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## A Modest Proposal For Preventing Multipartite Arbitrations From Being A Burden To The Parties And For Making Them Beneficial To The Parties

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# ARTICLES

## A MODEST PROPOSAL FOR PREVENTING MULTIPARTITE ARBITRATIONS FROM BEING A BURDEN TO THE PARTIES AND FOR MAKING THEM BENEFICIAL TO THE PARTIES

ALEXIS MARTINEZ\* & ROSTISLAV PEKAR\*\*

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### INTRODUCTION

The recent increase in so-called “mass” investment treaty claims involving Argentina, the Czech Republic, and Spain put multipartite arbitration in the spotlight. Specifically, considerable attention has been

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dedicated to whether dozens, if not thousands, of claimants should be permitted to bring their claim in one set of proceedings when a single host-State is involved.

While investment arbitration involving several claimants is common and considered *de facto* acceptable,<sup>1</sup> the question of whether a very high number of claimants can bring their claims together has not been asked or debated until recently. Strikingly, the question of whether such disputes *should* necessarily be litigated together has not yet been given the same importance.

In this paper, the authors consider arbitral practice in respect of multipartite arbitration, but also dedicate special focus to the factual and legal circumstances that may arise to alter whether it is efficient and fair to continue a multipartite arbitration. We will show that, in certain complex circumstances, this is not always the case.

In doing so, the authors focus on the three common scenarios that give rise to multipartite arbitration: a parent company and an investment vehicle as joint claimants, investors in the same investment as joint claimants, and investors in different investments as joint claimants.

The authors conclude by recommending that, in multipartite proceedings, tribunals consider carefully whether to hold a separate phase during which it will be debated and decided whether, and if so, how, proceedings should be consolidated.

## II. WHERE THE PARENT COMPANY AND THE INVESTMENT VEHICLE ARE JOINT CLAIMANTS

### A. *Arbitral Practice*

This situation commonly arises in circumstance where an investment vehicle brings a claim, together with its parent company, and wishes to invoke the nationality of the latter. This is directly envisaged at Article 25(2)(b) of the International Centre for Settlement of Investment Disputes (“ICSID”) Convention, which refers to the possibility that “because of foreign control,” the parties to an investment treaty agree to treat a legal person as “a national of another Contracting State for the purposes of this Convention.”<sup>2</sup> Numerous investment treaties contain such provisions, and

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1. Christoph H. Schreuer ET AL., THE ICSID CONVENTION: A COMMENTARY, Article 25, ¶¶ 277–82 (2d ed. 2009); *see also* HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 406 (1968) (quoting the British expert, Mr. P.J. Allot, who considered implicit that “there might will be more than two [parties to a dispute], as other provisions of the draft seem to admit.”).

2. ICSID Convention art. 25(2)(b), Apr. 10, 2006.

these are frequently invoked in ICSID and other types of investment treaty arbitration.

For instance, in *MTD Equity v. Chile*,<sup>3</sup> MTD Equity was the 100% owner of MTD Chile, a company organized under the laws of Chile.<sup>4</sup> MTD Chile could therefore avail itself of the nationality of its parent company because such a purpose was directly envisaged in Article 6(2) of the Chile–Malaysia bilateral investment treaty.<sup>5</sup>

As the above example illustrates, it is uncontroversial that, in the presence of adequate treaty language, there are no bars to a parent company and its investment vehicle bringing a claim jointly against the host–State.

### B. Practical Considerations

At first glance, no issue could arise from the parent company and the investment vehicle bringing the claim simultaneously. Indeed, one might think it makes little difference whether the parent company, the investment vehicle, or both entities bring the claim.

However, various circumstances may arise in which the investment vehicle does not have the same legal rights as its parent company under investment treaty law. This is particularly the case when considering the right to fair and equitable treatment (“FET”), which is commonly set out in investment treaties.<sup>6</sup>

A key determinant of the content of the standard is the legitimate expectation of the investor at the time of investment. Broadly defining the standard, the ICSID Tribunal in *Técnicas Medioambientales Tecmed v. Mexico* stated that the FET standard “requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”<sup>7</sup> In modern investment treaty arbitrations, whether or not the investor could, at the time of the investment, legitimately expect certain actions of the host–State has thus become a crucial determination on which the outcome of the arbitration often depends.

However, consider the following hypothetical facts: domestic nationals set up Company A, which massively invests into the exploration of natural resources. The exploration is successful, and Company A starts producing.

3. *MTD Equity Sdn. Bhd. v. Chile*, ICSID Case No. ARB/01/7, Award, (May 25, 2004).

4. *Id.* ¶ 94

5. *Id.*

6. See, e.g., 2012 U.S. Model Bilateral Investment Treaty, Article 15; Energy Charter Treaty, Article 10(1).

7. *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003).

At that moment, the original owners sell fifty-one percent of Company A to a foreign investor. The foreign investor does not have Company A make any additional investments. It just purchases the fifty-one percent holding.

An investment dispute arises and the foreign investor and Company A are both claimants. The FET standard undoubtedly protects the legitimate expectations that the investor had when it purchased the fifty-one percent holding in Company A. The question is, though, whether Company A has the same legitimate expectations and if so, whether they are protected by the FET standard.

Company A made massive investments, but it was not an “investor” within the meaning of the applicable investment treaty at that time because it was domestically owned. Should Company A be able to rely on legitimate expectations that it had at that time?

In a similar vein, Company A became a deemed foreign investor only when the “real” foreign investor bought fifty-one percent of its shares, but Company A did not make any investment at that time. Its stock changed hands, but nothing more happened. Should Company A be able to rely to the legitimate expectations that it had at that moment, even though it did not make any investments?

These are very important questions because they may result in the disposition of forty-nine percent of the overall claim.

In the authors’ view, this simple example illustrates that when assessing the legitimate expectations of the claimants in circumstances where a parent company and the investment vehicle are joint claimants, a Tribunal should carefully distinguish between the expectations of the parent company and those of its investment vehicle. As the two entities may have different histories and interactions with the host-State, it may follow that the parent company and the investment vehicle have distinct legitimate expectations. From such differences would necessarily arise different legal protections under the fair and equitable standard.

### III. WHERE INVESTORS IN THE SAME INVESTMENT ARE JOINT CLAIMANTS

#### A. *Arbitral Practice*

It is also common for claims to be brought jointly against the same host-State but under different investment treaties. For example, in the case of *Goetz v. Burundi*, six shareholders instituted proceedings jointly.<sup>8</sup> The Tribunal upheld its jurisdiction.<sup>9</sup> Likewise, in *Klöckner v. Cameroon*, Klöckner and two of its subsidiaries jointly claimed against Cameroon in

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8. *Goetz v. Burundi*, ICSID Case No. ARB/95/3, Award, ¶ 18 (Feb. 10, 1999).

9. *Id.* ¶¶ 86–89.

respect of the same investment, and the Tribunal upheld its jurisdiction.<sup>10</sup> It is reported that, in both cases, the host-State did not contest jurisdiction on that ground.<sup>11</sup>

However, in *Guaracachi America, Inc. v. Bolivia*, Bolivia objected to multipartite arbitration on the ground that its silence did not constitute consent. The case involved claims by Guaracachi America, Inc. and its subsidiary in respect of the same investment but under two different bilateral investment treaties.<sup>12</sup> The Tribunal laconically rejected Bolivia's objection, agreeing with an earlier decision that "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."<sup>13</sup>

Interestingly, in *Alasdair v. Costa Rica*, 137 investors brought a claim against Costa Rica under at least ten investment treaties on the ground that the host-State did not sufficiently protect their deposits in a private scheme.<sup>14</sup> Unfortunately, the issue of multipartite arbitration was not considered because the Tribunal declined jurisdiction on the ground that there was no investment in accordance with the law of Costa Rica.<sup>15</sup>

A crucial distinction, however, must be made in such circumstances between proceedings under the ICSID Rules (both the Arbitration Rules and the Additional Facility Arbitration Rules) and other arbitration rules, and in particular the UNCITRAL Arbitration Rules.

In ICSID procedure, it is the practice of the Secretary-General to register disputes as part of a single set of proceedings when several claimants file a single request for arbitration.<sup>16</sup> Perhaps as a result, the *de facto* practice is

10. Klöckner Industrie-Anlagen GmbH v. Cameroon, ICSID Case No. ARB/81/2, Award, 21 October 1983.

11. See *Alemanni v. Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction, ¶285 (Nov. 17 2014) (where the Tribunal noted that it appeared that the Tribunals in these cases appeared to have received "the particular assent of both parties ad casum" to consolidation).

12. *Guaracachi Am., Inc. v. Bolivia*, PCA Case No. 2011-17, Award, ¶ 3, 5 (Jan. 31 2014) (noting reliance on the United States-Bolivia Bilateral Investment Treaty and the United Kingdom-Bolivia Bilateral Investment Treaty).

13. *Id.* ¶¶ 341-43 (quoting *Ambiente Ufficio S.P.A. v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 141 (Feb. 8 2013)) (stating that the silence of a particular provision does not limit the scope of consent already given).

14. *Anderson v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, ¶¶ 2-3 (May 19, 2010).

15. *Id.* ¶ 59.

16. Christoph H. Schreuer ET AL., *THE ICSID CONVENTION: A COMMENTARY*, Article 25, ¶ 277 (2d ed. 2009).

that the host-State accepts that it is bound by the registration. Indeed, as shown by the ICSID cases summarized above, challenges to the jurisdiction of the Tribunal on the ground that distinct shareholders in the same investment cannot bring their claims are rare and, so far, unsuccessful.<sup>17</sup>

The UNCITRAL Arbitration Rules, in contrast, do not require an administrator to register a request.<sup>18</sup> A Notice of Arbitration must be sent to the opposing party.<sup>19</sup> Consequently, if that party wishes object to any form of consolidation, it might respond to that effect.<sup>20</sup> Further, to make its intention unequivocal, that party might appoint a different co-arbitrator in respect of each set of claims brought by a claimant.<sup>21</sup>

This was the course of action followed by the Czech Republic in respect of the claims filed against it in 2013.<sup>22</sup> The claims followed changes in its legislation that affected photovoltaic power producers.<sup>23</sup> Specifically, faced with claims brought under multiple investment treaties by multiple claimants with investments in different operations, the Czech Republic agreed to the consolidation of the claims that involved the same investment operation and the same investment treaties.<sup>24</sup> For those claims that did not, however, the Czech Republic objected to consolidation, and appointed a different arbitrator in each set of claims.<sup>25</sup>

One group of claimants objected to the Czech Republic's response and asked the Secretary-General of the Permanent Court of Arbitration to

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17. It is, however, accepted that such challenges can be brought, as ICSID Institution Rule 7(e) indeed requires the Secretary-General, when sending the Notice of Registration, to remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission or Arbitral Tribunal in regard to jurisdiction.

18. See generally *UNCITRAL Arbitration Rules*, UNCITRAL, <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-2013/UNCITRALArbitration-Rules-2013-e.pdf> (last revised 2013).

19. See *id.* art. 3(1).

20. See *id.* art. 4(1).

21. See generally *id.* art. 9.

22. See e.g., Press Release, Ránana Solar, IPVIC: Solar Arbitration Commencing Today (May 9, 2013) (on file at photovoltaic power producers) (announcing that eight international investors filed a notice against the Czech Republic).

23. See e.g., *id.* (stating that the claims alleged severe financial damages caused by the introduction of "retroactive and discriminatory measures, such as a solar levy of twenty-six percent on the revenues of solar installations").

24. See Luke Eric Peterson, *Following PCA Decision, Czech Republic Thwarts Move by Solar Investors to Sue in Single Arbitral Proceeding; Meanwhile Spain Sees New Solar Claim at ICSID*, Invest. Arb. R. (Jan 1, 2014), <http://www.iareporter.com/articles/following-pca-decision-czech-republic-thwarts-move-by-solar-investors-to-sue-in-single-arbitral-proceeding-meanwhile-spain-sees-new-solar-claim-at-icsid/>

25. See *id.*

designate an appointing authority under the UNCITRAL Arbitration Rules to appoint an arbitrator in lieu of the arbitrators selected by the Czech Republic.<sup>26</sup> In other words, these claimants sought to force the consolidation of their claims.

The Secretary-General refused to designate an appointing authority, noting that the purpose of such designation is to safeguard the constitution of an arbitral tribunal when, for example, one party fails to appoint the second arbitrator or when an agreement cannot be reached on the appointment of a presiding arbitrator.<sup>27</sup> As, *prima facie*, the Czech Republic had actively participated in a timely manner by appointing an arbitrator, the Secretary-General concluded that no vacancy existed to justify an intervention to facilitate the constitution of an arbitral tribunal.<sup>28</sup> As a consequence, the arbitrations proceeded together where the Czech Republic had agreed to consolidate, and separately where the host-State had not.

In sum, it is easier for an investor to consolidate proceedings where the rules provide for registration by an administrative authority. In contrast, it is easier for a host-State to oppose joint claims by investors where the rules afford the respondent the opportunity to appoint an arbitrator prior to registration of the case.

### *B. Practical Considerations*

The potential complexities that arise from having several shareholders bring together claims in the same investment are manifold.

The complexities described above concerning the fair and equitable treatment standard, which is in part premised on legitimate expectations, also arise. However, the differences in legal protections may be even more intricate because the claimants will likely have different backgrounds, different negotiation histories with the host-State, different investment terms, a different investment timeline, and may bring their claims under different instruments.

For example, it could very well be the case that one claimant is an experienced corporation that negotiated specific protections with the host-State and agreed to specific written investment terms, while the other party might be a high risk speculative fund that purchased the funds years later at a price that was discounted because the investment climate in the host-State deteriorated significantly. It is apparent that these two claimants, although they might bring their claims together, are in fact not entitled to

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26. *See id.*

27. *See id.*

28. *See id.*

the same legal protection.

The protection available to each claimant may also be widely different because, commonly, the claimants are protected by different legal instruments. This is the case when, as in *Klöckner v. Cameroon* and *Guaracachi America, Inc. v. Bolivia*, the claimant invoked different investment treaties (whether bilateral or multilateral, such as the Energy Charter Treaty or the North American Free Trade Agreement (“NAFTA”)) because they hold different nationalities. In those circumstances, the claimants will have different legal rights as provided for in the applicable instruments.

Consequences may be important where key protections are provided under one agreement but not the other. For instance, not all investment treaties include an umbrella clause or a most favoured nation clause.<sup>29</sup>

The jurisdictional issues facing the claimants may also be very different. The most clear-cut example is that some investment treaties only allow the arbitration of disputes involving expropriation.<sup>30</sup> Non-expropriation claims thus may be available only to some of the multiple claimants.

Another example is the denial of benefits under some treaties that allows a Contracting Party to deny investment protection where the claimant is owned or controlled by nationals of that Contracting Party and the claimant has no substantial business activities in the area of the Contracting Party where it is organized.<sup>31</sup> The denial of benefits is not possible under all treaties, and thus, it is possible that it can be invoked only against some of the multiple claimants.

The fundamental difficulty with these differences is that they tend to be ignored in the multiple claimants’ pleadings. The multiple claimants generally choose to present one storyline and one set of legal claims, as if all the facts and legal arguments apply to all claimants alike. It is then for the defendant state to properly differentiate among the individual claimants in its defense—and this imposes a great burden on the defendant state, when one would expect the claimants to have to demonstrate jurisdiction and clearly set out the claims on the merits asserted by each of the multiple claimants.

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29. See e.g., Agreement on Economic Co-operation Between the Government of the Kingdom of the Netherlands and the Government of the Republic of Kenya, Nov. 9, 1970, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1793>.

30. For example, the China-Peru Bilateral Investment Treaty, signed on June 9, 1994 envisages arbitration only in respect of “a dispute involving the amount of compensation for expropriation.” See Agreement Between the Government of the Republic of Peru and the Government of the People’s Republic of China Concerning the Encouragement and Reciprocal Protection of Investments art. 5 (Sept. 6, 1994.)

31. Article 17-1 of the Energy Charter Treaty is a notable example.

#### IV. WHERE TWO OR MORE CLAIMANTS IN DIFFERENT INVESTMENTS ARE JOINT CLAIMANTS IN PROCEEDINGS ARISING FROM THE SAME MEASURE

##### A. *Arbitral Practice*

Until recently, two or more investors in separate investments acting as joint claimants in proceedings arising from the same measure were generally not considered to cause any difficulty. In *Funnekotter v. Zimbabwe*, for instance, 13 claimants with investments in different farms—but all protected under Agreement on Encouragement and Reciprocal Protection of Investments Between Zimbabwe and the Netherlands—brought claims against Zimbabwe in a single set of proceedings.<sup>32</sup> The Tribunal had no difficulty upholding its jurisdiction and it appears that no objection was raised by Zimbabwe on that ground.<sup>33</sup>

This issue received more attention in recent years in the context of “mass” claims following the three claims brought against Argentina by numerous holders of unpaid sovereign bonds, and a string of cases against Spain and the Czech Republic arising from changes to legislation affecting photovoltaic power producers in both countries. The Argentinean cases, in particular, drew attention because they concern thousands of claimants with no relation to each other beyond the fact that their similar investment was similarly affected by Argentina. We summarized above the outcome of the procedural dispute in the Czech dispute. As to the Argentinean cases, all three Tribunals refused to decline jurisdiction.

The majority in *Abaclat v. Argentina* considered that, although the ICSID Convention was silent on whether collective claims are admissible, it had the power to fill the gap and admit such claims:

[I]n the light of the absence of a definition of investment in the ICSID Convention, where the BIT covers investments which are susceptible of involving 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.<sup>34</sup>

The Tribunal therefore admitted the claim of 60,000 Italian bondholders.<sup>35</sup> The host-State’s arbitrator, Professor Georges Abi-Saab, dissented,

32. *Funnekotter v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, ¶¶ 3, 19 (Apr. 22, 2009)

33. *Id.* ¶ 95.

34. *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction, ¶¶ 517–20 (Aug. 4, 2011).

35. *Id.* ¶ 519.

considering that the silence of the ICSID Convention could not mean consent.<sup>36</sup>

In *Ambiente Ufficio v. Argentina*, the Tribunal ruled that the action brought by ninety claimants amounted to multiparty proceedings (in contrast to a “class action” or a “mass claim”) of a type generally accepted in ICSID arbitral practice.<sup>37</sup> The Tribunal therefore considered that “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.”<sup>38</sup> The Tribunal also noted that the nature of claims involving mass instruments such as bonds would typically lead to collective proceedings.<sup>39</sup> The Tribunal therefore upheld jurisdiction. The host-State’s arbitrator, Judge Santiago Torres Bernárdez, dissented on the ground that the silence of the ICSID Convention did not mean consent.<sup>40</sup>

The Tribunal in *Alemanni v. Argentina* had to decide upon its jurisdiction in a case brought by seventy-four bondholders.<sup>41</sup> The three arbitrators considered that there are three sets of circumstances where arbitration is possible with a multiplicity of parties: (i) when it is specifically provided for (e.g., in an applicable treaty or set of arbitration rules); (ii) when it receives the particular assent of both parties, which could be express or inferred; and (iii) where the instrument setting up the arbitration or establishing the respondent’s consent to it can properly be interpreted, on the particular facts of the case, as covering the particular multiplicity of claimants within that consent.<sup>42</sup> The arbitrators concluded that an investment treaty could be interpreted to cover multiple claims where they pertained to the same dispute because the bilateral investment treaty referred to “*investors*” (plural, thereby envisaging multiple claimants) in relation to a “*dispute*” (singular, thereby envisaging a single dispute).<sup>43</sup> However, the Tribunal held that the decision on whether there was the required substantive unity in the dispute submitted to arbitration

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36. See generally *id.* ¶¶ 154–75 (Professor Georges Abi-Saab dissenting).

37. *Ambiente Ufficio S.P.A. v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 114 (Feb. 8, 2013).

38. *Id.* ¶¶ 141–46.

39. *Id.* ¶ 144.

40. *Id.* ¶¶ 76–82 (Bernárdez, J., dissenting)

41. *Alemanni v. Argentina*, ICSID Case No. ARB/07/8, Decision on Jurisdiction, ¶ 1 (Nov. 17, 2014).

42. *Id.* ¶ 285.

43. *Id.* ¶ 287.

could only be determined during the merits phase, and therefore concluded that the arbitration should proceed but that its decision on that point should be deferred.<sup>44</sup>

Overall, as the above decisions illustrate, host–States have been generally unsuccessful when objecting to multipartite arbitration. To date, only the Czech Republic, in conformity with the UNCITRAL Arbitration Rules, has been successful in opposing consolidation using the method set out above.

### B. Practical Considerations

In the situations contemplated here, the difficulties summarized in the two preceding sections reappear.

Specifically, it is possible that the claimants will have made their investment in a different manner, following a different timeline, and under the protection of different legal instruments. As a result their jurisdictional, substantive, and even procedural rights may be vastly different. Various examples were contemplated in the preceding sections. Moreover, because the claimants will have made distinct investments, the difficulties are magnified, making it increasingly probable that the rights of each claimant will be different. When claims by thousands of claimants are considered, as has recently been the case, the difficulties are multiplied exponentially.

Faced with these issues, the approach of the Tribunal in *Abaclat v. Argentina* stands apart. The Tribunal, after upholding jurisdiction, decided to dedicate a first phase of the arbitration to establishing the core issues that would affect the merit of the thousands of claims, and in particular the conditions that a claimant would have to fulfill for its claim to be granted.<sup>45</sup> The Tribunal envisaged that it might find three types of issues at the end of this first phase: (i) issues that might be of a general nature and would apply to all claimants uniformly could be decided at once with regards to all claimants; (ii) issues that, while generally applicable to all claimants, might present certain objective features that would require making certain distinctions among groups of claimants, and could be decided through a sampling procedure; and (iii) issues to claimant specific that they would require a case–by–case analysis.<sup>46</sup> The Tribunal therefore expressly envisaged a multiplication of distinct proceedings within the same arbitration. Surprisingly, the Tribunal envisaged the use of a “sampling procedure” to determine the outcome of some of these proceedings, in other words that the decision in a test case involving certain claimants

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44. *Id.* ¶¶ 286–295.

45. *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction, ¶ 668 (Aug. 4, 2011).

46. *Id.* ¶ 669.

might be extrapolated to other claimants.<sup>47</sup>

The Tribunal in *Ambiente Ufficio v. Argentina* took a different approach, premised on its conclusion that it was not dealing with a “mass claim” but with simpler multiparty proceedings. The Tribunal decided that it would proceed normally, and that the proceedings were not “unmanageable”, even if they involved ninety claimants.<sup>48</sup> The Tribunal stated: “the Tribunal cannot see a fundamental problem in taking evidence regarding, and assessing, the individual case of each and every of the [ninety] Claimants remaining in the case.”<sup>49</sup> Interestingly, the Tribunal deemed irrelevant the question of whether it was most efficient to decide the claims in a single set of proceedings, as it held that this question had no bearing on whether it had the right to conduct multipartite proceedings.<sup>50</sup> Obviously, the task of considering the individual case of ninety claimants would have been colossal. As the case was discontinued in May 2015, the Tribunal was not granted the opportunity to set out how it intended to carry out this enterprise. Similarly, the case in *Alemanni v. Argentina* was discontinued in August 2015 before the Tribunal could issue procedural directions concerning the ensuing proceedings.

It is also worth highlighting the two efficient procedural arrangements agreed between the forty–six claimants and Mexico in *Bayview Irrigation District v. Mexico*,<sup>51</sup> and the 109 groups of claimants and the United States in the case known as *Canadian Cattlemen for Fair Trade v. United States*.<sup>52</sup> In both cases, the parties agreed that, at least for preliminary objection purposes, the individual claims would be heard in one proceeding. The underlying assumption was that if the host–State’s objection was upheld, all claims would be disposed of.

In *Bayview Irrigation District v. Mexico*, Mexico’s pleadings show that notwithstanding Mexico’s objection to the claimants having unilaterally joined their claims in a single proceeding, Mexico consented to having the tribunal’s jurisdiction for all claims determined in a single proceeding.<sup>53</sup>

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47. *Id.* ¶¶ 666–67, 669. The Tribunal also referred to these as “bell weather proceedings”, likely intending to reference the bellwether approach sometimes followed by United States courts when there is no other feasible way for the courts to handle an enormous case load. In such proceedings, the court’s decision on a common issue is extrapolated to the other claimants. *Id.* ¶ 666.

48. *Ambiente Ufficio S.P.A. v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 166 (Feb. 8, 2013).

49. *Id.* ¶¶ 168; *see also id.* ¶¶ 164–72.

50. *Id.* ¶ 172.

51. *Bayview Irrigation Dist. v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award (June 19, 2007).

52. *Canadian Cattlemen for Fair Trade v. United States of America*, UNCITRAL Cattle Cases, Award (Jan. 28, 2008).

53. *Bayview*, ICSID Case No. ARB(AF)/05/01, Memorial on Jurisdiction ¶ 75

Mexico eventually prevailed on jurisdiction and all claims were dismissed, saving considerable time and costs.<sup>54</sup> In *Canadian Cattlemen for Fair Trade v. United States*, the Tribunal's first Procedural Order recorded the fact that, although 109 Notices of Arbitration were filed, the parties had agreed to consolidate the claims.<sup>55</sup>

#### CONCLUSION

The above review shows that Tribunals have, so far, shown a propensity to continue multipartite proceedings. Indeed, no Tribunal is known to have "deconsolidated" proceedings. Only where the procedural rules allow the host-State to block multiparty arbitration (namely, the UNCITRAL Arbitration Rules) has a host-State been able to stop multipartite arbitration from going ahead.

Perhaps even more strikingly, only one Tribunal is known to have given extensive consideration to how, in practice, conduct the proceedings in a manner that is most efficient for the parties.<sup>56</sup> In contrast, the Tribunal in *Ambiente Ufficio v. Argentina* took the view that whether or not it was most efficient to decide the claims in a single set of proceedings was irrelevant.<sup>57</sup>

Overall, the authors consider that the arbitral debate should not only focus on whether there *can* be multipartite proceedings, but also on whether there *should* be multipartite proceedings, and, if so, how to best conduct these proceedings so that the rights of all parties are respected.

In most circumstances, it would likely be most efficient to conduct multipartite proceedings, without impacting due process, rather than have separate Tribunals determine each issue. The Tribunals, however, must be very attentive to the differences between claimants and their claims, and they should strictly require that the differences be explained and respected in both parties' pleadings, especially in the claimants' statement of claim or memorial.

Furthermore, as shown above, there may be circumstances where the facts, the applicable legal framework, and the legitimate expectations of the parties are so complex or vary to such an extent that it becomes inefficient—and potentially undesirable—to continue consolidated proceedings.

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(Apr. 19, 2006).

54. *Id.* ¶ 77.

55. *Canadian Cattlemen for Fair Trade v. United States*, UNCITRAL Cattle Cases, Procedural Order No. 1, ¶ 4 (Oct. 20, 2006).

56. *See generally* *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction (Aug. 4, 2011).

57. *Ambiente Ufficio S.P.A. v. Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction, ¶ 172 (Feb. 8, 2013).

For instance, assuming that the situation of each of the ninety claimants in *Ambiente Ufficio v. Argentina* had been vastly different, it could possibly have been extremely inefficient to have ninety subsets of proceedings decided together by the same Tribunal. Three highly sought after arbitrators might find such endeavor extremely time consuming, leading to inevitable delays.

Or, to take the example of an ongoing case, assuming that the Tribunal in *Abaclat v. Argentina* eventually reaches decisions through a “sampling procedure,” the Tribunal will face the challenge of ensuring that the decision that is extrapolated to other parties indeed applies squarely to each party that is bound by it. Any other outcome would, obviously, be contrary to due process.

The authors therefore recommend that, when faced with multiple claimants, the parties and tribunals take the time to consider whether it is actually more efficient and consistent with due process to proceed on a consolidated basis.

First, if all parties agree, multipartite arbitration should naturally go ahead. Indeed, it may very well be more efficient to do so. Consolidation need not be agreed for the entirety of the proceedings. For instance, as in *Bayview v. Mexico*, the parties might agree to determine jurisdictional claim together, so that they might either all be dismissed together, or that a decision might later be taken as to whether the claims should be split in the following proceedings.

Second, if there is no agreement, the authors suggest that the tribunal should carefully consider whether to hold a separate phase during which it will be debated and decided whether, and if so, how, proceedings should be consolidated. While it will rarely be necessary to hold such phase, there may be circumstances where the issues are so complex that it is necessary to do so to ensure that an appropriate decision is reached.

This suggestion resembles—but also differs from—the approach taken by the Tribunal in *Abaclat v. Argentina*, which decided to hold a separate phase between the jurisdiction and merits phases to determine the core issues that would affect the merit of the thousands of claims, and in particular the conditions that a claimant would have to fulfill for its claim to be granted. In contrast to that decision, the authors recommend that this phase take place prior to the jurisdictional phase. Indeed, the jurisdictional phase is particularly likely to give rise to complex and differing claims as multipartite proceedings often involve different jurisdictional requirements and different sets of facts.

The authors believe that this exercise of additional caution and, when necessary, of an additional procedural phase to decide how to carry the arbitration, will, through debate and the emergence of best practices, result

in more efficiency and a better arbitral process. It would benefit the Parties because it would be an additional safeguard for efficiency and due process. And it would, also, lighten the burden on the host-State and the Tribunal to distinguish between the rights of each claimant.