THE INVESTMENT TREATY ARBITRATION REVIEW

Seventh Edition

Editor
Barton Legum

THE LAWREVIEWS

THE INVESTMENT TREATY ARBITRATION REVIEW

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review* boasts a number of new chapters. The result is greater coverage and a resource that is even more useful to practitioners.

As before, this new edition provides an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments in the field of investment treaty arbitration.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to those developments and the context behind them.

This seventh edition represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume.

Barton Legum
Honlet Legum Arbitration
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May 2022

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Admissibility and Procedural Issues

Chapter 13

MULTIPARTY CLAIMS

Jennifer Haworth McCandless and Angela Ting[1]

I INTRODUCTION

Multiparty claims have become increasingly common in investor-state arbitration. In fact, multiparty claims have been described as 'a common feature in ICSID [International Centre for Settlement of Investment Disputes] arbitration'.[2] As of February 2022, 346 cases involving more than one claimant have been registered on the ICSID website,[3] the majority of which (221) were filed during the past 10 years.[4] This is up from 102 multiparty cases that were registered in the preceding 10 years (between January 2002 and January 2012).[5]

The rise in multiparty arbitration has been attributed to globalisation, economic crises and related state measures.[6] In 2021, ICSID registered 31 multiparty cases, surpassing the number of cases recorded in prior years: 18 in 2020, 15 in 2019, 22 in 2018, 27 in 2017

1 Jennifer Haworth McCandless is a partner and Angela Ting is an associate at Sidley Austin LLP.

2 *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility (8 Feb. 2013) (*Ambiente* Decision), at para. 135. See also Christoph Schreuer et al., *The ICSID Convention – A Commentary* (2nd ed. 2009) (Schreuer, *ICSID Convention*), at Art. 25, para. 278.

3 This total includes both active and closed cases. Multiparty arbitration involving two or more claimants were identified using ICSID's 'Cases Database' and the search term 'and', and excluding claimant name that includes 'and'. ICSID website, https://icsid.worldbank.org/cases/case-database (last accessed 21 Mar. 2022). See also *Ambiente* Decision, op. cit. note 2, above, at para. 135, n. 44 (noting that the search term 'and others' only identifies three or more claimants in ICSID Cases Database, excluding cases involving two claimants whose names would be included in the case name).

4 See ICSID website, op. cit. note 3, above.

5 id.

6 See, e.g., Marine Koenig, 'Mass Proceedings In the Investor-State Arbitration Setting: Offspring of Legal Genetic Engineering', 1 *ITA In Review* 33 (2019) (Koenig, 'Mass Proceedings In the Investor-State Arbitration Setting'); Tim Tyler and Elena Guillet, 'Towards a Practical Framework for Mass Claims Under Investment Treaty Arbitration' (16 Sep. 2021) (Tyler and Guillet, 'Towards a Practical Framework for Mass Claims'), at https://www.velaw.com/insights/towards-a-practical-framework-for-mass-claims-under-investment-treaty-arbitration/ (last accessed 18 Apr. 2022).

and 28 in 2016.[7] Although it is unclear whether the rise in the number of multiparty cases in 2021 was attributed to the covid-19 pandemic, many agree that multiparty claims will continue to increase.[8]

Multiparty claims by affiliated entities (for example, a parent company and its subsidiary) are largely unremarkable and have long been part of investment treaty arbitration.[9] However, a recent key development in multiparty claims within the ICSID framework is the emergence of claims brought by numerous unaffiliated claimants based on separate but similar investments, all under a single proceeding. This chapter refers to these types of claims as 'collective claims', 'collective arbitration' or 'collective proceedings'. The first 'wave' of these cases started in 2007 with *Abaclat and others v. Argentine Republic* (*Abaclat*),[10] *Giovanni Alemanni and others v. Argentine Republic* (*Alemanni*)[11] and *Alasdair Ross Anderson and others v. Republic of Costa Rica* (*Anderson*),[12] followed by *Ambiente Ufficio SpA and others v. Argentine Republic* (*Ambiente*)[13] in 2008.

In *Abaclat*, *Alemanni* and *Ambiente*, unrelated groups of bondholders sought to recover losses resulting from Argentina's restructuring of its sovereign debt. Argentina objected to the tribunals' jurisdiction by arguing, inter alia, that it was improper to arbitrate claims in a collective proceeding under the Argentina–Italy bilateral investment treaty (BIT) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention).[14] For the first time, arbitral tribunals and institutions were faced with questions about whether collective claims were permitted under the existing legal and procedural framework.[15] The tribunals upheld jurisdiction in all three aforementioned cases, though not without dissents in two of them.[16] The tribunals' decisions generated considerable debate in the investment arbitration community regarding the appropriate

7 See ICSID website, op. cit. note 3, above.

8 See, e.g., Marie Stoyanov and Lucia Raimanova, 'Multiparty Proceedings and Mass Claims' in *The Investment Treaty Arbitration Review*, 115 (3rd ed., 2018, Chapter 11) (Stoyanov and Raimanova, 'Multiparty Proceedings and Mass Claims'); Deepu Jojo Sushama, 'Mass Claims in Investment Arbitration – The Need of the Hour', Kluwer Arbitration Blog (4 Mar. 2015), at http://arbitrationblog.kluwerarbitration.com/2015/03/04/mass-claims-in-investment-arbitration-the-need-of-the-hour/ (last accessed 18 Apr. 2022) (Sushama, 'Mass Claims in Investment Arbitration').

9 See, e.g., *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2).

10 ICSID Case No. ARB/07/5.

11 ICSID Case No. ARB/07/8.

12 ICSID Case No. ARB(AF)/07/3.

13 ICSID Case No. ARB/08/9.

14 See *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility (4 Aug. 2014) (*Abaclat* Decision), at paras. 470–71; *Giovanni Alemanni and others v. Argentine Republic* (ICSID Case No. ARB/07/8), Decision on Jurisdiction and Admissibility (17 Nov. 2014) (*Alemanni* Decision), at paras. 47–50; *Ambiente* Decision, op. cit. note 2, above, at paras. 68–72.

15 See *Abaclat* Decision, op. cit. note 14, above, at para. 295.

16 See *Abaclat* Decision, Dissenting Opinion of Georges Abi-Saab (Abi-Saab Dissent); *Ambiente* Decision, Dissenting Opinion of Santiago Torres Bernárdez (Bernárdez Dissent); *Alemanni* Decision, op. cit. note 14, above, at pp. 167–68.

means to handle collective claims. In *Anderson*, unrelated claimants from Canada sought to recover losses resulting from Costa Rica's shutdown of an investment fund. The tribunal declined jurisdiction on grounds other than the numerosity of the claimants, proceeding largely unaffected by that fact.[17]

In 2015, a collective claim was brought against Cyprus. Bondholders in *Theodoros Adamakopoulos and others v. Republic of Cyprus* (*Adamakopoulos*)[18] sought to recover losses allegedly caused by Cyprus's implementation of a bank rescue plan in response to an economic crisis – claimants argued that the government's plan substantially reduced the value of their deposits or rendered their bonds worthless. The *Adamakopoulos* tribunal upheld jurisdiction, with one arbitrator dissenting.[19] Although the four collective claim cases in which the tribunals upheld jurisdiction indicate that such claims are permitted within the investor-state framework, the debate surrounding the decisions merits a closer look at the claims.

Section II below provides an overview of collective claims in investor-state arbitration, including a brief description of the current procedural framework for investment treaty cases under the ICSID Convention, where the issue has been discussed most comprehensively.[20] Section III discusses certain key issues that may arise in collective claims: (1) consent; (2) due process and fairness; and (3) other procedural and practical considerations. Finally, Section IV provides some concluding remarks based on the issues discussed in the chapter.

II MULTIPARTY CLAIMS UNDER THE ICSID FRAMEWORK

Generally, there are two categories of multiparty proceedings under the ICSID framework: (1) claims brought by multiple claimants in a single proceeding at the same time; and (2) claims initiated in separate proceedings that are subsequently consolidated into a single, multiparty proceeding.[21] Collective claims – that is, claims by unaffiliated claimants with separate but similar or related investments – typically (though not necessarily) fall under the first category. We focus on collective claims in the first category and the accompanying legal and practical challenges.

17 See *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award (19 May 2010) (*Anderson* Award), at para. 65.

18 ICSID Case No. ARB/15/49.

19 See *Theodoros Adamakopoulos and others v. Republic of Cyprus* (ICSID Case No. ARB/15/49), Decision of Jurisdiction (7 Feb. 2020) (*Adamakopoulos* Decision), at para. 342, and Statement of Dissent by Marcelo G Kohen (Kohen Dissent).

20 Of course, collective claims can also arise in non-ICSID investment treaty arbitration. See, e.g., *Erhas and others v. Turkmenistan* (PCA Case No. 2013-27), discussed in *Investment Arbitration Reporter*, at https://www.iareporter.com/arbitration-cases/erhas-and-others-v-turkmenistan/ (last accessed 18Apr. 2022).

21 See Stacie I Strong, 'Case Comment – *Ambiente Ufficio S.p.A. and others v. Argentine Republic*: Heir of Abaclat? Mass and Multiparty Proceedings', 29 *ICSID Rev. – F.I.L.J* 149, 149–50 (2014).

i Collective claims in investment arbitration

Before *Abaclat* was registered, multiparty cases under ICSID involved a smaller number of claimants, with 42 being the highest number recorded in a case.[22] Most of these multiparty cases involved claimants who were connected in at least two respects: (1) they were related through family connections,[23] corporate structure or business ventures;[24] and (2) their claims concerned the same investment, or investments.[25] *Abaclat* broke the record with approximately 60,000 claimants.[26] *Alemanni*, *Anderson*, *Ambiente* and *Adamakopoulos* involved 74, 137, 90 and 956 claimants, respectively.[27] Notably, unlike other multiparty cases, these claimants were connected neither through family nor business connections, and their individual investments were separate from each other's.

Abaclat was the first case in which a state challenged the tribunal's jurisdiction and the claims' admissibility based on alleged per se impropriety of multiparty claims under the treaty at issue and the ICSID Convention, and where such a challenge was decided by the tribunal.[28] Given the novelty of collective claims at the time, there were questions about the legal, procedural and practical aspects of the claims, including even the proper terminology to characterise them. These claims generated disagreements among the arbitrators hearing the claims, even before generating debate in the wider investment treaty arbitration community. Except in *Alemanni*, the tribunals' decisions upholding jurisdiction (and in some cases admissibility) were accompanied by dissenting opinions.[29]

ii Limited guidance in the existing legal and procedural framework

There is limited guidance in investment treaties and institutional rules on the propriety and the handling of collective claims. Tribunals recognise that investment treaties are largely silent on whether collective claims are permissible. For example, none of the BITs at issue in the four collective proceedings in which the tribunal upheld jurisdiction (i.e., the Argentina–Italy

22 See *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award (19 Jun. 2007), n. 1 (the number of claimants was initially 46 but was later reduced to 42).

23 See, e.g., *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/01/2).

24 See, e.g., *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17).

25 See, e.g., *Newmont USA Limited and Newmont (Uzbekistan) Limited v. Republic of Uzbekistan* (ICSID Case No. ARB/06/20).

26 The number of claimants in *Abaclat* dropped from 180,285 to approximately 60,000 owing to the withdrawal of certain claimants. See *Abaclat* Decision, op. cit. note 14, above, at n. 1.

27 See *Anderson* Award, op. cit. note 14, at Annex A. The number of claimants in *Alemanni* dropped from 183 to 74. See *Alemanni* Decision, op. cit. note 14, above, at para. 327. The number of claimants in *Ambiente* decreased from 119 to 90. See *Ambiente* Decision, op. cit. note 2, above, at para. 120. The number of claimants in *Adamakopoulos* fell from 969 to 956. See *Adamakopoulos* Decision, op. cit. note 19, above, at para. 2 and n. 3.

28 See *Ambiente* Decision, op. cit. note 2, above, at para. 130 (noting that a similar challenge was raised in *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), but it was subsequently dropped).

29 See Abi-Saab Dissent, op. cit. note 16, above; Bernárdez Dissent, op. cit. note 16, above; and Kohen Dissent, op. cit. note 19, above.

BIT,[30] the Greece–Cyprus BIT[31] or the Belgium–Luxembourg Economic Union–Cyprus BIT[32]) limits the number of investors that can bring a treaty claim against the state in a single proceeding.[33] Similarly, various multilateral trade agreements with investment chapters, such as the Comprehensive Economic Trade Agreement[34] and the North American Free Trade Agreement (and its successor, the Agreement between the United States of America, the United Mexican States, and Canada),[35] do not indicate any such limitation.[36] Furthermore, institutional frameworks such as the ICSID Convention and the 2006 ICSID Rules of Procedure for Arbitration Proceedings (2006 ICSID Arbitration Rules) do not provide for such a limitation in their list of jurisdictional requirements.[37] In fact, some have stated that the ICSID Convention did not contemplate collective proceedings when it was drafted.[38] Owing to the lack of direction as to how collective claims should be handled, many disputes between the parties have focused on the tribunal's jurisdiction and the claim's admissibility.

The Argentine decisions provide little guidance regarding how tribunals may resolve substantive claims in collective proceedings. This is because *Abaclat* was settled, and *Alemanni* and *Ambiente* were discontinued, before issues of liability or damages were determined.[39] *Adamakopoulos* remains pending, and no decision on liability has been issued. For the purposes of this chapter, we focus on the procedural issues raised and addressed in the aforementioned cases.

30 See Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments (22 May 1990) (entered into force 14 Oct. 1993).

31 See Agreement between the Government of the Hellenic Republic and the Government of the Republic of Cyprus for the Reciprocal Promotion and Protection of Investments (30 Mar. 1992) (entered into force 26 Feb. 1993).

32 See Agreement between the Republic of Cyprus and the Belgium–Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investment (26 Feb. 1991) (entered into force 5 Jun. 1999).

33 See, e.g., *Abaclat* Decision, op. cit. note 14, above, at para. 297; *Ambiente* Decision, op. cit. note 2, above, at paras. 74–75; *Adamakopoulos* Decision, op. cit. note 19, above, at para. 201.

34 The Comprehensive Economic and Trade Agreement (30 Oct. 2016) (entered into force provisionally 21 Sep. 2017).

35 See North American Free Trade Agreement (17 Dec. 1992) (entered into force 1 Jan. 1994). The Agreement between the United States of America, the United Mexican States, and Canada (10 Dec. 2019) (entered into force 1 Jul. 2020).

36 See Stoyanov and Raimanova, 'Multiparty Proceedings and Mass Claims', op .cit. note 8, above, at 119, n. 44.

37 See *Abaclat* Decision, op. cit. note 14, above, at para. 289; *Ambiente* Decision, op. cit. note 2, above, at para. 97; *Adamakopoulos* Decision, op. cit. note 19, above, at para. 115. ICSID's revised Arbitration Rules (due to take effect 1 Jul. 2022) are likewise silent on the subject.

38 See *Abaclat* Decision, op. cit. note 14, above, at paras. 517, 519; Abi-Saab Dissent, op. cit. note 16, above, at para. 165.

39 See *Adamakopoulos* Decision, op. cit. note 19, above, at para. 189 ('The Tribunal further observes that none of the other 'mass claims' cases proceeded to a final resolution. Thus, the complexities of a mass claim case and the various solutions proposed for it have not been tested in practice'.).

III ISSUES IN COLLECTIVE CLAIMS

i Consent

As with any investor-state arbitration, the parties' consent to arbitration is an essential element in establishing a tribunal's jurisdiction over their dispute.[40] Typically, a state consents to arbitration through the dispute resolution clause in an investment treaty.[41] Through that clause, a state agrees in advance to resolve potential investment disputes brought against it through arbitration.[42] When a covered foreign investor – a national of the other state that is a counterparty to the treaty – initiates arbitration against the state by filing a request for arbitration, it gives its consent to arbitrate that dispute. With the investor's consent, there is then an agreement between the parties to submit the particular dispute to arbitration. Arbitral institutions may further require that the parties' consent be in writing to establish a tribunal's jurisdiction, for example, under Article 25(1) of the ICSID Convention.[43] Where an arbitration involves hundreds or tens of thousands of claimants, even the process of establishing the parties' consent to arbitration, and therefore the tribunal's jurisdiction, necessarily presents certain legal and practical challenges.

Issues relating to respondent's consent

A question that has arisen in collective claims is whether the state's consent, as expressed in a treaty's dispute resolution clause, applies to collective claims. Argentina has argued in the negative in all three cases brought against it.[44] It further argued that a secondary or a special consent from the state is necessary to establish the tribunal's jurisdiction.[45] The three tribunals that have heard collective claims against Argentina and decided on jurisdiction held that neither the Argentina–Italy BIT (which was the applicable treaty in all three cases) nor the

40 See Report of the Executive Directors on The Convention on the Settlement of Investment Disputes between States and Nationals of Other State, Jurisdiction of the Centre (18 Mar. 1965), at Art. 23 ('Consent of the parties is the cornerstone of the jurisdiction of the Centre'.).

41 See Koenig, 'Mass Proceedings In the Investor-State Arbitration Setting', op. cit. note 6, above, at 43. While there are other sources of state's consent to arbitration, such as an investment contract or investment-promotion laws enacted by the states, collective claims under the ICSID framework have largely been based on investment treaties. See also *Abaclat* Decision, op. cit. note 14, above, at para. 8; *Adamakopoulos* Decision, op. cit. note 19, above, at para. 1.

42 See Andrea M Steingruber, 'Case Comment – *Abaclat and others v. Argentine Republic*: Consent in Large-Scale Arbitration Proceedings', 27 *ICSID Rev. – F.I.L.J* 237, 238 (2012); Koenig, 'Mass Proceedings In the Investor-State Arbitration Setting', op. cit. note 6, above, at 43–44.

43 See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, April 2006 (ICSID Convention), at Art. 25(1) ('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 designate 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.').

44 See *Abaclat* Decision, op. cit. note 14, above, at para. 297; *Ambiente* Decision, op. cit. note 2, above, at paras. 70-71; *Alemanni* Decision, op. cit. note 14, above, at paras. 130–32.

45 See *Abaclat* Decision, op. cit. note 14, above, at para. 481; *Ambiente* Decision, op. cit. note 2, above, at para. 128; *Alemanni* Decision, op. cit. note 14, above, at para. 268.

ICSID Convention limited the number of investors bringing a dispute against Argentina.[46] The tribunals also held that the BIT's and the ICSID Convention's silence on this issue did not imply that collective claims were barred or that a secondary consent was required.[47]

In reaching their conclusions, the tribunals relied on certain terms or phrases contained in the jurisdictional provisions in the Argentina–Italy BIT and the ICSID Convention. In *Abaclat*, the majority held that the BIT's dispute resolution clause under Article 8 indicates that Argentina consented to submit 'disputes relating to investments'[48] and that 'investments' under the BIT include bonds, which are 'susceptible of involving . . . a high number of investors'.[49] Thus, the majority concluded that Argentina's consent to arbitration covered collective claims under the BIT, as 'it is difficult to conceive why and how the Tribunal could loose [sic] such jurisdiction where the number of Claimants outgrows a certain threshold'.[50] In *Ambiente* and *Alemanni*, Argentina argued that multiparty claims could not be brought under the ICSID Convention because its Article 25 described the party that can bring a claim against a host state as a 'national', using the singular form of the word, rather than describing that party in the plural form.[51] In both cases, the tribunals rejected Argentina's claims, finding that there was no reason that the term 'national' under Article 25 of the ICSID Convention should be taken strictly in the singular form.[52] Relying on the term 'dispute' under the Argentina–Italy BIT, however, the *Alemanni* tribunal held that the state's consent applies to collective claims only if the claims relate to 'a single dispute', such that the interests of the disputing parties are identical 'in all essential respects'.[53]

These decisions were not without opposition. In *Abaclat* and *Ambiente*, the dissenting arbitrators agreed with Argentina that the state must expressly consent to collective arbitration.[54] They also agreed that the ICSID Convention's silence on the issue meant that the Member States intended to preclude collective claims from the tribunal's jurisdiction.[55] Agreeing with the dissenting arbitrators, other commentators have argued that express consent from all parties, including the state, is necessary because a collective proceeding is

46 See *Abaclat* Decision, op. cit. note 14, above, at paras. 474, 489–90, 516–17; *Ambiente* Decision, op. cit. note 2, above, at paras. 126–28, 146; *Alemanni* Decision, op. cit. note 14, above, at paras. 268–71.

47 See *Abaclat* Decision, op. cit. note 14, above, at para. 490; *Ambiente* Decision, op. cit. note 2, above, at para. 146; *Alemanni* Decision, op. cit. note 14, above, at paras. 269, 271.

48 *Abaclat* Decision, op. cit. note 14, above, at paras. 473–74.

49 ibid., at para. 490.

50 id.

51 See *Ambiente* Decision, op. cit. note 2, above, at para. 70; *Alemanni* Decision, op. cit. note 14, above, at para. 131.

52 See *Ambiente* Decision, op. cit. note 2, above, at para. 130; *Alemanni* Decision, op. cit. note 14, above, at para. 270.

53 *Alemanni* Decision, op. cit. note 14, above, at para. 292. The tribunal deferred the determination of whether this requirement is met to the merits stage. See also *Alemanni* Decision, Concurring Opinion of J Christopher Thomas QC, at paras. 2, 11.

54 See Abi-Saab Dissent, op. cit. note 16, above, at para. 190 ('a mere acceptance to arbitrate does not cover collective mass claims actions . . . a special or secondary consent is needed for such collective actions'); Bernárdez Dissent, op. cit. note 16, above, at para. 81 ('parties' consent to international arbitration must be a manifest consent with regard to both the very existence of the consent and its scope').

55 See Abi-Saab Dissent, op. cit. note 16, above, at paras. 166–68; Bernárdez Dissent, op. cit. note 16, above, at para. 76.

akin to a class action, which requires affirmative consent from all parties.[56] Similarly, others have questioned the tribunals' interpretation of 'national' in the plural form when the text of the ICSID Convention uses the singular form ('a national of another Contracting State').[57]

Some six years after the last of the Argentine decisions was rendered, the *Adamakopoulos* tribunal was confronted with the same questions about the respondent's consent. Upholding jurisdiction, the *Adamakopoulos* majority held that a secondary or a special consent to collective claims from the state was not necessary given the absence of such a requirement in the two treaties at issue in that case (the Greece–Cyprus BIT and the Belgium–Luxembourg Economic Union–Cyprus BIT).[58] It also found that the singular terms on which Cyprus relied in objecting to the tribunal's jurisdiction (e.g., reference to terms such as 'national', 'investor' and 'any dispute') did not preclude the possibility that multiple claimants could file a single case against the state.[59] Most notably, the majority held that the Greece–Cyprus BIT, the Belgium–Luxembourg Economic Union–Cyprus BIT and the ICSID Convention were equally silent on whether disputes must be brought by a single investor as on whether disputes may be brought by multiple investors, thus undermining any argument against collective claims based on the BITs' or the ICSID Convention's silence.[60] Agreeing with the *Alemanni* tribunal, the *Adamakopoulos* majority held that it had jurisdiction over the dispute so long as the claims had 'substantial unity' such that they made up 'a single dispute'.[61]

Issues relating to claimants' consent

Claimants' consent to collective arbitration is much less controversial, with the issue only sometimes arising with respect to the consent's clarity and validity.[62] As explained earlier, claimants' initiation of an arbitration (i.e., their filing of the request for arbitration (RFA)) is evidence of their consent.[63] Because Article 36 of the ICSID Convention requires an RFA

56 See Adam Raviv, 'ITA-ASIL 2014: Mass and Class Claims in Arbitration', Kluwer Arbitration Blog (22 Apr. 2014), http://arbitrationblog.kluwerarbitration.com/2014/04/22/ita-asil-conference-mass-and-class-claims-in-arbitration/ (last accessed 18 Apr. 2022) (referring to *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1775 (2010)). See also Stacie I Strong, 'Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T and Return to First Principles', 17 *Harv. Negot. L. Rev.* 201 (2012).

57 Hans van Houtte and Bridie McAsey, 'ICSID, the BIT and Mass Claims', *ICSID Review, Foreign Investment Law Journal* (Volume 27, No. 2, Fall 2012), at 235.

58 See *Adamakopoulos* Decision, op. cit. note 19, above, at paras. 201, 205, 270.

59 See ibid., at para. 198 (citing *Alemanni* Decision, op. cit. note 14, above, at para. 265).

60 See ibid., at paras. 198–200.

61 ibid., at paras. 209–10. See also *Erhas and others v. Turkmenistan* (PCA Case No. 2013-27), Investment Arbitration Reporter, at https://www.iareporter.com/articles/an-uncitral-tribunal-declines-jurisdiction-over-a-joint-treaty-claim-brought-against-turkmenistan-by-a-series-of-unrelated-claimants/ (last accessed 18 Apr. 2022) (noting that owing to the lack of commonality in the claims, the majority declined jurisdiction; the third arbitrator, who issued a separate declaration, indicated that he would have found jurisdiction but would have found the claims inadmissible due to their lack of commonality).

62 See Koenig, 'Mass Proceedings In the Investor-State Arbitration Setting', op. cit. note 6, above, 46–47, 49–50.

63 Schreuer, *ICSID Convention*, op. cit. note 2, above, at 218.

to be written,[64] claimants' RFA and the state's advance written consent (through the treaty's dispute resolution clause) together would ordinarily satisfy the jurisdictional requirement of written consent under Article 25 of the ICSID Convention.

Although an RFA is filed in claimants' names, it is generally filed and signed by claimants' duly authorised representatives as permitted under the ICSID Rules.[65] In most cases, the authorised representatives are claimants' attorneys or agents. Documents evidencing claimants' delegation of authority to their attorneys or agents, such as a power of attorney (POA) or a similar contract, act as claimants' authorisation for the attorneys to act on their behalf, and their consent to arbitration.[66] To establish a tribunal's jurisdiction, these documents must clearly and unambiguously demonstrate the claimants' consent, and the consent must establish that the claimants knew that they were submitting their dispute to arbitration when they signed the documents.[67]

The feasibility of verifying each claimant's consent is a key consideration in collective proceedings. In *Abaclat*, the majority found that the approximately 60,000 claimants established their consent by signing a document entitled the TFA Mandate Package, which was an agreement written by an association, Task Force Argentina, created to resolve potential claims against Argentina.[68] The TFA Mandate Package contained a POA that included a declaration of irrevocable consent to submit the dispute to arbitration.[69] In particular, the majority found that the POA clearly and unambiguously demonstrated the claimants' consent.[70] The majority also found the claimants' consent to be valid, because the signed Package contained information about the purpose and the modalities of the ICSID arbitration, such that it allowed claimants to make an informed decision, prior to signing the Package, as to whether they wished to participate in the arbitration.[71] Likewise, the *Ambiente* and *Alemanni* tribunals found that the claimants established their consent to arbitration when they signed a similar package – the NASAM Mandate Package, created by the North Atlantic Société d'Administration to help coordinate potential claims against Argentina.[72] That Package also included a special POA.[73]

In *Adamakopoulos*, the state's jurisdictional objections focused less on the claimants' consent than on its own lack of consent to collective claims. Nonetheless, as part of upholding its jurisdiction, the majority fixed the number of claimants at 956 and ruled that no claimant could withdraw from the arbitration without the state's consent.[74] In the majority's view, 'if individual claimants were entitled to exit from the mass claim at will', it would be

64 See ICSID Convention, op. cit. note 43, above, at Art. 36(1) ('Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General').

65 See ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (10 Apr. 2006) (2006 ICSID Arbitration Rules), at Rule 1.1.

66 See *Abaclat* Decision, op. cit. note 14, above, at para. 453.

67 See ibid., at paras. 461–65.

68 See, e.g., ibid., at paras. 65–66 and 85.

69 See ibid., at paras. 85, 452, 501(iv), 658.

70 See ibid., at para. 453.

71 See ibid., at para. 461.

72 See, e.g., *Alemanni* Decision, op. cit. note 14, above, at paras. 16 and 45.

73 See, e.g.,ibid., at para. 45.

74 See *Adamakopoulos* Decision, op. cit. note 19, above, at para. 260.

'unreasonable for the Respondent and create uncertainty for the Tribunal'.[75] The tribunal held that its prohibition against claimants' unilateral withdrawal from the arbitration was consistent with Article 25(1) of the ICSID Convention, which provides that '[w]hen the parties have given their consent, no party may withdraw its consent unilaterally'.[76]

ii Due process and fairness

Because collective claims involve many claimants, they arguably present certain due process concerns among the parties. These concerns include whether declining jurisdiction would mean denying claimants access to justice because they may not otherwise be able to afford to bring the claims individually;[77] whether each claimant would be given adequate opportunity to be heard; and whether respondents similarly would be given the opportunity to defend against each claimant's claims. Because it may take more time for a tribunal to determine many claims, the question arises whether any such delay would unduly prejudice the state, which would be forced to wait for the tribunal to decide each claim. Further, because each claimant's claim may differ in certain respects and thus prompt specific objections from the respondent, the question arises whether hearing and determining specific aspects of the claims would unduly prejudice other claimants, who would be forced to wait before they could obtain resolution for their own claims.

To tackle some of these due process and fairness concerns, tribunals have adopted specific procedures as permitted under Article 44 of the ICSID Convention and Rule 19 of the 2006 ICSID Arbitration Rules.[78] These provisions allow tribunals to decide procedural issues not covered under the applicable arbitration rules or the parties' agreement.[79] However, some of the tribunals' procedures have themselves provoked debate. For example, the *Ambiente* majority decided that they did not need to verify the nationality of all 90 claimants to determine whether each of them met the *ratione personae* requirement under Article 25(1) of the ICSID Convention.[80] In the majority's view, so long as 'at least some of the Claimants qualify as "nationals of the other contracting State"', the case could proceed to the merits.[81] Although the majority reserved the right to review each claimant's nationality at a later stage,[82] they did not outline the procedure to exclude claimants who might later be found to have

75 id.

76 ibid., at para. 261.

77 See *Abaclat* Decision, op. cit. note 14, above, para. 484. See also Sushama, 'Mass Claims in Investment Arbitration', op. cit. note 8, above (noting that collective claims permit the 'arrival of the average man before ICSID proceedings').

78 See ibid., at paras. 663 et seq.; *Adamakopoulos* Decision, op. cit. note 19, above, at para. 236.

79 See ICSID Convention, op. cit. note 43, above, at Art. 44 ('If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question'.); 2006 ICSID Arbitration Rules, op cit. note 65, above, at Rule 19 ('The Tribunal shall make the orders required for the conduct of the proceeding'.) See also Proposed Amendments to the Regulations and Rules for ICSID Convention Proceedings, ICSID Arbitration Rules at Rule 27 ('(1) The Tribunal shall make the orders and decisions required for the conduct of the proceeding. (2) Orders and decisions may be made by any appropriate means of communication, shall indicate the reasons upon which they are made, and may be signed by the President on behalf of the Tribunal. (3) The Tribunal shall consult with the parties prior to making an order or decision it is authorized by these Rules to make on its own initiative'.).

80 See *Ambiente* Decision, op. cit. note 2, above, at para. 324.

81 ibid., at para. 324.

82 See ibid., at para. 325.

failed the nationality requirement. Critics suggested that this approach raised due process concerns for respondents, arguing that a respondent's jurisdictional objections would be meaningless if a tribunal were able to decide that it was sufficient to confirm the nationality of only a subset of claimants.[83]

Due process concerns were also voiced about the *Abaclat* tribunal's decision on jurisdiction. Recognising that it would not be able to examine all elements of a claim or all documents in the same way that it might in cases involving fewer claimants, the *Abaclat* majority adopted a procedure to allow a 'simplified verification of evidentiary material'.[84] The procedure involved grouping the claims into three categories: those with (1) issues that apply to all claimants uniformly; (2) issues that apply to all claimants but nonetheless present certain distinguishing aspects that require separating some claimants from the others; and (3) claimant-specific issues that require a case-by-case inquiry.[85] In particular, the majority decided that matters falling in the second category would be identified using a 'sampling procedure', a method that has been used in mass claims proceedings under public international law.[86] The dissenting arbitrator objected to the sampling procedure as being incompatible with the ICSID arbitration process, and commentators have taken the view that the procedure is 'difficult to reconcile with arbitral due process'.[87]

The *Adamakopoulos* majority also adopted certain procedures with respect to various stages of the proceedings[88] that were criticised as potentially affecting the parties' due process rights. For example, in the discovery phase, the majority indicated that they would limit document requests and production of documents to issues that were common among the claims.[89] That limitation could constrain both parties' ability to seek the types of documents that they might judge most relevant to their respective cases. With respect to pleadings, the majority also suggested that the liability and damages phases could be bifurcated so that the respondent would not be burdened with responding to the individual damages claims unless and until the tribunal found liability against the state.[90]

83 See, e.g., Stoyanov and Raimanova, 'Multiparty Proceedings and Mass Claims', op. cit. note 8, above, at 132.

84 *Abaclat* Decision, op. cit. note 14, above, at para. 531.

85 See ibid., at para. 669.

86 id. See also van Houtte and McAsey, op. cit. note 57, above, at 232. See also Arturo J Carrillo and Jason Scott Palmer, 'Transnational Mass Claim Processes (TMCPs) in International Law and Practice', 28 *B.J.I.L* 343, 365, 419 (2010) (explaining that the United Nations Compensation Commission (UNCC) – established in 1991 to resolve claims against Iraq resulting from its invasion and occupation of Kuwait after Iraq was found liable for violating international law – developed the 'statistical sampling' method that facilitated decision-making based on grouping instead of individual case-by-case determination in the UNCC's efforts to process over 2.6 million claims from 96 countries).

87 Abi-Saab Dissent, op. cit. note 16, above, at paras. 194–97; Matthew Weiniger and Mike McClure, 'Looking to the Future: Three "Hot Topics" for Investment Treaty Arbitration in the Next Ten Years', 4 *T.D.M* 5 (2013).

88 See *Adamakopoulos* Decision, op. cit. note 19, above, at paras. 250–57.

89 See *Adamakopoulos* Decision, op. cit. note 19, above, at paras. 252–53.

90 See ibid., at para. 254.

iii Other procedural and practical considerations

Similar to the challenges of testing every claimant's nationality or checking the sufficiency of every POA,[91] there may be logistical problems in assessing each individual claimant's claim on the merits in collective claims. For example, if the claimants allege a treaty violation based on fair and equitable treatment and frustration of legitimate expectations, it may be difficult for a tribunal to identify and test the reasonableness of each claimant's expectations and to determine whether those specific expectations were frustrated by the respondent's measures. Indeed, the *Alemanni* tribunal held that the expectations of each of the 74 claimants would need to be verified and the extent to which each claimant's rights were deprived would need to be determined.[92] However, it did not explain how it expected to perform this exercise, and the case was discontinued before that approach could be put to the test. The *Abaclat* majority planned a different approach with respect to claimants' expropriation claims. They decided to assess the claimants' expropriation claims collectively rather than individually,[93] but likewise never reached the stage of actually making a collective assessment.

Because none of the Argentine cases reached the merits and the *Adamakopoulos* case is still pending, questions remain as to how substantive claims could or should be determined in collective proceedings. For example:

a Must each claimant testify as to his or her individual expectations?

b Could each claimant present his or her own witnesses and experts to substantiate his or her claims?

c Would the respondent, in turn, be expected to respond to the witnesses and experts for each and every claimant?

d Would the procedures for determining the substantive claims vary depending on the number of claimants involved (e.g., approximately 60,000 in *Abaclat* versus 74 in *Alemanni*)?

In addition to issues of liability, the determination of damages claims also presents its own challenges in a collective claim setting. Seeking to address these challenges, the *Adamakopoulos* majority discussed the possibility of bifurcating the liability and damages phases of the proceeding in order for the tribunal to assess damages with respect to individual claims for which liability had been found.[94] In addition, noting that it would be unduly burdensome for the respondent to pursue the individual claimants to recover costs were it to prevail on the merits, the *Adamakopoulos* majority invited the respondent to submit an application for security for costs.[95] However, questions remain regarding the process for determining the amount of damages for each claimant or costs attributed to each claimant. For example, if a tribunal were to find liability, would claimants' damages be assessed individually, taking into consideration expert testimony similar to that which occurs in cases of non-collective claims? If a tribunal did not find liability, how would costs for the respondent be assessed against each claimant? How would the respondent collect costs from hundreds of claimants if the tribunal did not order security for costs?

91 See Tyler and Guillet, 'Towards a Practical Framework for Mass Claims', op. cit. note 6, above.

92 See *Alemanni* Decision, op. cit. note 14, above, at para. 293.

93 See *Abaclat* Decision, op. cit. note 14, above, at para. 536.

94 See *Adamakopoulos* Decision, op. cit. note 19, above, at para. 257.

95 See ibid., at paras. 264–66.

There is no question that collective claims present various procedural and logistical challenges. As yet, however, although some tribunals have proposed methods to address these challenges, we have not seen those methods put into practice. If the *Adamakopoulos* tribunal holds the respondent liable, that decision may provide guidance on how future tribunals can tackle procedural and practical issues in collective proceedings.

IV CONCLUSIONS

To an extent, the jurisdictional decisions in *Abaclat*, *Alemanni*, *Ambiente* and *Adamakopoulos* have paved a way for future collective claims to proceed to the merits.[96] Despite the dissents and the arbitration community's debates surrounding the tribunals' decisions, collective claims have been permitted to proceed under the existing investment arbitration framework. Multiple tribunals have held that, absent express language to the contrary, investment treaties and institutional rules do not preclude collective claims and do not require the states to give special consent to collective proceedings to establish a tribunal's jurisdiction. Put another way, they have not subjected collective claims to additional jurisdictional requirements above and beyond those applicable to single-claimant or affiliated-claimants multiparty cases.

The tribunals confronting these types of claims have also recognised that collective claims can raise certain due process and fairness concerns and have sought to address those concerns procedurally. However, there is little experience from which to draw about how such procedures would (or would not) fare in practice. Only with more cases will future tribunals develop practices for how various jurisdictional and substantive elements may be handled in collective proceedings.

96 See Koenig, 'Mass Proceedings In the Investor-State Arbitration Setting', op. cit. note 6, above, at 35 and 59.

Appendix 1

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