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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARCELLO BARBON I, Individually And On Behalf Of All Others Similarly Situated, Plaintiff, v. REPUBLIC OF ARGENTINA, Defendant.	:	No. 06 Civ. 5157 (TPG)

DECLARATION OF JUDGE KOOROSH H. AMELI IN SUPPORT OF PLAINTIFF MARCELLO BARBONI'S MOTION TO COMPEL AND MOTION FOR RESTRICTING ORDER OR PRELIMINARY INJUNCTION AND OTHER RELIEF

My name is Koorosh H. Ameli. I have been instructed by Counsel for Plaintiff in the present case to give my opinion as an expert in international arbitration.

1. I am a former Judge of the Iran-US Claims Tribunal where I served for over two decades. I resigned from that position in 2009 and established my private practice, Ameli International Arbitration in The Hague, The Netherlands in 2010. I have an LL.M. degree from Harvard University. I am a member of the International Law Association Committee on International Commercial Arbitration and various other international arbitration intuitions.

2. The Iran-US Claims Tribunal is an international arbitration tribunal, established by treaty between Iran and the United States, the Algiers Accords of 19 January 1981. Its decisions have been widely cited by other international arbitration tribunals, including the International Center for Settlement of Investment Disputes, ICSID. International arbitration is my field of expertise and it is the subject of my former work as a judge; my publications; my presentations; and my current work in international arbitration.

3. I am familiar with Plaintiff Marcello Barboni's Complaint and his allegations in this matter. I understand the Court appointed Robert Gaudet, Timothy Ashby, and Jenik Radon to serve as Class Counsel and appointed Marcello Barboni to serve as Class Representative on behalf of a Class of investors who own bonds issued by the Republic of Argentina with ISIN XS0076397248. I understand the Court has appointed Special Master Pollack to assist with the negotiations of various parties with claims against Argentina and that he has brokered certain settlement agreements and helped Class Counsel for Mr. Barboni exchange communications with Argentina.

4. I am familiar with Plaintiff Marcello Barboni's pending motion to compel and pending motion for a restricting order or preliminary injunction. I am also familiar with the letter brief dated February 26, 2016 that counsel for Abaclat and Others in *Abaclat and others v. The Argentine Republic*, ICSID case No. ARB/07/5, Carolyn Lamm of White & Case LLP, ("Abaclat Counsel"), filed in opposition to Mr. Barboni's motions. I have reviewed the Confidentiality Order that is referenced in the letter brief of Abaclat Counsel and that was issued on January 27, 2010 by the ICSID Tribunal ("Confidentiality Order"). I respectfully disagree with many of the statements of Abaclat Counsel about the significance of the Abaclat arbitration and the Confidentiality Order as follows.

5. Abaclat Counsel, White & Case, incorrectly contends in its letter to the Court dated February 26, 2016 regarding Mr. Barboni's motion to compel and motion for a preliminary injunction or restricting order that:

> Personal information requested by Class Counsel is subject to a Confidentiality Order in the Arbitration, and disclosure is restricted due to European and Italian privacy directives.

6. It is not clear if the requested information is personal information, especially where it is for the sole purpose of establishing whether the Abaclat claimants and their claims are identical with those of the Barboni Class in the present case. To the extent the Abaclat Counsel contends they are identical, there is an evident admission of privity between the Abaclat claimants and the Barboni class and therefore the arbitration Confidentiality Order and the European and the Italian privacy directives inapplicable, in particular where the respondent in both cases is also the same, Republic of Argentina. To the extent the claimants and their claims in the two cases are not identical, it is to ensure that they remain so in order to protect the jurisdiction of the Court in the present case.

7. Further, the Italian Privacy Code to which the Abaclat Counsel cites from the arbitration Confidential Order, admits that disclosure for situations as the present case is "justified by specific circumstances, such as the performance of a contract or the establishment, exercise or defence of legal claims."[1] In my understanding, the exceptions to confidentiality in this provision allow the addresses and other information of the Abaclat claimants to be released to Mr. Barboni's Class Counsel and the Court because it is justified by the exercise of their legal claims for breach of contract in this Court by Class Counsel.

[1] Confidentiality Order, para. 127(ii).

8. These exceptions to confidentiality are also recognized in international commercial arbitration, where the parties, their claims and the arbitrators are principally private rather than in investment treaty arbitrations under the ICSID with prevalent transparency aspects. Thus, the International Law Association Resolution No. 1/2010, adopting the Recommendations of its Committee on International Commercial Arbitration, provides the following exceptions to confidentiality, including "pursuing a legal right" in subparagraph (a):

> Reasonable exceptions to an obligation of confidentiality may include:
> (a) prosecuting or defending the arbitration or proceedings related to it (including enforcement or annulment proceedings), or **pursuing a legal right**;
> (b) responding to a legitimate subpoena, governmental request for information or other compulsory process;
> (c) making a disclosure required by law, or by the rules of a securities exchange; or
> (d) seeking legal, accounting or other professional services, or satisfying information requests of potential acquirers, investors or lenders,
> provided that in each case that the recipient agrees in advance to preserve the confidentiality of the information provided.[2] (Emphasis added.)

This exception in paragraph 5(a) reflects the customary practice in international arbitrations, and it would apply with equal force to any ICSID arbitration proceeding including the Abaclat arbitration.

9. As another example of exceptions to confidentiality in international arbitration practice, in *Behring International v. Iran*,[3] where the claimant sought warehouse charges for respondent Iran's huge items of military equipment purchased before the revolution for weekly shipment to Iran, and the respondent sought a counterclaim for mishandling of the equipment, the Iran-US Claims Tribunal appointed a Swedish expert, Sigfrid Akselson of FFV Engineering

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[2] International Law Association Resolution No. 1/2010, para. 5(a), *available at* http://www.ila-hq.org/download.cfm/docid/B735709E-31A7-4374-BE5179AEE0756168 (last viewed on Feb. 28, 2016) (emphasis added). A copy of the Resolution is attached as Exhibit A to this declaration. *See* Ex. A, at p. 3, para. 5(a).

[3] *Behring International, Inc v. Iran*, Decision No. 27-382-3 (19 Dec. 1983), 4 Iran-US CTR 89, 91-92, https://www.iusct.net/Documents/En/1112.aspx

Systems in the United States to receive confidential information and submit an inventory of the property belonging to the Iranian Air Force and their conditions with appropriate technical tests. Although the Decision is not explicit, an apparent reason for the appointment of the Swedish expert was lack of direct access regarding the equipment for Iran or its representatives in the United States for various reasons including US national security concerns until the representatives of the US armed forces and security agencies were available, as may be seen in the final award in the case.[4] What is significant about that case is that the Tribunal appointed a third-party outside expert, Mr. Akselson, to receive information that was considered highly confidential (and which involved information that was far more sensitive than the addresses that Abaclat Counsel seeks to protect) but to whom the Tribunal, nevertheless, required the US party to produce this information for review and analysis. The expert was given access to highly confidential information. This decision stands for the principle that it would be consistent with international arbitration practice at ICSID or elsewhere for an expert assisting this Court to similarly receive any information that Abaclat Counsel deems confidential. For instance, Special Master Pollack could be given the information. Class Counsel and Class Representative could also be given the information to use with their agents since they were appointed by the Court to safeguard the interests of the Class. However, first, it is necessary to determine whether the information that the Abaclat Counsel seeks to protect is even confidential. As I noted above, I do not believe it is confidential because Abaclat Counsel has addresses for the same people Abaclat Counsel represented before ICSID who Class Counsel also represent. There is no need to keep information confidential where the same parties are involved. In other words, Abaclat claimants represented by Abaclat Counsel do not need to protect their own addresses from being disclosed

[4] Id., Final Award No. 523-382-3 (29 Oct.1991), 27 Iran-US CTR 218, 225-226, paras. 20-21, https://www.iusct.net/Documents/En/1387.aspx

to themselves as members of the Class represented by Mr. Gaudet, Dr. Ashby and Mr. Radon.

10. As another example of how confidentiality issues are handled in international arbitration tribunals, in the case of *Bechtel v. Iran*[5] before the Iran-United States Claims Tribunal, where proof of the United States nationality of the majority shareholders of the claimants' closely held corporations was required under the treaty establishing the Tribunal and the claimants declined to present direct evidence due to general privacy and security concerns, the Tribunal appointed an international accounting firm, Peat Marwick Nederland, to examine and report on the basis of which and other evidence their eligibility was confirmed. This decision by the Iran-US Claims Tribunal serves as another example of how, despite confidentiality and privacy concerns, such information can be presented to at least a third party who will assist the tribunal with resolution. Here, that person could be Special Master Pollack or even Class Counsel and the Class Representative.

11. Further, as the ICSID Confidentiality Order in the Abaclat arbitration admits:

> "[T]he Tribunal shares the opinion expressed by the tribunal in the *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (hereafter "Biwater Case"), according to which:
> "In the absence of any agreement between the parties on this issue, there is no provision imposing a general duty of confidentiality in ICSID arbitration, whether in the ICSID Convention, any of the applicable Rules or otherwise. Equally, however, there is no provision imposing a general rule of transparency or non-confidentiality in any of these sources."[6] (footnote omitted.)

12. Thus, on the basis of its general authority for the conduct of the proceedings, the ICSID Arbitral Tribunal held that under

> "Article 44 of the ICSID Convention and Rule 19 of the ICSID Arbitration Rules, unless there exist an agreement of the Parties on the issue of confidentiality/transparency, [it] shall decide on the matter on a case

[5] Bechtel, Inc. et al v. Iran, Award No. 294-181-1 (4 March 1987), 14 Iran-US CTR 149, 156, paras. 27-29.
[6] Confidentiality Order, para. 67, https://www.iusct.net/Documents/En/1747.aspx

> by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain information and/or documents."[7]

13. And for same reasons, the Confidentiality Order "remain[s] in force until conclusion of the proceedings, unless otherwise agreed between the Parties or ordered by the Tribunal".[8] In fact, for annulment or enforcement of the eventual arbitral award or settlement the Abaclat parties as well as third parties may have recourse to public courts to pursue their rights and thereby, requiring necessary disclosure when the Confidentiality Order has no effect according to its own terms.

14. Therefore, absent agreement of Abaclat Counsel and if the Court deems the information sought from White & Case is truly confidential, the Court may appoint a Special Master to examine the documents (or allow already-appointed Special Master Pollack to do so), or provide the information to Class Counsel and Class Representative as appointees of the Court, and report to the Court under a protective order to make sure that the information is not made public. I understand, however, that White & Case has not moved for any protective order so the matter is not before the Court. And Argentina has no cause to complain as it must already have access to all the Abaclat information and no reason to prevent this Court to protect its jurisdiction to adjudicate the claims against it, absent a fair and reasonable settlement.

15. Abaclat Counsel is incorrect to state "Class Counsel … misrepresents the Arbitral Tribunal's Decision on Jurisdiction". In my opinion it is totally correct for Class Counsel to state that the present case is a purely contract claim case even under the Arbitral Decision on Jurisdiction, because it is based on breach of contract cause of action for contractual remedies before the contractual choice of forum in New York City. The present case before the Court in

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[7] Id., para. 73.
[8] Id., para. 153 (d).

New York is not based on breach of treaty cause of action under international law, does not seek treaty remedies and is not submitted to the treaty arbitration before ICSID. In contrast, the Abaclat arbitration case is a breach of treaty claim for remedies under the treaty, Argentina-Italy BIT and before the treaty forum, an ICSID arbitration. It is based on breach of treaty, Argentina-Italy BIT, for fair and equal treatment, Article 2 (2), discrimination, Article 2 (2), national treatment, Article 3 (1), expropriation, Article 5, most favored nation treatment, Article 3 (1) and Argentina-Chile BIT, Article 7(2).[9]

16. Similarly, defenses may be different in the two cases as well as the availability counterclaims in contract cases, which are not so in the case of a treaty claim such a BIT.

17. The fact that both causes of actions in the cases arise from some of the same events does not preclude one from the other and the ICSID Arbitral Decision on Jurisdiction in the Abaclat case has been careful not to make any holding of the kind. It is true that certain Italian bondholders stayed their other arbitration and court proceedings against Argentina involving the same bonds for inclusion in the Abaclat case and the ICSID Albaclat Decision on Jurisdiction has taken note of them.[10] However, Abaclat Counsel has been aware at all times that the Barboni Class case before the present Court was never stayed and the Abaclat Decision has said nothing about it.

18. The fact that the Abaclat claimants had to present the Argentine default as a sovereign act to establish the ICSID arbitral tribunal's jurisdiction and for the Tribunal to accept it as such has nothing to do with the free characterization of that conduct under the contract before the present Court. The Umbrella clause which might have come close to the point was

[9] Abaclat and other and The Argentine Republic, ICSID Case No. ARB/075, Decision on Jurisdiction and Admissibility (Aug. 4, 2011), paras. 312-315.
[10] Id., paras. 82 and 193.

clearly left undecided as moot.[11] In other words, there is nothing to prevent the Abaclat claimants from pursuing their breach of contract claims before this Court through Class Counsel.

19. With ICSID, it is possible to have parallel proceedings in a separate Court such that there is no problem with the concept of lis alibi pendens (which is Latin for "dispute elsewhere pending") according to which domestic courts do not accept jurisdiction over a case already pending before another court in the same system, whether on the basis of forum non conveniens or the first in time rule with no clear position in international law. Because this concept does not apply to ICSID proceedings to bar parallel proceedings in a Court, in *SPP v. Egypt*,[12] the ICSID arbitral Tribunal rejected a motion to decline jurisdiction in favor of the French Supreme Court, where the contract claim based on the same sovereign conduct was pending. It held that "When the jurisdiction of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction". [13] In other words, applied to the present situation, this means that the ICSID rules do not prohibit this Court from hearing the breach of contract claims of Abaclat claimants who are members of Mr. Barboni's Class.

20. Further, as observed, in *Azurix v. Argentina*,[14] "In one of the first cases that an ICSID tribunal had to decide on the existence of a pending suit and its relevance to the ICSID proceedings, the tribunal 'declared that there could only be a case of lis pendens where there was identity of the parties, object and cause of action in the proceedings pending before both tribunals,'"[15] adding that "This line of reasoning has been consistently followed by arbitral

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[11] Id., para. 332.
[12] *Southern Pacific Properties (Middle East) Ltd v. Egypt*, Decision on Jurisdiction I, 27 Nov. 1985, 3 ICSID Rep 112 (1985) and 3 ICSID Rep 189 (1988).
[13] Id., Decision on Jurisdiction I, 27 Nov. 1985, 1 ICSID Rep 112, 129, para. 84.
[14] *Azurix Corp. v. Argentina*, decision on Jurisdiction, 17 Jul. 2003, 7 ICSID Rep 494, para. 88, http://www.italaw.com/sites/default/files/case-documents/ita0060.pdf
[15] Id., citing *Benvenuti and Bonfant v. Congo, Award*, 8 Aug. 1980, 1 ICSID Rep 340, para. 1.14.

tribunals in cases involving claims under BITs."[16] Consequently, even if such test where to apply here, there would be no lis pendens between the Abacalt case before the ICSID and the present case due to the failure of identity of cause and object. In other words, the cause of action of the Abaclat claimants before ICSID is different from the cause of action for breach of contract that Mr. Barboni's Class is pursuing in this Court. As a result, lis pendens does not apply to bar any claims from being brought in this Court.

20. I attach as Exhibit A a true and correct copy of the Confidentiality Order that the ICSID Tribunal issued on January 27, 2010 in the case of the Abaclat Claimants represented by Abaclat Counsel. I keep these records in the ordinary course of business.

21. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 29th of February, 2016 in The Hague, The Netherlands.

Koorosh H. Ameli

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[16] Azurix v. Congo, Decision on Jurisdiction, 17 Jul. 2003, 7 ICSID Rep 494, para. 89, http://www.italaw.com/sites/default/files/case-documents/ita0060.pdf