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The Freedom of Arbitrators to Conduct Collective Proceedings When the Rules are Silent: Considerations in the Wake of the Abaclat Decision

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ABSTRACT

Collective arbitration remains almost unknown around the world. The Arbitral Tribunal in the case of *Abaclat and Others v the Argentine Republic* rendered a majority Decision of Jurisdiction and Admissibility that constitutes the first ICSID case bringing the question whether collective claims may be deemed in investment arbitration. Such Decision was strongly questioned by the Dissenting Opinion. This is subject of debate and few academic studies deal with the complexity of the matter. Taking into account the above, we will observe the main features of mass arbitration and its differences, the wording of several sets of rules and the interpretation of rules when they are silent. ICSID Convention allows exercising inherent powers. As such, inherent powers provide Arbitrators the freedom to interpret silence and to conduct collective arbitration within certain limits.

. . . casi me he determinado dejarlo al silencio; pero como éste es cosa negativa, aunque explica mucho con el énfasis de no explicar, es necesario ponerle algún breve rótulo para que se entienda lo que se pretende que el silencio diga y si no, dirá nada el silencio, porque ése es su propio oficio: decir nada.[1]

—Sor Juana Inés de la Cruz, Respuesta a Sor Filotea (1691)

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1 Author's translation: 'I have almost decided to leave it to silence, but as this is something negative, although it explains a lot with the emphasis of not explaining, it is necessary to put a brief label to make it clear what silence is meant to say and if not, silence will say nothing because that is its own occupation: to say nothing.'

1. INTRODUCTION

Collective arbitration[2] is a system for the settlement of mass claims that remains almost unknown outside of the United States and Spain.[3] Few comprehensive rules of arbitration are specifically suited for the settlement of collective disputes.[4]

The majority Decision of Jurisdiction and Admissibility (Decision) in the case of *Abaclat and Others v the Argentine Republic*[5] (*Abaclat*) is deemed the first ICSID case relating to collective claims in the realm of investment arbitration. Such Decision was strongly questioned by the Dissenting Opinion (Opinion) of Georges Abi-Saab,[6] in which he discussed several issues concerning the arbitral jurisdiction. It is doubtful if arbitration under ICSID Convention, ICSID Arbitration Rules (ICSID Framework) and Argentina-Italy BIT (BIT) provisions can settle collective mass claims. ICSID Framework contains no reference to collective proceedings as a possible form of arbitration. Nevertheless, inherent powers and the proper interpretative approach allow arbitral tribunals enough leeway to fill gaps and conduct collective proceedings. This freedom is not unrestricted.

The question whether ICSID Framework and different BIT provisions may deal with collective proceedings is important. Other tribunals may adopt similar approaches to the exercise of their inherent powers over questions of procedure and establish a more robust body of principles to ensure the proper administration of international justice.

This article will treat the following considerations. The possibility to bring mass claims under ICSID Framework and BIT provisions. It is important to explore the effects of consenting to ICSID jurisdiction and the proper interpretation of silence of ICSID Convention regarding collective proceedings. However, there are certain limits in the interpretative approach of silence. All the above will lead us to understand that there is no need to have a secondary consent for mass claims, given that inherent powers constitute the express permission to fill *lacunae*.

This article will focus on the development of collective proceedings under ICSID Framework and BIT provisions derived from the *Abaclat* case; thus, certain observations portray the way in which ICSID Framework and BIT provisions were used to develop a collective proceeding. On the basis of the above, conclusions are built. This article will not include references to other issues of investment, unless related to the subject matter.

2 The terms 'collective action', 'mass claim' and 'collective arbitration' are used herein as neutral terms, detached from a specific jurisdiction and more appropriate for the development of these procedures in international law. As the term 'class action' is strongly established in English language 'collective action' and 'class action' may be used interchangeably where necessary. See A Gidi, 'Class Actions in Brazil – A Model for Civil Law Countries' (2003) 51 A J of Int'l L 334.

3 See '*Real Decreto 231/2008, de 15 de febrero, por el que se regula el Sistema Arbitral de Consumo*', arts 56–62.

4 See AAA Supplementary Rules for Class Arbitrations (AAA Supplementary Rules), JAMS Class Arbitration Procedures, NAF Class Arbitration Procedures and DIS-Supplementary Rules for Corporate Law Disputes.

5 *Abaclat and Others v the Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011).

6 *Abaclat and Others v the Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion (28 October 2011).

Nowadays, no one would doubt that the systematic study of comparative law plays vital roles. The science of law includes the techniques of interpretation and the development of models to prevent or resolve social conflicts.[7] Collective arbitration shall rely on the judicial proceedings, since arbitration is considered a substitute for State justice, pursuing the same ends.[8] Moreover, investment arbitration may be deemed as a substitute for the use of armed force and diplomatic protection. Due to the few rules dealing with collective procedures under international law, certain reliance on domestic law seems feasible.

2. FACTS OF THE *ABACLAT* CASE

From 1991 through 2001, Argentina placed 179 bonds issued in the international capital markets, 173 bonds were denominated in foreign currencies. Claimants allegedly purchased 83 of the 173 foreign currency bonds. The 83 bonds allegedly purchased by Claimants are governed by the laws of different jurisdictions, issued in different currencies and listed on various international exchanges such as Buenos Aires, Frankfurt, Hong Kong, Luxemburg, Milan, Munich and Vienna. The maturity varies from 3 to 5 years.

By the late 1990s, Argentina suffered a severe economic recession and consequent reduction of fiscal revenues, leading to incur additional debt. These adverse economic developments reflected on 'capital flight' and decrease of capital inflow. In early 2001, Argentina took various measures in an attempt to restructure its economy and lighten its debt. Nevertheless, these efforts did not suffice. Later in December 2001, Argentina defaulted by publicly announcing the deferral of over USD $100 billion of external bond debt.[9]

The Public Emergency and Reform Law of 2002 (Emergency Law) declared a public emergency in social, economic, administrative, financial and exchange matters. Additionally, the devaluation of the peso further accentuated the weight of debt in foreign currencies. This led Argentina to envisage the restructuring of its foreign debt.[10]

As such, the Executive Committee of the Italian Banking Association established 'Task Force Argentina' (TFA)[11] which aims to 'represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina'. Some bondholders seized Italian courts and obtained relief against the banks that sold the securities. This explains the creation of TFA and the discovery of ICSID arbitration as a way of deflecting responsibility from the banks.[12]

Bondholders wishing to be represented by TFA were requested to sign a mandate for the protection of the interests connected with the bonds involved in the

7 K Zweigert and H Kötz, *Introducción al derecho comparado* (Oxford 2002) 16.

8 SI Strong, 'From Class to Collective: The De-Americanization of Class Arbitration' (2010) 26 Arbitration Int'l.

9 Decision paras 50–58.

10 Decision paras 60–62.

11 *L'Associazione per la Tutela degli Investitori in Titoli Argentini* is established in Rome and organized under Italian law as an *associazione non riconsciuta*, founded by its members' contributions.

12 Opinion para 254.

Argentinean crisis. Over 450,000 Italians claimed to have held Argentine bonds and submitted their mandates to TFA.

In January 2005, Argentina launched the Exchange Offer 2005, pursuant to which bondholders could exchange 152 different series of bonds, of which it had suspended payment in 2001. In February 2005, Law 26,017 was enacted and provided those bonds which were not exchanged in the Exchange Offer 2005 could not enter into transaction. The period for submitting tenders expired and 76.15% of all holdings participated in the Exchange Offer 2005, following which Argentina issued several bonds.[13]

The Exchange Offer 2005 settled in June 2005. Claimants did not participate in said Exchange. Unsatisfied with the situation and in order to represent the Italian bondholders in ICSID arbitration, TFA designed a new mandate (TFA Mandate Package) composing of a letter of instructions to Bondholders (TFA Instruction Letter), a Declaration of Consent, Delegation of Authority and Power of Attorney (Power of Attorney) in favour of White & Case and TFA Mandate, and other documents.[14]

TFA's member banks arranged for the distribution and collection of the Mandate Package among their clients during March and April 2006, which was accepted by over 180,000 Italian bondholders. On 14 September 2006, White & Case filed before ICSID the Request for Arbitration accompanied by Annexes A through E on behalf of these Italian bondholders (Claimants). On 26 September 2006, ICSID transmitted to Respondent the Request for Arbitration.

In December 2006, Claimants submitted supplemental Annexes related to Annexes A through E and submitted Annexes K and L. The substitute annexes reflected: (i) an addition of Claimants, (ii) the withdrawal of certain Claimants, (iii) corrections and substitutions to the information on Claimants, (iv) the revision of the aggregate amounts and (v) the addition of one new bond series.[15]

On 3 May 2010, Argentina launched the Exchange Offer 2010 which aimed to restructure defaulted obligations, to release Argentina from related claims and to terminate legal proceedings. Argentina invited 'the Owners of each Series of Bonds listed in Annexes A-1 and A-2 (jointly "Eligible Securities") to submit offers to exchange Eligible Securities for New Securities and, in certain cases, cash . . . '. Claimants hold security entitlements in the bonds listed in said Annexes and were eligible to tender into this Exchange Offer 2010. Many Claimants tendered into the Exchange Offer 2010, and withdrew the proceedings.[16] From 180,000 Claimants, about 120,000 Claimants were subject to discontinuance of the ICSID proceedings.

3. IS *ABACLAT* A COLLECTIVE MASS CLAIM ACTION?

Gidi defines a collective or class action as 'the action brought by a representative plaintiff (collective standing), in protection of a right that belongs to a group or people (object of the suit), which judgement will bind the group as a whole

13 Decision paras 65–66, 68, 77–78.
14 Decision paras 80–85.
15 Decision paras 90–91, 98–99, 103.
16 Decision paras 92–97.

(res judicata)'. Accordingly, the essential elements of a collective or class action are (i) the existence of a representative plaintiff, (ii) the object of the action relates to the protection of a group's right (claim for class relief) and (iii) the res judicata effect.[17] *Abaclat* fulfils the three elements as follows:

A. Collective Standing, Conflict of Interest and Abuse of Process

TFA brought the action before ICSID and mentioned in its TFA Instruction Letter that counsels would coordinate directly with TFA and act as the sole agent. It also would not be possible to give instructions directly to attorneys. These instructions are even consistent with collective procedure rules.[18] Additionally, TFA would act in the collective interest of the bondholders and would operate autonomously.[19] The object of TFA Mandate[20] is as follows:

> Agent is hereby entrusted with the assignment of providing for the coordination of any arbitral and judicial proceedings . . . in the name and on behalf of the holders of Bonds . . . for the recovery of their investment in the Bonds.[21]

Furthermore, the majority determined that TFA is considered the agent of Claimants pursuant to Rule 18 of ICSID Arbitration Rules, although TFA has been provided with powers beyond the power of a normal agent under said Rule.[22] As such, TFA obtained the necessary collective standing in order to represent Claimants and bring the action before ICSID.

It is important to note that Argentina alleged an 'abuse of rights' against TFA. There are certain criminal condemnations for forgery of the signatures of the mandates granted to TFA by Italian courts that the Decision did not mention.[23] In addition, Argentina considered that the Tribunal should not have allowed the dispute because TFA was pursuing its own interest, which conflicted with Claimant's interest. Besides, it was foreign to the interests that the BIT and the ICSID Convention protect.[24] One should not forget that Italian courts were seized by several bondholders who successfully obtained relief against the banks that sold the bonds. The Opinion considered that this makes clear in great part the creation of TFA by the banks and their resort to ICSID arbitration as a means of deflecting responsibility.[25]

The Tribunal determined that the abuse of rights by TFA was not related to the jurisdiction of the Tribunal but rather to the admissibility since 'Respondent's

17 Gidi (n 2).

18 See *Code de Procédure Civile du Québec*, art 1017: 'Un membre ne peut intervenir volontairement en demande que pour assister le représentant, soutenir sa demande ou appuyer ses prétentions' and *Ley 472 de 1998* of Colombia, art 48: 'En la acción de grupo el actor o quien actúe como demandante, representa a las demás personas que hayan sido afectadas individualmente por los hechos vulnerantes, sin necesidad que cada uno de los interesados ejerza por separado su propia acción.'

19 Decision para 86.

20 Opinion para 231.

21 Decision para 88.

22 Decision para 532.

23 Opinion para 231.

24 Decision paras 646–59.

25 Opinion paras 33, 254.

consent covered the mass aspect of the proceedings and that TFA's role therein was not of such a nature as to vitiate Claimant's consent'.[26] ICSID Convention does not regulate admissibility issues.[27] The power to consider these types of objections may be found in the inherent powers of judicial bodies. Moreover, ICSID Tribunals have not been uniform when dealing with admissibility issues.[28]

It is better to deem preliminary objections of 'abuse of rights' or 'abuse of process'[29] as matters of admissibility rather than jurisdiction. These objections are not directed at the adjudicator's jurisdictional right but at the abusive conduct of the claimant.[30] The decision of the Tribunal to treat the abuse of process against TFA as an issue of admissibility should be regarded as correct. Nonetheless, it should be noted that the abuse in *Abaclat* is not addressed to the Claimants but to their agent.

Neither ICSID Convention nor ICSID Arbitration Rules endow tribunals with an explicit power to prevent abuse of process.[31] 'However, the power to prevent abuse of process may exist as an inherent power of ICSID Tribunals.'[32] The prevention of 'abuse of process' is one of the components of the deeper 'function of ensuring the proper administration of international justice'.[33] The Tribunal in *Abaclat* stated that the theory of abuse of rights is an expression of the principle of good faith, which is a fundamental principle of international and investment law.[34]

Whether explicitly or by necessary implication, arbitral decisions have accepted abuse of process objections.[35] A notable NAFTA case is *Waste Management Inc. v the*

26 Decision paras 654–55.

27 The argument for inherent powers to consider objections regarding admissibility, according to Paparinskis, may be found in the comparative powers of other international courts (especially the ICJ) to consider such objection. M Paparinskis, 'Inherent Powers of ICSID Tribunals: Broad and Right So' in I Laird and T Weiler (eds), *Investment Treaty Arbitration and International Law* (JurisNet LLC 2012) 34.

28 ibid. The clash has been observed by Paparinskis. Some Tribunals have left the issue open, noting the absence of practical consequences when distinguishing between objections to jurisdiction and admissibility; others have addressed both objections in interchangeable terms, leaving the question of admissibility in ICSID proceedings open. In contrast, some have accepted the distinction, and others have even upheld the admissibility objections.

29 According to Brown the 'common law doctrine of "abuse of process" is related to the concept of "abuse of rights", a term more familiar in civilian legal systems'. C Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 British Ybk Intl L 195, 231. As the concept of 'abuse of process' emphasizes the 'procedural nature' of the abuse or the 'misuse of the procedure', such terms should be considered more appropriate for this type of abuse; however, as the Tribunal in *Abaclat* referred to 'abuse of rights', in this article such terms shall be considered interchangeable.

30 Paparinskis (n 27) 27–28.

31 *Waste Management, Inc v United Mexican States,* ICSID AF Case No ARB(AF)/00/3, Decision on Mexico's Preliminary Objection Concerning the Previous Proceedings (26 June 2002) para 49.

32 Taking into account the State practice invoked by several countries, Paparinskis has recognized a general consensus about the existence of the doctrine of abuse of process in international adjudication. Paparinskis (n 27) 27–28.

33 Brown (n 29) 229–32.

34 Decision para 644. H Lauterpacht, *Development of International Law by the International Court* (London 1958) 164. 'There is no right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused'; *Mobil Corporation and others v Bolivarian Republic of Venezuela*, ICSID Case No ARB/07/27, Decision on Jurisdiction (10 June 2010), para 169.

35 Paparinskis (n 27) 28–29 citing *Lauder v Czech Republic*, UNICTRAL Case, Final Award (3 September 2001) para 174; *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Decision on Jurisdiction (8 December 2003) para 96; *Bayindir Insaat Turizm Ticaret v Sanayi AS v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction (14 November 2005) paras 171–73; *Saluka Investments BV v Czech*

United Mexican States where the Tribunal determined that if there is 'an inherent power to dismiss a claim on the grounds of abuse of processes', 'it would only be for the purpose of protecting the integrity of the Tribunal's processes or dealing with genuinely vexatious claims'.[36] This case is also applicable to ICSID arbitrations as the Tribunal did not rely on NAFTA provision, but rather on inherent powers.[37]

In the case of *Libananco Holdings Co Ltd v Republic of Turkey*, the Tribunal drew upon its inherent powers expressing 'the principle as being that parties have an obligation to arbitrate fairly and in good faith and that an arbitral tribunal has the inherent jurisdiction to ensure that this obligation is complied with'.[38] According to Paparinskis, this case is relevant twofold. First, it hints 'broad inherent powers to deal with the abuse of process during arbitral proceedings, supporting *a fortiori* the existence of such powers regarding the initiation of the proceedings'. Secondly, the tribunal may stretch these powers with such elasticity, even to the degree of restraining important procedural rights of the parties when the alleged impropriety has been sufficiently grave.[39]

In this regard, it is important to recall certain features of collective justice, particularly, adequacy of representation which is a prerequisite in certain judicial and arbitral jurisdictions.[40] This prerequisite in the United States is that 'the representative parties will fairly and adequately protect the interests of the class'.[41] It is required to meet due process standards.[42] An adequate representative cannot have claims antagonistic to, or in *conflict with*, the interests of the class. This requirement 'mainly seeks to uncover conflicts of interest between named parties and the class they seek to represent'.[43] Similarly, in Mexico adequate representation is deemed not to be in

Republic, UNCITRAL Case, Partial Award (17 March 2006) paras 231–32; *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision on Preliminary Objections (18 April 2008) para 115; *Chevron Corp and Texaco Petroleum Corp v Ecuador*, UNCITRAL Case, Interim Award (1 December 2008) paras 137, 143–47; *Europe Cement Investment & Trade S.A. v Turkey*, ICSID Case No ARB(AF)/07/2, Award (13 August 2009) paras 171, 174–75; *Cementownia "Nowa Huta" S.A. v Turkey*, ICSID Case No ARB(AF)/06/2, Award (17 September 2009) para 159; *Chevron Corp and Texaco Petroleum Corp v Ecuador*, UNCITRAL Case, Partial Award on Merits (30 March 2010) para 354; *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Decision on the Application for a Preliminary Ruling (7 December 2009) paras 16–26; *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Order of the Committee Discontinuing the Proceedings and Decision on Costs (28 April 2011) para 65.

36 *Waste Management, Inc v United Mexican States* (n 31) para 49.

37 Paparinskis (n 27) 29.

38 *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues (23 June 2008) para 78.

39 Paparinskis (n 27) 31.

40 See AAA Supplementary Rules (n 4) r 4.a.4, Group Procedure Law of Sweden art 8 and US Federal Rules of Civil Procedure (Fed R Civ P) r 23. In Quebec, the court ascribes the status of representative to the member that adequately represents the members. *Code de procédure civile du Québec* arts 1002–3.

41 US Federal Rules of Civil Procedure r 23(a)(4), AAA Supplementary Rules (n 4) r 4.a.4.

42 By protecting the rights of absent class members who will be bound by the final judgement, and shall be satisfied during the litigation at any moment *Phillips Petroleum Co v Shutts*, 472 US SCt 797 (26 June 1985) 808–12.

43 'Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.' See *New Directions Treatment Servs v City of Reading*, 490 F3d 293, US Ct of Appeals Third Circuit (15 June 2007) 313.

conflict of interest with the members.[44] Under domestic jurisdictions, a representative with a conflict of interest as in *Abaclat* case would not have collective standing and the action would not even be admitted.

Notwithstanding the above, the Tribunal found that even if TFA had pursued interests which conflicted with Claimants' interest, this would not lead to the inadmissibility of the dispute. The alleged abuse of rights concerned TFA's interests as arising out of Claimants' pursuit of ICSID proceedings.[45] Although the TFA Mandate may not be duly accomplished and the interests of Claimants not adequately represented, the rights pertain to Claimants and not to TFA. Thus, the abuse may be committed by TFA but not by Claimants. Nevertheless, the abuse of rights should have been interpreted in a wider sense.

Accordingly, the obligation to arbitrate fairly and in good faith when dealing with collective proceedings shall include not only the parties but also their representative. Adequacy of representation is necessary to secure the collective standards of justice. The Tribunal's decision is notoriously against the nature and complexity of collective systems of justice. Of course, this may be due to the absence of express provisions guiding the Tribunal on collective procedural issues. The Institut de Droit International has called upon all those involved in investment arbitration to acknowledge that the power of tribunals to deal with collective claims should be addressed by appropriate rules.[46] Nonetheless, the Tribunal holds inherent powers to protect the integrity of the process.

ICSID tribunals have not dealt before *Abaclat* with the abuse of process in regards to the adequacy of representation and the conflicts of interest between the agent and the members of the collective group. Still, some cases suggest the development of these issues towards that end so that collective claims may go further in the realm of international law. For instance, the Tribunal in the *Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia* case resolved claimant's objection to one of respondent's counsel who appeared at a late stage of the proceedings. This counsel was affiliated with the same barristers' Chambers as the President of the Tribunal. In regards to the risk of justifiable apprehension of partiality, the Tribunal concluded that it held inherent powers to preserve the integrity of the proceedings and decided that the counsel could not participate in the case.[47] In *Rompetrol Group N.V. v Romania*, the Tribunal considered a similar situation. It determined that the only justification to exercise a control over the representation of the parties 'would be an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process', on the basis that the integrity would be compromised where the

44 *Código Federal de Procedimientos Civiles*, art 586.

45 Decision paras 646–59. In addition, Argentina did not allege that Claimants were abusing their right to resort to ICSID arbitration in order to protect their investment.

46 Institut de Droit International, *Session de Tokyo – 2013* (18ème Commission Plénière 13 septembre 2013) art 7: 'La possibilité pour les tribunaux arbitraux de statuer sur des réclamations de masse devrait faire l'objet de dispositions appropriées dans les instruments régissant les procédures arbitrales d'investissement.'

47 *Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia*, ICSID Case No ARB/05/24, Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings (6 May 2008) paras 12–36.

exclusion is not so ordered.[48] Although the above cases addressed the conduct of counsel, such inherent powers may also apply to regulate the conflict of interest with regard to the representative of the group.

Taking into account TFA's conflict of interest and that Claimant's may not be adequately represented, we may not conclude that the Tribunal's decision aims at ensuring the integrity of the entire process or the proper administration of collective international justice. The Tribunal should have been mindful that 'the Tribunal as guardian of the legitimacy of the arbitral process is to make every effort to ensure that the Award is soundly based and not affected by procedural imperfection'.[49]

B. Object of the Suit

Article 8(1) of the BIT provides for the settlement of investment disputes made 'in relation to the issues governed by this Agreement'. The Tribunal found that the alleged facts relate to the acts of Argentina's default in December 2001 and, in particular, the way it consulted with its creditors, the way it reached a decision in dealing with foreign debt and effects of the legal framework it promulgated for such decision.[50]

Additionally, the Tribunal considered that, *prima facie*, the facts, if established, were susceptible to violation of the BIT provisions, especially:

- The arbitrary implementation of regulations and laws can amount to an unfair and inequitable treatment, and may constitute an act of expropriation. The new legal framework deprives an investor from the value of its investment.
- The alleged different treatment afforded to domestic investors is susceptible to constituting a discriminatory treatment and breaching national treatment.[51]

Accordingly, the Tribunal considered that the claims were not pure contractual claims but treaty claims based on the fact that Argentina intervened as a sovereign by virtue of its State power to modify its payment obligation towards its creditors.[52] This is the object of the suit.

However, the Opinion considered that claims retain their individualized character, since the security entitlements are different in regard to price, date of purchase, place of purchase, currency, applicable law and chosen forum. These are characteristics relevant only to contract claims; while what counts here, according to the Decision are the treaty claims, which are 'homogeneous'.[53] Although, there are differences between the security entitlements, it shall be recalled that Claimants do not hold 60,000 different bonds. Conversely, Claimants allegedly purchased 83 foreign currency bonds.

48 *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision of the Tribunal on the Participation of a Counsel (14 January 2010) paras 16, 22.
49 *Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia* (n 47) para 15.
50 Decision para 313.
51 Decision para 314.
52 Decision paras 324–26.
53 Opinion paras 139–43.

In this respect, I differ from the Opinion, since 'the claims deriving from the BIT' may be considered 'homogeneous' as the Decision did. The claims are related to the Argentinean economic crisis that led to the default. As such, the crisis constitutes *the same fact pattern* out of which the claims arose. The many differences of the security entitlements shall be taken into consideration when determining compensation, but not for determining the object of the suit.

C. Res Judicata

The Tribunal had jurisdiction *ratione personae* over each Claimant being a natural person, a juridical person and non-recognized associations with Italian nationality and other characteristics in the terms of the Decision.[54] The final award will bind the Claimants with the above characteristics and they may be considered as members of the group. Certain jurisdictions regulating aggregative procedures, as the present case, allow different opportunities during the proceedings or after the judgement to manifest consent in order to be bound by the ruling.[55]

In this sense, the Tribunal noted that Claimants were added after the filing of the Request for Arbitration and that 'mass proceedings may require making certain adjustments to the number and identity of Claimants'.[56] The observations of the Tribunal are consistent with the logic of collective justice. Article 36 of the ICSID Convention requires that relevant information on the parties' identity be submitted with the request for arbitration. Said article does not prohibit parties to complement their request even before the registration if any relevant information is missing. Therefore, it seems possible to add claimants prior to the registration of the request for arbitration.[57]

Due to the limitations of the current ICSID Framework, there is no further opportunity to aggregate any Claimants, in later stages of the proceedings, which may not be in accordance with the collective systems of justice.

D. Nature of the Case

The nature of the case as a 'collective mass claims action' was confirmed by the Respondent and by Nagareda, a leading expert in the field. Counsel to the Claimants spoke of a non-class aggregate proceeding.[58]

The Decision used the expression of '"mass proceedings" . . . as referring simply to the high number of Claimants appearing together as one mass, and without prejudgement on the procedural classification of the present proceedings as a specific kind of "collective proceedings" recognized under any specific legal order'.[59] After analysing the two main types of 'collective proceedings', the Decision determined that the case is 'a sort of hybrid kind of collective proceedings, in the sense that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of claimants involved'.[60]

54 Decision paras 411–12 and 420–21.
55 Mexican Federal Code of Civil Procedure, art 594; Group Procedure Law of Sweden, art 14.
56 Decision para 610.
57 Decision paras 610–11.
58 Opinion para 129.
59 Decision para 480.
60 Decision para 488.

The reasons why Claimants appeared as one mass opt-in class or aggregative proceedings[61] may be found not only in procedural commodity, but also in the current absence of consolidating claims mechanism within the ICSID Framework.

4. THE ORIGIN OF COLLECTIVE PROCEEDINGS AND DIFFERENCES BETWEEN COURTS AND ARBITRAL TRIBUNALS

The origin of collective procedures is found in medieval times, when Chancery Courts administered justice through the first group litigations. The numerous persons made it impossible to call all of them to trial, and the poor infrastructure of medieval justice made it difficult to manage individual rights.

It is important to recall that Chancery Courts had an equity jurisdiction; therefore, they administered justice according to principles of *fairness* where common law would give no or inadequate redress. Conversely, common law courts had a *strict adherence to rigid writs* and forms of action to provide a remedy for every injury.[62]

As such, common law courts sought legalistic solutions and settled the disputes in the presence of the parties whose direct and immediate rights were at issue. In contrast, equity courts tried to determine the rights of any person holding a common interest in the dispute in order to solve them globally. This trend reflects the fact that proceedings before the Chancellor almost invariably raised questions of property titles affecting the rights of several individuals. The result was the birth of the compulsory joinder of parties whose aim is to avoid a multitude of actions and the risks of contradictory judgements.[63]

It is important to stress a difference between said courts and arbitral tribunals. Courts in general are part of the judicial branch and their jurisdiction stems from their judicial power. 'National courts are established by the law and possess *ipso facto* compulsory jurisdiction within the ambit of their subject-matter competence.'[64] As the Opinion noted, courts have some leeway to develop the law and engage in legal experimentation within certain limits. For instance, in Mexico, before the enactment of collective procedure rules, an *amparo*[65] benefited 217 indigenous people of the *Mini Numa* community, even when 'the judgement only protects the person who asked for the protection' and 'the judgement would only analyse the constitutionality of the act with respect to the person who appeared and signed the *amparo* lawsuit'.[66]

61 The Decision contemplated the possibility to create 'subclasses, to the extent that any differences between the parties arose, suggesting the type of individualized analysis that is somewhat reminiscent of aggregative proceedings'. SI Strong, 'Mass Procedures in Abaclat v. Argentine Republic: Are They Consistent With the International Investment Regime?' (2012) 3 YB on Intl Arbitration 8.

62 SH Gifis, *Law Dictionary* (5th edn, Barron's 2003) 175.

63 P-C Lafond, 'Le recours collectif : entre la commodité procédurale et la justice sociale' (1998–99) 29 RDUS 8.

64 A Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal' (2003) 3 Law & Prac Int'l Cts & Tribunals 504.

65 Under the current Mexican law, an *amparo* action is a claim for relief under general constitutional guarantee against violation of one's civil rights by public authorities.

66 Only four members of the community signed the *amparo* lawsuit, claiming access to health services. Nevertheless, they did not evidence any power of attorney to represent the community. *David Montealegre Hernández, and others v Gobernador and others*, Amparo Administrativo 1157/2007-II, Seventh District Court in the State of Guerrero, Mexico, Judgment (11 July 2008).

Even when there were no express rules for collective proceedings, a court with judicial jurisdiction ruled in favour of a community. Conversely, arbitral tribunals that draw their jurisdiction from the consent of the parties have to confine their judicial activities within the boundaries of such consent.[67] Accordingly, they may not act as equity courts but as common law courts within the limits of the consent to arbitrate.

In this respect, the Opinion highlighted the case of *Stolt Nielsen S.A. v Animal Feed International Corp*, where the US Supreme Court held that:

> An implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agree to submit their disputes to an arbitrator.[68]

As well, the Court stated that changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental; and consent to class-action arbitration cannot be presumed from the parties silence.[69] The above should be nuanced, inasmuch as a painstaking analysis concluded that 'the provision of representative relief and the underlying policy rationales'[70] are the two areas in which collective arbitration differs most significantly from other forms of multiparty arbitration.[71]

The Opinion considered that 'the fundamental differences between the two modes of arbitration . . . differences that 'change the nature of arbitration' and the great risks to which the later mode exposes defendants – all converge to highlight the necessity of a special consent . . . '.[72]

Such Opinion is based on the implicit premise that the nature of arbitration may be defined and universally agreed upon;[73] it does not provide any specific basis under which it supports the conclusion that the nature among the 'two modes of arbitration . . . change the nature of the arbitration'. A thorough analysis of the nature of bilateral arbitration under the US system allows concluding that there is a change and Georges Abi-Saab would have given more support to such conclusion.

67 Opinion para 147.

68 130 US SCt 1758 (2010).

69 Opinion para 151.

70 These distinctions deserve a comment. First, in the US litigation (FRCP 23) and arbitration (AAA Supplementary Rules r 4, 5, 6, 8) systems, parties are expressly authorized to seek relief on a representative basis; they do not bring their own individual claims. Second, there are several benefits in judicial and arbitral collective procedures underlying policy. Class suits give access to justice to parties with low-value claims that otherwise would be unlikely to be heard on an individual basis. The cost of the suit may be higher than the anticipated recovery. In addition, class suits create a financial disincentive for corporations to engage in risky or socially unacceptable behaviours. SI Strong, 'Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T and a Return to First Principles' (2012) 17 Harv Negot L R 13–18, 37–44.

71 ibid 75.

72 Opinion para 153.

73 In the same sense, the *Stolt Nielsen SA v Animal Feeds International Corp* 130 S Ct (2010) 1758, 1775. See Strong, 'Does Class Arbitration "Change the Nature" of Arbitration?' (n 70) 3.

In addition to the difference between domestic judicial bodies and arbitration tribunals, we need to stress other important differences between the above US decisions and the *Abaclat* Tribunal. First, even when arbitral tribunals draw their jurisdiction from the consent of the parties, US decisions are embedded in a domestic legal framework, for instance, under US system parties seek relief on a representative basis. In contrast, Claimants in *Abaclat* cannot assert the claims of other parties who are unnamed at the time of filing of the Request for Arbitration or prior to the registration of such Request. The limitations of the current ICSID Framework do not permit to aggregate any Claimants in later stages of the proceedings. This hints that Claimants are bringing their individual claims.[74]

Moreover, ICSID Tribunals are international tribunals established by an international treaty and operating pursuant to such instrument. They resolve disputes with States, are authorized to apply international law[75] and in the majority of cases they do so.[76] *Abaclat* is encrusted in the realm of international law. Admittedly, important distinctions exist. US decisions may not be taken isolated without the context that girds domestic law. Having set out certain differences, it is worth noting that not only consent is needed to conduct collective arbitration but also a special set of rules is desirable.[77] There is need to arrive at the proper interpretation of silence and the exercise of inherent powers, and it is to these issues that this article now turns.

5. THE SILENCE OF THE ICSID CONVENTION REGARDING COLLECTIVE PROCEEDINGS

A. Arbitral Rules and Consent to Conduct Collective Proceedings

The analysis of several common law decisions teaches that collective actions derive from the rule of joinder of plaintiffs.[78] Scholars suggest that certain arbitral rules give arbitrators the discretion to order collective proceeding through certain references to multiparty proceedings and other provisions that may be applicable to collective proceedings.[79] As such, the LCIA Rules give arbitrators '"the widest

74 See above part 3.C. Res Judicata of this article.

75 ICSID Convention, art 42.

76 Paparinskis (n 27) 19; AR Parra, 'Applicable Law in Investor-State Arbitration' *Arbitration ICCA* 6 <http://www.arbitration-icca.org/articles.html?author=Antonio_Parra&sort=author> accessed 12 September 2014; T Nakamura, 'Determination of the Substantive Law Applicable to Disputes in Investment Arbitration' (2010) TDM 8, 10; C Leben, 'La théorie du contrat d'État et l'évolution du droit international des investissements' *Recueil des cours de l'Académie de droit international* (France 2003) 292; P Weil, 'L'Etat, l'investisseur étranger et le droit international: la relation désormais apaisée d'un ménage à trois' in *Ecrits de droit international* (PUF 2000) 417; OF Cabrera Colorado, 'Los Fondos Soberanos de Inversión (Sovereign Wealth Funds), su regulación en el Derecho Internacional y el Arbitraje de Inversión' in S Rodriguez and H Woss (eds), *Foro de Arbitraje en Materia de Inversión, Tedencias y Novedades* (UNAM 2013) 452 <http://biblio.juridicas.unam.mx/libros/7/3386/15.pdf> accessed 12 September 2014.

77 As noted before, the Majority erred when it did not properly analyse the abuse of rights and TFA's conflict of interest, even though it holds inherent powers to ensure the integrity of the process. See Institut de Droit International (n 46) art 7.

78 See Lafond (n 41) 13.

79 See ICC Rules of Arbitration (effective 1 January 2012) arts 7–10; CEPANI Rules of Arbitration (effective 1 January 2005) art 12; LCIA Rules (effective 1 January 1998) r 22.1, Strong, 'From Class to Collective' (n 8) 36.

discretion to discharge" their obligations and impose the duty "to adopt procedures suitable to the circumstance of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties" dispute'.[80] In a similar form appears Article 17 (1) of the UNCITRAL Arbitration Rules:

> the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceeding so as to avoid unnecessary delay and expense to provide a fair and efficient process.[81]

The 'Tribunal Rules of Procedure' of the Iran–US Claims Tribunal expressly provide in Article 1 that '. . . the initiation and conduct of proceedings before the arbitral tribunal shall be subject to the following Tribunal Rules which may be modified by the Full Tribunal or the two Governments'. As well, Article IV of the Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association (Section 177 Agreement) states as follows:

> (c) The Claims Tribunal shall have power to issue writs and other processes, make rules and orders and promulgate other procedural regulations, not inconsistent with the laws of the Marshall Islands and this Agreement, as may be required. Such power shall include the authority to make orders for the attendance of witnesses with or without documents, and to make orders for the disposal of exhibits.[82]

Additionally, the Nuclear Claims Tribunal Act that formally established Marshall Islands Nuclear Claims Tribunal (NCT)[83] to satisfy the requirement in Article IV Section I (a) of the Section 177 Agreement[84] §122 provides with the following wording:

> (8) When the questions of law or fact presented by a claim are of common or general interest to a group of individuals or when the parties are numerous and it is impractical to involve them all directly in the dispute resolution process, one or more may file for the benefit of all under a class action.

80 Strong, 'From Class to Collective' (n 8) 36, r 14.
81 UNCITRAL Arbitration Rules (adopted in 2010).
82 See Agreement between the Government of the USA and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association (25 June 1983) (Section 177 Agreement), art IV.
83 Title 42 Nuclear Claims, Chapter 1 Nuclear Claims Tribunal, §103. (1).
84 ibid §104.

Article 38 of the United Nations Compensation Commission (UNCC) Provisional Rules for Claims Procedure (UNCC Rules)[85] states the following:

a) In so far as possible, claims with significant common legal and factual issues will be processed together.
b) Panels may adopt special procedures appropriate to the character, amount and subject-matter of the particular types of claims under consideration.

The above provisions may allow or have allowed tribunals to order collective proceedings under these rules. For instance, the NCT issued an award in the class action of *The People of Enewetak et al.* totalling USD $324,949,311[86] and an award in the class action of *The People of Bikini et al.* totalling USD $563,315,500.[87] As well, *The Egyptian Workers' Claims* composed of approximately 1.24 million claims for around USD $491 million, being the dollar value of funds deposited by Egyptian workers into banks in the Republic of Iraq for transfer to beneficiaries in the Arab Republic of Egypt. Finally, the Panel of Commissioners appointed to review *The Egyptian Workers' Claims* pursuant to the provisions of the UNCC Rules recommended that '[c]ompensation in the amount of USD $84,393,992 be awarded for 223,817 claims of Egyptian workers'.[88]

Before *Abaclat*, it seems that no tribunal had settled mass claims under international law without a special agreement between the parties,[89] save for the UNCC. The Security Council, using its exceptional and mandatory powers on all members under Chapter VII of the Charter of the United Nations, established UNCC.[90] The absence of similar provisions that specifically contemplate collective proceedings or a language that may be applicable to such proceedings, allows parties to argue that they did not agree to resolve collective proceedings. Accordingly, we shall proceed to analyse if there is any ground supporting this statement when there are no express provisions.

ICSID Framework does not compose of similar provisions to the ones abovementioned. Not surprisingly, the Tribunal found undisputedly 'that the ICSID framework contains no reference to collective proceeding as a possible form of arbitration'.[91] There is no express language suited to conduct collective proceedings. The silence of ICSID Convention regarding collective proceedings is not fortuitous. In this regard the majority stated the following:

> at the time of conclusion of the ICSID Convention, collective proceedings, were quasi inexistent, and although some discussions seem to have taken place with regard to multi-party arbitration, these discussions were not conclusive on

85 Provisional Rules for Claims Procedure, UNCC, Governing Council, S/AC.26/1992/10 Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th meeting, Sixth session (26 June 1992).

86 *In the Matter of the People of Enewetak, et al.*, NCT No 23-902, Memorandum Decision and Order (15 April 2000).

87 *The People of Bikini et al.*, NCT No 23-04134, Memorandum of Decision and Order (5 March 2001).

88 *The Egyptian Workers' Claims*, UNCC S/AC.26/1997/3, Final Report and Recommendations of the Panel of Commissioners (2 October 1997) 2, 63.

89 See, for instance, Section 177 Agreement (n 82) art IV.

90 Charter of the United Nations (24 October 1945) Chapter VII.

91 Decision para 517.

> the intention to either accept or refuse multi-party arbitrations, and even less so with regard to the admissibility of collective proceedings.[92]

ICSID Convention, as many other treaties, was not tailored with thorough detailed provision for the procedural powers of the Tribunals.[93] Assuming *arguendo* that even negotiators of the ICSID Convention had intended to establish a comprehensive set of procedural rules and tried to reach an exhaustive agreement on the powers to be accorded to tribunals,[94] 'representative proceedings were beyond the horizon of foreseeability [sic] of the drafters of the ICSID Convention'.[95] ICSID Framework does not even contain multiparty arbitration provisions.[96] The most notable provisions in this respect are Article 44 of the ICSID Convention and Rule 19 of the ICISD Arbitration Rules which state as follows:

> Article 44
>
> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.
>
> Rule 19
>
> Procedural Orders
> The Tribunal shall make the orders required for the conduct of the proceeding.

The above provisions confer on tribunals with sufficient powers to settle disputes and properly administer justice, even though there is no express language in the ICSID Framework guiding arbitral tribunals to conduct collective proceedings. ICSID Convention and Arbitration Rules are applicable to the proceedings to the extent that parties have not agreed on the applicable procedural law.[97] 'These provisions are the mere expression of the inherent power of any tribunal to resolve procedural questions in the event of *lacunae*.'[98] Due regard shall be given to the comments of Paparinskis, since he considers that 'the exercise of inherent powers by

92 Decision para 519.

93 See ICSID Convention, art 44; ICISD Arbitration Rules, r 19.

94 E Gordon, 'The World Court and the Interpretation of Constitutive Treaties' (1965) 59 AJIL 794, 803.

95 Opinion para 165.

96 The issue was raised during the drafting of the ICSID Convention, but the question was left open. During the latest revision of the Rules it was debated, but it was not expressly addressed in the revised Rules of 2006. Opinion para 175. However, this may be improved under other rules of arbitration more favourable to collective proceedings, such as NAFTA art 1126 or a contract clause allowing the joinder of parties.

97 C Salonidis, 'Inherent Powers in ICSID Arbitration' in Laird and Weiler (eds) (n 27) citing art 44.

98 Decision paras 517–52, citing C Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) art 44.

ICSID Tribunals is put on safe legal grounds by explicit language' contained in the above provisions and he adds:

> Deciding on questions of procedure necessary for the resolution of the case is simply a roundabout way of describing inherent powers that are necessary for the fulfilment of judicial function. The Convention and the Rules provide explicit legal basis for the exercise of inherent powers that have not been already spelled out. Concerns about inappropriate use of implied powers can therefore be left aside. While the scope and content of inherent powers still has to be elaborated by the traditional techniques of functional or comparative analysis, the explicit authority to 'decide' 'any question of procedure' provides the pre-approval of States expressed through the ordinary meaning of treaty terms.[99]

Consent to ICSID arbitration is needed to impose any manner of obligation upon Parties. In the present case, both Parties consented to ICSID arbitration as a dispute resolution method for disputes arising out of the BIT.[100] Consequently, Parties expressly consented to the source of procedural powers bestowed on Tribunals, as established in the form of the ICSID Convention and ICSID Arbitration Rules[101] and conferred on the Tribunal not only the authority to conduct proceedings, but particularly 'the authority to "decide" "any question of procedure" through the ordinary meaning of treaty terms'. Parties by consenting to ICSID arbitration preapproved the exercise of inherent powers,[102] including the 'express permission to go beyond what the rules say'.[103] Thus, an objection on the basis that ICSID tribunals can only exercise those powers which are expressly stated in the ICSID Framework seems unsuccessful. The same fate shall deserve an objection driving out collective claims due to the fact that ICSID Framework 'contains no reference to collective proceeding as a possible form of arbitration'.

'Constitutive instruments and even rules of procedure often contain *lacunae*, such as gaps or ambiguities.'[104] In order to examine the exercise of inherent powers by the

99 He adds that the existence of Art 44 necessarily makes implied powers as a basis for the inherent powers irrelevant. The applications of inherent powers in ICISD arbitration may be in fact less controversial than in any other adjudicatory context. Moreover, he sheds light on the existence of broad inherent powers by analysing the conduct of all those involved in ICSID arbitration. On the one hand, States have argued in favour of broad inherent powers to address abuse of process, regulate the conduct of counsel, grant enforceable orders (other than awards) regarding costs and permit the participation of *amici curiae*. On the other hand, investors have argued in favour or accepted the existence of broad inherent powers to address abuse of process, order non-pecuniary remedies, regulate the conduct of counsel, regulate the proceedings, investigate bribery and grant enforceable orders regarding costs. Furthermore, ICSID has adopted Arbitration Rules on submissions by *amici curae* in terms broadly similar to those exercised under the rubric of inherent powers exercised by arbitral Tribunals. Even non-parties have argued in favour of broad inherent powers of Tribunals. Paparinskis (n 27) 19, 21.

100 Decision paras 453–55, 489.

101 Brown (n 29) 200–1.

102 Paparinskis (n 27) 20. 'Thus, it could be argued that the explicit language of the ICSID Convention establishes *a priori* the appropriateness of the exercise of inherent powers by ICSID Tribunals.' Salonidis (n 97) 52.

103 N Blackaby, 'The Inherent Authority of an ICSID Tribunal: What Is the Limit' Panel Discussion in Laird and Weiler (eds) (n 27) 86.

104 Brown (n 29) 202.

majority, an identification of the gap found in ICSID Framework is essential, and this question is now addressed.

B. Qualified Silence and the Exercise of Inherent Powers

Although the poet warned us several centuries ago that 'silence will say nothing because that is its own occupation: to say nothing'. The Decision found that it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret silence as a 'qualified silence' categorically prohibiting collective proceedings just because it was not mentioned in the ICSID Convention. As the poet said 'it is necessary to put a brief label to make it clear what the silence is meant to say'.

As a rule, 'silence does not have a meaning in itself. It cannot be made to speak one way or another; unless it is surrounded by circumstances' that give certain meaning.[105] 'An ICSID tribunal's power to close gaps in the rules of procedure is declaratory of the inherent power of any tribunal to resolve procedural question in the event of *lacunae*'.[106] The silence of the ICSID framework regarding collective proceedings was interpreted as a *gap*. Article 44 of the ICSID Convention provides that where the ICSID framework is silent on a procedural question, which is not subject to the parties' agreement, the Tribunal shall decide the question. Article 44 was further complemented by Rule 19 ICSID Arbitration Rules according to which 'the Tribunal shall make the orders required for the proceeding'.[107]

The Tribunal found *lacunae* consisting of the procedural question to conduct collective proceedings. By exercising the inherent powers conferred by Article 44 of the ICSID Convention and Rule 19 of the ICISD Arbitration Rules filled the 'silence' of the Convention, even when silence does not have a meaning in itself and determined that mass claims are admissible.[108]

At this point, it should be recalled that States parties to the ICSID Convention have little control over the treaty provisions[109] and ultimately, arbitrators are entrusted to decide their content.[110] Therefore, consent to a particular jurisdiction does not necessarily explain the legal effects of that jurisdiction.[111] Once the Parties to the dispute consented to refer the dispute to ICSID, it is then up to the Tribunal to determine how it is to fulfil its functions. In a similar vein, the Special Court for Sierra Leone considered it may resort to its inherent jurisdiction 'when the Rules are silent and such recourse is necessary in order to do justice'.[112] Judge Shahabuddeen

105 Opinion para 168.

106 C Schreuer, *The ICSID Convention: A Commentary* (CUP 2001) 683; C Schreuer and others (n 98) 688.

107 Decision paras 517–51.

108 Decision paras 517–21; 660.

109 Pursuant to Art 44 of ICSID Convention, parties may agree to vary arbitration proceedings. A revision of the ICSID Arbitration Rules can only be done by the Administrative Council, which is the body competent to adopt the Arbitration Rules under Art 6(1)(c) ICSID Convention. In addition, '[a] treaty may be amended by agreement between the parties' Vienna Convention on the Law of Treaties (opened for signature 23 May 1969) (entered into force 27 January 1980) (VCLT) Art 39.

110 Brown (n 29) 202.

111 Brown (n 29) 209, citing Orakhelashvili (n 64) 505.

112 *Prosecutor v Norman et al.*, Case No SCSL-04.14.T, Appeals Chamber, Decision on Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 Refusing to Leave to File an Interlocutory Appeal (17 January 2005) 32.

of the ICTR Appeals chamber held in the *Kanyabashi* case that a tribunal possessed 'the inherent competence . . . to regulate its own procedure in the event of silence in the written rules, so as to assure the exercise of such jurisdiction as it has and to fulfil itself, properly and effectively, as a court of law. Without that residual competence, no court can function completely'.[113]

Inherent powers may be examined through the identification of international adjudication which has a function beyond the settlement of disputes. This function is composed of manifold aspects: (i) inherent powers ensure fair administration of justice, since there is a need for effectiveness and efficiency in international adjudication; (ii) allow tribunals to discharge its judicial function and to safeguard its role; (iii) control process and the proper conduct of proceedings; (iv) international tribunals play an important role in the clarification and the progressive development of international law; (v) interest of third parties to the dispute (*amicus curiae* submissions); (vi) lending legitimacy to international treaties; (vii) filling gaps or ambiguities in a treaty; (viii) and in the case of ICSID, tribunals are concerned with the protection of foreign investment.[114]

The scope and content of inherent powers shall be resolved by the traditional techniques of comparative and functional analysis. Investment Tribunals have identified certain important functions for the exercise of these powers, including the protection of the integrity of the process, dealing with vexatious claims, continuity and fairness of the proceedings, facilitation of settlement of investment claims, promotion of fair and efficient dispute resolution, interests of justice and interests of parties.[115]

The Decision is aligned to the function of international adjudication by several considerations. It is likely that this collective action gave Claimants access to justice with low-value claims that would be unlikely to be heard on an individual basis, since the cost of the individual claim would be higher than the relief sought. It 'would also be practically impossible for ICSID to deal separately with 60,000 individual arbitrations',[116] and the rejection of the claim may be tantamount to a denial of justice. The Tribunal determined that 'this would be shocking given that the investment is protected under the BIT which expressly provides for ICSID jurisdiction and arbitration'.[117] Another aspect to be considered is that Parties consented to ICSID arbitration and consequently to the inherent powers contained in the ICSID Framework. The Tribunal found a gap (the silence of ICSID Convention regarding collective proceedings) and filled it by exercising its inherent powers. As such, the Tribunal ensured the proper administration of justice in the pursuit of effective and efficient protection of investment, facilitating the settlement of a collective dispute.

There are many examples illustrating the exercise of inherent powers to fulfil the judicial function but none of them similar to order collective proceedings. Brown denotes that these include the powers to rule on counterclaims; to reformulate the

113 *Kanyabashi v Prosecutor*, ICTR App Ch, Decision on the Defence Motion for Interlocutory Appeal (3 June 1999); Brown (n 29) 215.

114 C Brown, *A Common Law of International Adjudication* (Oxford 2009) 72–78 (internal footnotes omitted); Salonidis (n 97) 46 (internal footnotes omitted).

115 Paparinskis (n 27) 21.

116 Decision para 537.

117 ibid.

submissions of the applicants; to exercise judicial economy, in refraining to rule on certain claims if it is not needed to do so in order to resolve the matters in dispute; to create a special procedure as a means of maintaining jurisdiction over a dispute; to make site visits; to order the preparation of an independent expert report; to issue practice directions, as well as the power to hear preliminary objections regarding jurisdiction and admissibility separately from the merits.[118]

Salonidis has identified that these powers arise in the context of virtually every stage of the process. Such powers include, the power to decide upon the characterization in law to be given to a matter, to address only those claims which must be addressed to resolve the matter at issue, to assess the credibility of witness' testimony, the power to order interim measures of protection, to award compensation and generally to make all those determinations that are necessary for the exercise of the primary jurisdiction over the claims.[119]

Additionally, in the field of ICSID arbitration, Paparinskis has ascertained a trend to favour a broader scope and content of inherent powers. Tribunals have identified broad inherent powers referring to functional and comparative considerations. The full scope of specific powers remains to be explored and teased out in future arbitrations and State practice. By now these powers have been spelled out as the power to grant binding provisional measures; the power to prevent the abuse of process; the power to accept submissions from non-parties; the power to deal with evidence; the power to order remedies; the power to stay proceedings; to exclude counsel from proceedings, and even powers at the annulment process.[120]

Not surprisingly, the Decision has caused much debate. Tribunals have exercised inherent powers to frame rules of procedure, make procedural orders and devise procedures for matters not contemplated in the constitutive treaty,[121] but never before have they been exploited to conduct collective proceedings. The debate is further pronounced by the differences between collective and multiparty arbitration in the field of ICSID.

The most notable distinction in this case may be found in the collective standing that TFA obtained to act as the sole agent of initially 180,000 Claimants and after discontinuance 60,000 Claimants. Claimants even consciously curtailed their rights in order not to directly instruct the attorneys and TFA to conduct proceedings.[122] Further, although there are many differences between the security entitlements held by the 60,000 Claimants, it may be argued that they are all in connection with the same fact pattern, that is, the Argentinean economic crisis that led to default. In addition, the Tribunal would 'not be in a position to examine all elements and related documents in the same way as if there were a handful of Claimants'.[123]

Even though proceedings have not finished, we can anticipate on the above rationale that the Opinion is correct since adaptations will glaringly 'diverge from the

118 Brown (n 29) 216 (internal footnotes omitted).
119 Salonidis (n 97) 50 (internal footnotes omitted).
120 Paparinskis (n 27) 27–28, 42.
121 C Brown, 'Inherent Powers in International Adjudication' in C Romano, K Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (OUP 2014) 836.
122 Decision para 546.
123 Decision para 519.

usual ICSID proceedings'. Nevertheless, the development of the proceedings and the final Award will be necessary to determine if such adaptations breach Respondent's rights. For all the above, the exercise of inherent powers to conduct collective proceedings is highly controversial; on this basis, it is important to explore the interpretative approach needed to exercise inherent powers within the boundaries of consent.

C. Interpretation of Silence and Limitations

Interpretation of treaties shall rely on the principles of treaty interpretation which are codified in Articles 31 and 32 of the Vienna Convention on the Law of the Treaties of 1969 (VCLT).[124] Principles prescribe starting with the ordinary meaning to be given to the terms of the treaty in its context and be guided by the object and purpose of the treaty, to clarify any subsisting ambiguity, if needed. The above principles are not exhaustive and may not be sufficient to deal with the silence of ICSID Framework in regards to collective proceedings.

International courts may harmonize the exercise of inherent powers by taking into account the principle of effectiveness in treaty interpretation and the evolutive approach to treaty interpretation. First, the principle of effectiveness denotes a rule for treaty interpretation, namely, the maxim '*ut res magis valiat quam pereat*'.[125] The principle of effectiveness draws the inference that parties to a treaty intended its provisions 'to have certain effect, and not to be meaningless'.[126] All the provisions are presumed to have significance and meaning, and the treaty as a whole and each of its provisions must be intended to have some end.[127] Secondly, the principle of evolutive approach,[128] which has been widely applied by several courts,[129] assumes that the terms of an instrument are 'not static, but were by definition evolutionary'.[130] The treaty is open to adapt to emerging norms of international law.[131] Sinclair found that 'the evolution of the law can be taken into account in interpreting certain terms in a treaty which are by their nature expressed in such general terms as to lend themselves to an evolutionary interpretation'.[132] The International Court of Justice (ICJ) resolved that:

> the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law . . . an international instrument has to

124 VCLT (n 109), arts 31–32.

125 'That the matter may have effect rather than fail.' H Taki, 'Effectiveness' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2009) para 1.

126 R Jennings and A Watts (eds), *Oppenheim's International Law* (Oxford 9th edn 1992) vol I, 1280.

127 C Brown, *A Common Law* (n 114) 46, citing Thirlway, 'Part Three' (1991) 62 Brit YB Int'l L 1, 44.

128 This principle seems to be incompatible with the principle of intertemporal law: 'a juridical fact must be appreciated in the light of the contemporary law with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.' *Island of Palmas*, 2 RIAA 829, 245 (US Netherlands, 1928). Nevertheless, while the principle of intertemporal law is often determinative, it can, in certain cases, only be a starting point and be displaced by subsequent developments. Brown, *A Common Law* (n 114) 47.

129 Brown, *A Common Law* (n 114) 47.

130 *Iron Rhine Railway* PCA, Award (24 May 2005) 79.

131 *Gabcikovo-Nagymaros Project* ICJ Rep 7 (1997) 67–68.

132 IM Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press 1984) 140.

> be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.[133]

The evolutive approach is consistent with one aspect of the public function of international adjudication. This is the role that international courts play in the progressive development of international law. The development of international law by international tribunals is considered one of the important conditions of their continued successful functioning.[134] Furthermore, Visscher stated that '[m]uch more than the establishment of peace, the development of international law is the essential function of judicial settlement' by a tribunal.[135]

Of course, the above principles shall not be applied unrestricted, certain boundaries are needed. The particular functions of each international tribunal will set out the scope of its inherent powers. A court may not claim to hold an inherent power if that power is not needed for the performance of its specific functions.[136] The ICJ, for instance, has resolved not to interpret an instrument in such a form that 'would go beyond the scope of its declared purposes and objects'.[137] A tribunal might not employ the above principles 'in order to introduce what amounts to a revision of the treaty'.[138] Interpretation, therefore, should oscillate between the treaty's individual provisions and the logic of all its provisions as a whole.[139] 'There are limitations on the exercise of inherent powers, including that such powers cannot be inconsistent with the terms of the relevant constitutive instrument.'[140] Consequently, interpretation must not contradict the provisions of the instrument.

Inherent powers as well are subject to these limitations. Treaty makers can introduce limitations only by express treaty or arbitral rules. Inherent powers will be restricted only if the power is in opposition to a manifest directive, being mutually exclusive with the treaty rule or arbitration rule.[141] For instance, in *Pope & Talbot Inc v Canada*, the Tribunal determined that it had no power to grant a provisional measure enjoining the application of a trade measure, since article 1134 of NAFTA states as follows: 'A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117.'[142] An ICSID Tribunal determined that '[a]lthough the Tribunal as the Petition asserts, does have certain inherent powers with respect to arbitral procedure, it has no authority

133 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)* ICJ Rep (Advisory Opinion 1971) para 53.

134 Lauterpacth (n 34) 6–7.

135 C de Visscher, *Theory and Reality in Public International Law* (PUP 1968) 390.

136 Brown, *A Common Law* (n 127) 79.

137 *Rights of Nationals of the United States in Morocco* ICJ Rep176 (1952) 196.

138 *South West Africa* ICJ Rep (1962) Joint Diss Op Spender and Fitzmaurice 319, 465, 468. In a similar vein *Iron Rhine Railway* (n 130) 49.

139 DS Jonas and TN Saunders, 'The Object and Purpose of a Treaty: Three Interpretative Methods' (2010) 43 VJTL 3.

140 *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Annulment Proceeding, Decision on RSM Production Corporation's Application for a Preliminary Ruling (7 December 2009) para 20.

141 Paparinskis (n 27) 12, 22.

142 *Pope & Talbot Inc v Canada* NAFTA, Interim Measures (7 January 2000).

to exercise such power in opposition to a clear directive in the Arbitration Rules'.[143] The above led Martin Paparinskis to ably identify that the argument of limitation or removal of specific inherent powers has to fulfil the high interpretative threshold of opposition to a clear directive before it can be accepted.[144]

Mindful of the above, it is possible to ascertain that the Decision is harmonized with the above principles. First, there is no *clause contraire* impeding the Tribunal to conduct collective proceedings, nor does ICSID Framework expressly exclude the use of inherent powers in this regard. Inherent powers may not be restricted to order collective proceedings.

Secondly, the terms of ICSID Convention cannot remain static, but shall adapt to international law. Even though, at the time of the conclusion of the ICSID Convention collective proceedings were 'quasi inexistent', now there are several instruments that have allowed different tribunals to conduct mass proceedings. Therefore, powers of other international courts in existence can explain the contemporary ordinary meaning of inherent powers of ICSID Tribunals.[145] The terms of Article 44 of the ICSID Convention and Rule 19 of the ICISD Arbitration Rules are 'by their nature expressed in such general terms' that provide enough leeway to apply the evolutive principle.[146] All of the above favours the interpretative approach of silence as extending to cover mass claims. This is supported with the public function of international adjudication encompassing further development of international law. The evolutive principle casts out any fear in connection with the absence of collective proceedings at the time of the conclusion of the ICSID Convention, and the impossibility to anticipate these proceedings by the drafters of the instrument.

Thirdly, when considering the particular functions of ICSID tribunals to set out the scope of its inherent powers, it shall be recalled that the majority determined the end of the instrument by resolving that 'ICSID Convention aims at promoting and protecting investments'[147] and found the meaning of silence by stating that 'it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a "qualified silence" categorically prohibiting collective proceedings'.[148] The BIT covers the bonds as investments. Consequently, the Decision underpinned its rationale by stating 'where such investments require a collective relief in order to provide effective protection . . ., it would be contrary to the purpose of the BIT and to the spirit of ICSID' to require a specific consent to conduct collective proceedings in addition to the consent to ICSID arbitration.[149] The rationale in which the Tribunal had inherent powers to resolve the dispute relied on the principle of effectiveness. The provisions of ICSID are not devoid of meaning.

143 *Aguas Provinciales de Santa Fe S.A., Suez Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v the Argentine Republic* (ICSID Case No ARB/03/17) Order on Amicus Curiae (17 March 2006) 7.

144 Paparinskis (n 27) 22.

145 ibid 16.

146 Sinclair (n 132) 140.

147 Decision para 490.

148 Decision para 519.

149 Decision paras 489–90, 518.

Fourthly, another aspect to be considered in the interpretative approach of the Decision encompasses the limitations established. This matter is of utmost importance given that a serious departure from a fundamental rule of procedure and the manifest excess of inherent powers both constitute grounds for the annulment of the award.[150] A modification of existing rules can only be effected subject to the parties' agreement[151] taking into account the minimum standards of fair procedure, to the extent that the rules to be modified are not mandatory. A tribunal's power is limited to filling the gaps of ICSID Framework. Its role is not to complete or improve the ICSID Framework in general. The tribunal's power to fill gaps is limited to the design of specific rules to deal with specific problems arising out of the proceedings.[152] For all the above the Tribunal found that it could not:

- modify the current arbitration rules without the Parties' consent. A revision of the ICSID Arbitration Rules can only be done by the Administrative Council, which is the body competent to adopt the Arbitration Rules under Article 6(1)(c) ICSID Convention; or
- adopt a full set of rules of procedure unless the Parties have agreed that the Arbitration Rules adopted by the Administrative Council should not apply without substituting their own rules.[153]

Nevertheless, in regards to the Tribunal's power under Article 44 to fill gaps consisting in the design of specific rules in order to conduct the proceedings, the Opinion determined that the proposed adaptations violate the Respondent's rights. It is an absolute due process right in any proceeding to have every element of the claim presented against him, examined by the tribunal, through adversarial debate that affords him full opportunity to contest and refute these elements one by one. As such, the Opinion concluded that the 'adaptations' of the Arbitration Rules that the Decision prescribed for hearing the case are manifestly *ultra vires*.[154]

The form in which the Decision curtailed the Respondents' defence right was questioned by the Opinion. The Decision is not certain that the effect of the examination method and procedure on Argentina's defence rights is limited and relative. As well, the availability to enter into full length and detail into the individual circumstances of each Claimant was criticized. The Opinion stressed that the abridgement of Respondent's procedural rights against its will in order to give greater protection to the investment of the Claimants is a one-sided balance.[155]

Full development of this case is needed to assess if the adaptations will constitute a revision of ICSID Convention. ICSID Framework only allows to aggregate Claimants after the filing of the Request for Arbitration and prior to the registration of the Request.[156] Thus, the Tribunal may not allow new claimants to manifest their consent to be bound by the award after the registration of the Request for

150 ICSID Convention, 52(1)(b), (d).

151 Pursuant to art 44 of ICSID Convention, parties may agree to vary arbitration proceedings. In addition, according to art 39 of the VCLT (n 109) 'A treaty may be amended by agreement between the parties'.

152 Decision paras 517–21.

153 Decision para 524.

154 Opinion paras 210–62.

155 ibid.

156 See above part 3.C. Res Judicata of this article. ICSID Convention, art 36; Decision paras 610–11.

Arbitration, during the proceedings or even after rendering the award. This adaptation would be in accordance with the collective systems of justice; nonetheless, it would clearly contravene ICSID Convention and may constitute a modification of the instrument.

6. FINAL COMMENT

Georges Abi-Saab warned that arbitral tribunals should not act like Chancery Courts trying to adapt the rules when the consent to arbitrate and the ICSID Framework precluded so. Instead, he recommended to pay strict adherence to the consent to arbitrate and the current ICSID Framework and BIT provisions. This is to avoid unneeded adaptations even though the consent to arbitrate and the ICSID Framework provisions would have given no or inadequate redress. However, ICSID Framework contains the preapproval of Parties to exercise inherent powers and allows tribunals to go beyond what the express wording of the rules say. Parties agreed that the Tribunal hold the authority to 'decide' 'any question of procedure'. This notably includes the possibility to conduct collective proceedings.

Notwithstanding the powerful reasoning of Georges Abi-Saab, the Decision of the majority may be considered like the first gleam of dawn, as it has shed light on the admissibility of collective claims in the field of ICSID arbitration. This exercise of inherent powers may inspire other international tribunals to conduct mass proceedings within the boundaries of the proper interpretative approach and the public functions of international adjudication. The Tribunal, in this first appearance of light, experimented a fall. It did not properly determine the adequacy of representation, even though it holds inherent powers to protect the integrity of the process. The risk to breach the rights of Claimants or Respondent is high. A special set of rules seems desirable (although not needed) to conduct mass proceedings in a safe manner within the standards of collective justice. Arbitrators are advised to remain on the path of the righteous, where the morning sun shines ever brighter until the full light of day.

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