ICSID Case No. ARB/07/5

ABACLAT AND OTHERS
(CLAIMANTS)

and

THE ARGENTINE REPUBLIC
(RESPONDENT)

PROCEDURAL ORDER NO. 22

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31 JULY 2013

IN VIEW OF

1. Claimants' letter of 15 March 2013, informing the Arbitral Tribunal that they had produced and would continue to produce to Respondent updated bank certification letters pursuant to Respondent's document production request No. 8, and that "*Claimants have made corresponding updates to the data reflected in the Database for some of these Claimants to ensure consistency in the record*".

2. Procedural Order No. 19 dated 8 April 2013, by which the Arbitral Tribunal enquired about the updates made to the Database and ruled as follows:

> *"1. From now on, Claimants are strictly forbidden to make any update to the database without filing a prior request with the Arbitral Tribunal indicating (i) the reasons for the update; (ii) the nature of the update; (iii) the consequences on the content of the Database; and (iv) what measures Claimants intend to take to ensure traceability of the changes made to the Database.*
>
> *2. Claimants are invited to provide the Arbitral Tribunal by 11 April 2013 with the information mentioned in paras. 1 of the dispositif and 12 above, and in particular whether the "updated Access Database" allows to easily trace the changes made or whether any other action is necessary in this regard.*
>
> *3. Respondent will then be invited to comment thereon, and the Arbitral Tribunal will in due time decide what weight to give to such updated information."*

3. The information provided by Claimants on 11 April 2013 in response to Procedural Order No. 19 and Respondent's comments thereon of 19 April 2013.

4. Claimants' request of 25 April 2013 to be allowed to upload further bank certification letters to the Database and make corresponding updates to the Database data.

5. Procedural Order No. 21 dated on 2 May 2013, by which the Arbitral Tribunal ruled as follows:

> *"1. The Arbitral Tribunal confirms the principle set forth in item 1 of the executive part of Procedural Order No. 19 of 8 April 2013 regarding further updates to the Database, i.e. that Claimants are strictly forbidden to make any update to the database without filing a prior request with the Arbitral Tribunal indicating (i) the reasons for the update; (ii) the nature of the update; (iii) the consequences on the content of the Database; and (iv) what measures Claimants intend to take to ensure traceability of the changes made to the Database.*
>
> *2. The Arbitral Tribunal will determine the appropriate next steps, and, in particular, specific rules on how to deal with past and future changes made or to be made to the Database.*
>
> *3. For this purpose, Claimants are invited to respond to the questions listed in Annex 1 by Friday, 10 May 2013, and Respondent will then be invited by the Arbitral Tribunal to provide comments thereon within a time frame to be determined by the Arbitral Tribunal.*
>
> *4. Claimants' request of 25 April 2013, which relates to modifications of the content of the Database, is temporarily denied and will be re-examined once the Arbitral Tribunal has decided on the appropriate next steps as provided for under item (2) above.*
>
> *5. The current Procedural Timetable is modified as follows:*

(i) Submission by the Expert of the Draft Verification Report: 31 May 2013

(ii) Comments thereon by the Parties: 1 July 2013

(iii) Issuance of Final Verification Report: 15 July 2013

6. All other deadlines are suspended.

6. Annex 1 to Procedural Order No. 21, in which the Arbitral Tribunal set out a list of questions for Claimants regarding the updates made to the Database data.

7. The answers that Claimants provided on 10 May 2013 concerning the questions set out in Annex 1 to Procedural Order No. 21, and Respondent's comments thereon of 22 May 2013.

8. The Arbitral Tribunal's letter of 4 June 2013 inviting Claimants to complement some of their previous answers by 12 June 2013 and inviting Respondent to thereafter comment thereon by 20 June 2013.

9. The additional answers that Claimants provided on 12 June 2013 to the questions raised by the Arbitral Tribunal, and Respondent's comments thereon of 24 June 2013.

10. Claimants' comments of 1 July 2013 concerning Respondent's letter of 24 June 2013.

11. The Arbitral Tribunal's letter of 22 July 2013 requesting Claimants to provide further clarification regarding withdrawn Claimants and the clarification provided by Claimants on 25 July 2013.

CONSIDERING

12. That, in summary, Claimants position is as follows:

    (i) The Database is a tool created and maintained by Claimants, at their own expense, to facilitate collection, organization, and review of individualized Claimant evidence. This Database is based on documentary evidence relating to each individual Claimant, and which has since the outset of these proceedings, and with minor, transparent exceptions, remained constant for the entirety of the case.

    (ii) Since Respondent was given access to the Database in April 2010, Claimants have made IT-related updates to improve functionality as well as limited updates to the data in the Database, all of which is extracted from the face of the documentary evidence in the Database. Claimants submit that these updates were made to ensure that the data, which was entered manually and is meant to reflect the information in the underlying documentary evidence, accurately reflects the information in those documents.

    (iii) These IT- and data-related updates have not in any way impacted the underlying documentary evidence on which Claimants continue to rely, and serve to further facilitate the review of that evidence.

(iv) All updates have been done within the briefing period established by the Arbitral Tribunal, and at no point has Respondent been deprived of access to the updated data or underlying documentary evidence, or of the ability to review and comment on them. Throughout the case, the updates were performed to ensure that Respondent has access to comprehensive and accurate evidence for each Claimant. Respondent has ample opportunity to address any of the Database and/or evidentiary issues in correspondence, its response to Dr. Wühler's draft report, and Respondent's Rejoinder.

(v) It would be highly prejudicial to Claimants' rights if they were prohibited from entering the current version of the Database into the record or from making future updates to the data and documentation.

(vi) Claimants could submit all the documentary evidence in hard copy with their forthcoming memorial submissions, but the Database provides a manageable and practical tool to organize and access evidence.

13. That, in contrast, Respondent's position is as follows:

(i) It reiterates its objections to the use of the Database in this proceeding, for any purpose whatsoever, to the extent that its integrity is incurably compromised. It further objects to all the changes made to the Database since the commencement of this arbitration proceeding, which have not but added to its illegitimacy.

(ii) Respondent submits that it is absurd to expect a party to exercise its right of defense based on such Database, which allegedly contains information concerning tens of thousands of Claimants and which is in permanent change. The least the Tribunal should have done is take control of the Database at the outset of the proceedings. Not only did it fail to do so, but it countenanced permanent changes to the Database by one of the parties, which is in fact controlling this proceeding.

(iii) Claimants' letter compounds the legal uncertainty and insecurity by its vague and ambiguous terms. However, the problem lies not only in the vagueness and ambiguity of Claimants' allegations, but also in that Claimants presented forged signatures.

(iv) The Tribunal cannot rely on Rule 25 of the ICSID Arbitration Rules with regard to changes of the data in order to introduce, eliminate and/or modify the most important documentation in the proceeding. This is without prejudice to the fact that Claimants have not submitted the original documents, which, given the circumstances of the present case, Argentina demands.

(v) Claimants' responses to the Tribunal's questions confirm that their data and information "updates" are nothing more than opportunities to purge the Database of the vices and defects that render it invalid.

(vi) Respondent requests "*to disregard the Database as a means of proof in this proceeding*", and "*a fortiori, it is unconceivable to use the Database to establish in a definite manner who the Claimants are, whether they have granted a valid and genuine consent to the ICSID arbitration, and as the case may be, whether such consent still remains in place*".

CONSIDERING FURTHER

14. That it is common ground that Claimants have either directly or through the assistance of third parties made changes to the Database on a regular basis.

15. That it is disputed between the Parties to what extent such updates are admissible and whether or not they affect the reliability and utility of the Database.

16. That the Arbitral Tribunal therefore considers it necessary to establish a set of principles regarding the management of and in particular the updates to the Database.

17. That as a matter of principle, the Arbitral Tribunal considers that the principles set out in item 1 of the executive part of Procedural Order No. 19 should constitute the premise for any future update to be effected to the Database, unless otherwise provided herein or otherwise ordered by the Arbitral Tribunal.

18. That item 1 of the executive part of Procedural Order No. 19 provides as follows:

> *"1. From now on, Claimants are strictly forbidden to make any update to the database without filing a prior request with the Arbitral Tribunal indicating (i) the reasons for the update, (ii) the nature of the update; (iii) the consequences on the content of the Database; and (iv) what measures Claimants intend to take to ensure traceability of the changes made to the Database."*

19. That it appears that the updates made by Claimants to the Database (hereinafter 'Past Updates') are of varying nature and may therefore require a slightly differentiated treatment.

20. That these Past Updates include the following:

    (i) Technical updates, including hardware and software updates;

    (ii) Updates concerning the content of the data in the Database, whereby these updates can be separated into three categories:

        a. The withdrawal of individual Claimants (hereinafter "withdrawn Claimants");

        b. New entry into the Database of 'old data' concerning Nationality and Holding Data (i.e. addition into the Database of information already reflected in the existing documentary evidence);

        c. New entry into the Database of 'new data' concerning Nationality and Bank Certificates (i.e. addition into the Database of new information).

21. That it is further necessary to set out principles for the future (hereinafter 'Future Updates').

1. With regard to Technical Updates

22. That, with regard to past technical updates, i.e. (i) the hardware update of September 2012; and (ii) the software updates of September 2012 and December 2012, the Arbitral Tribunal understands that these updates did not modify the content of the Database, but only upgraded the hardware and software in order to improve the functionality of the Database. As such, the Arbitral Tribunal rules to approve these updates.

23. That, with regard to future technical updates (i.e. updates concerning only the hardware or software of the Database and not modifying the content of the Database), the Arbitral Tribunal considers that these updates are in principle admissible subject to the following procedure: Claimants shall notify the Arbitral Tribunal and Respondent of any intended technical update by a 5 days prior written notice and provide the information set out in item 1 of Procedural Order No. 19. Respondent may then raise any objection it may have within 2 days of receiving Claimants' notice, and the Arbitral Tribunal would then decide on the matter. If no objection is raised, Claimants are entitled to proceed with the announced update.

24. That the above described procedure shall also apply to the 'Attempted Software Update of March 2013' and Claimants are invited to proceed as indicated above shall they wish to implement this update.

2. With regard to Withdrawn Claimants

25. That, with regard to withdrawn Claimants, the Arbitral Tribunal understands that these withdrawals concern individual Claimants which withdrew between 5 October 2010 and 23 January 2013 and were thus removed from the Database. Claimants' earlier position seems to have been that these withdrawals were implicitly authorized by the Arbitral Tribunal's Decision on Jurisdiction and Admissibility of 4 August 2011 and Procedural Order No. 13, although Claimants have in their letter of 25 July 2013 now raised a formal request that "*the Tribunal approve the withdrawals and order the discontinuance of the proceeding as to all Claimants who have withdrawn since 5 October 2010*".

26. That in its Decision on Jurisdiction and Admissibility, the Arbitral Tribunal clearly set out that "*the notices by which Counsel for Claimants informed the Tribunal and Respondent of the withdrawal of further Claimants on 7 November 2008 and 5 October 2010 in the form of substitute versions of Annex L cannot, by themselves, effect the withdrawal of the concerned Claimants from the proceedings*" (para. 616) and that withdrawals of Claimants after the registration of the Request for Arbitration are to be deemed to constitute a "*request for discontinuance pursuant to Rule 44 ICSID Arbitration Rules, thereby subject to the conditions and modalities set forth in Rule 44*" (para. 620). The Arbitral Tribunal further set out that "[t]*he Tribunal can only order discontinuance to the extent it is accepted by Respondent, i.e., to the extent that such discontinuance would be 'full and final' and that costs be allocated as requested by Respondent*" (para. 628). The Arbitral Tribunal then concluded that the withdrawal of the

Claimants listed in Annex L relating to their acceptance of the Exchange Offer 2010 fulfilled these requirements and that is why the Arbitral Tribunal approved the discontinuance of the proceedings with regard to such Claimants (para. 635).

27. Thus, the principles set out with regard to the withdrawal of Claimants in the Arbitral Tribunal's Decision on Jurisdiction and Admissibility cannot be deemed to constitute an implicit authorization for the future to withdraw Claimants at any time and without formally informing Respondent and the Arbitral Tribunal thereof.

28. That, since such a withdrawal is deemed to constitute a 'request for discontinuance', there must be a request. Claimants cannot effect the withdrawal by themselves. Withdrawal of any individual Claimant requires the issuance by the Arbitral Tribunal of an order for discontinuance according to Rule 44 of the ICSID Arbitration Rules.

29. That, whether or not such request will be granted will depend on whether or not the withdrawal meets the two requirements set out in the Decision on Jurisdiction and Admissibility, i.e. that it is 'full and final' and that costs be allocated evenly between Claimants and Respondents. While it is possible that these conditions are met with regard to the withdrawn Claimants, without a formal request for discontinuance supported by information on the reasons and circumstances of the withdrawal, and without an order of discontinuance issued by the Arbitral Tribunal, Claimants may not withdraw or remove any individual Claimants from the Database.

30. That, consequently, the removal of withdrawn Claimants from the Database and thereto related Annexes between 5 October 2010 and 23 January 2013 are without legal effect.

31. That Claimants shall therefore submit a formal request for discontinuance for all the withdrawn Claimants and provide explanations on the reasons for and circumstances of such withdrawals. While the Arbitral Tribunal notes that Claimants have filed such a formal request in their letter of 25 July 2013, they have failed to provide explanations on the reasons for and circumstances of the relevant withdrawals. Claimants are therefore invited to re-submit their request accompanied by the requested information, including in particular a list of all the withdrawn Claimants. Respondent will then be given the opportunity to confirm whether or not it accepts such withdrawal at the same conditions as established previously.

3. With regard to the Entry of 'New Data'

32. That, with regard to the past entry of 'new data' concerning Nationality Data and Bank Certification Letters, the Arbitral Tribunal considers that the new data and any thereto relating documentary evidence constitutes 'supporting documentation' in the sense of Rule 24 of the ICSID Arbitration Rules and should therefore be submitted with the instrument it relates to, i.e. the latest being Claimants' Memorial on Phase 2 of 1 October 2012. To the extent that Claimants intended to submit new data outside of the timeline for submission of its written submissions, they should have filed a special request with the Arbitral Tribunal.

33. That, in both cases, Claimants may not automatically update the Database to reflect this new data and shall seek prior approval from the Arbitral Tribunal according to the principles set out in item 1 of the executive part of Procedural Order No. 19.

34. That, consequently, the past entry into the Database of the 'new data' concerning Nationality Data and Bank Certification Letters is without legal effect.

35. That Claimants shall file a request to admit new data into the record (where such data was filed after their Memorial on Phase 2 of 1 October 2012), and a corresponding request to be allowed to update the relevant data in the Database accordingly. While the latter request is subject to Rule 24 of the ICSID Arbitration Rules, the former is subject to item 1 of the executive part of Procedural Order No. 19.

36. That any future entry of 'new data' requires prior approval by the Arbitral Tribunal based on a written request from Claimants in accordance with Rule 24 of the ICSID Arbitration Rules and the principles set out in item 1 of the executive part of the Procedural Order No. 19.

4. With regard to the Entry of 'Old Data'

37. That, with regard to past entry of 'old data' concerning Nationality Data and Holding Data, these entries can be deemed to fall into two main categories: (i) corrections of erroneous data entries; and (ii) additions of data into the Database.

38. Under Rule 25 of the ICSID Arbitration Rules, "*an accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered*".

39. That, while the correction of erroneous entries falls under Rule 25 of the ICSID Arbitration Rules, the addition of 'old data' into the database constitutes a modification to a pre-existing 'supporting documentation' under Rule 24 of the ISCID Arbitration Rules.

40. That, therefore, the correction or entry of such data into the Database requires in principle the consent of Respondent or leave by the Arbitral Tribunal to be requested in accordance with the principles set out in item 1 of the executive part of Procedural Order No. 19.

41. That, considering that the 'old data' was extracted from pre-existing documentary evidence, that Claimants have provided in their correspondence sufficient information concerning this data and that the changes made are traceable, the Arbitral Tribunal considers it appropriate to approve these entries of 'old data' concerning Nationality Data and Holding Data into the Database.

42. That, with regard to future entries of 'old data', the Arbitral Tribunal considers that whilst such entries must be subject to a formal request, to the extent that the data is not new and is already contained in the case records, the consent from Respondent and/or leave from the Tribunal can be obtained implicitly.

43. That, consequently, future entry of 'old data' is admissible based on a 5 days prior written notice from Claimants (according to the principles set out in item 1 of the executive part of Procedural Order No. 19) and provided Respondent does not object

within 2 days upon receipt of Claimants' notice. In case of objection, Claimants must await a decision from the Arbitral Tribunal before proceeding with the update.

5. Other Updates

44. That any updates not falling under any of the above categories shall be subject to the principles set out in item 1 of the executive part of Procedural Order No. 19 and require prior approval by the Arbitral Tribunal.

6. Cut-Off Date

45. That the cut off date for any further change whatsoever to the Database and/or the underlying documentary evidence shall be 1 week prior to the date for submission of Respondent's Rejoinder on Phase 2, or – in case a further submission from Claimants is justified in the light of potentially new arguments or documents – 1 week prior to the date for submission of Claimants' 'Sur-Rejoinder' on Phase 2.

7. Other Related Issues

a) Involvement of LegisPro

46. That it appears that some of the updates were effected by LegisPro upon a mandate from TFA.

47. That the Arbitral Tribunal considers it appropriate to request further information on the specific mandate entrusted to LegisPro.

48. That, consequently, Claimants are requested to submit copy of the engagement letter or equivalent document or information regarding LegisPro's involvement in the management of the Database.

b) Access to Underlying Documentary Evidence

49. That Respondent has requested to be given access to the original documentary evidence underlying the Database.

50. That the original documentary evidence is extremely voluminous given the high number of Claimants involved.

51. That the right of defense of Respondent to be given access to the original documentary evidence must be pondered against Claimants' right to efficient proceedings.

52. That the Arbitral Tribunal considers that the Final Verification Report of Dr. Wühler may be relevant to determine the right balance between the Parties' opposing interests.

53. That, consequently, the Arbitral Tribunal defers ruling on this issue until issuance of Dr. Wühler's Final Verification Report.

CONSEQUENTLY THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

1. The principles set out in item 1 of the executive part of Procedural Order No. 19 constitute the premise for any future update to be effected to the Database, unless otherwise provided herein or otherwise ordered by the Arbitral Tribunal.

2. With regard to Technical Updates:

(i) The Arbitral Tribunal approves (i) the hardware update of September 2012; and (ii) the software updates of September 2012 and December 2012.

(ii) Future technical updates, including the 'Attempted Software Update of March 2013' are admissible based on a 5 days prior written notice from Claimants and provided Respondent does not object within 2 days upon receiving Claimants' notice. In case of objection, Claimants must await a decision from the Arbitral Tribunal before proceeding with the update.

3. With regard to withdrawn Claimants:

(i) The past removal of withdrawn Claimants from the Database and thereto related Annexes between 5 October 2010 and 23 January 2013 are without legal effect.

(ii) Withdrawal of any individual Claimant requires the issuance by the Arbitral Tribunal of an order for discontinuance according to Rule 44 of the ICSID Arbitration Rules. Claimants shall therefore re-submit their request for discontinuance according to the principles set out in para. 31 above.

4. With regard to entry of 'new data'

(i) The past entry into the Database of the 'new data' concerning Nationality Data and Bank Certification Letters is without legal effect.

(ii) Claimants shall file a request to admit new data into the record (where such data was filed after its Memorial on Phase 2 of 1 October 2012), and a corresponding request to be allowed to update the relevant data in the Database according to the principles set out in para. 35 above.

(iii) Any future entry of 'new data' requires prior approval by the Arbitral Tribunal based on a written request from Claimants in accordance with Rule 24 of the ICSID Arbitration Rules and the principles set out in item 1 of the executive part of the Procedural Order No. 19.

5. With regard to entry of 'old data'

(i) The Arbitral Tribunal approves these past entries of 'old data' concerning Nationality Data and Holding Data into the Database.

(ii) Future entry of 'old data' is admissible based on a 5 days prior written notice from Claimants (according to the principles set out in item 1 of the executive part of Procedural Order No. 19) and provided Respondent does not object within 2 days upon receipt of Claimants' notice. In case of objection, Claimants must await a decision from the Arbitral Tribunal before proceeding with the update.

6. Any updates not falling under any of the above categories shall be subject to the principles set out in item 1 of the executive part of Procedural Order No. 19 and require prior approval by the Arbitral Tribunal.

7. The cut off date for any further change whatsoever to the Database and/or the underlying documentary evidence shall be 1 week prior to the date for submission of Respondent's Rejoinder on Phase 2, or – in case a further submission from Claimants is justified in the light of potentially new arguments or documents – 1 week prior to the date for submission of Claimants' 'Sur-Rejoinder' on Phase 2.

8. Claimants are requested to submit by 5 August 2013 copy of the engagement letter or equivalent document or information regarding LegisPro's involvement in the management of the Database.

9. The decision on whether Respondent shall be given access to the original of the documentary evidence underlying the Database is deferred until issuance of the Expert's Final Verification Report.

10. All other requests are rejected.

[signed]

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Pierre Tercier,

President

On behalf of the Arbitral Tribunal

An Individual Statement of Dr. Santiago Torres Bernárdez is attached.

Individual Statement by Santiago Torres Bernárdez to PO Nº22

My vote in favour of PO Nº 22 encompasses two reservations concerning paragraphs 2 (i) and 5(i) of the decisional part, as follows:

Paragraph 2 (i)

1. The decisional part of the PO distinguishes *inter alia* between "updates concerning only the hardware or software of the Database" (the so-called Technical Updates) and "updates modifying the contents of the Database". Furthermore, paragraph 2 thereof distinguishes between "past Technical Updates" and "future Technical Updates". These latter Technical Updates, including the attempted Update of March 2013, are subject to a given prior written notice procedure set forth in paragraph 2(ii) which I approve. However, such a procedure is not made applicable by the Order to the "past Technical Updates" made by Claimants in September and December 2012 and the Order even "approves" those unilateral and untimely changes.

2. I disagree with this aspect of the decision, embodied in paragraph 2 (i) of the Order, for two main reasons. First, the ICSID Arbitral Rules do not grant a party the right to make *any change* in duly recorded filed evidential elements in between the filing of two instruments of its own, without prejudice of the right of that party to submit additional or new supporting documentation together with its following next instrument. Secondly, the technical changes introduced unilaterally in the Database by the Claimants in September and December 2012 could well have a bearing on the design and structure of the recorded Database to the point of impairing its functioning, access, manageability and/or reliability as an evidential element or of some of the various formats of the Database submitted by the Claimants.

3. Furthermore, the fact that a given "update" could be characterized as technical in nature does not mean necessarily that the ensuing change would be minor or without relevance for the assessment of the value of the Database as an element of proof or of the proof of having discharged the burden of proof. This may be the case of some Technical Updates but by no means necessarily of all Technical Updates.

Paragraph 5(i)

4. I reserve also my position concerning the approval by the PO of unilateral entries made by the Claimants into the Database of "old data" concerning Nationality Data and Holding Data, as provided for in paragraph 5(i) of the Order. In my opinion, the "past entries of that old data" should have been submitted to the same prior written notice procedure as provided for "future entries old data" in paragraph 5 (ii). I find no justification for the distinction made in this respect by the Order.

5. It might be said that on the old data the Respondent have had the opportunity to comment thereon. I admit it but, in my view, this is not the issue at the stake here. The real issue is not so much whether the information concerned is known by the Respondent but the fact that the said data has been newly entered, unilaterally and untimely, into the recorded Database by the Claimants, an act which finds no justification in ICSID Rules (see Rule 26 (3)) and that the Respondent alleges to jeopardize the exercise of its right of defence. ICSID Rules do not allow indeed a party to modify elements of evidence already submitted and recorded by a tribunal, without prejudice of the right of such a party to submit in due course together with another authorized instrument further elements of evidence even on the same item or items.

6. The inputs concern involved, in any case, changes in the recorded Database of the included supporting documentation (Rule 24) and was made by the Claimants outside the time-limit fixed for their filing of the instrument to which it relates, as well as it is going apparently much further than the mere correction of accidental errors (Rule 25). In my opinion, the Arbitral Tribunal is duty bound to upholding and enforcing, in all circumstances, the procedural principle of the integrity of every timely filed element of evidence formally put into the records of the case by a Tribunal's decision as in the present case.

Signed: Santiago Torres Bernárdez