167</sup> which found itself in a situation comparable to that of the present Tribunal insofar as the question of jurisdiction *ratione materiae* is concerned. In order to answer this question, the Tribunal considers it useful to first recall the pertinent legal provisions.
416. Pursuant to Art. 25(1) of the ICSID Convention, the Centre's jurisdiction *ratione materiae* "shall extend to any legal dispute arising directly out of an investment".
417. Furthermore, Art. 1(1) of the Argentina-Italy BIT reads – under the heading "definitions" ("definiciones"/ "definizioni") – in its Spanish and Italian authentic versions:

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 aún 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;

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<sup>167</sup> See *Abaclat* Decision, para. 251.



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

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 mobile 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 private 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.

418. In its unofficial English translation<sup>168</sup>, the provision reads:

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<sup>168</sup> See Annex RA 147 for the translation provided by the Respondent; see *Request* §§ 76, 77 for the alternative translation offered by the Claimants.

For the purpose of this Agreement:

1. The term “investment” shall mean, in conformity with the legal system of the host State and independently from the legal form adopted or from any other connected legal system, any contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party in the territory of the other, in accordance with the laws and regulations of the latter.

Within this general context, the following are specifically, but not exclusively, considered to be investments:

a. movable and immovable property, and any other right *in rem*, including, to the extent they may be used as investments, security interests over the property of third parties;

b. shares, equity interests or any other form of holding, even if a minority or indirect interest, in companies organized in the territory of one of the Contracting Parties;

c. [Claimants: bonds] [Respondent: obligations], public or private securities or any other right [Claimants: for performances] [Respondent: to benefits] or services [Claimants: that have] [Respondent: with] an economic value, [Claimants: including also] [Respondent: as well as] capitalized income;

d. credits directly related to an investment, regularly entered into and documented pursuant to the provisions in force of the State in which said investment is made;

e. copyrights, intellectual or industrial property-including patents, licenses, registered, trademarks, trade secrets and industrial designs-as well as technical procedures, transfer or technological know-how, trade names and goodwill;

f. [Claimants: any right having an economic value conferred by law or contract] [Respondent: any right of an economic nature granted by law or by contract], and any license or concession in accordance with provisions in force regulating such economic activities, including prospect, cultivation, extraction, and exploitation of natural resources.

419. While there is no disagreement between the Parties as to the *legal* character of the present dispute, as required by Art. 25(1) of the ICSID Convention, the notion of “investment” has become the object of a heated controversy in the case at hand. Art. 1(1) of the Argentina-Italy BIT contains a legal definition of the term “investment” “[f]or the purpose of this Agreement”, and Art. 25(1) of the ICSID Convention calls for a (legal) dispute “arising directly out of investment” for it to be covered by the jurisdiction of the Centre.

420. Thus, the very essence of the contention between the Parties in regard to jurisdiction *ratione materiae* is the question how Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT interact and what legal implications the use of the term “investment”

in both of these provisions may have. As concerns the relationship between the two provisions, the Parties have referred to the so-called *double barreled* test. It is therefore this aspect to which the Tribunal will direct its attention subsequently.

421. Before that, the Tribunal must, however, clarify what constitutes the economic operation for which the status of an investment protected under Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT is claimed.

**2. The relevant economic operation at stake in the present proceedings and the purported lack of standing of the Claimants in this context**

422. The Parties in the present case have offered diverging views as to what economic operation the Tribunal should look at in order to assess whether it is in presence of an investment in the meaning of Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT. While the Respondent insists on a strict distinction of “bonds” and “security entitlements”, with the Claimants supposedly only holding the latter, Claimants do not consider this distinction to be relevant in the present case and call upon the Tribunal to regard the issuance of bonds as an integrated operation also including security entitlements.

423. Without delving into the minutiae of the mechanism of issuing and circulating sovereign bonds, the Tribunal would consider that, for the purpose of identifying the protected investment in the present case, the distinction between bonds and security entitlements has no particular significance; in any event, it does not have the significance which Respondent seeks to ascribe to it. The Tribunal would endorse the statement of the *Abaclat* Tribunal in this regard that “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”.<sup>169</sup>

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<sup>169</sup> *Abaclat* Decision, para. 358. For the treatment of the “general unity” of an investment operation and the pertinent case-law see *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, para. 26, n. 28; *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 93-105, with further references as well as *D. Carreau et al.*, *Droit International Économique*, 3<sup>rd</sup> ed., 1990, 570, para. 956, as cited in *E. Gaillard*, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, in: C. Binder et al. (eds.), *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Schreuer*, Oxford, 2009, 403, at

424. Furthermore, the *Abaclat* Decision has described where the economic unity of the operation lies in terms well applicable also to the present proceedings:

i) First, 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.

ii) Secondly, the security entitlements are the result of the distribution process of the bonds through their division into a multitude 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.

iii) Thirdly, 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.<sup>170</sup>

425. Against this background, the Tribunal would consider that the Claimants have correctly characterized the investment at stake as the overall loans which made funds available to finance the Respondent's budgetary needs, with each Claimant holding a proportionate share of that investment (*C II* § 83; *C III* § 91). To seek to split up bonds and security entitlements into different, only loosely and indirectly connected operations would ignore the economic realities, and the very function, of the bond issuing process. In particular, it would disregard the fact that it is the bond issuing State itself that departs from the assumption, and counts on the fact, that persons will purchase shares of the bonds on the secondary market, in the form of security entitlements, since otherwise the bond could not have been successfully issued in the first place.

426. The Tribunal in the *CSOB v. Slovakia* case was right to state that

[a]n investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an

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405; see, in contrast, the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, paras. 69-72 challenging the majority's "one economic operation" approach.

<sup>170</sup> *Abaclat* Decision, para. 364.

investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.<sup>171</sup>

427. In a similar vein, the Tribunal in the *Enron Corporation v. Argentina* case found that “an investment is indeed a complex process including various arrangements [...]. This particular aspect was explained by an ICSID tribunal as ‘the general unity of an investment operation’ and by another tribunal considering an investment based on several instruments as constituting an ‘indivisible whole’.”<sup>172</sup>
428. The doctrine of the “general unity of an investment operation” is well-established in international investment law.<sup>173</sup> Hence, when a tribunal is in presence of a complex operation, it is required to look at the economic substance of the operation in question in a holistic manner. As aptly stated by Professor Schreuer,

[i]t follows from this consistent case law that tribunals, when examining the existence of an investment for the purposes of their jurisdiction, have not looked at specific transactions but at the overall operation. Tribunals have refused to dissect an investment into individual steps taken by the investor, even if these steps were identifiable as separate legal transactions. What mattered for the identification and protection of the investment was the entire operation directed at the investment’s overall economic goal.<sup>174</sup>

429. In the light of this jurisprudence and applying it to the facts of the present case, the Tribunal is convinced that the process of issuing bonds and their circulation on the secondary, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind “aris[e] directly out of an investment” and are therefore covered by Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT.

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<sup>171</sup> *Československa obchodní banká, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 72.

<sup>172</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, para. 70.

<sup>173</sup> See notably the references in *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 93 *et seq.*

<sup>174</sup> *C. Schreuer/U. Kriebaum*, At what time must legitimate expectations exist?, in: Jacques Werner/Arif Hyder Ali (eds.), *A Liber Amicorum: Thomas Wälde. Law Beyond Conventional Thought* (2010) 265, at 272.

430. This was also the view held by the Tribunal in the *Abaclat* case<sup>175</sup>:

The Tribunal is of the opinion that such argument [i.e., 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] 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, 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 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.

431. In view of the bond issuance process constituting a single economic operation, notably including the circulation of security entitlements on the secondary market, the present Tribunal will in the following refer to these instruments together, with wordings such as “bonds and security entitlements”, “bonds or security entitlements”, “bonds/security entitlements”, etc. implying no difference in meaning, but referring to this unity of the investment operation at stake.

432. This finding permits the Tribunal to simultaneously dispose of related arguments put forward by the Respondent. It has been submitted that the Claimants as holders of mere security entitlements acquired through multiple intermediaries lack standing because they are only remotely connected with the underlying bonds (*R I* § 254). It has equally been contended that the indirect holding system implicates a cut-off point beyond which claims are not permissible because the connection with the investment is too remote (*R I* § 256; *R III* §§ 175-179).

433. To be sure, while the argument of a lack of standing is presented to operate on the level of jurisdiction *ratione personae*, as it suggests that the Claimants do not qualify as investors for having failed to have themselves made “investments”<sup>176</sup>, the argument is closely related to the pertinent discussion of the Tribunal’s jurisdiction *ratione materiae*.

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<sup>175</sup> *Abaclat* Decision, para. 376.

<sup>176</sup> See *supra* para. 327.

Accordingly, the response to be given to it cannot be different from what has been stated above. Given the Tribunal's conclusion that the bond issuing process, including the purchase of security entitlements on the secondary market, is to be seen as an economic unity embodying a single act of investment, it cannot uphold the Respondent's submission and thus has to reject the argument that Claimants would lack standing in the present proceedings.

434. In a similar vein, inasmuch as it may be suggested that in view of the "remote character" of the Claimants' security entitlements, when compared to the situation of the original underwriters with regard to the initial act of issuing of the bonds, the investment would not arise "directly" out of an investment as required by Art. 25(1) of the ICSID Convention, the same reasoning applies. Being part of a single economic operation, the purchase of security entitlements by Claimants on the secondary market is to be considered part and parcel of a single investment.

### **3. The nature and legal relevance of the "double barreled" test**

435. Having clarified at what economic operation the Tribunal has to look when assessing whether it is in presence of a protected investment, the Tribunal now turns to the above-mentioned question of the nature of the so-called "double barreled" test and how it is to be applied in the present case. It should first be noted in this regard that both Parties accept the relevance of this test when it comes to understanding the term "investment" in Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT and to determining, on this basis, the jurisdiction *ratione materiae* of the Centre (*C II § 81; R I §§ 144-146; R II § 224*).
436. At the same time, the exact functioning and application of the test are controversial between the Parties: On the one hand, Respondent insists that in order for a protected investment to be present, each and all of the requirements set forth both in the ICSID Convention and the applicable BIT must be fulfilled. Respondent thus contends that the term "investment" in Art. 25 of the ICSID Convention must be interpreted autonomously, i.e. independently of the investment clause in the pertinent BIT, and that the objective requirements laid down in the ICSID Convention cannot therefore be overridden by the

Parties (*R III §§ 118, 119, 144 et seq.*). On the other hand, Claimants submit that the “investment” requirement of the ICSID Convention is primarily controlled by the Parties and should not be interpreted separately from the definition of investment in the relevant BIT (*C I § 210, C II § 89*).

437. In this regard, the present Tribunal would consider that, inasmuch as the Tribunal is established and operates under the ICSID Convention, its competence cannot transcend the jurisdiction of the Centre, as defined in Art. 25 of the Convention. Hence, to the extent that Art. 25 imposes limits on the jurisdiction of the Centre, they are also binding upon the Tribunal.
438. As Art. 41(2) of the ICSID Convention clearly states, any objection by a party that a dispute is not within the jurisdiction of the Centre or for other reasons is not within the competence of the Tribunal, shall be considered and decided by the Tribunal, and this decision must obviously be taken on the basis, and within the boundaries, of Art. 25 of the Convention. Accordingly, irrespective of whether this operation is referred to as a “double keyhole” approach or a “double barreled” or “twofold” test<sup>177</sup> or whether it is described as identifying the “outer limits” of the consent to arbitration given by the Parties, Art. 25 of the ICSID Convention is – in addition to and beyond the relevant provisions of the Argentina-Italy BIT – pertinent for the present Tribunal’s Decision on the jurisdiction of the Centre and the Tribunal’s competence to hear the present case.
439. Furthermore, the limits set by Art. 25(1) ICSID Convention are not subject to consensual change<sup>178</sup> by the parties to a dispute<sup>179</sup>, save Art. 25 or, for that matter, another provision of the Convention were to declare the consent of the parties to be relevant in terms of the

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<sup>177</sup> See in general *Schreuer/Dolzer*, Principles of International Investment Law (note 127) 62; *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 124 and 125 with references to the pertinent case-law.

<sup>178</sup> *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 122, 123 and 125-127; see also *M. Waibel*, Opening Pandora’s Box. Sovereign Bonds in International Arbitration, 101 AJIL (2007) 711, at 718, 719 (n. 52 and 54) and 722, emphasizing that the term “investment” in Art. 25(1) of the ICSID Convention is “not infinitely elastic”, as well as Professor Abi-Saab’s Dissenting Opinion in the *Abaclat* case, para. 46 seconding this statement.

<sup>179</sup> E.g. the exclusion of persons having dual nationality from the jurisdiction *ratione personae* of the Centre if one of the nationalities is that of the host State; see Art. 25(2)(a) of the Convention; see *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 5 and 7.



jurisdiction of the Centre.<sup>180</sup> Accordingly, the existence of an “investment” within the meaning of Art. 25 ICSID Convention is a mandatory requirement for the jurisdiction of the Centre, with a request for arbitration transcending these limits leading to the dismissal of the case.

440. Alas, this first set of responses does not settle the question how the mandatory jurisdictional requirement *ratione materiae* of “investment” plays out in the present case and, in particular, how narrow or wide the limits set by it are. The reach of the Convention can only be properly assessed by submitting the term “investment” in Art. 25(1) to a thorough analysis and clarifying whether bonds or security entitlements such as those pertinent to the present dispute constitute “investments” for the purposes of the ICSID Convention and the Argentina-Italy BIT.

#### **4. The meaning of “investment” under Art. 25(1) of the ICSID Convention**

441. The Parties agree that neither the ICSID Convention nor, for that matter, other ICSID Regulations or Rules contain a legal definition of the term “investment”. However, they draw different conclusions from this fact: while the Claimants argue that, due to the lack of a definition, the investment requirement under Art. 25 of the Convention must be interpreted broadly and having primary regard to the intention of the Parties in each individual circumstance (*C I §§ 210, 219; C III § 119*), the Respondent claims the opposite and refutes that Art. 25 should be subject to a broad interpretation (*R II § 234*).
442. As the Parties themselves concede, the meaning to be given to the term “investment” must be the result of an interpretation of the provision in question according to the rules of international law. The intensive debate, not to say controversy, regarding the term “investment” which has become manifest in various arbitral decisions dealing with Art. 25 of the ICSID Convention but also in pertinent academic circles, reveals that the meaning of the term is far from being clear.

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<sup>180</sup> See e.g. Art. 25(2)(b) of the Convention according to which the parties to a dispute can agree that a juridical person having the nationality of the host State but subject to foreign control should be treated as a national of another Contracting State for the purposes of the Convention. Even though such persons would normally be excluded from the scope of application *ratione personae* of the Convention, the agreement of the parties as authorized by Art. 25 brings them back under the Convention’s protective umbrella.

443. Given the fact that Art. 41 of the ICSID Convention makes the Tribunal the judge of its own competence, it is the Tribunal's responsibility to clarify the interpretation to be given to the term in a systematic and well-reasoned fashion and to decide on this basis whether the concept of "investment" is susceptible to cover sovereign bonds or security entitlements such as those pertinent to the present case. In this operation, the Tribunal will be guided – and the Parties fully agree in this regard – by the generally accepted rules of treaty interpretation as set out in Art. 31 of the VCLT, notably the general rule that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

444. Furthermore, pursuant to Art. 32 of the VCLT,

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

445. The Tribunal is well aware that Art. 32 of the VCLT only provides for *supplementary* means of interpretation which thus only come into play if and to the extent that the application of the rules of interpretation codified in Art. 31 of the Vienna Convention were to lead to the result that the meaning of the provision in question remains "ambiguous or obscure". The Tribunal is further aware that such a conclusion cannot be drawn at this stage of the reasoning.

446. Having made this proviso, the Tribunal considers it nonetheless preferable, in the light of the circumstances of the case and for the sake of clarity of the argument, to first turn its attention to the drafting process of the ICSID Convention, notably in regard to the genesis of its Art. 25. This course of action shall help to enlighten the background against which the provision was adopted and to prepare the ground for a proper analysis of the term "investment" according to the rules of interpretation enshrined in Art. 31 of the VCLT.

447. It is through this way of proceeding that the Tribunal will be able to assure itself whether, on the one hand, the criteria of interpretation established by Art. 31 of the VCLT lead to a sufficiently clear understanding of the term “investment” in Art. 25 of the ICSID Convention that might subsequently be confirmed by referring to the *travaux préparatoires* or whether, on the other hand, those criteria leave the meaning of the term “ambiguous or obscure” so that refuge is to be taken to the preparatory work and the circumstances of conclusion of the ICSID Convention in order to determine the meaning of the term “investment”. In that sense, the following remarks are clearly not meant to modify the well-established rules of treaty interpretation or to substitute for a proper interpretation of the provision in question in the light of Art. 31 of the VCLT.

**a) *The background of the adoption of Art. 25(1) of the ICSID Convention***

448. According to the 1965 Report of the Executive Directors on the ICSID Convention, “[n]o attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25 (4)).”<sup>181</sup> While this statement is commonly cited as authoritative comment for the interpretation of Art. 25 of the ICSID Convention, it is rarely made subject to further analysis.

449. To begin with, the statement must be qualified inasmuch as several, though unsuccessful, attempts at defining the term “investment” had actually been made in the negotiation process leading to the adoption of the ICSID Convention in 1965.<sup>182</sup> In fact, the question of whether and how to define the concept of “investment” was one of the most contentious issues in that process. While a first camp, mostly consisting of developed (viz. capital-exporting) States, proposed to abstain from any definition of investment and to leave that matter entirely to the consent of the States involved, another group of States, dominated by developing (viz. capital-importing) States, was strongly in favour of a precise and narrow definition that would limit the Convention’s scope of application

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<sup>181</sup> Report of the Executive Directors (note 97), nr. 27.

<sup>182</sup> *Schreuer*, ICSID Convention Commentary, Art. 25, para. 119.

*ratione materiae* to a well-defined (and if possible even exhaustive) list of protected investments.<sup>183</sup> When the negotiations were on the brink of failure due to the stalemate between the two camps, a compromise proposal introduced by the United Kingdom brought the breakthrough, permitting that in the final vote the Convention was adopted by an overwhelming majority.<sup>184</sup>

450. This compromise proposal sought to take account of the concerns of both camps. To this effect, it combined two aspects: On the one hand, it opted for the bare use of the term “investment”. This was a concession to the proponents of the non-definition approach, implying that the Convention would impose no, or only very weak, limits as to the jurisdiction *ratione materiae* of the Centre regarding the question whether a certain economic operation would qualify as an investment under Art. 25 of the ICSID Convention.
451. On the other hand, this liberal approach was complemented, and contained, by the establishment of a mechanism by which (namely the capital-importing) States could withhold matters from the jurisdiction of the Centre which they considered inappropriate to be dealt with by this institution. The immediate result of the move to accommodate these States’ concerns was the introduction of Art. 25(4) of the ICSID Convention – a provision which was not in the Convention’s draft before. It permits any Contracting State, before or after ratification of the Convention, to “notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre [...] Such notification shall not constitute the consent required by paragraph (1).”

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<sup>183</sup> For a detailed account of the negotiations, notably regarding the competing proposals of jurisdictional “maximalists” and “minimalists” see *J. D. Mortenson*, The Meaning of “Investment”: ICSID’s *Travaux* and the Domain of International Investment Law, 51 *Harvard International Law Journal* (2010) 257, at 281 *et seq.*; see also *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 113 *et seq.*; *D. R. Sedlak*, ICSID’s Resurgence in International Investment Arbitration: Can the Momentum Hold?, 23 *Penn State International Law Review* (2004) 147, at 156, 157.

<sup>184</sup> *Mortenson*, The Meaning of “Investment” (note 183) 289 *et seq.* and 301, notably referring to Aron Broches’ summary of the arrangement in his report to the Executive Directors as allowing “each Contracting State [to], in effect, write its own definition” of “investment”; see Memorandum of the Meeting of the Committee of the Whole, 16 February 1965, in *Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1968), Vol. II, 972; see, in a similar vein, *Schreuer*, ICSID Convention Commentary, Art. 25, para. 115.

452. States had therefore the possibility of restricting the Centre's jurisdiction *ratione materiae* to economic operations and assets which they considered to constitute investments, by giving or not giving consent or by qualifying their consent with certain restrictions<sup>185</sup> – be it via their domestic investment legislation or via the applicable BIT. In addition, notifications under Art. 25(4) of the ICSID Convention allowed States to make announcements in general terms as to the types of disputes in respect of which they would consider giving consent. While such notifications do not amount to limiting as such the jurisdiction *ratione materiae* of the Centre and while those notifications cannot replace the specific consent to arbitration required under Art. 25 (see its afore-cited para. 4, final sentence), they may have an indirect bearing on jurisdiction: a consent clause which is not entirely clear may be interpreted by reference to a prior notification of classes of disputes in respect of which the host State has expressed its intentions.<sup>186</sup> Accordingly, the consent of the parties as to the scope of the term “investment” is to be deemed of great relevance when establishing the meaning of Art. 25 of the ICSID Convention, without the concept thus becoming subject to the parties' unfettered discretion.<sup>187</sup>
453. The scope of the term “investment” in a given case would therefore be the product of a liberal understanding of the concept of “investment”, combined with possible restrictions to the consent to arbitration as provided by the host State.<sup>188</sup> Such restrictions may be

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<sup>185</sup> See also A. Broches, *The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 *Columbia Journal of Transnational Law* (1966), 261, at 268: “During the negotiations several definitions of ‘investment’ were considered and rejected. It was felt in the end that a definition could be dispensed with ‘given the essential requirement of consent by the parties’. This indicates that the requirement that the dispute must have arisen out of an ‘investment’ may be merged into the requirement of consent to jurisdiction.”

<sup>186</sup> Schreuer, *ICSID Convention Commentary*, Art. 25, paras. 921 *et seq.* and 934.

<sup>187</sup> Broches, *The Convention on the Settlement of Investment Disputes* (note 185) 268: “Presumably, the parties' agreement that a dispute is an ‘investment dispute’ will be given great weight in any determination of the Centre's jurisdiction, although it would not be controlling.”

<sup>188</sup> See e.g. E. C. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, in: P. Muchlinksi et al., *The Oxford Handbook of International Investment Law*, Oxford 2008, 49, at 63: “It was, however, a deliberate decision not to include a definition of investment in the Treaty, for fear that a concrete meaning would limit its scope and raise unnecessary jurisdictional problems’ [...] [T]he definition of ‘investment’ should depend on the parties' consent in the separate international investment agreements or in international instruments [...] The absence of definition makes it possible to have a fairly liberal interpretation when it comes to deciding what an investment would be” (referring to D. A. Lopina, *The International Centre for Settlement of Investment Disputes: Investment Arbitration for the 1990s*, *Ohio State Journal on Dispute Resolution* (1988) 107, at 114 and to N. Rubins, *The Notion of ‘Investment’ in International Investment Arbitration*, in: Norbert Horn (ed.), *Arbitrating Foreign Investment*

effected by the interplay of pertinent declarations on the part of the States involved, including (i) notifications under Art. 25(4) and, in particular, definitions of investment as contained (ii) in national investment legislations as well as (iii) in the applicable BITs.<sup>189</sup>

454. It is therefore Art. 25(1) of the ICSID Convention itself that opens the general scope of the term “investment” to the possibility of restriction. This is how the provision has been understood to work at the time of conclusion of the ICSID Convention (even though the specific question of the Centre’s jurisdiction over loans seems to have been left open at that time<sup>190</sup>). The very citation from the Report of Directors referred to above testifies to this trade-off when it expressly links the lack of a definition of “investment”, first, to the “essential requirement of consent by the parties” and, second, to the “mechanism” of Art. 25(4) of the Convention. However, the Report’s wording is inaccurate inasmuch as the non-existence of a definition of “investment” in Art. 25(1) of the ICSID Convention was due to a deliberate abstention from including a definition rather than to a failure to agree on a definition.

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Disputes, The Hague 2004, 292 *et seq.*). See further *Mortenson*, The Meaning of “Investment” (note 183) 259, arguing that it is not correct that the “delegates at the drafting convention were forced to leave ‘investment’ undefined because of their inability [...] to formulate a single, clean definition [...] Rather, the decision to leave ‘investment’ open-ended had a specific meaning as part of a crucial compromise of a long-raging dispute.” See furthermore *ibid.*, 280: “The failure to define ‘investment’ [...] was an explicit choice that represented categorical adoption of the broad jurisdictional position in exchange for some crucial opt-out provisions aimed at taking the developing countries’ concerns into account.” See, however, *Waibel*, Opening Pandora’s Box (note 178) 730: “Many commentators mistakenly interpret Article 25’s definitional silence concerning ‘investment’ as legitimating an elastic notion of investment, but the *failure to reach consensus* cannot be used to adopt a broad notion *by default.*” (emphasis in original).

<sup>189</sup> See *Mortenson*, The Meaning of “Investment” (note 183) 293 *et seq.*

<sup>190</sup> See *Schreuer*, ICSID Convention Commentary, Art. 25, para. 118, generally referring to Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1968), Vol. II, 261, 474, 668, 709. See, however, the account of *Mortenson*, The Meaning of “Investment” (note 183) 299, n. 225 who concludes that “all efforts to eliminate the Convention’s application to bonds, loans, and capital flow were rejected”. In that regard, he refers to the pertinent sources in the afore-mentioned Documents Concerning the Origin and Formulation of the ICSID Convention, notably Summary Proceedings of the Legal Committee Meeting (Nov. 27, 1964, Morning), p. 709 (Philippines) (suggesting the elimination of claims based on capital flow); Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), p. 261 (Burundi) (“[A] foreign company which lent money to a State could not be regarded as an investor.”); Consultative Meeting of Legal Experts, Addis Ababa (Dec. 16–20, 1963), p. 261 (Broches) (explaining that the current draft covered loans); Consultative Meeting of Legal Experts, Bangkok (Apr. 27–May 1, 1964), p. 474 (Australia) (stating that the Convention also covers “borrowing of cash by the host country from foreign private investors”). See also *Waibel*, Opening Pandora’s Box (note 178) 720, n. 61, further referring to the statement of the Austrian delegate that “public loans or bonds should not be included”; see *ibid.*, 709.

**b) Interpretation of the concept of “investment” in the light of Art. 31 of the VCLT and its application to the financial instruments in the present case**

455. As stated above, the previous remarks regarding the genesis of Art. 25 of the ICSID Convention cannot be decisive for the interpretation of the provision as a matter of international law, which remains subject to the general rules of treaty interpretation as codified in Art. 31 of the VCLT. In particular, reliance on the *travaux préparatoires* and the intentions of the parties must not lead to an outcome deviating from the interpretation of Art. 25 “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, even if indicated otherwise by the historical background. The previous remarks are only meant to provide a useful background for the operation of interpretation to which the Tribunal now turns.

**(1) Ordinary meaning**

456. To begin with, as regards the ordinary meaning of the term “investment”, this is a notion covering a wide range of economic operations varying substantially as to their character and profile. For instance, investment has been defined as “[t]he placing of capital or laying out of money in a way intended to secure income or profit from its employment”<sup>191</sup> or “[a]n expenditure of money for income or profit or to purchase something of intrinsic value: capital outlay”.<sup>192</sup> A comparison of common definitions of the term “investment”, “investissement” and “inversión” in the three authentic languages of the ICSID Convention (i.e. English, French and Spanish)<sup>193</sup>, while not giving clear contours to the notion of investment, confirms the broad character of the concept. Accordingly, the Tribunal is of the opinion that the ordinary meaning of the term “investment” does certainly not restrict the scope of the notion so as to exclude bonds or

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<sup>191</sup> *Black’s Law Dictionary*, 4<sup>th</sup> ed. 1951.

<sup>192</sup> *Webster’s Third New International Dictionary*, 3<sup>rd</sup> ed. 1961.

<sup>193</sup> See *Waibel*, Opening Pandora’s Box (note 178) 719, n. 55; *Mortenson*, The Meaning of “Investment” (note 183) 310, n. 258-260.

security entitlements such as the ones pertinent to this case from its purview, but is rather susceptible to include those financial instruments.<sup>194</sup>

## (2) Context

457. Furthermore, Art. 31 of the VCLT reminds the interpreter that the terms used in the treaty should not be analyzed in an isolated manner, but understood in their context, i.e. by relying on the method of systematic interpretation. In that regard, the Tribunal may usefully refer back to the previous sub-section<sup>195</sup> according to which the possibility of notification, as laid down in Art. 25(4) of the ICSID Convention, and the possibility for States to restrict the Centre's jurisdiction *ratione materiae* by limiting their consent to arbitration via their investment legislation and their BITs, work as compensatory mechanisms counter-balancing a wide and possibly even extensive understanding of "investment" in Art. 25(1) of the ICSID Convention. The existence of this balancing mechanism would militate for an interpretation which does not unduly place restrictions on the concept of "investment" in para. 1 but which gives it a broad scope of application, subject to the possibility of subsequent restriction by the parties.

## (3) Object and purpose

458. When it comes, thirdly, to object and purpose, the situation is less clear. The often-cited first preambular paragraph of the ICSID Convention which emphasizes "the need for international cooperation for economic development, and the role of private international investment therein"<sup>196</sup> may well be understood in different ways. While the Decision in the *Abaclat* case saw the Convention's aim in "encourag[ing] private investment while

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<sup>194</sup> However, it is worth referring to Professor Amerasinghe's caveat in this context: "dictionary definitions devised for the purpose of economic science or financial analysis may be irrelevant for the purpose of defining investment in connection with the Centre's jurisdiction. So also tax law or investment law definitions in municipal law are intended to relate to special objectives and would be of limited usefulness"; see *id.*, *The International Centre for Settlement of Investment Disputes and Development* (note 101) 180. Yet, even endorsing this argument would not result in the opposite conclusion that bonds/security entitlements are *not* covered by the term's ordinary meaning, but would rather suggest that the term is "ambiguous" in the sense of Art. 32 of the VCLT or that this is a case of a term having been given "[a] special meaning [...] if it is established that the parties so intended" (Art. 31 para. 4 of the VCLT).

<sup>195</sup> See *supra* para. 453.

<sup>196</sup> See also the Report of the Executive Directors (note 97), nr. 9 according to which the Convention was "prompted by the desire to strengthen the partnership between countries in the cause of economic development".



giving the Parties the tools to further define what kind of investment they want to promote”,<sup>197</sup> Professor Abi-Saab’s Dissenting Opinion harshly criticized this approach as

a purely subjective, truncated and partial representation of the object and purpose of the ICSID Convention and the BIT [...] [T]he object and purpose of these two treaties – the ICSID Convention and the BIT – are described as being exclusively to afford maximum protection to foreign investment and foreign investors; as if these treaties were “unilateral contracts” creating rights for the benefit of one party only.<sup>198</sup>

459. In Professor Abi-Saab’s opinion, “[t]his unilateral vision is in stark contrast to the ‘object and purpose’ of the ICSID Convention”,<sup>199</sup> notably as it becomes manifest in the Report of Executive Directors.<sup>200</sup> That the interpretation of the ICSID Convention in terms of its object and purpose can lead to both an extensive and a restrictive reading of the term “investment”, depending on what goal one ascribes to the Convention, also becomes manifest both in arbitral jurisprudence<sup>201</sup> and in the pertinent academic literature.<sup>202</sup>

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<sup>197</sup> *Abaclat* Decision, para. 364.

<sup>198</sup> Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 157.

<sup>199</sup> *Ibid.*, para. 159.

<sup>200</sup> See Report of the Executive Directors (note 97), nr. 13: “While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.”

<sup>201</sup> See, e.g., *Československa obchodní banká, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 64: “This statement [the statement in the 1965 Report of Executive Directors; see *supra* note 181] also indicates that investment as a concept should be interpreted broadly because the drafters of the Convention did not impose any restrictions on its meaning. Support for a liberal interpretation of the question whether a particular transaction constitutes an investment is also found in the first paragraph of the Preamble to the Convention [...] This language permits an inference that an international transaction which contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.” See the references to the pertinent case-law in *Schreuer*, ICSID Convention Commentary, Art. 25, para. 121, n. 145 and *Gaillard*, Identify or Define? (note 169) 407-411.

<sup>202</sup> See in this regard, e.g., *D. A. R. Williams*, Jurisdiction and Admissibility, in: P. Muchlinski et al., *The Oxford Handbook of International Investment Law*, Oxford 2008, 868, at 876 (“A broad interpretation of Article 25 ‘investment’ is supported by distinguished commentators and the awards of various tribunals.”, referring to *C. F. Amerasinghe*, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes* (note 101) 181 as well as the *CSOB v. Slovakia* and *Fedax v. Venezuela* decisions (see *supra* notes 169 and 201); *Mortenson*, *The Meaning of “Investment”* (note 183) 301 *et seq.*, arguing for “deference” to be shown by international tribunals to the judgment of sovereign states for three reasons: (a) the benefit of maximizing policy flexibility in a changing, pluralist world, allowing different Member States to pursue different policies at any given moment in time and to change their minds over time, (b) the wisdom of vesting decisional authority in the body with comparative advantages in expertise and policy legitimacy, and (c) the lack of need to protect vulnerable interests by tightening legal scrutiny. See also *Gaillard*, Identify or Define? (note 169) 406 *et seq.*

460. In this tug-of-war of judicial and scholarly opinions, the Tribunal would, by way of a tentative conclusion, resist to endorse an overly narrow reading of the term “investment” in Art. 25(1) of the Convention. In particular, the Tribunal would like to caution against a restrictive reading of the jurisdictional provisions of the ICSID Convention which does not find its base in the Convention itself, but rather draws on concerns regarding the ability, and appropriateness, of arbitral tribunals to tackle difficulties relating to the substantive side of a case. This is a question to be dealt with on the level of the merits, but should not lead tribunals to decline to hear cases in “anticipatory obedience” to real or imagined constituencies.<sup>203</sup>
461. At the same time, the Tribunal would concede that a restrictive reading is required if the consent given by a State indicates that certain types of investment should be excluded from the protection of the ICSID arbitration mechanism. The key role of the requirement of (specific) consent to arbitration on the part of States is already articulated in the last preambular paragraph<sup>204</sup> and becomes particularly and repeatedly manifest in Art. 25 of the ICSID Convention, notably in the last sentence of its para. 4. Not surprisingly, the Report of the Executive Directors<sup>205</sup> refers to consent therefore as the “cornerstone” of the jurisdiction of the Centre.
462. In the present context, the paramount argument militating against a broad understanding of the term “investment” would be that this might come as a surprise for States having subscribed to international arbitration. Yet, the Tribunal cannot see what States would lose in terms of the consent-based character of the ICSID Convention, and arbitral proceedings conducted on its basis, by the mere fact that the term “investment” in Art. 25(1) is understood in the broad terms suggested by the provision itself and seconded by the definition in the BIT that arises from the very consent of the parties, in conjunction

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<sup>203</sup> *Mortenson*, The Meaning of “Investment” (note 183) 272: “tribunals may be cutting back on their jurisdiction in an ill-formulated (and perhaps even unconscious) effort to communicate modesty to their state-constituents and avoid applying what some view as the investment regime’s increasingly overbroad *substantive* rules.” (emphasis in the original); see also *ibid*, 313 and 314.

<sup>204</sup> “Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration”.

<sup>205</sup> Report of the Executive Directors (note 97), nr. 23.

with an express authorization for investors to submit such protected investments to ICSID arbitration. In this regard, the very fact that BITs regularly combine (and do so also in the present case) a detailed definition of the term “investment” with explicit authorization for the investor to resort to ICSID arbitration, should be given great weight in deciding whether or not the transaction in question is an investment for the purposes of Art. 25 of the ICSID Convention.<sup>206</sup> As pointed out above, States have a number of ways available to them to qualify their consent and to exclude certain types of investment from their consent to arbitration.<sup>207</sup>

463. As regards the case before the Tribunal, Art. 1(1) of the Argentina-Italy BIT contains a detailed agreement between the two States parties as to what economic operations they wanted to see included in the term “investment”. Assuming that sovereign bonds/security entitlements are covered by this definition,<sup>208</sup> the *Abaclat* Tribunal convincingly concluded that leaving those outside of the scope of protection of the ICSID Convention because of a purportedly narrower definition of “investment” in Art. 25 of the Convention would “make no sense in view of Argentina’s and Italy’s express agreement to protect the value generated by these kinds of contributions [...] [T]here 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.”<sup>209</sup> In this context, Claimants have correctly noted that a narrow definition of investment excluding bonds would “unreasonably deny sovereign States [...] the possibility to promote subscription of their public debt by granting to foreign bondholders ICSID protection. Such an artificial limitation of sovereign power is unwarranted” (*C IV* § 35).

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<sup>206</sup> See *Alcoa Minerals of Jamaica v. Jamaica*, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence, 6 July 1975, 4 Yearbook of Commercial Arbitration (1979), 206, at 207; see further *Československa obchodní banká, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para. 66 according to which the parties’ acceptance of the Centre’s jurisdiction “with respect to the rights and obligations arising out of their agreement therefore creates a strong presumption that they considered their transaction to be an investment within the meaning of the ICSID Convention.”

<sup>207</sup> See *supra* para. 453. The fact that Art. 25 para. 4, once introduced into the Convention, was only scarcely used (see *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 926, 927; *Mortenson*, The Meaning of “Investment” (note 183) 294) cannot change this result.

<sup>208</sup> See *infra* paras. 488 *et seq.*

<sup>209</sup> *Abaclat* Decision, para. 364.

**(4) Subsequent State practice**

464. Subsequent State practice which, by virtue of Art. 31(3)(b) of the VCLT, shall also be taken into account in the operation of interpretation together with the context, does not lead to a conclusive result. Given the existence of both wide and restrictive definitions of the term “investment” in BITs and national investment legislation, it is hard to identify a common pattern, at least one that would exclude sovereign bonds from the scope of the term “investment” with the necessary clarity.<sup>210</sup> Accordingly, no counter-argument can be deduced from this aspect of treaty interpretation.
465. It should be noted in this regard that several tribunals have used what might be called a “state practice approach” in the sense that they were looking into whether the general inclusion of obligations in “very substantial numbers of BITs across the world” could generate an “international consensus” relevant to the interpretation of Art. 25 of the ICSID Convention.<sup>211</sup> On the basis of its own analysis, the Tribunal is, however, not in a position to draw such conclusions in the present context.

**(5) Pertinent case-law and doctrine**

466. In the light of Art. 38(1)(d) of the Statute of the International Court of Justice, one might also refer to “judicial decisions and the teachings of the most highly qualified publicists of the various nations” for the determination of rules of international law. It has been pointed out already that both on the judicial and the academic levels, there is much controversy on the meaning to be given to the term “investment” in Art. 25 of the ICSID Convention and on whether to construe it broadly or restrictively.
467. That financial investments such as the sovereign bonds/security entitlements at stake in the present case may constitute investments for the purpose of Art. 25(1) of the ICSID

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<sup>210</sup> See *Mortenson*, The Meaning of “Investment” (note 183) 312: “State practice thus seems at worst ambiguous on the question, and in no event a source of such clarity as to override the other considerations outlined here.”

<sup>211</sup> See, for instance, *Biwater Gauff (Tanzania), Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 314; *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, paras. 34-36; see *Mortenson*, The Meaning of “Investment” (note 183) 277, n. 93 and 303, n. 238.

Convention has already been confirmed in a comparable case by the *Fedax* Tribunal<sup>212</sup> and in other cases.<sup>213</sup> Even the *Joy Mining* Tribunal which is commonly cited for its strict approach to Art. 25 of the ICSID Convention has, by distinguishing *Fedax* from the facts of the *Joy Mining* case, signaled its approval of the approach taken by the *Fedax* Tribunal.<sup>214</sup>

468. In general, Professor Amerasinghe claims that “a broad approach to the interpretation of this term in Article 25 is warranted”.<sup>215</sup> Similarly, Professor Schreuer is reluctant as to the possibility to derive from the ICSID Convention itself a specific notion of “investment” that would delimit the scope of Art. 25(1) of the Convention in a meaningful way. He states that the “only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble’s first sentence [...] Therefore, it is arguable that the Convention’s object and purpose indicate that there should be some positive impact on development.”<sup>216</sup> Furthermore, in the recent second edition of his ICSID Convention Commentary and already in view of the cases dealing with Argentine sovereign bonds pending before ICSID tribunals, Professor Schreuer

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<sup>212</sup> *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, 11 July 1997, para. 29 where the Tribunal concluded, in the light of the broad scope of Art. 25 of the ICSID Convention, that “loans qualify as an investment within ICSID’s jurisdiction, as does, in given circumstances, the purchase of bonds. Since promissory notes are evidence of a loan and a rather typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention in the circumstances of a particular case like this.”

<sup>213</sup> See *Schreuer*, ICSID Commentary, Art. 25, para. 149 and its references to *Československa obchodní banká, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, paras. 76-91; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/15, Award, 28 September 2007, paras. 214-216 as well as *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14, Award, 17 December 2003, paras. 6, 8, 18, 21; see, however, also *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, paras. 42-50 and *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004, para. 189. See in this regard also *Dolzer/Schreuer*, *Principles of International Investment Law* (note 127) 66, 67; *Waibel*, *Opening Pandora’s Box* (note 178) 720-722.

<sup>214</sup> *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, paras. 60 and 61: “Even the much cited *Fedax* case is to be distinguished from the present one although it admitted that financial contributions made in the form of promissory notes did qualify as an investment. [...] [T]he element that persuaded the tribunal to reach that conclusion was that the financing in question *had and was being used by the State to finance its budget under a law of public credit* [...] The situation in this case is clearly not of the same nature.” (emphasis added); see *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, 11 July 1997, para. 42 in this regard.

<sup>215</sup> *Amerasinghe*, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes* (note 101) 181.

<sup>216</sup> *Schreuer*, ICSID Convention Commentary, Art. 25, para. 121, with references to the pertinent case-law.

specifically submits that “[f]inancial instruments such as loans or the purchase of bonds may qualify as investments”.<sup>217</sup>

469. This position is seconded by Georges R. Delaume according to whom it “is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID”.<sup>218</sup> In particular, he submits that “the characterization of transnational loans as ‘investments’ has not raised difficulty [...] [F]rom the origin of the Convention [it has been assumed] that longer term loans were included in the concept of ‘investment’”.<sup>219</sup> Compared to that, the dissenting voices have remained in the minority.<sup>220</sup> Moreover, it is interesting to recall in this context that attempts were made in the drafting process of the ICSID Convention to eliminate its application to bonds, loans and capital flow, but all of these were rejected.<sup>221</sup>

## (6) Conclusion

470. As a result, the Tribunal would conclude that the term “investment” in Art. 25 of the ICSID Convention, when interpreted in accordance with its ordinary meaning, in its context and in the light of the object and purpose of the Convention, is to be given a broad meaning, i.e. with jurisdictional limits arising from this provision only at the outer margins of economic activity.<sup>222</sup> There is no need here for the Tribunal to decide the

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<sup>217</sup> *Ibid.*, Art. 25, para. 149 with further references in n. 191.

<sup>218</sup> *G. R. Delaume*, ICSID and the Transnational Financial Community, 1 ICSID Review (1986) 237, at 242.

<sup>219</sup> See *ibid.*, 239 and 240; see also *I.F.I. Shihata*, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID Review (1986) 1, at 4; see, however, the criticism by *Waibel*, Opening Pandora’s Box (note 178) 722.

<sup>220</sup> See, in particular, *Waibel*, Opening Pandora’s Box (note 178); *id.*, Sovereign Defaults before International Courts and Tribunals, Cambridge 2011, 219 *et seq.*; *Gaillard*, Identify or Define? (note 169) 404 *et seq.*

<sup>221</sup> See references *supra* note 190. In particular, Australia’s position according to which the draft of the Convention also covered phenomena such as the “borrowing of cash by the host country from foreign private investors” deserves mention; see Consultative Meeting of Legal Experts, Bangkok, 27 April-1 May 1946, in Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1968), Vol. II, 474.

<sup>222</sup> Even Professor *Abi-Saab* in his fervent Dissenting Opinion in the *Abaclat* case concedes in paras. 45, 46 that “[i]t is true that the[] outer-limits [of the types of dispute that can be treated within ICSID] bound a vast ambit [...] leav[ing] much latitude and a wide margin of interpretation and further specification to States in their BITs”. He insists, however, that limits “exist all the same” and that the term “investment” in Art. 25(1) of the ICSID Convention is “not infinitely elastic”, the latter statement referring to *Waibel*, Opening Pandora’s Box (note 178) 722.

question whether one should go as far as including any “plausibly economic activity or asset” under the umbrella of Art. 25 of the Convention as long as States are prepared to subject it to ICSID jurisdiction.<sup>223</sup> In fact, there are good reasons to leave a single commercial transaction such as the delivery of a single load of cars outside the concept of investment and thus outside the subject-matter jurisdiction of the Centre.<sup>224</sup>

471. Sovereign bonds and security entitlements based thereupon are, however, in no way comparable to single commercial transactions. Notwithstanding the peculiarities of these financial instruments<sup>225</sup>, in the light of the broad understanding to be given to Art. 25 of the ICSID Convention, the Tribunal has no doubt that bonds/security entitlements such as those at stake in the present proceedings fall under the term “investment” as used in Art. 25 of the Convention.
472. Accordingly, the Tribunal can see no reason why sovereign bonds/security entitlements should be excluded from the jurisdiction of the Centre and, for that matter, from the competence of this Tribunal, if and to the extent that there is evidence that the States parties, i.e. Argentina and Italy, considered those to be investments to be protected, in view of which they both gave their “advance and irrevocable consent that any dispute [on this basis] may be submitted to arbitration” (Art. 8(3) of the Argentina-Italy BIT). Hence, sovereign bonds/security entitlements are covered by the term “investment” in Art. 25(1) of the ICSID Convention.

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<sup>223</sup> See notably *Mortenson*, The Meaning of “Investment” (note 183) 300.

<sup>224</sup> See *Dolzer/Schreuer*, Principles of International Investment Law (note 127) 70; *Schreuer*, ICSID Convention Commentary, Art. 25, para. 122; *Mortenson*, The Meaning of “Investment” (note 183) 269, n. 38 with further references; see *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, para. 42; *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, paras. 43-45 and 52; see also the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 45, n. 7 with further references.

<sup>225</sup> See the description of the “anomalous” features of such financial instruments in the Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 57: “Such widely dispersed off-the shelf financial products, with their high velocity of circulation and their remoteness, the same as their holders, from the State in whose territory the investment is supposed to take place (being traded within seconds at the touch of a button in capital markets, with no involvement or knowledge of the borrowing country, nor passage through the territory or the legal system of that State), seem at first blush to be worlds apart from the direct foreign investment model, which is usually long negotiated and extensively embedded in the legal environment of the host State.” See, in a similar vein, *ibid*, paras. 108 and 118.

473. Against this background, there is no need to refer to Art. 32 of the VCLT, apart from noting that the account of the circumstances of the adoption of Art. 25(1) of the ICSID Convention “confirms the meaning resulting from the application” of Art. 31 of the VCLT, as provided for by Art. 32 of the Vienna Convention.
474. Alternatively, even if one were not to endorse the Tribunal’s conclusion as to the meaning of the term “investment” in Art. 25 of the ICSID Convention including bonds/security entitlements, one would at least have to concede that the meaning of the term was left “ambiguous or obscure”. Art. 32 of the VCLT would then call for the use, as a supplementary means of interpretation, of the preparatory work of the treaty and the circumstances of its conclusion. As described above<sup>226</sup>, this would clearly point into the direction of the term “investment” as encompassing financial instruments such as bonds/security entitlements, subject to relevant statements on the part of the concerned States that would exclude such instruments from the scope of protected investments.

**5. The relevance of the so-called *Salini* test in the interpretation of the concept of “investment” in Art. 25(1) of the ICSID Convention**

***a) The non-jurisdictional nature of the so-called Salini test***

475. In *Salini v. Morocco*<sup>227</sup>, the Tribunal had to deal with the construction of a highway by Italian contractors in Morocco. The Respondent in this case argued that the construction contract did not constitute an investment. In order to answer this question, the Tribunal examined several criteria and concluded that the contract in question did qualify as an investment pursuant to the definition in the pertinent BIT in combination with Art. 25(1) of the ICSID Convention.<sup>228</sup>

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<sup>226</sup> See *supra* paras. 448 *et seq.*

<sup>227</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

<sup>228</sup> See *ibid.*, para. 45; see in this regard also *Schlemmer*, Investment, Investor, Nationality, and Shareholders (note 188) 67.



476. Since then, several tribunals have proceeded in a similar fashion using similar criteria with the consequence that the test has become known as the “*Salini test*”.<sup>229</sup> With certain variations<sup>230</sup>, it includes the following elements: (a) the existence of a substantial contribution, (b) the project should have a certain duration, (c) participation in the risks of the transaction beyond the mere risk arising from a commercial transaction, (d) regularity of profit and return for the investors as well as (e) significance of the operation for the host State’s development.<sup>231</sup>
477. Of particular relevance to the present case are the decisions in the *Fedax* and *Joy Mining* cases.<sup>232</sup> In the first of these cases, *Fedax*, the question at stake was whether promissory notes would qualify as an investment, a question that was affirmed by the Tribunal.<sup>233</sup> In contrast, in *Joy Mining*<sup>234</sup>, the Tribunal had to decide whether certain performance guarantees would amount to an investment. Arguing that there was no risk involved and that the relevant period was too short and also implicitly challenging whether the guarantees contributed to the economic development of the host country, the Tribunal concluded that the performance guarantees would not qualify as an investment.<sup>235</sup>
478. The *Salini* test and the afore-mentioned decisions have become the point of departure for a line of cases in which the deciding tribunals felt a need to fill the concept of “investment” in Art. 25(1) of the ICSID Convention with an independent meaning whose contours are considered to be expressed by the *Salini* criteria. This implies that an investment has to pass not only the threshold of the relevant BIT and the rather general

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<sup>229</sup> See the discussion of cases in *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 154 *et seq.* and 159, 160; *Dolzer/Schreuer*, Principles of International Investment Law (note 127) 68, 69; *Gaillard*, Identify or Define? (note 169) 404, 411; *Mortenson*, The Meaning of “Investment” (note 183) 274 *et seq.* and 277, n. 91-93 with further references.

<sup>230</sup> See, e.g., *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004, paras. 53-57; *Mortenson*, The Meaning of “Investment” (note 183) 273, n. 60-63 with further references.

<sup>231</sup> See *Schreuer*, ICSID Convention Commentary, Art. 25, para. 153; *Schlemmer*, Investment, Investor, Nationality, and Shareholders (note 188) 65, with further references.

<sup>232</sup> As to these two cases see also *infra* para. 467

<sup>233</sup> *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, paras. 21-29 and 43.

<sup>234</sup> *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004.

<sup>235</sup> See *ibid.*, paras. 53-63; see also *Schlemmer*, Investment, Investor, Nationality, and Shareholders (note 188) 68 in this regard.

requirements of an investment under Art. 25 of the ICSID Convention as set out before. It has to overcome, in addition, a higher hurdle that underlies the term “investment” in Art. 25, with a mandatory *Salini*-style test. This approach has become the basis for a peculiar, and amplified, version of the double barreled test. As a result, what has occurred in several instances was that, while an economic operation or asset managed to pass the test in regard to the pertinent BIT, it failed to meet the standards purportedly governing, in the deciding tribunal’s view, the application of Art. 25 of the ICSID Convention, thus leading to the tribunal in question dismissing the case for lack of jurisdiction *ratione materiae*.

479. Whether one should rely on the *Salini* test at all and, in particular, whether the ICSID Convention justifies to construe it as embodying *jurisdictional* requirements, meaning that a lack of realization of one of the elements of the test would imply lack of jurisdiction and thus the duty for the Tribunal to dismiss the case, has been subject to controversy. The preceding analysis has also made clear that the present Tribunal endorses the view that the term “investment” in Art. 25(1) of the ICSID Convention should not be subjected to an unduly restrictive interpretation. Hence, the *Salini* criteria, if useful at all, must not be conceived of as expressing jurisdictional requirements *stricto sensu*.
480. The Commentary to the ICSID Convention to which both Parties have referred in the present case, approaches the matter in a similar fashion. In the Commentary’s first edition, Professor Schreuer identified the five criteria enumerated above<sup>236</sup> and characterized them as “typical” to “most of the operations” that have been subject to ICSID proceedings. He then added an important qualification: “These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”<sup>237</sup> In the second edition of the Commentary, Professor Schreuer comments on the rise of the *Salini* test in these words: “The development in practice from a descriptive list of typical features towards a set of

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<sup>236</sup> *Schreuer*, ICSID Convention Commentary, 1<sup>st</sup> ed., Art. 25, para. 122: (a) “a certain duration” of the enterprise, (b) “a certain regularity of profit and return”, (iii) an “assumption of risk”, (iv) a “substantial” commitment by the investor, and (e) some “significance for the host State’s development”; see *supra* para. 476.

<sup>237</sup> *Ibid.*, para. 122; see now *Schreuer*, ICSID Convention Commentary, Art. 25, para. 153.

mandatory legal requirements is unfortunate. The First Edition of this Commentary cannot serve as authority for this development.”<sup>238</sup>

481. Following Professor Schreuer’s approach, the criteria assembled in the *Salini* test, while not constituting mandatory prerequisites for the jurisdiction of the Centre in the meaning of Art. 25 of the ICSID Convention, may still prove useful, provided that they are treated as guidelines and that they are applied in conjunction and in a flexible manner.<sup>239</sup> In particular, they may help to identify, and exclude, extreme phenomena that must remain outside of even a broad reading of the term “investment” in Art. 25 of the ICSID Convention.<sup>240</sup> Nonetheless, the basic character, and rationale, of the “non-definition” of investment allow Art. 25(1) of the ICSID Convention to cover a wide range of economic operations and assets, susceptible to include non-standard and atypical investments and capable of adapting to the evolving nature of economic activity.<sup>241</sup>

**b) *The application of the Salini test to the bonds/security entitlements in the present case***

482. Having given the “*Salini* test” its proper place when assessing the jurisdiction *ratione materiae* in the present case, in the Tribunal’s view, the bonds/security entitlements which are at stake in the present proceedings fulfill the criteria generally ascribed to the *Salini* test. In this context, the Tribunal would recall that it is important to bear in mind

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<sup>238</sup> *Schreuer*, ICSID Convention Commentary, Art. 25, para. 171.

<sup>239</sup> See *Salini Costruttori S.p.A. and Italstrate S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52: “In reality, these various elements may be interdependent [...] As a result, these various criteria should be assessed *globally* even if, for the sake of reasoning, the Tribunal considers them individually here.” (emphasis added) See further *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 171, 172 and 174 (“In fact, tribunals have pointed out repeatedly that the criteria they applied were interrelated and should be looked at not in isolation but in conjunction. [...] A rigid list of criteria that must be met in every case is not likely to facilitate the task of tribunals or to make decisions more predictable.”), with further references; see also *Dolzer/Schreuer*, Principles of International Investment Law (note 127) 69, n. 141; *Schlemmer*, Investment, Investor, Nationality, and Shareholders (note 188) 66: “Although these basic criteria are generally applied, it cannot be regarded as a *numerus clausus*. There are a number of instances, involving non-traditional types of investment transactions, where one cannot just rely on these criteria *in abstracto* but has to look at all the circumstances of the case in a flexible manner.”

<sup>240</sup> See *supra* para. 470.

<sup>241</sup> See *Mihaly International Corporation v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, para. 33 characterizing the fact that the term “investment” is left undefined by the ICSID Convention as “preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment”.

that the investment at stake constitutes an economic unity<sup>242</sup> and should not be split up in separate economic operations.

483. As regards, first, the prerequisite of a *substantial contribution on the part of the investor*<sup>243</sup>, it is not relevant that the contribution of the single Claimant might have been minor. What counts is that the bonds issued as a whole amounted, without doubt, to a substantial contribution on the investors' part.
484. Secondly, while Respondent argues that the *minimum duration* for an investment is two to five years (*Tr p. 137/18*)<sup>244</sup> and that Claimants would generally not hold their security entitlements for that amount of time (or have at least not provided evidence for this), it is the duration of the bonds issued that is relevant. This was also confirmed in the *Fedax* case where the Tribunal accepted that the endorsement of negotiable promissory notes left the duration of the investment untouched.<sup>245</sup>
485. Thirdly, in terms of the requirement of an *operational* as opposed to a mere commercial risk, Respondent submits that the risk assumed by the Claimants of not being paid is not different from that involved in any commercial contract between a creditor and a debtor and that such ordinary commercial contracts cannot be considered an investment (*R I §§ 164, 165*). However, given the risk of the host State's sovereign intervention, a risk that became manifest in Argentina's very default and restructuring, what is at stake is not an ordinary commercial risk.<sup>246</sup>

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<sup>242</sup> See *supra* paras. 422 *et seq.*

<sup>243</sup> See in general *Schreuer*, ICSID Convention Commentary, Art. 25, para. 161 with further references; see also *Schlemmer*, Investment, Investor, Nationality, and Shareholders (note 188) 68; *Gaillard*, Identify or Define? (note 169) 415, 416.

<sup>244</sup> See in general *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 162-170 and 173, 174; *Waibel*, Opening Pandora's Box (note 178) 724-726; *Gaillard*, Identify or Define? (note 169) 404, 405; see furthermore *Salini Costruttori S.p.A. and Italstrate S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 45.

<sup>245</sup> See *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, para. 43.

<sup>246</sup> As to the generally generous application of this criterion see *Schreuer*, ICSID Convention Commentary, Art. 25, para. 163; see also *Waibel*, Opening Pandora's Box (note 178) 726; *Williams*, Jurisdiction and Admissibility (note 202) 880; *Gaillard*, Identify or Define? (note 169); *Mortenson*, The Meaning of "Investment" (note 183) 298, n. 220.

486. Fourthly, apart from the generally doubtful existence of the criterion of *regularity of profits and returns* as an independent element of the *Salini* test,<sup>247</sup> the Respondent's argument that security entitlements are transferred easily and frequently cannot convince. Again, the bonds and security entitlements have to be deemed a single economic operation, with the interest supposed to be paid periodically satisfying the criterion of regularity of profits and returns.
487. Fifthly, regarding the prerequisite of a *significant contribution to the development of the host country*, there can be no doubt, given the unity of the economic operation at stake, that the funds generated through the bonds issuance process were ultimately made available to Argentina and must be deemed to have contributed to Argentina's economic development.<sup>248</sup> In view of the volume of the bonds involvement, the contribution was certainly significant to Argentina's development.<sup>249</sup>

## **6. The meaning of "investment" under Art. 1(1) of the Argentina-Italy BIT**

488. The definition of the term "investment" in Art. 1(1) of the Argentina-Italy BIT contains a non-exhaustive list of different types of investments falling under the protective umbrella of the BIT (*arg.* "the following are specifically, but not exclusively, considered to be investments").<sup>250</sup>
489. In particular, lit. c specifically addresses financial instruments. However, there has been strong disagreement between the Parties as to how to properly understand the terms used

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<sup>247</sup> See *Schreuer*, ICSID Convention Commentary, Art. 25, para. 157.

<sup>248</sup> See also *Abaclat* Decision, para. 378.

<sup>249</sup> As to the controversial criterion of a contribution to the host State's development see *Schreuer*, ICSID Convention Commentary, Art. 25, para. 164 as well as paras. 173, 174: "A test that turns on the contribution to the host State's development should be treated with particular care. [...] Any concept of economic development, if it were to serve as a yardstick for the existence of an investment and hence for protection under ICSID, should be treated with some flexibility." See also *Schlemmer*, Investment, Investor, Nationality, and Shareholders (note 188) 68; *Mortenson*, The Meaning of "Investment" (note 183) 274; *Waibel*, Opening Pandora's Box (note 178) 723, 724; *Gaillard*, Identify or Define? (note 169) 413, 414.

<sup>250</sup> See also the authentic Spanish and Italian versions: "son considerados en particular como inversiones, aunque no en forma exclusiva" and "sono considerati specificamente come investimenti, anche se non in forma esclusiva".

in the authentic Spanish and Italian versions of the BIT<sup>251</sup> and how to adequately translate them into English. In particular, it has been controversial whether the term “obligaciones” in Spanish and “obbligazioni” in Italian should be translated as “bonds”, as suggested by the Claimants, or “obligations”, as contended by the Respondent.

490. The Tribunal considers in this regard that whatever position one wants to take on the translation issue, there can be no doubt that Art. 1(1) of the Argentina-Italy BIT covers the bonds/security entitlements at stake in the present proceedings.
491. To begin with, even following the Respondent’s argument as to the translation of the terms “obligaciones” and “obbligazioni”, this would only mean to replace the concept of “bonds” by the admittedly broader concept of “obligations” which would, however, still include bonds/security entitlements. While the Respondent has focused its argument on the translation issue, it has not explained to the satisfaction of the Tribunal how one could derive from the wording of the Spanish and Italian authentic versions that the Parties excluded bonds/security entitlements from the purview of the Argentina-Italy BIT because they did not use the words “bonos” in Spanish and “titoli obbligazionari” in Italian (*R II* §§ 292, 296). At most, it might be argued that the Parties opted to use a generic term covering all types of obligations, thus including bonds/security entitlements. Had the Parties sought to actually exclude those instruments from the scope of the application of the BIT, they would have had to say so explicitly.
492. This conclusion is corroborated by the fact that lit. c further includes “any other right to benefits or services with an economic value”.<sup>252</sup> The use of this residual or “catch-all” clause clearly indicates that the Parties to the Argentina-Italy BIT sought to make lit. c a comprehensive provision encompassing all types of obligations and comparable rights as long as they have an economic value. It is obvious that the very object of such residual clause is to include all rights having an economic value, even if they were to be deemed

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<sup>251</sup> See the authentic Spanish and Italian versions: “obligaciones, títulos públicos o privados o cualquier otro derecho a prestaciones o servicios que tengan un valor económico, como también las ganancias capitalizadas” and “obbligazioni, titoli pubblici o private o qualsiasi altro diritto per prestazioni o servizi che abbiano un valore economico, come altresì redditi capitalizzati”.

<sup>252</sup> Translation of the Respondent; see also the Claimants’ translation: “any other right for performances or services that have an economic value” (see *supra* para. 418).

to be “non-standard” or “atypical”, rather than excluding any such right, without a very specific reason to do so. Yet, such a reason has not been brought to the fore during the present proceedings.

493. Moreover, in the same spirit, Art. 1(1)(f) of the Argentina-Italy BIT contains a further catch-all clause bringing “any right of an economic nature granted by law or by contract”<sup>253</sup> into the purview of the BIT. The Tribunal seconds the finding of the majority decision in the *Abaclat* case which, pronouncing itself on its jurisdiction on the basis of the same Argentina-Italy BIT, concluded that “the definition provided for in Art. 1(1) is not drafted in a restrictive way. Based on its wording, Art. 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.”<sup>254</sup> Given this state of affairs, the present Tribunal thus cannot see how it could be concluded that the bonds/security entitlements at stake in the present proceedings would not fall under at least one of these provisions.
494. It deserves particular mention that this was also the position taken by Professor Abi-Saab in his Dissenting Opinion in the *Abaclat* case in which he was otherwise very critical of the approach taken by the majority decision recognizing bonds/security entitlements as “investments” under the relevant provisions of the ICSID Convention and the Argentina-Italy BIT. Professor Abi-Saab specifically stated that “Article 1/1/c covers financial instruments, and that its language is large enough to encompass the security entitlements in the Argentinean bonds”.<sup>255</sup>
495. Hence, the Tribunal is fully convinced that the bonds/security entitlements pertinent to the present case fall into the scope of application of the list of investments laid down in Art. 1(1)(a)-(f) of the Argentina-Italy BIT.

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<sup>253</sup> Translation of the Respondent; see also the Claimants’ translation: “any right having an economic value conferred by law or contract” (see *supra* para. 418).

<sup>254</sup> *Abaclat* Decision, para. 354.

<sup>255</sup> Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 68; see, in a similar vein, *Waibel*, Opening Pandora’s Box (note 178) 730.

**7. Investment made “in the territory” of Argentina**

496. It is agreed between the Parties that, in addition to having to fall into the afore-mentioned list of investments, the chapeau of Art. 1(1) of the Argentina-Italy BIT further requires that the contribution at stake be invested “in the territory” of the host State in order for the contribution to qualify as a protected investment “for the purposes of this Agreement”. This territoriality requirement is reinforced by being repeated in the second preambular paragraph and in Art. 1(2) of the Argentina-Italy BIT.
497. The Parties have expressed very different views on the question whether the territoriality requirement is met in the present case. Respondent submits, in essence, that it is impossible for a financial instrument which was issued outside Argentine territory and is not physically held in Argentina, which is subject to foreign laws and enforceable in foreign jurisdictions, which is registered in the accounts of banks located outside Argentina and whose proceeds did not accrue to Argentina, to qualify as an investment “in the territory” of Argentina. Claimants reject this argument and focus on who benefitted from the investments in question in order to identify the *situs* of the investment at stake. The Claimants do not consider choice of law and forum clauses pointing to other legal orders than Argentine law to prove an investment to be a non-Argentine one.
498. The Tribunal would consider in regard to the territoriality requirement, as enshrined in Art. 1(1) of the Argentina-Italy BIT, that, given the character of the investments at stake, the decisive criterion cannot be whether those are physically located in Argentina, as suggested by the Respondent. By their very nature, financial instruments such as bonds/security entitlements are not physical investments such as a piece of land, an industrial plant or a mine, as correctly pointed out by the Claimants.
499. The Tribunal is convinced that, in order to identify in which State’s territory an investment was made, one has to determine first which State benefits from this investment. Most observers will agree that the one criterion which may be taken from the ICSID Convention itself when it comes to determining the nature of an investment under this Convention, is that of a contribution “for economic development”, as referred to in



the first preambular paragraph of the ICSID Convention.<sup>256</sup> Accordingly, to assess where an investment was made, the criterion must be to whose economic development an investment contributed.

500. The present Tribunal thus cannot come to any other conclusion than identifying the Respondent as the beneficiary of the investment at stake in the present proceedings. It would like to recall, in this context, the importance to conceive of the investment in question as a unified economic operation.<sup>257</sup> The whole bond issuing process, notably including the circulation of security entitlements on the secondary market, was devised – and specifically intended by the Respondent itself – to raise money for the budgetary needs of Argentina and thus to further the development of that State.

501. Hence, the Tribunal cannot endorse the argument made by the Respondent that, while the issuance of the bonds might have benefitted Argentina and might have allowed it to refinance part of its foreign debt, the proceeds of Claimants’ purchases of security entitlements did not accrue to the Respondent (*R II § 357*), since such an approach ignores the realities of the bond issuing process and negates the very reasons for which the Respondent undertook to issue the bonds in question with the underwriters.

502. In this context, the present Tribunal is also sympathetic to the statement by the *Abaclat* Tribunal<sup>258</sup> which endorsed an analogous type of reasoning and found

that the determination of the place of the investment depends, in the first instance, 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 were the invested funds ultimately

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<sup>256</sup> See *Schreuer*, ICSID Convention Commentary, Art. 25, para. 121, with references to the pertinent case-law (n. 145): “only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble’s first sentence [...] Therefore, it is arguable that the Convention’s object and purpose indicate that there should be some positive impact on development.”

<sup>257</sup> See *supra* para. 429.

<sup>258</sup> *Abaclat* Decision, para. 374.

made available to the Host State and did they support the latter's economic development?<sup>259</sup>

503. Similarly, the Tribunal does not see any need for the Claimants to prove that the funds in question can be traced to a specific project, enterprise or activity in the host State's territory. Nowhere in the Argentina-Italy BIT can such "specificity requirement" complementing the prerequisite of territoriality be found.<sup>260</sup> Claimants are right to point out that the proceeds of the bond issuances were, at least in the beginning, included in Argentina's official budget and that the pertinent Argentine legislation had to provide that the purpose of each financing must be authorized and specified by the law (*C IV § 45, 47*).<sup>261</sup>
504. To which extent and in which ways those funds made available to the Respondent were actually used for promoting the economic development of Argentina does not fall into the

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<sup>259</sup> In this regard, the *Abaclat* Tribunal notably refers to *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997, para. 41: "It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers and other entities. [...] The important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs. It is not disputed in this case that the Republic of Venezuela, by means of the promissory notes, received an amount of credit that was put to work during a period of time for its financial needs." See further *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, paras. 136-140, where emphasis was laid on the fact that the aim of SGS's activity was to "raise the financial revenue of the State" (*ibid.*, para. 139); *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 111; *Československa obchodní banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, paras. 78, 79. See furthermore, *Schreuer*, ICSID Convention Commentary, Art. 25, paras. 192 *et seq.*, notably paras. 197, 198: "Where the document providing the basis of consent refers to investment in the territory of a State, a certain degree of flexibility is appropriate. Not all investment activities are physically located on the host State. This is particularly true of financial instruments. [...] If a treaty includes loans and claims to money in its definition of investment, it would be unrealistic to require a physical presence in or a transfer of funds into the host State [...] In cases involving financial obligations the *locus* of the investment can often be determined by reference to the debtor and its location. In this way financial instruments issued by States have their *situs* in that State."

<sup>260</sup> See also *Abaclat* Decision, para. 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 that in Art. 1 of their 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."

<sup>261</sup> See also *Abaclat* Decision, para. 44 where it is mentioned that the issuance of Argentina's sovereign bonds, as governed by Law No. 24.156 on Financial Administration and Control Systems (LFA), required that either a specific law must authorize the loan or that it must be included in a general authorization contained in the annual budget law. Therein, amongst others, the "purpose of financing" must be specified (see Art. 60 LFA; see also *C IV § 45*, referring to Art. 56 LFA).

sphere of the Claimants. Nor is it relevant whether the individual Claimants, when purchasing the security entitlements, actually believed or were aware that they were making “an investment in Argentina”. It suffices that, by virtue of the bonds issuance process and the circulation of bonds/security entitlements, funds were made available to the Respondent that were at its disposal to foster its economic development, and this notably suffices to qualify the investment at stake as one made “in the territory” of Argentina.

505. Again, the Tribunal deems it appropriate to point out that the *Abaclat* Tribunal reached a similar conclusion when finding that

[t]here 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.<sup>262</sup>

506. In contrast, the Tribunal would not attribute particular significance to the fact that the different contracts involved in the complex machinery and on the different levels of the bonds issuing process are governed by non-Argentine laws and enforceable in non-Argentine jurisdictions. The Claimants’ argument that an investment project physically located in the Respondent’s territory but in case of which the relevant contracts contain choice of law and forum clauses pointing to other legal orders than that of Argentina, would still be considered an investment project in the territory of the Respondent (*CI* §§ 287, 288; *Tr p. 192/6*), is persuasive in the eyes of the Tribunal.
507. In addition, inasmuch as Respondent contends that it could not exercise any sovereign right in respect of Claimants’ alleged investments, the Tribunal is not convinced by this argument. It was notably through the operation of Law No. 26.017<sup>263</sup> that the Respondent sought to influence the terms of the bonds/security entitlements issued by it. In addition, nowhere in the ICSID Convention or the Argentina-Italy BIT it is said that an investment

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<sup>262</sup> *Abaclat* Decision, para. 378.

<sup>263</sup> See *infra* note 285.

may only be considered to be made in the territory of the host State if that State can exercise full sovereign rights or, for that matter, otherwise full control in regard to those investments.

508. In sum, the Tribunal is convinced that, looking at the investment operation at stake as a whole and in terms of its economic realities, it is hard to imagine the investment's *situs* to be elsewhere than in Argentina. While the Respondent is right to point out that a number of "connecting factors" (*R IV p. 15*) do not point to Argentina, the Tribunal cannot join the Respondent's conclusion that the investment was not made in the Respondent's territory since the decisive elements, notably the fact that the funds involved were destined to contribute to Argentina's economic development and were actually made available to it for that purpose, qualify the investments pertinent to the present case as having been made in Argentina.
509. In regard to the bonds/security entitlements at stake, the only alternative conclusion to be drawn would be to state that those have their *situs* nowhere, as the Respondent could not point to any other jurisdiction that would have closer links to the investments at issue. This would, however, imply that those investments fall out of the protection of investment law completely. Yet, as far as the present Tribunal is concerned, such position cannot be reconciled with the obvious intent of the Parties, when concluding the Argentina-Italy BIT, to make Art. 1(1) of the BIT cover various types of obligations, including financial instruments such as bonds/security entitlements, in view of which they must have been aware that those would often have a *situs* not as clearly identifiable as that of a mine or industrial plant.
510. Consequently, the Tribunal concludes that the bonds/security entitlements at stake in the present proceedings are investments made in the territory of Argentina for the purposes of Art. 1(1) of the Argentina-Italy BIT.

**8. Investment made "in accordance with the laws and regulations" of Argentina**

511. Finally, the Respondent has pointed to a further requirement contained in the chapeau of Art. 1(1) of the Argentina-Italy BIT, namely that the investment in question must be "in

accordance with the laws and regulations” of the host State, in order for an investment to fall within the scope of application *ratione materiae* of the BIT.

512. The Tribunal does not see any reason why the investments at stake should not be in accordance with the laws and regulations of the host State, i.e. Argentina. During the proceedings, no argument has been brought before the Tribunal that the bonds/security entitlements would have violated any provision of Argentine law.
513. However, the Respondent submits that, according to Art. 8(7) of the Argentina-Italy BIT, the Tribunal “shall make its decision based on the laws of the Contracting Party involved in the dispute – including its rules on conflict of laws –, the provisions of this Agreement, the terms of any particular agreements entered into regarding the investment, as well as applicable principles of international law”. The Respondent further contends that Argentine law provides that the validity and nature of contracts executed outside Argentina shall be governed by the laws of the place where the contract was executed, i.e. Italy, so that Italian law is to be applied to the security entitlements at hand (*RI* § 205; *Tr p. 144/21*).
514. In that respect, the Tribunal would endorse the position of the *Abaclat* Tribunal which understands Art. 8(7) of the Argentina-Italy BIT as dealing exclusively with the law applicable to the merits of the dispute, but not as serving as a basis to extend the definition of investment as provided for in Art. 1(1) of the BIT, as these two provisions “have different contexts and different purposes”.<sup>264</sup>
515. The present Tribunal would recall in this regard that it already addressed a related question, pertaining to the consent of the Claimants, more particularly regarding the question of the purported invalidity of the Power of Attorney. The Tribunal concluded that this question must be dealt with solely on the basis of Art. 25(1) of the ICSID Convention (as the pertinent provision for assessing questions of jurisdiction), as opposed to Art. 42 of the Convention which is supposed to address the law applicable to the merits

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<sup>264</sup> See *Abaclat* Decision, para. 383.

of the dispute.<sup>265</sup> Against this background, the Tribunal takes the position that an analogous reasoning should apply *mutatis mutandis* to the question at stake here.

516. In addition, this result also makes sense in the light of the object and purpose of this provision. The Tribunal would agree with the submission of the Claimants that the provisions of the host State's law contemplated by the "in accordance with the laws and regulations" clause essentially relate to "the rules of public law or administrative law of the host State that forbid certain types of investments or require that these be made respecting certain principles aimed at protecting the interests of the host State" (*C I* § 300). Hence, economic operations shall notably be excluded from the purview of protected investments when they are not compatible with the *ordre public* of the host State.
517. In conclusion, the question of jurisdiction *ratione materiae* in respect of the "in accordance with the laws and regulations" clause must be solved on the sole basis of Art. 1(1) of the BIT, i.e. by reference to Argentine law, and not by relying upon Art. 8(7) of the BIT. Accordingly, as there is no indication whatsoever that provisions of Argentine law have been violated by the bonds/security entitlements pertinent to the present case, the Tribunal must conclude that also this requirement of jurisdiction *ratione materiae* is fulfilled.
518. Yet, even if one were to adopt the position that Italian substantive law was applicable to the question at stake, this would not lead to a different outcome. Assuming *arguendo* that the selling restrictions on security entitlements contained in Italian law reached the extent which has been suggested by the Respondent, the purported illegality would not have been committed by the Claimants, but by a third party, namely Italian banks and financial intermediaries. Furthermore, this illegality would have been committed at the expense of the Claimants themselves, and not to the detriment of the Respondent. Given that the "in accordance with the law and regulations" clause serves to protect the host State's *ordre public*, the Tribunal cannot see how such violations of Italian law, even if proved to have

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<sup>265</sup> See *supra* paras. 233 *et seq.*

taken place, could negatively affect the qualification of the investments at stake as being in accordance with the laws and regulations of the host State.<sup>266</sup>

519. Consequently, the bonds/security entitlements were made in accordance with the laws and regulations of Argentina pursuant to Art. 1(1) of the Argentina-Italy BIT.

## **9. Conclusion**

520. Having rejected all preliminary objections of the Respondent as to the purported lack of jurisdiction *ratione materiae* and having assured itself that all requirements in this regard are satisfied in respect of the pertinent bonds and security entitlements, both under Art. 25 of the ICSID Convention and Art. 1(1) of the Argentina-Italy BIT, the Tribunal concludes that, as far as the requirement of the existence of a legal dispute arising directly out of an investment is concerned, there exists jurisdiction of the Centre and, for that matter, competence of the present Tribunal to decide the case at hand.

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<sup>266</sup> See also *Abaclat* Decision, para. 385 in that regard: “The alleged breach of applicable regulations on which Respondent relies, concerns breaches allegedly committed by the Italian banks and not by Claimants. 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 Art. 1 para. 1 of the Argentina-Italy BIT.”

## V. EXISTENCE OF *PRIMA FACIE* TREATY CLAIMS

### A. Positions of the Parties

#### 1. Contentions by Respondent

521. The Respondent submits that it is well established that an international court or tribunal must satisfy itself, at the jurisdictional stage, that the case presented by a claimant is capable of coming within the provisions of the treaty that has been invoked (*R I* § 217; *R III* § 150; *Tr p.* 97/21). As regards this so-called *prima facie* test, in the Respondent's opinion, the allegations pleaded by Claimants are not capable of establishing the violations of the provisions of the Argentina-Italy BIT invoked in the Request (*R I* § 219). Nowhere do the Claimants explain how their claims – first focusing on a claim for failure to pay the debt, then drawing more upon the 2005 Exchange Offer and Law No. 26.017 (*R II* §§ 362, 363) – constitute a violation of the Argentina-Italy BIT (*R II* 365).
522. In this context, Respondent points out that the host State is responsible for breach of an investment treaty only when it acts in the exercise of its governmental or sovereign authority rather than merely as a commercial party (*R I* § 220; *R III* § 153; *Tr p.* 96/9). For this purpose, account is to be taken of the nature of the relevant act, not of its form. Even where the State has acted through laws and decrees, such act may be commercial in nature, especially in the context of the present case (*R III* § 154; *Tr pp.* 102/22, 375/2).
523. Respondent insists that it was impossible for it to exercise sovereign authority in regard to the Claimants' security entitlements and the underlying bonds since these are governed by foreign law and enforceable in foreign jurisdictions. These bonds and security entitlements are therefore beyond the scope of Argentina's legislative jurisdiction so that the Respondent could not and did not alter or cancel the Claimants' rights. A State's sovereign power to prescribe and enforce legal rights is by definition limited to its own legal jurisdiction, and it thus cannot affect rights under another State's laws or foreign courts (*R I* § 223; *R II* §§ 368, 373; *R III* § 155; *Tr p.* 101/3).



524. In particular, the Exchange Offer launched by Respondent in 2005 was absolutely voluntary at all times. It was only a payment proposal and a restructuring offer which bondholders were not forced to accept, nor could Argentina have forced them to do so. Law No. 26.017 does not modify significantly the substantive rights of those who did not accept the 2005 Exchange Offer (*R II §§ 369, 370; R III § 156; Tr p. 102/4*).
525. Inasmuch as the Claimants argue that there is jurisdiction over their claim for fair and equitable treatment based on the Respondent's refusal to repay and to reasonably restructure its debt, such a refusal to repay does not constitute a basis of jurisdiction because non-payment in itself is no violation of international law. Furthermore, in the Respondent's opinion, fair and equitable treatment does not prohibit debtors from offering options for the repayment of obligations in situations of need and, for that matter, from restructuring its debt in accordance with their real ability to pay (*R I § 228; R II § 366; R III § 159*).
526. The allegations that Claimants cite in support of their purported expropriation claim are obviously wrong because the bonds at stake were not taken away from the Claimants, rather, they remain in full property of those titles. These allegations are simply assertions that Argentina did not pay Claimants their contract claims, a complaint about a failure to pay that does not amount to expropriation under international law (*R I §§ 230, 231; Tr pp. 104/7, 380/15*).
527. Finally, insofar as the Claimants seek to rely on the full protection and security clause through the most-favoured nation clause of the Argentina-Italy BIT, they do, in the eyes of the Respondent, not offer any argument as to how this clause would allow the inclusion of an extraneous right into the BIT (*R I § 236*).

## **2. Contentions by Claimants**

528. The Claimants argue that they have established a *prima facie* violation of a series of provisions of the Argentina-Italy BIT (*Request §§ 39 et seq.; C I § 338; C II § 134; Tr p. 162/18*).

529. First, by eliminating the bondholders' rights to capital and interest and by refusing to restore their rights even after Argentina's economic situation came back to normal, Respondent committed a gross violation of the obligation to protect the investors' legitimate expectations, to respect the stability of the investment environment as well as the requirements of reasonableness, proportionality and due process. Accordingly, the Respondent violated the duty to accord fair and equitable treatment under Art. 2 of the Argentina-Italy BIT (*Request* §§ 40 *et seq.*; *C III* §§ 43, 44).
530. Secondly, given the fact that Respondent used its sovereign powers to deprive the bondholders of all their economic rights and failed to restore their rights, there is a violation of the Respondent's obligation to refrain from measures of expropriation of the investors' right and property, without immediate, adequate and effective compensation, as prescribed in Art. 5 of the Argentina-Italy BIT (*Request* §§ 51 *et seq.*; *C III* §§ 45, 46).
531. Thirdly, according to the Claimants, while not laid down explicitly in the BIT, the obligation of full protection and security is applicable in the present case via the most-favoured nation clause of Art. 3 of the Argentina-Italy BIT which renders applicable Art. 2(2)(a) of the Argentina-US BIT that contains such an obligation. This duty was violated by Respondent's failure to provide a secure and transparent legal environment to the bondholders (*Request* §§ 61 *et seq.*; *C III* §§ 47, 48).
532. The Claimants resist the Respondent's attempt to downgrade the dispute to a contract dispute. They thus reject the defense that the claims brought in the present arbitration relate to a mere failure to pay, which as such cannot be characterized as a violation of the BIT, and that Argentina's acts complained of by the Claimants were not carried out in the exercise of the Respondent's sovereign capacity (*C I* § 323; *C III* § 51; *Tr p.* 165/7). On the contrary, the present case concerns precisely the consequences of a legislative act on the part of Argentina, i.e. Law No. 26.017, which led to the total and irreversible annihilation of Claimants' rights. A legislative act is the most typical manifestation of a sovereign act (*C I* §§ 328, 329; *C II* § 127, 130) because non-participating holders lost any rights under the bonds (*C II* § 132). The situation at hand is therefore not an ordinary

breach of contract, but a straightforward and paradigmatic violation of a treaty obligation (*C I § 332; C IV § 71*).

533. In this regard, the fact that the bonds/security entitlements were stipulated to be governed by a foreign law and submitted to the jurisdiction of foreign courts is not sufficient to put them beyond the reach of the Respondent's legislative jurisdiction. Argentina was at the same time the debtor of the bonds and the holder of sovereign power on its territory and it maintained the full power to modify its obligations (*C I § 330; C II § 130; C III § 52; Tr p. 166/4*).

### **B. Findings of the Tribunal**

534. While the Parties agree that there exists a "legal dispute" within the meaning of Art. 25(1) of the ICSID Convention (*Tr p. 167/13*), it is contested whether the claims submitted to the Tribunal fall within the scope of protection of the Argentina-Italy BIT. In this regard, the Respondent argues that the claims at stake are of a merely contractual character and that they do not arise out of rights and obligations contained in the BIT, whereas Claimants state the opposite. In particular, the Claimants request the Tribunal to declare that "the Respondent has breached its international obligations under the BIT and international law by failing to ensure equitable treatment and full protection and security to their investments and by expropriating such investments without prompt, adequate and immediate compensation" (*Request § 90*).
535. Whatever position one might want to adopt in this regard, the Respondent is right to contend that it is necessary for an international tribunal to satisfy itself, at the jurisdictional stage, that the case presented by a claimant is capable of coming with the provisions of the treaty that has been invoked in the dispute at hand (*R I § 217; R III § 150*), i.e. in the present case the Argentina-Italy BIT. This refers to the so-called *prima facie* test, an exercise to which the Tribunal will turn now.
536. In this regard, the Tribunal takes note of the fact that the *Abaclat* Tribunal has engaged in a persuasive analysis of the issues in question<sup>267</sup>, in relation to mostly the same

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<sup>267</sup> See in particular *Abaclat* Decision, paras. 311-332.

provisions of the Argentina-Italy BIT which are also relied upon by the Claimants here. Following its general approach to take inspiration from the *Abaclat* Decision, wherever applicable and appropriate,<sup>268</sup> the present Tribunal considers it both useful and legitimate to draw on its sister Tribunal's reasoning when addressing the question of the existence of *prima facie* claims subsequently.

### 1. Basis of the *prima facie* test

537. As convincingly stated by the *Abaclat* Tribunal, “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”.<sup>269</sup> And the *Abaclat* Tribunal continues: “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, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.’”<sup>270</sup>

538. In a similar vein, it has been stated that

[t]he prima-facie test is firmly established as the threshold test for establishing jurisdiction *ratione materiae* in investment treaty cases. The formulation of the approach and of the prima-facie test, which appears to find most favour, is the following: “The tribunal should be satisfied that, if the facts alleged by the claimant ultimately prove true, they would be capable of falling within (or coming within) (or constituting a violation of) the provisions of the investment treaty.” This formulation has received particular endorsement by the tribunals in *Salini v Jordan*, *Impregilo v Pakistan*, and *Saipem v Bangladesh*. The semantic differences in wording between ‘falling within’ or ‘coming within’ or ‘constituting a violation of’ have been said to be of little importance.<sup>271</sup>

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<sup>268</sup> See *supra* para. 12.

<sup>269</sup> *Abaclat* Decision, para. 303, referring to *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paras. 84 *et seq.*, in particular para. 91.

<sup>270</sup> *Abaclat* Decision, para. 303, referring to the afore-mentioned *Saipem v. Bangladesh* case, para. 91.

<sup>271</sup> A. Sheppard, The Jurisdictional Threshold of a Prima-Facie Case, in: P. Muchlinksi et al., The Oxford Handbook of International Investment Law, Oxford 2008, 932, at 960, referring to *Salini Costruttori S.p.A. and Italstrate S.p.A.*

539. Furthermore, it has been said that

Tribunals have developed a practice under which they will apply a *prima facie* test as to the merits of the case at the stage of determining jurisdiction. It is applied especially where the claim alleges the violation of a treaty that is invoked as the basis of jurisdiction [...] [The test] requires that the facts alleged by the claimant, if established, are capable of forming the basis for a treaty violation. Tribunals have applied this test in a large number of cases. It does not appear to be controversial in principle.<sup>272</sup>

540. The *prima facie* test is commonly traced back to the *Mavrommatis* Judgment of the Permanent Court of International Justice<sup>273</sup> and the *Ambatielos* Judgment of the International Court of Justice<sup>274</sup> as well as, in particular, to the latter Court's 1996 Judgment on Preliminary Objection in the *Oil Platforms* case<sup>275</sup> and the Separate Opinions of Judges Shahabuddeen and Higgins in that case.<sup>276</sup>

## 2. Alleged breaches of the Argentina-Italy BIT

541. Having the afore-mentioned test in mind, for the purposes of assuring itself of its jurisdiction, the Tribunal must thus satisfy itself that, if the facts alleged by the Claimants ultimately prove true, those would be capable of constituting a breach of the Argentina-Italy BIT. The present Tribunal shares the view of the *Abaclat* Tribunal that “[i]n 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

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v. *Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 151; *Impregilo, S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, paras. 237-254; *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, paras. 84-91.

<sup>272</sup> *Schreuer*, ICSID Convention Commentary, Art. 41, paras. 86, 87, with further references; see also *ibid.*, Art. 41, paras. 88-92 and Art. 42, paras. 117, 118.

<sup>273</sup> *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment, 30 August 1924, PCIJ Series A, No. 2, 16.

<sup>274</sup> *Ambatielos (Greece v. United Kingdom)*, Merits: *Obligation to Arbitrate*, Judgment, ICJ Reports 1952, 10, 18.

<sup>275</sup> See *Oil Platforms (Iran v. USA)*, Preliminary Objection, Judgment, ICJ Reports 1996, 803, paras. 16 *et seq.*

<sup>276</sup> See *ibid.*, 822 *et seq.* and 847 *et seq.* (notably at 586, para. 33); see further *Sheppard*, The Jurisdictional Threshold of a Prima-Facie Case (note 271) 934-938; *Schreuer*, ICSID Convention Commentary, Art. 41, para. 86; *Zeiler*, Jurisdiction, Competence, and Admissibility Claims in ICSID Arbitration Proceedings, in: C. Binder et al. (eds.), *International Investment Law for the 21<sup>st</sup> Century: Essays in Honour of Christoph Scheuer*, Oxford, 2009, 76, at 86, 87.

to the assessment of whether the facts alleged may constitute breaches of these provisions on their face”.<sup>277</sup>

542. The Claimants contend that – by virtue of the acts of the Respondent in relation to its default in December 2001 and its subsequent dealing with its creditors, notably regarding the 2005 Exchange Offer and by adoption of Law No. 26.017 and other legislative and regulatory acts adopted in this context – they have become subject to different types of violations of the Argentina-Italy BIT, notably in regard to (a) the Respondent’s duty to accord the Claimants fair and equitable treatment according to Art. 2(2) of the BIT, (b) its obligation under Art. 5 of the BIT not to expropriate the Claimants’ investments without payment of adequate, effective and immediate compensation, as well as (c) its duty to accord the Claimants full protection and security by virtue of the most-favoured nation treatment clause in Art. 3(1) of the BIT in connection with Art. 2(2)(a) of the Argentina-US BIT.
543. As concerns the Respondent’s counter-argument that whatever acts it may have set, they did not amount to more than a non-payment of a contractual debt and an absolutely voluntary restructuring offer and would therefore give merely rise to a *contractual*, but not a treaty claim, the Tribunal considers that it was not so much the failure to pay, but the use of the Respondent’s sovereign prerogatives when restructuring its debt, notably including the adoption of Law No. 26.017, which qualify the Respondent’s acts as potential breaches of the Argentina-Italy BIT and thus as *treaty* claims.
544. This distinction is relevant since it is generally admitted, as also acknowledged in the *Abaclat* case, that in regard to a BIT claim

an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim [...] 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. [...]

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

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<sup>277</sup> *Abaclat* Decision, para. 311.

provisions contained therein are unilaterally altered by a sovereign act of the Host State. This is the case where the circumstances and/or the behavior of the Host State appear to derive from the exercise of its sovereign 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.

The Emergency Law<sup>278</sup> had the effect of unilaterally modifying Argentina's payment obligations [...].

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, namely Law No. 26.017, entitling it not to perform part of the obligations which Argentina had undertaken prior to the enactment of such a law, and fixing in a sovereign manner 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.

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.

[...] [Hence,] 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.<sup>279</sup>

545. In the light of this reasoning of its sister Tribunal with which the present Tribunal fully agrees, the attempts of Respondent to present its actions as operating purely on the contractual level and not amounting to the use of sovereign power are ultimately not convincing.
546. In particular, this holds true for the argument that even when a State acts through laws and decrees, this would not necessarily imply the exercise of governmental or sovereign authority, but could also constitute an act commercial in nature. In the light of what has been stated above, whatever types of legislative acts and different legal consequences engendered by them one might envisage, Law No. 26.017 and related legislative and regulatory acts did in fact unilaterally modify Respondent's payment obligation.

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<sup>278</sup> This refers Law No. 26.017; see *Abaclat* Decision, para. 78 and *infra* note 335.

<sup>279</sup> *Abaclat* Decision, paras. 316, 318, 321, 323-325.

547. Related to that, it may well be true, as contended by the Respondent, that the bonds/security entitlements at stake in the present proceedings are governed by foreign law and enforceable in foreign jurisdictions. However, insofar as the Respondent seeks to conclude from the existence of such choice of law and forum selection clauses that those instruments were, by definition, beyond the scope of Argentina's legislative jurisdiction, the present Tribunal cannot follow this reasoning. While the Respondent could obviously not alter the terms of legal rights and obligations as arising from different laws and jurisdictions, it could nonetheless influence those bonds/security entitlements within the reach of the Respondent's (notably territorial) jurisdiction, for instance by legally forbidding the executive authorities to enter into any settlement of the claims in question or by ordering the domestic judicial authorities, should an "old" bond come before them, to replace *ipso jure* the old bonds by the newly issued bond instruments.<sup>280</sup>
548. It is therefore not a far-fetched conclusion – in particular taking into account that at this stage of the proceedings the Tribunal has to apply a *prima facie* standard – that such course of action can plausibly be understood as having unilaterally altered the contractual equilibrium and having transcended the realm of purely non-sovereign action. In the light of this *prima facie* assessment, the Tribunal is therefore not in presence of a purely contractual claim, but of a treaty claim. The Respondent's acts in relation to its default in December 2001 and its subsequent actions, notably including the adoption of Law No. 26.017, may well have amounted, as alleged by the Claimants, to a violation of at least one of the provisions of the Argentina-Italy BIT on which the Claimants have relied in the present proceedings.
549. Against this background, the present Tribunal fully endorses the pertinent findings of the *Abaclat* Tribunal:

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

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<sup>280</sup> See as to arts. 3 and 6 of Law No. 26.017 *infra* notes 285 and 286.



laws deprive an investor of the value of its investment or from the returns thereof.<sup>281</sup>

### 3. Conclusion

550. The Tribunal thus concludes at this stage of the proceedings that the allegations of the Claimants and the facts on which these allegations are based are, if proven, susceptible of constituting a violation of BIT provisions invoked by the Claimants. Whether the Claimants' presentation of the facts is accurate will, if and inasmuch as necessary, be examined during the merits stage of the proceedings.

551. The Tribunal further concludes that, in the light of its *prima facie* assessment, the acts of the Respondent, as alleged by the Claimants, include the exercise of sovereign authority on the part of the Respondent and, thus falling within the scope of protection of the Argentina-Italy BIT, constitute treaty claims. As a consequence, for the purposes of this *prima facie* assessment, the claims at stake arise out of rights and obligations contained in the Argentina-Italy BIT so that the present dispute falls within the jurisdiction *ratione materiae* of the Centre and the competence of the present Tribunal.

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<sup>281</sup> *Abaclat* Decision, para. 314.

**VI. COMPLIANCE WITH ARTICLE 8 OF THE ARGENTINA-ITALY BIT –  
THE PREREQUISITES OF AMICABLE CONSULTATIONS AND RECOURSE  
TO ARGENTINE COURTS**

**A. Positions of the Parties**

**1. Contentions by Respondent**

552. Respondent argues that Art. 8 of the Argentina-Italy BIT provides for a multi-layered, sequential dispute resolution system (*R I* § 269; *R II* § 429; *R III* § 88). It gives rise to mandatory jurisdictional requirements; failure to respect them implies a bar to the jurisdiction of the Tribunal (*Tr p.* 22/3). As the prerequisites of Art. 8 of the BIT must be satisfied before Argentina can be considered to have consented to arbitration through the BIT and as Claimants have improperly skipped the first two steps (i.e. amicable consultations and recourse to the Argentine courts), it follows that Argentina has not consented and that the Centre has no jurisdiction (*R I* § 273; *R II* § 431; *R III* § 84).
553. As to the *amicable consultations* requirement of Art. 8(1), Respondent points out that Claimants have acknowledged their failure to make any attempt to resolve their purported claims against Argentina (*R I* § 271). Furthermore, Respondent submits that it conducted good-faith consultations with innumerable purchasers and creditor groups since its default in 2001 and that the 2005 Exchange Offer was a product of these substantial discussions and reflected the contributions of many creditor groups (*R I* §§ 278, 279; *R II* §§ 459, 460; *Tr p.* 418/6). Moreover, Law No. 26.017 did not make settlement with Argentina impossible or futile. It only required legislative consent to any settlement which is corroborated by the reopening of the Exchange Offer in 2010 (*R I* § 280; *R II* § 462). Argentina further contends that Claimants could have attempted to negotiate with Respondent before Law No. 26.017 was enacted (*R II* § 461; *Tr p.* 34/15).
554. Moreover, Respondent considers the prerequisite to have *recourse to domestic courts* for 18 months to be mandatory. It is a precondition to avail oneself of international arbitration according to Art. 8(3) of the Argentina-Italy BIT (*R I* §§ 283, 286, 287). Respondent points out in that regard that Claimants do not dispute their failure to submit their claims to the Argentine courts (*R I* § 282).

555. In addition, Respondent contests that the Claimants can rely on “the so-called futility exception” (*R I* § 288). Respondent submits in that regard that Claimants err when claiming futility because it would be impossible for Argentine courts to resolve the dispute within 18 months. For one, it is far from impossible for Argentine courts to decide a case similar to the present one in 18 months (*R I* §§ 289, 293). More importantly, Art. 8(3) of the BIT does not require the dispute to be *resolved* within the timeframe stipulated therein, but only that the dispute is *submitted* to domestic courts (*R I* §§ 291, 294; *R II* § 466; *R III* § 94).
556. In Respondent’s opinion, there are at least two reasons to include a requirement to have recourse to domestic courts in the Argentina-Italy BIT: On the one hand, the Contracting Parties intended to give local courts an opportunity to decide a dispute before it could be submitted to international arbitration so that judicial authorities would be afforded the opportunity to review – and, if appropriate, to correct – government acts before setting in motion the intricacies and consequences associated with international investment arbitration. The provision gives the host State the opportunity to address the allegedly wrongful act within the framework of its domestic legal system, thus avoiding potential international responsibility therefor. On the other hand, the Contracting Parties could have the chance to resolve the dispute in their territories in a shorter period of time than international arbitration (*R I* §§ 292, 293; *R II* §§ 467, 468).
557. As regards Claimants’ reference to Law No. 26.017, Argentina contends that the law in no way inhibits Claimants from submitting the dispute to local courts (*R I* § 297). Furthermore, Respondent deems Claimants’ reference to the 2005 *Galli* Judgment of the Supreme Court of Argentina<sup>282</sup> and its progeny unavailing since this was a purely domestic case. By virtue of Art. 75 para. 22 of the Argentine Constitution, international treaties such as the Argentina-Italy BIT rank above domestic legislation in the legal

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<sup>282</sup> Corte Suprema de Justicia de la Nación, *Galli, Hugo G. y otro/Poder Ejecutivo Nacional s/ amparo*, Final decision, 5 April 2005 (Fallos: 328:690), Case No. G. 2181 XXXIX; see Annex CLA 37.

hierarchy.<sup>283</sup> Accordingly, Claimants could have relied on the BIT before the Argentine courts in order to have Law No. 26.017 (assuming that it was not in compliance with the international obligations of Argentina, which is disputed by Respondent) set aside by the domestic courts as unconstitutional (*R I* § 296; *R II* § 473; *Tr pp.* 36/21, 431/6, 433/15).

558. In regard to Claimants' submissions regarding futility due to the high costs of commencing proceedings in local courts, Argentina contends that the mere fact that such recourse might be burdensome or would cause the investor to incur costs does not defeat the requirement for Claimants to meet the conditions of Art. 8 of the BIT. High costs do not render the local recourse option futile, just expensive (*R II* §§ 470, 471). Furthermore, Respondent submits that remedies before Argentine courts are inexpensive (*Tr p.* 434/9). Should any investor consider that the costs incurred by him to satisfy the BIT requirements are unreasonable, he may attempt to recover such costs by resorting to the international arbitral tribunal (*R III* § 114).
559. Concerning the most-favoured nation clause (hereinafter "MFN clause") argument made by the Claimants, Respondent contends, first, that the MFN clause does not apply to dispute resolution mechanisms (*R I* § 272; *R II* § 477). Secondly, the MFN clause only applies to investments in the territory of Argentina (*R II* § 491). Thirdly, even if the clause applied to dispute resolution provisions, Claimants have not shown that the dispute settlement provisions contained in the Argentina-US BIT<sup>284</sup>, notably its Art. VII para. 3, are more favourable than those of the Argentina-Italy BIT. In particular, it does not amount to less favourable treatment for Claimants to be first required to resolve the dispute in domestic courts (*R II* §§ 494, 495).

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<sup>283</sup> Constitution of Argentina, as sanctioned by the Constituent General Congress on 1<sup>st</sup> May 1853, reformed by the National Convention "ad hoc" on 25 September of 1860 and with the Reforms of the Conventions of 1866, 1898, 1957 and 1994, Art. 75 para. 22: "Corresponde al Congreso [...] Aprobar o desechar tratados concluidos con las demás naciones y con las organizaciones internacionales y los concordatos con la Santa Sede. Los tratados y concordatos tienen jerarquía superior a las leyes."; Translation: "Congress is empowered [...] To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws."

<sup>284</sup> Treaty between the USA and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of 14 November 1991; see Annex CA 39 (hereinafter "Argentina-US BIT").

## 2. Contentions by Claimants

560. Claimants accept that there exists an obligation for the Parties, under Art. 8 of the Argentina-Italy BIT, to resort to amicable consultations and to have recourse to domestic courts prior to taking a dispute to international arbitration (*Tr p. 226/10*). However, in their opinion, this provision does not lay down mandatory jurisdictional requirements but merely provides for procedural prerequisites which do not need to be strictly followed. Thus, non-compliance is not a bar to ICSID jurisdiction (*C I § 382; C II § 164*). According to the Claimants, these procedural prerequisites constitute reasonable prior steps to avoid an international arbitration which could prove useless if other simpler or less costly solutions to the dispute could be found. In contrast, recourse to international arbitration should not be unduly jeopardized or procrastinated where there are no realistic prospects that the other means for the settlement of the dispute will prove workable or successful (*C I § 379*). The Claimants submit that, in the case at hand, any effort to resort to the mechanisms indicated in arts. 8(1) and (2) of the BIT would have proved futile since there was no realistic prospect for the Parties to reach an agreement on the present dispute or to obtain justice at the hands of the courts of Argentina (*C I § 388*).
561. As regards more specifically the prerequisite of *amicable consultations* pursuant to Art. 8(1) of the BIT, the Claimants submit that the Respondent has always displayed a hostile and uncooperative attitude towards them (*Request § 87*). They refute the argument that the 2005 Exchange Offer showed Argentina's willingness to consult the bondholders since the terms of the offer were elaborated unilaterally by Argentina and then imposed on bondholders who were not involved in the negotiations (*C I §§ 391 et seq.; C II § 170; Tr p. 227/21*).
562. According to the Claimants, the possibility of reaching an amicable settlement was finally precluded by Art. 3 of Law No. 26.017 which forbids Respondent from entering into any judicial, out-of-court or private settlement with bondholders who did not participate in the 2005 Exchange Offer (*Request § 87; C I §§ 393 et seq.; C II § 178; Tr p. 229/18; C III § 174*). The Claimants consider the absence of consultations before the enactment of Law No. 26.017 to be irrelevant since consultations were only required before the request for international arbitration was submitted, so that Claimants were

certainly not under an obligation to consult before 2005 (*Tr pp.* 229/7, 464/21; *C III § 173*). Given the fact that Art. 8 para. 1 of the Argentina-Italy BIT merely requires amicable consultations to be pursued “insofar as possible”, Claimants cannot be blamed for not having had recourse to consultations since these were impossible (*C I § 387; C II § 180*).

563. Concerning the prerequisite to have *recourse to the domestic courts* of the host State for a period of 18 months prior to resorting to international arbitration according to Art. 8(2) of the BIT, Claimants have contended that this is not a mandatory requirement, but merely an option for the investor (*C I § 398*). To this effect, they rely on the language of the provision according to which disputes “may” be submitted to the courts. Claimants contrast this wording with that of Art. 10 of the Argentina-Germany BIT (“shall”) which was pertinent in the *Wintershall* case and seek to distinguish that case on this basis (*C I §§ 385, 387*).
564. Furthermore, even if recourse to domestic courts were considered mandatory, Claimants submit that any legal action before Argentine courts on their part would have been entirely futile, and this for several reasons: First, it is clearly impossible for the local courts to decide a case of such magnitude in only 18 months (*Request § 89; C I § 419; C II §§ 208, 211; Tr p.* 234/10).
565. Secondly, Law No. 26.017, notably its arts. 3<sup>285</sup> and 6<sup>286</sup>, is considered by Claimants to have been absolutely categorical in shutting the door to any possibility to obtain redress

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<sup>285</sup> Law No. 26.017, Art. 3: “Prohíbese al Estado nacional efectuar cualquier tipo de transacción judicial, extrajudicial o privada, respecto de los bonos a que refiere el artículo 1° de la presente ley.” (as to the Spanish original see Annex RA 72). See also the translation provided by the Respondent: “The national Government is precluded from entering into in [*sic*] any type of judicial, extra-judicial or private settlement with respect to the bonds to which Article 1 of the present law refers.” (Annex RA 72). The translations as provided by the Claimants read: “It is prohibited to the National Government to make any kind of [*C II*: The national Government is precluded from entering into in (*sic*) any type of] judicial, out-of-court or private settlement, in respect of the bonds referred to in article 1 of this Act [i.e. the bonds that were not tendered for exchange in the 2005 Exchange Offer].” (*C I § 393, n.* 326; *C II § 174 n.* 76).

<sup>286</sup> Law No. 26.017, Art. 6: “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 título a la orden de tribunales de cualquier instancia, competencia y jurisdicción [...] quedarán reemplazados, de pleno derecho, por los ‘BONOS DE LA REPUBLICA 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.” The English translation provided by the Respondent reads: “Notwithstanding the above

before Argentine courts (*Request* § 88; *C I* § 411; *C II* § 201). This is corroborated by the legal stance taken by the Supreme Court of Argentina in the afore-mentioned judgment in the *Galli* case<sup>287</sup> which demonstrated that any bondholder attempting to obtain payment by resorting to the courts of Argentina will face a rejection of its claims so that any such attempt would have proven a totally useless and frustrating exercise (*C I* §§ 415, 418; *C II* § 203; *Tr p.* 231/7). Furthermore, Claimants refute Respondent's argument that *Galli* only related to domestic cases and that the Claimants could have relied before the Argentine courts on the supremacy of the Argentina-Italy BIT over Law No. 26.017 according to Art. 75 para. 22 of the Constitution of Argentina (*C II* § 204; *Tr p.* 233/16; *C III* § 179). In *Galli*, the Supreme Court declared the restructuring legislation to be a non-justiciable political question and recognized in this and subsequent decisions the constitutionality of Law No. 26.017 (*C II* § 205; *C III* § 180). Moreover, the position taken by the Argentine Government in the present proceedings squarely contradicts the one which the same Government vigorously defended in domestic litigation (*C I* §§ 416-418; *C II* § 206; *Tr p.* 234/3).

566. Thirdly, Claimants contend that to bring proceedings before the Argentine courts they would have to pay a judicial tax (*tasa de justicia*) in an amount of 3 % of the amount claimed. In addition, since they are not domiciled and do not possess real estate in Argentina, they would also have to submit a guarantee (*garantía de arraigo*) which can be very costly. Moreover, if the Claimants abandoned the proceedings after the elapse of the 18 months, they would be required to pay the costs of the proceedings and would not be entitled to recover their own costs (*C I* § 422; *Tr p.* 235/6; *C III* § 182).

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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 [...] 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." (see Annex RA 72). As to the Claimants' translation see *C II* § 174, *n.* 76: "Notwithstanding the above provisions, the bonds of the national Government eligible under the terms of Decree No. 1735/04, deposited pursuant to any cause or title to the order of any court or any instance, competence, and jurisdiction [...] 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 by Decree No. 1735/04 and its complementary norms for the assignment, liquidation and issue of such bonds."

<sup>287</sup> See *supra* note 282.

567. In any event, the Claimants contend that they are not required to have recourse to domestic courts on account of the MFN clause contained in Art. 3 of the Argentina-Italy BIT. In the eyes of the Claimants, this clause applies to all matters covered by the BIT (*C I § 406*). According to the Claimants, both the wording of the provision and ICSID case law admit that MFN clauses extend to dispute resolution mechanisms (*C I §§ 404, 406*). Hence, Art. 3 of the Argentina-Italy BIT allows Claimants to rely on Art. VII para. 3 of the Argentina-US BIT and thus to refer the dispute to ICSID arbitration with no need to satisfy the 18-month period before the domestic courts (*C I § 400; C II § 189*).

## **B. Findings of the Tribunal**

568. According to Art. 8(1)-(3) of the Argentina-Italy BIT,

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

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

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

569. Respondent has contended, and Claimants have agreed (*Tr p. 226/10*), that these provisions give rise to obligations for a party who wants to avail itself of the dispute resolution mechanism offered by the Argentina-Italy BIT. The Parties disagree, however, on the precise legal nature of these obligations (1.) as well as on the scope of the prerequisites of amicable consultations (2.) and of recourse to the domestic courts (3.).

### **1. Nature of the obligations enshrined in Art. 8(1)-(3) of the Argentina-Italy BIT**

570. Respondent has insisted throughout the proceedings that Art. 8(1)-(3) of the Argentina-Italy BIT create a “multi-layered, sequential dispute resolution system” constituting “mandatory jurisdictional requirements”. In contrast, in Claimants’ view, these only give rise to “procedural prerequisites”. Both Parties have drawn the Tribunal’s attention to



numerous authorities and cases in which legal issues which they deemed comparable to those in the present dispute were at stake. In particular, the International Court of Justice, relying on its case-law on the matter, recently qualified negotiation requirements stemming from Art. 29 of the *Convention on the Elimination of all Forms of Discrimination against Women* as affecting its jurisdiction.<sup>288</sup> In contrast, the Tribunal in the *Abaclat* case – which had the same BIT before it as the present Tribunal – concluded that Art. 8(1)-(3) of the Argentina-Italy BIT were requirements of admissibility rather than jurisdiction.<sup>289</sup>

571. Further examples could be added at will. The major conclusion to be drawn for them, however, is that there has not been a consistent approach on these matters by investment treaty tribunals<sup>290</sup>, let alone in international law more generally. This does not come as a surprise since each international arbitral tribunal or judicial body must craft its decision on the basis of the applicable substantial provisions of international law and within the specific institutional and procedural framework in which it is embedded. This limits the extent to which a tribunal such as the present one can rely on distinctions made by other tribunals which may perfectly make sense from their respective viewpoint.
572. The present Tribunal is called to interpret and apply the Argentina-Italy BIT which does not differentiate between “mandatory” and “non-mandatory” requirements as well as “jurisdictional”, “admissibility” or “procedural” prerequisites. Nor is such distinction contained in the ICSID Convention or the Arbitration Rules. Hence, as far as the

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<sup>288</sup> See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility, Judgment*, ICJ Reports 2006, 6, para. 88; as to Art. 75 of the WHO Constitution, Art. XIV para. 2 of the Unesco Constitution, and Art. 14 para. 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation see, in a similar vein, *ibid.*, paras. 99 *et seq.*, 107 *et seq.* as well as 117 *et seq.* Furthermore, in *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)*, *Preliminary Objections, Judgment, 1 April 2011*, para. 141, the negotiation requirement in Art. 22 of the Convention was considered a precondition to be fulfilled before the seisin of the Court, i.e. a precondition to the exercise of the Court’s jurisdiction (*ibid.*, para. 183). See, however, the *jurisprudence constante* of the International Court of Justice which treats the requirement of exhaustion of local remedies (in the context of diplomatic protection) as an admissibility issue; see e.g. *Interhandel Case (Switzerland v. USA)*, *Preliminary Objections Judgment*, ICJ Reports 1959, 6, 23 *et seq.*; see also *I. Brownlie*, *Principles of Public International Law*, 7<sup>th</sup> ed., 2008, 492 *et seq.*

<sup>289</sup> *Abaclat Decision*, para. 496.

<sup>290</sup> See *Williams*, *Jurisdiction and Admissibility* (note 202) 919.

applicable law is concerned, there is no *a priori* reason for the Tribunal to enter into the doctrinal intricacies of these distinctions and the related academic and judicial discourse.

573. That being said, the mandate given to the Tribunal by the Parties states that there should first be “a preliminary phase in the proceedings covering *jurisdiction and admissibility*”.<sup>291</sup> For this reason, these concepts are relevant to the Tribunal and this becomes manifest in the very title of its present Decision, i.e. “Decision on Jurisdiction and Admissibility”. At the same time, this does not force the Tribunal to draw a neat dividing line between these two concepts and to endorse one of the many controversial views articulated as to where the exact difference lies between them. The Tribunal would like to note in this context that the terminology applied by the Parties themselves does not seem to be free from ambiguities.<sup>292</sup>
574. The Tribunal would consider that the mission with which it has been entrusted by the Parties does not call it, in the first place, to give an answer as to whether the legal issues at stake are to be classified as questions of jurisdiction or admissibility. The Tribunal’s mandate – and it is to this mandate that the title of the present Decision refers – rather requires it to take note of and thoroughly examine all legal claims made by the Parties under the labels of both jurisdiction and admissibility and to decide whether these are justified in law or not.
575. What is thus crucial, in the Tribunal’s opinion, is that all claims of lack of jurisdiction and admissibility filed by Respondent in its Memorial and elaborated upon in its further written and oral submissions 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”. Hence, irrespective of whether others may identify a different degree of “bindingness” with regard to the two notions, in this Tribunal’s view and at least with regard to the requirements set forth by Art. 8(1)-(3) of the Argentina-Italy BIT, if any of

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<sup>291</sup> See Minutes of the First Session, point 14 (emphasis added); *supra* para. 5.

<sup>292</sup> For instance, while some of Respondent’s submissions qualify violations of obligations under Art. 8 of the Argentina-Italy BIT as obstacles to the admissibility of the claims at stake (*R I* § 282), other passages suggest the opposite, i.e. that such violations would give rise to jurisdictional obstacles (*R I* §§ 273, 287, 298).

these requirements in their interpretation by the Tribunal and applied to the facts of the case, has not been met by Claimants, the Tribunal would have to dismiss the case irrespective of whether the requirement would qualify as one of jurisdiction or admissibility.

576. In order to answer these questions, the Tribunal will now turn to the submissions of the Parties as to whether the Claimants have complied with the requirements of prior amicable consultations and recourse to the domestic courts of Argentina, respectively.

## **2. The prerequisite of amicable consultations**

577. Art. 8(1) of the Argentina-Italy BIT states the requirement that any dispute relating to investments falling into its scope of application “shall be, insofar as possible, resolved through amicable consultations”. In the Tribunal’s opinion, the language of the provision clearly suggests that it creates a duty for the Parties to enter into consultations. This becomes manifest in the authentic versions of Art. 8(1) of the BIT where the use of “será [...] solucionada” in Spanish and “sarà [...] risolta” in Italian indicates the existence of a legal obligation.<sup>293</sup> This result is corroborated by the conditional clause in para. 2 which authorizes the Parties to proceed to subsequent dispute resolution mechanisms (only) “if such consultations do not provide a solution”.

578. The present Tribunal is aware that the Tribunal in the *Abaclat* case came to a different result in view of the very same provision of the Argentina-Italy BIT. It notably concluded that “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.”<sup>294</sup> The Tribunal justified this conclusion chiefly by relying on the use of the phrase “insofar as possible” (in Spanish: “en la medida de lo posible”; in Italian: “per quanto possibile”) in Art. 8 para. 1 of the Argentina-Italy BIT.

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<sup>293</sup> See the analogous situation in *Wintershall AG v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 where Art. 10 para. 2 of the Argentina-Germany BIT similarly provided for that a “dispute [...] shall [...] be submitted” (“la controversia [...] será sometida” in Spanish and “Meinungsverschiedenheit [...] ist [...] zu unterbreiten” in German) and where the deciding arbitral tribunal correctly identified this wording as being “indicative of an ‘obligation’ – not simply a choice or option” and “legally binding” (*ibid.*, para. 119).

<sup>294</sup> *Abaclat*, Decision, para. 564.

579. In contrast, the present Tribunal would rather follow the reasoning in the Dissenting Opinion of Professor Abi-Saab who has rightly pointed out that the addition of this phrase does not eliminate the binding character of the provision, but characterizes it as a certain type of binding provision, namely an “obligation of means” or of “best efforts”.<sup>295</sup> As also the International Court of Justice has emphasized on several occasions, provisions directing the parties to consult or negotiate may well constitute legally binding obligations, non-compliance with them having legal effects, including the dismissal of the case. Whether and to which extent they set forth binding obligations, is a matter of interpretation of the relevant provisions.<sup>296</sup>
580. A party defying a duty to engage, as far as possible, in amicable consultations would therefore have to be prepared to see its claim denied to be admitted to the merits phase. However, before reaching such conclusion, the Tribunal must clarify the exact nature of the “duty to consult insofar as possible”. Two remarks are in place in this regard:
581. First, from its very character as an obligation of means and not of result follows that “an obligation to negotiate does not imply an obligation to reach an agreement.”<sup>297</sup> Some tribunals go even so far as to qualify consultation or negotiation clauses as mere procedural requirements whose violation would have no effect on jurisdiction or the admissibility of the claim.<sup>298</sup> Yet, this is not the view taken by this Tribunal. At the same time, one must take note of the fact that in the few cases where investment tribunals

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<sup>295</sup> Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 26.

<sup>296</sup> See, e.g., *Railway Traffic between Lithuania and Poland, Advisory Opinion, 15 October 1931*, PCIJ Series A/B, No. 42, 116; *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), Judgment*, ICJ Reports 1969, 3, para. 85; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment*, ICJ Reports 2010, 14, paras. 149, 150; see also *supra* note 288.

<sup>297</sup> *Railway Traffic between Lithuania and Poland, Advisory Opinion, 15 October 1931*, PCIJ Series A/B, No. 42, 116.

<sup>298</sup> See, e.g., UNCITRAL (NAFTA), *Ethyl Corp. v. Canada*, Award on Jurisdiction, 24 June 1998, para. 85; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras. 74-88 and 187; UNCITRAL, *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, para. 187; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, para. 100; see, however, the approach in *Antoine Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, paras. 90-93; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004; see furthermore *Schreuer, Consent to Arbitration* (note 100) 844 *et seq.*

struck out cases for a violation of a consultation or negotiation requirement, this was mostly for the reason that the respective clauses contained minimum periods of time for consultations which were not respected by the claimants.<sup>299</sup> This is not the case here, however, where we have a *simple* consultation clause which does not reserve any minimum requirement of time for consultations.

582. Secondly, the qualifying phrase “insofar as possible” which is commonly found in international investment treaties,<sup>300</sup> indicates that if the Claimants can show that consultations were *not possible*, they cannot be held to have breached the duty incumbent upon them. This does not mean reading a futility exception into Art. 8(1) of the Argentina-Italy BIT, but it is a direct and independent consequence of the very wording of the provision in question. Furthermore, there is considerable authority for the proposition that mandatory waiting periods for consultations (let alone a *simple* duty to consult, as in the present case) do not pose an obstacle for a claim to proceed to the merits phase if there is no realistic chance for meaningful consultations because they have become futile or deadlocked.<sup>301</sup> In this regard and particularly taking note of the fact that Art. 8(1) of the Argentina-Italy BIT envisages consultations with a view of “resolving” the dispute at stake, the Tribunal would endorse the *Abaclat* Tribunal’s

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<sup>299</sup> *Burlington Resources, Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 315; *Murphy Exploration and Production Company International v. Ecuador*, ICSID Case No. ARB/08/4, Award, 15 December 2010, paras. 90 *et seq.*, in particular paras. 131 and 132.

<sup>300</sup> See, e.g., Art. 26 para. 1 of the Energy Charter Treaty; Art. XIII para. 1 of the Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments; Art. X para. 1 of the Agreement between the Government of the Kingdom of Norway and the Government of the Republic of Hungary on the Promotion and Reciprocal Protection of Investments; Art. 8 para. 1 of the Agreement between the Republic of Austria and Romania on the Promotion and Reciprocal Protection of Investments.

<sup>301</sup> As to the pertinent case-law of the International Court of Justice see the references in *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russia)*, Preliminary Objections, Judgment, 1 April 2011, para. 159. In the field of arbitration see, for instance, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, para. 92: “attempts at a negotiation solution [prove] futile”; *Biwater Gauff (Tanzania), Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 343: “settlement obviously impossible” and “negotiations obviously futile”; UNCITRAL, *Ronald S. Lauder v. Czech Republic*, Final Award, 3 September 2001, paras. 188-191; *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, para. 184. See also *Schreuer*, Consent to Arbitration (note 100) 846 stating in relation to mandatory waiting periods: “What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiation table if these negotiations are obviously futile.”

conclusion that consultation “is to be reasonably understood as referring not only to the technical possibility of settlement talks, but also to the possibility, i.e. the likelihood, of a positive result” and that “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.”<sup>302</sup>

583. Hence, while a *consultation as far as possible* requirement of the type enshrined in Art. 8(1) of the Argentina-Italy BIT creates a legal obligation, this obligation is not violated if it is established that (a) the sufficient minimum amount of consultations was actually conducted, or at least offered, or that (b) amicable consultations in order to resolve the case at stake were not possible in the first place.
584. Applying these considerations to the facts of the present case, no consultations between the Parties have taken place. To be sure, Claimants submit that after 2001 “there were several attempts by groups of holders of Argentine bonds to enter into negotiations with Argentina for a reasonable proposal” (*C II § 167*). However, Respondent contends (*R I § 271; R IV § 16*), and Claimants concede, that they “did not personally attempt consultations with Argentina before the commencement of these proceedings” (*C IV § 19*). In this respect, the Tribunal concludes that Claimants could not establish that a minimum amount of consultations between them and the Respondent were conducted.
585. The Tribunal thus turns to the second alternative, i.e. that meaningful consultations with a view of resolving the dispute at stake were not possible. In 2005, during the time the Exchange Offer was open for acceptance by Argentina’s creditors, the Argentine Congress adopted Law No. 26.017 which forbade the country’s government from entering into any judicial, non-judicial or private settlement with the non-participating bondholders as well as from reopening the Exchange Offer.<sup>303</sup> In fact, this law prevented the Argentine Government from “enter[ing] into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of

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<sup>302</sup> *Abaclat* Decision, para. 564.

<sup>303</sup> As to Art. 3 of Law No. 26.017 see *supra* note 285.

prior condition”.<sup>304</sup> The Government could have discharged its duty “so to conduct [itself] that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it”<sup>305</sup> only at the cost of violating Law No. 26.017. Hence, at least since the adoption of this law it was clear that no realistic possibility of meaningful consultations to settle the dispute with the Argentine Government existed.

586. This result is not affected by the fact that the Argentine Congress could have at any time suspended or eliminated the ban on consultations and negotiations and that it actually did so in 2010 in order to open the way for the new Exchange Offer (*R I* § 280; *R II* § 462). What is crucial in this regard is that, first, the potential partner for negotiations, i.e. the Argentine Government, was not in a position to act accordingly while the law was in force, i.e. from 2005 onwards, and, second, that the very reason for the non-availability of a venue for meaningful consultations was above all Congress’ adoption of Law No. 26.017.

587. As far as Respondent argues that Claimants were free to initiate consultations *before* the adoption of Law No. 26.017, the Tribunal would consider that there existed no duty for the Claimants to do so in order to comply with Art. 8(1) of the Argentina-Italy BIT. The provision is entirely silent regarding the time when consultations have to take place. The only temporal requirement to be drawn from the provision is that this must be done before the party in question has recourse to the domestic courts and proceeds to international arbitration. As the Request was filed on 23 June 2008, the Tribunal cannot therefore see why the Claimants would have fallen short of complying with Art. 8(1) of the BIT by not having had initiated consultations before 2005 (i.e. the year of adoption of Law No. 26.017).

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<sup>304</sup> *North Sea Continental Shelf Cases (Germany/Denmark; Germany/ Netherlands), Judgment*, ICJ Reports 1969, 48, para. 85.

<sup>305</sup> *Ibid.*, para. 85.

588. Accordingly, the Tribunal concludes that Claimants did not violate the requirement to engage in amicable consultations incumbent upon them by virtue of Art. 8(1) of the Argentina-Italy BIT.

### **3. The prerequisite of having recourse to domestic courts**

#### ***a) Binding character of the requirement***

589. As regards the second element in the three-step dispute resolution system, i.e. the requirement to have recourse to domestic courts, the Tribunal is of the opinion that the clear wording of Art. 8 paras. 2 and 3 of the Argentina-Italy BIT permits of no other conclusion than that the provision sets forth a binding precondition for access to international arbitration.

590. This follows first from the unqualified “if” at the beginning of para. 3 – “if such consultations do not provide a solution” (in Spanish: “Si esas consultas no aportaran una solución”; in Italian: “Se tali consultazioni non consentissero una soluzione”) – which makes the very right to start an arbitration dependent on prior submission of the dispute to the local courts of the Respondent and the lapse of a period of 18 months since the notification of the commencement of national proceedings.

591. Secondly, this holds true in spite of the use of the word “may” (in Spanish: “podrá”; in Italian: “potrà”) in Art. 8 para. 2 of the BIT. This paragraph speaks of the possibility to submit a dispute to the domestic courts of the host State in case of the continuing existence of a dispute subsequent to (or for lack of) consultations. If an investor does not want to abandon his claims at this point, he “may” proceed in the order envisaged by the BIT’s dispute settlement system by approaching the host State’s courts. Far from characterizing the recourse to domestic courts as a voluntary exercise on the way to international arbitration, para. 2 must be read in context with para. 3. There, the further possibility (in Spanish: “podrá”; in Italian: “potrà”; in English: “may”) to submit the dispute to international arbitration is conditioned by the twofold obligation (a) to previously have recourse to the host State’s courts and (b) to notify the commencement of these national proceedings. As a consequence, the *possibility* to proceed to international



arbitration is at the disposal of the investor only when not having failed to satisfy the *obligation* of having recourse to domestic courts.

592. Thirdly, the reference to the *Wintershall* case where in Art. 10(2) of the pertinent Argentina-Germany BIT the wording “shall [...] be submitted” (“será sometida” in Spanish; “ist [...] zu unterbreiten” in German) is used in relation to the recourse to domestic tribunals<sup>306</sup>, as opposed to the phrase “may be submitted” in Art. 8(2) of the Argentina-Italy BIT, is of no avail to the Claimants. As has been pointed out, the term “may” refers to the possibility for the investor to further proceed with the claim, but does not dispose of the need to make use of this possibility in the manner prescribed by the BIT, i.e. his obligation to have recourse to domestic courts before submitting an arbitration request. To suggest an *argumentum e contrario* here would be tantamount to ignoring the logic structure, and interdependence of the different steps, of Art. 8 paras. 1-3 of the Argentina-Italy BIT.
593. This Tribunal is not called upon to interpret similar provisions in other treaties. But at least in application to the specific rulings regarding Art. 8 of the BIT, the Tribunal is for the above reasons not convinced by the concerns and criticism raised vis-à-vis clauses “provid[ing] for a mandatory attempt at settling the dispute in the host State’s domestic courts for a certain period of time”<sup>307</sup> inasmuch as this has prompted investment arbitral tribunals or distinguished scholars in the field to challenge the binding character of such clauses.<sup>308</sup> The Tribunal cannot ignore the fact that such clauses are commonly found in investment treaties<sup>309</sup> and that they are typically drafted in a manner that manifests their

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<sup>306</sup> *Wintershall AG v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, paras. 119 *et seq.*

<sup>307</sup> *Schreuer*, Consent to Arbitration (note 100) 847; see also *L. Markert*, Streitschlichtungsklauseln in Investitionsschutzabkommen (2010) 210 referring to such clauses as “temporary limited local remedies clauses” (“befristete local remedies-Klauseln”).

<sup>308</sup> *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, para. 224 which speaks in respect of an analogous clause in the applicable BIT of a “curious requirement” and “sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view”. See also *C. Schreuer*, Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration, 4 *The Law and Practice of International Courts and Tribunals* (2005) 1, at 4, 5; see similarly *id.*, ICSID Convention Commentary, Art. 26, para. 204; *P. Peters*, Exhaustion of Local Remedies: Ignored in Most Bilateral Investment Treaties, 44 *Netherlands International Law Review* (1997) 233, at 245.

<sup>309</sup> See *Schreuer*, Calvo’s Grandchildren (note 308) 16.

binding nature. These characteristics are clear indications that the Contracting Parties of the respective BIT intended to give such clauses some effect. Treaty provisions should not be construed in a way that takes away from them all useful effect (*ut res magis valeat quam pereat*). It is thus necessary for a tribunal called to interpret such a clause to duly acknowledge its binding character and to identify which purposes it may serve in the context of the applicable BIT. This also holds true in the present case.

***b) Legal consequences of disregarding the requisite of having recourse to Respondent's courts***

594. Given the fact that Art. 8(2) and (3) of the Argentina-Italy BIT give rise to a legally binding requirement of prior recourse to the Respondent's courts and that it is undisputed between the Parties that Claimants did not submit the dispute to Argentine courts before initiating the present arbitration proceedings on 23 June 2008<sup>310</sup>, the Respondent contends that the Tribunal should reject to hear the case.

595. The *Abaclat* Tribunal which had to deal with a similar situation and the very same BIT reached the following conclusion in this regard: “[T]he 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 in Article 8. [...] Claimants’ disregard of the 18 months requirement is in itself not yet sufficient to preclude Claimants from resorting to arbitration.”<sup>311</sup> These statements were harshly criticized in Professor Abi-Saab’s Dissenting Opinion, where they were qualified as “very odd indeed”, since they ignored that

no instrument, laying down jurisdictional limits or admissibility conditions, specifies the legal consequences of non observance of these limits or non fulfilment of these conditions. These consequences are embedded in the very legal classification of these as jurisdictional limits or admissibility conditions. According to the general rules of law and rules of general international law, non

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<sup>310</sup> See *RI* § 282 referring to Claimants’ Reply to Respondent’s First Set of Documents Requests, para. 25 (Annex RA 113, para. 25): “There are no documents relating to any attempt of NASAM’s or of any of the Claimants to resolve any of the claims at issue in this arbitration through resort to local courts or tribunals [...]”

<sup>311</sup> *Abaclat* Decision, paras. 579, 580.

compliance begets the inevitable legal sanction of dismissing the case, as falling outside the jurisdiction of the tribunal or as inadmissible.<sup>312</sup>

596. This Tribunal would be inclined to endorse the latter position. If a requirement set forth by Art. 8 of the Argentina-Italy BIT were not complied with, the venue to international arbitration would not be open. However, at this stage the Tribunal would consider it premature to come to such conclusion. Claimants argue that the prerequisite of having recourse to the domestic courts of Argentina has not been violated by, or does not apply to, Claimants, and this for two reasons: First, they argue that paras. 2 and 3 of Art. 8 of the BIT are inapplicable in the present case because recourse to Respondent's courts would have been futile. Secondly, the Claimants seek to take refuge to the MFN clause in Art. 3 para. 1 of the Argentina-Italy BIT in combination with Art. VII(3) of the Argentina-US BIT. The Tribunal will now examine the futility argument (c) and the MFN clause argument (d) in turn.

*c) The futility exception*

**(1) Existence of the futility exception**

597. Claimants submit that there exists an exception to the duty to have recourse to Respondent's courts in case such recourse would be futile. Respondent implicitly accepts the existence of a futility exception, but argues that the relevant threshold is very high and that the facts of the case do not lend themselves to give rise to a situation of futility (*RI* §§ 290, 291).

598. Even though the Parties do therefore not disagree as to the *existence* of a futility exception with regard to prerequisite of having recourse to domestic courts, as laid down in Art. 8(2) and (3) of the Argentina-Italy BIT, the Tribunal must assure itself that this view of the Parties constitutes a sound interpretation of these provisions. The question of the applicable *threshold* can only be addressed once it is clear that the exception exists in the first place.<sup>313</sup>

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<sup>312</sup> Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 28.

<sup>313</sup> See *infra* paras. 608 *et seq.*

599. It appears to be generally accepted in international law that obligations requiring an individual to approach a State's local courts before a claim may be taken to the international plane do not apply unconditionally. Under certain circumstances, the lack of a claim's prior submission to domestic courts does not lead to the dismissal of the claim, notably in the law of diplomatic protection. Indeed, for a State to bring a claim on behalf of one of its nationals under the title of diplomatic protection, the individual concerned must, as a matter of principle, exhaust the legal remedies available to him in the State where the alleged injury took place.<sup>314</sup> However, only those remedies must be used which are available "as a matter of reasonable possibility."<sup>315</sup> This exception to the local remedies rule, the so-called *futility* rule, is now universally recognized in the law of diplomatic protection. It is set out in Art. 15(a) of the Draft Articles of the International Law Commission on Diplomatic Protection of 2006 (hereinafter "2006 ILC Draft Articles on Diplomatic Protection") in the following manner: "Local remedies do not need to be exhausted where [...] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress."<sup>316</sup>
600. That being said, Art. 8(3) of the Argentina-Italy BIT does not mention or refer to such exception. This is not the end of the matter, however. According to the general rules of treaty interpretation as codified in Art. 31 of the VCLT, it is required that when interpreting a treaty provision "any relevant rules of international law applicable in the relations between the parties" shall be "taken into account, together with the context" (Art. 31 para. 3 lit. c of the VCLT).<sup>317</sup> The term "relevant rules of international law" also includes pertinent customary international law.<sup>318</sup>

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<sup>314</sup> See *Elettronica Sicula S.p.A. (ELSI) (USA v. Italy)*, Judgment, ICJ Reports 1989, 15, para. 50; see further Art. 14 of the 2006 ILC Draft Articles on Diplomatic Protection; *Brownlie*, Principles of Public International Law (note 288) 492.

<sup>315</sup> See *Certain Norwegian Loans (France v. Norway)*, Judgment, ICJ Reports 1957, 9, Separate Opinion of Judge Lauterpacht, 34, at 39; *Barcelona Traction, Light and Power Company, Limited (Second Phase)*, Judgment, ICJ Reports 1970, 3, Separate Opinions of Judge Tanaka, 114, at 144, 145 and of Judge Gros, 267, at 284; see *Brownlie*, Principles of Public International Law (note 288) 495 with further references.

<sup>316</sup> Art. 15 lit. a of the 2006 ILC Draft Articles on Diplomatic Protection.

<sup>317</sup> As to the relevance of this provision in treaty interpretation see notably the *Oil Platforms Case (Iran v. USA)*, Judgment, ICJ Reports 2003, 161, paras. 41 *et seq.* as well as *Certain Questions of Mutual Assistance in Criminal*

601. Thus, in order to determine whether the futility exception also applies in the context of a provision such as Art. 8 (3) of the Argentina-Italy BIT, it is necessary for the Tribunal to assess whether the customary law exception of futility regarding the rule of exhaustion of local remedies in diplomatic protection is sufficiently comparable to the requirement of recourse to the domestic courts of Art. 8 (3) of the Argentina-Italy BIT to identify the former as a rule of international law “relevant” to the latter.
602. In that regard, the Tribunal would consider that exhaustion of local remedies clauses and the prerequisite to have recourse to domestic courts for a certain amount of time are similar inasmuch as they both require to turn to the local judicial authorities before the claim can be successfully brought to the international plane. Both serve the purpose of honoring the host State’s sovereignty by providing the latter the opportunity to settle a dispute in its own fora before moving on to the international level. In a similar vein, Respondent has submitted that clauses of the type of Art. 8 (3) of the Argentina-Italy BIT intend to give local courts an opportunity to decide a dispute before turning to international arbitration so that judicial authorities would be afforded the opportunity to review – and, if appropriate, to correct – government acts before setting in motion the intricacies and consequences associated with international investment arbitration. Indeed, the provision gives the host State the opportunity to address the allegedly wrongful act within the framework of its own domestic legal system, thus avoiding potential international responsibility therefor (*RI* § 292; *RII* § 467). Furthermore, the Contracting

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*Matters (Djibouti v. France), Judgment*, ICJ Reports 2008, 177, paras. 112 *et seq.*; in particular regarding investment law see *A. van Aaken*, *Fragmentation of International Law: The Case of International Investment Law*, 17 *Finnish Yearbook of International Law* (2008), 91, at 103 and 108; see *Markert*, *Streitschlichtungsklauseln in Investitionsschutzabkommen* (note 307) 167, 168 and 213 *et seq.* It is worth noting that also Professor *Abi-Saab*’s Dissenting Opinion in the *Abaclat* case, para. 28 refers to the relevance of “general rules of law and rules of general international law”.

<sup>318</sup> *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, 6 July 2007, para. 208; *C. McLachlan*, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *International and Comparative Law Quarterly* (2005) 279, at 310 *et seq.* with further references to the pertinent case-law; *International Law Commission, Report on Fragmentation of International Law* (2006), 7; *A. van Aaken*, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 *Indiana Journal of Global Legal Studies* (2009), 483, at 497, 498.

Parties could have the chance to resolve the dispute in their territories in a shorter period of time than international arbitration (*R I* § 293; *R II* § 468).<sup>319</sup>

603. Accordingly, in view of the strong structural parallels between these two types of clauses, the Tribunal does not consider it a far-fetched conclusion to assume that the futility exception to the exhaustion of local remedies rule in the field of diplomatic protection is, in the light of Art. 31(3)(c) of the VCLT, also applicable to clauses requiring recourse to domestic courts in international investment law. The conclusion that the futility of local remedies constitutes an exception to the duty of having recourse to local courts is also affirmed in the case-law and in legal academia.<sup>320</sup>
604. Yet, there is a major difference between these two types of clauses. While in the field of diplomatic protection the affected individual is generally required to “exhaust” local remedies, in the case of requirements of recourse to domestic courts the investor typically has to submit the dispute to the local courts for a certain amount of time. Given the realities of settlement of complex disputes and the multi-stage character of domestic judicial proceedings, of which the Contracting States of BITs are certainly well aware, it is hardly plausible (and insofar everyone seems to agree) to impute to such clauses the purpose of resolving an investment dispute by passing through the domestic legal system and obtaining a final judgment within that amount of time. The consequence of the

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<sup>319</sup> For further reasons see UNCITRAL (PCA), *ICS Inspection and Control Services Limited v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 269, n. 298.

<sup>320</sup> *Biwater Gauff (Tanzania), Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 343; *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 153. See, however, for the opposite view (regarding the UK-Argentina BIT) UNCITRAL, *BG Group Plc. v. Argentina*, Final Award, 24 December 2007, para. 146 (but accepting a variation of the futility argument on the basis of Art. 32 of the VCLT; see *ibid.*, para. 147) as well as the subsequent decision of the US Court of Appeals for the District of Columbia Circuit, *Argentina v. BG Group Plc.*, 665 F.3d 1353 (D.C. Circuit, 17 January 2012), 2 and 17; on which 106 AJIL (2012) 393 *et seq.* See further – again regarding the US-Argentina BIT – *ICS Inspection and Control Services Limited v. Argentina*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, para. 263, citing the *Abaclat* Decision as the only decision brought to the Tribunal’s attention where an element of futility had been used successfully to allow derogation from the prerequisite of recourse to domestic courts, and concluding that futility had not been demonstrated to the Tribunal’s satisfaction (see *ibid.*, paras. 269 and 273); see, in a similar vein, (regarding the Germany-Argentina BIT) *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, Award, 22 August 2012, para. 198, where the Tribunal appears to affirm, in principle, the existence of a futility exception, but concludes that futility was not demonstrated by the Claimant in the case in question (see *ibid.*, para. 191); see, however, the Dissenting Opinion of Judge Brower, para. 15. See in general C. Schreuer, *Travelling the BIT Route. Of Waiting Periods, Umbrella Clauses and Forks in the Road*, *Journal of World Investment and Trade* (2004), 231, at 238.

recognition of the limited purpose of such clauses is not, however, to challenge the soundness and relevance of the latter at all<sup>321</sup>, but to direct the attention on these very purposes and enquire about the functions which such clauses may actually serve in the limited time foreseen, in the present case 18 months.<sup>322</sup>

605. Such amount of time may indeed be sufficient for the commencement of formal court proceedings to prompt the Parties to the dispute to agree on a court or out-of-court settlement or for the national courts to render a first-instance judgment in the investor's favour which the host State does not appeal. Since the domestic judicial system may precisely serve such purposes where and inasmuch as there exist "reasonably available local remedies to provide effective redress", the futility exception appears to be the appropriate standard also in regard to recourse to domestic courts clauses.
606. What is more, since the futility exception is even capable of disposing of a duty to exhaust local remedies – i.e. the use of (virtually) all means offered by the domestic dispute settlement system for a (virtually) unlimited amount of time –, this must hold true *a fortiori* for a duty to have recourse to local remedies for a limited amount of time. Accordingly, the only aspect where there exists a major difference between the two types of clauses, i.e. the time aspect, does not prevent the drawing of a parallel between them regarding the futility exception; it rather militates in favour of drawing this parallel.
607. Hence, the Tribunal concludes that an interpretation of BIT clauses such as Art. 8(3) of the Argentina-Italy BIT, in the light of Art. 31(3)(c) of the VCLT, results in admitting a futility exception also in respect to such clauses, on the model of the futility exception to the exhaustion of local remedies rule in the field of diplomatic protection.

## (2) Threshold of the futility exception

608. Given the widely analogous structure and purposes of clauses on the exhaustion of local remedies in the law of diplomatic protection and clauses providing for recourse to

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<sup>321</sup> See, however, *P. Juillard*, *Chronique de droit international économique – Investissements*, 41 *Annuaire Français de Droit International* (1995) 604, at 608; *A. Crivellaro*, *Consolidation of Arbitral and Court Proceedings in Investment Disputes*, 4 *Law and Practice of International Courts and Tribunals* (2005) 371, at 399.

<sup>322</sup> See *supra* para. 593.

domestic courts such as Art. 8(3) of the Argentina-Italy BIT, the Tribunal considers it appropriate to also draw on the International Law Commission's work on diplomatic protection as regards the *threshold* for the futility exception. The standard was articulated in the afore-cited Art. 15(a) of the 2006 ILC Draft Articles on Diplomatic Protection in the following manner: "Local remedies do not need to be exhausted where [...] [t]here are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress [...]".<sup>323</sup>

609. This standard was carefully drafted and documented by the International Law Commission, as becomes manifest in the Commentary to the Draft Articles.

(3) The "obvious futility" test, expounded by Arbitrator Bagge in the *Finnish Ships Arbitration*, sets too high a threshold. On the other hand, the test of "no reasonable prospect of success", accepted by the European Commission of Human Rights in several decisions, is too generous to the claimant. This leaves the third option which avoids the stringent language of "obvious futility" but nevertheless imposes a heavy burden on the claimant by requiring that he prove that in the circumstances of the case, and having regard to the legal system of the respondent State, there is no reasonable possibility of effective redress offered by the local remedies.

This test has its origin in a separate opinion of Sir Hersch Lauterpacht in the *Norwegian Loans* case and is supported by the writings of jurists. [...]

In this form the test is supported by judicial decisions which have held that local remedies need not be exhausted where the local court has no jurisdiction over the dispute in question; the national legislation justifying the acts of which the alien complains will not be reviewed by local courts; the local courts are notoriously lacking in independence; there is a consistent and well-established line of precedents adverse to the alien; the local courts do not have the competence to grant an appropriate and adequate remedy to the alien; or the respondent State does not have an adequate system of judicial protection.

(4) In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted. The

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<sup>323</sup> See *supra* para. 599.



decision on this matter must be made on the assumption that the claim is meritorious.<sup>324</sup>

610. In the light of the International Law Commission’s well-reasoned and well-balanced restatement of the threshold applicable to the futility exception, the Tribunal does not consider it necessary to rely on alternative standards proposed by the Parties. In that regard, it will not follow Claimants’ submission that recourse to international arbitration “should not be unduly jeopardized or procrastinated where there are no realistic prospects that other means for the settlement of the dispute will prove workable or successful” (*C I* § 379). Likewise, in view of what has been stated above, the Tribunal is not convinced that “according to international arbitration panels, the test of futility is ‘obvious futility’ or ‘manifest ineffectiveness’ – in other words, more than alleged probability of failure is required”, as argued by the Respondent (*R I* §§ 290, 296, n. 402f.; *R II* §§ 465, 473).<sup>325</sup>
611. Furthermore, the Tribunal would wish to point out that since the present case only regards a requirement to have temporary recourse to domestic courts, as opposed to a fully-fledged exhaustion of local remedies requirement, the threshold to be met for the futility exception to be realized in the present case cannot possibly be considered higher than in the context of diplomatic protection; on the contrary, it is arguably rather lower.

### **(3) Application of the futility exception to the present case**

612. Claimants marshal three separate arguments in favour of the futility exception being fulfilled in the present case, with the Respondent opposing all of these. The Tribunal will now examine them in turn.
613. (a) Claimants submit that any legal action on their part before Argentine courts would have been an entirely futile exercise since it is clearly impossible for the local courts to decide a case of such magnitude in only 18 months (*Request* § 89; *C I* § 419; *C II* §§ 208, 211; *Tr p.* 234/10). However, as has been already pointed out above<sup>326</sup>, Respondent (*R I*

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<sup>324</sup> ILC Draft Articles on Diplomatic Protection, Commentary, Art. 15, nr. 3 (footnotes omitted).

<sup>325</sup> Respondent notably refers to the United States Restatement (Third) of Foreign Relations Law according to which the futility exception applies only when local remedies are “clearly sham or inadequate, or their application is unreasonably prolonged”, § 713 cmt. f (1986).

<sup>326</sup> See *supra* para. 604.

§§ 291, 294; R II § 466; R III § 94) is right to submit that Art. 8(3) of the BIT may not be construed to require the dispute to be *resolved* by a final judgment in the domestic court system within 18 months, but only that the dispute is *submitted* to the domestic courts.

614. To begin with, the provision solely calls for the dispute not to be submitted to international arbitration before “a period of 18 months has elapsed since notification of the *commencement* of the proceeding before the national jurisdictions” (emphasis added). Furthermore, the very existence of Art. 8(4) of the Argentina-Italy BIT<sup>327</sup> confirms that the Parties to the BIT considered it not to be a rare case that domestic proceedings would still be pending when the arbitration is initiated. In addition, by expressly recognizing that a case with a certain complexity in the factual and legal realm could hardly be dealt with in a period of 18 months in any legal system (notably further taking into account the multi-level nature of national court systems) (*Tr p. 468/12*), Claimants themselves suggest that construing the provision as setting forth a time standard for the final disposal of the dispute cannot be a sound interpretation of the provision in question. Otherwise, the 18 months period which was expressly agreed upon by the Parties would be rendered nugatory in most real-life investment disputes.
615. (b) In Claimants’ view, Law No. 26.017 was absolutely categorical in shutting the door to any possibility to obtain redress before Argentine courts (*Request § 88; C I § 411; C II § 201*). They consider this to notably hold true for Art. 6 of the Law<sup>328</sup> since it prevented the domestic courts from fulfilling the very functions the *recourse to domestic courts* prerequisite was said to serve. Respondent counters that Claimants could have set aside Law No. 26.017 (assuming that it was not in compliance with the international obligations of Argentina) by arguing before the domestic courts that, by virtue of Art. 75 para. 22 of the Argentine Constitution, international treaties to which Argentina is a party rank higher in the hierarchy of the Argentine legal system than laws adopted by Congress (*R I § 296; R II § 473; Tr pp. 36/21; 431/6; 433/15*).

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<sup>327</sup> “From the moment an arbitral proceeding is commenced, each of the parties to the dispute will adopt all the necessary measures in order to desist from the ongoing judicial proceeding.”

<sup>328</sup> See *supra* note 286.

616. Claimants contend, however, that such a course of action was not to be expected from the Argentine courts, since the legal stance taken by the Supreme Court of Argentina in its 2005 *Galli* Judgment<sup>329</sup> demonstrated that any bondholder attempting to obtain payment by resorting to the domestic courts of Argentina would face a rejection of his claims, so that any such attempt would have constituted a totally useless and frustrating exercise (*C I* §§ 415, 418; *C II* § 203; *Tr p.* 231/7). Respondent counters this argument by emphasizing that *Galli* was a purely domestic case including exclusively domestic bondholders so that it cannot be taken as guidance for how the Argentine judicial system would have treated non-domestic bondholders, notably in view of Art. 75 para. 22 of the Constitution.
617. In *Galli*, the Supreme Court remanded an appellate court decision which had ordered Respondent to pay certain amounts due to certain Argentine nationals under bonds which the latter had not tendered for exchange, and upheld the compatibility of the debt restructuring legislation with the Argentine Constitution. As regards the reasons for this decision, they are laid out in quite some detail in the Opinion of the Procurator-General of the Nation (pp. 1-29) which the seven Justices of the Supreme Court expressly endorsed (p. 30). Against this background, the *Galli* judgment can be said to be based on the following findings:
- Both the Procurator-General and the Justices emphasize the powers of Congress, under arts. 75 paras. 7 and 8 of the Argentine Constitution, to settle the payment of the domestic and foreign debt of the Nation and to fix the general budget, and refer to the “monetary sovereignty” (*soberanía monetaria*) of Congress (p. 23; per Justices Zaffaroni and Lorenzetti, § 10, p. 55).
  - Against this background, the debt restructuring process is qualified as belonging to the political sphere and thus generally not being subject to judicial review, notwithstanding a rather generic test of “reasonability” (*carácter razonable*) and non-discrimination of the measures in question, but which does not change the general picture of judicial deference vis-à-vis the political echelons (p. 26; per

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<sup>329</sup> See *supra* para. 557.

Justices Maqueda and Highton de Nolasco, § 12, p. 42; per Justices Zaffaroni and Lorenzetti, § 9, p. 54; per Justice Argibay, § 4, p. 64).

- Furthermore, it is pointed out that participation in the Exchange Offer was an option for the bondholders and that those who did not participate acted voluntarily and thus exposed themselves to the consequences of their behaviour (per Justices Maqueda and Highton de Nolasco, §§ 18, 19, pp. 46, 47). The investors were aware that the laws adopted by Congress forbade the executive power to reopen the exchange process as well as the possibility of entering into any kind of judicial, out-of-court or private transaction with regard to the bonds that were not exchanged (per Justice Argibay, § 7, pp. 65, 66).
- The Procurator-General and the Justices of the Supreme Court strongly draw upon the Supreme Court's *Brunicardi* case<sup>330</sup> which dealt with the foreign sovereign debt of Argentina and measures taken in this regard by the Argentine Government in 1983. Accordingly, if a Government decided to suspend the payment of debt for reasons of financial necessity or public interest, this was generally accepted by the international community (p. 20). According to the Supreme Court in *Brunicardi*, there exists a principle of international law that precludes a State's international responsibility in case of suspension or modification, in whole or in part, of the payment of the external debt, in the event the State is forced to do so due to reasons of financial necessity (p. 22; per Justices Maqueda and Highton de Nolasco, § 10, p. 39; per Justices Zaffaroni and Lorenzetti, §§ 13, 14, pp. 59, 60).

618. The Tribunal would consider that these arguments apply, in principle, with equal force to non-domestic bondholders. In particular given the Supreme Court's stance on international law, it is very doubtful whether a reference to Art. 75 para. 22 of the Argentine Constitution and to Argentina's international obligations under the BIT would have changed the picture. It may well be that the Constitution endows international treaties with a higher normative rank than laws, but a BIT would still be inferior to the provisions of the Constitution itself. The Supreme Court in *Galli* emphasizes the powers

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<sup>330</sup> Fallos 319:2886.

of Congress to settle domestic and foreign debt, notably in emergency situations, and accepts the debt restructuring process as emanating from this constitutional power. The fact that the Supreme Court qualifies the restructuring legislation to be generally non-justiciable by the courts and confirms its reasonable character suggests that the Supreme Court was not prepared to interfere with the exercise of powers by Congress which, in the Supreme Court's view, were reserved to Congress by the Constitution itself.

619. Furthermore, *Galli* was followed by two later decisions of the Argentine Supreme Court in 2008 in which it expressly upheld the approach taken in *Galli*.<sup>331</sup> Hence, when Claimants submitted the Request in 2008 – and this is the perspective from which the futility *vel non* of having recourse to Argentine courts must be assessed – they were confronted with a line of Supreme Court cases manifesting that the latter was not willing to let the judiciary interfere with the debt restructuring decisions of Congress regarding the emergency situation of the early 2000s.
620. Given the jurisprudence of the Supreme Court of Argentina and in the light of the circumstances prevailing in the present case, the Tribunal concludes that having recourse to the Argentine domestic courts and eventually to the Supreme Court would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile. Hence, Claimants did not violate the duty to have recourse to Argentine courts under Art. 8(2) and (3) of the Argentina-Italy BIT when they submitted the Request for Arbitration on 23 June 2008.
621. The Tribunal would like to add, to its knowledge, since 1994, i.e. the introduction of the new Art. 75 para. 22 into the Argentine Constitution, no domestic law was struck down for being incompatible with a BIT.
622. (c) As regards the cost argument, there can be no doubt that approaching the local courts will create additional costs for the investor. However, as the International Law Commission has rightly pointed out in the context of the duty to exhaust local remedies

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<sup>331</sup> *Lucesoli, Daniel Bernard c/ Poder Ejecutivo Nacional s/ amparo*, Case No. L. 542. XLIII, 9 September 2008 (Annex CLA-38) and *Rizzuti, Carlos Pablo c/ Poder Ejecutivo Nacional s/ amparo*, Case No. R. 483. XLIV, 22 December 2008 (Annex CLA-39).

in cases of diplomatic protection, it is not sufficient to show that those remedies are “difficult or costly. The test is [...] whether the municipal system of the respondent State is reasonably capable of providing effective relief.”<sup>332</sup> While Claimants contend that filing their claim in the Argentine courts may have given rise to substantial costs, they have not established that the financial burden imposed upon them would reach an extent that the Argentine court system cannot be deemed reasonably capable of providing effective relief. To reach such conclusion on the basis of mere financial reasons can only be envisaged, if at all, in exceptional circumstances.

623. In addition, Art. 8(4) of the Argentina-Italy BIT provides that “[f]rom the moment an arbitral proceeding is commenced, each of the parties of the dispute will adopt all the necessary measures in order to desist from the ongoing judicial proceeding.” This provision may help to alleviate the financial burden by avoiding or reducing costs incumbent upon Claimants inasmuch as it also commits a Party to take the necessary steps to allow the other Party to desist from the domestic proceedings. Hence, once the 18 months term has expired and a Party decides to proceed to international arbitration, the other Party must, to the extent possible, adopt the necessary measures so that no additional costs will arise for the former Party due to the mere fact of exercising a right expressly granted to it by the BIT, namely Art. 8(3) of the BIT. Any other interpretation would not be consistent with an application of Art. 8(4) in good faith. As a possible consequence, if a Party used instruments of domestic law available to it to make the other Party leaving the domestic proceedings overly costly so as to actually restrain it from proceeding to international arbitration, this might constitute a violation of Art. 8(4) of the BIT and might lead the aggrieved Party to sue for the loss incurred in the subsequent arbitral proceedings.

**(4) The Tribunal’s conclusions and the Decision in the *Abaclat* case**

624. The Tribunal in the *Abaclat* case came to the same result, viz., that the duty to have recourse to Argentine courts, according to Art. 8(2) and (3) of the Argentina-Italy BIT, was not violated by Claimants, albeit on the basis of a different reasoning. It did not want

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<sup>332</sup> ILC Draft Articles on Diplomatic Protection, Art. 15(a), Commentary; see *supra* note 324.

to rely so much on the “general principle of futility” but rather on a “weighting of the specific interests at stake.” This weighing of interests of the Parties aims at taking into serious consideration the host State’s interest of having an opportunity to address the allegedly wrongful act within the framework of its own domestic legal system before resorting to international arbitration, and then at comparing this interest with that of the Claimants of being provided with an efficient dispute resolution mechanism. In the *Abaclat* Tribunal’s opinion, “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?’”<sup>333</sup> “[T]his 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”.<sup>334</sup>

625. On the basis of that approach to the question, the *Abaclat* Tribunal concluded that “[i]n the light of the Emergency Law<sup>335</sup> 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.”<sup>336</sup>
626. The reasoning of the *Abaclat* Tribunal is committed to an approach focusing on “the context, as well as [...] the purpose and aim of Article 8.”<sup>337</sup> While this wording evokes elements of Art. 31 of the VCLT, the Tribunal’s decision was harshly criticized in the Dissenting Opinion of Professor Abi-Saab for “tak[ing] the liberty of striking out a clear

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<sup>333</sup> *Abaclat* Decision, para. 581 as well as paras. 582 and 584.

<sup>334</sup> *Ibid.*, para. 582.

<sup>335</sup> The *Abaclat* Tribunal hereby refers to Law No. 26.017, also referred to as *ley Cerrojo* (see *ibid.*, para. 78). As to the ambiguity of the majority decision in this regard (which also refers to the Public Emergency and Reform Law of 2002 as “Emergency Law”; *ibid.*, para. 60) see *C IV § 19, n. 12* and *R IV 16, n. 62*.

<sup>336</sup> *Abaclat* Decision, para. 588.

<sup>337</sup> *Ibid.*, para. 579.

conventional requirement, on the basis of its purely subjective judgment.”<sup>338</sup> The present Tribunal has chosen a different path for its own reasoning on the matter and has, in the previous sub-section, laid out in detail how an interpretation strictly faithful to the requirements of Art. 31 of VCLT, notably including Art. 31(3)(c) of the Vienna Convention, leads to identify a futility exception in the pertinent *lex lata*, i.e. Art. 8(2) and (3) of the Argentina-Italy BIT.

627. The Tribunal cannot ignore, however, that on a more general level the “futility” reasoning which governs the present Decision and the “fair opportunity” approach endorsed by the *Abaclat* Tribunal are not mutually exclusive, but complement each other. In fact, they seem to be based on different perspectives on the same reality of competing interests. Whilst the “futility” reasoning rather looks at the problem from *Claimants’* side, the “fair opportunity” approach, by asking whether *Respondent* is given a fair opportunity to address the dispute through its local courts, takes the latter’s perspective. Similarly, whereas the emphasis of the “futility” approach is on the existence for Claimants of an *effective* remedy, the “fair opportunity” approach draws on the idea of *forfeiture* of Respondent’s right to preferential dealing with the case due to its inability or unwillingness to provide effective legal means of redress to the investor(s).
628. In sum, the challenge is to strike a balance between these equally legitimate and important interests under the circumstances of a concrete case. In view of Respondent’s acts, notably the adoption of Law No. 26.017, it would seem to the Tribunal to impose an undue burden on Claimants and not to be compatible with the Tribunal’s responsibility to guarantee fair and effective arbitration proceedings to construe Art. 8 of the Argentina-Italy BIT so as to require Claimants to have recourse to Argentine courts when being placed in a situation such as the present one and sanction their not having done so by dismissing the case. After all, it was acts clearly attributable to the Respondent, namely arts. 3 and 6 of Law No. 26.017, which prevented both the executive and judicial authorities of Argentina by legislative *fiat* of the Argentine Congress – laws enacted by Congress being, according to Art. 13 of the Argentine Constitution, alongside the

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<sup>338</sup> Dissenting Opinion of Professor Abi-Saab in the *Abaclat* case, para. 30.



Constitution itself, “the supreme law of the Nation” – from addressing, let alone effectively settling, the claims of the Claimants within the domestic legal system of Argentina. Accordingly, it cannot be concluded that the requirement of having recourse to Respondent’s domestic courts, as set forth in Art. 8(2) and (3) of the Argentina-Italy BIT, was violated by Claimants.

*d) No need to rely on the most favoured nation clause of Art. 3(1) of the BIT*

629. In view of this result, it is not necessary for the Tribunal to enter into the question whether the most favoured nation clause contained in Art. 3 para. 1 of the Argentina-Italy BIT may have entitled Claimants to rely on the allegedly more favourable dispute resolution clause contained in Art. VII(3) of the Argentina-US BIT.

## **DISSENTING OPINION BY ARBITRATOR TORRES BERNÁRDEZ**

630. Arbitrator Dr. Torres Bernárdez will issue a Dissenting Opinion to the present Decision on Jurisdiction and Admissibility. In agreement with Dr. Torres Bernárdez, the text of the Dissenting Opinion will be published subsequently.

## **DECISIONS TAKEN BY THE TRIBUNAL**

631. In view of the above reasoning and subject to the mandate given to it by the Parties to restrict its decision at this stage of the proceedings to “preliminary objections of a general character only”<sup>339</sup>, the Tribunal

- *Decides* that the present case falls within the jurisdiction of the Centre and that the Tribunal has competence to decide the present case;
- *Decides* that the Claimants’ claims are admissible;
- *Therefore dismisses* all Respondent’s objections as regards jurisdiction and admissibility;
- *Takes note* of the discontinuance of proceedings as of 8 February 2103 in regard to the 29 Claimants listed in para. 343 above;
- *Orders* the afore-mentioned Claimants and the Respondent to bear the arbitration costs and their own costs as set out in paras. 348-352 above and in a separate Procedural Order;
- *Reserves* the decision on the costs not decided upon in the present Decision and in the separate Procedural Order to the merits phase of the proceedings;
- *Decides* to rename the present proceedings “Ambiente Ufficio S.p.A. and others v. Argentine Republic”.

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<sup>339</sup> See *supra* para. 5.

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



Judge Bruno Simma



Professor Karl-Heinz Böckstiegel



Dr. Santiago Torres Bernárdez