Ambiente Ufficio S.p.A. and Others v. Argentine Republic
ICSID Case No. ARB/08/9 (formerly Giordano Alpi and others v. Argentine Republic), Decision on Jurisdiction and Admissibility, 2 February 2013 (Bruno Simma, Karl-Heinz Böckstiegel) and Dissenting Opinion of Santiago Torres Bernárdez, 2 May 2013

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Keywords

In Ambiente v. Argentina, an arbitral tribunal established under the ICSID Convention and the bilateral investment treaty (BIT) between Argentina and Italy upheld, by a majority, its jurisdiction and the admissibility of claims brought against Argentina by 90 Italian investors arising out of Argentina's default on sovereign bonds. Of the myriad of jurisdictional objections raised by Argentina that the Tribunal rejected, three issues stand out as particularly important to the development of international investment law. This comment focuses on those three points as discussed in the majority and dissenting opinions. First, the Tribunal held that the ICSID Convention and the BIT’s silence concerning multi-party actions did not imply an absence of consent to arbitrate in the form of such proceedings. Second, the Tribunal relied on the doctrine of a “single economic operation” encompassing the entire sovereign

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bond issuance process to conclude that the security entitlements to Argentine bonds held by the Claimants constituted protected “investments.” Third, the Claimants were not required to satisfy the BIT’s prerequisite steps to arbitration—amicable negotiations and recourse to Argentine courts—because resort to those channels of dispute resolution was futile. Beyond its contribution to those three issues, the decision is significant as a further step toward the use of investor-State arbitration to resolve sovereign default disputes amid the current rash of sovereign debt crises.

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Multiple Claimants

Argentina raised a host of objections based on the number of claimants. In sum, it argued that neither the ICSID Convention nor the Italy-Argentina BIT contemplated arbitral jurisdiction over “collective actions” ( paras. 68–69 ), but that both restrict jurisdiction to single investor disputes. The majority began its analysis of this issue by clarifying terms relating to multi-party and mass proceedings. Because each individual claimant was participating in the proceedings, the arbitration was not a “class action,” which is characterized by its representative nature ( paras. 114–118 ). Further, with only 90 claimants, it was not a “mass claim,” unlike the concurrently running arbitration Abaclat and Others v. Argentina, which involves 60,000 Italian holders of Argentine bonds and Argentina in ( paras. 119–120 ). The majority thus adopted the more accurate terminology “multi-party” action or proceeding. By using this more neutral term, it sought to avoid the suggestion, conveyed by the terms “mass claim” and “class action,” that procedural modifications were necessary per se.

The majority next rejected Argentina’s argument that the silence of the ICSID Convention and the BIT on multi-party arbitration implied a lack of consent to such actions ( paras. 126–147 ). Starting from Article 31 of the Vienna Convention on the Law of Treaties ( VCLT ), it concluded that the ordinary meaning of the terms in Article 25 of the ICSID Convention, the Convention’s jurisdictional provision, leaves ambiguous whether only single-investor or also multiple-investor actions were envisaged ( paras. 129–30 ). While Article 25 refers to jurisdiction over disputes between “a contracting State” and “a national of another contracting State,” the majority concluded that that language does not preclude a single action involving multiple such disputes, each within ICSID’s jurisdiction. The BIT’s jurisdictional clause was even less supportive of