

ICSID Case No. ARB/07/5

**ABACLAT AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

PROCEDURAL ORDER NO. 32

1 AUGUST 2014

IN VIEW OF

- Procedural Orders No. 27 of 30 May 2014, No. 28 of 9 June 2014 and No. 31 of 20 June 2014, as well as the documents and correspondence referred to therein;
- The Arbitral Tribunal's letter of 28 June 2014;
- Respondent's letters of 7, 18 and 21 July 2014;
- Claimants' letters of 23 June 2014, as well as of 7, 14, 17 and 22 July 2014;

CONSIDERING

- that, in its letter of 28 June 2014, the Arbitral Tribunal invited the Parties to make submissions on – among others – the following issues:
 - (i) Information regarding individual Claimants (sections A & C of the letter);
 - (ii) Claimants' letter of 23 June 2014 requesting that certain documents be introduced into the record (section B. 1 of the letter);
 - (iii) Examination of individual Claimants (section B.2 & D of the letter);
 - (iv) Correction of the transcripts (section F of the letter)
- that, in its letter of 21 July 2014, Respondent raised a new request concerning declarations made by Mr. Nicola Stock;
- That for the sake of clarity these issues will be dealt with separately below;

1. AS CONCERNS INDIVIDUAL CLAIMANTS

CONSIDERING

- that Claimants consider that the 40,422 Claimants verified by the Tribunal-appointed Expert, as well as another 4,006 Claimants for which a mere verification on legal grounds would be sufficient, are ready for the Tribunal's decision;
- that the Expert, after verifying the Database, has considered that the files of 40,422 Claimants did not give rise to any particular issues and were complete and legible (hereinafter the "Verified Claimants");
- that for all other Claimants, the Expert has identified a number of issues affecting either the completeness, legibility or consistency of information provided in the Database;
- that although objecting to the Verification Process and the findings of the Expert, Respondent has not provided any specific rebuttal evidence as concerns the Verified Claimants;

- that it appears that a number of the Verified Claimants have requested their withdrawal from the present proceedings and that such request has not yet been finally decided upon by the Tribunal;
- that, under these circumstances, the Tribunal finds it appropriate to proceed first with regard to the Verified Claimants who are not subject to any withdrawal request and to defer its ruling on all remaining Claimants until after its decision on the Verified Claimants;
- that Claimants are hereby invited to re-submit by Wednesday 6 August 2014 the list of the Verified Claimants (list A.2.i) by updating the column “withdrawal pending” with all withdrawals filed by any Claimant since 5 October 2010 (and not 25 September 2013 as currently in the Table) and to make two sub-lists, i.e. (i) one with Verified Claimants who have not filed any request for withdrawal and (ii) one with Verified Claimants having requested to withdraw;

2. AS CONCERNS THE INTRODUCTION OF DOCUMENTS RELATING TO THE U.S. SUPREME COURT’S PROCEEDINGS

CONSIDERING

- that, on 23 June 2014, pursuant to Procedural Order No. 31, Claimants filed the following documents for their introduction into the record as C-7671 to C-7672 :
 - (i) A 29 May 2014 Paris Club press release concerning an alleged agreement with Argentina (C-7676), and two related press releases from the Argentinean Ministry of Economy and Finance and the IIF (C-7677 and C-7678);
 - (ii) The ruling of 16 June 2014 of the U.S. Supreme Court in *NML Capital Ltd. v. Argentina*, together with (1) the Order List of the United States Supreme Court, 573 U.S. (2014) (C-7671), (2) the Second Circuit Court’s Notice of Denial of Petition for Writ of Certiorari (C-7672), (3) the Second Circuit Court’s Order Lifting Stay of Enforcement of Amended Injunction (C-7673), and (4) transcripts of the hearing before Judge Griesa of 18 June 2014 (C-7674);
 - (i) Recent public statements by Argentina’s President Mrs. Kirchner and Minister of Economy Mr. Kicillof (C-7679 to C-7682);
- that, on 7 July 2014, Respondent responded to Claimants’ letter and submitted 25 rebuttal documents. Respondent objected to Claimants’ submission of the Second Circuit Court’s ruling of 18 June 2014 (C-7673), the transcript of the hearing (C-7674) and the U.S. Supreme Court’s order on discovery of 16 June 2014 (C-7671) based on the argument that these documents exceed the scope of submissions admitted under Procedural Order No. 31;

- that, on 14 July 2014, Claimants responded to Respondent's objections. Claimants contend that (i) the additional documents are offered for completeness of the record, and to provide the Tribunal, further to its own request at the hearing, with the most recent information available, (ii) all three documents are publicly available, (iii) they are directly relevant and/or immediately follow from the Supreme Court's 16 June rulings, and (iv) Argentina is a party to the concerned proceedings and thus has access to all relevant documents and has been given an opportunity to submit rebuttal evidence;
- that, in their letter of 14 July 2014, Claimants further objected to certain rebuttal documents submitted by Respondent and predating the developments covered by Procedural Order No. 31 and requested that these documents be excluded from the record;

CONSIDERING FURTHER

- that, in Procedural Order No. 31, the Arbitral Tribunal granted Claimants leave to submit three documents into the record, including (i) *"the Paris Club's 29 May 2014 press release regarding its recent agreement with Argentina"*, (ii) *"the ruling of the US Supreme Court of 16 June 2014 in the NML Capital case"*, and (iii) *"the video of President Kirchner's 16 June address"*;
- that the Arbitral Tribunal granted Claimants leave based on the fact that Claimants considered these documents to be highly relevant and that Respondent was in principle not opposed to their introduction subject to certain terms and conditions;
- that with their submission of 23 June 2014 Claimants submitted additional documents;
- that these documents are however directly related to and/or immediately follow the U.S. Supreme Court's ruling of 16 June 2014 and therefore help its understanding and assessing its impact;
- that these documents are publicly available;
- that Respondent was a party to the proceedings before the U.S. Supreme Court, has thus access to all relevant documents and has been given the opportunity, of which Respondent made use, to submit rebuttal evidence;
- that, under these circumstances, the Arbitral Tribunal sees no reason to exclude the additional documents from the record;

CONSIDERING FURTHER

- that Respondent submitted 25 documents as exhibits RE-814 to RE-827 and RD-586-596 in response to Claimants' letter of 23 June 2014;
- that some of these documents largely pre-date the proceedings before the U.S. Supreme Court's ruling of 16 June 2015, in particular:

- (i) RE-816 dated 29 March 2006, Report to the External Evaluation of the Independent Evaluation Office of the IMF;
 - (ii) RE-818 dated 10 March 2011, Europe's Sovereign Debt Crisis and its Impact on U.S. and European Financial Institutions, Navigant;
 - (iii) RD-596 dated 4 April 2012, Amicus curiae, U.S. in support of the Argentine Republic;
 - (iv) RE-820 dated July 2003, First Review under Stand-By Arrangement, IMF Report No. 03/214;
 - (v) RE-821 dated March 2004, Second Review under Stand-By Arrangement, IMF Report No. 04/195;
 - (vi) RE-822 dated December 2003, Request for Stand-By Arrangement, IMF Report No. 03/392;
 - (vii) RE-827 dated 3 March 2005, Transcript of former President Nestor Kirchner's address;
- that the purpose of Procedural Order No. 31 was to provide the Tribunal with information on the recent developments relating to the U.S. Supreme Court's proceedings;
 - that Respondent's right to submit evidence was to rebut the documents submitted by Claimants;
 - that Respondent has not specified to what extent these documents relate to the U.S. Supreme Court proceedings and why they are relevant and/or to what extent they serve to rebut the documents submitted by Claimants;
 - that Respondent has also not specified why these documents were not submitted previously;
 - that under these circumstances, the Arbitral Tribunal does not consider it appropriate to admit RE-816, RE-818, RE-820, RE-821, RE-822, RE-827 and RD-596;

CONSIDERING FURTHER

- that, by letter of 21 July 2014, Respondent further requested leave to introduce a letter from the Italian Prime Minister Mr. Matteo Renzi to Argentina's President, Mrs. Cristina Fernandez de Kirchner;
- that, by letter of 22 July 2014, Claimants took note of Respondent's request and reserved the right to object thereto after seeing the documents;
- that, in view thereof, Respondent is granted leave to produce this document without prejudice to Claimants' right to object thereto;

3. AS CONCERNS EXAMINATION OF INDIVIDUAL CLAIMANTS

CONSIDERING

- that, in Procedural Order No. 27, the majority of the Arbitral Tribunal ruled that “*the standard applicable in the present proceedings is that (i) only witnesses having issued witness statements may be subject to cross-examination*” and therefore rejected Respondent’s request to cross-examine each and every Claimant granting Respondent the right to cross-examine those Claimants who had submitted a witness statement;
- that, in Procedural Order No. 28, the Arbitral Tribunal took note of Respondent’s decision not to call individual Claimants who have submitted a witness statement for examination at the hearing;
- that, consequently, Respondent did not call any Claimants for cross-examination at the hearing;
- that, by its letter of 28 June 2014, the Arbitral Tribunal invited Respondent to “*set out in detail its request concerning the hearing of Claimants*”;
- that, in its letter of 7 July 2014, Respondent reiterated its request “*to examine each of the Claimants, in accordance with the list accompanying the Claim Memorial*”;
- that Claimants object to this request based on the following main arguments: (i) that it is legally unnecessary to the extent that, as concerns the merits, all Claimants were treated “*en masse*” by Argentina and, as concerns the jurisdiction, Claimants have provided individual documents for each Claimant, (ii) that, instead of securing due process for any of the Parties, Respondent’s request would monopolize the procedure, (iii) that the applicable standard, as determined by the Tribunal, is that only Claimants having submitted a witness statement may be cross-examined, and (iv) that Respondent provided no reason to revisit the Tribunal’s decision;

CONSIDERING FURTHER

- that the Arbitral Tribunal has dealt with Respondent’s request to cross-examine each Claimant in its Procedural Orders Nos. 27 and 28;
- that, notwithstanding such decision, the Arbitral Tribunal provided Respondent with an additional opportunity to further detail and substantiate its request for examination of individual Claimants;
- that, in its letter of 7 July 2014, Respondent failed to further substantiate or detail its request;
- that the Tribunal does therefore not see any reason to revisit its previous decisions;

4. AS CONCERNS THE CORRECTION OF THE TRANSCRIPTS

- that, by letter from Claimants dated 17 July 2014, the Parties have filed a joint amended version of the English transcripts as well as a list of remaining disagreements concerning the correction of the transcripts;
- that this list was forwarded by the ICSID secretariat to the Court Reporters on 21 July 2014 with the request to verify the audio recordings;
- that, on 22 July 2014, the Court Reporter in charge of the English transcripts reverted to the ICSID secretariat with the results of the audio recordings;
- that, on 30 July 2014, the Court Reporter in charge of the Spanish transcripts reverted to the ICSID secretariat with the results of the audio recordings;
- that, the transcripts shall be amended according to the verification of the audio recordings by the Court Reporters;

5. AS CONCERNS THE DECLARATION OF MR. NICOLA STOCK

- that, by letter of 21 July 2014, Respondent complained about a letter written by Mr. Nicola Stock, the representative of TFA, to the *Financial Times*. According to Respondent, this letter would be in breach of Procedural Order No. 3 of 27 January 2010, in particular its paragraph 153.a.i. Therefore, Respondent requests that the Tribunal order Mr. Stock to refrain from making declarations in public which are not necessary and are used as an instrument to antagonize the Parties;
- that, by letter of 22 July 2014, Claimants refuted Respondent's allegations that Mr. Stock's declarations were in breach of the standards set forth in Procedural Order No. 3. According to Claimants, Mr. Stock's letter does not disclose any confidential information about either Party or the ICSID proceeding, nor does it serve to antagonize Respondent, but in fact merely serves to respond to misleading allegations made by Minister Kicillof;
- that both Parties are reminded that they shall abide by the terms of Procedural Order No. 3, and in particular to engage into public discussions of the case only where such public discussion is "*restricted to what is necessary, and is not used as an instrument to antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3*" (para. 153.a.i. of Procedural Order No. 3) ;

6. AS CONCERNS OTHER ISSUES

- that, by separate letter of 23 June 2014, Claimants requested that certain materials relating to Respondent's Opening Argument and certain parts of Mr. Marx's direct examination be excluded from the record;

- that Respondent has not commented upon Claimants' request;
- that Respondent is hereby invited to comment thereon by Wednesday 6 August 2014;

CONSEQUENTLY, THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

1. AS CONCERNS INDIVIDUAL CLAIMANTS

- That, under these circumstances, the Tribunal finds it appropriate to proceed first with regard to the Verified Claimants who are not subject to any withdrawal request and to defer its ruling on all remaining Claimants until after its decision on the Verified Claimants;
- That Claimants are hereby invited to re-submit by Wednesday 6 August 2014 the list of the Verified Claimants (list A.2.i) by updating the column "withdrawal pending" with all withdrawals filed by any Claimant since 5 October 2010 (and not 25 September 2013 as currently in the Table) and to make two sub-lists, i.e. (i) one with Verified Claimants who have not filed any request for withdrawal and (ii) one with Verified Claimants having requested to withdraw;

2. AS CONCERNS THE INTRODUCTION OF DOCUMENTS RELATING TO THE U.S. SUPREME COURT'S PROCEEDINGS

- Claimants' exhibits C-7671 to C-7672 are hereby admitted into the record;
- Respondent's exhibits RE-814, 815, 817, 819, 823, 824, 825, 826 and RD-586 to RD-595 are admitted into the record; Respondent's exhibits RE-816, 818, 820, 821, 822, 827 and RD-596, are hereby rejected;
- Respondent is granted leave to produce letter from the Italian Prime Minister Mr. Matteo Renzi to Argentina's President Mrs. Cristina Fernandez de Kirchner without prejudice to Claimants' right to object thereto;

3. AS CONCERNS CROSS-EXAMINATION OF INDIVIDUAL CLAIMANTS

- Respondent's request to cross-examine each Claimant is hereby rejected;

4. AS CONCERNS THE DECLARATION OF MR STOCK

- both Parties are reminded that they shall abide by the terms of Procedural Order No. 3, and in particular to engage into public discussions of the case only where such public discussion is "restricted to what is necessary, and is not used as an instrument to antagonize the Parties, exacerbate their differences, unduly pressure one of them, or render the resolution of the dispute potentially more difficult, or circumvent the terms of this Procedural Order No. 3" (para. 153.a.i. of Procedural Order No. 3);

5. AS CONCERNS OTHER ISSUES:

- **Respondent is hereby invited to comment on Claimants' separate letter of 23 June 2014 by Wednesday 6 August 2014.**

The decisions made in this Procedural Order have been made jointly by the majority of the members of the Arbitral Tribunal.

Dr. Torres Bernárdez has issued a separate 'Statement of Dissent', which is attached hereto.

[signed]

Pierre Tercier,

President

On behalf of the majority of the Arbitral Tribunal