

ICSID Case No. ARB/07/5

**ABACLAT AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

PROCEDURAL ORDER NO. 11

27 JUNE 2012

IN VIEW OF THE FOLLOWING

1. On 21 July 2011, Respondent filed an ‘*Urgent Request for Provisional Measures of the Argentine Republic*’ (hereinafter “Request”), in which it requested as provisional measures that:

“a) A hearing be scheduled urgently so that Orianna Pilastro and Antonio Pilastro may testify before the Tribunal, regarding the event described herein [reference omitted], in addition to any other claimant that the Tribunal may designate. The Argentine Republic confirms its full availability to attend a hearing immediately, whenever and wherever as it may be convenient for the Tribunal.

b) Claimants be ordered to refrain from altering or destroying any document, including but not limited to, the original powers of attorney and mandates that were allegedly granted to TFA and counsel by Claimants.

c) the ICSID’s Secretary-General be urgently requested to issue a report on the method it applied to verify the authenticity of the documentation submitted together with the Request for Arbitration dated 14 September 2006.

[...]”

2. On 29 July 2011, Claimants filed their ‘*Response to Respondent’s Request for Provisional Measures*’ (hereinafter “Response”), in which they concluded as follows:

“[...]

- *Reject Respondent’s request for provisional measures.*
- *Reject Respondent’s selectively submitted evidence from the Italian proceeding as inadmissible.*
- *Award Claimants costs and fees incurred in responding to Respondent’s request.*
- *After issuing its decision regarding jurisdiction, order Respondent to provide an accounting of its involvement in the proceedings involving the Pilastros (or any other Claimants), along with its misuse of confidential Claimant documents in connection with those proceedings, and provide a list of all Claimants who accepted Respondents’ 2010 Exchange Offer.” [references omitted]*

3. On 3 August 2011, Respondent filed its reply to Claimants’ Response.
4. In its letter of 4 August 2011, accompanying its ‘*Decision on Jurisdiction and Admissibility*’ (hereinafter the “Decision”), the Arbitral Tribunal addressed Respondent’s Request for Provisional Measures in the following terms:

“With respect to the Respondent’s Request for Interim Measures of 21 July 2011 (the ‘Request’), Claimants’ response of 29 July 2011 and Respondent’s[s] reply of 3 August 2011, the majority of the Tribunal is of the opinion that Claimants have convincingly argued that there is a lack of urgency. In the same vein, the majority of the Tribunal is of the opinion that there is no convincing reason why Respondent’s Request should be dealt with prior to the issuance of the Decision. Accordingly, the majority of the Tribunal rejects the Request, Professor Abi-Saab dissenting.

The matters raised in the Request, however, may be discussed for scheduling and other purposes at the case management conference that will be organized at the earliest convenience of the Parties and the members of the Tribunal for the purposes of the further conduct of the proceedings.

[...]”

5. In their letter of 2 March 2012, Claimants’ re-addressed the issue of the Request and filed following conclusions and counter-requests:

“For the foregoing reasons, and those set forth in their 15 September 2011 submission, Claimants respectfully request that the Tribunal issue an order as follows:

- [...]
- *The Tribunal affirms its rejection of Respondent’s July 2011 request for provisional measures, with prejudice, and awards Claimants all costs and fees incurred in responding to the provisional measures request.*
- *Respondent is ordered to provide Claimants access to Respondent’s database and any other data compiled regarding individual Claimants tendering into the 2010 Exchange Offer.*
- *Respondent is ordered to provide an accounting of its involvement in criminal proceedings in Italy against individual Claimants, including Respondent’s use of confidential Claimant documents in connection with such proceedings. Claimants whose confidential personal information has been used in violation of the Tribunal’s confidentiality order and EU personal data laws shall be compensated for any costs, damages, and losses as a result of Respondent’s illegal acts.*
- *The Tribunal affirms, and again orders Respondent to comply with, the Tribunal’s orders regarding (i) confidentiality; (ii) impermissibility of selectively producing non-public documents; and (iii) procedures for the submission of documents.*

6. Respondent’s letters of 20 January 2012, 10 February 2012 and 9 March 2012 do not contain any mention or reference to its Request.

7. At the meeting of 9 May 2012 (hereinafter the “Meeting”), and according to the Provisional Agenda of 24 April 2012, the Parties and the Arbitral Tribunal addressed again Respondent’s Request and heard the Parties’ respective positions (see transcripts English version p. 148 l. 11 to p. 176 l. 17; transcripts Spanish version p. 150 l. 8 to p. 179 l. 18). Both Parties confirmed their previous positions:

- Respondent confirmed that its request was still of interest and, therefore, maintained (see transcripts English version p. 150 l. 5-7 and p. 155 l. 7-8; transcripts Spanish version p. 151 l. 22 to p. 152 l. 2 and p. 157 l. 9-10), and in particular that *“the Tribunal rule favorably on the Provisional Measures, on the request for the Provisional Measures [...], that the persons indicated therein be called to testify – in particular Ms. Pilastro—that both Parties be invited to do so [...].”*
- Claimants confirmed its previous requests as follows (see Claimants’ Power Point Presentation, p. 94; see also transcripts English version p. 175 l. 19 to p. 176 l. 17; transcripts Spanish version p. 178 l. 17 to p. 179 l. 18):

“ *Summary of Request for Relief*

- *Reject (again) Respondent’s provisional measures request*
- *Disregard and strike all Italian proceeding documents*
- *Order Respondent to account for its involvement in any Italian proceedings against Claimants, including Respondent’s abuse of confidential documents*
- *Award Claimants costs and fees.* ”

CONSIDERING THAT

8. Whereas Respondent has in its letters of 20 January 2012, 10 February 2012 and 9 March 2012 (see above paras 5 and 6) not provided any further comment regarding its Request or Claimants' counter-requests, it has substantiated its Request during the Meeting as follows (transcripts English version p. 149 l. 8 – p. 156 l. 2; transcripts Spanish version p. 150 l. 22 to p. 158 l. 3):

- The circumstances surrounding the signature of the relevant documents by Ms. Orianna Pilastro and Mr. Antonio Pilastro indicate that there was no true intention of the Pilastros to begin ICSID arbitration and that, in particular, Ms. Orianna Pilastro was fraudulently induced in signing documents for herself and on behalf of her brother and father; it would further appear that the signature on the revocation of the Mandate concerning Ms. Orianna Pilastro in December 2012 is not Ms. Orianna Pilastro's signature;
- These circumstances are "extremely serious" and if fraud was confirmed, this case could not go forward; in particular, it would not be sufficient to simply remove the Claimants whose signatures are at stake, instead the whole proceedings would need to stop;
- Therefore, there is a clear need to clarify these circumstances and for that purpose examine Ms. Orianna Pilastro.

These arguments concern the first part of Respondent's Request (see above para 1), and Respondent has not provided further comments regarding the second and third part of its Requests, i.e. its request to order Claimants not to alter or destroy documents (except that Respondent has confirmed being opposed to any destruction, see transcripts English version p. 200 l. 3-4; transcripts Spanish version p. 203 l.16-20) and to request ICSID Secretary-General to provide a special report.

9. Claimants' position is that further to the Arbitral Tribunal's ruling of 4 August 2011 (see above para 4), the Decision and Claimants' 29 July 2011 letter (see above para 2), the matter deserves no further attention and denial of the requested relief remains appropriate (Claimants' letter of 15 September 2011, p. 16). In addition, Claimants contend that the Request does not articulate, let alone meet, applicable standards (i.e. urgency, irreparable harm, necessity to preserve rights, burden of proof), and is moot because the only evidence submitted relate to members of the Pilastro family, all of whom withdrew from the proceedings over 15 months ago (see para 649(v) of the Decision).

10. In particular, Claimants made the following arguments: (i) there would be no urgency and to the extent that any of the issues raised still exists, it may be addressed in the course of the individualized review process, (ii) there would be no irreparable harm, since Respondent would actually have no right to examine non-witnesses and there would, in any case, be no risk to documents, (iii) there would be no necessity to

preserve rights, because Respondent's right to defence would not be jeopardized if the provisional measures were not granted, because individual Claimants consent documents – with respect to existing Claimants – may be subject to review and authentication during the upcoming individual review process, and (iv) Respondent would have failed to meet the burden of proof considering that it has not in any way substantiated or articulated its request and that the kind of measures requested by Respondent are extremely rarely granted. Further, Claimants contend that they demonstrated that each of the allegedly fraudulent Claimant family signatures was in fact nothing other than one family members signing on behalf of another, an ordinary and everyday occurrence in life (Claimants' letter of 15 September 2011, p. 16; Claimants' letter of 2 March 2012, p. 15; Power Point Presentation at Meeting of 9 May 2012, pp. 72-92; transcripts English version p. 158 l. 5 to p. 176 l. 17; transcripts Spanish version p. 160 l. 11 to p. 179 l. 18).

CONSIDERING FURTHER THAT

(1) With regard to Respondent's Request for Examination of Orianna and Antonio Pilastro:

“a) A hearing be scheduled urgently so that Orianna Pilastro and Antonio Pilastro may testify before the Tribunal, regarding the event described herein [reference omitted], in addition to any other claimant that the Tribunal may designate.” (see above para 1)

11. Although Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules do not provide for specific requirements for issuing a recommendation of provisional measures and leaves this largely within the margin of appreciation of the arbitral tribunal, a wide consensus has emerged in practice according to which a recommendation for provisional measures would usually require that following conditions be met: (i) urgency of the requested measures, (ii) the risk of irreparable harm or serious prejudice in case the measures are not granted, (iii) the necessity of the measures in order to preserve the right at risk.
12. By letter of 4 August 2012 sent to the Parties together with its Decision (see above para 4), the Arbitral Tribunal previously rejected Respondent's Request due to a lack of urgency.
13. During the Meeting, Respondent has reiterated its Request.
14. However, Respondent has not convincingly substantiated to what extent this Request would now fulfill the requirement of urgency and, thus, fails to meet the applicable standard.
15. In addition, whether the consent of some of the Claimants may have been obtained based on fraud is part of the questions which the Parties will be given the opportunity to address during the next phase.

(2) With regard to Respondent's Request for Protection of Documents:

"b) Claimants be ordered to refrain from altering or destroying any document, including but not limited to, the original powers of attorney and mandates that were allegedly granted to TFA and counsel by Claimants." (see above para 1)

16. Nothing in the record suggests that Claimants have the intention to destroy or otherwise alter any document, in particular original powers of attorney and mandates.
17. However, regarding those claimants which have allegedly withdrawn from the present proceedings, Claimants have stated that they would consider it most appropriate to delete the information in the Database and destroy documents relating to such claimants, and have actually requested the right to do so (transcripts English version p. 191 l. 5- 11; p. 194 l. 3-9; transcripts Spanish version p. 194 l. 3-9).
18. Respondent has raised various concerns regarding the reliability of the Database and objected to Claimants' handling of the information contained therein (see e.g. R-R-MJ para 189 and CREMIEUX paras 45-55; R-PHB paras 89, 118, 499). In this respect, the Tribunal cannot rule out that the concerned information and documents may be of importance to Respondent's rights of defense.
19. Given the immediate commencement of the next phase of the proceedings, the Tribunal considers that the '*Urgent Request for Provisional Measures of the Argentine Republic*' fulfills the requirement of urgency at this stage of the proceedings concerning the protection of Claimants' documents, it being understood that the conditions on confidentiality, in particular as contained in the Arbitral Tribunal's Procedural Order No. 3, continue to apply and that the information contained in the documents at stake falls under the applicable privacy obligation.
20. Furthermore, in application with Article 47 of the ICSID Convention and ICSID Arbitration Rule 39(3), the Tribunal can make use of its discretion in recommending measures other than those specified in the Respondent's Request for protection of documents. Therefore, even if urgency were not at stake, the Tribunal finds that it can recommend provisional measures for the preservation of Respondent's rights of defense.
21. Consequently, in view of preserving Respondent's rights of defense and ensuring the integrity of the proceedings, the Tribunal considers it appropriate to recommend that Claimants refrain from deleting and/or destroying any information and/or documents relating to Claimants having allegedly withdrawn from the proceedings, until further order from the Tribunal.

(3) With regard to Respondent's Request for a Special Report from ICSID:

"c) the ICSID's Secretary-General be urgently requested to issue a report on the method it applied to verify the authenticity of the documentation submitted together with the Request for Arbitration dated 14 September 2006." (see above para 1)

22. The first question that arises is whether or not it is within the powers of the Tribunal to formally request the ICSID Secretary-General to establish a special report as the one requested. The second question is whether the issues touched upon by the report belong to the scope of competence of ICSID. These two questions appear to be intertwined.

23. Article 36(3) of the ICSID Convention provides: *"The Secretary-General shall register the request [for arbitration] unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of the registration or refusal to register."*

24. The Report of the Executive Directors on the Convention of 18 March 1965 explains the Secretary-General's screening power as follows:

"20. The Convention requires the Secretary-General to perform a variety of administrative functions as legal representative, registrar and principal officer of the Centre (Articles 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b) and 65). In addition, the Secretary-General is given the power to refuse registration of a request for conciliation proceedings or arbitration proceedings, and thereby to prevent the institution of such proceedings, if on the basis of the information furnished by the applicant he finds that the dispute is manifestly outside the jurisdiction of the Centre (Article 28(3) and 36(3)). The Secretary-General is given this limited power to "screen" requests for conciliation or arbitration proceedings with a view to avoiding the embarrassment to a party (particularly a State) which might result from the institution of proceedings against it in a dispute which it had not consented to submit to the Centre, as well as the possibility that the machinery of the Centre would be set in motion in cases which for other reasons were obviously outside the jurisdiction of the Centre e.g., because either the applicant or the other party was not eligible to be a party in proceedings under the Convention."

25. The screening process carried out by the Secretary-General under Article 36(3) of the ICSID Convention is, therefore, of a purely administrative nature, and it is conducted principally for the purposes of avoiding unnecessary use of the Centre's resources. Further, this screening process concerns only the request for arbitration and is, therefore, conducted at an early stage.

26. The powers of ICSID are in this respect very limited and, except where the circumstances lead the ICSID Secretary-General to refuse registration of a case, the verification by ICSID of the request for arbitration could under no circumstances lead to a decision affecting in any way a future decision on jurisdiction of the arbitral tribunal. Therefore, the screening tasks of the Secretary-General and the task of the arbitral tribunal to examine the jurisdictional conditions are two separate and independent tasks. Neither one is accountable to the other as to how its own task is conducted.

27. Furthermore, questions relating to the Centre's jurisdiction and the Tribunal's competence are to be resolved by the Tribunal after a request for arbitration has been registered. This basic principle follows, *inter alia*, from Article 41(2) of the ICSID Convention, which provides that "[a]ny objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal."
28. A verification of the authenticity of the documentation submitted together with a request of arbitration is therefore a matter within the powers of an Arbitral Tribunal and does not form part of the administrative functions that the Secretary-General is required to fulfill.
- 29. Consequently, the Tribunal considers that the ICSID Framework does not provide for any basis either (i) enabling the Tribunal to request such a report from the ICSID Secretary-General; or (ii) entrusting the ICSID Secretary-General with the power to issue such report.**

(4) With regard to Claimants' Requests Relating to Confidentiality:

- *Respondent is ordered to provide an accounting of its involvement in criminal proceedings in Italy against individual Claimants, including Respondent's use of confidential Claimant documents in connection with such proceedings. Claimants whose confidential personal information has been used in violation of the Tribunal's confidentiality order and EU personal data laws shall be compensated for any costs, damages, and losses as a result of Respondent's illegal acts.*
- *The Tribunal affirms, and again orders Respondent to comply with, the Tribunal's orders regarding (i) confidentiality; (ii) impermissibility of selectively producing non-public documents; and (iii) procedures for the submission of documents.* " (see above para 5 and 7)

and

- *Reject Respondent's selectively submitted evidence from the Italian proceeding as inadmissible.* " (see above paras 2 and 7)

30. In connection with Claimants' Request, as well as with regard to proceedings initiated before the Federal Court of the Southern District of New York (hereinafter the "Barboni case"), a question has arisen concerning the interpretation of Procedural Order No. 3 on Confidentiality, and in particular whether the prohibition contemplated in Procedural Order No. 3 to disclose information relating to individual Claimants to unauthorized parties extends also to information concerning Claimants who have withdrawn from, and are, therefore, not anymore Parties to the present proceedings.
31. In view of the Tribunal's Procedural Order No. 3 on Confidentiality of 27 January 2010, two points are to be made:

- (i) It is clear that Procedural Order No. 3 and the obligation of confidentiality contemplated thereunder remains in force until the end of the proceedings. Consequently, both Parties remain bound thereby.
- (ii) The issues at present raise the question of the scope of the duty of confidentiality contemplated in Procedural Order No. 3.
32. **With regard to whether or not the information requested in the Barboni case is covered by the duty of confidentiality contemplated by Procedural Order No. 3**, para 132 thereof provides that Respondent shall use the information contained in the Database (“Confidential Information”) solely for purposes of conducting this arbitration. *A contrario*, this means that Respondent is not entitled to use the Confidential Information for other purposes. The restriction is clear and applies systematically to all the information in the Database, therefore, also to information relating to Claimants currently listed therein as well as Claimants, who may since then have already withdrawn from the proceedings. The mere fact that a Claimant was at some point listed in the Database makes any information relating to this Claimant protected and subject to the protection provided by Procedural Order No. 3. Consequently, Respondent is not entitled to disclose any information contained in the Database and relating to former Claimants.
33. **With regard to the impermissibility of documents relating to different proceedings**, the Tribunal considered that “*it cannot simply apply its own standard to other arbitration proceedings and assume confidentiality*” (para 139 of Procedural Order No. 3) and that “*in order to decide on the admissibility of these documents, it is necessary to balance Respondent’s right of defence, [...], with (i) Claimants’ right to equality of arms and (ii) the general interest of ensuring the integrity of the procedure and in particular the finding of the truth*” (para 143 of Procedural Order No. 3). These considerations and principles remain generally applicable also to documents of a different nature than the documents, which were the object of the decision of the Tribunal in Procedural Order No. 3.
34. In application of the considerations and principles set out in Procedural Order No. 3, whenever a Party requests to introduce documents which relate to different arbitration or litigation proceedings, the Tribunal will decide on the admissibility of these documents based on balancing of the Parties’ right of defence and their right to equality of arms, while taking into account the general interest of ensuring the integrity of the procedure and in particular the finding of the truth.
35. **With regard to the documents relating to the criminal proceedings involving Ms. Orianna Pilastro**, the relevant documents include: (i) the transcript of a declaration made by Ms. Orianna Pilastro before the Italian Police (Annex II to Respondent’s Request), (ii) the transcript of a declaration made by Mr. Antonio Pilastro (Annex III to Respondent’s Request), and (iii) a petition to class the case (Annex I to Respondent’s Request). These documents were issued within the context of an investigation concerning the authenticity of the signature of the Pilastros affixed on relevant documents of the TFA Mandate Package and the revocation of the TFA

Mandate. However, no further information is available at this stage regarding the circumstances under which these proceedings were initiated.

36. These documents were submitted to the Tribunal by Respondent in order to further support its argument that the way in which TFA collected the consent of the Claimants was fraudulent and that these consents are, therefore, invalid. As such, these documents are in Respondent's eyes an important part of their right of defence.
37. On balance, the Tribunal notes the potential use of such documents with regard to the finding of the truth. Therefore, the Tribunal considers that these documents are to be admitted into the record, without prejudice to the Tribunal's power to freely appreciate the evidentiary weight and value to be attributed to such documents in view of all the relevant circumstances.
38. **With regard to Claimants' request to order Respondent to account for its involvement in the Italian criminal proceedings**, in particular those concerning the Pilastros, it has not been established that the information leading to the initiation of the criminal proceedings had been provided by Respondent (transcripts English version p. 165 l. 13 to p. 166 l. 8; transcripts Spanish version p. 168 l. 4 to p. 169 l. 1). In any case, the criminal proceedings have already been closed. Consequently, the Tribunal rejects Claimants' request.

(5) With Regard to Claimants' Request on Costs:

"- Award Claimants costs and fees incurred in responding to Respondent's request." (see above paras 5 and 7)

39. The Tribunal takes note of Claimants' request. This request will be taken into consideration when deciding on the overall costs of the proceedings.

(6) With Regard to Claimants' Request to Provide Claimants access to Respondent's Database and other data:

"■ Respondent is ordered to provide Claimants access to Respondent's database and any other data compiled regarding individual Claimants tendering into the 2010 Exchange Offer." (see above para 5)

40. The Tribunal takes note that this request, which was raised in Claimants' letter of 2 March 2012, has not been repeated or otherwise mentioned by Claimants during the Meeting. The Tribunal, therefore, considers this request to be moot.

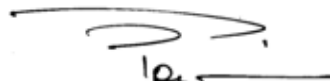
THE ARBITRAL TRIBUNAL HEREBY DECIDES AND RECOMMENDS AS FOLLOWS:

With regard to Respondent's requests:

- 1. Respondent's request that a hearing be scheduled urgently so that Ms. Orianna Pilastro and Mr. Antonio Pilastro may testify before the Tribunal in addition to any other claimant that the Tribunal may designate, is rejected;**
- 2. Respondent's request that Claimants be ordered to refrain from altering or destroying any document, including but not limited to, the original powers of attorney and mandates that were allegedly granted to TFA and counsel by Claimants, is granted and the Tribunal hereby recommends Claimants to refrain from deleting and/or destroying any information and/or documents relating to claimants having allegedly withdrawn from the proceedings;**
- 3. Respondent's request that ICSID's Secretary-General be urgently requested to issue a report on the method it applied to verify the authenticity of the documentation submitted together with the Request for Arbitration dated 14 September 2006, is rejected.**

With regard to Claimants' requests:

- 4. Claimants' request that Respondent's selectively submitted evidence from the Italian proceeding be rejected as inadmissible, is rejected;**
- 5. Claimants' request that Respondent be ordered to provide an accounting of its involvement in criminal proceedings in Italy against individual Claimants and that Claimants whose confidential personal information has been used in violation of the Tribunal's confidentiality order and EU personal data laws shall be compensated for any costs, damages, and losses as a result of Respondent's illegal acts, is rejected;**
- 6. Claimants' request that the Tribunal affirms, and again orders Respondent to comply with, the Tribunal's orders regarding (i) confidentiality; (ii) impermissibility of selectively producing non-public documents; and (iii) procedures for the submission of documents, is granted to the extent set forth in paras 33 and 34;**
- 7. Claimants' request on the decision on costs is noted and reserved;**
- 8. Claimants' request to be provided access to Respondent's database and any other data compiled regarding individual Claimants tendering into the 2010 Exchange Offer is considered moot.**



For the Arbitral Tribunal
Pierre Tercier, President