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## **MASS PROCEEDINGS IN THE INVESTOR-STATE ARBITRATION SETTING: OFFSPRING OF LEGAL GENETIC ENGINEERING?**

by Marine Koenig

### **I. INTRODUCTION**

Globalization has increased the possibility of widespread legal harm.<sup>1</sup> Over the past decades, Argentina's sovereign debt crisis, its default, and its subsequent restructuring have offered a prime example of this. In its aftermath, Argentina's sovereign debt crisis has left thousands of aggrieved bondholders with a multiplicity of claims of relatively small amounts and a debate regarding the appropriate means to address them.

International dispute resolution bodies face an increasing number of claims of small amounts arising under international law.<sup>2</sup> The investor-State arbitration system is no exception. In order to give effect to substantive norms, procedural devices have been considered appropriate means to address widespread legal harm. Within the investor-State arbitration framework, this has taken the form of mass proceedings.

The debate regarding mass proceedings emerged with the noteworthy decision on admissibility and jurisdiction in *Abaclat*.<sup>3</sup> The *Abaclat* award was shortly followed by two sister cases, *Ambiente*<sup>4</sup> and *Alemanni*,<sup>5</sup> dealing with substantially similar legal and procedural patterns.

This paper addresses the emergence of mass proceedings within the investor-State arbitration framework. This phenomenon has been regarded as one of the most noteworthy developments of investment law over the past decade. Although the

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<sup>1</sup> See generally Stacie I. Strong, Chapter 10. *Class Arbitration Outside the United-States: Reading the Tea Leaves*, in MULTIPARTY ARBITRATION, Vol. 7, 183-213 (Eric A. Schwartz & Bernard Hanotiau eds. 2010).

<sup>2</sup> Friedrich Rosenfeld, *Mass Claims in International Law*, 4 J. INT'L DISP. SETTLEMENT 159, 159 (2013).

<sup>3</sup> *Abaclat & Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

<sup>4</sup> *Ambiente Ufficio S.P.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013).

<sup>5</sup> *Giovanni Alemanni et al. v. The Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (Nov. 17, 2014).



subject has given rise to an extensive literature, all commentators agree on the novelty of this procedural device in the investor-State arbitration system, which is explored herein.

Section II exposes the legal framework set up by the Argentinean trilogy of awards. Section III then proposes a taxonomy of mass proceedings. Section IV stresses the conceptual importance to distinguish jurisdiction from admissibility. Section V discusses the main jurisdictional issue: consent. Section VI sets out the specific methodology developed to address mass claims admissibility. Lastly, Section VII closes out the aforementioned presentation with some final remarks.

## II. THE LEGAL FRAMEWORK: THE ARGENTINIAN TRILOGY

In 2001, Argentina defaulted on its repayment obligations on its sovereign debt, including bonds owned by Italian citizens. Consequently, three claims were lodged by bondholders at the International Centre for Settlement of Investment Disputes (“ICSID”)<sup>6</sup> under the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments, signed in Buenos Aires on May 22, 1990 (“Argentina-Italy BIT” or the “BIT”), the *Abaclat*, *Ambiente*, and *Alemanni* cases.

The decisions on admissibility and jurisdiction in the *Abaclat*, *Ambiente*, and *Alemanni* cases form a set of three consistent awards. The tribunal in *Ambiente* referred to the *Abaclat* decision regarding the factual background,<sup>7</sup> and it did so more generally “whenever appropriate.”<sup>8</sup> According to the tribunal, this referral was justified by the “substantial overlap of the questions of fact and law the two Tribunals are confronted with in their respective cases.”<sup>9</sup> In an extensive quote, the *Alemanni* award recycles the *Ambiente* reference to the *Abaclat* award.<sup>10</sup>

All three tribunals considered that they had jurisdiction over the claims brought

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<sup>6</sup> The International Centre for Settlement of Investment Disputes was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 [hereinafter “ICSID Convention”], and entered into force in 1966, when it had been ratified by 20 state members of the World Bank.

<sup>7</sup> *Ambiente*, ¶ 61.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* ¶ 11.

<sup>10</sup> *Alemanni*, ¶ 255.



before them and allowed the cases to proceed on the merits. The main difference between the three cases is the number of claimants: *Abaclat* involved 60,000 investors, whereas *Ambiente* and *Alemanni* involved, respectively, 90 and 74 aggrieved bondholders.

Although there is no binding precedent within the ICSID framework,<sup>11</sup> and flexibility is praised as one of the main features of the system, there is a need for consistency that results in persuasive precedents. As acknowledged by Professor Gabrielle Kaufmann-Kohler, “in investment arbitration, there is a progressive emergence of rules through lines of consistent cases on certain issues.”<sup>12</sup> The *Abaclat*, *Ambiente*, and *Alemanni* decisions form a line of consistent cases regarding mass claim proceedings, the analysis of which provides us with a better understanding of what might be a guiding framework of persuasive precedent in investment arbitration.

Analysis of mass proceedings in investment arbitration calls for a comprehensive taxonomy in order to determine the common features shared with other similar proceedings developed within the international and domestic frameworks.

### III. TAXONOMY OF MASS PROCEEDINGS

The tribunal in *Abaclat* referred to “mass proceedings” as a “qualification for the present proceedings ... referring simply to the high number of Claimants appearing together as one mass, and without any prejudgment on the procedural classification of the present proceedings as a specific kind of collective proceedings recognized under any specific legal order.”<sup>13</sup> This terminology had been used in public international law, and the examination of mass claims processes helps in understanding the procedural device used in international investment arbitration. Eventually, it allows the characterization of mass proceedings in the international investment arbitration framework.

#### A. Lessons from Public International Law: International Mass Claim Processes

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<sup>11</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 36 (2008).

<sup>12</sup> Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23 J. INT’L ARB. 357, 357 (2007).

<sup>13</sup> *Abaclat*, ¶ 480.



The *Abaclat*, *Ambiente*, and *Alemanni* decisions exemplify the mass proceedings in investment arbitration; however, mass claim processes are well-known procedural devices in public international law. The use of mass claim processes can be traced back to the Jay Treaty in 1794, which established two commissions to address a large number of claims by US and British citizens.<sup>14</sup>

Mass claim processes traditionally refer to the “numerosity of claims which have some ‘commonality of legal and factual issues’ but which are decided individually.”<sup>15</sup> Usually they involve the creation of a specific adjudicative body.<sup>16</sup> To that extent, mass claim processes differ from mass claims arising within the investment context. The latter have taken the form of procedural devices that bind claims in order to bring them in the form of a single substantive claim before the arbitral forum.<sup>17</sup>

Mass claim processes provide a better understanding of mass claim proceedings in international investment arbitration. Both fall within the functional definition of “streamlined procedure[s] which allows processing a high number of claims arising from a violation of international law that raise common factual and/or legal questions.”<sup>18</sup> Mass processes show features analogous to mass claim proceedings. Their constituting methods and instruments range from treaties<sup>19</sup> to arbitration agreements.<sup>20</sup> The nature of the proceedings has, in some instances, been similar to

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<sup>14</sup> HOWARD M. HOLTZMANN & EDDA KRISTJANSDDOTTIR, INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 2-3 (2007).

<sup>15</sup> Hans Van Houtte & Bridie McAsey, *Case Comment - Abaclat and Others v. Argentine Republic*, ICSID, *the BIT and Mass Claims*, 27 ICSID REV., 231, 231-32 (2012) (citing HANS DAS & HANS VAN HOUTTE, POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW II 23-5 (2008)); see also *Abaclat*, Dissenting Opinion of Professor Georges Abi-Saab, ¶¶ 182-83 (“If we examine all the examples of international mass claims programs ... we note the following common major features that distinguish them from the present case: ... a) Each one of them, without exception, was specifically established to process a particular set of mass claims. None of them was set in motion by an application to a standing Tribunal, or on the basis of a prior compromissory clause (or another prior jurisdictional title) as in the present case.”).

<sup>16</sup> See VAN HOUTTE & MCASEY, *supra* note 15, at 231-32; *Abaclat*, Dissenting Opinion, ¶¶ 182-83.

<sup>17</sup> STACIE I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 342 (2013).

<sup>18</sup> ROSENFELD, *supra* note 2, at 2.

<sup>19</sup> For example, the Iran-United States Claims Tribunal was created by a declaration by the Islamic Republic of Iran and the United States of America. It provides that the Tribunal would conduct the proceedings according to the UNCITRAL Arbitration Rules.

<sup>20</sup> For example, the Claim Resolution Tribunal for Dormant Accounts in Switzerland was established by an agreement to arbitrate between the Swiss Bankers Association and two leading Jewish organizations. Its purpose was to resolve claims to accounts in Swiss banks that had been dormant since the Second World War.





arbitration.<sup>21</sup> The main elements drawn from the variety of mass claim processes that are helpful to further this analysis are the procedural techniques used to deal with the numerosity of claimants.<sup>22</sup>

In his dissent from the *Abaclat* majority, Professor Georges Abi-Saab uses mass claim processes to support his showing that there is a need for consent by all parties “to establish a mechanism with jurisdiction to process a particular set of mass claims - or collaterally, to endow an already existing body or framework with such jurisdiction - and to devise the procedures for so doing.”<sup>23</sup> Not only does he offer a biased reading of the great variety of mass processes, but he also limits their relevance to the consent issue alone, whereas they can be helpful to develop mass claims proceedings to a broader extent.

The heterogeneity of mass claim processes established have not led to the emergence of a single standard that can be relied upon.<sup>24</sup> However, the techniques used can be a basis for mass claim mechanisms in international investment arbitration, if tailored to the specificities of the investment framework.<sup>25</sup>

#### B. *Mass Proceedings in the International Investment Framework*

In departing from preexisting procedural devices such as multiparty proceedings, the three tribunals dealing with Argentina’s sovereign debt crisis have cautiously rejected preexisting terminology, including the technical reference to “mass proceedings.” However, this has not impaired the descriptive relevance of “mass proceedings” to refer to the hybrid, multiparty proceedings developed in the international investment setting.

##### 1. Are Mass Proceedings the Heir of the Multiparty Proceedings?

Multiparty proceedings have long been recognized within the ICSID framework.<sup>26</sup>

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<sup>21</sup> As an example, the Iran-United States Claims Tribunal’s constituting instrument provides that the Tribunal shall conduct the proceedings according to the UNCITRAL Arbitration Rules.

<sup>22</sup> See HOLTSMANN & KRISTJANSDOTTIR, *supra* note 14, at 2-3.

<sup>23</sup> *Abaclat*, Dissenting Opinion, ¶ 189.

<sup>24</sup> ROSENFELD, *supra* note 2, at 159.

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., *Antoine Goetz et al. v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999); *Bayview Irrigation District et al. v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award (Jun. 19 2007); *Funnekotter v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 7, 2009); *Anderson v. Republic of Costa Rica*, ICSID Case No. ARB/(AF)/07/3, Award (May 10, 2011).





The majority in the *Ambiente* award qualifies them as “a common feature in ICSID arbitration.”<sup>27</sup>

Multiparty proceedings before ICSID tribunals can be divided into two subcategories. The first subcategory encompasses multiple arbitral proceedings that are separately and individually launched, and later joined or consolidated in a single multiparty proceeding.<sup>28</sup> The second subcategory designates proceedings that are originally filed as multiparty actions, i.e., the submission of one claim by a plurality of claimants in one single proceeding.<sup>29</sup> The *Abaclat*, *Ambiente*, and *Alemanni* mass proceedings fall within the latter subcategory.

It is worth noting that, before the *Abaclat* case, no State had ever objected to the jurisdiction of arbitral tribunals over claims brought by multiple parties or those claims’ admissibility on the ground that they were improper within the ICSID arena. The *Klöckner v. Cameroon*<sup>30</sup> case stands as an exception where the respondent State raised an argument relying on the wording of Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”).<sup>31</sup> The Republic of Cameroon alleged that Article 25(1) excluded multiparty arbitration. This objection was ultimately dropped.<sup>32</sup>

The *Abaclat*, *Ambiente*, and *Alemanni* mass proceedings appear to be a new form of multiparty proceeding, which raises questions about the alleged novelty of the debate about mass proceedings.

## 2. Mass Proceedings a Descriptive Rather than Normative Terminology

In the *Abaclat* award, the tribunal refers to the concept of mass proceedings to qualify the high number of claims appearing together as one “mass.” It therefore rejects the use of said terminology to refer to any specific kind of multiparty

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<sup>27</sup> *Ambiente*, ¶ 135.

<sup>28</sup> Stacie I. Strong, *Case Comment - Ambiente Ufficio SpA and others v Argentine Republic, Heir of Abaclat? Mass and Multiparty Proceedings*, 29 ICSID REV. 149, 150 (2014) [hereinafter STRONG *Ambiente*]; *Ambiente*, ¶ 123.

<sup>29</sup> STRONG *Ambiente*, *supra* note 28, at 149; *Ambiente*, ¶ 124.

<sup>30</sup> *Klöckner Industrie-Anlagen GmbH et al v. U. Republic of Cameroon & Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award (Oct. 21, 1983).

<sup>31</sup> ICSID Convention, art. 25.

<sup>32</sup> *Ambiente*, ¶ 136; *Abaclat*, Dissenting Opinion.



proceeding.<sup>33</sup> The *Ambiente* majority goes further, rejecting the use of the term “mass proceeding” as non-technical<sup>34</sup> in order to avoid any linguistic ambiguity and potential confusion carried out by its use.<sup>35</sup> Ultimately, the *Alemanni* tribunal ended the debate stating that it “sees no advantage whatsoever in entering into a battle of terminology.”<sup>36</sup>

The cautious refusal of two of the three tribunals to use the term “mass proceedings,” even in a descriptive way, shows their willingness to depart from preexisting procedural patterns. In this regard, the *Ambiente* tribunal explains its concern that the use of a preexisting terminology be used as a basis “to import aspects into the ICSID framework which are associated with concepts deriving from the court litigation and arbitration regime of domestic laws ... or other areas of international law, which might bear the same name but may well have a technical meaning different from, or even incompatible with, the legal framework set up by the ICSID Convention.”<sup>37</sup> This does not prevent the use of this terminology to describe the procedural device developed through this set of cases. It does, however, leave open the technical characterization of said proceedings.

### 3. Characterization of Mass Proceedings

Out of the three cases, the *Abaclat* award is the only one that enters the debate as to the characterization of mass proceedings. The *Alemanni* and *Ambiente* awards take the same position: they do not attempt to characterize the nature of the mass proceedings but expressly reject any representative features.<sup>38</sup> However, due to the common characteristics of the three cases, the *Abalcat* analysis is useful as a clear presentation of mass claims in investment arbitration.

The *Abaclat* majority starts with a comparison between mass and representative proceedings. It emphasizes how the conduct of the proceedings resembles a

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<sup>33</sup> *Abaclat*, ¶ 480.

<sup>34</sup> *Ambiente*, ¶ 119.

<sup>35</sup> *Id.* ¶ 120.

<sup>36</sup> *Alemanni*, ¶ 267.

<sup>37</sup> *Ambiente*, ¶ 121.

<sup>38</sup> *Id.* ¶ 115; *Alemanni*, ¶ 267.



representative action where a numerosity of claims arises as one claim.<sup>39</sup> However, contrary to classic representative class arbitration proceedings, a third party represented the claimants in this case.<sup>40</sup> The representative made decisions on behalf of all claimants regarding the conduct of the proceedings, which is a feature of representative proceedings.<sup>41</sup>

The *Abaclat* majority then focuses on the aggregate element. The majority finds this element in the claimants' individual and conscious choice of participating in the arbitration.<sup>42</sup> It is finally emphasized that those two kinds of proceedings share a common *raison d'être*: they “emerge[] where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law.”<sup>43</sup> Eventually, the majority characterizes the proceeding as hybrid in nature, “in the sense that ... [the arbitration] starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of Claimants involved.”<sup>44</sup>

The characterization of the mass proceedings as hybrid in nature is a compromise that allows the *Abaclat* tribunal to depart from the traditional US class arbitration scheme while creating a new category in the well-established nomenclature.

The procedural device developed in the *Abaclat*, *Ambiente*, and *Alemanni* awards can be generally qualified as a mass proceeding distinct from the mass processes used in public international law. These mass proceedings represent a type of multiparty proceeding that shares common features with the traditional proceedings developed within the ICSID framework. The nature of the process is neither fully aggregate nor completely representative, hence its qualification as a hybrid proceeding. The tribunals, by avoiding using technical, well-established nomenclature, bypass the concern of preexisting national or international mechanisms having persuasive effect on the developing international investment regime of mass claims.

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<sup>39</sup> *Abaclat*, ¶¶ 483, 488.

<sup>40</sup> *Id.* ¶ 487; VAN HOUTTE & MCALEY, *supra* note 15, at 235.

<sup>41</sup> *Abaclat*, ¶ 487.

<sup>42</sup> *Id.* ¶ 486.

<sup>43</sup> *Id.* ¶ 484.

<sup>44</sup> *Id.* ¶ 488.



#### IV. THE CONCEPTUAL IMPORTANCE TO DISTINGUISH JURISDICTION FROM ADMISSIBILITY IN MASS CLAIMS PROCEEDINGS

The *Abaclat* award on jurisdiction and admissibility stresses the importance of distinguishing these two concepts.<sup>45</sup> The *Ambiente* and *Alemanni* tribunals also used this dichotomy. However, the *Ambiente* majority once again took a tentative approach, refusing to draw a clear line between two core concepts in order to avoid terminology debates.<sup>46</sup> The *Alemanni* award, synthesizing its sister tribunals' approaches, notes that it is "not convinced that the distinction between the two concepts, such as it may be, raises any major difficulty; but nor is it convinced that the distinction is of any particular importance in disposing of the issues presently before it."<sup>47</sup>

In order to present a comprehensible analysis of the three awards on jurisdiction and admissibility, the distinction is relevant. The guiding question presented by the *Abaclat* majority is helpful in this regard:

If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction.<sup>48</sup>

However, to narrow our analysis, emphasis will be placed first on the main jurisdictional requirement, the parties' consent to arbitration; and second, on the noteworthy methodology developed by the *Abaclat* tribunal to retain mass claims' admissibility notwithstanding the silence of the conventional instruments.

#### V. JURISDICTION - CONSENT

Following the guiding question of *Abaclat*, our analysis will focus on what has been qualified as the "cornerstone of the Centre jurisdiction:"<sup>49</sup> consent to arbitration.

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<sup>45</sup> *Id.* ¶ 246.

<sup>46</sup> *Ambiente*, ¶ 573.

<sup>47</sup> *Id.* ¶ 257.

<sup>48</sup> *Abaclat*, ¶ 249.

<sup>49</sup> Report of the Executive Directors on The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Jurisdiction of the Centre, available at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section05.htm>.



Consent in international investment arbitration is twofold as it refers to the respondent State's consent, which is the offer to arbitrate, and the claimant's acceptance embodied in the request for arbitration lodged at ICSID. It is noteworthy that the tribunals in *Abaclat*, *Ambiente*, and *Alemanni* developed a double standard to assess the parties' consent.

A. *Respondent's consent to arbitrate*

In investor-State arbitration, the State's consent to arbitrate is constituted by a general consent provided by the State while becoming a party to the ICSID Convention and a specific consent to ICSID jurisdiction for a given dispute. However, a third consent has been envisioned regarding mass proceedings; it has been alleged that a "secondary consent" is necessary for the claims to proceed in the form of a "mass."

1. *The General Consent*

The general consent is characterized by the State's participation in the ICSID Convention. Article 25 of the ICSID Convention sets up the objective elements required to retain the Centre's jurisdiction. Those are the "outer limits" of its jurisdiction, which are not subject to the parties' disposition.<sup>50</sup> The Convention sets two conditions regarding consent. From a substantive point of view, there must be consent between the parties to submit a specific dispute to the jurisdiction of the Centre. From a formal point of view, written consent of both parties is required.

The question remains as to whether mass proceedings falls within the "outer limits" of the Centre's jurisdiction. The majority in *Alemanni* stressed that the language used in Article 25(1), a "dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State," should not be construed to mean a "dispute between a Contracting State and one, but only one, national of another Contracting State."<sup>51</sup> Furthermore, Article 25(4) of the ICSID Convention contemplates the possibility for the signatories to "notify the Centre of the class or classes of disputes which it would or would not consider submitting to

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<sup>50</sup> CHRISTOPH H. SCHREUER ET AL., *THE ICSID CONVENTION: A COMMENTARY* 91 (2009).

<sup>51</sup> *Alemanni*, ¶¶ 270-71.



the jurisdiction of the Centre.”

As previously explained, multiparty proceedings have been lodged before at ICSID. They are well-known within the ICSID framework; therefore, the signatories should foresee that such proceedings could be brought against them. The language of Article 25 of the ICSID Convention does not exclude multiparty proceedings, and “provided that the jurisdictional limitations as to the parties to proceedings under the Centre are observed, and the consent of all parties concerned is secured, there is no reason why appropriate multi-partite proceeding[s] cannot be carried out pursuant to the Convention.”<sup>52</sup>

Argentina did not notify the Centre that it wanted to exclude from the scope of its general consent proceedings involving a numerosity of claimants.<sup>53</sup> Argentina, as a signatory of the ICSID Convention, has provided a general consent according to Article 25 that does not exclude the possibility of multiple claims brought in mass form.

## 2. The Specific Consent

The specific consent is embodied in the dispute resolution clause contained in the relevant BIT. In the cases at issue, the relevant provision, Article 8(3) of the BIT, reads “with this purpose and under this Agreement, each Contracting Party grants its anticipated and irrevocable consent that any dispute may be subject to arbitration.” This offer to arbitrate is an open and standing offer,<sup>54</sup> i.e., a pre-existing consent by the host State to litigate claims arising out of the BIT according to ICSID proceedings. The respondent State’s prospective consent to arbitrate is “a procedural guarantee for simulating and protecting foreign investments;”<sup>55</sup> investors can “capitalize” on this consent, as it provides them the opportunity to bring a suit at any time. Prospective

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<sup>52</sup> Carolyn B. Lamm et al., *Consent and Due Process in Multiparty Investor-State Arbitrations*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 54, 60 (2009) (citing Paul C. Szasz, *The Investment Dispute Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J. L. & ECON. DEV. 26, 28 (1970)).

<sup>53</sup> To forecast Argentina’s notifications, see <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST4>.

<sup>54</sup> Alemanni, ¶ 270.

<sup>55</sup> Andrea M. Steingruber, *Case Comment – Abaclat and Others v. Argentine Republic Consent in Large-scale Arbitration Proceedings*, 27 ICSID REV. 237, 238 (2012).



consent is characteristic of the investment law system as its main purpose is to stimulate foreign investments by guaranteeing substantive and procedural protections.

A respondent State's specific consent is inherently directed to multiple investors as long as their investment falls within the scope of protection of the BIT. Through BITs, States consent to the mandatory arbitration of disputes with foreign investors as a group.<sup>56</sup> Therefore, States should be aware of the possibility of being confronted by multiple claims of protected investors arising out of similar legal and factual patterns.<sup>57</sup>

Contracting States are the drafters of the dispute resolution mechanisms contained in the BITs; they are left with the possibility to exclude a certain type of dispute from its scope. The majority in *Alemanni* noted that "where the consent of the respondent State is in issue, the question for consideration remains simply: on the proper interpretation of the BIT, has the respondent, or has it not, given a consent which is wide enough in scope to cover the proceedings brought (as in the case) by the multiple group of co-claimants."<sup>58</sup> Article 8(3) of the BIT does not exclude disputes brought in mass form. Therefore, as long as the tribunal has jurisdiction over each of the individual claims, there is no reason why it should lose jurisdiction because of the number of claimants.<sup>59</sup>

### 3. Secondary Consent

In its submissions to the tribunal, Argentina asserted the need for "secondary consent" to allow the claims to proceed on the merits in the form of a "mass."<sup>60</sup> The concept of "secondary" consent, referring to a "particular type of procedure," is supported by the dissenting opinion of Professor Georges Abi-Saab to the *Abaclat* award. It is therein explained that "traditional multiparty arbitrations are ... required to establish secondary consent in cases where the arbitration agreements are silent

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<sup>56</sup> GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 62 (2007).

<sup>57</sup> STEINGRUBER, *supra* note 55, at 241.

<sup>58</sup> *Alemanni*, ¶ 269.

<sup>59</sup> *Abaclat*, ¶ 490.

<sup>60</sup> *Id.* ¶ 481; *Alemanni*, ¶¶ 133, 137.





or ambiguous as to multiparty treatment.”<sup>61</sup> From this, it follows, according to the dissent, that if this concept applies to multiparty arbitration, it applies *a fortiori* to mass proceedings.<sup>62</sup> The author cited as a reference by the tribunal corrects the biased reading of the original source. In a subsequent article, the same author, Professor Stacie Strong, emphasizes that the dissenting arbitrator had misunderstood the reference to a “secondary” consent as meaning “additional” instead of “subordinate.”<sup>63</sup>

In the same subsequent article, Professor Strong explains the “secondary” consent theory of Professor Rau.<sup>64</sup> This theory draws a distinction between matters of primary and secondary concern. Matters of primary concern, which include core questions, should be applied a strict standard of consent. Matters of secondary concern, on the other hand, which include non-core questions, should be applied a less stringent standard of consent. Procedural issues, such as the form of the proceedings, fall within the latter category. A secondary consent, in the sense of “subordinate” consent, should apply to procedural matters. Where applicable the concept of “secondary consent” for particular forms of arbitration has been described as extremely fluid and generally leading to a presumption in favor of consent.<sup>65</sup> It is therefore unsurprising that the tribunals in the *Abaclat*, *Ambiente*, and *Alemanni* cases rejected the need for “secondary” consent.<sup>66</sup>

The first argument on the basis of which the need for “secondary” consent was rejected refers to the nature of the investment. It is developed in the *Abaclat* award. The ICSID Convention aims at promoting and protecting investments. This protection is provided through procedural devices guaranteeing the effectiveness of the substantive protection. Bonds qualify as “protected investments” under the so-called “double-barreled” test, i.e., they meet the definition of investment under the

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<sup>61</sup> *Abaclat*, Dissenting Opinion, ¶ 173 (citing Stacie I. Strong, Does Class Arbitration ‘Change the Nature’ of Arbitration? Stolt Nielsen, AT&T and Return to First Principles, 17 HARV. NEGOT. L. REV. 201 (2012))

<sup>62</sup> *Id.* ¶ 174.

<sup>63</sup> STRONG *Ambiente*, *supra* note 28, at 151.

<sup>64</sup> *Id.* (citing Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of ‘Consent’*, 24 ARB. INT’L 199, 203 (2008)).

<sup>65</sup> Ridhi Kabra, *Has Abaclat v Argentina left the ICSID with a ‘mass’ive problem?*, 31 ARB. INT’L 425, 427 (2015).

<sup>66</sup> *Abaclat*, ¶ 490.



BIT<sup>67</sup> and Article 25 of the ICSID Convention.<sup>68</sup> They are instruments which by nature are likely to involve, in the context of the same investment, a high number of investors.<sup>69</sup> Therefore, it would be contrary to the purpose of the ICSID Convention and the BIT “to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration.”<sup>70</sup>

The second argument on the basis of which the need for a “secondary” consent was rejected contemplates the nature of the proceedings. As noted by the *Ambiente* majority, when confronted with a situation of *ex post* joinder of separate claims or consolidation of individual actions, there is a need for an additional consent.<sup>71</sup> However, the cases at stake relate to none of those situations but are characterized by the submission of a claim by a plurality of claimants in one single ICSID proceeding.<sup>72</sup> The institution of such proceeding does not require any “secondary” consent on the part of the respondent State beyond the general requirements of consent to arbitration.<sup>73</sup>

In the *Abaclat*, *Alemanni*, and *Ambiente* awards, the tribunals characterized both the general and specific consent given by Argentina. The need for “secondary” consent purportedly incurred by the “mass” aspect of the claims was rejected. However, the “mass” aspect of the claims raises specific issues regarding the claimants’ consent.

#### B. The Claimants’ Consent to Arbitrate

The characterization of a claimant’s consent to arbitrate is generally not a complicated issue in ICSID arbitration as it follows a well-established pattern. However, the scheme of representation in the Argentinean trilogy, along with the power of attorney mechanism, gave rise to concerns regarding its validity.

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<sup>67</sup> *Id.* ¶¶ 356, 361.

<sup>68</sup> *Id.* ¶ 367.

<sup>69</sup> *Id.* ¶ 490. For an explanation about the qualification of bonds as investments in the *Abaclat* and *Ambiente* cases, see Tomokos Ishikawa, *Keeping Interpretation in Investment Treaty Arbitration ‘on Track’: The Role of State Parties*, in *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21<sup>ST</sup> CENTURY* 115, 117–22 (Jean E. Kalicki & Anna Joubin-Bret eds. 2015).

<sup>70</sup> *Abaclat*, ¶ 490.

<sup>71</sup> *Ambiente*, ¶ 123.

<sup>72</sup> *Id.* ¶ 124.

<sup>73</sup> *Id.* ¶ 141.



## 1. Characterization of the Claimants' Consent within the ICSID Framework

Within the ICSID arena, and according to Article 25's jurisdictional requirements, a claimant's written consent is given through initiation of the proceedings. The commencement of the proceedings constitutes the acceptance by the investor of the host State's offer to arbitrate, thus perfecting the consent. According to Article 36 of the ICSID Convention, the request for arbitration must be submitted in writing. The established practice is that the request embodies the consent of the investor<sup>74</sup> satisfying the writing requirements of Article 25(1) and Article 36.

The ICSID Institution Rules<sup>75</sup> contemplate the possibility for the request to be filed by the claimant's duly authorized representative.<sup>76</sup> The power of attorney establishes a link between the claimants and the request for arbitration.<sup>77</sup> It constitutes both the authorization given by the investor to its lawyer to launch the proceedings and the claimant's consent to submit the dispute to arbitration.

The validity of the consent embodied in the power of attorney is a matter of jurisdiction. The law applicable to the determination of the tribunal's jurisdiction under Article 25 has been the subject of great debates; however, the predominant view in the field is that principles of international law should apply.<sup>78</sup> Therefore, the validity of the consent expressed in the power of attorney is subject to the general principle of international law and should be assessed with regard to the ICSID general framework.<sup>79</sup>

## 2. The Scheme of Representation

In the *Abaclat* case, *l'Associazione per la Tutela degli Investitori in Titoli Argentini* ("TFA") was created to "represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina."<sup>80</sup> When the initiation of ICSID arbitration

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<sup>74</sup> SCHREUER, *supra* note 50, at 218.

<sup>75</sup> ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Apr. 10, 2006) [hereinafter "ICSID Institution Rules"].

<sup>76</sup> *Id.* at Rule 1(1).

<sup>77</sup> *Ambiente*, ¶ 230.

<sup>78</sup> *Id.* ¶ 236; *Abaclat*, ¶ 447.

<sup>79</sup> *Abaclat*, ¶ 447.

<sup>80</sup> *Id.* ¶ 65.



against Argentina was considered as a new mandate, the “TFA Mandate Package” was designated. The Mandate Package contained, among other things, the TFA Instruction Letter, a Power of Attorney, and the TFA Mandate. The TFA Instruction Letter explained the object and modalities of the ICSID arbitration along with the instructions for the bondholders on how to participate.

The Power of Attorney contained a declaration of irrevocable consent to submit their claims to ICSID arbitration and to accept Argentina’s offer to arbitrate contained in Article 8 of the BIT.<sup>81</sup> A Delegation of Authority and Power of Attorney conferred to the law firm White & Case the power to initiate and conduct ICSID arbitration on the claimants’ behalf.<sup>82</sup> The TFA Mandate was granted by the signatories to TFA so that it could act as coordinator of the ICSID arbitration.<sup>83</sup>

In the *Ambiente* and *Alemanni* cases, *North Atlantic Société d’Administration* (“NASAM”), a company based in Monaco, set up an original third-party funding scheme under which it decided to “co-ordinate, organize and fund” aggrieved bondholders’ legal action against Argentina.<sup>84</sup> The “NASAM Mandate Package” was signed between the claimants and NASAM. It contained a Special Power of Attorney and NASAM Mandate establishing a principal-agent relationship.

### 3. The Power of Attorney: A Clear and Unambiguous Expression of Irrevocable Consent

In *Abaclat*, the tribunal held that the Power of Attorney was a clear and unambiguous expression of irrevocable consent by the claimants to launch ICSID arbitration against Argentina and to entrust White & Case with its conduct. It concluded that the Power of Attorney constituted a written consent in the sense of Article 25(1) of the ICSID Convention.<sup>85</sup>

In *Ambiente* and *Alemanni*, the claimants were represented by Mr. Parodi, Mr. Radicati, and Mr. Barra. Only Mr. Parodi was designated in the “Special Power of Attorney.” Mr. Parodi designated as co-counsel Mr. Radicati and Mr. Barra, according

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<sup>81</sup> *Id.* ¶ 452.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* ¶ 85.

<sup>84</sup> *Alemanni*, ¶ 79.

<sup>85</sup> *Abaclat*, ¶ 453.



to the powers granted to him in the Special Power of Attorney. The circumstances of this delegation, in the *Alemanni* factual pattern, gave rise to complications.<sup>86</sup>

In *Ambiente*, the tribunal developed a flexible approach toward the formal requirements applying to the Special Power of Attorney based on two premises. The first was that Article 36 of the ICSID Convention has a double function, both launching the proceedings and embodying the claimants' written consent. Second, Article 1(1) of the ICSID Institution Rules only requires that the representative who signs the request of arbitration be "duly authorized." The tribunal deduced that no formal requirements applied to the Power of Attorney.<sup>87</sup> The majority, furthering the *Abaclat* finding, made no reference to the writing requirement of the Power of Attorney, avoiding numerous criticisms regarding its formal validity.

However, it is difficult to understand why the link between Article 25 and Article 36 is established both substantively (through consent) and formally (through the written requirement), whereas the link between Article 36 and Article 1(1) of the Institution Rules departs from the formal requirement of a written vehicle to embody the claimants' consent. This *Ambiente* finding seems too far-fetched, threatening the written requirement of Article 25, the sole formal condition ensuring the integrity of the claimants' consent.

#### 4. The Validity of the Consent

To address the validity of the claimants' consent, it is important to keep in mind the main inquiry of the *Abaclat* tribunal separating jurisdiction from admissibility issues. Once it has been established that the Power of Attorney constituted a clear and unambiguous consent by the claimants, the only question related to the jurisdictional requirement of consent that remains is whether or not this consent was flawed.

The tribunal in *Abaclat* considered that the TFA Mandate Package contained enough information for the claimants to make an informed consent as to whether or not they wished to submit their dispute to ICSID arbitration.<sup>88</sup> The tribunal found

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<sup>86</sup> *Alemanni*, ¶ 37.

<sup>87</sup> *Ambiente*, ¶ 242.

<sup>88</sup> *Abaclat*, ¶ 461.



that even though some of the claimants might not have had “a full picture of what they were doing” when signing the TFA Mandate Package, they were able to acquire it afterward.<sup>89</sup> It then emphasized that the claimants were in a position where they *could have* contemplated the scope of their commitment. In the course of the proceedings, the claimants did not invoke a lack of consent. Therefore, it was considered irrelevant whether or not they *effectively* contemplated the scope of their commitment.<sup>90</sup>

The representation scheme was not considered as having flawed the claimants’ consent.<sup>91</sup> Initiation of the proceedings by White & Case in accordance with the TFA Mandate Package did not impair the validity of the claimants’ consent.<sup>92</sup>

The tribunal in *Alemanni* mentioned its “discomfort” regarding the Special Power of Attorney and the sub-delegation from Mr. Parodi to Mr. Radicati and Mr. Barra.<sup>93</sup> The sub-delegation occurred without informing the claimants, and the letter of authority in favor of Mr. Radicati and Mr. Barra was submitted at the post-hearing stage.<sup>94</sup> However, the tribunal, while recognizing that there has been a “cavalier disregard of niceties that falls below the standards normally expected in ICSID arbitration,”<sup>95</sup> considered that it had not impaired the claimants’ consent and that the absence of such consent would have manifested itself in one way or another.

Regarding the representation scheme common to *Alemanni* and *Ambiente*, the tribunal in the latter case held that NASAM’s mandate did not undermine the tribunal’s proper exercise of its jurisdiction.<sup>96</sup>

Eventually, the tribunals found that the claimants had expressed a clear and unambiguous consent through the mandates of attorney. The claimants’ consent had been flawed neither by the original scheme of representation nor by the circumstances under which the powers of attorney were signed.

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<sup>89</sup> *Id.* ¶ 463.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* ¶ 464.

<sup>92</sup> *Id.* ¶ 465.

<sup>93</sup> *Alemanni*, ¶ 279.

<sup>94</sup> *Id.* ¶ 278.

<sup>95</sup> *Id.* ¶ 279.

<sup>96</sup> *Ambiente*, ¶ 278.



C. Toward a Double Standard to Assess the Parties' Consent

A double standard to assess the parties' consent seems to have emerged that indicates the development of an interpretative presumption in favor of investors' protection.

1. Starting Point: The Development of a Double Standard of Consent

A double standard of consent arises from the tribunals' findings. On the one hand, a very stringent standard applies to the respondent State's consent. If the host State wishes to avoid mass claim proceedings, it has to *explicitly* state it. The respondent State can exclude mass proceedings from the scope of its general consent by notification to the Centre following the procedure set up by Article 25(4) of the ICSID Convention. The respondent State can also exclude mass proceedings from the scope of its special consent by a cautious drafting of the dispute resolution mechanism contained in the BIT.

On the other hand, a presumption in favor of the claimants' consent seems to emerge. The tribunals in *Abaclat*, *Alemanni*, and *Ambiente* obtained the claimants' consent and overcame strong objections against its existence and validity. To do so, the majorities relied on the argument that a "lack of consent would have manifested itself." The fact that the tribunals used such a questionable argument to characterize a crucial jurisdictional requirement is puzzling.

Moreover, the assessment of validity of the claimants' consent is done according to the relevant principles of international law. Reliance upon international law to appraise the claimants' consent allowed the tribunals to depart from the domestic rules that might otherwise have come into play. Use of international law *principles* offers flexibility, whereas domestic *rules* may have submitted consent to more burdensome criteria. Therefore, the use of international law principles favors characterization of the claimants' consent. The arbitral tribunals used all available means to retain the existence and validity of the claimants' consent to the extent that a mere presumption *in favorem* seems to have emerged.

2. Furthering the Analysis: An Interpretative Presumption in Favor of the Investors' Protection

Faced with ambiguity regarding the claimants' consent, the protection of





investors takes precedence. Keeping in mind that consent is the “cornerstone” of investor-State arbitration, it can be assumed that this is not an attempt to weaken this fundamental jurisdictional requirement but a willingness to retain a tribunal’s jurisdiction over a large number of claims. By retaining the tribunals’ jurisdiction over mass claims in the cases at issue, the arbitrators made a choice of profound regulatory importance driven by policy considerations. By doing so, the tribunals furthered the main purpose of the investor-State arbitration system, i.e., offering an effective procedural means to protect substantive rights. The boilerplate asymmetric standard to assess consent that is developed in the Argentinean trilogy is a further building block and a weight-bearing pillar for the development of a system that protects investors.

The tribunals in these cases have established that they had jurisdiction over the claims brought before them. However, in order for the tribunals to hear the cases, they had to determine if the claims were admissible. It is then through the lens of admissibility that the “mass” aspect of the claims had to be examined. In so doing, the most interesting issue is the distinctive methodology developed to address the admissibility of the “mass” aspect of the claims.

## **VI. THE CALL FOR A SPECIFIC METHODOLOGY TO ADDRESS “MASS CLAIMS” ADMISSIBILITY**

The *Abaclat* decision is noteworthy for the methodology developed in order to address the issue of mass claims’ admissibility. From the observation that the conventional instruments are silent regarding the admissibility of mass claims, the tribunal used the opportunity to develop a methodology meant to address the specific issues incurred by the silence of the conventional instruments.

### **A. Starting Point: The Silence of the Conventional Instruments**

In the *Abaclat* case, the tribunal found that the ICSID framework contains no reference to mass proceedings as a possible form of arbitration.<sup>97</sup> Therefore, the tribunal developed an analysis to determine the adequate means to address this silence of the conventional instruments.

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<sup>97</sup> *Abaclat*, ¶ 517.



The *Ambiente* tribunal, on the contrary, did not consider that there was a need to enter the controversy regarding the scope of the ICSID tribunal's power to deal with the adaptations of the ICSID procedural setting.<sup>98</sup>

The *Alemanni* tribunal equally refused to address the procedural implications of the silence of the ICSID framework.<sup>99</sup> The tribunal considered that if a claim is brought before an ICSID tribunal and said tribunal finds that it has jurisdiction, the adjudicative body is under a duty to exercise its jurisdiction.

Although the *Alemanni* and *Ambiente* tribunals addressed neither the silence of the ICSID procedural framework regarding mass proceedings nor the means to address it, those questions cannot be eluded. Moreover, it is worth explaining from where the tribunals' power to adapt the existing proceedings derives.

#### B. *Interpretation of the Silence*

The core question when it comes to the admissibility of mass proceedings is the interpretation of the silence of the conventional instruments.<sup>100</sup> If this is a "qualified silence," it means that the omitted reference was intended, which indicates that the ICSID framework does not allow mass claims to proceed on the merits.<sup>101</sup> If it is a "gap," it means that the silence was unintended and that the tribunal has the power to fill said gap.<sup>102</sup>

To interpret the silence of the conventional framework, two tools of interpretation can be used.<sup>103</sup> The first one resorts to public international law. The second one uses an investor biased approach that also underlies the ICSID framework. The *Abaclat* tribunal in its search for the right solution used a combined approach.

##### 1. The Public International Law Approach

Investor-State arbitration results from a bargaining process between two States. To give effect to the inter-State bargain, arbitral tribunals need to look at the intent

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<sup>98</sup> *Ambiente*, ¶ 169.

<sup>99</sup> *Alemanni*, ¶ 270.

<sup>100</sup> *Abaclat*, ¶ 517.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See VAN HARTEN, *supra* note 56, at 121.



of the sovereign parties. The States' intent is expressed through conventional instruments. According to this reasoning, silence in a conventional instrument should be interpreted consistently with said instrument.<sup>104</sup>

In order to determine whether the silence in the ICSID procedural framework ought to be considered a "qualified silence" or a "gap," deference should be given to the States' intent. The States' intent is expressed through the BIT, the ICSID Convention, and the Institution Rules. Eventually, the arbitral tribunals' analyses that address the silence of the ICSID framework should be conducted in light of the applicable BIT and the ICSID framework.

## 2. The Investor-Friendly Approach

The ICSID system aims to protect foreign investments. In order to further this goal, investor-State arbitration has developed as a regulatory dispute resolution mechanism. Through this mechanism, States' behavior toward investors is regulated, providing investors with substantive and procedural protections.

From an adjudicative point of view, it has given rise to interpretative presumptions in favor of the investor's protection. Those interpretative presumptions are achieved thanks to a "normative construction of investor protection."<sup>105</sup> The norm of investor protection has been erected as such within the ICSID framework. The norm of investor protection has then been elevated to a level that allows it to trump, or at least counterbalance, core concepts such as consent to arbitrate, or parties' procedural rights.

## 3. Seeking the Right Shade: The *Abaclat* Approach

The *Abaclat* tribunal reasoning should be read against the aforementioned theoretical background. The tribunal embraced both the public international law and the investor-friendly approaches.

The *Abaclat* tribunal's reasoning for the silence issue resorted to the public law approach. It found that it would be contrary to the purpose of the BIT and the spirit of the ICSID Convention to interpret the silence as a "qualified silence" categorically

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<sup>104</sup> *Id.* at 132.

<sup>105</sup> *Id.* at 139.



prohibiting mass proceedings.<sup>106</sup> To that extent, it developed different arguments.

First, the tribunal stated that, at the time of conclusion of the ICSID Convention, mass proceedings did not exist,<sup>107</sup> and the drafters could not contemplate them. This argument relates to the international law approach since it deals with the drafters' intent during the States' bargaining process.

Second, the tribunal observed that investments came in different forms. Therefore, the ICSID procedural setting may not be fully adapted to resolve all kinds of disputes arising out of all kinds of investments. However, as long as the investments are protected, they should be granted procedural protection along with substantive protection. There is no standard type of investment; thus there is a need for flexibility in the proceedings. However, the call for flexibility shall not be detrimental to the general principle of due process, and a balance between procedural rights and the interests of each party should be sought. This argument, taking into account the variety of investments and the call for procedural guarantees, relates to the investor-friendly approach.

The *Abaclat* tribunal concluded that the silence of the ICSID Convention regarding the admissibility of mass claims should be interpreted as a "gap." Therefore, it fell within its power to fill it.<sup>108</sup>

C. *The Means to Address the Conventional Silence – The "Gap-filing" Methodology*

To address the silence of the conventional instruments, the *Abaclat* tribunal derives its powers from textual and systemic grounds. However, the discretion allocated by those grounds is not without limits.

1. *The Tribunals' Powers: The Textual Ground*

A tribunal's powers to adapt the ICSID procedural framework are derived from Article 44 of the ICSID Convention and Article 19 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"). Those two provisions work in tandem.

Article 44 of the ICSID Convention, dealing with the issue of silence regarding procedural questions, states:

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<sup>106</sup> *Abaclat*, ¶ 519.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* ¶ 520.



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.

Article 19 of the ICSID Arbitration Rules, dealing with the issue of silence within the context of arbitration proceedings, reads as follows: “The tribunal shall make the orders required for the conduct of the proceedings.”

Reading those two provisions together shows that, in the event of *lacunae*, it is for the arbitral tribunal to provide the necessary procedural adaptations. This technique is known as the “gap-filling” methodology.

## 2. The Tribunals’ Powers: The Systemic Grounds

The self-contained nature of the ICSID system explains the development of the “gap-filling” methodology. First, *lacunae* on procedural matters ought to be resolved by the arbitrators without reference either to the domestic or the international framework. The willingness to untether procedural issues from the domestic and international scheme renders necessary the development of an alternative methodology to address them. This is why the “gap-filling” methodology has been developed. In order to appreciate the breadth of the tribunals’ discretion on procedural matters, an analogy with the applicable law inquiry is relevant. Article 42(1) of the ICSID Convention provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The arbitral tribunals are not bound by either domestic rules nor by international procedural principles when they deal with procedural matters, thereby reflecting the deeply self-contained nature of the system. ICSID proceedings appear to be not only self-contained but also denationalized.<sup>109</sup>

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<sup>109</sup> DOLZER & SCHREUER, *supra* note 11, at 257.



Second, Article 44 of the ICSID Convention and Article 19 of the Arbitration Rules express in broad and general terms the arbitrators' powers regarding procedural adaptations. They both show the wide scope of the adjudicative role the arbitral tribunals are entrusted with in the ICSID field.<sup>110</sup> Once again, the comparison with the applicable law inquiry is relevant; the procedural discretion the arbitrators are entrusted with is enhanced. It is telling that the arbitrators' procedural discretion appears as the strongest expression of their adjudicative mandate as compared to their discretion on applicable law inquiry. The self-contained nature of the system calls for such extended adjudicative powers on procedural matters. However, the discretion the arbitrators are granted does not come without limitations.

### 3. The Limits of the Tribunals' Discretion

Tribunals' discretion in dealing with procedural adaptations is circumscribed by inner and outer limits.

#### (i) The Inner Limits of the Tribunals' Discretion

In order to circumscribe the inner limits of the tribunal's discretion while implementing the "gap-filling" methodology, the *Abaclat* majority developed a threefold inquiry regarding the adequacy of the procedural adaptations. The adaptations should be limited *ad rem*. Moreover, an *in concreto* and *in abstracto* inquiry should lead to the conclusion of their adequacy.

##### a. An *Ad Rem* Limitation of the Adaptations

In the ICSID field, a revision of the Arbitration Rules falls within the exclusive competence of the Administrative Council.<sup>111</sup> An arbitral tribunal cannot modify the existing Arbitration Rules without the parties' consent.<sup>112</sup> It cannot adopt a full set of rules of procedure unless the parties (i) agreed that the Arbitration Rules do not apply and (ii) have not provided another set of rules.<sup>113</sup>

The *Abaclat* award states that a tribunal's power is limited to the filling of gaps left by the ICSID arena "in the specific proceedings at hand."<sup>114</sup> The tribunal explained

<sup>110</sup> See VAN HARTEN, *supra* note 56, at 122.

<sup>111</sup> ICSID Convention, art. 6(1)(c).

<sup>112</sup> *Abaclat*, ¶ 524.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* ¶ 523.



that its role is neither to complete nor to improve the ICSID framework in general but rather to design specific rules to deal with a specific problem arising in a given proceeding.<sup>115</sup> To that extent, the “gap filling” methodology is not an amendment of the existing rules but an adaptation of the rules. The “gap filing” methodology is meant to make a procedure workable within the ICSID framework.

b. An *In Concreto* Inquiry into the Adequacy of the Adaptations

The question remains as to the adequate means to address the procedural issues incurred by the mass aspect of the proceedings. Is the “gap filling” methodology, through an adaptation of the existing Arbitration Rules, adequate or is there a need for a general amendment of the existing Arbitration Rules?

In order to address this question, the *Abaclat* majority divided it into two sub-inquiries. First, it focused on the procedural needs induced by the mass proceedings. Second, it considered whether or not those needs could be adequately addressed through the powers the tribunal derived from Article 44 of the ICSID Convention and Rule 19 of the Arbitration Rules.<sup>116</sup>

The *Abaclat* tribunal found that the procedural needs were related to the conduct of the proceedings. Those procedural needs could be addressed through the powers the tribunal derived from the ICSID procedural field.<sup>117</sup>

c. An *In Abstracto* Inquiry into the Adequacy of the Adaptations

In determining whether the procedural adaptations were adequate, the *Abaclat* tribunal focused on the implications of the adaptations.<sup>118</sup> They were twofold: (i) it would have been impossible to treat each claimant as if it was a sole claimant, and thus some issues would have needed to be examined collectively, and (ii) the parties’ procedural rights might have been affected by the adaptations.<sup>119</sup>

To address the inevitable constraints the adaptations would impose on the parties’

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* ¶ 527.

<sup>117</sup> *Id.* ¶ 534.

<sup>118</sup> *Id.* ¶ 536.

<sup>119</sup> *Id.*





procedural rights, the tribunal used a “balance of interest” test. It considered that the complete denial of justice that would result from a rejection of the claims was a greater evil than the constraints imposed on the parties’ procedural rights.<sup>120</sup> The tribunal therefore concluded that the *in abstracto* inquiry into the adequacy of the adaptations called for the exercise of its discretion to determine procedural matters.

(ii) The Outer Limit of the Tribunal’s Discretion – Prohibition of Serious Departure from a Fundamental Rule of Procedure

The thorough analysis conducted by the *Abaclat* tribunal in taking note of the silence of the conventional instruments characterizes it, in order to ascertain its power and the appropriateness of their implementation, as being of core importance. Indeed, Article 52(1)(d) of the ICSID Convention sets as a ground for annulment of the award a “serious departure from a fundamental rule of procedure.” The seriousness of the departure is ascertained against the material effect on the parties.<sup>121</sup> A rule will be considered fundamental if its violation affects the fairness of the proceedings.<sup>122</sup> Thus, Article 52(1)(d) of the ICSID Convention constitutes the outer limit of a tribunal’s discretion in implementing the “gap-filling” methodology.

As previously explained, necessary adaptations of the procedural framework involve compromises regarding the procedural rights of the parties and due process guarantees. To avoid annulment of the award, the tribunal had to develop an in-depth analysis of the grounds and motives that allowed it to depart from fundamental rules of procedure.

## VII. CONCLUSION

Mass claim proceedings have emerged in the investor-State arbitration system as an appropriate means to address widespread legal harm, and the *Abaclat*, *Ambiente*, and *Alemanni* cases create a new procedural device for “mass proceedings.” That mass proceedings procedure is the heir of multiparty arbitrations and shares common features with mass processes in the public international law field.

In establishing this mass proceedings framework, the *Abaclat* tribunal drew a clear

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<sup>120</sup> *Id.* ¶ 537.

<sup>121</sup> DOLZER & SCHREUER, *supra* note 11, at 283.

<sup>122</sup> *Id.* at 257.



line between jurisdiction and admissibility, thus allowing a rigorous analysis of the procedural issues involved. From a jurisdictional point of view, the tribunal developed asymmetric standards for assessing the parties' consent: a low standard for the claimants and a high standard for the respondent. From an admissibility point a view, the tribunal used the "gap-filling" methodology to address the lack of procedural means to handle mass claims in the ICSID arena.

Moreover, the arbitral tribunals did not engage in "legal genetic engineering," which could ultimately "produce a monster," contrary to the fears set out by the dissenting arbitrator in *Abaclat*.<sup>123</sup> The tribunals rather developed a new procedural device that benefited the whole system because mass proceedings provide effective procedural protection to a wider range of investors.

Fundamentally, the Argentinean trilogy of cases illustrates the two theoretical views of international investment law.<sup>124</sup> The majorities' opinions reflect the liberal internationalist approach, which stands for the proposition that investment law serves private interests in order to enhance the freedom of capital movements. The dissenting opinion in *Abaclat* reflects the sovereigntist approach, which stands for the proposition that investment law should limit States' exposure to mass claims. Looking forward, the resolution of mass claims in international investment treaty arbitration likely lies somewhere between these two approaches.



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<sup>123</sup> *Abaclat*, Dissenting Opinion, ¶ 255.

<sup>124</sup> Stacie I. Strong, *Class, Mass Procedures As A Form of "Regulatory Arbitration" - Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 302 (2013).



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