

ICSID Case No. ARB/07/5

**ABACLAT AND OTHERS
(CLAIMANTS)**

and

**THE ARGENTINE REPUBLIC
(RESPONDENT)**

PROCEDURAL ORDER No. 25

28 APRIL 2014

IN VIEW OF

- Procedural Orders No. 13 of 27 September 2012, No. 14 of 1 November 2012 and No. 15 of 20 December 2012 and the timetable attached thereto;
- Claimants' letter of 10 April 2014 by which Claimants requested the opportunity to file a limited responsive submission to address any new matters relating to individual jurisdiction that Respondent raised in the Rejoinder;
- Respondent's letter of 16 April 2014 by which Respondent commented upon Claimant's request;
- Claimants' letter of 22 April 2014 in response to Respondent's letter of 16 April 2014;

CONSIDERING

- that Claimants justify their request based on the main argument that Respondent's Rejoinder exceeds – in a number of respects – the scope of arguments and documents on which the Parties had joined issue in their prior submissions; and,
- that Claimants would be significantly prejudiced if they were not afforded an opportunity to address arguments and documents, newly raised by Respondent at this late juncture, before the close of the written submission phase;
- that Respondent commented thereupon stating that (i) Claimants' request relates to Section II (B) of Respondent's Rejoinder on Phase 2, which in turn responds to Section VI (A) and (B) (Paragraphs 584-641) of Claimants' Reply on Phase 2, (ii) that in case the Tribunal deems it appropriate to grant Claimants an opportunity to refer to individual jurisdictional issues, Claimants' submission must only be limited to the issues specifically mentioned in Section II (B) of the Rejoinder on Phase 2, and (iii) that, given that Respondent had not submitted any new expert reports or witness statements, Claimants should in any event not be allowed to file new expert reports or witness statements at this procedural stage;

CONSIDERING

- that the procedural timetable contemplates the possibility of a "*Rejoinder Memorial on Jurisdiction regarding new arguments or documents, if any*" ("*Sur-Rejoinder*") by Claimants;
- that such a possibility constitutes an exception, given that the agreed principle was that there would be two exchanges of written submissions;
- that it is not uncommon or exceptional that the last submission, which responds to the previous one, contains additional statements and information;
- that moreover, in view of the duration of the present proceedings, the volume of submissions and exhibits already filed by the Parties as well as the approaching

date of the hearing, the possibility of a Sur-Rejoinder should be handled restrictively;

- that, consequently, it is necessary that the points to which Claimants intend to respond must be new and not of a nature to be sufficiently addressed at the upcoming hearing;

CONSIDERING FURTHER

- that the issues raised by Claimants in their letter of 10 April 2014 concern issues in relation to the proof of nationality of Claimants;
- that these issues have already been largely dealt with by Respondent in its Counter-Memorial at paras. 448 to 640;
- that, although Respondent has partly further substantiated or documented its arguments in its Rejoinder, few of the arguments identified by Claimants are actually new;
- that, in particular:
 - (i) *With regard to the issue of burden of proof for individual jurisdiction:* Although the specific argument of ‘proximity of proof’ does not appear to have been raised as such by Respondent in its previous submissions, Respondent has previously raised the argument that Claimants failed to provide sufficient evidence attesting their citizenship including among others para. 461 et seq. of Respondent’s Counter-Memorial;
 - (ii) *With regard to the issue of access to Claimant information:* Claimants’ remark concerns mainly Article 33 of D.P.R. No. 223/1989, which is a Technical Note of 23 May 2000 from the Italian Authority for Data Protection;
 - (iii) *With regard to the issue of individual natural Claimants files:* Respondent has referred to the specific Claimants concerned by way of examples to illustrate arguments made already in previous submissions and based on documents which were already part of the record;
 - (iv) *With regard to the issues of sufficiency of Italian birth deeds:* The arguments concerned were already addressed in Respondent’s Counter-Memorial in paras 480 and 502 et seq.;
 - (v) *With regard to the issues of sufficiency of Italian passport:* The arguments concerned were addressed in Respondent’s Counter-Memorial in paras 486 et seq. and 505 et seq. As to the Article 3 of Law No. 1185/1967, it is part of the law upon which Claimants’ expert Mr. Fumagalli commented, even if he did not comment on Article 3 specifically;
 - (vi) *With regard to the issues of sufficiency of Italian residency certificate:* The arguments concerned were addressed in Respondent’s Counter-Memorial

paras 460 and 492, although it appears that Respondent had not previously specifically relied upon the decision of February 2013 of the Italian Supreme Court on which it relies in its Rejoinder (RD-556);

(vii) *With regard to the issues of nationality of ecclesiastical entities:* The arguments concerned were addressed in Respondent's Counter-Memorial paras 546 et seq. and the legal authorities that Respondent refers to in its Rejoinder mostly relate to books or other publications on ecclesiastic law in the public domain;

(viii) *With regard to issues of individual juridical Claimant files:* The arguments concerned were addressed in Respondent's Counter-Memorial paras 543 and 553 et seq.

- that the Arbitral Tribunal considers that in view of the nature and scope of the arguments and exhibits upon which Claimants wish to respond, such response can be appropriately made at the hearing;
- that the Arbitral Tribunal does therefore not consider it necessary to arrange for an additional opportunity to respond to these arguments in writing before the hearing;
- that the Arbitral Tribunal reserves the right to arrange, if necessary and appropriate, for an additional written submission after the hearing;

CONSEQUENTLY THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

- **Claimants' request dated 10 April 2014 to be provided an opportunity to file a limited responsive submission to Respondent's Rejoinder is hereby rejected.**
- **The Arbitral Tribunal reserves the right to reconsider this decision after the hearing.**

[Signed]

Pierre Tercier,

President

On behalf of the Arbitral Tribunal