

Mass claims and the distinction between jurisdiction and admissibility (Part II)

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With the release of the Dissenting Opinion in *Abaclat v. Argentina*, we now have the benefit of a forceful critique of the majority's decision that the *Abaclat* Tribunal has jurisdiction to hear the claims of over 60,000 Italian investors against Argentina under the ICSID Convention and the Argentina-Italy BIT. Professor Georges Abi-Saab's Dissenting Opinion (the Dissent) raises a number of objections to the majority's decision. Most importantly, it states that the Tribunal "faces two glaringly insuperable obstacles that prevent it from taking jurisdiction". First, the investors' security entitlements are not protected investments, in particular, because the investments were not made, as required by the BIT, in the territory of Argentina. Second, an *ad hoc* ICSID tribunal does not have jurisdiction over collective mass claims under the ICSID Convention and the BIT, absent Argentina's specific consent to the mass claims procedure. This post builds on the discussion in my previous post of the majority's distinction between jurisdiction and admissibility in the context of mass claims. In contrast to the majority's view that the number of claimants is a question of admissibility and not jurisdiction, in Professor Abi-Saab's view, Argentina's objection went to the scope of its consent to arbitrate and its consent to arbitrate could not be interpreted to include mass claims.

Drawing on US Supreme Court decisions on class arbitration, Professor Abi-Saab

finds that there is such a fundamental difference between regular bilateral arbitration and mass proceedings that “special consent” is required for mass proceedings and that this consent cannot be deduced from a simple consent to arbitration. With respect to ICSID practice, he notes that cases of multi-party arbitration have either proceeded with the consent of the parties or without objection from the respondent. With respect to mass claims processes in international law, he notes that the practice has been to establish a specific process for the mass claims with the consent of the parties and that the only exception to this uniform practice is the United Nations Compensation Commission, which was established by the Security Council under its Chapter VII powers.

Professor Abi-Saab then turns to a subsidiary objection. Even if in principle Argentina’s consent to arbitration could be interpreted as consent to mass claims, he finds that the Tribunal does not have the power under the ICSID Convention and Arbitration Rules to adopt procedures for dealing with a mass claims proceeding. He takes issue with the majority’s distinction between a modification to the arbitration rules without party consent (which, according to the majority, a tribunal may not do) and adopting procedures to address the handling of mass claims (which, according to the majority, a tribunal is entitled to do). In Professor Abi-Saab’s view, the Tribunal has arrogated itself “the power to set aside, in large measure, the existing Rules of Procedure, and replacing them by another set of rules of its own; acting as a legislator, be it for one case.” (para. 208)

With respect to the concept of admissibility, Professor Abi-Saab appears to affirm that it has a role to play in international arbitration. He notes that “[g]enerically, the admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court.” (para. 18), but goes on to state that “none of these conditions has anything to do with the determination of the scope of consent whether to the general or the special jurisdiction of tribunals”. He also notes that “regardless of the classification of the objection as a plea to jurisdiction or to admissibility, the result of the non-fulfilment of the requirements should have been the same, the dismissal of the case.” (para. 25). He thus takes issue with the approach of the majority, which he views as deciding questions of admissibility in its own discretion based on of its own subjective “balancing of interests” (para. 261).

Although the majority's decision on consent is certainly controversial, it is sound in principle. Unlike an arbitration clause in a typical commercial contract, offers to arbitrate in investment treaties are open to the world of qualified investors. The offer to arbitrate is made to investors with investments. In principle, this offer to the world should be able to be accepted by a multitude of investors. If there is consent to arbitrate where one shareholder holds 100,000 shares, why is there not equally consent when there are 100,000 shareholders each holding one share?

Professor Abi-Saab is undoubtedly correct that the existence and scope of a Tribunal's powers go to jurisdiction. For example, where an investment treaty provides that a tribunal's remedial powers are limited to the granting of damages, it would be an excess of jurisdiction for the tribunal to order restitution of property or the specific performance of a contract. However, the Dissent is misguided in finding that the Tribunal exceeded its powers in adapting procedures for a mass claim arbitration. While it is true that the *Abaclat* proceedings might diverge from the usual ICSID proceedings, the ICSID Arbitration Rules provide a tribunal significant discretion in how proceedings are organized. While denouncing the majority's decision as "replacing" (para. 219) the ICSID Arbitration Rules, the Dissent does not provide any specific examples of where the majority's proposed adaptation to the proceedings would be contrary to the ICSID Arbitration Rules. In sum, the Dissent appears to equate what happens in the usual ICSID proceedings with what the ICSID Arbitration Rules require. For example, the ICSID Rules say very little about the mechanics for taking and considering evidence.

The Dissent expresses valid concerns with the procedures the Majority proposes for the simplification of the examination of claims and whether these procedures satisfy due process. Nevertheless, it is not possible to say *ex ante* that simplified procedures for the examination of evidence will necessarily breach the Respondent's due process rights. The Majority states in conclusion that:

... the Tribunal remains obliged to examine all relevant aspects of the claims relating to Claimants' rights under the BIT as well as to Respondent's obligations thereunder subject to the Parties' submissions. Thus, it is the manner in which the Tribunal will conduct such examination which may diverge from usual ICSID proceedings (para. 533).

Due process is not ignored by diverging from "usual ICSID proceedings". The form

and mechanics of proceedings are, and should be, a function of the claims to be decided and the evidence to be assessed. As the Majority notes:

Notwithstanding the high number of Claimants involved, the Tribunal must examine not only the elements necessary to determine its jurisdiction (i.e., the nationality of the Claimants, their status of investor and the existence of their investment, etc.), but also those necessary to establish Claimants' claims and relating to the merits of the case (i.e., the existence of a breach by Argentina of its obligations under the BIT, the effect of such breach on Claimants' investment, etc.). Thus, the high number of Claimants may not serve as an excuse not to examine such elements and adaptations to the procedure may therefore not affect the object of the Tribunal's examination. (para. 529).

The task ahead for the *Abaclat* Tribunal is gargantuan. Examining all elements of the claims and ensuring that the Respondent is accorded due process will be extremely time consuming. Even if one may well wonder if an *ad hoc* Tribunal of three busy arbitrators is the best mechanism to address this kind of dispute, the majority was correct to find that it can hear a mass claim.

This post is written by Andrew Newcombe as a member of the ITA Academic Council.