

ICSID Case No. ARB/07/5

**ABACLAT AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

**PROCEDURAL ORDER NO. 17
OF 8 FEBRUARY 2013**

(A) **CONSIDERING**

1. The Arbitral Tribunal refers to:
 - (i) Procedural Order No. 12, dated 7 July 2012, in which the Arbitral Tribunal decided to appoint one or more expert(s) in order to verify Claimant's Database (this process being referred to as the "Database Verification"), and
 - (ii) Procedural Order No. 15, dated 20 November 2012, in which the (majority of the) Arbitral Tribunal determined the scope of the Expert's Mission as well as the terms and conditions thereof, and decided to invite Dr. Wühler to prepare a "Work Proposal" according thereto. This Work Proposal would then be submitted to the Parties for their comments and the Arbitral Tribunal would then decide whether or not to confirm Dr. Wühler's appointment as Expert.
2. The Arbitral Tribunal further refers to:
 - (i) The Work Proposal received from Dr. Wühler on 26 December 2012 and forwarded to the Parties on the same day, his Alternative Work Proposal received by the Arbitral Tribunal on 22 January 2013 and forwarded to the Parties on 25 January 2013, and the Description of the Claims Review Team from Dr. Wühler received by the Arbitral Tribunal on 28 January 2013 and forwarded to the Parties on 1 February 2013.
 - (ii) The Parties' written comments (a) to the Work Proposal, including Respondent's letter dated 4 January 2013 and Claimants' letter dated 7 January 2013, (b) to the Alternative Work Proposal, including Respondent's letter dated 30 January 2013 and Claimants' letter dated 31 January 2013, and (c) to the Description of the Claims Review Team, including Respondent's letter dated 6 February 2013 and Claimants' letter dated 6 February 2013.
 - (iii) Respondent's letter dated 18 January 2013, and Claimants' response thereto of 1 February 2013.
3. The present Procedural Order deals with the appointment of Dr. Wühler as Expert to confirm the scope as well as the terms and conditions of his mission and to amend the Timetable accordingly. It further deals with ancillary procedural issues.

A. The Work Proposal

1. The Content of the Proposal

4. On 26 December 2012, Dr. Wühler submitted his Work Proposal. The methodology proposed by Dr. Wühler combined different types of work including the following activities and steps:
 - (i) *Preparatory Work:* Before starting the verification of the Database, Dr. Wühler suggested reviewing the documents and expert reports submitted by the Parties according to paras 29-32 of Procedural Order No. 15, and further examining and verifying information relating to an initial sample of 50 claims in order to

determine the categories and number of claims to be reviewed as part of the Expertise.

- (ii) *Technical Examination:* Dr. Wühler suggested reviewing the Database and its functionality, including the design and logical model of the Database and the related documentation and in particular testing data types, lengths, default values, security features, audit trails, entry/migration process of the information into the Database, etc. This examination would be done with the assistance of an IT specialist experienced in database design and systems analysis, who would also perform SQL queries to run reports and identify categories and/or groups of claims as specified by Dr. Wühler in the preparation and during the course of the claims review.
- (iii) *Statistical Work:* Based on the initial review of 50 claims and in accordance with statistical practice, a statistician would determine the type and size of the samples to be examined in the various categories of claims. Dr. Wühler anticipated that for the claims of natural persons (Annex A), a random sample of maximum 1,060 claims would need to be reviewed. With regard to Annexes B and C, Dr. Wühler suggested a review of half of these claims, with a focus on incorporation and authorized signatory information. A statistician would make a statistical analysis of the findings of the claims review.
- (iv) *Claims Review:* This phase would include the examination and verification of the information and related documents of the claims selected through the sampling procedure mentioned in (iii) above. Based mainly on the initial review of the 50 claims performed as part of the preparation of his Work Proposal, Dr. Wühler assumed that the review of one claim would take on average 15 min.
- (v) *Draft and Final Verification Reports:* Dr. Wühler would then prepare the Draft Report and, after receiving the Parties' comments thereto, his Final Report according to Procedural Order No. 15.

- 5. Dr. Wühler also indicated that he would need certain information from the Parties, the list of which is set out in section D of his Work Proposal.
- 6. Dr. Wühler suggested working with three assistants, including: (i) an IT specialist, Mr. Andrew Tatam, for the Technical Examination, (ii) a statistician, Mr. Michael Olszak-Olszewski, for the Statistical Work, and (iii) a lawyer with Italian language skills, Ms. Tanja Zvekic-Devetak, for the Claim Review.
- 7. Dr. Wühler confirmed that he should be able to meet the deadlines set forth in Procedural Order No. 15. He further estimated the costs of the Expertise at USD 92,450, including USD 15,400 already spent for the preparation of his Work Proposal.

2. The Parties' Comments on the Work Proposal

- 8. By letter dated 4 January 2013, Respondent made in essence the following comments on Dr. Wühler's Work Proposal:

- (i) Respondent reiterates its reservations concerning the legitimacy of the present proceedings.
 - (ii) Respondent submit that the appointment of Dr. Wühler and his team “*makes no sense*” because Claimants have failed to establish a *prima facie* evidence that each of the Claimants are Italian and did not reside in Argentina during the relevant period.
 - (iii) Respondent alleges that Dr. Wühler and his team lack the qualifications required to determine whether or not the information in the Database and the documents appear to be comprehensive, and that the work to be carried out by Dr. Wühler and his team is irrelevant for the purposes of determining the validity of the documentation contained in the database. However, such determination would be absolutely necessary.
 - (iv) Respondent objects to any type of sampling or statistical analysis as basis for the verification of the Database and requests to be given the right to defend itself against each claim and claimant individually.
 - (v) Respondent does not raise any specific objection or made any specific comment as to the individual team members proposed by Dr. Wühler.
9. By letter dated 7 January 2013, Claimants made in essence the following comments on Dr. Wühler’s Work Proposal:
- Claimants confirm their agreement with the scope of the Expert’s Mission as described in Procedural Order No. 15 and confirm that they believe the Work Proposal to be largely in line with such scope.
 - Claimants raise concerns with regard to the following issues:
 - *Technical Examination*: According to Claimants, the current scope of the Expert’s Mission as described in Procedural Order No. 15 does not include a technical review of the Database, but only a review of the usability of such Database. The Database would not be evidence as such, but only a means to facilitate the review of the evidence (which consists of the documents on which the Database is used). Thus, Claimants request that the Technical Examination be excluded from the Work Proposal.
 - *Sampling*: While Claimants agree with the sampling method suggested by Dr. Wühler with regard to the claimants listed in Annex A, Claimants disagree with a sampling of claimants listed in Annexes B and C. Claimants believe that the number of claimants listed in Annexes B and C is sufficiently limited to allow a review of each of them. Thus, Claimants request that the sampling method be applied only to claimants in Annex A.
 - *Costs*: Claimants are concerned as to the costs of the Expertise, in particular because of Respondent’s failure to pay their share of the advance on costs. Therefore, Claimants suggest limiting certain cost items, in particular with regard to travel costs relating to the Technical Review, which Claimants

consider inappropriate, and translation work, which Claimants believe can be outsourced to reduce costs.

- Claimants do not raise any specific objection or made any specific comment as to the individual team members proposed by Dr. Wühler.

B. The Alternative Work Proposal

1. The Content of the Alternative Work Proposal

10. Upon request of the Arbitral Tribunal, Dr. Wühler prepared an Alternative Work Proposal. The purpose of the Alternative Work Proposal was to respond to the Arbitral Tribunal's query whether it was feasible to examine all the document in the Database without sampling exercise, and what would be the impact of such change in method in terms of personnel, time and costs.
11. Dr. Wühler's Alternative Proposal of 22 January 2013 can be summarized as follows:
 - (i) Dr. Wühler believes that it is feasible to verify the required information for each Claimant individually;
 - (ii) The impact of an individual review would be as follows:
 - It would require hiring an additional 15 persons for the review of the claims of natural persons (Annex A). However, there would be no further need for a statistician.
 - It would take an additional month to submit the Draft Verification Report.
 - It would increase the costs by USD 180,000, reaching a total of USD 270,350.
12. On 28 January 2013, Dr. Wühler sent a 'Description of the Claims Review Team' suggesting 16 persons as claims reviewers, to review the claims under the supervision of a senior claim reviewer and Dr. Wühler himself.
13. Provided the team of claims reviewer proposed by Dr. Wühler is approved, Dr. Wühler believes that the Database Verification could proceed according to the following timetable:
 - (i) Preparatory Work, including the review of the documents to be sent by the Parties under section 29 of Procedural Order No. 15 and the documents requested by Dr. Wühler: 11 February 2013;
 - (ii) Technical Examination: 11 February 2013, except for ongoing SQL queries;
 - (iii) Claims Review Annexes B & C: 4 March 2013;
 - (iv) Claims Review Annex A: 2 April 2013;
 - (v) Draft Verification Report: 15 April 2013 (+ 10 days for Spanish translation);
 - (vi) Final Verification Report: 30 May 2013 (+ 10 days for Spanish translation);

2. *The Parties' Comments*

14. By letter dated 30 January 2013, Respondent made in essence the following comments to Dr. Wühler's Alternative Proposal:
- (i) Respondent reiterates its reservations concerning the legitimacy of the present proceedings and stresses that the Alternative Proposal does not address Respondent's concerns as to the appointment of Dr. Wühler and his Work Proposal.
 - (ii) Based on Dr. Wühler's estimation that he would need around 6 minutes to review information relating to one Claimant due to certain factors slowing down his review of the Database, Respondent concludes that these factors are so serious that they make the review of the Database pointless.
 - (iii) According to Respondent, Dr. Wühler's Alternative Proposal fails to provide for an analysis of the circumstances of each claim. Dr. Wühler's analysis would at the very best be limited to a comparison between the information in the Database and the documents provided by Claimants, but it would fail to address the very issue of the validity of the documents provided, such as the issues of falsified signatures and invalid consents. Therefore, the verification to be conducted by Dr. Wühler would not be sufficient to provide the Arbitral Tribunal with a basis to decide on the jurisdictional issues and it would also fail to provide Respondent with the opportunity to respond to each claim.
 - (iv) Dr. Wühler lacks the necessary qualification in the Italian language and Italian law to review the claims in Annexes B and C.
15. By letter dated 31 January 2013, Claimants made in essence the following comments on Dr. Wühler's Work Proposal:
- (i) Claimants reiterate their concerns regarding the cost burden given that the costs of the Expertise would be paid out of the advance on costs paid by the Parties and the fact that Respondent has failed to pay its share of the advance. Thus, Claimants would be the only ones paying for the Expertise, which would result in an inequality of the Parties and a denial of justice and due process to Claimants. If the Arbitral Tribunal was to order the costly full individual review that Respondent demands, Respondent must pay its equal share of the arbitration costs.
 - (ii) Claimants emphasize that the proposed full individual review must not extend beyond the nine-week period indicated by Dr. Wühler, or otherwise delay issuance of the verification report or other elements of the procedural timetable. Therefore, if necessary, Dr. Wühler could and should increase the size of his review team beyond fifteen members.
 - (iii) Claimants raise concerns regarding Dr. Wühler's statement that he encountered "*difficulty in matching nationality dates in documents with jurisdictional dates*". They believe that this statement may be indicative of an attempt by Dr. Wühler to draw conclusions as to the sufficiency of Claimants' nationality documents with regard to the legal jurisdictional requirements established by the Arbitral Tribunal.

According to Claimants, this would go beyond the permissible scope and, thus, request the Arbitral Tribunal to instruct Dr. Wühler accordingly in order to ensure that he and his team stick to certifying what is in the Database, and not draw any conclusions of a legal nature.

C. The Arbitral Tribunal's Position

16. Having considered the Parties' comments to the Work Proposal and the Alternative Proposal (including the Description of Claims Review Team), the Arbitral Tribunal, by majority decision, decides as follows:

3. Basic Framework of the Expertise

17. The Arbitral Tribunal notes that Claimants largely agree with the aim of the Database Verification process and the method suggested by Dr. Wühler. Claimants' reservations concern specific points of the proposal, but not the proposal as such or its basis.
18. In contrast, Respondent objects to the entire exercise based mainly on the arguments that it is irrelevant to the determination of the validity of the underlying documents and does not provide for the review of individual circumstances of each claim. In this respect, Respondent insists on dealing with each claim individually with regard to aspects of jurisdiction as well as merits.
19. In its Decision on Jurisdiction and Admissibility (the "Decision"), the Arbitral Tribunal decided by majority – among others –:
- (i) That it was admissible and acceptable under Article 44 ICSID Convention, Rule 19 ICSID Arbitration Rules, as well as under the more general spirit, object and aim of the ICSID Convention to establish a procedure to deal with Claimants' claims in a collective way (see para. 548 of the Decision).
 - (ii) That, in particular, specific circumstances surrounding individual purchases by Claimants of security entitlements are irrelevant, and further that, if Italian or other banks have breached any obligations they had towards Claimants or Argentina, such a breach is to be addressed in a recourse action against the relevant banks and is foreign and external to the present arbitration which concerns solely Argentina's behavior with regard to Claimants' investment (see paras 327-330 and 542 of the Decision).
 - (iii) That the Declaration of Consent signed by the individual Claimants submitted in this proceeding is in principle valid, whereby the potential existence of a fraud, coercion or essential mistake invalidating the consent of a specific individual Claimant based on the specific circumstances of the individual case remains open and will be dealt with in a later stage of the proceedings (paras 466, 501(iv), 502(ii), 698 of the Decision).
 - (iv) That the potential damage caused to Claimants is, by nature, the same for all Claimants although the scope of such damage will of course depend on the scope of their individual investment (para 543 of the Decision).

20. The Arbitral Tribunal believes that the Database Verification process designed and the implementation method proposed by Dr. Wühler in his Alternative Proposal is in accordance with the principles set out in the Decision.
21. As to Respondent's objections to the Database Verification process, they are to be rejected for the following reasons:
 - (i) The Arbitral Tribunal has already decided that it may handle the claims in a collective manner under the conditions prescribed in its Decision, that individual circumstances of purchase of the security entitlements are irrelevant to the present dispute and that the Declaration of Consent signed by the Claimants is in principle valid. Thus, to the extent that Respondent's objections aim at challenging these decisions, they are to be rejected as inadmissible.
 - (ii) With regard to issues which require an individual consideration, such as potential falsification of signatures and the scope of each Claimant's individual investment, these issues will be addressed by the Arbitral Tribunal in due time.

At this stage, the aim of the Database Verification is to verify the information available with regard to facts of nationality/incorporation, residence and date of purchase of the security entitlements, which are relevant to determine the Arbitral Tribunal's jurisdiction over the case (para 501(iii) of the Decision). While this process will allow to spot inconsistencies and irregularities in the information and documents submitted (such as inconsistencies in signatures), if any, it will be the Arbitral Tribunal's task to determine how to deal with such inconsistencies and irregularities, if any. The purpose of the Database Verification is not to proceed with an overall analysis of the circumstances surrounding the Claimants' consent or the validity of the documents on which such consent is based. This is and will remain the task of the Arbitral Tribunal. It, therefore, only constitutes a starting point for the Arbitral Tribunal to decide to what extent an individualized review of claims or documents will be necessary and how to best address such review. Therefore, Respondent's objections as to the necessity to review surrounding circumstances and the validity of the documentation submitted are inapposite and miss the point.

4. Confirmation of the Appointment of the Expert and Approval of his Team

22. Pursuant to para. 18 of Procedural Order No. 15, the Arbitral Tribunal hereby confirms the appointment of Dr. Wühler as Expert under the terms and conditions of his Alternative Proposal.
23. Regarding the team of assistants proposed by Dr. Wühler, the Arbitral Tribunal notes that neither Party has raised any objections towards any of the specific team members suggested by Dr. Wühler.
24. Thus, the Arbitral Tribunal hereby approves the engagement of the 16 persons listed in the Description of Claims Review Team.

5. Scope of the Expert's Mission

25. The Arbitral Tribunal hereby confirms the general scope of the Expert's Mission as described in paras 19-21 of Procedural Order No. 15, subject to the following clarifications and/or amendments:

- (i) The Expert shall proceed on the basis of the Alternative Proposal;
- (ii) There shall be no sampling;
- (iii) The Expert's verification shall include the Technical Review suggested by the Expert. In this regard, the Arbitral Tribunal does not consider Claimants' objections to be convincing. Rather, the Arbitral Tribunal finds that a review of the technical functionality and reliability of the Database is covered under items (i) and (iv) of para 21 of Procedural Order No. 15 and would be helpful;
- (iv) Item (iii) of para 21 of Procedural Order No. 15 shall be modified as follows (changes are underlined):

"Whether or not the information contained in the Claimants' Database and the documents relating thereto contain any inconsistencies, discrepancies or any duplication or any vice affecting Claimants' Database or the documents themselves, and in particular inconsistencies concerning signatures apposed by a (presumably) same Claimant on various documents;".

6. Applicable Procedure for the Expertise

26. The Arbitral Tribunal hereby confirms the general procedure applicable for the Expertise as described in paras 31-39 of Procedural Order No. 15, subject to the following amendments:

- (i) The deadlines provided for in Procedural Order No. 15 are amended as set forth in the attached Timetable.
- (ii) In addition to the information and documents listed in para 32 of the Procedural Order No. 15, the Parties shall further send to the Expert by 15 February 2013 the information requested under section D of his Alternative Proposal.

7. Relationship with Procedural Order No. 15

27. This Procedural Order is meant to complement and partly amend Procedural Order No. 15. Procedural Order No. 15 remains in force to the extent it has not been modified by the present Procedural Order No. 17.

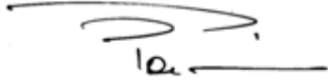
28. In case of conflict between provisions of this Procedural Order No. 17 and Procedural Order No. 15, the former shall prevail.

D. Further Procedural Aspects

29. In view of (i) the time elapsed since the issuance of Procedural Order No. 15, (ii) the decisions taken in this Procedural Order No. 17, (iii) the Parties' respective comments regarding the former Timetable, the Timetable attached to Procedural Order No. 12 is hereby modified as attached hereto.
30. In particular, the Arbitral Tribunal would like to point out the following in response to some comments raised by the Parties with regard to the procedure and the Timetable:
- (i) It should first be noted that Procedural Order No. 16 was agreed by the Arbitral Tribunal on a unanimous basis. It thus represents the views of the entire Arbitral Tribunal and not just of its President.
 - (ii) As set out in the Minutes of the First Session, the President has been granted the power to "*fix and extend time limits*". Respondent suggests that "*such delegation be interpreted and applied in a strict manner*" (footnote 7 on p. 4 of Respondent's letter of 18 January 2013). However, Respondent has not substantiated the reasons why a strict application would be necessary, nor has it defined what it understands by "strict". The President has always consulted with his co-arbitrators before exercising this power and he will continue to do so. Relevant decisions are only issued to the extent that none of the co-arbitrators object thereto. Therefore, all messages and decisions sent out by the President have been sent on behalf of the entire Arbitral Tribunal, unless the message or decision expressly indicates that it has been made by a majority.
 - (iv) The Arbitral Tribunal is making all possible efforts to reconcile equal treatment of the Parties with considerations of efficiency and the right to be heard. The updated Timetable takes these considerations into account.
31. Finally, and with regard to the issue of the deadline for translation of the Parties' memorial and accompanying witness statements and expert reports, the Arbitral Tribunal after having considered both Parties' positions, is of the opinion that it is appropriate to provide each Party with an additional 10 days period after the due date for the memorial for the submission of the translation of the memorial and accompanying witness statements and expert reports.
32. Regarding Claimants' further requests set out in their letter of 1 February 2013, the Arbitral Tribunal does not consider it necessary at this stage to modify the existing rules and invites both Parties to comply therewith.

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.



Pierre Tercier, President

On behalf of the majority of the Arbitral Tribunal

Annexes:

- Annex 1: Work Proposal, including CVs of assistants and budget estimate
- Annex 2: Additional Work Proposal and Description of Claims Review Team, including CVs of claim reviewers
- Annex 3: Revised Timetable
- Annex 4: Statement of Dissent by Dr. Santiago Torres Bernárdez.

Statement of Dissent of Dr. Santiago Torres Bernárdez

1. I vote against the present Procedural Order N° 17 because the Parties continue to be in disagreement on the appointment and confirmation of Dr. Wühler as Expert of the Tribunal (with or without a Team), on the object and purpose of the Expert's mission, its Scope, Mandate and Procedures, and the Timing allocated to each Individual Verification, as well as on the usefulness of a Verification of the Database out of context or in isolation from the legal and factual relevant surrounding circumstances. The legal grounds for this Dissent are therefore similar, *mutatis mutandis*, to those developed in my Dissenting Opinion appended to Procedural Order N° 15, including on the cost issue.

2. With respect to section D of the Procedural Order (Further Procedural Aspects), I did not object Procedural Order N° 16 in the belief that the prevailing rule was still the simultaneous submission of the translations. I agree therefore with the provision in point 31 of the present Order, although I consider that an additional period of 10 days is something short.

Signed:

Santiago Torres Bernárdez