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Sovereign Debt as an “Investment” – The Argentine Example



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Is ICSID Arbitration an Approach to Resolve Sovereign Debt Disputes? The Argentine Example

- 130+ lawsuits in New York, US\$ 3.3 billion+
- 470+ lawsuits in Germany, EUR 106 million+
- 3 ICSID arbitrations based on Italy-Argentina BIT, led by *Abaclat*:
 - 2 withdrawn after prevailing on jurisdiction (*Ambiente* and *Alemanni*)
 - *Abaclat* case brought by tens of thousands of Italian bondholders
 - Claims for expropriation; lack of fair and equitable treatment, national treatment, and most-favored nation treatment; and unreasonable or discriminatory treatment
 - Total claims of approximately US\$ 2.5 billion
 - Tribunal rendered Decision on Jurisdiction and Admissibility in August 2011
 - Case settled in February 2016, after briefing and hearing on the merits and change of Government



Why did the Argentine Circumstances Give Rise to a BIT Claim?

Argentina Established a Legal Framework Promoting Investment in the Bonds

- The *Abaclat* Tribunal found:
 - “Issuing sovereign bonds was one of the pillars of restructuring Argentina’s economy in the early 1990s In addition to enacting a series of [national] laws and decrees, Argentina also implemented various programs facilitating issuing sovereign bonds.”
 - “The process of Argentina issuing bonds in Europe was by relying on large investment banks as its lead managers, which studied the markets and competed with each other for Argentina’s business The lead managers would design, together with Argentina, a general bond issuance strategy.”
 - “In total, from 1991 through 2001, Argentina placed over US\$ 186.7 billion in sovereign bonds across both domestic and international capital markets. This included 179 bonds issued in the international capital markets that raised a total of approximately US\$ 139.4 billion.”



Why did the Argentine Circumstances Give Rise to a BIT Claim?
Argentina Concluded BITs Protecting Investments in Financial Instruments,
Including Sovereign Bonds

- Italy-Argentina BIT (1993), Article 1 (Tribunal’s translation):

“Investment’ shall mean, in compliance with the legislation of the receiving State and independent of the legal form adopted or any other legislation of reference, **any conferment or asset invested or reinvested** by an individual or corporation of one Contracting Party in the territory of the other Contracting Party, in compliance with the laws and regulations of the latter party.

In particular, investment includes, without limitation:

. . . .

(c) **obligations, private or public titles** or any other right to performances or services having economic value, including capitalized revenues . . .

. . . .

(f) **any right of economic nature** conferred under law or contract”



Under the Language of the Italy-Argentina BIT, Bonds and Securities Constitute “Investments,” Thus Are Entitled to Treaty Protection

- The *Abaclat* Tribunal found:
 - “[T]his list covers an extremely wide range of investments, using a broad wording and referring to formulas such as ‘independent of the legal form adopted,’ or ‘any other’ kind of similar investment.”
 - “[L]it. (c) specifically addresses financial instruments. It is true that the term ‘obligations’ is a broad term and can refer to any kind of contractual obligation, i.e., debt, and it is also true that the term ‘title’ is also very broad. However, put **in the context of the further terms** listed in lit. (c) such as ‘economic value’ or ‘capitalized revenue,’ as well as considering that lit. (f) already deals with the more general concept of ‘any right of economic nature,’ lit. (c) is to be read as referring to the **financial meaning** of these terms. Thus, the term ‘obligation’ may be understood as referring to an economic value incorporated into a credit title representing a loan. This kind of obligations would in the English language more commonly be called ‘**bond**,’ rather than ‘**obligation**.’ Similarly, the term ‘**title**’ in Spanish and Italian would be more accurately translated into the English term of ‘**security**,’ which means nothing more than **a fungible, negotiable instrument representing financial value.**”



In *Poštová banka v. Hellenic Republic*, the Tribunal Found that the Slovakia-Greece BIT Did Not Provide Protection for Investments in Sovereign Bonds

- Article 1 (“Definitions”) of the Slovakia-Greece BIT :

“For the purposes of this Agreement:

 1. “**Investment**” means every kind of asset and in particular, though not exclusively includes:
 - ...
 - b) shares in and stock and **debentures** of a **company** and any other form of participation in a company,
 - c) loans, **claims to money** or to any performance under contract having a financial value”
- In analyzing the Italy-Argentina BIT, the *Poštová* Tribunal found that:
 - “The conclusion of the *Abaclat* tribunal was that the terms ‘**obligations**’ and ‘**public securities**’ were **wide enough to encompass the bonds** that were the subject of the dispute in that arbitration.”
 - “A wide term like ‘obligations’ – particularly in the context in which it must be understood in civil law systems – and a **reference to ‘private or public titles**’ may well lead, as it seems to have led the *Abaclat* and *Ambiente Ufficio* tribunals, to the **conclusion that a Government bond is generally an obligation and specifically a public title.**”



Under the Italy-Argentina BIT, Security Entitlements in Bonds Constitute “Investments”

- The *Abaclat* Tribunal found:
 - “[T]he bonds . . . constitute ‘obligations’ and/or at least ‘public securities’ in the sense of Article 1(1) lit. (c) of the BIT.”
 - “With regard to the security entitlements that Claimants hold in these bonds, they also represent securities in the sense of Article 1(1) lit. (c), since they constitute an instrument representing a financial value held by the holder of the security entitlement in the bond issued by Argentina.”
 - The connection between the security entitlements and the bonds is not too remote for the dispute relating to rights arising from Claimants’ security entitlements to be “directly” related to an investment.



The Security Entitlements and the Bonds are Parts of “One and the Same Economic Operation”

- The *Abaclat* Tribunal rejected Respondent’s argument that Claimants’ instruments were under the Global Bonds and thus their security entitlements were not covered under the BIT.
- The *Abaclat* Tribunal found:
 - “The bonds at stake were always meant to be divided into smaller negotiable economic values, i.e., securities. . . . [T]he underwriters would not have subscribed to any of the bonds, without having previously **ensured that the bonds were re-sellable to the Intermediaries and their end customers**;
 - The security entitlements are the result of the distribution process of the bonds through their division into a multitude of smaller securities representing each a part of the value of the relevant bond. **The security entitlements have no value per se, i.e., independently of the bond**;
 - The fact that the distribution process happens electronically, without the physical transfer of any title, does not change anything to the fact that rights effectively passed on to acquirers of security entitlements in the bonds.”



The Language of the BIT and the Sequence of the Transactions Were Central to the Tribunal's Decision

- The *Abaclat* Tribunal found that “bonds and security entitlements therein cannot be regarded as two separate investments relating to different rights or values.”
 - “[Argentina] insists that under the underwriting agreements, the underwriter committed to a single lump-sum payment to Argentina for the issuance of the bonds and after that took all responsibility for selling the bonds on the open market.”
 - “[I]t cannot be ignored that by considering holders of security entitlements, such as Claimants, a necessary component of the Exchange Offer 2010, Argentina admitted their importance within the broader context of the bond issuance and distribution process.”
 - “If the Underwriters were really the sole purchasers of the bonds and thereby the sole ‘bondholders,’ why would it be necessary to ‘engage [into the Exchange Offer 2010] all parties that had beneficial interests in the bonds’?”



Purchasing Security Entitlements Entails Making a “Contribution”

- The *Abaclat* Tribunal found that “Claimants’ purchase of security entitlements in Argentinean bonds constitutes a contribution which qualifies as ‘investment’ under Article 25 ICSID Convention.”
 - “They purchased security entitlements in the bonds and thus, paid a certain amount of money in exchange of the security entitlements.
 - The value generated by this contribution is the right attached to the security entitlements to claim reimbursement from Argentina of the principal amount and the interests accrued.”



Security Entitlements in Bonds Satisfy the Territoriality Requirement

- The *Abaclat* Tribunal found that “the relevant bonds and Claimants’ security entitlements therein are both to be considered made in the territory of Argentina.”
 - “There is no doubt that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina’s economic development.”
 - “[F]orum selection clauses [contained in bonds’ terms and conditions] are clauses of a procedural nature aiming to determine the place of settlement of a dispute relating to a contractual performance. They have nothing to do with the place where a party is supposed to perform its obligations.”



Investors Holding Security Entitlements are Entitled to Investment Protections under the BIT

- The *Abaclat* Tribunal relied upon extensive evidence provided by **fact witnesses and experts** presented by Claimants in reaching its conclusion:
 - Dr. Francisco G. Susmel, Professor of Capital Markets Institutions, on Argentine securities law, in particular with regard to sovereign bond issuances;
 - Dr. William R. Cline, Senior Fellow of the Peterson Institute for International Economics, on Argentina's macroeconomic policies, and the economic crisis and default;
 - Iain Hardie, former head of Morgan Stanley's fixed-income emerging markets team who handled the underwriting of Argentine sovereign bonds, on the process by which sovereign bonds are issued in capital markets;
 - Dr. Joaquín A. Cottani, economist, former Argentine Undersecretary of Finance and Financial Representative to the U.S. and Canada, on Argentina's strategy for issuing sovereign bonds;
 - Dr. Pablo E. Guidotti, economist, former Argentine Secretary of the Treasury and Deputy Minister of Economy, on Argentina's financing needs and bond strategy.



Sovereign Action to Modify Payment Obligations Constitutes *Prima Facie* Treaty Violation

- The *Abaclat* Tribunal found :
 - “The arbitrary promulgation and implementation of regulations and laws can, under certain circumstances, amount to an **unfair and inequitable treatment**. It may even further constitute an **act of expropriation** where the new regulations and/or laws deprive an investor from the value of its investment or from the returns thereof.”
 - “Argentina, which considered itself insolvent, decided to **promulgate a law entitling it not to perform part of its obligations**, which Argentina had undertaken prior to such law, and **fixing sovereignly the modalities and terms of such liberation**. Such a behavior derives from **Argentina’s exercise of sovereign power**.”
 - “The allegations by Claimants with regard to different treatment afforded to domestic investors, such as Argentine pension funds, are **susceptible of constituting a discriminatory treatment** in breach of the obligation to refrain from discriminatory measures and to provide for national treatment.”
- Case **settled in February 2016** before a final award was issued:
for **150% of the face value** of the bonds (approximately US\$ 1.5 billion)

