

ICSID Case No. ARB/07/5

**GIOVANNA A BECCARA AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

PROCEDURAL ORDER NO. 5

2 APRIL 2010

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I. RELEVANT PROCEDURAL HISTORY

1. On 18 March 2010, the Tribunal issued its Procedural Order No. 4, in which it set forth certain principles on the admissibility and use of the documents submitted for witness and expert examination. With regard to relevant deadlines, the Procedural Order No. 4 provided as follows:
 - (i) Each Party was invited to submit by 26 March 2010 a list of the documents already submitted and which it plans to use during the hearing;
 - (ii) Claimants' Counsel were invited to submit by 30 March 2010 a list of existing proceedings relating to Claimants' security entitlements, conducted outside the present arbitration and which involve individuals or companies which are also Claimants in the present arbitration, to the extent Claimants' Counsel had knowledge thereof. In case Claimants have any objection to providing such information, they were invited to justify such objection in written by 26 March 2010;
 - (iii) Respondent was invited to identify the specific issues to be addressed during the direct examination of its handwriting experts Subinspector Pereyra and Mr Petersen (h) and summarize the substance of their testimony by 26 March 2010.
2. On 22 March 2010, the Tribunal held a pre-hearing joint telephone conference together with the Parties and ICSID concerning the organization and agenda of the Hearing on Jurisdiction scheduled on 7-13 April 2010 ("Pre-Hearing Conference"). At the conclusion of the teleconference, the following procedural matters were left open: (i) the specific order of examination of experts and witnesses, (ii) the presence of experts and witnesses during the hearing, (iii) the specific role and presence of Task Force Argentina ("TFA") during the hearing. While the Tribunal announced that it would render a decision on the first two matters, Respondent was invited to comment upon the third matter within five days, after which Claimants would also be given five days to answer.
3. On 25 March 2010, Claimants sent a letter complaining about Respondent's latest communication addressed to ICSID and requesting "immediate access" to the online version of the Claimants Database. Claimants feared that this request was an

indication that Respondent would be planning to use the additional information contained in the Database and not yet filed in paper form in the various Annexes to Claimants' submissions during the hearing. Claimants' mainly contend that such a use would be contrary to the Tribunal's Procedural Order No. 4, in which the Tribunal limited the future submission of documents, and would go beyond the scope of the hearing on jurisdiction because the documents at stake concern "individual nationality documents" that are not relevant to the 11 jurisdictional issues but relate to circumstances of individual Claimants.

4. On 26 March 2010, ICSID received following submissions from the Parties:
 - (i) The list of documents that each Party intends to use for witness and expert examination, as requested in the Procedural Order No. 4 (see above § 1);
 - (ii) A letter from Claimants declaring that they would submit the list of existing proceedings pending outside the present arbitration and involving some or all of Claimants as requested in the Procedural Order No. 4 (see above § 1). Claimants nevertheless raised an objection to "Respondent's repeated attempts to interfere unnecessarily with Claimants' preparations for the upcoming hearing";
 - (iii) A letter from Respondent containing one paragraph specifying and summarizing the issues to be addressed during the direct examination of the handwriting experts Subinspector Pereyra and Mr Petersen (Jr), as requested in the Procedural Order No. 4 (see above § 1);
 - (iv) A second letter from Respondent commenting on the position of TFA, as requested during the Pre-Hearing Conference (see above § 2). Respondent requested that TFA not be allowed to attend the upcoming hearing (see below § 33). In this letter, Respondent further requested the Tribunal "to grant Argentina immediate access to the information contained in Claimants' Database, in the terms of Procedural Order No. 3".
5. On 28 March 2010, Claimants submitted two letters to the Tribunal:
 - (i) In the first letter, Claimants followed up on their letter of 25 March 2010 (see above § 3) and objected to Respondents' request for immediate access to the Database and its intended use of the information contained therein. Claimants' main position is that it will arrange for online access to the

production of individual Claimant documents, but that those documents cannot be used at the hearing or in this phase of the arbitration proceedings.

(ii) In the second letter, Claimants object to the fact that in the list submitted on 26 March 2010 (see above § 4(i)), Respondent only designated documents submitted on 1 March 2010, thereby ignoring the voluminous documents it had submitted on 3 June 2009. Claimants further object to the use by Respondent of an undated video clip and incomplete transcript of an Italian TV show for use during Mr. Cerniglia's examination (see below § 18).

6. On 29 March 2010, the Tribunal sent out a letter to Parties in which it decided on the matters left open during the telephone conference of 22 March 2010 (see above § 2). The Tribunal therein (i) confirmed the order of examination of experts as witnesses as set forth in the draft agenda it circulated to the Parties on 5 March 2010, (ii) gave further specification as to the use of the time allocated to each Party, and (iii) set forth rules as to the presence of experts and witness during the hearing.

7. On 30 March 2010, the Tribunal received three different communications from the Parties:

(i) A letter from Claimants submitting a list of existing proceedings relating to Claimants' security entitlements, conducted outside the present arbitration and which involve individuals or companies which are also Claimants in the present arbitration, as requested in the Procedural Order No. 4 (see above § 1(ii));

(ii) A letter from Respondent answering Claimants' objections of 28 March 2010 (see above § 5(i)) to Respondent's request for immediate access to the database and to Claimants' arguments aiming at excluding the use during the hearing of further documents contained in the database (see above § 3 and 5(ii));

(iii) A letter from Claimants reiterating their objection to Respondent's demand for immediate access to the Database and the implications thereof.

8. On 1 April 2010, Claimants replied to Respondent's objection concerning TFA's participation to the hearing and requested the Tribunal to reaffirm under ICSID Arbitration Rules 18 and 32(1) that TFA representatives may attend the hearing.

II. OBJECT OF THE PRESENT PROCEDURAL ORDER AND THE TRIBUNAL'S POWER TO DECIDE

9. In the present Procedural Order No. 5, the Tribunal deals with the following issues:
- (i) The admissibility and use of documents for witness and expert examination, and in particular those listed in the Parties' lists as submitted on 26 March 2010 (see above § 4(i)) and those contained in Claimants online Database;
 - (ii) The admissibility of TFA's attendance to and its role during the hearing.
10. Rule 19 of the ICSID Arbitration Rules provides that "[t]he Tribunal shall make the orders required for the conduct of the proceeding". All the above mentioned issues relate to the conduct of the proceeding, and in particular of the upcoming hearing on jurisdiction.
11. Consequently, the present order is based on the Tribunal's power to determine the conduct of the proceedings as deriving from Rule 19 of the ICSID Arbitration Rules.

III. THE TRIBUNAL'S POSITION

A. Regarding the Admissibility and Use of Documents for Witness and Expert Examination

a) Preliminary Remarks

12. The Tribunal notes that both Parties have complied with the terms set forth in Procedural Order No. 4 and have indicated a list of specific documents they intend to use for witness and expert examination.
13. The Tribunal reminds that according to its Procedural Order No. 4, it has admitted all documents submitted by the Parties as of 1 March 2010 (see Procedural Order No. 4, § 50) and has set forth the following principle with regard to the use of such documents during the hearing (§ 50 *in fine*):

The use of these documents may not serve to unduly extend the scope of admissible examination for the jurisdictional hearing as

set forth at the First Session of 10 April 2008 and in the Tribunal's letter of 21 May 2009

14. The aim of the present Procedural Order No. 5 is thus not to question or repeat the principles set forth in the Procedural Order No. 4, but rather to apply these principles to the documents specifically designated by the Parties in the lists submitted by them on 26 March 2010 (see above § 4) and to other relevant issues raised with regard to documents for the examination of witnesses and experts.

15. In this regard, the Tribunal has taken due note of the Parties' positions as reflected in their various submissions. While it will refer where necessary to specific arguments of each Party, it deems it unnecessary to give a general summary thereof.

b) With Regard to Documents Designated by Respondent

16. With regard to Respondent's list, the Tribunal notes that Respondent's list refers solely to documents submitted on 1 March 2010, and does not refer to any of the documents submitted on 3 June 2009.

17. The Tribunal notes that most of the documents listed on Respondent's list refer to decisions of Italian courts or arbitral tribunals,¹ legal provisions of Italian law,² news papers articles³ and press releases of relevant actors,⁴ as well as scientific articles.⁵ The nature and indicated purpose of these documents seem to be in line with the principles set forth in Procedural Order No. 4.

18. Claimants have objected however to the use of Exhibit RE-610, which consists in a DVD and its transcript of a Italian TV show broadcast discussing Italian court decisions concerning proceedings initiated by Claimants and intended to be used for Mr Cerniglia's cross-examination by Respondent (see above § 5(ii)). Claimants' objection is mainly based on (i) the fact that the statements made in this TV show are not witness testimony, (ii) the alleged unreliability of such source and (iii) the late filing of this material. In case the Tribunal was to accept this material

¹ RC-181, RD-428-475.

² RD-476-477.

³ RE-590-592, RE-597-600.

⁴ RE-593-596, RE 601-609.

⁵ RE-611-614.

for use during the hearing, Claimants reserve the right to present their video to demonstrate that Respondent's submission is selective, incomplete and improper.

19. The Tribunal notes that out of the 75 Exhibits listed, 62 Exhibits are intended to be used for the examination of Mr Cerniglia, including the contested Exhibit RE-610. The Tribunal is thus concerned about the time that Respondent intends to spend on Mr Cerniglia's examination, the usefulness of dedicating so many documents to one single witness and the efficiency and constructiveness of such examination.

20. Nevertheless, the Tribunal admits the use of this video during the hearing as a matter of principle. At the same time however, the Tribunal subjects the use of such video to the following restrictions:

- (i) The Tribunal invites Respondent to review the scope of examination of Mr Cerniglia, in particular with regard to the number of relevant Exhibits;
- (ii) Secondly, the Tribunal reserves the right to interrupt the examination of Mr Cerniglia in case it deems that Respondent's examination is beyond the scope of what is necessary and appropriate;
- (iii) Finally, the Tribunal may – depending on the circumstances - allow Claimants to make use of their own video, if deemed necessary. Claimants are therefore invited to provide Respondent with a copy of such video.

21. **Consequently, the Tribunal allows the use of all the documents and material referred to in the list submitted by Respondent on 26 March 2010, under the terms and conditions set forth in § 20.**

c) *With Regard to Documents Designated by Claimants*

22. With regard to Claimants' list, the Tribunal notes that most of the documents referred to on Claimants' list refer to correspondence between Respondent and the association Federconsumatori,⁶ decisions of courts or arbitral tribunals,⁷ legal provisions,⁸ and scientific articles and book excerpts,⁹ and a couple of transcripts

⁶ C-969-970.

⁷ CLA-318-331, 337-342, 344-345, CLA-ITA 181-190, 192-212, 216-225, CLA-ARG 571.

⁸ CLA-ITA 191, CLA-317.

⁹ CLA-332-336, 347, CLA-ITA 213-215, .

of court proceedings involving Argentina.¹⁰ The nature and indicated purpose of these documents seem to be mostly in line with the principles set forth in Procedural Order No. 4.

23. However, two questions arise regarding the use of (i) CLA 343 and 346 concerning transcripts of court proceedings, and (ii) Exhibits CLA 318-330 concerning the cases “Reineccius, et al v. Bank for International Settlements” and “Reginald H. Howe v. Bank of International Settlements”, and which Respondent had objected to in its submission of 1 March 2010.

24. Regarding CLA 343 and 346, the Tribunal notes that Respondent was party to the concerned court proceedings. As such, Respondent had access to all relevant court files. These exhibits therefore do not fall within the scope of the documents deemed not admissible under the Procedural Order No. 3.

25. Regarding CLA 318-330, the Tribunal notes that (i) Claimants have replied to Respondent’s objections on 2 March 2010 concerning these Exhibits explaining why they would not fall within the scope of documents excluded by the Procedural Order No. 3, (ii) that Respondent has since then not insisted on its objection, and (iii) that Claimants have subsequently listed these Exhibits as part of the documents they intend to use for witness and expert examination, without triggering any renewed objection from Respondent.

26. In addition, in contrast to Respondent’s Exhibits RE-427, RE-428, RE-429, RE-435, RE-440, RE-452, RE-462, RE-488, RE-489, RE-490, RE-491, RE-492, RE-493, RE-494, RE-495, RE-496, RE-497, RE-498, RE-499, RE-504 and RE-528, which were excluded from the record in the Procedural Order No. 3, the present Exhibits CLA 318-330 do not concern transcripts of expert examinations or expert reports, but merely concern awards and orders rendered in the concerned arbitration proceedings and publicly accessible.¹¹ These exhibits therefore do not fall within the scope of the documents deemed not admissible under the Procedural Order No. 3.

27. ***Consequently, the Tribunal allows the use of all the documents and material referred to in the list submitted by Claimants on 26 March 2010.***

¹⁰ CLA-343 and 346.

¹¹ See http://www.pca-cpa.org/showpage.asp?pag_id=1157 (last accessed on 31 March 2010).

d) No Other Documents to be Used during the Hearing

28. The Parties have had ample opportunity to prepare and designate documents for examination of witnesses and experts. Each party has on 26 March 2010 expressly designated a list of specific documents it intends to use.
29. The Tribunal sees at this stage no reason to allow the use of any further document for the upcoming hearing.
30. **Consequently**, *the Parties may not use any other documents than those expressly listed in their list of 26 March 2010 and as admitted in § 21 and § 27 above.*

B. Regarding the Admissibility of TFA's Attendance to and its Role during the hearing

31. The Tribunal has taken due note of the Parties' positions as reflected in their various submissions. While it may refer where necessary to specific arguments of each Party, it deems it unnecessary to give a general summary thereof.
32. The role of TFA is an important question in the present arbitration, and it is covered mainly by the jurisdictional issues No. 1 and No. 2 listed in the Tribunal's letter of 21 May 2009. The role of TFA has consequently been extensively dealt with in the Parties' submissions. As such, the Tribunal must pay attention not to pre-judge this question when deciding on the admissibility and scope of TFA's attendance during the hearing.
33. Respondent's request not to allow TFA to attend the upcoming hearing (see above § 4 (iv)) is mainly based on the argument that "TFA is neither a party nor a witness nor an expert, and its mandate does not allow it to participate in any other character in this proceeding – such as agent, counsel or advocate- ..." and that Rule 32 of the ICSID Arbitration Rules would therefore not allow TFA's participation in the hearing.
34. In contrast, Claimants insist that TFA is Claimants' agent in the sense of Rule 18 and 32(1) of the ICSID Arbitration Rules and must thus be admitted to attend the hearing.

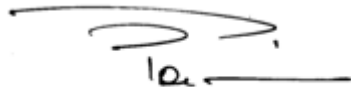
35. It is uncontested that TFA is not formally a party to the present arbitration. The Parties however disagree whether TFA should – for the purpose of the upcoming hearing - be considered as agent of Claimants.
36. In this respect, the Tribunal understands that Respondent is contesting the validity of the TFA Mandate and therefore the legitimacy of TFA’s representation of Claimants. This issue will be duly dealt with in the upcoming decision on jurisdiction as part of the jurisdictional issue No. 1 and 2.
37. At this stage, it is sufficient to note the following:
- (i) According to the clear wording of the TFA Grant of Mandate to TFA (“TFA Mandate”) each Claimant appoints TFA as its “Agent”, grants mandate to TFA to act as “coordinator” of the arbitration and – among others – to instruct Claimants Counsel;
 - (ii) TFA appears to have been *de facto* exercising all these powers since the signature of the TFA Mandate Package by Claimants;
 - (iii) Refusing TFA’s attendance based on the alleged invalidity of the TFA Mandate would carry the risk of pre-judging on certain jurisdictional issues.
38. **Consequently, the Tribunal allows, for the time being, TFA to attend the hearing as Claimants’ “agent”, without prejudice to the pending issue of the validity of its mandate.**

IV. ORDER

39. For the reasons set forth above, the Tribunal issues the following decision:

- (a) *The Tribunal allows the use of all the documents and material referred to in the list submitted by Respondent on 26 March 2010, under the terms and conditions set forth in § 20.*
- (b) *The Tribunal allows the use of all the documents and material referred to in the list submitted by Claimants on 26 March 2010.*
- (c) *The Parties may not use any other documents than those expressly listed in their list of 26 March 2010 and as admitted in § 21 and § 27 above.*
- (d) *The Tribunal allows, for the time being, TFA to attend the hearing as Claimants' "agent", without prejudice to the pending issue of the validity of its mandate.*

On behalf of the Tribunal,



Pierre Tercier,
Chairman