WHITE & CASE

The Future of Large-Scale Claims in Investment Treaty Arbitration

ITA-ASIL Conference: Mass and Class Claims in Arbitration

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International Mass Claims: Inevitable Effect of Globalization

IBA Legal Practice Division, Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress ¶¶ 4, 13 (2008)

- **Along with the globalization of business streams, the IBA Legal Practice Division recognized in 2008 as "inevitable that … the group of possible claimants who have similar claims may cross borders" in cases of:**
  - Liability for products or services offered on a global basis
  - Mass disasters
  - Human rights violations
- **"Multi-jurisdictional collective redress actions involving claimants and defendants from different countries and legal regimes are inevitable as parties press for broader, and perhaps global, resolutions of collective redress claims."**

Proliferation of Legislation on Collective Redress Litigation

IBA Legal Practice Division, Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress ¶ 12 (2008)

- **"Collective redress legislation was at one time the exclusive domain of the United States, Canada and Australia.**
- **However, it has now found its way on to the legislative agendas in Europe, Asia and South America."**

Europe		Asia	South America
Belgium (2014)	Norway (2008)	China (1991, 2007, 2012)	Argentina (1993, 1994)
Denmark (2005, 2008, 2010)	Poland (2009)	India (2013)	Brazil (1990)
Finland (2007)	Portugal (1995)	Japan (2013)	Chile (2004)
France (1992, pending)	Spain (2001, 2008)	Malaysia (1980)	Colombia (1998)
Germany (2004, 2005, 2007)	Sweden (2003)	New Zealand (proposed)	Guatemala (1961)
Greece (1994, 2007)	UK (1990, 1999, pending)	South Korea (2004)	Mexico (2010)
Italy (2009)		Taiwan (2002)	Peru (1993)
Netherlands (2005)		Thailand (proposed)	

Leading Arbitration Rules Offer Multi-Party Procedures:

- **ICC Rules of Arbitration (2012)**
  - Joinder, consolidation, claims between multiple parties or based on multiple contracts, arbitrator selection
- **LCIA Arbitration Rules (1998)**
  - Joinder, arbitrator selection
- **SCC Arbitration Rules (2010)**
  - Consolidation, arbitrator selection
- **Swiss Rules of International Arbitration (2012)**
  - Joinder, consolidation, arbitrator selection
- **CIETAC Arbitration Rules (2012)**
  - Consolidation, arbitrator selection
- **P.R.I.M.E. Finance Arbitration Rules (2012)**
  - Joinder, *de facto* consolidation, arbitrator selection
- **PCA Arbitration Rules (2012)**
  - Joinder, arbitrator selection

Contractual vs. Investment Treaty Arbitration

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 668-669, 683, 685 (2010)

- ***Stolt-Nielsen v. AnimalFeeds***
  - Agreement to class arbitration cannot be implied from a bilateral, contractual arbitration agreement
    - Parties had stipulated that the private contractual arbitration agreement was "silent" as to whether it permitted or precluded class arbitration
    - It is "clear from … the contractual nature of arbitration that parties may specify with whom they choose to arbitrate their disputes"
    - "Class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."
- **Consent in Investment Treaties**
  - Open-ended consent by host States
    - Host States do not know with whom they will arbitrate
  - Collective arbitration ≠ class arbitration
  - Nature of certain investments implies or necessitates numerosity of investors

Investment Treaty Tribunals Commonly Accept Jurisdiction over Claims of Multiple, Unaffiliated Parties

- ***Goetz v. Burundi*, ICSID Case No. ARB/95/3**
  - BIT claim of six individual Belgian shareholders in a Burundian company
- ***Suez et al. v. Argentina*, ICSID Case No. ARB/03/17**
  - Claim under two BITs of one French and two Spanish shareholders in an Argentine water company
- ***Urbaser et al. v. Argentina*, ICSID Case No. ARB/07/26**
  - BIT claim of two Spanish shareholders in an Argentine water company
- ***OKO Pankki Oyj et al. v. Estonia*, ICSID Case No. ARB/04/6**
  - Claim under two BITs of one German and two Finnish banks, lenders under a loan agreement
- ***Funnekotter et al. v. Zimbabwe*, ICSID Case No. ARB/05/6**
  - BIT claim of 14 unaffiliated Dutch investors in different farms in Zimbabwe

Investment Treaty Tribunals Have Not Raised Claimant Numerosity as a Jurisdictional Issue

- ***Anderson et al. v. Costa Rica*, ICSID Case No. ARB(AF)/07/3**
  - BIT claim of 137 investors in Ponzi scheme
  - Jurisdiction declined for lack of investments "owned in accordance with the laws" of Costa Rica
- ***Bayview Irrigation District et al. v. Mexico*, ICSID Case No. ARB(AF)/05/1**
  - NAFTA Chapter 11 claim of 46 claimants concerning Mexico's water use from border rivers
  - Jurisdiction declined for lack of "investment" in Mexico
- ***Canadian Cattlemen for Free Trade v. United States*, NAFTA/UNCITRAL**
  - NAFTA Chapter 11 claim of 109 claimants concerning US ban of Canadian cattle and beef after discovery of bovine spongiform encephalopathy (BSE)
  - Jurisdiction declined for lack of "investment" in United States

Typology

IBA Legal Practice Division, Guidelines for Recognising and Enforcing Foreign Judgments for Collective Redress ¶ 12 (2008);
Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/ 07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 483
(citing S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 501-508 (2010))

- **IBA Guidelines:**
  - "Actions for collective redress can take many forms, including
    - multi-party actions,
    - Group litigation,
    - representative litigation or
    - Class actions."
- ***Abaclat*:**
  - "It is impossible to list all the various types of collective proceedings existing worldwide within the context of court litigation or arbitration. A certain categorization into two main types of collective proceedings is, however, possible:
    - Representative proceedings …
    - Aggregate proceedings"

Representative Proceedings

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 483 (citing S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 501-508 (2010))

- ***Abaclat*:**
  - "Whilst forms of representative relief vary greatly, they have in common that a high number of claims arise as one single action. The mechanism in which these claims are brought together vary and can be categorized by reference to their approach to three different issues:
    i. the nature of the claim, with regard to which representative relief can take the form of a purely procedural device available regardless of the type of substantive law at issue, or be limited to certain fields of law (e.g., consumer law, antitrust, etc.);
    ii. the nature of the representative, who can be a private named individual on behalf of a large group of unnamed others or an approved intermediary entity on behalf of all injured individuals;
    iii. the nature of the relief, which can take the form of individual damages or representative relief (e.g., declaratory or injunctive relief)."

Aggregate Proceedings

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 483 (citing S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493, 501-508 (2010))

- ***Abaclat*:**
  - "Some jurisdictions address collective injuries through judicial aggregation of claims, such as, for example, the English Group Litigation Order (GLO), which results in the creation of a judicial registry of individual claims that arise out of the same fact pattern, and then are assigned to the same judge for management purposes.
  - Whilst this sort of collective proceeding is relatively uncontroversial in the context of court proceedings, where courts can simply apply pre-existing rules of procedure regarding joinder, intervention or consolidation to create the necessary procedure, the situation is more delicate in the context of arbitration.
  - Although certain principles and mechanisms have developed through the concept of 'multiparty and multicontract arbitrations,' typically involving a handful of parties, many issues remain where the number of parties reaches the 'mass' level."

“Mass Proceedings”

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 480

- ***Abaclat*:**
  - “It should be stressed that there is no uniform terminology concerning the various kinds of proceedings involving a high number of parties, and that various jurisdictions, courts and authors refer to different terms and meanings. For the sake of simplicity and clarity, the Tribunal will refer to ‘mass proceedings’ as a qualification for the present proceedings, whereby this term should be understood as 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.”

Common Rationale of Collective Proceedings

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 484 (citing S.I. Strong, *From Class to Collective: The De-Americanization of Class Arbitration*, 26 ARB. INT'L 493 (2010))

- ***Abaclat*:**

  "… although various legal systems have developed certain types of collective proceedings, their scope, modalities and effects remain different from one jurisdiction to another, and that there is, as of today, no harmonized approach towards such collective proceedings. Nevertheless, it appears that all these various forms of collective proceedings share a common 'raison d'être': Collective proceedings emerged where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law; in other words, collective proceedings were seen as necessary, where the absence of such mechanism would *de facto* have resulted in depriving the claimants of their substantive rights due to the lack of appropriate mechanism."

Abaclat: Background

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 313, 486

- **Claimants: 60,000 Italian holders of Argentine sovereign bonds**
  - Each Claimant is an individually-named party to the arbitration
  - Each Claimant executed a written consent to ICSID arbitration & POA/delegation of authority
  - Each Claimant provided individual information and documentation
- **Claims for violations of Argentina-Italy Bilateral Investment Treaty**
  - Based on "the acts of Argentina preceding and following its public default in December 2001, and in particular the way it consulted with its creditors, the way it reached a decision on how to deal with its foreign debt, and the nature, scope and effects on Claimants' security entitlements of the legislation and regulations it promulgated in implementation of its decision."
- **ICSID Tribunal affirmed jurisdiction and admissibility**
  - 280-page Decision on Jurisdiction and Admissibility (2011)

Bondholders Pursued Legal Action Against Argentina

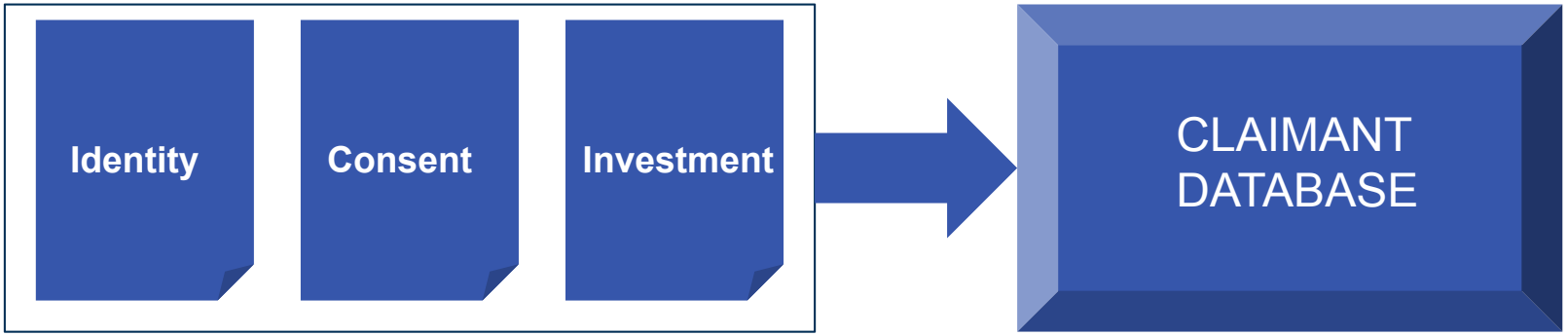
Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 82

- **130+ lawsuits in New York, US$3.3 billion+**
- **470+ lawsuits in Germany, EUR 106 million+**
- **3 ICSID arbitrations based on BIT, led by *Abaclat*:**
  - Pursue treaty rights:
    - *Abaclat* case at ICSID brought by tens of thousands of Italian bondholders
    - Claims for expropriation, lack of fair and equitable treatment, national treatment, most-favored nation treatment, unreasonable or discriminatory treatment
    - Total claims of approximately US$2.5 billion
  - Preserve contractual rights:
    - Group actions in SDNY by *Abaclat* claimants, stayed pending arbitration
    - Prescription letters

Claimants Consented to Arbitrate

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 453, 454, 486

- **Not a Class Action**
  - "[T]he present proceedings cannot be compared to US class-actions, in which a representative initiates a proceeding in the name of a class composed of an undetermined number of unidentified claimants. In the present arbitration, the number of Claimants is established, and so is their identity."
- **Individual Consents**
  - The consent forms submitted by Claimants contain "a clear and unambiguous expression of irrevocable consent" to ICSID jurisdiction
  - "The argument of a possible falsification of certain signatures is irrelevant at this stage."
- **Individual Data and Documentation**



Argentina's Consent to ICSID Jurisdiction Includes Claims Presented by Multiple Claimants in a Single Proceeding

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 489-490

- **Jurisdiction does not require specific consent to the form of collective proceedings:**
  - "Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could loose such jurisdiction where the number of Claimants outgrows a certain threshold. First of all, what is the relevant threshold? And second, can the Tribunal really 'loose' a jurisdiction it has when looking at Claimants individually?
  - ... where the BIT covers investments, such as bonds, which are susceptible of involving in the context of the same investment a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration. In such cases, consent to ICSID arbitration must be considered to cover the form of arbitration necessary to give efficient protection and remedy to the investors and their investments, including arbitration in the form of collective proceedings."

No Specific Consent Needed to "Mass" Aspect

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 491-492

- ***Abaclat***:
  - "the relevant question is not 'has Argentina consented to the mass proceedings?', but rather 'can an ICSID arbitration be conducted in the form of 'mass proceedings' considering that this would require an adaptation and/or modification by the Tribunal of certain procedural rules provided for under the current ICSID framework?' If the answer is in the affirmative, then Argentina's consent to ICSID arbitration includes such mass aspect. If the answer is in the negative, then ICSID arbitration is not possible, not because Argentina did not consent thereto but because mass claims as the ones at stake are not possible under the current ICSID framework."
  - "Consequently, … the 'mass' aspect of the present proceedings relates to the modalities and implementation of the ICSID proceedings and not to the question whether Respondent consented to ICSID arbitration. Therefore, it relates to the question of admissibility and not to the question of jurisdiction."

Plurality of Claimants is Not an Obstacle to Jurisdiction

Ambiente Ufficio S.p.A. et al. v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013) ¶ 141

- ***Ambiente Ufficio*:**
  - "In cases involving a plurality of claimants where the arbitral tribunals asserted their jurisdiction, the tribunals did not raise any jurisdictional doubts as to the existence of a multitude of claimants in the proceedings. The Respondent was not able to point to one single case, apart from the present one and its 'sister cases', where the respondent Government, let alone the deciding tribunal, would have considered the mere fact of several claimants instituting arbitral proceedings jointly an obstacle to jurisdiction, unless the respondent Government gives it specific consent to do so. Accordingly, in the present Tribunal's opinion, it is evident that multi-party arbitration is a generally accepted practice in ICSID arbitration, and in the arbitral practice beyond that, and that the institution of multi-party proceedings therefore does not require any consent on the part of the respondent Government beyond the general requirements of consent to arbitration."

Procedural Challenges to be Considered by Counsel

- **General Considerations Regarding Procedural Rights**
- **Structuring the Arbitral Procedure**
- **Proving Claimants' Nationality and Ownership of Investments**
- **Claimant Documentation and Information**
- **Use of an Electronic Database**
- **Confidentiality**
- **Claimant Withdrawal**
- **Verification of Claimant Documentation**

General Considerations Regarding Procedural Rights

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 519

- ***Abaclat*: Balancing the Parties' Procedural Rights & Interests**
  - "where an investment … shows certain particular characteristics, these characteristics may influence the way of conducting the arbitration, and lead the Tribunal to make certain adaptations to the standard procedure in order to give effect to the choice of ICSID arbitration. … However, it is understood that adaptations made to the standard procedure must be done in consideration of the general principle of due process and must seek a balance between procedural rights and interests of each party."

Structuring the Arbitral Procedure: in General

- **First Phase: general jurisdictional issues common to all Claimants**
  - Respondent may resist
  - Tribunal Order may be needed
  - Claimants may need to raise jurisdictional issues in order to have the Tribunal dispose of them
- **Second Phase: general liability and damages issues that are common to all Claimants**
- **Third Phase: individualized jurisdictional, liability and damages issues**
  - Consider running in parallel with second phase
  - May involve independent verification of Claimant data and documentation
    - Well-functioning database is critical

Abaclat: Timetable of Phase 2 (as of Nov. 2012)

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Orders No. 12 (July 7, 2012) & No. 15 (Nov. 20, 2012), Annex 2

- **Phase 1**
  - Jurisdiction and Admissibility: general issues
  - Hearing & Decision
- **Phase 2A**
  - Merits issues
  - Memorial & Counter-Memorial
- **Phase 2B**
  - Verification of Claimants' database
  - Document exchange
- **Phase 2C**
  - Reply & Rejoinder
  - Hearing & Decision
- **Phase 3-TBD**

		DATE	PARTY	DESCRIPTION	REFERENCE
2A	1.	30 Sept 12 (2 months)	Claimants	Claimants' Memorial on Phase 2 (CL MP2)	PO No. 12 para 2(i) & PO No. 13 para 67(B)(iii)
	2.	23 Dec 12 (2 months)	Respondent	Respondent's Memorial on Phase 2 (RSP MP2)	PO No. 13 para 67(B)(iii) & PO No. 14 para 1
2B	3.	23 Dec 2012	External Expert(s)	Submission of the Expert's Work Proposal	PO No. 15, para 23
	4.	4 Jan 2013	Claimants & Respondent	Submission of Comments to Expert's Proposal	PO No. 15, para 25
	5.	7 Jan 2013	Requesting Party	Request for Document Production in form of Redfern Schedule	PO No. 12, para 5 & PO No. 15 para 46
	6.	14 Jan 2013	Tribunal	Decision on the Expert's Proposal	PO No. 15, para 25
	7.	21 Jan 2013 (2 weeks)	Producing/ Objecting Party	Production of non-contentious documents and filing of objections concerning contentious document requests	PO No. 12, para 5 & PO No. 15 para 46
	8.	28 Jan 2013	Claimants & Respondent	Submission of Summary & Documents to Expert (provided his Work Proposal is confirmed)	PO No. 15, para 29
	9.	4 Feb 2013 (2 weeks)	Requesting Party	Answer to objections concerning contentious document requests	PO No. 12, para 5 & PO No. 15 para 46
	10.	18 Feb 2013 (2 weeks)	Objecting Party	Reply to answer to the objections concerning contentious document requests	PO No. 12, para 5 & PO No. 15 para 46
	11.	11 Mar 2013 (3 weeks)	Tribunal	Decision on Document Production Requests	PO No. 12, para 5 & PO No. 15 para 46
	12.	15 Mar 2013	External Expert(s)	Draft Report on the verification of Claimants' database	PO No. 15, para 33
	13.	25 March 2013	Claimants & Respondent	Production of documents according to the Tribunal's decision	PO No. 12, para 5 & PO No. 15 para 46
	14.	15 Apr 2013	Claimants & Respondent	Comments on Draft Report on the verification of Claimants' database	PO No. 15, para 36
	15.	30 Apr 2013	External Expert	Final Report on the verification of Claimants' database (Database Verification Report)	PO No. 15, para 37
2C	16.	1 Jul 2013 (2 months)	Claimants	Reply on Respondent's Memorial on Phase 2 (CL ReplyMP2)	PO No. 12, para 6 & PO No. 15, paras - 43-44
	17.	2 Sept 2013 (2 months)	Respondent	Rejoinder on Claimants' Reply Memorial on Phase 2 (RSP RejMP2)	PO No. 12, para 6 & PO No. 15, paras 43-44
	18.	16 Sept 2013 (TBC)	Claimants	Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any	PO No. 12, para 6 & PO No. 15, para 45
	19.	Oct/Nov 2013 TBC	ALL	Hearing on Phase 2 (Hearing P2)	PO No. 12, para 8 & PO No. 15, para 46
	20.	TBD	Claimants & Respondent	Post-Hearing Briefs	PO No. 12, para 9
	21.	TBD	Tribunal	Decision on Phase 2	

Abaclat: Overall Timeline

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Details

- **2006-2008** **Preliminary Steps**
  - Request for Arbitration
  - Registration of Request
  - Constitution of Tribunal and First Session
- **2008-2010** **Jurisdictional Phase**
- **2011-2012** **Decision on Jurisdiction and Aftermath**
  - Argentina's Provisional Measures Rejected
  - Argentina's Arbitrator Challenges
  - Argentina's Arbitrator Resigns
  - Argentina's Request for Annulment
  - Argentina Appoints Arbitrator; Reconstitution of Tribunal
- **2012-2014** **Merits/Damages and Individual Review Phase**
  - Procedural Hearing
  - Provisional Measures
  - Briefing and Document Exchange
  - Verification Expert Review and Report
  - Argentina's Arbitrator Challenges
  - Hearing in June 2014

Proving Claimants' Nationality and Ownership of Investments

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 529-530

- ***Abaclat***:
  - "Notwithstanding the high number of Claimants involved, the Tribunal must examine not only the elements necessary to determine its jurisdiction (i.e., the nationality of the Claimants, their status of investor and the existence of their investment, etc.), but also those necessary to establish Claimants' claims and relating to the merits of the case …."
  - "[A]daptations to hear the present case collectively would concern not that much the object of the examination, but rather (i) the way the Tribunal will conduct such examination, and/or (ii) the way Claimants are represented."
  - "With regard to the examination, it is undeniable that the Tribunal will not be in a position to examine all elements and related documents in the same way as if there were only a handful of Claimants. In this respect, the Tribunal would need to implement mechanisms allowing a simplified verification of evidentiary material, while this simplification can concern either the depth of examination of a document (e.g. accepting a scanned copy of an ID document instead of an original), or the number of evidentiary documents to be examined, and if so their selection process (i.e. random selection of samples instead of a serial examination of each document)."

Claimant Documentation and Information

- **Collect from each Claimant:**
  - Originally signed consent
  - Originally signed POA
  - Originally signed delegation of authority to an agent to coordinate with Claimants and counsel
  - Proof of ownership of investment
  - Proof of nationality at relevant points in time
  - Originally signed attestation that not a dual national of host State
  - Originally signed questionnaire covering all other relevant information
  - Any other proof that may be required
- **Hard copies and electronic copies**

Claimant Documentation: Collected Hard Copies

Use of an Electronic Database

- **Need a reliable provider**
  - Create a customized database with appropriate functionality
  - Input Claimant data and scan documents
  - Manage the Claimant data, including changes over time
- **Content**
  - Searchable scans of original documentation
  - Claimant data derived from documents
    - Claimant identification data
    - Ownership data
    - Bond data
- **Access**
  - Online, password-protected
  - Compartmentalized, by phase of the arbitration
  - Ability to export certain data sets for submission with Request for Arbitration

Submission of Claimant Information and Documentation

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 1-2, 592, 679

- **Annexes to Request for Arbitration:**
  - Annexes A-C: Claimants' names and addresses
  - Annexes D-E: POAs, delegation of authority, ownership documentation
  - Annexes K-L: Updates to Claimant information
    - Formats: Online, SQL, Access, DVDs, Excel, Pdf
- **Tribunal:**
  - "the Tribunal sees no reason why the Annexes and the information contained therein should – as a matter of principle - be deemed unmanageable or unreliable. At this stage of the proceedings it is sufficient to note that the Annexes appear to contain all the information required under Article 36 ICSID Convention and Rules 1 *et seq*. ICSID Institution Rules. Further, in conjunction with the online and the Excel database reproducing the information contained in the Annexes, such information is presented in a way sufficiently manageable for the examination of Claimant specific information."

Confidentiality

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Jan. 27, 2010) ¶¶ 131-133

- **Tribunal ordered confidentiality restrictions as to personal data as a condition to Respondent's access to Claimants' online Database**
  - ICSID Convention and Rules do not necessarily protect confidentiality of personal data
  - EU and Italian law obligate the (Italian) controller of the Database to prevent
    - Unauthorized access to personal data and
    - Processing of the data inconsistent with the purpose of its collection
- **Restrictions:**
  - Access only by "Authorized Persons"
  - Read-only access (no changes)
  - Use of "Confidential Information" only for purposes of the arbitration
  - Obligation to keep "Confidential Information" secure and to ensure compliance

Claimant Withdrawals

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 592, 613-640

- **Approximately 120,000 Claimants have withdrawn since Registration**
  - Argentina's 2010 Exchange Offer
  - Other reasons
- **Decision on Jurisdiction and Admissibility:**
  - Granted discontinuance (ICSID Arbitration Rule 44) as to withdrawn Claimants
  - Under "acceptable" conditions agreed by Respondent
    - "Full and final" character of withdrawal
    - Cost allocation: withdrawn Claimants and Respondent share arbitration costs, and each bear their own legal costs

Update and Correction of Claimant Information

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 677

- **Decision on Jurisdiction and Admissibility:**
  - "To the extent that the Tribunal has found that the … withdrawal of Claimants was admissible …, changes to the information relating to the identity of … withdrawn Claimants is admissible under Rule 25 ICSID Arbitration Rules."
  - "Changes and corrections to the contact information of some Claimants and/or to other supporting information are further also admissible under Rule 25 ICSID Arbitration Rules."
- **ICSID Arbitration Rule 25:**
  - "An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered."
- **Procedural Orders Nos. 13, 19, 22:**
  - Guidance for database updates and corrections

Verification of Claimant Documentation

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Procedural Order No. 15 (Nov. 20, 2012) ¶¶ 18, 19, 21; Procedural Order No. 17 (Feb. 8, 2013) ¶¶ 22, 25

- **Tribunal appointed independent expert for Database Verification**
  - "to examine and verify the information contained in Claimants' Database:"
    - Nationality of natural persons on September 14, 2006 and February 7, 2007
      - Specify cases of dual nationality
    - Domicile of natural persons prior to purchase date
    - Place, law and form of incorporation of juridical entities on September 14, 2006
    - Purchase date
  - Particular attention to whether:
    - "comprehensive, i.e., sufficient to make the factual determinations"
    - "organized in a manageable and easily searchable way, which allow a reliable verification"
    - "any inconsistencies, discrepancies or any duplication or any vice affecting Claimants' Database or the documents themselves," including signatures
    - "any particular difficulty … due to the design or functioning of [the] Database"

Sampling vs. Full Review

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶¶ 665-666; Procedural Order No. 17 (Feb. 8, 2013) ¶¶ 8, 25

- **Tribunal contemplated sampling**
  - "the present case involves a number of Claimants, which makes it *de facto* impossible to deal with all them *seriatim*. Based thereon, as well as on the homogeneity of the claims …, the Tribunal considers that it has the power to deal with the present proceedings in the form of collective proceedings as the Tribunal's method of examination…."
  - "During the Hearing the Parties and the Tribunal briefly discussed so-called 'sampling procedure,' also referred to sometimes as 'bell weather proceedings,' 'pilot case proceedings,' etc. The Tribunal contemplates the possibility to resort to such form of collective proceedings in order to deal with certain aspects of the present case."
- **Expert proposed sampling of 1,060 claims of natural persons**
  - Based on initial review of 50 claims by a statistician
- **Tribunal decided: full review**
  - "Respondent objects to any type of sampling or statistical analysis as basis for the verification of the Database and requests to be given the right to defend itself against each claim and claimant individually."

Final Verification Report upon Full Review

TFA Press Release (Oct. 1, 2013), *available at* http://www.tfargentina.it/download/TFA%20Comunicato%201%20ottobre%202013_eng.pdf

- **Proof of Nationality and Domicile**
  - "For the vast majority of the claims of natural persons, the documents with respect to the nationality of the Claimants and the related information contained in the documents are present in the Database"
  - With regard to nearly every juridical entity "the relevant documents were found ... and all the information relating to the documents is contained in the [Database]"
  - "For the vast majority of the claims, the documents concerning domicile and the information contained in these documents are present"
- **Proof of Individual Claims**
  - The vast majority of Claimants submitted relevant information
- **Database**
  - "Designed and maintained in accordance with good database practice"
  - "The information contained in the Claimants' Database and the documents relating thereto are comprehensive and are organized in a way which allows a reliable verification of the information in the Claimants' Database against the documents on which this information is based"

“Mass Claims” Under Other Investment Treaties?

- **Approximately 3,000 investment protection treaties in force**
  - BITs, FTAs and other multilateral treaties with investment chapters
- **Most treaties contain broad definitions of protected “investments”**
  - “every kind of asset”
  - Covering bonds, debt instruments and securities
    - Often mentioned expressly
- **Most treaties contain host State’s advance offer of consent to international arbitration**
  - of “disputes”
  - with “investors”

Key Questions to Consider

Abaclat et al. v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011) ¶ 541

- **Specific treaty language re: arbitral jurisdiction and consent**
- **Homogeneity ("4H"):**
  - "whether Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by [the host State] of homogeneous obligations provided for in the BIT."
- **Whether the nature of the investment requires collective relief for effective protection**
  - Is a cheaper, simpler remedy available?
  - Effort and costs required vs. expected outcome