

ICSID Case No. ARB/07/5

**ABACLAT AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

PROCEDURAL ORDER NO. 34

9 DECEMBER 2014

IN VIEW OF

- Procedural Order No. 32 of 1 August 2014, in which the Tribunal, upon Claimants' request, admitted into the record Exhibits C-7671 to C-7672 relating to the 16 June 2014 ruling of the U.S. Supreme Court in the *NML Capital Ltd. v. Argentina* case and various thereto relating rulings and orders;
- Procedural Order No. 33 of 4 September 2014, in which the Tribunal ruled that “[t]he Parties may not rely on new documents or legal authorities in their Post-Hearing Briefs, without prior leave from the Tribunal”;
- Respondent's letters of 18 and 24 September 2014 seeking to introduce into the record two documents, i.e. (i) a copy of the Argentine law No. 26984 as published on 12 September 2014 (hereinafter the “Law No. 26984”) and (ii) the Resolution 68/304 of the General Assembly of the United Nations of 17 September 2014 (hereinafter the “U.N. General Assembly Resolution 68/304”);
- Claimants' letter of 19 September 2014 objecting to such request;
- The Tribunal's message of 25 September 2014 ruling as follows:

“[...] Thus, under these circumstances, Respondent is granted leave to file such documents after the filing of the Reply Post-Hearing Briefs. The Post-Hearing Briefs shall not take into account these documents. When filing these documents, Respondent shall file separate comments to explain to what extent these documents are relevant and material to their case. Claimants will then be granted an opportunity to comment thereon.”
- The Tribunal's message of 13 November 2014 stating as follows:

“In reference to the Tribunal's message of 25 September 2014 conveyed per email by the ICSID Secretariat, Respondent is hereby invited to file the documents listed in its letter of 18 September 2014 by Thursday 20 November 2014 together with a separate explanatory note regarding the relevancy and materiality of these documents on Respondent's case. Claimants are then invited to respond thereto within 10 days upon receipt of the English translation of Respondent's comments. Neither Party shall file any further documents, without obtaining prior leave from the Tribunal.”

CONSIDERING

- That, on 20 November 2014, Respondent filed four documents, including (i) a copy of the Law No. 26984 (Appendix 1 to Respondent's letter of 20 November 2014), (ii) an extract of the preliminary debate before the Senate with Mr. Zembo's address to the Senate (Appendix 2), (iii) the U.N. General Assembly Resolution 68/304 (Appendix 3), and (iv) a letter of 9 July 2014 by Mr. Matteo Renzi, Prime Minister of Italy, to Dra. Cristina Fernandez de Kirchner, President of Argentina (Appendix 4), together with an accompanying letter setting out the relevancy of these documents;

- that, in its letter of 1 December 2014, Claimants objected to Respondent's submission with the following requests:

"Claimants respectfully request that the Tribunal:

- *Reject in its entirety, Respondent's request to introduce the four new documents into the record;*
 - *Strike any reference made by Respondent in its Post-Hearing Briefs to Law No. 26,984 and U.N. General Assembly Resolution No. 68/304; and*
 - *Afford Claimants the opportunity to submit into the record evidence to rebut Respondent's new documents, including the material referenced herein, in the event that it admits any of the four requested documents into the record."*
- That Claimants base their objections on the following main arguments:
 - (i) that the scope of Respondent's production exceeds the scope of the Tribunal's latest order;
 - (ii) that the documents that Respondent seeks to introduce are irrelevant to Claimants' claims for various reasons;
 - (iii) that admitting into the record Respondent's new documents would violate Claimants' fundamental procedural rights as there would be a clear imbalance in the treatment of the Parties with regard to the presentation of relevant evidence;

CONSIDERING FURTHER

- that Respondent was granted leave to submit two specific documents, i.e., the Law No. 26,984 and the U.N. General Assembly Resolution No. 68/304;
- that, at the same time, the Tribunal expressly prohibited the Parties from making any reference to these documents in the Post-Hearing Briefs;
- that Respondent has failed to comply with the express orders of the Tribunal by:
 - (i) filing four documents, two of which were not covered by the leave granted by the Tribunal in its letter of 25 September 2014, i.e. (i) the extract from the preliminary debate before the Senate (Appendix 2) and (ii) the letter from Mr. Matteo Renzi (Appendix 4);
 - (ii) referring to the Law No. 26,984 and the U.N. General Assembly Resolution No. 68/304 in its Post-Hearing Brief of 29 September 2014 at paras 42, 144 and footnote 244;
- that, whilst the transcripts of the preliminary debate before the Senate may be in the public domain, the extract submitted by Respondent is a selection of a small part of the entire debate, i.e., Mr. Zembo's address to the Senate, and does not allow appreciation of the full context and importance of the statements made by Mr. Zembo without studying the entire debate relating to the Law No. 26,984;

- that, the letter from Mr. Renzi is dated 9 July 2014 and could thus have been submitted at an earlier date and is further part of a chain of correspondence, which is not part of the record;
- that, under these circumstances, it would not be appropriate to admit these documents into the record;

CONSIDERING FURTHER

- that, as concerns the Law No. 26,984 and the U.N. General Assembly Resolution No. 68/304, it is undisputed that Respondent was granted leave to submit these documents;
- that Claimants' remaining objections concern the relevancy of these documents and the opportunity to respond thereto with additional rebuttal evidence;
- that the question of the relevancy of the Law No. 26,984 and the U.N. General Assembly Resolution No. 68/304 is disputed between the Parties and the Tribunal has not yet decided whether and to what extent the concerned documents may be relevant to the issues at stake in the present case;
- that, under these circumstances, it would be inappropriate to reject the concerned documents based on a lack of relevancy;
- that, as concerns Claimants' right to respond to such evidence, Claimants have already filed a 9-page letter with references to various documents and sources;
- that, as stated above in reference to Procedural Order No. 32, the Tribunal admitted into the record, upon Claimants' request, the 16 June 2014 ruling of the U.S. Supreme Court in *NML Capital Ltd. v. Argentina* and thereto relating rulings and orders of other U.S. courts;
- that the Law No. 26,984 has been promulgated partly in response to the effects of these U.S. court decisions;
- that, as such, the Tribunal considers that there is no imbalance in the treatment of the Parties and that by its detailed letter of 1 December 2014 Claimants have been given and have exercised their right to respond to Respondent's submission of 20 November 2014;
- that the Tribunal reserves the right to revert to the Parties in case it would consider requiring further information with regard to the impact of the Law No. 26,984 and the U.N. General Assembly Resolution No. 68/304;

CONSEQUENTLY, THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

1. WITH REGARD TO THE ADMISSIBILITY OF THE DOCUMENTS SUBMITTED BY RESPONDENT:

- (i) The Law No. 26,984 and the U.N. General Assembly Resolution No. 68/304 are admitted into the record, whereby the Tribunal makes at this stage no finding as to the relevancy of these documents on the issues at stake in the present case;**
- (ii) Appendices 2 and 4 to Respondent's letter of 20 November 2014 shall be excluded from the record and references thereto in Respondent's letter of 20 November 2014 shall be stricken.**

2. WITH REGARD TO REFERENCES MADE TO THE DOCUMENTS IN RESPONDENT'S POST-HEARING BRIEF:

All references to the Law No. 26,984 or the U.N. General Assembly Resolution No. 68/304 in Respondent's Post-Hearing Brief shall be stricken.

3. WITH REGARD TO CLAIMANTS' REQUEST TO SUBMIT REBUTTAL EVIDENCE:

- (i) Claimants' request is rejected as the Tribunal considers that Claimants' letter of 1 December 2014 and the references contained therein are at this stage sufficient for the purpose of responding to the documents admitted into the record.**
- (ii) The Tribunal reserves the right to revert to the Parties in case it would consider requiring further information with regard to the impact of the Law No. 26,984 and the U.N. General Assembly Resolution No. 68/304.**

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 'Concurrent and Dissent Statement', which is attached hereto.

[signed]

*Pierre Tercier,
President
On behalf of the majority of the Arbitral Tribunal*