International Centre for Settlement of Investment Disputes
Washington, D.C.

In the Proceeding between

GIOVANNI ALEMANNI AND OTHERS

and

ARGENTINE REPUBLIC

(ICSID Case No. ARB/07/8)

ORDER OF THE TRIBUNAL
DISCONTINUING THE PROCEEDING

Members of the Tribunal
Sir Franklin Berman, KCMG, QC, President
Professor Karl-Heinz Böckstiegel, Arbitrator
J. Christopher Thomas, QC, Arbitrator

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

Date: 14 December 2015

Representing the Claimants:

Prof. Avv. Luca G. Radicati di Brozolo
ARBLIT - Radicati di Brozolo
Sabatini
15 via Alberto da Giussano
20145 Milan, Italy
and
Avv. Piero G. Parodi,
Prof. Abogado Rodolfo Carlos Barra
Via S. Maurilio 14
20123 Milan, Italy

Representing the Respondent:

Dra. Angelina María Esther Abbona
Procuradora del Tesoro de la Nación
Argentina
Posadas 1641 – Piso 1
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Argentina

Background

1. The Tribunal will begin by recalling briefly the background to the present stage of the proceedings.

2. As to the period from the initiation of the arbitration until March 2013, reference can be made to paragraphs 1-29 of the Tribunal's Decision of 17 November 2014 on Jurisdiction and Admissibility.

3. Following the issuance of the Decision, the Centre requested the Parties on 24 November 2014 under Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations to make a sixth advance payment, of USD 200,000 each, to cover the expenses to be incurred in the proceeding during the next following three to six months.

4. On 9 January 2015, the Secretary of the Tribunal notified the Parties that the Centre had not received the payments that had been requested from them in November 2014 and invited either party to pay the full amount of USD 400,000 within 15 days as foreseen in Regulation 14(3)(d).

5. By letter of 12 January 2015, the Claimants updated their list of withdrawing Claimants and requested more time to submit a final list. The Claimants additionally requested that the proceeding be stayed for lack of payment in light of the Respondent's refusal to pay its part of the expenses of the proceeding, which would need to be considered by the Claimants in their final decision about the continuation of the present proceeding.

6. On 27 January 2015, as the requested payment was still outstanding, the Secretary-General moved that the Tribunal stay the proceeding pursuant to Regulation 14(3)(d), which the Tribunal proceeded to do on 6 February 2015.

7. By letter of 9 February 2015, the Respondent took note of the suspension of the proceedings, reserved its rights to comment on the Claimants' letter and requested that, should the proceedings resume, a new deadline be set for it to respond to the letter.

8. By letter of 18 February 2015, the Claimants described the Respondent's failure to respond to their letter as designed "to generate more confusion and uncertainty in the remaining bondholders" and requested that the "strategy" adopted by the Respondent to abstain from paying its costs of the arbitration, as it had done in the previous two bondholder cases, be taken

into account by the Tribunal as a further element meriting that the Respondent pay the costs associated with the proceeding. The Claimants requested, inter alia, that, in the event of the discontinuance of the proceeding, the Tribunal establish a deadline to interrogate each remaining Claimant on the continuation of the arbitration and "complete" its Decision on Jurisdiction by deciding on the costs of the proceeding after the Parties had been given an opportunity to submit their respective arguments.

9. On 10 August 2015, the Secretary of the Tribunal informed the Parties that nearly six months had elapsed since the suspension of the proceeding for lack of payment, and that the Secretary-General was accordingly considering moving the Tribunal to discontinue the proceeding pursuant to Regulation 14(3)(d). The Parties were invited to submit their observations by 14 August 2015.

10. By letter of 14 August 2015, the Respondent reiterated its earlier position, particularly in light of the subsequent discontinuance of the *Ambiente Ufficio* case,[1] and claimed to have suffered prejudice from the commencement of both sets of proceedings. In support, the Respondent referred to the fact that the Tribunal had joined to the merits its preliminary objections based on the multiplicity of claimants and on the absence of an investment in Argentina within the meaning of the BIT, and referred to the observations in the Decision on Jurisdiction and Admissibility regarding certain aspects of the arrangements for the Claimants' representation in this proceeding. In conclusion the Respondent requested that the Secretary-General move the Tribunal to discontinue the case, and following this that the Tribunal discontinue the case and order the Claimants to pay the costs and expenses of the arbitration.

11. By letter of 18 August 2015, the Acting Secretary-General moved the Tribunal to discontinue the proceeding pursuant to Administrative and Financial Regulation 14(3)(d).

12. By letter of 1 September 2015, counsel for the Claimants requested an extension of time to state the Claimants' final position on the discontinuance of the proceeding and to rebut certain arguments raised by the Respondent; the Tribunal granted a three week extension on 2 September 2015, following which the Respondent would have an equivalent period (three weeks) to respond to the Claimants' observations.

13. By letter of 23 September 2015, the Claimants stated that the discontinuance of the present proceeding seemed "inevitable" since they had been discouraged from continuing to

[1] *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (ICSID Case No. ARB/08/9).

the merits phase given the Respondent's "bad-faith behavior" adopted in all the bondholder cases, including its refusal to share the costs of the arbitration; its constant obstruction and delay of the proceeding by raising frivolous objections, which had also been adopted in the other two bondholder cases; and in addition, outside of the arbitration procedure itself, the creation of panic and frustration with the aim of provoking confusion among the participants. The Claimants accused the Respondent of having exploited the fact that the majority of investors in this proceeding are people of middle-low class lacking in financial experience and easily impressed or frightened, which was not merely unfair, it was a violation of the Respondent's commitment to arbitrate under the BIT.

14. The Claimants further denied that there was anything peculiar about the financial arrangements which contained provisions very common in funding agreements; the Claimants had not abandoned their right of control over the conduct of the arbitration, but merely given individual powers of attorney to their lawyer which could be revoked. The Claimants vigorously rejected the 'dishonest' allegation that Avv. Parodi had a financial interest in NASAM, for which there was not the faintest evidentiary support, but confirmed instead his status as an individual bondholder with the right to appear as counsel in his own case. Avv. Parodi's non-appearance before the Tribunal did not signify his failure to participate in the conduct of the case.

15. Finally, the Claimants requested that the Respondent be ordered to bear the costs of the proceeding. There was no rule imposing on the claimant party an obligation to engage on the merits phase of a proceeding; conversely, the Respondent's refusal to pay its share of the costs of the proceeding was a strategy to hinder its continuation in violation of fundamental international principles of due process, including access to justice and equal treatment of the Parties. Furthermore, the Respondent had acted inconsistently, seeing that in the *Ambiente Ufficio* case it had requested that the costs and expenses be borne by the Parties equally. The Claimants submitted that, given the autonomy of the jurisdictional phase in which they were successful and the fact that the Tribunal had "unconditionally" recognized the admissibility of the request, the general principle that costs follow the event, predominantly applied by ICSID Tribunals, would seem to be inevitably applicable if only for reasons of equity. The Claimants invoked Article 38(5) of the ICC Rules which expressly permits the Tribunal to take into account when allocating costs a party's wasteful conduct, which applied to the Respondent's behaviour in the present case. The Claimants accordingly requested that the Tribunal

discontinue the proceeding for lack of payment, and order the Respondent to cover all the costs and expenses of the proceeding, together with compound interest.

16. By letter of 15 October 2015, the Respondent reiterated its position of 14 August 2015, stating that nothing in the Claimants' letter modified its position. It should not be made responsible for the Claimants' loss of interest in the arbitration. The Claimants' failure to move the proceedings forward rendered unjustifiable the expenses and costs incurred to date. Since the beginning of the arbitration, the Respondent had highlighted the difficulties the Tribunal would encounter in conducting an individual analysis over every claim and claimant in a case of this nature. When deciding on costs the Tribunal should take into account the fact that it had joined to the merits the jurisdictional objections on the multiplicity of Claimants and the lack of an investment, and should take into account as well the financial and legal arrangements of the Claimants. The Respondent recalled that it had consistently adopted the position of the "inadmissibility of this arbitration proceeding as a mechanism to settle a sovereign debt dispute, and the unviability of a proceeding brought by a number of claimants that has changed over time and whose identification and ownership of the security entitlements at stake has not been established so far." The Respondent accordingly requested the discontinuance of the proceeding pursuant to Administrative and Financial Regulation 14(3)(d) and that the Claimants be ordered to pay the costs and expenses of the proceeding.

Analysis by the Tribunal

17. The Tribunal finds itself in the unusual position that, not only have the requisite advances not been made by any Party to this arbitration proceeding, so triggering the motion by the Secretary-General for its discontinuance, but all of the Parties on both sides are actively urging the Tribunal to comply with the Secretary-General's request. The Tribunal can see no reason of any kind not to do so, and intends accordingly formally to discontinue the arbitration for lack of payment.

18. The only question remaining is that of costs. It will be recalled that, in its Decision of 17 November 2014 on Jurisdiction and Admissibility, the Tribunal had reserved the question of the costs of that phase of the proceedings.

19. The Tribunal has given anxious consideration to the question of costs. It would have done so even if it had not been faced with energetic claims from both sides to be awarded costs.

At a time at which the system of investment arbitration is under sustained criticism, both from inside and from outside (even though much of this criticism is unjustified or exaggerated), tribunals are under a duty to keep under regard the cost efficiency of the proceedings before them. The Tribunal has noted a growing tendency on the part of ICSID Tribunals to make use of the general powers conferred on them to allocate the costs of arbitral proceedings, and is in favour of this tendency, as a matter of principle; the idea should never be allowed to gain ground that launching claims, or maintaining defences, that turn out to be unsustainable is a cost-free option.

20. Turning now to the particular situation before it, the Tribunal must begin by assessing what powers it has under the governing legal instruments to make awards of costs to one Party or another. Only then will it make sense to consider whether such powers should be exercised in the specific circumstances, and if so how. This is of course against the background of the state of the present proceedings as at the moment of discontinuance; namely, that the Tribunal has ruled, in its Decision of 17 November 2014, on the series of preliminary objections as to jurisdiction and admissibility raised by the Respondent, but that no proceedings of any kind, neither procedural nor substantive, have been held on the merits, given the failure by the Parties to provide the necessary funding for the continuation of the arbitration. Of the Respondent's preliminary objections, five have been rejected; the remaining two have been rejected in part and for the rest joined to the merits under the provisions of Article 41(2) of the ICSID Convention and 41(4) of the Arbitration Rules.

21. The Parties presented no submissions to the Tribunal on the prior question of its powers to make the costs awards they request. The Tribunal must therefore analyse the matter for itself. The relevant provisions are Article 61(2) of the Convention, Arbitration Rule 28(1) and Arbitration Rule 47(1)(j).

22. Article 61(2) lays down:-

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid."

The Article goes on to specify that such decision "shall form part of the award."

23. As to the Arbitration Rules, paragraph (1)(j) of Rule 47, the Rule which regulates the Award, contains a general empowerment with respect to costs, by specifying that the Award "shall" contain "any decision of the Tribunal regarding the cost of the proceeding." The Tribunal interprets this provision, notably its reference to 'any' decision, as conveying on a tribunal a wide discretion over the allocation of costs, but as requiring that, if that discretion is exercised, it must form part of the final disposition of the case. Other tribunals have interpreted Article 61(2) and Rule 47(1)(j) in the same way.[2]

24. Rule 28(1) reads as follows:-

> "Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
> (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
> (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties."

The Tribunal is not aware that there has been any contrary agreement between the Parties as foreseen either in Article 61 or in the *chapeau* to this Rule.

25. The Tribunal finds itself in a state of some uncertainty as to the overall impact of these provisions. On reflection, it concludes that the soundest interpretation is that the obligation (and it is a clear obligation) imposed on any tribunal by the first sentence of Article 61(2) is brought into operation only at the moment when an arbitral proceeding is brought to a definitive end through an award, whether this be on the merits or on jurisdiction. This interpretation is reinforced by the fact that paragraph 2 of Rule 28 establishes its procedural counterpart by requiring the parties to submit to the tribunal statements of their own costs but only after the closure of the proceeding (sc. under Rule 38) and in the perspective of the rendering of the award which will follow within 120 days. Conversely, although paragraph 1 of Rule 28 seems to open to the tribunal a wider freedom of action, neither the text itself nor subsequent practice offers much guidance as to the principles that should guide a tribunal in exercising it. At all events the Rule 28(1) power (a) is limited to the central costs of the arbitration itself, and (b) has no clear procedural counterpart, since there is no indication under the Rules as to what triggers the determination by the Secretary-General (see above); moreover, whatever decision the tribunal may take under Rule 28(1), it is in any event <u>expressly</u> 'without prejudice to the

[2] The practice is exhaustively analysed in Schreuer's Commentary, at pp. 1223-1243.

final decision on the payment of the cost of the proceeding' – and, as indicated, that decision comes into play only at the moment of the issue of the award. The present Tribunal is not however in the position of issuing a final award.

26. The Tribunal accordingly finds that it does not possess the power to make the costs orders applied for either by one side or the other in this arbitration. Even if it had found itself to have a power of that kind, the Tribunal is in serious doubt whether it would, in the circumstances of the case, have wished to exercise it. The Tribunal draws attention to the remarks it has already had occasion to make about the failings in co-operation between the Parties and with the Tribunal. It notes, in addition, that the majority of the Respondent's preliminary objections had already been advanced, and rejected, in a series of previous arbitrations. Conversely, although it could be said that the Claimants were to a substantial extent successful at the preliminary stage, that was not entirely the case; moreover, the bringing of two identical arbitrations in parallel[3] must necessarily have led to the incurring of substantial additional costs to no apparent purpose, and the Tribunal has no way of knowing whether the proceeds of any costs award would have found their way into the pockets of the Claimants themselves or the litigation funders.

27. The Tribunal accordingly intends to declare the present arbitration proceedings discontinued under Administrative and Financial Regulation 14, but will make no order as to costs.

FOR THE REASONS SET FORTH ABOVE:

In accordance with Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations, the Arbitral Tribunal hereby discontinues the present proceeding.

[Signed]

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Sir Franklin Berman, KCMG, QC
President, for the Tribunal

[3] i.e. *Ambiente Ufficio* and the present case (see paragraphs 254-256 of the Tribunal's Decision on Jurisdiction and Admissibility).