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Where Are We Now? Investment Treaty Arbitration, Sovereign Debt, and Mass Claims in the Post-*Abaclat* Era

by Jennifer Permesly and Meredith Craven*

Abstract

In a watershed decision in 2011, an ICSID tribunal accepted jurisdiction over a mass claim brought by 180,000 Italian bondholders against the Republic of Argentina, alleging international law claims arising out of Argentina's sovereign debt default. In 2016, the Abaclat arbitration settled before a decision on the merits could be reached. This Article examines developments in mass claims and sovereign debt claims following the Abaclat jurisdictional decision. It examines procedural aspects of the Abaclat arbitration in order to assess what lessons can be learned about addressing mass claims through investment treaty arbitration. It also looks at recent developments in the sovereign debt arena in an effort to draw conclusions about the potential future of sovereign debt claims as a subject of investment treaty arbitration.

In 2011, an ICSID tribunal issued a controversial decision to accept jurisdiction in the case of *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, in which 180,000 Italian bondholders brought claims against the Republic of Argentina under the Argentina-Italy bilateral investment treaty (“BIT”).¹ In 2016, a new administration in Argentina settled that arbitration prior to a decision on the merits. Much was written about the *Abaclat* arbitration when the majority of the tribunal first decided to accept jurisdiction. This Article examines the impact of the *Abaclat* Jurisdictional Decision in light of the arbitration’s settlement. It reviews developments taking place in the *Abaclat* arbitration and in several other investment treaty arbitrations in the years following the jurisdictional ruling in an effort to address an important question: where have we landed with regard to whether mass claims and sovereign debt are the appropriate subject of investment treaty arbitration?

The *Abaclat* Jurisdictional Decision has been both praised and criticized for its two principal jurisdictional holdings: (i) that a single ICSID tribunal may adjudicate a “mass” claim brought by thousands of individual claimants; and (ii) that the purchase by claimants of sovereign bonds issued by Argentina constituted an “investment” in Argentina. The settlement of the *Abaclat* case means that these holdings will never be incorporated into a final award on the merits, nor will they be tested through the ICSID annulment process.²

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¹ Referred to herein as “*Abaclat*.” The case was initially brought as *Giovanna a Beccara and Others v. Argentine Republic*. The *Abaclat* majority, comprising Prof. Pierre Tercier (President) and Prof. Albert Jan van den Berg (Claimants’ appointee), rendered its Decision on Jurisdiction and Admissibility on August 4, 2011 [hereinafter the “*Abaclat* Jurisdictional Decision”]. Prof. Georges Abi-Saab (Respondent’s appointee), dissented from the Jurisdictional Decision and resigned from the tribunal shortly thereafter. Prof. Abi-Saab was replaced by Dr. Santiago Torres Bernárdez.

² It is highly likely that Argentina would have challenged the Jurisdictional Decision through the ICSID annulment process, had a merits decision been rendered against it. See S.I. Strong, *Mass Procedures as a Form of “Regulatory Arbitration” - Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. Corp. L. 259, 262, n. 12 (2012-2013) (noting the then-considerable likelihood that Argentina would seek to annul the Jurisdictional Decision following the conclusion of the merits phase).

The *Abaclat* Jurisdictional Decision may have “opened the door” to mass claims proceedings,³ but it also raised important questions about how the tribunal would effectively manage the mass claims process, and whether Argentina’s due process rights could be adequately addressed. Further, the claims at issue posed significant challenges for any merits award: the tribunal was asked to – but ultimately did not – decide the controversial question of whether Argentina’s conduct in defaulting on its debt and its actions in connection with its global debt restructuring resulted in a breach of its international law obligations. Although these questions remain unanswered post-settlement, subsequent developments provide some guidance. First, as examined in Section II below, the procedural phases that followed the Jurisdictional Decision are documented in a series of publicly available procedural orders, which illustrate the significant complications the tribunal faced in implementing procedures to adjudicate the mass claims and suggest certain adjustments that may be required in the event of future mass claim arbitrations.⁴ Second, as examined in Section III below, the majority’s classification of sovereign debt as an “investment” has provoked considerable debate, especially in light of a more recent decision that arrives at a conflicting conclusion. It has also led to the adoption in recent investment instruments of clauses that limit, to some extent, the ability of holdout creditors to challenge negotiated debt restructurings in investment treaty arbitration.

1. Background of the *Abaclat* Jurisdictional Decision

In *Abaclat and Others v. Argentine Republic*, 180,000⁵ Italian nationals holding defaulted Argentine sovereign bonds registered a claim before ICSID alleging that Argentina’s massive bond default in 2001, and its subsequent conduct in connection with restructuring that debt, constituted breaches of Argentina’s treaty obligations under the Argentina-Italy BIT.⁹ Most of the *Abaclat* claimants were Italian individuals or small corporations who held Argentine sovereign bonds but likely would have been unable or unwilling to seek redress through ICSID arbitration based on the small size of their respective individual bondholdings. Together, however, their claims totaled approximately US \$2.5 billion.⁶ The claimants were represented by a consortium of Italian banks referred to as “Task Force Argentina,” which

³ In 2013, Prof. S.I. Strong, who has written extensively on mass claims adjudication, noted that “Regardless of the future outcome of *Abaclat* itself, most commentators would agree that the door has been opened to mass claims in the investment context, with the only question being when, not whether, the next mass claim will be filed.” Strong, *supra* n. 2, at 321-22. Although various commentators predicted a rash of mass investment claims following the Jurisdictional Decision in *Abaclat*, *id.* at 261, n. 11, to the authors’ knowledge, to date no other mass investment claim has been filed on anywhere near the scale of *Abaclat*. Footnotes 61-62 *infra* and the accompanying text discuss some claims brought on behalf of groups of claimants since *Abaclat*.

⁴ The procedural orders associated with the *Abaclat* dispute are publicly available on the ICSID website and ITALAW.com, as well as through TDM’s Legal and Regulatory Documents archive. See generally <https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/07/>; <http://www.italaw.com/cases/35>; <https://www.transnational-dispute-management.com/legal-and-regulatory-countries.asp>.

⁵ The claim was initially filed on behalf of 180,000 claimants, but by the time the majority issued the *Abaclat* Jurisdictional Decision, the number of claimants had been reduced by two thirds, to 60,000, as various claimants elected to withdraw from the arbitration, many choosing to participate in Argentina’s 2010 Exchange Offer. By the date of settlement, the number was further reduced to 50,000 claimants, according to press releases issued by Task Force Argentina.

⁶ This figure is based upon reporting at the time of settlement. The claimants remaining at settlement in February 2016 held bonds with a principal value of about US \$900 million and sought a total of US \$2.5 billion in principal and interest. Argentina settled with the claimants for roughly 150% of principal, or US \$1.35 billion. See Task Force Argentina, *Comunicato stampa: L’Argentina e la Task Force Argentina hanno raggiunto un accordo preliminare per la risoluzione della controversia con gli obbligazionisti retail italiani* (2 Feb. 2016), <http://www.tfargentina.it/comunicati.php?ordine=data1> (detailing the terms of the preliminary agreement between Argentina and Task Force Argentina on behalf of the claimants).

had represented the claimants in the debt exchange negotiations that preceded the ICSID arbitration and filed the Request for Arbitration on their behalf in 2006.⁷

The *Abaclat* arbitration was the first case to be brought before ICSID on behalf of a “mass” group of claimants, all alleging that they were affected by identical conduct of the sovereign giving rise to claims under a single BIT. Prior to *Abaclat*, groups of similarly situated claimants had filed investment arbitrations, but the very largest of these involved just 137 claimants.⁸ In none of those cases did the tribunal wrestle with the feasibility or propriety of hearing such a claim. Two “sister” cases were filed by other Italian bondholders against Argentina around the same time as *Abaclat*, but each of those arbitrations involved roughly 100 claimants.⁹ The sheer number of the *Abaclat* claimants distinguished the arbitration from these previous cases in both degree and kind – as one commentator has noted, it would have required more than 10,000 pages to simply list the name, address and investment amount for each of the claimants.¹⁰

In 2008, Argentina filed jurisdictional objections, posing a series of arguments relating to the size and scope of the claims, the nature of the claims at issue, and what it considered to be the impropriety of claimants’ representation by Task Force Argentina.¹¹ Article 25 of the ICSID Convention provides that ICSID jurisdiction shall extend to legal disputes (i) arising out of an *investment* between a Contracting State and a national of another Contracting State and (ii) which the parties to the dispute have *consented in writing* to submit to ICSID.¹² Under the ICSID framework, the investor’s act of consent is manifested either in the Notice of Arbitration initiating the dispute, or in a prior instrument. The Contracting State’s act of

⁷ Following an initial challenge by Argentina to registration, ICSID registered the claim in February 2007.

⁸ See, e.g., *Alasdair Ross Anderson and Others v. Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010) (involving 137 claimants); *Canadian Cattlemen for Fair Trade v. United States*, NAFTA/UNCITRAL Award on Jurisdiction (28 Jan. 2008) (involving 109 claimants). See also *Bernardus Henricus Funnekotter and Others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award (22 Apr. 2009) (involving thirteen claimants); *Bayview Irrigation District and Others v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007) (involving forty-six claimants); *Antoine Goetz and Others v. Burundi*, ICSID Case No. ARB/95/3, Award, ¶ 89 (10 Feb. 1999) (involving three claimants) (noting that ICSID does not recognize any particular limit on the number of parties).

⁹ See *Alemanni v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (17 Nov. 2014) (183 claimants at time of filing, reduced to seventy-four claimants prior to the jurisdictional decision); *Ambiente Ufficio v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 Feb. 2013) (119 claimants at time of filing, reduced to ninety claimants prior to the jurisdictional decision).

¹⁰ See Berk Dermikol, *Does an Investment Treaty Tribunal Need Special Consent for Mass Claims?*, 2 Cambridge J. Int’l & Comp. L. 612, 617 (2013) (“The mere fact that a simple chart showing only the names, addresses and investment of each claimant might take around 10,000 pages might illustrate why the case is different from others.”).

¹¹ In order to undertake representation of the claimants in *Abaclat*, Task Force Argentina issued each claimant an instructional letter explaining the ICSID process and required each claimant to sign and return a Declaration of Consent, constituting formal consent to the ICSID arbitration; a Power of Attorney in favor of White & Case as counsel to the group of claimants; a Grant of Mandate authorizing Task Force Argentina to make strategic decisions on behalf of the group of claimants as the claimant “coordinator”; and a questionnaire regarding the circumstances of their bond purchase. *Abaclat*, Jurisdictional Decision, ¶¶ 85-91.

¹² See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter “ICSID Convention”], Art. 25(1) (1966) (“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”); see, e.g., *Abaclat* Jurisdictional Decision, ¶¶ 253-258 (describing the four main factors required for jurisdiction under ICSID Convention Art. 25, including written consent of the parties).

consent is usually either found within the applicable bilateral investment treaty or in another instrument (e.g. a contract with an investor). Argentina’s jurisdictional objections focused on the interpretation of the terms “investment” and “consent” in the context of a treaty-based claim.

Argentina argued that its consent to arbitrate disputes arising under the Argentina-Italy BIT within the ICSID system did not encompass consent to an arbitration involving sovereign debt claims, brought *en masse* by a sole representative on behalf of a large group of claimants. Argentina argued that it had not and could not have consented to such arbitration under the ICSID Convention, which does not refer to mass or collective proceedings, and that its due process rights could not be adequately protected by an ICSID tribunal in the context of a mass arbitration:

The present proceeding would change the nature of ICSID claims as it was envisioned, from one focused on studied analysis of the grievances brought by an individual investor for a singular, precise harm, to one focused on mass or class claims in which the circumstances of each Claimant can no longer be realistically examined and the peculiarities of each investment are ignored in favor of the lowest common denominator.¹³

Argentina also argued that the claimants’ purchases of bonds were not capable of constituting “investments” under the BIT or pursuant to the objective investment criteria required to satisfy Article 25 of the ICSID Convention. It argued that the claimants’ purchases of bonds on the open market, typically through their banks or other intermediaries in Italy, did not involve any direct transaction within the territory of Argentina, constitute a substantial contribution to the economy of the host state, or entail the undertaking of any operational risk, features commonly required by tribunals in examining whether a particular transaction constitutes an investment qualifying for treaty protection.¹⁴

In its 282-page Jurisdictional Decision, a majority of the tribunal rejected Argentina’s arguments and held that the mass claim could proceed. (Argentina’s party-appointed arbitrator issued a strongly worded dissent.) First, the majority found consent to arbitrate claims arising out of sovereign debt “*en masse*” within the language of the BIT, on the basis that the Argentina-Italy BIT had included sovereign bonds within the definition of investment. Here, the majority relied on the BIT’s definition of investment, which contained a category for “*obligations*, private or *public titles* or any other right to performances or services having economic value, including capitalized revenues.”¹⁵ The majority held that

¹³ *Abaclat* Jurisdictional Decision, ¶ 471 (summarizing the respondent’s jurisdictional objections). Argentina also objected to the validity of the claimants’ consent, arguing that the consent forms and powers of attorney provided by the claimants to Task Force Argentina were invalid and improper for various reasons. See *Abaclat* Jurisdictional Decision, ¶ 428. The majority rejected those arguments in a detailed discussion regarding the ability of ICSID claimants to delegate consent to arbitrate to a third party representative. *Id.* ¶¶ 430-466.

¹⁴ Sovereign bonds are issued by the state in bulk to underwriters, with one lump sum payment made to the state by the underwriters. The underwriters are then responsible for distributing, or “selling” the bonds on the open market, which they accomplish by dividing the bonds into multiple issuances and distributing them to financial institutions and other intermediaries, where they may pass through a number of smaller intermediaries until they ultimately are sold to retail bondholders such as the claimants in *Abaclat*. The retail holder is free to engage in further sale and purchase transactions on the secondary market. See generally Michael Waibel, *Opening Pandora’s Box: Sovereign Bonds in International Arbitration*, 101 Am. J. Int’l L. 711, 723 (2007).

¹⁵ See *Abaclat* Jurisdictional Decision, ¶ 352 (emphasis added).

this language was broad enough to encompass “public” or sovereign bonds.¹⁶ The majority was unconcerned that these bonds might not meet all of the “objective” criteria of an investment required by certain tribunals: it was sufficient, in the majority’s view, that the bonds had “contributed” to the Argentine economy. Argentina had always intended its bonds to be distributed and sold on the retail markets in Italy (and other countries). On this analysis, regardless of whether any individual bondholder’s purchase provided a direct or immediate flow of funds into Argentina, the purchases made by Italian retail bondholders as a whole supported the bond underwriters’ initial investment in Argentine debt and thereby made funds “available to the host state.”¹⁷

The majority then found that because sovereign bonds are nearly always sold *en masse* and are therefore susceptible to collective actions, the BIT’s inclusion of such bonds as “investments” was itself sufficient evidence of consent to arbitrate claims arising out of those bonds in a collective proceeding.¹⁸ Given this language in the BIT, the majority perceived it unnecessary to identify specific consent to arbitrate mass claims under the ICSID framework. The ICSID Convention did not explicitly exclude multi-party proceedings, and Argentina had not registered any specific reservation to the ICSID Convention regarding mass or class claims. The majority therefore concluded that there was simply no indication that Argentina’s consent to ICSID jurisdiction was limited to any particular numerical threshold:

Assuming that the Tribunal has jurisdiction over the claims of several individual Claimants, it is difficult to conceive why and how the Tribunal could [lose] such jurisdiction where the number of Claimants outgrows a certain threshold.¹⁹

As for Argentina’s due process concerns, the majority adopted the converse argument, noting that the principal concern was to ensure that the *claimants* had an adequate forum for redress.²⁰ It held that the ICSID Convention must be assumed 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.”²¹ The majority viewed the critical issue not as one of consent, but of “admissibility”²²: that is, was an ICSID

¹⁶ *Id.* ¶¶ 355-56.

¹⁷ *Id.* ¶ 374.

¹⁸ *See Id.* ¶ 490. The tribunal in *Ambiente Ufficio v. Argentine Republic* similarly held that multi-party proceedings are appropriate where they derive from the nature of the covered investment: “[T]he authors of the BIT by the very act of including [the bonds] into the list of protected investments, were envisaging a high number of potential claimants.” *Ambiente Ufficio*, Decision on Jurisdiction and Admissibility, ¶ 144.

¹⁹ *Abaclat* Jurisdictional Decision, ¶ 490.

²⁰ *Id.* ¶¶ 536-537 (emphasis added) (noting that it would be a denial of justice and a “shocking” result if the claimants were prohibited from adjudicating their claims in a single arbitration, given the cost-prohibitive nature of their individual claims).

²¹ *Id.* ¶ 490.

²² In a vigorous dissent, Prof. Abi-Saab maintained that consent and admissibility were separate and distinct inquiries and that tribunals should require “special consent” by states in order to adjudicate claims of the size and nature at issue in *Abaclat*. *See Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, ¶¶ 148-153 (4 Aug. 2011) [hereinafter “Dissent”]. Several observers have agreed with the Dissent, suggesting that “special consent” to adjudicate a mass claim should be required. *See* Relja Radović, “When I Grow Up I’ll Be a Court”: *Understanding Investor-State Mass Claims Arbitration with the Help of Domestic Class Action Processes* (Aug. 2016), available at <http://ssrn.com/abstract=2733489> or <http://dx.doi.org/10.2139/ssrn.2733489> (arguing that special consent for mass claims is necessary under the ICSID Convention); *but see* Dermikol, *supra* n. 10, 624-626 (distinguishing mass claims arbitrations from U.S.-style class arbitrations and arguing that the large number of claimants in a mass investment arbitration does not change the nature of the arbitration).

tribunal *capable* of adjudicating the claim?²³ In analyzing that question, the majority considered that the ICSID Convention’s silence on a framework or mechanism for adjudicating mass claims should be interpreted not as a restriction on such claims, but merely as indicating a “gap” in the ICSID Arbitration Rules, which the tribunal was free to fill through the design and adoption of specific procedures to adjudicate the dispute.²⁴ The majority further anticipated that it *could* design procedures adequate to address the dispute despite its massive scope.

2. *Abaclat* Opens the Door to Mass Claims, But Process Questions Remain

When the *Abaclat* Jurisdictional Decision was handed down, many viewed it as ushering in a new era of mass investment treaty claims. Some arbitration scholars and practitioners pondered the potential “regulatory” effects of the decision, focusing on the majority’s policy rationales for providing access to ICSID to claimants that, for practical reasons, otherwise would be precluded from bringing their claims in arbitration. Others seized upon the majority’s broad view of procedural flexibility as inherent within the ICSID regime, permitting tribunals to fashion procedures for various types of claims. Still others worried about the potential for abuse by third-party funders or law firms who would benefit from grouping together claimants en masse to bring a new type of pressure to bear on states.

The *Abaclat* tribunal’s recent Consent Award—and a 5-page accompanying declaration by Argentina’s party-appointed arbitrator—confirms that the settlement of the claims by Argentina did not constitute an admission of ICSID jurisdiction or liability.²⁵ Nonetheless, there is little question that the *Abaclat* Jurisdictional Decision has been and will continue to be relied upon by future “mass” claimants seeking to demonstrate that the principles established by *Abaclat* should apply with equal force to their claims. While ostensibly based on the language of the BIT before it, the Jurisdictional Decision was unequivocal that mass claims are appropriate in certain instances: the key question for the majority was not whether but *how* the claims would be adjudicated by the tribunal.²⁶ The majority’s holding that mass claims are admissible under the ICSID regime was rooted in two key notions. First, the majority believed that it was capable of devising procedural innovations to adjudicate the mass claims fairly and fully.²⁷ Second, the majority believed that the claimants’ claims were sufficiently “homogenous” such that their mass adjudication was both feasible and appropriate.²⁸ Both of these assumptions were tested in the arbitration’s subsequent procedural phases.

²³ The majority framed the question as follows: “The question is rather —under what circumstances will ICSID arbitration be possible under the terms of Argentina’s consent?” *Abaclat* Jurisdictional Decision, ¶ 495.

²⁴ *Id.* ¶¶ 534-539 (explaining that the tribunal has the authority to fill gaps in the ICSID procedure to administer a mass proceeding in accordance with the due process rights of each of the parties).

²⁵ See *Abaclat*, Consent Award Under ICSID Arbitration Rule 43(2), ¶ pp (29 Dec. 2016); *Abaclat*, Declaration appended to the Consent Award by Arbitrator Santiago Torres Bernárdez, ¶¶ 4-5 (15 Dec. 2016).

²⁶ *Abaclat*, Jurisdictional Decision, at ¶ 492 (“Consequently, the Tribunal is of the opinion that 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.”).

²⁷ *Id.* at ¶ 529-533 (finding that the tribunal could develop procedures within the boundaries of the ICSID Rules to examine all the claims and claimants, through simplification of the examination process, because “such simplification of the examination process is to be distinguished from the failure to proceed with such examination.”).

²⁸ *Id.* at ¶ 540 (“The Tribunal is of the opinion that group examination of claims is acceptable where claims raised by a multitude of claimants are to be considered identical or at least sufficiently homogeneous.”).

Following the Jurisdictional Decision, the tribunal focused on confirming that each of the “mass” claimants met the jurisdictional requisites established by the majority. The best method for doing so was debated hotly by the parties. Ultimately, the tribunal rejected proposals by the claimants to use forms of sampling or other statistical methods of analysis, and instead appointed an independent expert to conduct a “claimant-by-claimant” analysis.²⁹ The expert’s task was defined as determining whether each claimant (i) was indeed an Italian national; (ii) was not a dual national of Argentina and Italy; and (iii) had purchased a security entitlement in Argentina’s debt; and (iv) the date on which the purchase, if any, was made.³⁰ Several of the procedural orders indicate that after such review was conducted, Argentina would bear the burden to challenge whether individual claimants had satisfied the jurisdictional requisites.³¹

According to the information available from the procedural orders, the individualized review of claimants proceeded as follows:

- Using sophisticated technology, the *Abaclat* claimants established a computerized database, where information regarding each claimant, its nationality, its bondholding, and proof of its consent to the arbitration was uploaded. The tribunal emphasized the careful organization and care taken to establish a proper and manageable database, which featured technology ensuring searchability, confidentiality, and advanced management tools.³²
- The independent expert initially estimated that he and a team of fifteen claims reviewers could complete the review in approximately nine weeks, spending an average of fifteen minutes on the examination of each claimant, at a cost of approximately US \$270,000.³³ Ultimately, the expert required several extensions and the hiring of several additional assistants to facilitate the review.
- The procedural orders indicate that the claimants made a series of changes to the database during the course of the review, including the withdrawal of more than two-thirds of the claimants that initially filed the claim. Although Argentina objected to these withdrawals, the majority ultimately allowed them as discontinuances under ICSID Arbitration Rule 44, ordering claimants and respondents to share the arbitration costs.³⁴

Although mired in procedural objections and complications (as well as a number of dissents to procedural orders issued by Argentina’s party-appointed arbitrator), the review of the claimant database was eventually completed, and the expert provided his conclusions to the

²⁹ The tribunal appointed Dr. Norbert Wühler, who had previously served as a claims adjuster for numerous international claims commissions, including the United Nations Compensation Commission. *See Abaclat*, Procedural Order No. 17, ¶¶ 22-24 (8 Feb. 2013) (confirming appointment of Dr. Wühler); *Abaclat*, Annex 1 to Procedural Order No. 15 (20 Nov. 2012) (C.V. of Dr. Wühler).

³⁰ For a description of the scope of the expert’s review, *see Abaclat* Jurisdictional Decision, ¶ 501(iii); *Abaclat*, Procedural Order No. 15, ¶ 19(iii) (20 Nov. 2012).

³¹ *See* Ronald J. Bettauer, *Tribunal Establishes Initial Procedures for Review of Mass Bondholder Claims against Argentina*, ASIL Insights, Vol. 17 (3 July 2013), <https://www.asil.org/insights/volume/17/-issue/16/tribunal-establishes-initial-procedures-review-mass-bondholder-claims> (summarizing the expert review process).

³² *See* Carolyn B. Lamm, *The Future of Large-Scale International Claims in Investment Arbitration*, Slides presented to ITA-ASIL Conference: Mass and Class Claims in Arbitration (Washington D.C., 9 Apr. 2014).

³³ *Abaclat*, Annex 2 to Procedural Order No. 17, ¶¶ 7, 11 (22 Jan. 2013); *see also Abaclat* Jurisdictional Decision, ¶¶ 412-413. The procedural orders reflect that the expert team was able to designate just three or six minutes to certain of the claimants.

³⁴ *See* Lamm, *supra* n. 32, at 27; *Abaclat* Jurisdictional Decision, ¶ 640.

tribunal in a report, subject to comment by the parties and testimony at a merits hearing.³⁵ The tribunal conducted a merits hearing in June 2014 and appears to have been prepared to make at least a preliminary ruling on the merits with regard to certain claimants following the hearing.³⁶

Several aspects of the arbitral procedure merit further consideration. First, it is unclear how – or whether – the parties or the tribunal were expected to review and test the expert’s conclusions. The procedural orders do not reveal the tribunal’s role in examining the claimant database or confirming its independent view of the expert’s work. They further suggest an extremely limited scope for Argentina’s examination of individual claimants. The tribunal granted Argentina the right to examine only *eight individual claimants* that had been selected by the claimants themselves to submit witness statements in the arbitration.³⁷ In his dissent to Procedural Order No. 27, the arbitrator appointed by Argentina was unequivocal in his criticism of this decision: “This is an amazing outcome by all standards, a procedural joke.”³⁸

Second, the procedural orders do not direct the expert to examine individualized merits issues. In the *Abaclat* Jurisdictional Decision, the majority had anticipated that the expert would determine “individualized jurisdictional, liability and damages issues.”³⁹ Yet the procedural orders contain no suggestion that the expert was directed to conduct any further analysis regarding the merits of each claimants’ claim (for example, the nature or circumstances surrounding each claimant’s purchase), or that it was to review the damages associated with each individual claimant’s bondholding.⁴⁰ Indeed, Procedural Order No. 17 goes so far as to note that “specific circumstances surrounding individual purchases ... *are irrelevant* ... foreign and external to the present arbitration which concerns solely Argentina’s behavior with regard to Claimants’ investment.”⁴¹

This view appears rooted in the majority’s position that mass adjudication of the claimants’ claims was proper because those claims were fundamentally “homogenous.” According to the

³⁵ See *Abaclat*, Procedural Order No. 27, p. 15 (30 May 2014) (indicating that the tribunal would call Dr. Wühler in his capacity as the Tribunal expert to testify and be examined by the tribunal and the parties at the hearing in mid-June 2014); *Abaclat*, Consent Award, ¶ cc (29 Dec. 2016) (describing the merits hearing that took place from June 16-24, 2014).

³⁶ See *Abaclat*, Procedural Order No. 32, p. 7 (1 Aug. 2014) (indicating that the tribunal would proceed to decide with regard to claimants who were “verified” by the expert and who had not attempted to withdraw from the proceeding); see also *Abaclat*, Declaration appended to the Award by Arbitrator Santiago Torres Bernárdez, at ¶ 13 (indicating that the tribunal was in the process of producing its draft Award when the parties reached settlement).

³⁷ *Abaclat*, Procedural Order No. 27, p. 10, 14-15 (30 May 2014).

³⁸ *Abaclat*, Dissent to Procedural Order No. 27, ¶ 8 (30 May 2014) (Dr. Santiago Torres Bernárdez dissenting).

³⁹ See Lamm, *supra* n. 32.

⁴⁰ Compare *Abaclat*, Procedural Order No. 12, ¶¶ 4-5 (7 July 2012) (indicating merely that the scope of the expert review would fall under paragraph 501(iii) of the Jurisdictional Decision); Procedural Order No. 15, at ¶¶ 19-22 (clarifying that the criteria under 501(iii) focus strictly on jurisdictional issues such as nationality, incorporation and date—but not circumstances—of purchase of the relevant security entitlement); Procedural Order No. 17, at ¶ 21 (reemphasizing the limits of the scope of expert review) (“The Purpose of the Database Verification is *not* to proceed with an overall analysis of the circumstances surrounding the Claimants’ consent or the validity of the documents on which such consent is based.”). See also Work Proposal submitted by Dr. Norbert Wühler (26 Dec. 2012) (appended to Procedural Order No. 17); Alternative Work Proposal submitted by Dr. Norbert Wühler (22 Jan. 2013) (same).

⁴¹ *Abaclat*, Procedural Order No. 17, ¶ 19(ii) (8 Feb. 2013) (emphasis added).

majority, the claimants were homogenous in that they all complained of an identical international law *breach* by Argentina⁴²:

[I]t is irrelevant whether Claimants have or do not have homogeneous contractual rights to repayment by Argentina of the amount paid for the purchase of the security entitlements. The only relevant question is whether Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by Argentina of homogeneous obligations provided for in the BIT.⁴³

For the majority, this homogeneity was integral to how the rest of the case would proceed. The majority acknowledged that Argentina would not be permitted to “bring arguments in full length and detail concerning the individual situation of each of the Claimants” but would instead have to accept a collective determination of certain issues.⁴⁴ Nonetheless, it considered that the similarities among the claims far outweighed their differences, thereby justifying a collective adjudicatory process.

The majority viewed homogeneity primarily from the perspective of the respondent state’s breach: a similar action by the state gave rise to claims by many. One could imagine a similar reasoning applying to hundreds of foreign business affected by a new environmental regime, or to thousands of foreign individuals impacted by a sovereign’s new tax regulations. In U.S. class action law, the court examines whether questions of law or fact common to class members *predominate* over any questions affecting only individual members. Similarly, the *Abaclat* reasoning considers the homogeneity of Argentina’s alleged breach as predominating over the particularized circumstances of the claimants’ individual bondholdings.⁴⁵ Yet at the time of rendering the *Abaclat* Jurisdictional Decision, the tribunal had not yet examined the individual claimants, the terms of their bond instruments, or the circumstances of their bond purchases—this was explicitly left to the procedural phase of the arbitration. In fact, the *Abaclat* claimants held eighty-three different types of bonds governed by the laws of different jurisdictions, issued in different currencies, and listed on various international exchanges around the world.⁴⁶ Their claims therefore differed on a number of grounds, including “price, date of purchase, place of purchase, in which currency, applicable law, chosen forum, etc.”⁴⁷

It is far from clear that these distinctions were merely academic ones. In his dissent, Prof. Abi-Saab considered that a bondholder purchasing a bond on the “secondary market,” perhaps at a significant discount in the years following Argentina’s default and with a clear intention to sue, was differently situated from a bondholder that had purchased on the primary market, well before the default with full expectation of repayment.⁴⁸ Such arguments

⁴² *Id.* ¶¶ 540-544 (explaining that the claimants’ claims can be simplified so as to deal with them in a mass proceeding if they are “identical or at least sufficiently homogeneous”).

⁴³ *Abaclat* Jurisdictional Decision, ¶ 541.

⁴⁴ *Id.* ¶ 536. *See also* Dermikol, *supra* n. 10, at 617 (arguing that “consent to mass claims . . . will [] entail a waiver of the right to object to the necessary procedural adaptations”).

⁴⁵ This and similar reasoning gave rise to several challenges by Argentina to the majority of tribunal members, including one alleging that they had “prejudged” the merits of the dispute, but ICSID rejected those challenges. *See Abaclat*, Recommendation Pursuant to the Request by ICSID Dated November 18, 2011 on the Respondent’s Proposal for the Disqualification of Professor Pierre Tercier and Professor Albert Jan Van Den Berg, Dated September 15, 2011 ¶¶ 104-131 (19 Dec. 2011).

⁴⁶ *Abaclat* Jurisdictional Decision, ¶¶ 50-51.

⁴⁷ *See* Dissent, ¶ 143.

⁴⁸ *Id.* ¶¶ 70-71.

could be relevant in assessing a bondholding investor’s “legitimate expectations,” which investment tribunals frequently examine in their analysis of fair and equitable treatment claims. Other claimants might have purchased their bonds at a steep discount, a distinction that may have affected their entitlement to damages.⁴⁹

In an article that was published in the ICSID Review shortly after the Jurisdictional Decision was rendered, one leading commentator wrote:

The challenge facing the Tribunal will be to employ data management techniques that will maximize the efficiency with which individual claims that are similarly situated as to specific issues of law or fact may be reliably grouped. If the individual Claimants are reliably grouped along the relevant axes of law and fact, the Tribunal should not need to rely on statistical sampling and modelling in the strict sense, which might yield a reasonably acceptable aggregate result but not a sufficiently reliable result as to each individual case. Instead, it should be able to make determinations of groups of claims *on the basis of common characteristics* relevant to the issue at hand.⁵⁰

The author further posited that the tribunal should identify specific categories of claimants and discrete issues of law and fact necessary to demonstrate breach and entitlement to recovery for each category.⁵¹ Yet the procedural orders do not suggest that the tribunal focused on identifying common “axes of law or fact,” or that it directed the expert to subgroup claimants in any meaningful way.⁵²

The majority’s reluctance to dig deep within its own homogeneity principle may have diluted the impact of that principle as an organizing principle for mass claims arbitrations. Mass claims may be viewed as fundamentally different from consolidated claims: the claimants and respondent in a mass claims dispute are less likely to belong to the same or compatible arbitration agreements arising out of a single common legal transaction. Further, while ICSID tribunals have consolidated separate claims arising under arbitration clauses found in a series of arguably interconnected relationships, it is more difficult to justify implied consent to adjudicate thousands of distinct individual legal disputes before a single tribunal.⁵³

⁴⁹ The majority acknowledged the potential differences between primary and secondary market purchases, but was not persuaded that it altered its homogeneity findings, focusing instead on the effect that Argentina’s conduct had on all bondholders. See *Abaclat* Jurisdictional Decision, ¶¶ 25-26 (differentiating between primary and secondary bond markets); *id.* ¶ 234 (noting Argentina’s objection based upon the claimants’ status as secondary market purchasers).

⁵⁰ Donald Francis Donovan, *Abaclat and others v Argentine Republic As a Collective Claims Proceeding*, 27 ICSID Rev. 261, 267 (2012) (emphasis added).

⁵¹ *Id.* (“[T]he key will be the identification of discrete issues of law and fact and the reliable grouping of Claimants in accord with those issues. Once that is accomplished, the Tribunal should be able to ensure that it has conducted a sufficiently rigorous examination of the relevant evidence to decide the material issues of disputed fact.”).

⁵² In Procedural Order No. 12, the tribunal instructed the parties to brief “to what extent investors, claims, and/or issues can be grouped.” Procedural Order No. 12 at ¶ 3. Nonetheless, it is not clear whether any such grouping occurred.

⁵³ *Cf. Noble Energy Inc. and Machalpower Cia. Ltda. v. The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/5/12, Decision on Jurisdiction, ¶ 193 (5 Mar. 2008) (finding jurisdiction over disputes arising out of multiple agreements, because there was “an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration”).

It is critical, therefore, that the suitability of a mass claim for collective adjudication be rooted firmly within the commonality, or “homogeneity,” of the individual claims, and that this commonality be examined and confirmed before the respondent state is made to proceed to the merits of a mass claim proceeding.⁵⁴ In U.S. class actions, the crux of the action often lies in the “class certification” stage, where the defendant attempts to identify sufficient distinctions among class members to render their claims unworthy of collective adjudication.⁵⁵ Many have argued that *Abaclat* is fundamentally different from a “class action” as typically conceived under U.S. law: the claimants were each individually identified and bound by the result through a process to which they individually acquiesced; whereas a “class” of plaintiffs in a U.S. class action remains largely amorphous and unidentified until after the merits have been adjudicated.⁵⁶ This distinction would have mattered, however, only if Argentina could have used the individualized nature of the claimants to challenge their homogeneity or “un-mass” the mass claim in a practical and meaningful way.⁵⁷ While there is no question that an individualized examination of 60,000 claimants would not have been possible or advisable (not even Argentina argued as much), it is not clear whether the *Abaclat* majority struck the right balance in its limited assessment of the individual claimants and restrictions on cross-examination.⁵⁸

It is of course entirely possible that the tribunal intended to conduct a more robust merits review on its own, but we will likely never know how (or whether) such a review was conducted. In an unorthodox declaration issued in conjunction with the settlement Consent Award, Professor Torres Bernardéz sharply criticized the majority of the tribunal for failing to include a series of procedural orders relating to the hearing and the merits deliberations in the procedural summary of the Consent Award.⁵⁹ The declaration further criticizes the majority’s “evident failure” to produce a final award “within a reasonable period of time” in the nearly two years between the end of merits hearings in 2014 and the parties’ request to

⁵⁴ The approach by the *Ambiente Ufficio* tribunal was markedly different from the *Abaclat* tribunal: there, the tribunal refused to draw conclusions regarding the homogeneity of the claims at the jurisdictional phase and instead simply noted that the claims were “sufficiently linked” for them to be decided upon in a single multi-party arbitration. *Ambiente Ufficio*, Decision on Jurisdiction and Admissibility, ¶¶ 152-163. The *Alemanni* tribunal also reserved its decision as to whether the claimants and Argentina had a “single dispute” to the merits phase of the arbitration, which was not ultimately reached. *Alemanni*, Decision on Jurisdiction and Admissibility, ¶¶ 288, 293. However, because the *Ambiente Ufficio* and *Alemanni* cases involved only 90 and 74 claimants, respectively, at the time of the jurisdictional decisions, it was feasible for those tribunals to examine the claimants individually prior to reaching the merits stage.

⁵⁵ The American Arbitration Association’s Supplementary Rules for Class Arbitration also feature commonality as a critical touchpoint, providing that a class action may be maintained where “the arbitrator finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.” See Supplementary Rules for Class Arbitrations, Rule 4(b), available at https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf.

⁵⁶ Dermikol, *supra* n. 10, at 624-26 (distinguishing U.S.-style class actions from mass arbitrations like *Abaclat*).

⁵⁷ See *Abaclat* Dissent, ¶ 236 (“[I]t is an absolute due process right of a respondent in a judicial or arbitral proceeding, to have every element of the claim or claims presented against him, examined by the tribunal, through adversarial debate that affords him full opportunity to contest and refute these elements one by one, if he can.”).

⁵⁸ As Prof. Abi-Saab noted in his Dissent: “Homogeneity is in the eyes of the beholder. One can always reach a sufficient level of homogeneity, i.e. common denominators, by climbing up the ladder of abstraction and/or by weeding out all the specifics of the claims that appear inconvenient.” *Abaclat* Dissent, at ¶ 142.

⁵⁹ Nor do such orders appear in the public record of the case. *Abaclat*, Declaration appended to the Award by Arbitrator Santiago Torres Bernardéz, ¶ 13.

suspend the proceedings in March 2016.⁶⁰ Professor Torres Bernardéz's statements are vague and far from conclusive, but his criticisms raise the specter of the deep inefficiencies that are arguably inherent in any attempt to adjudicate mass claims on a scale such as this one.

As of the date of this writing, there have been a number of multi-party claims brought before ICSID and UNCITRAL tribunals alleging investment treaty violations, though none on anywhere near the same scale as *Abaclat*. Several tribunals since *Abaclat* have highlighted the importance of the homogeneity principle, rejecting claims brought by multiple unrelated claimants alleging similar breaches.⁶¹ For example, an UNCITRAL tribunal rejected a claim filed by a group of twenty-two Turkish investors requesting that their claims relating to over thirty-one different projects in different industries in Turkmenistan be jointly heard. The tribunal observed that while multi-party arbitrations are increasingly frequent, the joint submission of several claims made by several claimants would normally suppose the existence of certain links between the claims and/or claimants. Dismissing the claimants' reliance on *Abaclat*, the arbitrators held that those decisions do not imply the acceptance of joint adjudication of entirely unrelated claims made by unrelated claimants over a variety of investments.⁶²

It therefore remains to be seen whether tribunals will follow the *Abaclat* approach in future mass claims investment treaty arbitrations. As two prominent commentators have noted about the post-*Abaclat* view of collective proceedings, "The simple conclusion that can be drawn at this stage is that there are very few, if any, principles and that there are even fewer answers to the myriad problems that can arise in this connection."⁶³

Critically, the *Abaclat* Jurisdictional Decision was not tested in the ICSID annulment process. At least two annulment grounds may have been arguable: Article 52(1)(b), which permits annulment where "the Tribunal has manifestly exceeded its powers" or Article 52(1)(d), permitting annulment based on a "serious departure from a fundamental rule of procedure."⁶⁴ The Article 52(1)(b) arguments would have focused largely on the "consent" arguments reviewed above, and analyzed at length by other commentators. The Article 52(1)(d)

⁶⁰ The majority dubbed the declaration a breach of deliberative secrecy. See *Abaclat*, Additional Declaration by President Pierre Tercier and Arbitrator Albert Jan van den Berg (29 Dec. 2016); *Abaclat*, Additional Declaration by Arbitrator Santiago Torres Bernárdez (29 Dec. 2016). See generally, Douglas Thomson, *Dissenter fires parting shot in Argentine bond case*, Global Arbitration Review (9 Jan. 2017), available <http://globalarbitrationreview.com/article/1079747/dissenter-fires-parting-shot-in-argentine-bond-case>.

⁶¹ Indeed, the homogeneity principle could be considered a defining feature in determining whether consent to mass or group arbitration exists at all. See Luca G. Radicati di Brozolo and Flavio Ponzano, *Representative Aspects of 'Mass Claim' Proceedings in Investor-State Arbitration*, p. 131, in *Class and Group Actions in Arbitration* (ICC, Bernard Hanotiau and Eric A. Schwartz eds.) (positing that the tribunal's requirement of specific consent to collective adjudication in *Erhas and Others v. Turkmenistan*, UNCITRAL, Award (8 June 2015) may have been influenced by the "lack of commonality" among the disparate claims at issue in the arbitration).

⁶² See Luke Eric Peterson, *An Uncitral Tribunal Declines Jurisdiction Over a Joint Treaty Claim Brought Against Turkmenistan By a Series Of Unrelated Claimants*, Investment Arbitration Reporter (23 June 2015), available <http://www.iareporter.com/articles/an-uncitral-tribunal-declines-jurisdiction-over-a-joint-treaty-claim-brought-against-turkmenistan-by-a-series-of-unrelated-claimants/> (describing *Erhas and Others v. Turkmenistan*, UNCITRAL, Award (8 June 2015)). In another case, the PCA rejected an attempt by a bloc of ten foreign investors to bring claims under a series of investment treaties complaining of various measures allegedly affecting their investments in the Czech Republic's photovoltaic sector. 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*, 7 Inv. Arb. Rep. 29 (6 Jan. 2014).

⁶³ Radicati di Brozolo and Ponzano, *supra* note 61, at 139.

⁶⁴ ICSID Convention, Art. 52.

challenge may have been more complex, given that it requires a showing of the following three requirements:

- The rule of the procedure was fundamental, that is, it concerns the fairness of the proceedings;
- The tribunal departed from the procedural rule, and
- The departure must have been serious (i.e., had a material impact on the outcome of the award).⁶⁵

Serious departure from a fundamental rule of procedure has been considered in forty-one annulment decisions known as of the date of this writing, resulting in full or partial annulment four times.⁶⁶ One can envision a series of possible arguments by Argentina regarding the procedural steps adopted by the tribunal, including for example its inability to examine each claimant, or to cross-examine claimants of its choice.

Hypothetical annulment proceedings aside, the question the international community must now examine is whether the *Abaclat* procedural phase demonstrates that mass claims can indeed be fairly and fully adjudicated by an ICSID tribunal, such that the example can and should be followed by future tribunals.⁶⁷

Those who argue that ICSID should provide a forum for groups of claimants that could not otherwise afford to bring their claims would answer in the affirmative, confident that ICSID arbitration, assisted by modern technology, is capable of supporting mass claim arbitration at both a theoretical and practical level. Others argue that ICSID is not the right forum for mass claims, because the states who designed the ICSID system rightly expect that it will permit them to address claims on an individual basis. These critics emphasize that international administrative compensation commissions – which benefit from state participation and provide robust protections for adjudicating particular types of claims arising out of a single incident – are a more appropriate forum for harms that affect mass numbers of claimants.⁶⁸ Still others suggest a compromise approach: if there is a desire to consider mass claims under ICSID, then states should design a uniform procedure to regulate them,⁶⁹ rather than permit arbitrators to develop ad hoc approaches in particular arbitrations.⁷⁰

⁶⁵ See ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, ¶¶ 98-101 (5 May 2016) (discussing the standard for annulment under Art. 52(d)).

⁶⁶ See *id.* ¶ 101.

⁶⁷ Strong notes that flexibility is an important aspect in international investment arbitration given the difficulty of amended multilateral accords, but that “flexibility needs to be tempered with predictability if the investment regime is to operate efficiently.” Strong, *supra* n. 2, at 315.

⁶⁸ See discussion of PCA-administered mass claims processes in S.I. Strong, *Class and Collective Relief in the Cross-Border Context: A Possible Role for the Permanent Court of Arbitration*, 23 Hague Y.B. Int’l L. 113, 133-39 (2010).

⁶⁹ For example, the AAA has developed a set of supplementary rules to address class claims in the commercial arbitration context. See AAA Supplementary Rules for Class Arbitrations, *supra* n. 557. The Supplementary Rules may apply in circumstances where a claim is brought on behalf of a class and the arbitrator has made an initial determination that the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class. The Supplementary Rules provide detailed criteria for appointing a class representative and determining whether a class action may and should proceed.

⁷⁰ See, e.g., Antonio Crivellaro, *Chapter 11: Third-Party Funding and ‘Mass’ Claims in Investment Arbitrations*, in *Third-Party Funding in International Arbitration (ICC Dossier)* 137, 150 (Bernardo M. Cremades Román & Antonias Dimolitsa eds., Int’l Chamber of Commerce (ICC) 2013) (suggesting that ICSID design a uniform procedure to regulate mass investment claims, rather than allow/impose upon arbitrators to

In the meantime, there is not yet evidence of any serious pushback by the international community to exclude mass claims from ICSID or other investment treaty mechanisms. The door to mass claims is therefore ajar, and the *Abaclat* Jurisdictional Decision is likely to be relied on by future claimants as a precedent for investment treaty claims filed “*en masse*.” Yet the serious issues confronted by the *Abaclat* tribunal in the procedural stage, and the importance of an in-depth examination of homogeneity as a prerequisite to mass arbitration, suggest that caution must be exercised in connection with any future mass claims adjudication.

3. Inconsistent Decisions Leave Significant Questions About Whether Sovereign Debt Qualifies for Investment Treaty Protection

The *Abaclat* majority’s decision to extend investment protections to claimants holding sovereign bonds has engendered considerably more criticism than its decision to adjudicate mass claims, both because of its potential to interfere with a sovereign’s consensual debt restructuring process and its expansion of investment protections to a non-traditional and potentially sweeping new realm. The *Abaclat* majority acknowledged the prospective regulatory effects of its decision, stating that opening the door to ICSID arbitration over sovereign bonds “would create a supplementary leverage against ... rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring.”⁷¹ Yet that rather sweeping policy objective may be significantly tempered by a more recent ICSID decision addressing sovereign debt claims under a different treaty, as well as by recent developments in the sovereign debt arena.

The *Abaclat* majority framed its decision almost entirely in terms of the BIT at issue before it, finding that the language of the BIT reasonably encompassed sovereign bonds. Many BITs, however, contain broad definitions of what constitutes an “investment,” such that they encompass large categories of assets, securities, and financial instruments. Some ICSID tribunals have balanced these broad definitions against an examination of whether objective investment criteria also exist. Whether these objective criteria represent a necessary additional criterion, over and above the textual definition of “investment” in a bilateral investment treaty, is a matter of debate (as is the content of any objective test), but proponents of an objective test often urge that a tribunal examine whether there has been a “substantial” or “significant” contribution by the investor to the economic development of the host state, the existence of an “operational risk” associated with the investment, regularity of profit or return, and a certain or fixed duration for the investment.⁷²

come up with procedural solutions to mass and collective claims); Veijo Heiskanen, *Chapter 44: And Others: Mass Claims in ICSID Arbitration in Building International Investment Law: The First 50 Years of ICSID* 613, 624 (Meg Kinnear et al., eds., Kluwer Law Int’l 1015) (suggesting that a mandatory consolidation procedure would make mass investment arbitration more useful for claimants and more economical for respondents). *But see* Deepu Jojo Sushama, *Mass Claims in Investment Arbitration- The Need of the Hour*, Kluwer Arbitration Blog (4 Mar. 2015), <http://kluwerarbitrationblog.com/2015/03/04/mass-claims-in-investment-arbitration-the-need-of-the-hour/> (suggesting that mass investment arbitration procedure fashioned by the *Abaclat* tribunal is an apt procedure to resolve future sovereign debt disputes).

⁷¹ *Abaclat* Jurisdictional Decision, ¶ 514; *see also* Dissent, ¶ 265.

⁷² The case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, is often referred to as the leading case imposing objective criteria on the definition of “investment” found in ICSID Art. 25, although *Salini* has been criticized by some tribunals and commentators. *See Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (31 July 2001), 6 ICSID Rep. 400 (2004), 42 I.L.M. 609 (2003) (stating that “the doctrine

In *Abaclat*, the majority suggested that the language of the BIT was the *only* relevant criterion in establishing jurisdiction over sovereign bonds. It held that objective investment criteria established by prior tribunals were useful considerations, but should “*not serve to create a limit, which the Convention itself nor the Contracting parties to a specific BIT intended to create.*”⁷³ In other words, according to the majority, a tribunal need not consider whether the bonds also met objective investment criteria under Article 25, where the parties had clearly agreed to protect the investment under the terms of their BIT.⁷⁴

Whether objective criteria should be considered at all is a subject of significant debate among the international arbitration community, and is beyond the scope of this article.⁷⁵ It is well established that the drafters of the ICSID Convention chose not to include a definition of investment within the treaty;⁷⁶ yet many tribunals and scholars have looked for the presence of certain core elements to distinguish an investment from an ordinary commercial transaction. One annulment decision argued:

[T]he parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment.⁷⁷

Other tribunals and ad hoc committees have taken a view that the absence of any express restrictions on the term investment within the ICSID Convention suggests that investment as

generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction”). Waibel argues for two additional objective investment criteria: a territorial link and an association with a commercial undertaking. *See* Waibel, *supra* n. 14, at 723. *But see* Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2d Ed.), ¶ 121 (Cambridge Univ. Press 2009) (“It is arguable that the Convention’s object and purpose indicate that there should be some positive impact on development. But it does not necessarily follow that an activity that does not contribute to the host State’s development cannot be an investment in the sense of Art. 25 and is hence outside of the Centre’s jurisdiction.”).

⁷³ *Abaclat* Jurisdictional Decision, ¶ 364 (emphasis added).

⁷⁴ The *Alemanni* and *Ambiente Officio* tribunals, which considered the same Argentina-Italy BIT at issue in *Abaclat*, relied on similar reasoning regarding the BIT’s definition of investment to find jurisdiction in those cases. Neither tribunal considered objective investment criteria.

⁷⁵ The subjectivist and objectivist trends are explored in detail in Emmanuel Gaillard & Yas Banifatemi, *Chapter 8: The Long March Towards a Jurisprudence Constante on the Notion of Investment*, in *Building International Investment Law: The First 50 Years of ICSID* 97-126 (Meg Kinnear et al., eds., Kluwer Law Int’l 2015). For an analysis suggesting that the travaux of ICSID Convention leaves the investment decision in the states’ hands, *see* Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 *Harvard Int’l L.J.* 257 (2010).

⁷⁶ Veijo Heiskanen, *Of Capital Import: The Definition of “Investment” in International Investment Law*, in *Protection of Foreign Investments Through Modern Treaty Arbitration* 51 n. 1 (Anne K. Hoffman, ed., ASA Special Series No. 34, May 2010) (citing 1965 Report of Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, para. 27).

⁷⁷ *See Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 31 (1 Nov. 2006). *But see Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 Apr. 2009) (annulling the award for manifest excess of powers where the arbitrator declined to exercise jurisdiction on the basis that the *Salini* test was not met) (“[T]he Committee finds that the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the [BIT] to be a gross error that gave rise to a manifest failure to exercise jurisdiction.”).

a concept should be interpreted broadly and that the intentions expressed in the parties' BIT are the paramount consideration in evaluating jurisdiction.⁷⁸

In the context of sovereign debt disputes with foreign bondholders, the objective versus subjective investment definitions raise a pertinent question: whether there are certain types of investments that by their nature are inappropriate for ICSID adjudication and thus should not be accepted by investment treaty tribunals, even if they can conceivably be couched under the "investment" definition contained in a particular BIT. The question requires states, commentators and scholars to balance the absence of any international insolvency regime against the propriety of interfering with a state's sovereign exercise of debt restructuring through an international treaty dispute mechanism.

With this context in mind, the *Abaclat* reasoning stands in stark contrast to a jurisdictional decision rendered in late 2015, in which a different ICSID tribunal considered both subjective and objective criteria in evaluating whether sovereign bonds could qualify as investments – and found that they could not. In *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic*,⁷⁹ the tribunal considered whether a Slovakian bank could bring claims against Greece under the Greece-Slovakia BIT arising out of Greece's default on sovereign bonds held by the bank. It distinguished the Greece-Slovakia BIT from the Argentina-Italy BIT, finding that the BIT did *not* include sovereign debt within its definition of investment.⁸⁰ Notably, the language in that BIT could arguably be considered *more* expansive than that found in the Argentina-Italy BIT: it includes a category for "**loans, claims to money** or to any performance **under contract having a financial value.**"⁸¹ Nonetheless, the *Poštová* tribunal found that the absence of any category for "public" instruments made the definition sufficiently distinct from the language considered by the *Abaclat* tribunal so as not to encompass sovereign bonds.⁸²

The *Poštová* tribunal could have ended its analysis there, but instead it went on to suggest that sovereign bonds could not satisfy the objective investment criteria of "contribution of money or assets, duration and risk."⁸³ According to the *Poštová* tribunal, a decision by Greece to refinance its foreign debt by selling bonds on the open market did not constitute an act of economic venture funded by the claimants' purchase of those bonds. The tribunal focused on the fact that the bonds were issued to fund general budgetary obligations of Greece, thereby distinguishing them from loans or financial instruments associated directly with a specific economic enterprise.⁸⁴ The *Poštová* tribunal was particularly concerned with the idea that an investment entails an "economic operation creating value," in the sense of an asset or operation that contributes to an economic venture over time.⁸⁵ The *Poštová* tribunal

⁷⁸ See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, ¶ 312 (24 July 2008) ("In the Tribunal's view, there is no basis for a rote, or overly strict, application of the five Salini criteria in every case. These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention.").

⁷⁹ ICSID Case No. ARB/13/8, Award (9 Apr. 2015) [hereinafter "*Poštová* Award"]. The tribunal in *Poštová* included Prof. Eduardo Zuleta (President), Mr. John Townsend (Claimants' appointee) and Prof. Brigitte Stern (Respondent's appointee).

⁸⁰ *Poštová* Award, ¶ 332.

⁸¹ *Id.* ¶ 336 (emphasis added). Most treaties contain similarly broad definitions of protected "investments" covering "every kind of asset;" some mention debt instruments expressly.

⁸² *Id.* ¶¶ 304-308.

⁸³ *Id.* ¶¶ 356, 371.

⁸⁴ *Id.* ¶¶ 361-364.

⁸⁵ Veijo Heiskanen offers an interesting alternative analysis: one that would define an investment by looking for the presence of a "capital contribution" by the owner, such that he/she bears long term risk in the asset in

directly contravened the *Abaclat* majority's conception that the indirect infusion of cash into Argentina resulting from the claimants' purchase was a "value-creating" proposition in the sense typically associated with an ICSID investment.⁸⁶

The *Poštová* tribunal also suggested that the generalized risk inherent in the purchase of sovereign bonds—that is, the risk that the sovereign will default—is distinct from operational risk undertaken by a claimant through a particular investment in the country.⁸⁷ For the *Poštová* tribunal, the differentiating factor between a bond or financial instrument qualifying for investment protection and one not qualifying for investment protection is the presence of an associated commercial enterprise linked to the sovereign.⁸⁸

We are therefore left with significant disagreement between two esteemed tribunals and among commentators as to whether sovereign debt may be the proper subject of ICSID arbitration. The debate is a significant one, not only for sovereign debt claims but also for disputes arising out of other types of financial instruments that may not bear the traditional forms of objective investment indicia. *Abaclat* suggests that broad language in a BIT suggesting an intention to encompass such instruments should override any conflicting objective analysis. Yet the *Poštová* tribunal highlights the considerable drawbacks of such an approach, focusing in particular on the reasons why open market purchases may be too far removed from the objective definition of investment to fit neatly within the ICSID regime.⁸⁹

While *Poštová* and *Abaclat* will remain two critical pillars in the debate regarding jurisdiction over sovereign debt and other financial instrument-based claims, the international community has also reacted to the Argentine debt disputes in ways that may limit future claimants' ability to use investment treaty arbitration to resolve sovereign debt claims.

question. Sovereign bonds would arguably qualify as investments under this straightforward, accounting-based definition. Heiskanen also argues that the criteria of contribution to the host state is not necessarily a relevant one to the concept of private investment, and notes the significant controversy that exists over this element. *See* Heiskanen, *supra* n. 76, at 70. Notably, the US Model BIT lists exemplary characteristics of investments including "the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk;" however it does not expressly require a showing of a capital contribution to the state. US Model BIT, Art. 1 (2012) (defining "investment").

⁸⁶ One of the claimants, *Poštová banka, a.s.*, sought annulment of the award on the basis of ICSID Convention Art. 52(1)(e) (failure to state the reasons for which relief is granted). *Poštová banka* argued that the tribunal's reasoning did not follow logically and was contradictory, because the tribunal found that *Poštová banka* had contractual rights under the bond instruments, but the tribunal did not explain why these independent rights under the bond instruments did not constitute investments in Greece. *See Poštová*, Decision on Annulment, ¶¶ 91-92, 103 (29 Sept. 2016). The annulment committee found no gap or contradiction in the tribunal's logic, opining that not every contractual right in a foreign country constitutes a protected investment in that country. *Id.* ¶¶ 155, 158.

⁸⁷ *Poštová Award*, ¶¶ 369. Waibel takes the argument one step further: "Bondholders are atomized and anonymous. Bonds are bought on the secondary market without formal or other specific relationship with the debtor government. Bondholders' nationalities might change with every transaction." Waibel, *supra* n. 14, at 722.

⁸⁸ *Poštová Award*, ¶ 333 n.494 (opining that sovereign bond purchases do not involve a commercial undertaking within the state).

⁸⁹ The ICC Commission Report on Financial Institutions and International Arbitration notes this very debate: "While [sovereign debt] decisions have caused heated debate, the argument essentially boils down to two issues, which are: first, whether a sovereign bond in the form of dematerialised securities falls within the ordinary meaning of "investment" as defined in a typical BIT; and second, whether such a product, particularly when it is acquired on the secondary market, must also satisfy an objective test which entails determining whether the investment possesses the character of an "investment". ICC Commission Report, Financial Institutions and International Arbitration, at 14 (ICC Publication 877-0 ENG, 2016).

First, the Argentine crisis has led to the increased use of collective action clauses in sovereign bonds. These clauses permit a specified majority of bondholders to bind all bondholders through consent to a sovereign's debt restructuring.⁹⁰ Such clauses seek to limit the ability of small numbers of holdout creditors to refuse the terms of the restructuring and instead litigate or arbitrate for full recovery.⁹¹ There are, of course, older sovereign debt instruments that do not include such clauses and may remain subject to holdout litigation.⁹² Even in those instances, the Argentine experience has highlighted the dangers of non-consensual debt restructurings and has likely made sovereigns more willing to negotiate with holdouts in the future.⁹³

Second, and more directly relevant to the ICSID regime, several recently negotiated bilateral and multilateral investment treaties include a "public debt" exception, whereby bondholders are expressly prohibited from bringing claims on sovereign bonds that are the subject of a concluded "negotiated debt restructuring" by the host state (other than, in the case of US Free Trade Agreements, claims of discriminatory conduct).⁹⁴ The parameters of such clauses have

⁹⁰ The International Capital Market Association currently recommends a supermajority of at least 75% of bondholders. See International Capital Market Association, "Standard Aggregated Collective Action Clauses For The Terms And Conditions Of Sovereign Notes," (Aug. 2014) available <http://www.icmagroup.org/assets/documents/Resources/ICMA-Standard-CACs-August-2014.pdf>. Several recent trade agreements follow this advice, defining a negotiated restructuring as involving "holders of no less than 75 percent of the aggregate principal amount of the outstanding debt." See, e.g., U.S.-Colombia Trade Promotion Agreement, Annex 10-F (2) (22 Nov. 2006) (entered into force 15 May 2012); Free Trade Agreement between the United States of America and Peru, Annex 10-F (12 Apr. 2006) (entered into force 1 Feb. 2009); see also Comprehensive Economic Trade Agreement between Canada and the EU (Annex 8-B) (not yet entered into force) (same); Trans-Pacific Partnership, at p. 9-5 (not yet entered into force) (same). The European Union's negotiating text of the Transatlantic Trade and Investment Partnership between the U.S. and EU proposed a lower supermajority of 66%. See Transatlantic Trade and Investment Partnership, European Commission Draft Text – Investment, at Annex II (3).

⁹¹ Waibel, *supra* n. 14, at 713.

⁹² Several of Venezuela's sovereign bonds, for example, contain such clauses, while many of the bonds issued by Venezuela's state oil company, PDVSA, do not. See, e.g., Francisco Rodriguez, *Venezuela Has Good Reasons to Avoid Default*, Bloomberg View (11 Aug. 2016), <https://www.bloomberg.com/view/articles/2016-08-11/venezuela-has-good-reasons-to-avoid-default>. Notably, Venezuela has withdrawn from the ICSID Convention, making it significantly less likely that bondholders can challenge a Venezuelan default before an ICSID tribunal. Of course, ICSID Additional Facility, ad hoc or UNCITRAL adjudication may remain viable options, depending on the terms of the applicable investment treaties.

⁹³ Note, however, that recent bond documents indicate a possible trend towards commercial arbitration (rather than domestic litigation) for the resolution of disputes. The ICC Task Force examined 92 sovereign bonds (82 of which were issued between 2010 and 2015) and found that arbitration was available as a means of dispute settlement in 18 of the 92 sovereign bonds – or approximately 20%. ICC Commission Report, *Financial Institutions and International Arbitration*, at 12 (ICC Publication 877-0 ENG, 2016).

⁹⁴ For example, a number of U.S. bilateral and multilateral free trade agreements include provisions providing for a public debt exception. See, e.g., U.S.-Colombia Trade Promotion Agreement, Annex 10-F (2) ("No claim that a restructuring of debt issued by a Party other than the United States breaches an obligation under Section A [Treatment of Investments] may be submitted to, or if already submitted continue in, arbitration under Section B [Investor-State Dispute Settlement] if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission, except for a claim that the restructuring violates [the obligation to accord national treatment and most favored nation treatment]."); Free Trade Agreement between the United States of America and Peru, Annex 10-F (same); Free Trade Agreement Between the Government of Chile and the Government of the United States of America, Annex 10-B (6 June 2003) (entered into force 1 Jan. 2004) (exempting restructuring disputes from investment arbitration generally); Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA), Annex 10-A (5 Aug. 2004) (entered into force 1 Jan. 2009) (same). Similar public debt exclusions appear in the unratified Trans-Pacific Partnership (Annex 9-G) and Comprehensive Economic Trade Agreement (Annex 8-B) between Canada and the EU, and negotiating drafts of the Transatlantic Trade and Investment Partnership (Annex X). It is unclear whether these latter multilateral treaties will ultimately enter into force but they nonetheless demonstrate

not yet been tested; for example, one of the *Abaclat* claimants' key arguments was that Argentina's Exchange Offers were *not* properly negotiated and instead were "crammed down" to force maximum bondholder participation. Regardless, the new clauses suggest that, under those treaties, investment treaty arbitration is not the preferred mechanism for resolving sovereign debt claims where the state has reached agreement with a supermajority of debtholders to restructure that debt on a non-discriminatory basis.⁹⁵

Finally, we have yet to understand the ultimate implications of the *Abaclat* Jurisdictional Decision on the approach taken by individual states towards their post-*Abaclat* treaty negotiations. The United States considered a sovereign debt exclusion in its Model BIT, but ultimately did not adopt it.⁹⁶ As for Argentina itself, in its first bilateral investment treaty negotiated post-crisis, Argentina did not expressly exclude sovereign bonds but tailored its investment definition in ways that are ostensibly responsive to the *Abaclat* experience: the term "debts" is mentioned only in relation to private companies, and the investment definition further requires the "commitment of resources into the territory of the host Contracting Party."⁹⁷ This measured approach by Argentina may in part reflect the slippery slope a state may encounter in attempting to expressly delineate (or expressly exclude) certain types of investments within their BIT definitions.

4. Conclusion

The *Abaclat* majority's decision to permit adjudication of bondholder disputes arising out of Argentina's sovereign debt default through the prism of international investment law is a noteworthy example of the extension of investment arbitration to encompass assets and business transactions that were not historically associated with the ICSID regime. The treaty and sovereign bond reforms discussed above have the potential to reduce the likelihood of future sovereign debt investment arbitrations, and the example of the Argentine experience more generally will remain a powerful incentive for states to engage in robust restructuring efforts that reduce "holdout" litigation.

Nonetheless, *Abaclat*'s holdings regarding the propriety of adjudicating mass claims within the ICSID regime, as well as its more fluid, BIT-focused test for assessing jurisdiction over investments arising out of financial instruments such as sovereign bonds, is likely to remain significant, controversial, and hotly debated for years to come. *Abaclat* was settled before its critical decision on the merits could be rendered. Yet for international arbitration practitioners, it is safe to assume that the influence of *Abaclat* has only just begun.

states' growing inclination to exclude negotiated sovereign debt restructuring disputes from investment arbitration.

⁹⁵ Other initiatives are underway to address sovereign debt crises, including an ad hoc committee organized under the auspices of the United Nations Conference on Trade and Development (UNCTAD) that is considering various multilateral options to create a legal framework for sovereign debt restructuring processes. See Gregor Baer, *Towards an International Insolvency Convention: Issues, Options and Feasibility Considerations*, 17 Bus. L. Int'l 5, 22 (Jan. 2016).

⁹⁶ See Mark Kantor, *Abaclat: An Aberration?*, in *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012*, 131-32 (Arthur Rovine, ed., Brill 2013) (explaining that the United States opted not to adopt a proposed amendment to the U.S. Model BIT excluding sovereign debt from the definition of "investment").

⁹⁷ See Luke Eric Peterson, ANALYSIS: A look inside Argentina's first new Bilateral Investment Treaty in 15 years (Dec. 13, 2016), available at <http://www.iareporter.com/articles/analysis-a-look-inside-argentinas-first-new-bilateral-investment-treaty-in-15-years/> (analyzing the Argentina-Qatar bilateral investment treaty).