

ICSID Case No. ARB/07/5

**ABACLAT AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

PROCEDURAL ORDER NO. 33

4 SEPTEMBER 2014

IN VIEW OF

- Procedural Orders No. 28 of 9 June 2014 and 32 of 1 August 2014, as well as the documents and correspondence referred to therein;
- Claimants' second letter of 23 June 2014;
- The Tribunal's directions of 24 June 2014;
- Respondent's letter of 6 August 2014

CONSIDERING

- that, in its letter of 23 June 2014, Claimants requested the Tribunal to:
 - *Reaffirm that, during their closing arguments, the Parties may not rely on documents or legal authorities that are not already in the record;*
 - *Strike from the record all Respondent slides and hearing transcript excerpts referencing documents that are not in the record, as identified in Exhibit 1; or, alternatively, permit Claimants to respond and submit rebuttal information into the record;*
 - *Strike from the record pages 1006:10 – 1107:17 and 1109:12 – 1117:20 of the Day 4 transcript, where Mr. Marx's testimony exceeds the scope of this written report."*
- that the Arbitral Tribunal considers it appropriate to deal with these three requests separately;

1. AS CONCERNS CLAIMANTS' REAFFIRMATION REQUEST

CONSIDERING

- that Claimants base their request on Procedural Order No. 28;
- that Respondent's objections to Claimants' request do not specifically address this request;
- that, in Section C of the executive part of Procedural Order No. 28, the Tribunal provides as follows :
 - "C. Other Issues*
 - 1. Documents for Use During the Hearing*
 - The Parties shall prepare the above mentioned documents and refrain from submitting any document not already in the record without obtaining prior leave from the Arbitral Tribunal;"*
- that this ruling was made in view of and relating to the conduct of the hearing;
- that it does, as such, not extend beyond the scope of the hearing;
- that it was however made based on a joint agreement of the Parties;

- that, the Parties' agreement reflects the common understanding that a Party shall not submit new documents in a setting where the other Party has no due opportunity to provide rebuttal evidence;
- that this also reflects general principles of international arbitration and derives in particular from the principle of the equality of arms and due process;
- that the upcoming Post-Hearing Briefs are simultaneous submissions and are meant to summarize the Parties' positions as set out in their past submissions and in view of the hearing held in Washington, DC in June 2014;
- it is therefore not the purpose of Post-Hearing Briefs to introduce new documents or legal authorities;
- that, consequently, the Tribunal considers it appropriate to rule that the Parties may not rely on new documents or legal authorities in their Post-Hearing Briefs, without prior leave from the Tribunal;

2. AS CONCERNS CLAIMANTS' REQUEST TO STRIKE THE DOCUMENTS LISTED IN EXHIBIT 1 TO THEIR LETTER OF 23 JUNE 2014

CONSIDERING

- That Claimants request that the Tribunal “[s]trike from the record all Respondent slides and hearing transcript excerpts referencing documents that are not in the record, as identified in Exhibit 1; or, alternatively, permit Claimants to respond and submit rebuttal information into the record”;
- that, according to Claimants, the documents and legal authorities listed in Exhibit 1 to their letter of 23 June 2014 and referred to in Claimants' Opening Argument are new, in the sense that they were not part of the record before the hearing;
- that, during the hearing, Claimants objected to the lack of record citations and to Respondent's use of new documents not already in the record (see transcripts of 17 June 2014 (Day 2) 422:14 – 423:6 and 465:12 – 466:1);
- that the Tribunal directed Respondent to provide record citations and indicated that it would decide on Claimants' objection regarding new documents (see transcripts of 27 June 2014 (Day) 422:21 – 423:6 and 465:6-11);
- that, on 18 June 2014, Respondent provided Claimants with a copy of its Powerpoint presentation used during its Opening Statements together with the concerned citations;
- that, according to Respondent, this submission has rendered Claimants' request ineffective;

CONSIDERING FURTHER

- that according to Section C of Procedural Order No. 28, neither Party was entitled to submit new documents at the hearing;
- that the documents listed in Exhibit 1 to Claimants' letter of 23 June 2014 are, for the majority, references to philosophical or legal theory books and where therefore used by Respondent to illustrate general principles of law;
- that, for the remaining part of the listed documents, they can be classified into the following categories:
 - o three references to legal provisions, i.e., to paras 103, 1047 and 1050 of Argentina's Civil Code;
 - o one reference to a decision of the Supreme Court of Argentina involving the Argentine Ombudsman and holders of bank deposits;
 - o one reference to the so-called "London Agreement 1953";
 - o one reference to an undated bill presented to the British parliament;
- that Respondent relied on these references mostly for the purpose of illustrating a point, rather than relying on these references as factual evidence or legal basis;
- that the time spent by Respondent on these references was very limited;
- that, under these circumstances, it does not appear necessary or appropriate to strike the relevant passages from the transcripts or grant Claimants a right to submit rebuttal evidence, and it is sufficient that Claimants have the opportunity to comment on these references in their Post-Hearing Briefs if they so wish without however submitting new evidence;
- that, consequently, Claimants requests in this regard are rejected, whereby Claimants may however comment on any of these references in their Post-Hearing Briefs if they so wish, without however submitting new evidence;

3. AS CONCERNS CLAIMANTS' REQUEST TO STRIKE PASSAGES OF MR MARX'S TESTIMONY

CONSIDERING

- that Claimants request that the Tribunal "[s]trike from the record pages 1006:10 – 1107:17 and 1109:12 – 1117:20 of the Day 4 transcript, where Mr. Marx's testimony exceeds the scope of this written report".
- that Claimants base their request on the following main arguments:
 - (i) that during the examination of Mr. Marx, Respondent repeatedly sought to elicit testimony that was well outside the scope of his written report, which is in breach of the directions set out by the Tribunal in Procedural Order No. 28;

- (ii) that, according to Claimants, this breach persisted during Mr. Marx's examination notwithstanding the Tribunal's direction that he shall limit his testimony to the scope of his report and concerning the following passages 1106:10 – 1107:17 and 1109:12 – 1117:20 of the transcripts of 19 June 2014 (Day 4);
- (iii) that Respondent's objections that Claimants' expert, Dr. Bianchi, proceed with a Power-point presentation in lieu of a direct examination led the Tribunal to prevent Mr. Bianchi from making his presentation, which would only underscore the need to exclude the impermissible direct testimony of Mr. Marx;
- that, according to Respondent, this issue is moot to the extent that the Tribunal already dealt with Claimants' objections during the hearing and allowed some of the objections and rejected others (see transcripts of 19 June 2014 (Day 4) p. 1096:10–17; 1099:2–20; 1101:3-5; 1114:17–19; 1116:2-6; 1117:4-17; etc.);

CONSIDERING FURTHER

- that, according to section A.4 of the executive part of Procedural Order No. 28, the Tribunal granted Respondent the right to conduct a direct examination of Mr. Marx "*whereby the scope of [his] examination shall be limited to the scope of [his] original witness statements and/or expert reports*".
- that Claimants raised various objections during Mr. Marx's direct examination regarding the scope of his examination and answers;
- that the Tribunal dealt with some of these objections during the hearing by granting some and rejecting others (see e.g. see transcripts of 19 June 2014 (Day 4) p. 1101:3-5, p. 1115:15-1116:1, p. 1117:7-19);
- that the Tribunal can and will give due regard, when weighting the evidence provided by Mr. Max, to Claimants' remaining objections regarding the scope of Mr. Marx's testimony;
- that it therefore does not consider it necessary or appropriate to strike any passage from Mr. Marx's direct examination from the transcripts;
- that, consequently, Claimants' request in this regard is rejected;

CONSEQUENTLY, THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

- 1. The parties may not rely on new documents or legal authorities in their Post-Hearing Briefs, without prior leave from the tribunal.**
- 2. Claimants' requests to strike from the record all Respondent slides and hearing transcript excerpts referencing documents that are not in the record, as identified in Exhibit 1 to their letter of 23 June 2014; or, alternatively, permit Claimants to respond and submit rebuttal information into the record, are rejected. Claimants may comment on any of these references in their Post-Hearing Briefs if they so wish, without however submitting new evidence.**
- 3. Claimants' request to strike from the record pages 1006:10 – 1107:17 and 1109:12 – 1117:20 of the Day 4 transcript, where Mr. Marx's testimony exceeds the scope of this written report is rejected.**

[signed]

Pierre Tercier,

President

On behalf of the Arbitral Tribunal