

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
Washington, D.C.**

**(ICSID Case No. ARB/04/14)**

Wintershall Aktiengesellschaft  
(Claimant)

v.

Argentine Republic  
(Respondent)

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**AWARD**

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**Members of the Tribunal**

Mr. Fali S. Nariman, President  
Dr. Santiago Torres Bernárdez, Arbitrator  
Professor Piero Bernardini, Arbitrator

**Secretary of the Tribunal**

Ms. Claudia Frutos–Peterson

*On behalf of the Claimant*

Mr. Frank H. Dienemann,  
Mr. Andrés O. Wertheimer  
Wintershall Aktiengesellschaft  
Buenos Aires, Argentina  
and  
Mr. José A. Martínez de Hoz (Jr.)  
and Mrs. Valeria Macchia  
Pérez Alati, Grondona, Benites Arntsen  
& Martínez Hoz (Jr.)  
Buenos Aires, Argentina

*On behalf of the Respondent*

Dr. Osvaldo César Guglielmino  
Procurador del Tesoro de la Nación Argentina  
Procuración del Tesoro de la Nación Argentina  
Buenos Aires, Argentina

**Date of dispatch to the Parties: December 8, 2008**

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## Part-I

### I. PROCEDURAL HISTORY

#### 1. **Points of dispute raised by letter of two Claimants dated April 2, 2003 addressed to the President of the Argentine Republic – under Article 10(1) of the Bilateral Investment Treaty between the Argentine Republic and the Federal Republic of Germany**

1. The history of this case begins with a letter dated April 2, 2003 from (1) Wintershall Aktiengesellschaft (“Wintershall”) a company incorporated in the Federal Republic of Germany and (2) Wintershall Energía S.A. (“WIAR” or the “Argentine Company”) a wholly-owned Argentinean subsidiary of Wintershall, to the President of the Republic of Argentina: reciting the points of dispute with Argentina. It sets out how and in what way the Government of Argentina had failed to comply with the rights and guarantees granted to German investors under the terms of a Bilateral Investment Treaty (BIT) Concerning the Reciprocal Encouragement and Protection of Investments between Argentina and the Federal Republic of Germany<sup>1</sup> – hereinafter “Argentina–Germany BIT”: - a treaty ratified by both Contracting Parties and approved by Law No. 24.098 of the Argentine Congress.
  
2. After mentioning that Wintershall owned protected investments in Argentina, which included an indirect control of shareholding in its wholly owned Argentine subsidiary (WIAR); the letter went on to state in some detail about the investment - dispute: that WIAR, an oil and natural gas producer in Argentina was performing activities pursuant to hydrocarbon-production concessions, exploration-permits and production-contracts in the Provinces of Neuquén, Mendoza and Tierra del Fuego; and that the Government of Argentina had set up and established a hydrocarbons-regulatory framework under various laws, decrees and licences – between the years 1989 and 1992 to the effect –
  - (i) that hydrocarbon producers would have the right to freely export crude oil<sup>2</sup>, whereas gas exports would be subject to the prior approval of the Secretary of Energy;<sup>3</sup>

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<sup>1</sup> Date of entry into force of the BIT for both Argentina and Germany is November 8, 1993. (*See* Request for Arbitration, para. 38).

<sup>2</sup> Decree No. 1589/1989, Article 3; Reconversion Decree, Article 5 and *Plan Argentina*, Article 6.

<sup>3</sup> Gas Law, Article 3 and Decree No. 1738/1992, Article 3.

- (ii) that the approval of any export documentation related to shipments of liquid hydrocarbons would be confirmed within seven (7) business days from the relevant filing, and upon the expiration of this period the approval would be deemed to have been automatically granted;<sup>4</sup>
- (iii) that the Executive Branch would give twelve (12) months prior notice in the event that it imposed restriction on crude oil exports; in the event the Executive branch established such restrictions, producers (including WIAR) were to be entitled to receive, in respect of each production unit, a price not lower than that of crude oil in similar conditions;<sup>5</sup>
- (iv) that exports of liquid and gaseous hydrocarbons were to be exempt from any existing or future fees, duties, rights or withholdings;<sup>6</sup> and the applicable exchange rate for the portion of foreign exchange sale proceeds to be retransferred to Argentina in respect of exports and imports of hydrocarbons and by-products, would be the seller exchange rate for transfers of US dollars quoted by the Banco de la Nación Argentina at the close of business on the day preceding the settlement of the relevant transaction;<sup>7</sup>
- (v) that hydrocarbon producers that enjoyed the right freely to dispose of their production of crude oil, natural gas and/or liquefied gas in accordance with Articles 6 and 94 of the Hydrocarbons Law, Articles 14 and 15 of the Decree N° 1055/1989 and Articles 3 and 4 of the Decree N° 1212/1989, as well as those producers of hydrocarbons that benefited from such right established in the exploration-permits, production-concessions and contracts to which they were parties (as was the case with the permits, concessions and contracts of WIAR), would be entitled to freely dispose of 70% of the foreign exchange sale proceeds set forth in the relevant contracts, bidding and/or renegotiation documents; that this would be the case whether the hydrocarbons were exported, (in which case they were not required to retransfer to Argentina the relevant percentage of such foreign exchange), or were sold in the domestic market, (in which case they would be entitled to acquire freely transferable foreign exchange equivalent to such percentage, which however could not exceed seventy per cent (70%) of the value of each transaction;<sup>8</sup>)
- (vi) that since prices of crude oil<sup>9</sup> and gas prices at the wellhead<sup>10</sup>, had been deregulated as from December 1, 1991 and January 1, 1994, respectively, the terms of all transactions of purchase and sale entered into by producers were without controls.

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<sup>4</sup> Decree No. 1589/1989, Article 3 and Decree No. 1738/1992, Article 6.

<sup>5</sup> Decree No. 1589/1989, Article 6.

<sup>6</sup> *Ibid.*, Article 3 and *Plan Argentina*, Article 6.

<sup>7</sup> Decree No. 1589/1989, Article 4.

<sup>8</sup> *Ibid.*, Article 5; Reconversion Decree, Article 6 and *Plan Argentina*, Article 6.

<sup>9</sup> Decree No. 1212/1989, Article 9.

<sup>10</sup> Gas Law, Article 83 and Decree No. 2731/1993 of December 29, 1993.

- (vii) that the contractual rights, including the rights derived from the sale and purchase contracts of liquid and gaseous hydrocarbons entered into by WIAR (the Argentinean Company), were to enjoy the same constitutional protection as granted to property rights;<sup>11</sup>
  - (viii) that liquid and gaseous hydrocarbons extracted from production concessions were to be subject to a maximum of 12% royalty payable to the jurisdiction where such block was located<sup>12</sup>; and
  - (ix) that the tariffs chargeable for the distribution of gas were to be calculated in US dollars, and expressed in pesos at the exchange rate applicable at the date of invoicing,<sup>13</sup> adjustable on a biannual basis in accordance with variations in the United States Producer Price Index (“**US PPI**”),<sup>14</sup> adjustable so as to reflect the cost of purchased gas and transportation costs<sup>15</sup>, and reviewed every five years and readjusted in the light of general economic circumstances, including a factor relating to mandatory investments, and a factor relating to improvement in efficiency.<sup>16</sup>
3. That all the abovementioned rights and guarantees had been expressly incorporated in the terms of each production-concession, exploration-permit and production-contract to which the Argentinean Company (WIAR) was a party, by means of the respective Decrees or Administrative Authorizations enacted by the Federal Executive Branch or by the Chief Ministry (*Jefatura de Gabinete*).
4. The said letter dated April 2, 2003 then described how in breach of the above undertakings, guarantees and protections established in the Argentina–Germany BIT, Argentina had unilaterally taken certain measures including, the enactment and/or the approval of Decrees and Resolutions in the years 2001, and 2002 (detailed in the said letter) which decrees and resolutions impinged on the right of hydrocarbon producers (including WIAR) to freely dispose of their authorized percentage of export proceeds; and also had an adverse impact on the revenues of the Argentinean Company and, consequently on the value of Wintershall’s equity ownership in the Argentine Company (WIAR). It was asserted that such measures had (i) prevented Wintershall from timely receipt of dividend payments from the Argentine

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<sup>11</sup> Argentine Constitution, Articles 14 and 17.

<sup>12</sup> Hydrocarbons Law, Articles 59 and 62; Reconversion Decree, Article 10, and *Plan Argentina*, Article 6.

<sup>13</sup> License, Article 9.2.

<sup>14</sup> *Ibid.*, Article 9.4.1.1.

<sup>15</sup> *Ibid.*, Articles 9.4.2. and 9.4.3.

<sup>16</sup> *Ibid.*, Articles 9.4.1.2, 9.4.1.3, 9.4.1.4 and 9.5 and Gas Law, Article 42.

Company (WIAR); (ii) impaired vested legal and contractual rights of the Argentine Company (WIAR) which enjoyed the constitutional protection of property rights, and; (iii) “violate[d] Article 4(2) of the Treaty [Argentina–Germany BIT] which, prohibit[ed] Argentina from taking directly or indirectly, expropriation measures or any other measure with equivalent effect, except for public purpose, without prompt compensation.”<sup>17</sup>

5. It was mentioned in the said letter that the measures adopted by the Argentine Government also constituted a violation of Articles 2(1), 2(2), 2(3), 4(1), 5 and 7(2) of the Treaty, (Argentina–Germany BIT) which required that (i) protected investments **receive** a fair and equitable treatment, full protection and legal security, and that neither of the Parties would impair by arbitrary or discriminatory measures the management, operation, use or enjoyment of investments, (ii) that each Party shall guarantee the free transfer of payments related to an investment, freely and without delay and (iii) and that each of the Parties shall comply with the agreed commitments with respect to the investment.
  
6. The letter then went on to mention paragraph (1) of Article 10 of the said Treaty (Argentina–Germany BIT) which provided that “any dispute arising between either of the Contracting Parties and the national or company of the other Contracting Party in connection with the investments under this Agreement shall if possible be amicably settled by the parties to the dispute...” The letter proceeded to state (in terms of paragraph (2), and then of paragraph (3) of Article 10) that “in the event that the dispute cannot be settled amicably within the period of six months counted as from the date in which one of the parties to the dispute has initiated it, the dispute shall be submitted, on request of one of them, for resolution to the competent courts of the Party wherein the investment has been made (in this case Argentina). If the case is submitted to the courts of Argentina, the parties may resort to international arbitration if (i) the court has not rendered a final decision within eighteen (18) months as from the initiation of the court proceeding or (ii) even upon a final decision rendered by a court, if the parties are still under dispute....”

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<sup>17</sup> Request for Arbitration, Annex 7.

## 2. Call for negotiations

7. “Based on the foregoing, and in the light of Article 10 of the Treaty” Wintershall and the Argentine Company notified to the Argentine Government (by the said letter dated April 2, 2003) of the commencement of the period of amicable negotiations provided for in the said Treaty and the existence of its right, in the event that the Disputes were not amicably resolved through negotiation, to commence one or more judicial or arbitral cases against the Republic of Argentina (inter alia) before the International Centre for Settlement of Investment Disputes (ICSID).
- a) **Further letter dated December 19, 2003 - Right to more favourable treatment invoked under Article VII of Argentina – USA BIT – “in lieu of the dispute settlement mechanism of Article 10 of the Argentina–Germany BIT”**
8. In a further communication of December 19, 2003, addressed by Wintershall and WIAR to the President of the Argentine Republic, it was pointed out that since more than six months had elapsed since the investment dispute was raised, without any response from the Argentine Government, Wintershall and WIAR now invoked their right to a more favourable treatment as provided in the Argentina-Germany BIT and other Bilateral Investment Treaties to which the Republic of Argentina was a party, “including the dispute resolution mechanism set forth by Article VII of the Bilateral Investment Treaty for the Reciprocal Encouragement and Protection of Investments executed between the United States of America and Argentina in force as from October 20, 1994, (the “Argentina-US Treaty”), in lieu of the dispute settlement mechanism of Article 10 of BIT.”<sup>18</sup>
9. Both Wintershall and WIAR notified to the President of Argentina their willingness and consent to submit the above referred investment dispute “to the exclusive jurisdiction of ICSID in order that the same be settled pursuant to an international arbitration, in accordance to Article VII of the Argentine-US Treaty.”

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<sup>18</sup> *Ibid.*, Annex 8.

### 3. Subsequent correspondence between the Claimants and the Centre

10. In a letter of consent to the jurisdiction of the International Centre for the Settlement of Investment Disputes (“ICSID”), pursuant to Article VII, Section 3(a)(i) of the US-Argentina Treaty Concerning the Reciprocal Encouragement and Protection of Investment addressed by Wintershall and WIAR to the Secretary-General of ICSID it was stated –

“Enclosed is a copy of the letter that Wintershall and WIAR have delivered to the Federal Government of the Argentine Republic. Pursuant to the more favorable nation status granted through the Argentine – German Treaty Concerning the Reciprocal Encouragement and Protection of Investment (the “German BIT”), Wintershall and WIAR invoke their right to the more favorable treatment provided by other Argentine Bilateral Investment Treaties, including the dispute resolution provision found in Article VII of the Argentina-US BIT (the “US BIT”), instead of the dispute resolution provision contained in Article 10 of the German BIT. The more favorable treatment is based upon Articles 3(1) and 7(1) of the German BIT and the considerations to be addressed in the Request for Arbitration to be delivered by Claimants.

By the enclosed letter, Wintershall and WIAR notified the Argentine Republic of their consent to the ICSID jurisdiction. Wintershall’s and WIAR’s consent was given in order to resolve a dispute arising directly out of an investment.

By this letter Wintershall and WIAR hereby respectfully notify ICSID that they have consented to the exclusive jurisdiction of ICSID for the resolution of the dispute arising directly out of their investments.”<sup>19</sup>

11. In a further letter dated December 23, 2003 addressed to the Secretary General of ICSID, transmitting the Request for Arbitration to the Centre, it was stated on behalf of Wintershall and WIAR as follows:

“Enclosed is the Request for Arbitration submitted by Wintershall and WIAR as claimants (the “Claimants”). By the enclosed Request for Arbitration, Claimants respectfully request the institution of an ICSID arbitration proceeding against the Argentine Republic under the terms of the Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Federal Republic of Germany and the Republic of Argentina effective November 8, 1993 (the “German BIT”).

Claimants also respectfully invoke the most favourable nation status granted by the

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<sup>19</sup> *Ibid.*, Annex 9 (Letter dated December 22, 2003).

German BIT and thus that the above referred arbitration be solved in accordance with the dispute resolution mechanism provided by Article VII of the Treaty Concerning the Reciprocal Encouragement and Protection of Investments between the United States of America and the Argentine Republic effective October 20, 1994. The more favourable treatment is based upon Articles 3(1) and 7(1) of the German BIT. Claimants invoke the more favourable standard based on the considerations mentioned in the enclosed Request for Arbitration and supported with the holding of the ICSID Tribunal in the Maffezini jurisdictional decision (Case No. ARB/97/7) and other pending arbitration cases registered with ICSID wherein the Argentine Republic is also a party to the proceedings and whereby the investors invoked more favorable dispute resolution provisions of other Bilateral Investment Treaties signed by Argentina.”

**4. Request for Arbitration, and subsequent correspondence between the (original) two Claimants and the Centre**

12. As mentioned in the communication dated December 23, 2003, to the Centre, the Request for Arbitration was enclosed. Receipt of the communication along with the Request for Arbitration was acknowledged on behalf of the Centre on December 30, 2003. In a letter dated January 8, 2004, to Wintershall and WIAR the Centre informed the parties that the Centre had not yet determined whether the Request for Arbitration should be registered – it invited the attention of the parties to the conciliation procedure in case they had any interest in it.
13. On February 2, 2004, Wintershall and WIAR, through their attorneys, intimated to the Centre that they did not believe the alternative conciliation mechanism would yield any positive results, since they had made a good faith effort to consult and negotiate with the Government of Argentina since April 2, 2003, but had received no response, that Argentina had not shown any willingness to solve the investment dispute that gave rise to their Request for Arbitration in spite of the lengthy period that had elapsed since the sending of the notice of dispute.

**5. WIAR exercises its rights of Withdrawal as Claimant**

14. On March 18, 2004 the Counsel for the Centre requested Wintershall for a clarification as to the position of Wintershall Energía S.A. (WIAR) as a requesting party. On May 5, 2004, the

attorney for Wintershall and WIAR notified the Centre that WIAR exercised its right of withdrawal granted under Rule 8 of the Institution Rules of the Convention, and intimated that Wintershall would henceforth continue the proceedings as Sole Claimant.

*Registration of Wintershall's Request for Arbitration as Sole Claimant – ICSID Case No. ARB/04/14*

15. On July 15, 2004, the Secretary-General of the Centre notified Wintershall that the Centre had registered its (i.e. Wintershall's) Request for Arbitration dated December 23, 2003. Parties were invited to constitute an arbitral tribunal as soon as possible in accordance with Articles 37 to 40 of the Convention. In a further communication of July 15, 2004, the Centre informed Wintershall that the registration of the Request was without prejudice to the powers and functions of the Arbitral Tribunal under Article 41 and 42 of the Convention in regard to the jurisdiction and the merits. Parties were intimated that the case had been assigned ICSID Case Number ARB/04/14.

**6. Request for appointment of a Tribunal and the appointment of the present Tribunal**

16. On July 21, 2004, the Claimant proposed under Rule 2(1) of the ICSID Arbitration Rules, that the Tribunal should consist of three arbitrators, with the Claimant appointing one arbitrator, the Respondent appointing one arbitrator and the Secretary-General of ICSID appointing the third arbitrator who shall be the President of the Tribunal. Subsequently, in the absence of an agreement between the Parties, the Claimant requested that the Tribunal be constituted in accordance with Art. 37(2)(b). However, by letters of August 17 and 19, 2005, the Parties agreed that the President of the Tribunal would be appointed by the Secretary-General of ICSID in accordance with a list provided by the Parties.
17. This Tribunal was thereafter duly constituted on September 7, 2005 under Article 37(2)(a) of the ICSID Convention by: (i) the appointment by Wintershall (the Claimant) of Prof. Piero Bernardini (Italian) as Arbitrator; (ii) the appointment by the Republic of Argentina (the Respondent) of Dr. Santiago Torres Bernardez (Spanish) as Arbitrator; and (iii) the appointment by the Secretary-General of ICSID of Mr. Fali S. Nariman (Indian) as

President.

## 7. Relevant extracts from Wintershall's Request for Arbitration

18. In the Request for Arbitration the details of investments and the investment disputes with the Government of Argentina were set out. Paragraph 7 and 8 of the Request for Arbitration read as follows:

**“III. Argentina has failed to comply with the BIT, international law and/or Argentine law.**

7. Argentina has failed to comply with the BIT, international law and/or Argentine law. The BIT imposes certain legally-binding obligations and standards of conduct on Argentina. Those obligations and standards of conduct include the following:

- Investments shall not be expropriated or nationalized or subject to other measures equivalent to expropriation or nationalization except:
  - for a public purpose
  - upon a payment of compensation, which shall be equivalent to the value of the investment prior to the expropriation, shall be payable without delay and effective; and
  - shall be subject to review in an ordinary judicial proceeding
- Investments shall be accorded fair and equitable treatment
- Investments shall be accorded full protection and security
- Investments shall be accorded a treatment no less favorable than the one afforded to investments of companies or nationals of either Party or of third states
- Parties shall not impair by arbitrary measures the management, use or enjoyment of an investment
- Parties shall comply with the agreed commitments undertaken with respect to an investment

8. Argentina has failed to comply with these obligations and standards of conduct with respect to Claimants' investment. International law also imposes on Argentina each of the obligations and standards of conduct encompassed in the BIT, including the prohibition on expropriations, unless they meet, and are carried out in accordance with, the criteria set forth in the BIT. Argentina has failed to comply with international law with respect to its treatment of Claimants' investment.”

18.1 After objecting to the various measures adopted by the Respondent (the Government of Argentina) it was stated (in the Request for Arbitration) as follows:

“35. In summary, the measures enacted by the Argentine Government expressly violated the BIT, the Hydrocarbon Concessions and Contracts and specific rules applicable to the oil and gas industry in reliance on which the Claimants made their investments in Argentina and WIAR entered into agreements with counterparties.

36. Thus, Claimants suffered and continue to suffer the consequences of the Argentine situation to an extent going far beyond the general consequences sustained by other entities and the general public. Indeed, they were picked by the Argentine Government to bear the brunt, without justification or compensation whatsoever.”

18.2 Relying on the most favoured nation clause (MFN) in the Argentina–Germany BIT (Article 3) it was asserted in the Request for Arbitration that the Claimants (now sole Claimant) became entitled to avoid the dispute resolution mechanism established by Article 10 of the BIT and to invoke “in lieu thereof” the dispute–resolution mechanism in Article VII of a bilateral investment treaty between Argentina and the USA (briefly, “the Argentina–US BIT”). Paragraph 40 of the Request for Arbitration reads as follows:

“40. Using the most favoured nation status granted through the BIT, Claimants invoke their right to the most favoured treatment provided by other Argentine Bilateral Investment Treaties (“Other BITs”), in this case, the dispute resolution provision included in Article VIII of the Argentine-US BIT<sup>(a)</sup> (the “US BIT”), in lieu of the disputes resolution mechanism established by Article 10 of the BIT.<sup>(b)</sup> Claimants also invoke any other provisions of Other BITs entered into by Argentina that may be more beneficial to invest.”

<sup>(a)</sup>The US Argentina BIT was signed by the Argentina and the United States of America and became effective on October 20, 1994.

<sup>(b)</sup>ICSID Case No. ARB 97/7. See *Maffezini* Jurisdiction Decision, at paragraph 56: “If a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle.”

18.3 The Grounds for invoking MFN treatment were then mentioned - in paragraphs 41-46 of the Request for Arbitration - which are reproduced in full:

**Grounds for Invoking the MFN treatment**

“41. The request of more favourable dispute settlement provisions is made pursuant to the aforementioned BIT provisions which guarantee that German investors shall

be entitled to a more favourable treatment with respect to their investments. Thus, Claimants assert that the BIT gives them the option to submit the investment dispute with Argentina to ICSID arbitration without prior referral to the domestic courts of Argentina based on the considerations mentioned below.

“42. Claimants invocation of the more favourable standard is also supported with the holding of the ICSID Tribunal in the *Maffezini* jurisdictional award<sup>(c)</sup>, and other pending arbitration disputes involving Argentina already registered with ICSID, whereby more favourable dispute resolution provisions were allowed to investors.”<sup>(d)</sup>

<sup>(c)</sup>See *Maffezini* Jurisdiction Decision, at paragraph 56:

If a third-party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle.

<sup>(d)</sup>See *Camuzzi International S.A. v. Argentine Republic*, *Siemens A.G. v. Argentine Republic* and *Telefonica S.A. v. Argentine Republic*.”

#### **MFN Granted Pursuant to a Specific BIT Provision**

“43. The right of Claimants to a more favorable treatment is granted pursuant to a **specific provision on the matter** and, thus, is not restricted to any specific right or standard of treatment. Also, the language of Article 3(1) provides for the more favourable treatment of investments of foreign investors in general.

“44. Article 3(1) of the BIT is applicable to dispute resolution provisions since it is compatible with the *ejusdem generis* rule. As noted by the Commission of Arbitration in the *Ambatielos* case “*the most-favored-nation clause can only attract matters belonging to the same subject as that to which the clause itself relates*”<sup>20</sup>. It was then recognized that more favorable nation clause extends to the administration of justice and that dispute settlement arrangements are inextricably related to the protection of foreign investors as they are essential for the adequate protection of the rights the treaties seek to guarantee.”<sup>21</sup>

“45. Furthermore, the requirement stated in *Maffezini* that the third-party treaty **has to relate to the same subject matter as the basic treaty**, is met since the third party treaty invoked by the Claimants relates to the protection of investments.”<sup>22</sup>

“46. Finally, although the BIT provides for exceptions to the most favored nation treatment, none of these apply to the dispute settlement provisions. The restrictions are specific and expressly stated in the BIT.”<sup>23</sup> (Emphasis in the original).

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<sup>20</sup> United Nations, Report of International Arbitral Awards, 1963, at 107.

<sup>21</sup> See *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction of January 25, 2000, para. 54. (“*Maffezini v. Spain*”).

<sup>22</sup> *Ibid.*, para. 56.

<sup>23</sup> See BIT, Articles 3(3) and 3(4).

18.4 Paragraph 53 to 57 of the Request for Arbitration read as follows:

“53. In the light of the abovementioned reasons, Claimants respectfully invoke their right to the most favored treatment provided by the dispute resolution provision included to Article VII of the US BIT, in lieu of the dispute resolution mechanism established by Article 10 of the BIT.

“54. The US BIT was signed and ratified by the Argentine Government and the United States of America and became effective on 20 October 1994. The BIT provides that investment disputes may be referred to ICSID for resolution:

*“Each Party [the Republic and the United States of America] hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for: (a) written consent of the parties to the dispute for purposes of Chapter II of the of the ICSID Convention [...].”*

“55. Art. VII Paragraph 2 of the US BIT provides that in the event of an investment dispute, the parties:

“[...] should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

*(a) to the courts or administrative tribunals of the Party that is a party to the dispute; or*  
*(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or*  
*(c) in accordance with the terms of paragraph 3”.*

“56. In turn, Art. VII Paragraph 3 of the US BIT provides that:

“Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2(a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for the Settlement of Investment Disputes [...].”

“57. Accordingly, Argentina consented to ICSID arbitration as a forum to resolve this dispute. As discussed below, the Claimants have also consented to ICSID jurisdiction over this dispute.”

**8. Request for relief**

18.5 In the Request for Arbitration the following relief was sought by the Claimant against the Republic of Argentina.

- “A finding and declaration that Argentina has failed to comply with the BIT, international law and/or Argentina law;
- A finding and declaration that the actions and omissions at issue constitute an expropriation without prompt, adequate and effective compensation; fail to comply with commitments undertaken towards investments (sic); are unfair, inequitable and arbitrary; and that Argentina has failed to provide full security and protection to Claimants’ investment;
- A declaration that Argentina shall take all appropriate measures to comply with the terms of the BIT, international law, the Argentine Constitution, Argentine law, the Hydrocarbon Regulatory Frameworks, the Hydrocarbon Concessions and Contracts, the terms and original conditions of all the Dollar–denominated agreements executed by WIAR and all necessary actions to annul the governmental actions discussed herein;
- The issuance of an injunction against the continuation of the governmental actions complained of herein;
- An award of damages to the Claimants for all damages incurred, and that may be incurred, due to the failure of Argentina to comply with the BIT, international law and/or Argentine law, including interest;
- An award to the Claimants of all costs of this proceeding, including their attorneys’ fees.”

**9. First Session of the Tribunal on November 22, 2007 – agreed procedure and – timetable**

19. The Arbitral Tribunal held its First session on November 22, 2007, at which the following procedure and timetable was inter alia agreed to by the parties (as recorded in the Minutes of the First Session of the Tribunal held in Paris at the World Bank offices on November 22, 2005):

“B. Jurisdiction (in the event Argentina raises objections to jurisdiction)

1. If Argentina decides to file objections to jurisdiction, it shall do so within seventy–five (75) days from the receipt of the Claimant’s memorial on the merits;

2. Thereafter the proceedings on the merits shall be suspended in accordance with Arbitration Rule 41(3);

3. The Claimant shall file its counter-memorial on jurisdiction within seventy-five (75) days from its receipt of the Respondent's memorial with objections to jurisdiction;

4. At this point, the Tribunal will decide, on the basis of the parties' written pleadings (Claimant's memorial on the merits, Respondent's memorial on jurisdiction and Claimant's counter memorial on jurisdiction) whether to bifurcate the question of jurisdiction and merits or to join the question of jurisdiction to the merits of the dispute;

5. If the Tribunal decides not to bifurcate, joining the question of jurisdiction to the merits of the dispute, the Respondent shall file its counter memorial on the merits within one hundred and ten (110) days from the date of the Tribunals' decision not to bifurcate. The schedule stated in Item 17(A)(3) to (5) will then apply, with the further clarification that the hearing referred to in Item 17(A)(5) will include a hearing both on jurisdiction and merits;

6. If the Tribunal decides to bifurcate, treating the question of jurisdiction as a preliminary matter, it will fix a date for a hearing on jurisdiction in consultation with the parties;

7. If, after such hearing, the Tribunal decides to uphold the Respondent's objections to jurisdiction, it will render an Award to that effect;

8. If, in the alternative, after such hearing, the Tribunal either rejects the Respondent's objections to jurisdiction or decides to join the question of jurisdiction to the merits of the dispute, the Respondent shall file its counter memorial on the merits within one hundred and ten (110) days from the date of the Tribunal's issuance of that decision [...]"

**10. Filing by the Claimant of its Memorial on the Merits (March 10, 2006)**

20. The Claimant then filed its Memorial on Merits on March 10, 2006 in which it summarised its claim:

**“B. Claim**

25. Claimant brings this claim because Argentina has:

- effectively expropriated key legal and contractual rights and associated revenues of Claimant;
- failed to treat Claimant's investments fairly and equitably;
- failed to comply with obligations undertaken towards investment;

- impaired by arbitrary or discriminatory measures the management, operation, use or enjoyment of Claimant's investments; and
- failed to provide full protection and legal security to Claimant's investment.”

## Part-II

### II. PLEADINGS OF THE PARTIES – ON THE OBJECTIONS TO JURISDICTION

#### 1. Preliminary objections raised by Argentina to the effect that the Dispute is not within the Jurisdiction of the Centre and/or not within the competence of the Tribunal (Memorial on Jurisdiction of June 12, 2006); and Claimant’s responses to these pleas (Counter-Memorial on Jurisdiction of September 15, 2006)

21. Relying on the provisions contained in Article 41 of the ICSID Convention<sup>24</sup> and Rule 41 of the Arbitration Rules<sup>25</sup> – Argentina filed, on June 13, 2006, a “Memorial of Objections to the Centre’s and Tribunal’s Jurisdiction” – para. 1 of which reads as follows:

“1. The Argentina Republic hereby submits duly and timely its memorial on lack of jurisdiction and requests that the Tribunal declare (i) that this dispute falls outside the jurisdiction of the international (sic) Centre for the Settlement of Investment Disputes (hereinafter, ICSID or the Centre) and (ii) that it has no jurisdiction over this dispute.”

22. Six Preliminary Objections to Jurisdiction were raised, and it was prayed:

#### “V. Prayer

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<sup>24</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”), Article 41:

“(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.”

<sup>25</sup> Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), Rev. January 2003, Rule 41 –Objections to Jurisdiction (Rule as at the date of the Request for Arbitration).

“(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary–General no later than the expiration of the time limit fixed for the filing of the counter–memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(5) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence it shall render an award to that effect.”

151. In consideration of the premises, the Argentine Republic respectfully request that this Arbitral Tribunal, seeing as Wintershall is not entitled to refer this dispute to ICSID arbitration:

- (1) find, pursuant to Rule 41(4) of the Rules of Arbitration, in favour of this (sic) *Objection to Jurisdiction* and *declare* the Centre's lack of jurisdiction, and, therefore,
- (2) *determine*, pursuant to Rule 41(5), the Tribunal's lack of jurisdiction to hear this case, and, therefore, *dismiss* the Request for Arbitration and the Claim Memorial, with costs to be charged against the Claimant, pursuant to Rule 47(1)(j) of the Rules of Arbitration." (Emphasis in original).

## **2. Further Written Pleadings filed and proceedings on Merits suspended**

23. The Claimant filed its Counter Memorial on Jurisdiction on September 15, 2006.
24. On the basis of the written pleadings of the parties (viz. Claimant's Memorial on the Merits, Argentina's Memorial on Jurisdiction dated June 20, 2006 and Claimant's Counter-Memorial on Jurisdiction dated September 15, 2006 the Tribunal decided, on December 8, 2006, to bifurcate the question of jurisdiction and the merits – and the proceeding on the merits stood suspended in accordance with Arbitration Rule 41.

## **3. Argentina's Six Preliminary Objections to Jurisdiction**

25. As already mentioned, Six "Preliminary Objections" were raised in the Argentine Republic's Memorial (on Objections to the Centre's and the Tribunal's Jurisdiction). Any one of these six Objections, if truly "preliminary", would (when upheld) result in the Claims made in the Request for Arbitration being declared inadmissible as not within the competence of the Tribunal under Article 41(2) of the ICSID Convention read with Rule 41(1) of the Arbitration Rules (as in force at the date of the Request for Arbitration).
26. The First Preliminary Objection to Jurisdiction of the Respondent has been set out in Argentina's Memorial (on Objections to the Centre's and Tribunal's Jurisdiction), and is summarized below:

### ***First Preliminary Objection to Jurisdiction:***

(1) that before resorting to an arbitral Tribunal Wintershall should have submitted the dispute raised by it to Courts of competent jurisdiction in Argentina under Article 10(2) of the BIT and had failed to do so.

(2) that Wintershall cannot not rely on the Most-Favoured-Nation Clause in Article 3 in order to avoid compliance with the requirements set forth in Article 10(2) of the BIT because:

(a) the MFN Clause in Article 3 of the Argentine-Germany BIT cannot be applied to the dispute settlement provision;

(b) that the interpretation that the Claimant (Wintershall) has placed on the MFN Clause violates “the *ejusdem generis* principle”;

(c) that the interpretation that the Claimant Wintershall has placed on the MFN Clause violates “the *effect utile* interpretation principle”;

(d) that the “Case Law” (cited) confirms that it is impossible for Wintershall to successfully rely on the MFN Clause for the settlement of the dispute.

27. The above Objection to Jurisdiction being truly “preliminary” it has been high-lighted – because although Six Separate “Preliminary” Objections to Jurisdiction have been raised by Argentina, and written pleadings have been filed by the parties (and arguments advanced) as regards each one of these Objections, it is the first Preliminary Objection to Jurisdiction that is sustained and upheld, by this decision and Award.

#### **4. Summary of the other five “Preliminary” Objections to Jurisdiction raised**

28. (1) that ICSID has no jurisdiction over the revision of the measures adopted as a result of a national emergency, given that these matters are subject exclusively to the Argentine Republic’s internal jurisdiction; (2) that the claim refers to contractual matters over which the ICSID has no jurisdiction; (3) that the Tribunal has no jurisdiction because all disputes relating to the instruments relied upon by Wintershall must be, pursuant to its provisions and the parties’ agreement referred to Argentine Courts; (4) that Wintershall has no legal standing to claim on legal rights that appertain to another person; and finally, (5) that Wintershall cannot claim on the areas it acquired after the measures under challenge were adopted.

29. Regarding the Second, Third, Fourth, Fifth and Sixth Objections to Jurisdiction, the detailed pleas and responses of the respective parties, and the decisions thereon are not set out and recorded. Any discussion on the Second to Sixth Objections to Jurisdiction is unnecessary and superfluous for two reasons: first, because in the Tribunal's view these further Objections to Jurisdiction are not exclusively preliminary in character, and secondly because it is Argentina's First Preliminary Objection to Jurisdiction that is being upheld by this decision and Award.

**5. Procedural directions by the Tribunal - filing of documents and statements of witnesses and experts; and an application by the Claimant for recognition of an assignment of the Claim that it has submitted in this arbitration (*pendente lite*)**

30. The Tribunal, having decided to bifurcate the proceedings and treat questions of jurisdiction raised as preliminary matters (if so found admissible), procedural directions were given with regard to the filing of observations on the Objections to Jurisdiction and also as to filing of statement of witnesses and documents. The Claimant and Respondent have filed various documents including copies of reports of cases decided by different ICSID and UNCITRAL Tribunals pertaining to questions of jurisdiction. The Claimant also filed statements of three experts proposed to be examined by it at the oral hearing: viz. Professor Christoph Schreuer, Dr. Hector Mairal and Dr. Juan Carlos Cassagne.

31. Meanwhile, the Claimant by a letter of May 18, 2007 notified the Centre of a "spin-off": viz. regarding a corporate restructuring of all assets and liabilities of the Claimant including assignment of all rights and liabilities of the Claimant against the Argentine Republic in the above case – ICSID Case No. ARB/04/14 to a new legal entity: with a prayer for recognition by the Tribunal of this new entity, which would continue, as Claimant, the ICSID Claim that had been filed by the original Claimant. This plea was resisted by the Respondent. It is considered and dealt with later.

**6. Oral Hearing on Preliminary Objections to Jurisdiction**

32. As requested by the parties, an oral hearing (on the Preliminary Objections to Jurisdiction) was held on October 14, 15 and 16 (2007) in Paris at the World Bank Offices, a venue agreed to by the parties. On October 9, 2007 the parties were notified by the Secretary of the Tribunal that the question of “Spin-Off” (raised in the Claimant’s letter of May 18, 2007) should also be addressed by the parties in their respective opening statements on Jurisdiction. Accordingly, at the oral hearing in Paris submissions were made and arguments were addressed by the parties through their advocates and legal representatives.

## **7. Names of Agents Counsel and Advocates of the Parties**

33. At the oral hearing in Paris – the following appeared for the Claimant and Respondent:

*Representing the Claimant were:* Mr. José A. Martínez de Hoz, Ms. Valeria Macchia, Ms. Jimena Vega Olmos, Mr. Gustavo Topalian, Mr. Peter Flory and Ms. Brenda Anthony.

*Representing the Respondent were:* Mr. Ignacio Torterola, Ms. Gisela Makowski and Mr. Ignacio Pérez Cortés.

## **8. Examination of Experts**

34. Apart from the presentations of the parties at the oral hearing on questions of jurisdiction (and on the “spin-off”), the Claimant examined (at the hearing in Paris) three experts Professor Christoph Schreuer, Dr. Hector Mairal and Dr. Juan Carlos Cassagne, who had earlier filed expert reports and the said three experts were cross-examined by the Counsel for Argentina. Members of the Tribunal also put some questions to the experts and their answers were duly recorded.

## **9. Further (oral) contention raised on behalf of Argentina**

35. During the hearing on the Objections to Jurisdiction in Paris –October 14 to 16, 2007 – Counsel for the Republic of Argentina also contended (with certain data) that assuming that the MFN Clause applied to the dispute – settlement provision in the Argentina–Germany

BIT (as contended by the Claimant), it had not been proved by the Claimant that prior resort to domestic Courts in Argentina (for an eighteen-month period) as stipulated in Article 10(2) of the Argentina–Germany BIT was less favourable to the Claimant than prompt direct access to ICSID arbitration. Hence, the MFN Clause in the Argentina–Germany BIT, even if interpreted as submitted by the Claimant, could not be invoked to urge that the Claimant was dispensed from complying with the provisions of Article 10(2). This contention was refuted (and disputed) by the Claimant.

**10. Post - Hearing Briefs filed by the Respondent and by the Claimant**

36. Each of the parties, independently of the other, duly filed Post Hearing Briefs on October 30, 2007 as per directions of the Tribunal.

**11. Query Raised by the President (January 2008)**

37. In January 2008 a query was raised by the President of the Tribunal regarding a new point of jurisdiction not taken or foreshadowed in Argentina’s Preliminary Objections to Jurisdiction: more of this later.

**a) Subsequent Correspondence between the Centre and the Parties after the Paris Hearing (apart from communications referred to elsewhere in this Award)**

38. A brief summary of the subsequent correspondence between the Centre and the parties (after the Paris hearing) is set out below:

- (1) October 19, 2007 – letter from Counsel for Argentina Government addressing three issues raised during the Paris hearing on which the Tribunal had requested further documents and clarifications.
- (2) October 30, 2007 Claimant’s Advocates response to the Argentine Government’s letter dated October 19, 2007.

- (3) December 20, 2007 – letter from the Claimant’s Advocates to the Centre bringing to the Tribunal’s attention “the recent enactments by the Argentine Government of new measures that are arbitrary and without temporal restraint.”
- (4) January 14, 2008 – letter of the Argentine Government to the Centre bringing to the attention of the Tribunal a decision (award dated April 21 2006) in the case of *Vladimir Berschader and Moise Berschader v. The Russian Federation*.
- (5) January 15, 2008 - Reply of Argentine Republic to Claimant’s advocates letter dated December 20, 2007 pertaining to “recent measures adopted by the Argentine Republic”, requesting that in the light of what was stated therein Claimant’s letter of December 20, 2007 be declared inadmissible.
- (6) Communication of January 18, 2008 from Claimant’s advocates to the Centre addressing the Tribunal with respect to Argentine Republic’s letter dated January 14, 2008; and commenting on the award rendered in *Vladimir Berschader and Moise Berschader v. The Russian Federation*.
- (7) February 7, 2008 – Argentine Government’s letter to the Centre with reference to the Claimant’s letter of January 18, 2008 requesting the Tribunal (for reasons stated therein) to dismiss the Claimant’s allegations regarding the “purported lack of independence of the Argentine Judiciary and the supposed coercion on the part of the [Argentine] government.”
- (8) February 14, 2008 – Claimant’s letter to the Centre bringing to the attention of the Tribunal an international arbitration award rendered in the *Rosinvest Case (Rosinvest Co UK Ltd v. Russian Federation – October 2007)*, and answering Argentina’s letter dated February 7, 2008.
- (9) February 15, 2008 – Claimant’s letter (together with Prof. Schreuer’s legal opinion) and Respondent’s letter of February 15, 2008 – in response to the Query raised by the

President (re new point of jurisdiction). Respondent's further letter of March 6 2008 with respect to Claimant's letter of February 15 and with respect to Prof. Schreuer's legal opinion dated February 7, 2008.

(10) March 6, 2008 – Detailed letter of Argentine Government to the Centre in response to Claimant's letter of February 15, 2008 (re: the new point of jurisdiction raised by the President): Argentina submitted that Wintershall's consent to ICSID jurisdiction, which was given under Article VII of the Argentine-US BIT should be considered invalid; and “in the alternative” Argentina restated its request that “certain fundamental provisions of the Argentine-US BIT such as the non-precluded measures provision in Article XI of that treaty, be applied to this dispute.”

(11) March 11, 2008 – communication of the Argentine Government to the Centre invoking Article 43(b) of the ICSID Convention and Rules 34(2)(b) and 37 of the Arbitration Rules and requesting the Tribunal to accept the invitation of the Argentine Government to visit the Argentine Republic “in order to conduct inquiries into the alleged lack of independence of Argentine courts and to make an order to this effect pursuant to Rule 37 of the Arbitration Rules”: This communication was replied to by the Centre as follows:

“The President of the Tribunal has asked me to inform you of the following:

The Tribunal acknowledges receipt of the parties' letters of February 15, 2008, and additionally Argentina's letters of March 6 and 11, 2008.

The Tribunal has decided that it will not be necessary for the parties to file any additional documents in connection with the Respondent's objections to jurisdiction. Additionally, the Tribunal does not consider it necessary to visit the Argentine Republic, as requested by the Respondent, pursuant to Article 43(b) of the ICSID Convention and ICSID Arbitration 37(1).”

(12) April 4, 2008 – Letter of the Claimant filed, seeking specific permission of the Tribunal, to file a response to the allegations made in the Respondent's detailed letter of March 6, 2008 (re: new point of jurisdiction raised by the President): this permission was granted.

### **Part-III**

#### **III. DECISIONS ON FOUR SEPARATE MATTERS THAT HAVE ARISEN IN THE COURSE OF THESE PROCEEDINGS**

39. The Tribunal deems convenient to deal and record at this stage of the Award certain separate decisions that it has adopted with respect to four distinct matters which had arisen in the course of the arbitral proceedings, viz.

- (A) First regarding a query raised *suo motu* by the President of the Tribunal after the close of oral arguments.
- (B) Next, regarding the application of the Claimant in the letter dated May 18, 2007 addressed to the Centre for permitting Wintershall Holding Aktiengesellschaft (“Wintershall Holding”) to continue with the ICSID Claim as Claimant.
- (C) Thirdly, regarding the additional plea raised by the Respondent during the oral hearings in Paris that it had not been established that the provision of dispute resolution in Article VII of the Argentina-US BIT is more favourable than the dispute – resolution mechanism provided in Articles 10(2) and 10(4) of the Argentina-Germany BIT.
- (D) Lastly, the contention arising from the Claimant’s letter of December 20, 2007 and the response of the Argentina Government thereto of January 15, 2008 – as well as the contents of the further communications of January 18, 2008 and February 7, 2008 referred to in paragraph 38 above.

These four matters are dealt with separately.

##### **1. Query raised *suo motu* by the President after close of oral arguments**

40. After the close of oral arguments, it appeared to the President of the Tribunal, on a detailed perusal of the papers and proceedings, that since throughout the correspondence prior to the

Request for Arbitration, as also in the Request for Arbitration, the Claimant had claimed ICSID arbitration under Article VII of the Argentina-US BIT in lieu of Article 10 of the Argentina–Germany BIT, it could not be validly asserted that the institution of the case (by the Request of Arbitration) had to be considered as the Claimant’s “consent in writing” under Article 25 of the ICSID Convention; that, in the circumstances, for want of effective “consent in writing” on the part of the Claimant to ICSID Arbitration under Article 10(4) of the Argentina–Germany BIT – an essential requirement under Article 25 of the ICSID Convention – the Tribunal may lack jurisdiction at the threshold to entertain Arbitration Case No.ARB/04/14 or to grant any relief to the Claimant. Accordingly, notice of this new point was given to the parties to enable them to respond. The Centre’s letter dated January 24 2008 to the parties reads as follows:

“The President of the Tribunal has asked me to inform you of the following:

Ongoing through the record of this case it appears that the consent in writing to jurisdiction under Article 25 by the Claimant has been expressed under Article VII of the Bilateral Investment Treaty between Argentina and the United States of America and (apparently) not the Bilateral Investment Treaty between Argentina and Germany. The point was not taken or argued at the Paris hearing, but since it arises from the record, the Tribunal would like the parties to address in writing their comments on the question by Friday, February 15, 2008.”

41. On February 15, 2008, the Respondent filed its response (to the new point raised by the President) requesting “that Claimant’s consent to the jurisdiction of ICSID - which was given under Article VII of the Argentina-US BIT-be considered invalid”. In the alternative, Respondent requested that certain fundamental provisions of the Argentina-US BIT (the most obvious example being Article XI) the inclusion of which counterbalances provisions that can be deemed favourable to protected investors, such as the dispute settlement provisions of that treaty, be applied to this dispute.” The Argentine Republic elaborated its submissions in a further letter dated March 6, 2008 – asserting that the point raised by the President was correct and should be sustained.
42. The Claimant first offered its response to the new point (raised by the President), by letter dated February 15, 2008, forwarded to the Centre together with a legal opinion of Professor Schreuer dated February 7, 2008. In its response the Claimant emphatically stated that it

would be an untenable and clearly unfair proposition to bring into question the appropriateness of Claimant's consent to ICSID jurisdiction at this late stage of the proceedings; that both parties as well as ICSID and the Tribunal had proceeded on the basis of the existence of consent to ICSID jurisdiction in relation to the claims brought under the Germany-Argentina BIT, and that the Respondent had never previously objected to the appropriateness of such consent; that good faith required that any doubts regarding the existence of Claimant's consent should have been brought up at the time of the registration of the case or shortly thereafter (i.e., during the first session in relation to the constitution of the Tribunal) which would have allowed the Claimant to clarify any doubts regarding, or to cure any defect affecting, the expression of such consent.<sup>26</sup>

43. In its letter dated April 4 2008, the Claimant responded to the elaborate submission made (on the new point raised by the President) in Argentina's further letter of March 6, 2008.

**a) Decision**

44. The Tribunal has carefully considered the responses received from each of the parties to the query raised by the President. Whilst in no way denying to itself the competence to examine and to rule *proprio motu* on any new question (on jurisdiction) not previously raised by the parties, the Tribunal (including the President) has decided in the present case – to confine its consideration to the points specifically raised in Argentina's First Preliminary Objection to Jurisdiction (and the replies thereto): points that have been elaborately argued by each of the parties before the Tribunal. It is so decided.

**2. Regarding Claimant's Application made to the Tribunal by letter dated May 18 2007 (addressed to the Centre) for permitting Wintershall Holding Aktiengesellschaft ("Wintershall Holding") to continue with the ICSID claim as Claimant**

**a) The factual background of Claimant's Application dated May, 18, 2007**

45. It appears from what has been now brought on record by the Claimant – that in November

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<sup>26</sup> See Claimant's letter of February 15, 2008, paras. 12, 13 and 14.

2006 a new legal entity Wintershall Holding Aktiengesellschaft was registered in Lunenburg in Germany to which new entity Wintershall's rights and liabilities in and arising from the present arbitration proceedings had been assigned; this was disclosed to the Respondent for the first time by the Claimant's letter dated May 18, 2007 addressed to the Centre, in which the Claimant described what it called the "spin-off" – which was in the nature of a corporate re-structuring of all of the assets and liabilities of the Claimant Wintershall – except for a few specified assets – to and in favour of Wintershall Holding Aktiengesellschaft – a 100% subsidiary of the Claimant Winternshall. The letter notified the Centre that through the "spin-off", Wintershall had transferred to Wintershall Holding AG, the Transferred Assets and Liabilities as a whole including its shares in *Wintershall Explorations and Poducktions Beteiligungsgesellschaft mbH* ("WIEP") and Wintershall Bank GmbH through which it indirectly fully owned Wintershall Energia S.A. ("WIAR"). It was asserted that the transferred Assets and Liabilities included Wintershall's rights and liabilities in and arising from the arbitration proceedings against the Argentine Republic in ICSID Case No. ARB/04/14.

46. The letter dated May 18, 2007 stated that for purposes of ensuring the payment of all and any liabilities arising from the ICSID Claim, as well as the continuity of the proceedings relevant to the ICSID Claim, Wintershall Holding had entered into an agreement with the Claimant (the "Supporting Agreement") whereby the Claimant had agreed to (i) be jointly and severally liable for any costs and liabilities arising from the ICSID Claim; and (ii) to the extent it may be required by the Tribunal, to continue maintaining its capacity as claimant in relation to the ICSID Claim, either solely or jointly with Wintershall Holding AG, in order to satisfy any requirements the Tribunal deems applicable under the ICSID Convention and the Argentina– Germany BIT. A copy of the Supporting Agreement dated as of November 15, 2006 ("spin-off date") was attached.
47. The prayer made in the letter of May 18, 2007 was as follows:

“9. The Original Claimant [Wintershall, the Claimant] and Wintershall Holding kindly request the Tribunal to acknowledge that:

- (i) Wintershall has spun-off the Transferred Assets and Liabilities as a whole,

including its indirect interest in WIAR, to Wintershall Holding; (ii) the Original Claimant expressly transferred the ICSID Claim to Wintershall Holding; (iii) in accordance with the provisions of German law, Wintershall Holding is the partial universal successor in interest of Wintershall in relation to the ICSID Claim; and (iv) as the partial universal successor of the Original Claimant, Wintershall Holding will continue the ICSID claim as claimant. In the event the Tribunal considers that the Original Claimant, either solely or jointly with Wintershall Holding, should maintain its capacity as claimant in the current proceedings, we kindly request that the Tribunal take due consideration of Wintershall's willingness to act in such capacity as specified in point 6 above and in the Supporting Agreement." (Emphasis added).

48. By letter of August 15, 2007 the Respondent replied to Claimant's letter of May 18, 2007, stating that it did not consent to the request and submitted that the Tribunal should reject the Claimant's application for acknowledging the "spin-off" or for permitting the new Holding Company to continue with the claim.
49. By its reply dated September 18, 2007, (with a copy to the Respondent), the Claimant submitted that the objections of Argentina were groundless – expert opinions were filed. It was mentioned that on the basis of the Supporting Agreement executed between Wintershall and Wintershall Holding AG the Claimant had offered the Tribunal the possibility that Wintershall either solely or jointly with Wintershall Holding AG would maintain a capacity as claimant in the current proceedings. The letter requested the Tribunal to reject Argentina's objections and acknowledge Wintershall Holding AG in its capacity as partial universal successor in interest to Wintershall as Claimant in the instant existing proceedings. There was a third request as well made in paragraph 33(iii) of the letter viz:

“(iii) In the event the Tribunal considers that Wintershall, either solely or jointly with Wintershall Holding, should maintain the capacity as claimant in the current proceedings, acknowledge Wintershall, either solely or jointly with Wintershall Holding, as claimant/s in the present ICSID proceedings.” (Emphasis added).

**b) Submissions made and Evidence led on the application dated 18-05-2007 at the Paris Hearing**

- 50 The reason why the Claimant insisted on recognition by the Tribunal of Wintershall Holdings AG, the new company to which the claim in the present ICSID arbitration had been assigned, was because (as stated at the oral hearing in Paris) the concessions which had

been granted by the Argentine Government in favour of the Claimant's wholly owned Argentine subsidiary were still in force, and it was considered relevant for the successor interest to be made a part of the claim. This was candidly stated by Counsel for the Claimant at the hearing on Day-2 in response to a question put by one of the Members of the Tribunal:

**ARBITRATOR TORRES BERNÁRDEZ:** “The second issue has to do with the spin-off. There is one thing that worries me about the spin-off. What is your interest?”

Why do you insist on the procedural succession?

Why is the Claimant so interested to have the new company sitting here around the table?

What is your interest in the whole action? Come on.

**MR. MARTINEZ DE HOZ:** Well, the point raised by Mr. President, I think he made a question towards the end of yesterday's meeting in which he asked; *are the concessions still in force? And we said, "Yes"*.

So I think the answer to your question was the question that Mr. President made, and whether the concessions were still in force.

*So the concessions still being in force, it is relevant for the successive interest to be part of this claim.*” (English Transcript, Pages 111-112).

51. Counsel for the Respondent however explained why its consent was not given to Claimant's request, and also mentioned other grounds of opposition to the Claimant's Request (in letter dated May 18, 2007) viz. that a post-submission assignment of an ICSID Claim from one entity to another was inadmissible in international law. Reliance was placed by the Respondent: (a) on ICSID Tribunal decision in *Mihaly v. Sri Lanka* Case (Award March 15, 2002) (where it was stated: “A claim under the ICSID Convention with its carefully structured system is not a readily assignable chose in action....”<sup>27</sup>); (b) on another decision of an ICSID Tribunal in *The Loewen Group Inc. v. USA - ICSID Case* (where the tribunal said: “it

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<sup>27</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2), Award of March 15, 2002. (“*Mihaly v. Sri Lanka*”).

may be inappropriate to use the domestic law concept of a freely assignable chose in action as an analogy for (assignment) of a NAFTA Claim.”<sup>28</sup>); and (c) on the commentary of Prof. Christoph Schreuer (in his book “ICSID Convention A Commentary” (p.184) where it was stated that: “If the host State is aware of and agrees to the assignment of rights and duties, the approval of the extension of jurisdiction *ratione personae* to the successor will be assumed, “(but not) [i]f the host state in unaware of an assignment or has resisted succession....”.

52. The Claimant’s expert Professor Christoph Schreuer was examined (at the oral hearing) as an expert of the Claimant and asked about the “spin-off” (Day-2 Paris):

**Q.:** “Are you aware of any principle under international law that would impede Wintershall Holding, which is the company to which the assets of Wintershall AG, the original Claimant, were spun off, would there be any principle under international law that would impede Wintershall Holding from being a sole Claimant, or a co-Claimant together with Wintershall AG?”

**A.:** “No. I am not aware of any such rules. There have been a few cases that do not cover exactly this situation, but that also cover succession incorporations, notably Vivendi II, and LESI Astaldi that indicate that this is possible, and that indicate in particular that the law of the incorporation of the company is the applicable law.” [...]

In Cross-examination, by Counsel for Argentina Prof. Schreuer was asked (Page 138) whether he knew of any case in the history of ICSID “in which a company had been succeeded by another company in a pending claim without the termination of the previous company, without finishing the existence of the previous company.”

The answer of Prof. Schreuer was as follows:

**A. :** “I don’t think this particular situation has actually arisen so far. Two cases come to mind; *Vivendi* and *LESI*, but in both cases there was an absorption not a spin-off, so I believe the old companies did not continue to exist.”<sup>29</sup>

<sup>28</sup> The *Loewen Group Inc. and Raymond L. Loewen v. United States of America*, (ICSID Case No. ARB(AF)/98/3), Award of June 26, 2003. (“*Loewen v. U.S.A.*”).

<sup>29</sup> Expert testimony from Christoph Schreuer, English Transcripts from the hearing of October 15, 2007, pp. 121-122.

**c) Post-hearing submissions in writing on Claimant’s application dated May 18, 2007**

53. It was submitted in the Post–Hearing written submissions that – there was no case in the history of International law where a claim had been assigned from one company to another while the original claimant still existed, and emphasis was placed on the fact that Professor Schreuer, (Claimant’s Expert Witness in the case) could not furnish any precedent;<sup>30</sup> all the cases mentioned by him referred to situations where the original company had merged with the successor or where the transfer of claim had taken place before filing the claim.<sup>31</sup> Hence it was a case of “partial succession” pending ICSID arbitration, with Wintershall AG (the Claimant) still being in existence. Both parties agreed that the spin-off was a universal partial succession and the German Transformation Act applied to this partial succession. However parties disagreed about the law applicable to the assignment of the claim in arbitration. The Respondent contended that if International law applied (and not German Law) then the Claimant should have asked for the Tribunal’s permission before effectuating the Spin-off.<sup>32</sup>

54. During the oral hearing at Paris Claimant’s Counsel (in view of Respondent’s objections) offered to keep both companies i.e. Wintershall A.G. and Wintershall Holding AG as Claimants in the present proceedings. But the Respondent persisted in its refusal to give consent and requested that the Tribunal reject the Claimant’s application.

**d) Discussion of the Claimant’s application for recognition by the Tribunal of the “Spin-off”**

55. A decision on Claimant’s application made in its letter dated May 18, 2007, may well have become academic – in the light of the decision (rendered in this Award) on the First Preliminary Objection to Jurisdiction. Even so it cannot remain undecided. An application was made by the Claimant by letter dated May 18, 2007, which had been responded to, oral evidence had been led in respect of this application, the application was then fully argued by each of the parties, and a decision specifically requested by the Respondent. Hence the

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<sup>30</sup> *Ibid.*, p. 139; *see* Post Hearing Brief of the Respondent dated October 30, 2007, para. 3, p. 1. (“Respondent’s PHB”).

<sup>31</sup> English Transcripts of the Hearing, October 15, 2007, p. 4.

<sup>32</sup> Respondent’s PHB, para. 6, p. 2.

Tribunal's decision in this regard.

56. Bilateral Investment Treaties between Contracting States offer rights and remedies to individuals which they can pursue regardless of the State of which they are nationals. Hence, the Request for Arbitration has been rightly made by the Claimant (Wintershall) – a national of the Federal Republic of Germany – in its own name. It is that claim which has been referred to ICSID Arbitration. If the applicable law so permits – there is nothing to prevent the Claimant (who is a beneficiary under the Argentine – Germany BIT) from voluntarily assigning his/its ICSID Claim to a third party; whether or not that third party be only a partial successor-in-interest of the Claimant. If a claim like the present had been brought before national courts, the latter would have ordinarily permitted a substitution or addition of parties to the proceedings in view of the assignment *pendente lite* of the claim.
57. It was however argued that in international arbitration proceedings, third parties may not become parties unless specific legislation (or rules) make provision for this. In Prof. Mouro Rubino Sammartano's treatise on International Arbitration – Law and Practice it is stated that in arbitral proceedings third parties may not become parties unless specific legislation otherwise provides; but on the same page there is also the following passage, viz.:

“Intervention by a third-party (in arbitral proceedings) may take place only with the consent of the parties to the original arbitration agreement.”<sup>33</sup>

58. The powers and functions of the Tribunal are to decide the “dispute” raised in the Claimant's Request for Arbitration (Article 42(10), and such arbitration proceeding has to be conducted in accordance with the provisions of Article 44 (of the ICSID Convention) which reads as follows:

“Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. 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

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<sup>33</sup> Mouro Rubino Sammartano, “*International Arbitration – Law and Practice*”, Kluwer Law International, 2<sup>nd</sup> Revised Edition, first Indian reprint, 2007, p. 295.

question.” (Emphasis added).

59. In the present case, an objection to the substitution of the Claimant by a new entity during the course of ICSID arbitration proceedings may be well-taken – for lack of empowerment of a Tribunal to do so, absent consent (See Article 44 of the ICSID Convention). But in the Tribunal’s view there is no obstacle to its directing (in this Arbitration Case) that both the Claimant and Wintershall Holding AG do continue with the ICSID proceedings as Joint Claimants – for the following reasons viz. –

(i) this is in line with the Claimant’s express request of May 18, 2007, confirmed by the Claimant’s post hearing submission of October 30, 2007 (paragraph 44); where it is stated:

“44. Argentina’s objections to the ability of Wintershall Holding AG to pursue the ICSID claim are also groundless because the only reason it gave was to maintain the original claimant liable for potential costs and liabilities, and this concern is satisfied by maintaining Wintershall AG as co-claimant in addition to Wintershall Holding AG as requested by Claimant. Article 44 of the ICSID Convention provides the Tribunal with the necessary authority for adding Wintershall Holding AG as a co-claimant or substituting Wintershall AG by Wintershall Holding AG.”

(ii) it also accords with the alternative stand of the Respondent stated in its Post-Hearing Brief of October 30, 2007; in paragraph 35 the Respondent has requested the Tribunal:

(a) to “reject Claimant’s request to transfer its decision to Wintershall Holding or, in the alternative, order that both Wintershall AG and Wintershall Holding be claimants in this arbitration.” (Emphasis added).

**e) Decision**

60. Argentina having itself agreed (and thus given its consent) to the two Wintershall Companies being joined as Claimants in this arbitration, the Tribunal has jurisdiction and power to direct that Wintershall Holding Aktiengesellschaft be joined as Claimant along with the existing Sole Claimant viz. Wintershall. It is so directed.

**3. Regarding the additional plea raised by the Respondent during the oral hearing held in Paris: that it has not been established that the dispute resolution provision in Article VII of the Argentina-US BIT is more favourable than the dispute – resolution mechanism provided in Articles 10(2) to (4) of the Argentina-Germany BIT**

61. It was orally argued in Paris that a less favourable provision in a basic treaty as compared to a provision in a third party treaty is not to be assumed or presumed. It must be proved. One of the early ICSID Tribunals – in the case of *Asian Agricultural Products Ltd., v. Democratic Socialist Republic of Sri Lanka* – had occasion to examine the operation of the most-favoured-nation-treatment agreed to between Sri Lanka and United Kingdom, in the light of the argument that a Sri Lanka-Switzerland treaty contained more favorable provisions on which the investor sought to rely. The provisions discussed, however, were not related to dispute settlement but to the liability standards under the treaties in question. As in the *Ambatielos* decision rendered by the Commission of Arbitration, this ICSID Tribunal held that “... it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favourable than those provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case”.<sup>34</sup>
62. In the present case also it was (orally) contended by the Respondent that it is not proven that Article VII of the Argentina–US BIT is more favourable to the Claimant than Article 10 of the Argentina-Germany BIT – assuming that the MFN clause in Article 3 applies to the dispute settlement provision in Article 10. Article VII of the Argentina - US BIT therefore could not justifiably be invoked. It is said that resort to a domestic court for provisional measures could be conceivably more effective than immediate direct recourse to an ICSID Tribunal – especially since provisional measures under the ICSID Convention are only recommendatory. Argentina submits that it has been plainly demonstrated in the present case that domestic remedies, if duly taken under Article 10(2), would have been effective. (See – Transcript dated 14.10.2007 Day 1 pages 48 to 67) – Contrariwise, it has been asserted in the Claimant’s post-hearing brief that there are various obstacles for obtaining redress in Argentine courts (para. 1.7). During the hearing held in Paris on the Objections to

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<sup>34</sup> *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3), Award of June 27, 1990, para. 54. (“AAPL v. Sri Lanka”).

Jurisdiction, instances were cited by Counsel for Argentina (supported by some documentation) that domestic courts in that country, including the Argentine Supreme Court, had granted, not only to the generality of foreign investors – but in specific instances also - to the wholly owned Argentine subsidiary of Wintershall (the Claimant) - prompt interlocutory relief against the measures that were consequential to the financial emergency measures enacted by decrees of the Argentine Government. It was said that the fact that the Claimant itself chose not to sue made little difference – it could have, if it had desired, sued directly under the BIT in domestic courts; a course permitted by Argentine Law No. 24.098 passed by the Argentine Congress.

**a) Decision**

63. The Tribunal holds *pro tem* that at this preliminary stage of the proceedings this additional plea of the Respondent is premature because the plea requires proof of factual data on each side; it really pertains to the merits of the case. It is so decided.
- 4. Lastly, the contention of the parties arising from the Claimant’s letter of December 29, 2007 and the response of the Argentine Government thereto of January 15, 2008, as well as the contents of the further communications of January 18, 2008 and February 7, 2008, referred to in paragraph 38 above**
64. The contention of the parties arising from the Claimant’s letter of December 20, 2007 regarding “recent enactment by the Argentine Government of new measures that are arbitrary and without temporal restraint” – and the response of the Argentine Government of January 15, 2008 in reply, as well as the contents of the further communications of January 18, 2008 and February 7, 2008 (mentioned in paragraph 38 above) – are not discussed or adverted to in this Award, since they do not form part of the jurisdictional objections under consideration. It is so decided.

## Part-IV

### IV. GENERAL APPROACH OF AN ICSID TRIBUNAL TO PRELIMINARY OBJECTIONS TO JURISDICTION

65. International Tribunals (like this one) set up to decide cases registered with the Centre under the Washington Convention (like the present arbitration case) are bodies of limited competence. They are empowered to adjudicate such cases only if the conditions for the exercise of their jurisdiction are fulfilled. There is considerable authority in the field of international law (starting with the PCIJ - predecessor of the ICJ) as to how such bodies of limited competence should approach questions of jurisdiction.
66. In *Mavrommatis (Greece v. Britain)* – the British Government raised a preliminary objection to the Court’s jurisdiction in the case and the Judgment of the Permanent Court of International Justice (PCIJ) observed at the outset as follows:

“The Law.

Before entering on the proceedings in the case of the *Mavrommatis* concessions, the Permanent Court of International Justice has been made cognisant of an objection taken by His Britannic Majesty's Government to the effect that the Court cannot entertain the proceedings. The Court has not to ascertain what are, in the various codes of procedure and in the various legal terminologies, the specific characteristics of such an objection; in particular it need not consider whether "competence" and "jurisdiction", incompétence and fin de non-recevoir should invariably and in every connection be regarded as synonymous expressions. It will suffice to observe that the extremely wide bearing of the objection upon which, before the case can be argued on its merits, the Court has to take a decision (without, however, in so doing, in any way prejudging the final outcome of such argument) has been indicated by the parties themselves in their preliminary counter-case and reply or in the course of the oral statements made on their behalf [...]<sup>35</sup> (Emphasis added).

67. In the same decision (*Mavrommatis*), one of the Judges, Judge Moore whilst otherwise dissenting from the judgment of the Court (concurring on the point of the Court’s approach to jurisdictional questions). He stated:

“There are certain elementary conceptions common to all systems of jurisprudence,

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<sup>35</sup> *Mavrommatis Palestine Concessions (Greece v. Great Britain)*, PCIJ, Ser. A No. 3, 1924, p. 10. (“*Mavrommatis*”).

<sup>35</sup> *Ibid.*, pp. 57-58.

and one of these is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has not jurisdiction. Nowhere is this more clearly laid down than in the great French repository of jurisprudence by Dalloz, where it is stated that, as jurisdiction is essentially a question of public order, it being a matter of general interest that no authority shall transgress the limits to which its action is confined, an exception to the competence of a tribunal may be taken at any stage of the proceedings, so that, even though the Parties be silent, the tribunal, if it finds that competence is lacking, is bound of its own motion to dismiss the case (se dessaisir d'office); and a judgment of the highest Court in France is cited to the effect that a court may itself supply the exception, although the Parties had not raised the point before the courts of first instance and of appeal. (Dalloz, *Repertoire, Compétence* Art. 2, n<sup>o</sup> 36).” (Emphasis added).<sup>36</sup>

68. Fifty years later in the *Aegean Sea Continental Shelf Case (Greece v. Turkey)*<sup>37</sup> (in December 1978) the International Court of Justice said much the same thing. It observed that it must always examine *proprio motu* the question of its own jurisdiction; even where one of the parties does not appear before it or fails to defend the case, and that the Court before reaching a finding upon the merits, must satisfy itself that it has jurisdiction. In a later decision in the *Case concerning United States Diplomatic and Consular Staff in Tehran (USA v. Iran)*, Judgment of May 24, 1980, the ICJ observed: that in accordance with its settled jurisprudence, the Court, in applying Article 53<sup>38</sup> of its Statute, must first take up, *proprio motu*, any preliminary question, whether of admissibility or of jurisdiction, that appears from the information before it to arise in the case and the decision of which might constitute a bar to any further examination of the merits of the Applicant’s case.
69. Like the PCIJ, and the ICJ, the Centre and ICSID tribunals appointed by the Centre, do not have general jurisdiction over States – they are tribunals of limited powers; and no presumption in favour of their jurisdiction can be made. On the contrary, the acceptance by a State of the jurisdiction of an international court or tribunal always requires to be expressed by means of a positive act or conduct (of “contracting-in”).
70. Accordingly, what is first called for in this ICSID Case is an examination as to whether the

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<sup>36</sup> *Ibid.*, pp. 57- 58.

<sup>37</sup> *Aegean Sea Continental Shelf (Greece v. Turkey)*, Decision of December 19, 1978, *ICJ Reports*, 1978, para. 15, p. 116. (“*Aegean Sea v. Turkey*”).

<sup>38</sup> Article 53 of the Statute requires the Court, before deciding in favor of an Applicant’s claim, to satisfy itself that it has jurisdiction, in accordance with Articles 36 and 37, empowering it to do so.

Tribunal has the jurisdiction (or competence) to proceed with the merits of the Claimants' Request for Arbitration. The term "jurisdiction of the Centre" is used in Article 25 of the Convention as a convenient expression to describe the limits within which the provisions of the Convention will apply, and the facilities of the Centre that will be available for conciliation and arbitration proceedings.<sup>39</sup> "Competence" of the Tribunal is the term also used as an expression equivalent to "jurisdiction" in Article 41 of the Convention. Even though there is a fine jurisprudential distinction between an objection to the "jurisdiction" of the Tribunal at the threshold, and an objection as to its "competence"<sup>40</sup>, objections under each of these heads are, as a general rule, treated as "preliminary objections" under the ICSID Convention.

71. The registration of this Case by the Secretary-General does not preclude the Tribunal from considering and ruling on the Objections to Jurisdiction filed by the Respondent. The registration of the Request for Arbitration by the Secretary-General and the Centre allotting the Request a Case Number is an administrative act in exercise of powers conferred by Article 36(3)<sup>41</sup> of the Convention. It does not preclude – neither in this case nor in any other – the exercise of powers and functions by the Arbitral Tribunal under Article 41 of the Convention and Rule 41 of the Arbitration Rules. The registration of the Request gives formal validity to the procedure – its essential validity is left to be determined by the Tribunal.

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<sup>39</sup> See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, para. 22.

<sup>40</sup> "The objection as to the substantive admissibility of the claim must be on some ground other than on merits; the objection to jurisdiction at the threshold is a plea that the tribunal itself is precluded from giving any ruling at all whether as to the merits or even as to the admissibility of the claim." See Sir Gerald Fitzmaurice, "*The Law and Procedure of the International Court of Justice*", Cambridge, Grotius Publications, 1986, Vol. 2, pp. 438- 439. ("*The Law and Procedure*").

<sup>41</sup> Article 36(3): "The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register."

## Part-V

### V. THE TWO PARTS OF ARGENTINA'S FIRST PRELIMINARY OBJECTION TO JURISDICTION

72. The points for determination which have been raised in the Respondent's first Preliminary Objection to Jurisdiction can be conveniently dealt with in two separate parts viz.

(A) In the first part – it is the Respondent's contention that before resorting to an arbitral Tribunal, Wintershall should have referred the dispute to Argentina Courts having competent jurisdiction (and then waited for an eighteen-month period) – as provided in Article 10(2) of the Argentina-Germany BIT – Not having done so, the Tribunal is not competent to entertain and adjudicate the claim on merits;

(B) In the second part – the Respondent's contention is that Wintershall cannot rely on the most-favoured-nation-clause in Article 3 of the Argentina-Germany BIT in order to avoid compliance with the requirements set out in Article 10(2) of the Argentina-Germany BIT – i.e. the MFN clause contained in Article 3 of the Argentina-Germany BIT cannot be extended to the dispute resolution provision (Article 10). The reasons urged by Argentina in support of this contention are: (i) that the MFN clause under the Argentina-Germany BIT cannot be applied to dispute settlement provisions; (ii) that the interpretation that the Claimant puts to the MFN clause violates the *ejusdem generis* principle and the *effect utile* principles, and (iii) because “case law” confirms that Wintershall cannot rely on the MFN clause for the settlement of its dispute with the Republic of Argentina.

#### 1. The need for considering separately the first part of the Argentina's contention on the first Preliminary Objection to Jurisdiction

73. It would not have been necessary to consider the contention whether (*de hors* any MFN Clause) ICSID arbitration could be invoked by the Claimant without first complying with Article 10(2) of the Argentina-Germany BIT) if the case had been confined to the contentions and submissions of the parties made in their respective Memorials submitted

before the Paris hearing. In the Claimant's Counter-Memorial on Preliminary Objections to Jurisdiction it was emphasised that the provision for resort to domestic courts (paragraph (2) of Article 10) was not "superfluous": it was admitted that paragraph (2) of Article 10 was applicable when the MFN clause did not extend to Article 10.<sup>42</sup> Independent of any extension (by interpretation) of the MFN Clause in Article 3 to Article 10, the Claimant (Wintershall) appeared to have accepted the position that the local-remedies – rule in paragraph (2) of Article 10 was a prerequisite to ICSID arbitration.

74. However, at the Paris hearing (on October 14-16, 2007) Prof. Schreuer (who gave oral evidence on behalf of the Claimant) opined that a clause like Article 10(2) of the Argentina-Germany BIT could be treated as "dispensable" because it made provision only for a "waiting period"; which prompted the Claimant in its post-hearing brief (dated October 30, 2007) – to assert – in paragraph 17 (for the first time) – that Article 10(2) being merely procedural was not a jurisdictional requirement and could be "overridden or dispensed". Hence, the plea raised on this first part of Argentina's first Preliminary Objection of Jurisdiction – (*de hors* the MFN clause) – requires to be separately considered.

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<sup>42</sup> See Claimant's Counter-Memorial on Preliminary Objections to Jurisdiction, paras. 94 and 96, where it was observed: "94. In Argentina's opinion the fact that in given cases investors can avail themselves of provisions contained in other investment treaties overriding those of the basic treaty render the latter useless. However, Article 10(2) of the Germany-Argentina BIT governs dispute settlement between investors and the host State unless the investor submitting the dispute chooses a more favorable provision contained in another investment treaty. Indeed Article 10(2) of the BIT would have applied to the instant case if Claimant had not invoked more favorable provisions in the US-Argentina BIT though the MFN clause. Therefore, dispute settlement provisions in the basic treaty do not become devoid of significance as a result of the investors having an "option" (not an obligation) to resort to a more favorable dispute resolution mechanism by virtue of an MFN clause." "96. Thus, Article 10(2) of the BIT applies unless the claimant decides to avail itself of dispute settlement provisions contained in other BITs." (Emphasis added).

## Part-VI

### VI. THE INTERNATIONAL LAW BROAD ISSUES INVOLVED IN THE CONSIDERATION BY THE TRIBUNAL OF ARGENTINA'S FIRST PRELIMINARY OBJECTION TO JURISDICTION

75. Since the afore mentioned first and second parts of the first Preliminary Objection to Jurisdiction involve (i) an interpretation of the text of the Argentina-Germany BIT in accordance with the Vienna Convention on the Law of Treaties 1969 and (ii) an application of “principles of MFN treatment” in Bilateral Investment Treaties; it would be more appropriate if these two aspects are first addressed.

#### 1. General considerations on the international law applicable to the two parts of Argentina's first Preliminary Objection to Jurisdiction: the interpretation of treaties

76. The law on treaty-interpretation is now codified – after the adoption by almost all nations of the world of the Vienna Convention on the 1969 Law of Treaties<sup>43</sup> (VCLT). Article 31 and 32 of the 1969 VCLT (**Article 33 is not reproduced below**) read as follows:

*“Article 31 – General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision;

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<sup>43</sup> The VCLT entered into force on January 27, 1980.

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

**“Article 32 – Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

77. In interpreting treaties (including BITs) this Tribunal must apply the 1969 Vienna Convention on the Law of Treaties – since both States are parties to the VCLT, and (more fundamentally) because as declared by the International Court of Justice, the rules of interpretation set out in the VCLT reflect customary international law in this matter.

78. The carefully-worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the *travaux préparatoires*, or any predilections based on presumed intention). Even before the entry into force of the 1969 VCLT (in 1980), the Institute of International Law<sup>44</sup> had adopted a textual approach to treaty interpretation<sup>45</sup> - *le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties* (“The signed text, is except for rare exceptions, the only and the most recent expression of the

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<sup>44</sup> The Institute of International Law is an on-going organisation devoted to the study and promotion of international law: and its members are widely considered to be the world’s leading public international lawyers. Although the deliberation and resolutions of the Institute have no official authority, in the chancelleries and parliaments of the world they have nonetheless – exerted a significant influence on learned opinion.

<sup>45</sup> Institute of International Law, “*Annuaire de l’Institut de droit international*”, Vol. 44, tome 1, 1952, p. 199.

common accord [or common will] between the parties.”).

79. Judgments of international tribunals (the PCIJ and ICJ) contain pronouncements to the effect that where the ordinary meaning of words (the text) is clear and they make sense in the context, there is no occasion at all to have recourse to other means of interpretation. For instance, in the Advisory Opinion of the International Court of Justice on *Admission of a State to Membership in the United Nations*<sup>46</sup> the Court said that it considered that there should be no deviation from the consistent practice of the Court, which was not to resort to preparatory work if the “*text of a convention was sufficiently clear in itself.*” In one of the later judgments of the ICJ - the Court, stated the general rule of international law on interpretation of treaties in the following words:

“the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.” (Emphasis added).<sup>47</sup>

80. And in a more recent decision of the I.C.J. in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain, ICJ Reports 1995 page 18 para. 33)*, the Court specifically recalled what it had previously said the year before in the *Case Concerning Territorial Dispute Libyan Arab Jamahiriya/Chad* (judgement dated February 3, 1994):

“in accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.” (I. C. J. Reports 1994, pp. 21-22, para. 41.) (Emphasis added)

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<sup>46</sup> *Admission of a State to Membership in the United Nations, ICJ Reports, 1948, page 63.*

<sup>47</sup> *Case concerning the Arbitral Award of 31 July 1989 (Guinea- Bissau v. Senegal)*, Judgment of November 12, 1991, *ICJ Reports, 1991, para. 48, p. 69*, quoting an earlier pronouncement of the Court in the Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations, ICJ Reports, 1950, p. 8.*

81. In Oppenheim's International Law, the general rule of interpretation of treaties is stated in the following terms:

“The general rule of interpretation laid down in Article 31 of the Vienna Convention adopts the textual approach: a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose? That such a textual approach – on which the International Law Commission was unanimous – is an accepted part of customary international law is suggested by many pronouncements of the International Court of Justice, which has also emphasised that interpretation is not a matter of revising treaties or of reading into them what they do not expressly or by necessary implication contain, or of applying a rule of interpretation so as to produce a result contrary to the letter or spirit of the treaty’s text.”<sup>48</sup>

82. The ICJ has often stressed that it is not the function of interpretation to revise treaties or to read into them what they do not contain expressly or by implication; that the terms (the text) of a treaty must always be adhered to, for the reason that a treaty expresses the mutual will of the Contracting States. A classic illustrative case is that of - *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, (Second Phase)* – (Advisory Opinion of the International Court of Justice of July 18, 1950)<sup>49</sup>. In that case the Court was asked whether the UN Secretary General could appoint the third member of a Treaty Commission upon the request of one side to the dispute where the other side (the States of Bulgaria, Hungary and Romania) had refused to appoint their own representative. The natural and ordinary meaning of the terms of the Peace Treaties with the three States concerned envisaged the appointment of the third member only after the other two had been nominated. Articles 36, 40 and 38 (respectively) of the Peace Treaties with Bulgaria, Hungary and Romania, after providing that disputes concerning the interpretation or execution of the Treaties, which had not been settled by direct negotiations, should be referred to the Three Heads of Missions – provided:

"Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of

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<sup>48</sup> Oppenheim's International Law, Vol. I (parts 2 to 4), 9<sup>th</sup> Edition, pages 1271 to 1272, Edited by Sir Robert Jennings Q.C. and Sir Arthur Watts K.C.M.G. Q.C. (published in 1992).

<sup>49</sup> *ICJ Reports*, 1950.

one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment.

2. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."<sup>50</sup>

83. The question at issue was whether the above provision empowering the Secretary-General to appoint the “third member” of the Commission applied in a case in which one of the parties had originally refused to appoint its own representative to the Commission. It was contended that the term “third member” was used simply to distinguish the neutral member from the two Commissioners appointed by the parties without implying that the third member could be appointed only when the two national commissioners had already been appointed; it was also contended that the mere fact of the failure of the parties, to select the third member by mutual agreement satisfied the condition required for the appointment of the third member by the Secretary-General. The Court rejected these contentions. It said:

“The Court considers that the text of the Treaties does not admit of this interpretation [...].

[...] The Secretary-General’s power to appoint a third member is derived solely from the agreement of the parties as expressed in the disputes clause of the Treaties; by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner. The power conferred upon the Secretary-General to help the parties out of the difficulty of agreeing upon a third member cannot be extended to the situation which now exists.”<sup>51</sup>

84. The ICJ said that the principle expressed in the maxim *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, could not justify the Court in attributing to the provisions for settlement of disputes in the Peace Treaties a meaning which would be contrary to their letter and spirit. The Court then went on to say:

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<sup>50</sup> *Ibid.*, p. 226.

<sup>51</sup> *Ibid.*, p. 227.

“The failure of machinery for settling disputes by reason of the practical impossibility of creating the Commission provided for in the Treaties is one thing; international responsibility is another. The breach of a treaty obligation cannot be remedied by creating a Commission which is not the kind of Commission contemplated by the Treaties. It is the duty of the Court to interpret the Treaties, not to revise them.”<sup>52</sup>

If this be the duty of an international court, the duty of an ICSID Tribunal is no different.

85. Prof. Christoph Schreuer, gave oral evidence before the Tribunal as the Claimant’s expert witness on international law. He was asked in cross-examination whether as a professor of Public International Law he really believed that two sovereign States will negotiate, sign and ratify a Bilateral Investment Treaty without caring to consider what was put in it.” Since this was how the question was framed, the Professor frankly replied as follows:

“[...] many times, in fact in the majority of times, BITs are among clauses of treaties that are not properly negotiated. BITs are very often pulled out of a drawer, often on the basis of some sort of a model, and are put forward on the occasion of state visits when the heads of states need something to sign, and the typical two candidates in a situation like that are Bilateral Investment Treaties, and treaties for cultural co-operation. In other words, they are very often not negotiated at all, they are just being put on the table, and I have heard several representatives who have actually been active in this Treaty-making process, if you can call it that, say that, ‘We had no idea that this would have real consequences in the real world’.”<sup>53</sup>

He was then pressed with the following question:

“**Q.** Do you mean to say that States negotiate nonsensical clauses?(...) Would you agree with me?”

Being a reputed International lawyer, Professor Schreuer responded:

“...sometimes they do but that doesn't mean that you should ignore them. I think you must still take the text of the Treaty at its face value. I am not suggesting that you should classify Treaty provisions into those that are sensical and those that are nonsensical. Treaty interpretation must proceed from the ordinary meaning, even if

<sup>52</sup> *Ibid.*, p. 229. This conclusion was re-affirmed by the ICJ in a subsequent Judgment of August 27, 1952, in the *Case concerning Rights of Nationals of the United States of America in Morocco*, *ICJ Reports*, 1952, p. 196.

<sup>53</sup> Expert testimony from Christoph Schreuer, Hearing Transcripts in English, 2<sup>nd</sup> day, October 15, 2007, p. 144.

we don't like them.....” (Emphasis added).<sup>54</sup>

86. Prof. Schreuer was then asked whether the intention of the parties was relevant for the interpretation of treaties according to the Vienna Convention, and he replied:

“No. No. Absolutely not. If you look at Article 31 and Article 32 of the Vienna Convention, you will see that the intention of the parties is never mentioned there, and for good reasons. In Vienna at the time there were long negotiations about the modalities of Treaty arbitration (sic)<sup>55</sup>, and there were essentially two schools of thought....” (he was interrupted and then resumed).

“may I continue? [...] Intention is not a concept that is used by the Vienna Convention on the law of treaties. It refers to the text of the Treaty, more specifically in accordance with the ordinary meaning given to the terms of the Treaty, or, to put it differently, intention is relevant to the extent that it is expressed in the terms of the Treaty, no more, no less.” (Emphasis added).<sup>56</sup>

The questioner persisted:

**Q.:** So from the answer you just gave me I gather you think the intention of the parties is not relevant in the interpretation of a Treaty”

**A. (Prof. Schreuer)** “No, that is not correct. As I just said, the intention is relevant to the extent that it finds expression in the text of a Treaty, but not beyond.”

**Q.:** “I believe that the representatives of states wouldn't agree much with what you are just saying, because the intention of the parties, when signing a Treaty, and when they negotiate the Treaty, is pertinent for the state in order to interpret it, but if that is your position, I guess you have made your point.”

**A. (Prof. Schreuer)** “This is not my position. This is what Article 31 of the Vienna Convention on the Law of Treaty says, and if I may say so, my predecessor in the chair in Vienna, Professor Zemanek used to fail students when they gave the answer that the intention of the parties was significant for the interpretation of treaties.”

**THE PRESIDENT:** “It is the letter of the Treaty.”

**A. (Prof. Schreuer)** “Yes.”<sup>57</sup>

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<sup>54</sup> *Ibid.*, p. 145.

<sup>55</sup> *Ibid.*, p. 145. Note: Perhaps Prof. Schreuer meant “modalities of treaty interpretation”; but the corrected record continues to read as above.

<sup>56</sup> *Ibid.*, p. 146.

<sup>57</sup> *Ibid.*, p. 147.

87. As Professor Schreuer has affirmed, it is the letter (the text) of the treaty that must prevail. “Treaty interpretation” as he rightly says “must proceed from the ordinary meaning (of words) even if we don’t like them...”
88. In the circumstances, the Tribunal holds that, there is no room for any presumed intention of the Contracting Parties to a bilateral treaty, as an independent basis of interpretation; because this opens up the possibility of an interpreter (often, with the best of intentions) altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty’s “true purpose”.
89. This possibility is not an imaginary one – it reveals itself (occasionally and quite subconsciously) in decisions of some ICSID Tribunals. Thus for instance:
- (a) in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* it was stated by an ICSID Tribunal - that far-reaching effects arising out of the text of the BIT under consideration should be confirmed by clear and convincing evidence of the shared intent of the Contracting Parties (an avowed pro-State approach)<sup>58</sup>;
  - (b) and in *SGS Société Générale de Surveillance v. Republic of Philippines*, a different ICSID Tribunal held that it was legitimate to resolve uncertainties in the interpretation of a BIT so as to favour protection of covered investments (an avowedly pro-investor approach)<sup>59</sup>;
90. In a book, recently published<sup>60</sup>, containing an article by M. Weiniger the different approaches to treaty interpretation are encapsulated (rather picturesquely) under the heading: “*Jurisdiction Challenges in BIT Arbitrations – Do you read a BIT by Reading a BIT or by Reading into a BIT*”.

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<sup>58</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction of August 6, 2003 (8 ICSID Rep. 383, pp. 442-443).

<sup>59</sup> *SGS Société Générale de Surveillance v. Republic of Philippines* (ICSID Case No. ARB/02/6), Decision on Jurisdiction of January 29, 2004 (8 ICSID Rep. 515, p. 550).

<sup>60</sup> M. Weiniger, “*Pervasive Problems in International Arbitration*”, 2006, Edited by L.A. Mistelis and J. Lew.

91. Prof. M. Koskenniemi, international lawyer and former diplomat, summed it all up in one sentence: the judicial process of interpretation of treaties (he said) sometimes “tends to create meaning rather than to discover it”.<sup>61</sup>
- 2. What are the principles governing most-favoured-nation clauses in bilateral treaties? – the difficulties in their application in individual cases**
92. If the general principles of treaty – interpretation, even after their codification in 1969 by the Vienna Convention on the Law of Treaties continue to present difficulties in their application in individual cases, in the area of the “law” (still un-codified) relating to most-favoured-nation-clauses there are more such difficulties and problems. This is largely because the “law” on MFN clauses is, in part, in a nascent stage of development – which is why there are such divergent responses by different *ad hoc* Committees to different MFN Clauses (and sometimes even similarly worded MFN clauses) in Bilateral Investment Treaties.
93. When in September 1924, the Assembly of the League of Nations passed a Resolution for the “progressive codification of International law” and appointed a Sub-Committee to consider whether it would be possible, and in what degree, “to reach an international agreement concerning the principal means of determining and interpreting the effects of the Most-Favoured-Nation clause in Treaties”, the Report of the Sub-Committee was inconclusive.<sup>62</sup> It said that it was simply not possible to reach international agreement concerning the principal means of determining and interpreting the effects of the Most-Favoured-Nation clauses in Treaties. The majority members of the Committee responded to the original question put to the Sub-Committee: with a negative answer: "it would not seem either necessary or desirable even if it were practicable to endeavour to frame a code provision to govern the case".<sup>63</sup> The majority was also not convinced of the necessity of having special substantive rules of interpretation in regard to the Most-Favoured-Nation

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<sup>61</sup> Prof. M. Koskenniemi, “*From Apology to Utopia: The Structure of International Legal Argument*”, University of Helsinki, 1989, p. 415. (“*Koskenniemi*”).

<sup>62</sup> Endre Ustor, (Special *Rapporteur* of the ILC), Document A/CN.4/ 213, April 18, 1969, para. 79, *Yearbook of the International Law Commission*, 1969, Vol. II, p. 170. It was the First report on the most-favoured-nation-clause.

<sup>63</sup> *Ibid.*, para. 90.

clause: "The ordinary rules of judicial interpretation would seem adequate and more desirable".<sup>64</sup> The Committee of Experts of the League found that "the international regulation of these questions by way of a general convention, even if desirable, would encounter serious obstacles" and did not place the topic of the most-favoured-nation clause on the list of topics which it recommended for codification.<sup>65</sup>

94. But twenty years later, in a memorandum (1949) of the Secretary General of the United Nations titled "Survey of International Law in Relation to the Work of Codification of the International Law Commission", it was stated that:

"The divergent interpretations of the most-favoured-nation clause continue to cause difficulties, and it may be necessary to reconsider the view expressed by the League of Nations Committee of Experts that the subject, which it discussed in detail on the basis of a thorough report, can be best dealt with by way of bilateral agreements."<sup>66</sup>

95. It was during the period – between the First and the Second World Wars – that some jurists and academic writers, perplexed as to the scope and ambit of the Most-favoured-Nation Clause, favoured the view that the MFN clause was an exception to the dictum *pacta tertiis nec nocent nec prosunt*, i.e. that treaties could only produce effects as between the Contracting Parties; apparently overlooking the incongruity inherent in this view viz. that a treaty between two States produced for the benefit of a third State (beneficiary of the most favoured nation clause) a direct legal title, in the creation of which treaty the third State took no part!<sup>67</sup>
96. It was only after the end of the Second World War – that the International Court of Justice made some comments on the effect and operation of the MFN Clause in Bilateral Treaties in

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<sup>64</sup> *Ibid.*, para. 92.

<sup>65</sup> *Ibid.*, para. 97.

<sup>66</sup> United Nations, Memorandum submitted by the Secretary-General, "Survey of International Law in Relation to the Work of Codification of the International Law Commission", extract from the Book of the ILC 1949. Document A/CN.4/1/Rev.1, para. 91, United Nations Publications, 1948. Vol. 1, pp. 52-53.

<sup>67</sup> See Endre Ustor, Second Report on the Most-Favoured-Nation Clause, *Yearbook of the International Law Commission*, 1970, Vol. II, p. 204, March 9 and May 18, 1970, Document A.CN.4/228 and Add. 1, paras. 25 and 26. ("Second Report on MFN").

three cases viz. *Anglo-Iranian Oil Company Case (jurisdiction)* [1952]<sup>68</sup>, the *Case concerning rights of nationals of the United States of America in Morocco* [1952]<sup>69</sup>, and the *Ambatielos Case (merits: obligation to arbitrate)* [1953]<sup>70</sup>. There was also a fourth case, not of the ICJ, but an Award of a (International) Commission of Arbitration (1956)<sup>71</sup> in what has come to be known as the *Second Ambatielos Case*.

97. The decision of the ICJ in the *Anglo Iranian Oil Company case*<sup>72</sup> was of seminal theoretical significance. It authoritatively affirmed (contrary to then current legal thinking) that the rule that treaties produced effects only as between Contracting States applied also to treaties containing MFN Clauses. The Court said that “a third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect” as between the Contracting Parties to the basic treaty. In the second case – *case Concerning Rights of Nations of the USA in Morocco (1952)* – the Court (ICJ) only restated the generally accepted view that the most-favoured-nation-clause represented the principle of equality of treatment in the field of foreign trade.
98. In the third case, *Ambatielos 1953 (Greece v. Great Britain)* – the Court held by majority (10:4) that it had no jurisdiction to decide on the merits of the claim brought by the Greek Government on behalf its national (Mr. Ambatielos) against the Government of the UK – for breach of a contract of sale of nine ships on agreed dates – but that it did have jurisdiction to decide (and so decided) that the United Kingdom (against whom the claim was made) was under an obligation to submit the breach-of-contract-dispute to arbitration.<sup>73</sup> The Greek Government had contended before the International Court of Justice that its national, Mr. Ambatielos did not receive at the hands of the United Kingdom Government the treatment to

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<sup>68</sup> *Anglo-Iranian Oil Company Case (United Kingdom v. Iran)*, Judgment of July 22, 1952, *ICJ Reports*, 1952, p. 93. (“*Anglo-Iranian*”).

<sup>69</sup> *Case concerning Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment of August 27, 1952, *ICJ Reports*, 1952, p. 176.

<sup>70</sup> *Ambatielos Case (Greece v. United Kingdom)*, Merits: Obligation to Arbitrate, Judgment of May 19, 1953, *ICJ Reports*, 1953. (“*Ambatielos I*”).

<sup>71</sup> *Ambatielos Case (Greece v. United Kingdom)*, Award of March 6, 1956, United Nations, Reports of International Arbitral Awards, Vol. XII, 1963, p. 87. (“*Ambatielos II*”).

<sup>72</sup> *Anglo-Iranian*, p. 109.

<sup>73</sup> *Ambatielos I*, p. 23.

which Greek nationals were entitled under the provisions of Article X<sup>74</sup> (as well as paragraph (3) of Article XV<sup>75</sup>) of the Treaty of November 10, 1886 (between Greece and the UK). The Greek Government also claimed that by virtue of the Most-Favoured-Nation Clause contained in Article X it was also entitled to claim for its nationals treatment in accordance with “Justice, Right and Equity” – such treatment having been assured by the United Kingdom to nationals of other States by virtue of separate treaties concluded by the United Kingdom with those other States.

99. In *Ambatielos*, (*Ambatielos-I*)<sup>76</sup> the majority of the Court held that the United Kingdom was under an obligation to co-operate with Greece in constituting a Commission of Arbitration “in accordance with the Protocol of 1886,<sup>77</sup> as provided in the Declaration of 1926.<sup>78</sup> The majority (of ten Members) of the Court however refrained from pronouncing upon the scope and applicability of the MFN clause relied on by the Greek Government.<sup>79</sup>”

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<sup>74</sup> Treaty of November 10, 1886 between Greece and the United Kingdom, Article X – The Contracting Parties agree that in all matters relating to commerce and navigation, any privilege, favour or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.

<sup>75</sup> *Ibid.*, Article XV, paragraph 3 – The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defense of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.

<sup>76</sup> To differentiate it from the Second *Ambatielos Case* (*Ambatielos II*) decided in the Award of the Commission of Arbitration.

<sup>77</sup> The Protocol of 1886 referred to in the Declaration of 1926 contains, *inter alia*, the following provision: “Any controversies which may arise respecting the interpretation or the execution of the present Treaty, or the consequences of any violation thereof, shall be submitted, when the means of settling them directly by amicable agreement are exhausted, to the decision of Commissions of Arbitration, and the result of such arbitration shall be binding upon both Governments.”

<sup>78</sup> *Ambatielos I*, “It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day’s date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886, and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10<sup>th</sup>, 1886, annexed to the said Treaty.”

<sup>79</sup> See Endre Ustor, “*Second Report on MFN*”, p. 209, where it is stated:

“61. In the course of the proceedings before the International Court of Justice (in the *Ambatielos Case*) the parties referred to a most-favoured-nation clause embodied in the treaty of commerce of 1886 and a national treatment clause of the same treaty granting “free access to the Courts of Justice”. They differed widely on the scope and effect of the most-favoured-nation clause and on the meaning of the term “free access to the Courts of Justice”.

62. The Court itself (i.e. the majority) did not decide on the substance of the dispute. Thus no discussion of the substantive issues, which would throw light on the problems connected with the operation of a most-favoured-

100. However, in a Joint Dissenting Opinion (by the then President of the Court Sir Arnold McNair and Judges Basdevant, Klaestad and Read) Article X of the Treaty of 1886 (which contained an MFN clause) was interpreted by the four judges who said:

“At this stage we meet Article X of the Treaty of 1886 which has been invoked by the Hellenic Government. This Article contains a most-favoured-nation clause which, in its opinion, embodies certain references to the requirements of the proper administration of justice. But, having regard to its terms Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment. The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.”<sup>80</sup> (Emphasis added).

101. Thus on the question whether the administration of justice belonged to the *genus*: “commerce and navigation” the Judges (relying on the *ejusdem generis* rule) refused to give an extensive interpretation to the MFN Clause<sup>81</sup> - despite the words “all matters relating to...” which occurred before the phrase “commerce and navigation”. Sir Gerald Fitzmaurice – one of the great exponents of international law (and himself for many years a Judge on the ICJ) – has agreed with this Dissenting Opinion; he has said that on the question whether the administration of justice belonged to the *genus* of "matters of commerce and navigation", the last sentence of that portion of the joint dissenting opinion quoted above was of paramount

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nation clause, is to be found in the Judgement of the Court. They are dealt with in great detail in the written and oral submissions of the parties and in the joint dissenting opinion of four members of the Court, Judge McNair, then President of the Court, and Judges Basdevant, Klaestad and Read.”

<sup>80</sup> *Ambatielos I*, Dissenting Opinion by Sir Arnold McNair, President, and Judges Basdevant, Klaestad and Read, *ICJ Reports*, 1953, p. 34.

<sup>81</sup> For practical purposes, it is essential to bear in mind the exact scope of each particular MFN Clause – for MFN treatment can only be claimed with respect to favours *ejusdem generis* granted by the promisor to the third State; an interesting application of this principle has been mentioned by Prof. George Schwazemberger in an Article in the British Yearbook on International Law 1945 (“*The Most-Favoured-Nation Standard in British State Practice*”, para. 96 at p. 108, footnote 6) It is the decision of the Umpire of the British-Venezuelan Mixed Claims Commission in the case of *The Aroa Mines* under the Protocol of February 13, 1903. The Umpire held that the relevant MFN Clause on which Great Britain relied and which extended to the administration of Justice only applied to rights before national courts but not, as Great Britain had maintained, to the proceedings of the International Mixed Claims Commission, a restricted interpretation of an MFN Clause.

importance (viz. “we do not consider it possible to base the obligation on which the Court has been asked to adjudicate on an extensive interpretation of this clause”). Sir Gerald Fitzmaurice then went on to say:

“The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to cause provisions not in themselves subject to an obligation of compulsory arbitration in the event of dispute, to become so by reason of their attraction by notional incorporation into another treaty that does contain such a clause. States may thus find themselves obliged to arbitrate cases they had never contemplated submitting (and would not normally have agreed to submit) to arbitration.”<sup>82</sup>

102. In *Ambatielos I*, the Joint Dissenting Opinion also contained the following paragraph highlighting another important aspect of a jurisdiction clause in a treaty:

“[...] it is necessary not to lose sight of the fact that in this case the Court has to decide, on the basis of the meaning to be attributed to the free access clause, what is the extent of the obligation to arbitrate arising from the Declaration of 1926. With two interpretations of Article XV, paragraph 3, before us, we cannot subscribe to the one which would extend it to the production of evidence and thereby enlarge the obligation to submit to arbitration. It is particularly difficult to accept an interpretative extension of an obligation of a State to have recourse to arbitration. The Permanent Court in the *Phosphates in Morocco* case stated that a jurisdiction clause must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it [...]”<sup>83</sup> (Emphasis added).

103. As a result of the majority decision of the ICJ, a Commission of Arbitration was subsequently set up by agreement between the Government of the United Kingdom and Northern Ireland and the Greek Government (in February 1955) the five-member Commission in its award of March 6, 1956, (*Ambatielos II*) affirmed right at the beginning the *ejusdem generis* rule: holding that “*the Most-Favoured-Nation Clause can only attract matters belonging to the same category of subject as that to which the clause itself relates.*”; Since the Greek Government had relied upon the Most-Favoured-Nation Clause contained in

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<sup>82</sup> G. Fitzmaurice, *The Law and Procedure*, Cambridge Grotius Publications, 1986, Vol. I, p. 325 footnote (3).

<sup>83</sup> *Ambatielos I*, Dissenting Opinion, *ICJ Reports*, 1953, p. 33, where reference is made to the *Phosphates in Morocco Case (Italy v. France)*. In the *Phosphates in Morocco (Italy v. France)*, 1938, the PCIJ observed that it was advisable in case of doubt, to give a restrictive interpretation of a clause in a treaty because such a clause “must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it”, PCIJ Ser. A/B No. 74, 1938, p. 14.

Article X of the 1886 Treaty and invoked provisions embodied in earlier treaties between the United Kingdom and third States (Denmark, Sweden and Bolivia), which provided that Parties would cause justice and equity to be administered to the subjects and peoples of each other, the question whether the “administration of justice” belonged to the *genus* of matters pertaining to “commerce and navigation,” was addressed by the Commission of Arbitration. On an interpretation of Article X of the Treaty of 1886 the Commission proceeded to state its view (differently from the Opinion of four Dissenting Judges of the ICJ in *Ambatielos I*) as follows:

“In the Treaty of 1886 the field of application of the most-favoured-nation clause is defined as including “all matters relating to commerce and navigation”. It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of commerce and navigation proves that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these Treaties contain provisions concerning the administration of justice. That is the case, in particular, in the Treaty of 1886 itself, Article XV, paragraph 3, of which guarantees to the subjects of the two Contracting Parties “free access to the Courts of Justice for the prosecution and defence of their rights”. That is also the case as regards the other Treaties referred to by the Greek Government in connection with the application of the most-favoured-nation clause.

It is true that “the administration of justice”, when viewed in isolation, is a subject matter other than “commerce and navigation”, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by Treaties of commerce and navigation.

Therefore, it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes “all matters relating to commerce and navigation”. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty.

Although the wording of Article X does not provide a clear and decisive indication in this respect, the Commission is of opinion that it is difficult to reconcile the narrow interpretation submitted by the Government of the United Kingdom with the indications given in the text, in particular in the last part of the sentence: “it being their (the Contracting Parties) intention that the trade and navigation of each country shall be placed, in all respects by the other on the footing of the most favoured nation.”<sup>84</sup> (Emphasis added).

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<sup>84</sup> *Ambatielos II*, p. 107.

104. Having thus determined the meaning of the most-favoured-nation clause contained in Article X of the Treaty of 1886, the Commission addressed itself to the question whether this clause effectively brought about the results which the Greek Government believed it did by relying on various Treaties concluded by the United Kingdom with other States. The conclusion of the Commission on this point was as follows:

“The Commission is therefore of opinion that the provisions contained in other Treaties relied upon by the Greek Government do not provide for any “privileges, favours or immunities” more extensive than those resulting from the said Article XV, and that accordingly the most-favoured-nation clause contained in Article X has no bearing on the present dispute. In view of this decision as to the proper interpretation of Article X, the Commission finds it unnecessary to consider expressly whether any of the 11 allegations of fact which in their totality, are alleged to constitute a breach of Article X, have been established.”<sup>85</sup> (Emphasis added).

105. The observations of the Commission on the interpretation of Article X of the Treaty of 1886 have been relied on and have influenced, decisions of ICSID and other tribunals: as for instance: (1) *Maffezini v. Spain*, Decision on Jurisdiction dated January 25, 2000, where the MFN Clause read: “In all matters subject to this Agreement....”; the Tribunal cited the (International) Commission’s opinion, holding that the scope of the *ejusdem generis* rule had been defined (in *Ambatielos-II*) “in broad terms”<sup>86</sup> (2) *Gas Natural v. Argentina*, Decision on Jurisdiction dated June 17, 2005, where the MFN Clause read: “In all matters governed by the present Agreement [...]”<sup>87</sup>; (3) *Suez-InterAguas v. Argentina* (known as *Suez-InterAguas*), Decision on Jurisdiction dated May 16, 2006, where the MFN Clause read: “In all matters governed by this Agreement [...]”<sup>88</sup>; (4) *Suez – Vivendi v. Argentina* (known as *Suez – AWG*), Decision on Jurisdiction dated August 3, 2006. In *Suez-AWG*, there were three BITs, each drafted differently (between Argentina and France, between Argentina and Spain and between Argentina and the United Kingdom) and it was only in the Argentina-Spain BIT that the MFN clause contained the words “in all matters governed by this

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<sup>85</sup> *Ibid.*, p. 110.

<sup>86</sup> *Maffezini v. Spain*, para. 49.

<sup>87</sup> *Gas Natural SDG, S. A. v. Argentine Republic* (ICSID Case No. ARB/03/10), Decision on preliminary questions about Jurisdiction of June 17, 2005, para. 26. (“*Gas Natural v. Argentina*”).

<sup>88</sup> *Suez, Sociedad General de Aguas de Barcelona S. A. e Interagua Servicios Integrales de Agua S. A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction of May 16, 2006, para. 55. (“*Suez-InterAguas v. Argentina*”).

Agreement”<sup>89</sup>; in *Suez-AWG* the Tribunal stated (in para. 66) that it did not share the view of the *Plama* Tribunal (February 8, 2005) that an Arbitration Clause must be “clear and unambiguous”, even where it is incorporated by reference to another text; and (5) *Vladimir Berschader v. Russian Federation* – award dated April 21, 2006 in Case No. 080/2004, – where the MFN Clause read: “in all matters covered by the present Treaty and in particular in Article 4,5,6 [...]”<sup>90</sup>. However, in the case last cited, despite the width of the language of the clause, the majority of members of the tribunal (2:1) held that the words (“in all matters covered by the present Treaty”) were not sufficiently “clear and unambiguous”. The majority held that even a clause so – worded would not cover the dispute resolution provision of the treaty!

106. But to resume with the history of the MFN clause. It was in the year 1967 that it was suggested at the 21<sup>st</sup> Session of UN General Assembly that the International Law Commission (ILC) should deal with the Most-Favoured-Nation Clause as an aspect of the General Law of Treaties. As a consequence, the ILC decided to place on its program of work the topic of “Most-Favoured-Nation Clauses in the law of Treaties.” At the conclusion of this program of work eleven years later – in the course of which it also made an in-depth study of the three leading cases of the ICJ<sup>91</sup> – as well as the decision of the Commission in the *Ambatielos* case - the International Law Commission adopted at its meeting held on 20<sup>th</sup> July 1978 a set of Draft Articles (with commentaries), with a recommendation to the General Assembly of the UN that they be adopted by Member-States.
107. The Draft Articles were proposed in a form designed to render them capable of being a basis for the conclusion of a Convention should that be decided upon by the General Assembly. But a Convention has not been undertaken so far. There are as yet no codified general rules

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<sup>89</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. y Vivendi Universal S.A v. Argentine Republic* (ICISD Case No. ARB/03/19) and *AWG Group Ltd. (UNCITRAL Case)*, Decision on Jurisdiction of August 3, 2006, para. 55. (“*Suez-AWG v. Argentina*”).

<sup>90</sup> *Vladimir Berschader v. Russian Federation* (Case No. 080/2004), Award of April 21, 2006. (“*Vladimir v. Russian Federation*”).

<sup>91</sup> The reason for the advisability and necessity of studying the three cases were given by the French author C. Rossillion, “*Journal du droit international*”, Paris, Vol. 82, No. 1, p. 77, as follows: “*The decisions of the International Court of Justice constitute the source of an international case law on points which have given rise to serious difficulties in the past and which involve the general theory of the clause; the solution found for their difficulties should therefore be specified as they go beyond the scope of the cases which they resolve.*”

of international law on MFN clauses in bilateral treaties. After more than twenty-five years, the ILC's Draft Articles on MFN clause (with commentaries) – sense as a guide to those who undertake the responsibility of interpreting an MFN clause in bilateral investment treaties between contracting States.

## Part-VII

### **VII. ARGUMENTS AND CONTENTIONS OF THE PARTIES ON THE FIRST-PART OF ARGENTINA'S FIRST PRELIMINARY OBJECTION TO JURISDICTION: THE QUESTION OF THE COMPLIANCE WITH ARTICLE 10(2) OF THE ARGENTINA-GERMANY BIT BEFORE INITIATING ARBITRATION PROCEEDINGS**

#### **1. Submissions and Arguments of the Respondent**

##### **a) In its Memorial on Objections to Jurisdiction**

108. The submissions and arguments in support of the first part of Argentina's first Objection to Jurisdiction contained in its Memorial on Jurisdiction are summarised below:

- (1) It is an admitted position that the Claimant did not fulfil the requirement in paragraph (2) of Article 10 of the BIT. Argentina and Germany had agreed that any dispute that the Claimant Wintershall (as Investor) may have with Argentina was to be first referred to the courts having competent jurisdiction in Argentina, and only if eighteen months elapsed without there being a decision on the merits of the dispute, that such dispute could be referred (after a further time lag of three months) to an international arbitral tribunal (Article 10(4)). The provision establishing the 18-month period was an opportunity to the courts of each State Party to apply and uphold international law, and grant a proper remedy – if appropriate. Argentina and Germany having agreed that disputes would be referred during a certain period to local courts, an arbitral tribunal could not ignore this requirement established by the parties on any ground – even on the alleged ground that the Argentine judiciary was not equipped to issue a decision on the merits within such period. Besides, case law was cited to show that the Argentine Judiciary could issue (and had issued) decisions on merits within eighteen months (various cases were cited<sup>92</sup>; Respondent's Memorial on Jurisdiction, para. 12)
- (2) Any interpretation of a treaty must be made in accordance with the “effet utile principle” of each of its provisions – if the Argentina-Germany BIT were interpreted

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<sup>92</sup> See Argentina's Memorial on Objections to Jurisdiction, para. 12, p. 4. For instance *CSJN, Dromi, José R. (Ministro de Obras y Servicios Públicos de la Nación) s/avocación en autos Fontela, Moisés E. v. Gobierno Nacional* case, July 13, 1990, *Jurisprudencia Argentina*, 1990-IV, p. 468 (AL RA 1). Measures such as the ones in question in the Request for Arbitration had been adjudged by Argentine Courts, and in many cases decisions on the merits had been issued in periods shorter than one year, for instance Federal Court in Contentious Administrative Matters No. 4, *BBVA Banco Francés S. A. c. Estado Nacional – Ministerio de Economía* case, February 5, 2002 (AL RA 2); Court of Appeals in Civil and Commercial Matters in and for San Isidro, Court Division II, *Inversiones Yatay S.A. c. Ferreyra, Ramón A* case, July 10, 2002, LA LEY, November 2002, p. 141 (AL RA 3); amongst many others; for the purpose of bringing any such actions for enforcement of constitutional rights (*amparos*) no filing fees whatsoever were payable.

as contended by Wintershall, the Treaty would contain superfluous and useless words (Respondent's Memorial on Jurisdiction, para. 29).

- (3) Before the Argentina-Germany BIT entered into force, the Argentine Republic and the Republic of Germany had separately entered into investment treaties (with other States) under which the investor was not required to first file a claim within a certain period in Courts having competent jurisdiction of the Contracting Party in whose territory the investment had been made – for instance: the Argentina-Sweden BIT (Article VIII) did not include the requirement that investment disputes be referred to local courts and remain there for a period of at least eighteen months. The Argentina-Sweden BIT entered into force on September 28, 1992, one year before the Argentina-Germany BIT. Similarly the Agreement subscribed to between the Government of the Argentine Republic and the Government of the French Republic for Reciprocal Promotion and Protection of Investment, entered into force on March 3 1993, and in the Germany-Bolivia BIT entered into force on November 9, 1990, three years before the Argentina-Germany BIT; neither in the Agreement or Treaty was there a requirement of first resorting to local courts. Thus, if the Claimant's interpretation were to be upheld, the words in Article 10 of the Argentina-Germany BIT would have no *effet utile* and would be superfluous. Why would Germany and Argentina agree on including paragraphs (1) and (2) of Article 10 of the Argentina-Germany BIT if from its date of entry into force a German investor could straightaway refuse to comply with those provisions relying on the Argentina-Sweden BIT; and an Argentine investor in Germany could straightaway refuse to comply with Article 10(2) relying on the Germany-Bolivia BIT? Evidently when Argentina and Germany negotiated this provision (Article 10(2)) they intended it to have an effect, and this effect could be no other that of submitting the dispute to the National Judiciary prior to making an international claim. In this way the courts of the host State and the investor were given the chance to resolve the dispute without resorting to international arbitration. Only an *effet utile* interpretation principle would give full force and effect to all Clauses of the BIT (Respondent's Memorial on Jurisdiction, paras. 32 to 37).

**b) Respondent's Post-Hearing Brief dated October 30, 2007**

109.1 It was stated in Respondent's Post-Hearing Brief as follows:

- (1) that the Claimant had not met the requirements established in Article 10 of the BIT and that the claim ought to be dismissed (para. 8 and para. 27 of Argentina's Post-Hearing Brief);
- (2) that in the alternative the proceedings should be suspended until the Claimant fulfils the requirement set forth in Article 10 of the BIT (Respondent's Post-Hearing Brief, para. 8 at page 3 and para. 27);

- (3) That the eighteen month clause was not a mere ritual requirement or a useless condition; (Respondent's Post-Hearing Brief, para. 8 at page 3 and para. 27 at page 10);
- (4) Consequently it was submitted that the Claimant must fulfil all the requirements set forth in the Argentina-Germany BIT. According to Article 10 of the Treaty, the submission of the dispute to the competent courts of the Contracting Party in whose territory the investment was made was a prior requirement for the submission of such dispute to international arbitration. Therefore, the investor must meet this condition in order to be entitled to institute arbitral proceedings. The direct consequence of Claimant's non-compliance with the eighteen-month-domestic-litigation-requirement was that Wintershall's claim must be dismissed. (Hearing Transcripts, day 3, October 16, 2007, p. 30 cited). In the alternative, the proceedings should be suspended until Claimant fulfilled the requirements set forth in Article 10 of the BIT." (Respondent's Post-Hearing Brief, para. 27, citing Procedural Order dated March 16, 2006 in *Western NIS Enterprise Fund v. Ukraine* (ICSID Case No. ARB/04/2), (AL RA 54).
- (5) The Argentine Republic therefore requested the Tribunal to decide in favour of Argentina's objections on jurisdiction, dismiss the Request for Arbitration and the Claim Memorial, or in the alternative suspend the proceedings until the Claimant fulfilled the requirements set forth in Article 10 of the BIT (Respondent's Post Hearing Brief, para. 35).

## 2. Claimant's Arguments and Contentions in Response

### a) In its Counter-Memorial on Jurisdiction.

109.2 In response to the first part of Argentina's first Preliminary Objection, the Claimant submitted in its Counter-memorial on Jurisdiction:

- (1) that Article 10(2) of the BIT applies unless the claimant decides to avail itself of dispute settlement provisions contained in other BITs. Therefore, the MFN provision of the Argentina- Germany BIT clearly does not make Article 10(2) of the BIT superfluous. (Claimant's Counter Memorial on Jurisdiction, para. 96).
- (2) that the requirement to submit Wintershall's claims to Argentine Courts would lead to inefficiency and inequity in the proceedings and in the words of *National Grid* it would "defeat the object and purpose of the treaty." (Claimant's Counter Memorial on Jurisdiction, para. 173, citing *National Grid Plc. v. Argentine Republic* (UNCITRAL Case), Decision on Jurisdiction of June 20, 2006, para. 91). [Hereinafter *National Grid v. Argentina*].
- (3) that it was both futile and discriminatory for Wintershall to pursue an investment

dispute of this nature through local Courts – because domestic courts are not able to decide a case of the nature of Wintershall Claim in eighteen months. Besides, Argentine Courts are less favourable to foreign investors because of a lack of independence on the part of the Argentine Judiciary. (Claimant’s Counter Memorial on Jurisdiction, paras. 129 to 163 and 174 to 214).

**b) Claimant’s Post-Hearing Brief dated October 30, 2007**

109.3 In its Post-Hearing Brief, the Claimant stated:

- (1) Whilst it was true that Article 10(2) of the BIT required prior submission to Argentine Courts during an eighteen-month period, this requirement being merely a procedural one could be over-ridden and dispensed with (Claimant’s Post-Hearing Brief, paras. 11, 12 and 20).
- (2) that it was established that it was impossible to obtain a final judgment in a damages claim within eighteen months in Argentine Courts – even a decision of a Court of first instance could not be obtained in that period. (Claimant’s Post Hearing Brief, para. 22).
- (3) that Argentina had cited cases involving preliminary measures obtained in Courts in Argentina by Wintershall’s wholly owned Argentine subsidiary, (Witnershall Energia S.A. (WIAR)) – In response, it was stated by the Claimant that “Claimant has never denied the limited benefit obtained by its local subsidiary through these preliminary measures. But this limited benefit does not go beyond the specific measures that were contested in the two relevant cases. In any case, due to the narrow and specific scope of the claims in these two cases cited by Argentina, the results cannot be projected in relation to the myriad of measures that were taken by Argentina on the basis of a self-declared emergency that gave rise to the dispute in these proceedings.” (Claimant’s Post Hearing Brief, para. 28, p. 7). (Emphasis omitted).
- (4) One of the points also put forward by the Claimant under the head “Impossibility of obtaining redress in the Argentine Courts” was – that the claim could not be withdrawn upon the expiration of the 18 month period without Argentina’s Consent unless it was done with prejudice. (Claimant’s Post Hearing Brief, para. 37(ii)).

**3. Discussion and Findings of the Tribunal on the first part of Argentina’s first Preliminary Objection to Jurisdiction**

a) **Non-State entities under bilateral investment treaties are secondary right holders and can invoke the doctrine of State Responsibility only to the extent provided for in the text of the bilateral treaty concerned**

110. In the past, individuals in one State injured by the acts of another State would request their home country to espouse their claim against the other State – in an international forum. This became known as an exercise in “diplomatic protection”. “Diplomatic protection” soon became a doctrine of International Law under which a State asserted a claim against another State based on an injury to one of its nationals caused by the latter State. “Diplomatic protection” was not always effective because no country could be mandated by international law to espouse such a claim. Moreover it was a customary rule of international law that a State would not espouse such a claim unless the injured private party had exhausted available remedies under the local laws of the country with which the dispute existed. Such an exhaustion-of-local-remedies rule was intended to ensure that the dispute was not elevated to the international plane unless the State that was alleged to have committed a wrongful act had been given an opportunity to resolve the dispute through its own legal system.
111. The principles governing “diplomatic protection” by a State of its own nationals were set out many years ago by the PCIJ in the *Mavrommatis Palestine Concessions Case* (1924)<sup>93</sup>: the decision established that the State alone could take action for injury to its citizens or subjects by the “Responsible State”. Conceptually “diplomatic protection” by a State of its own nationals was regarded as one form of invocation of “State Responsibility” – though not the only form. In the year 1928 the same International Court (PCIJ) recognized the possibility of individual rights of action being provided for in international agreements or treaties. The Court said this in the context of an international agreement where, according to the intention of the Contracting Parties, it was necessary to adopt “some definite rules creating individual rights and obligations...”<sup>94</sup>

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<sup>93</sup> *Mavrommatis*, Decision on Jurisdiction of 1924, PCIJ, Ser. A No. 2, p. 12.

<sup>94</sup> Advisory Opinion of the PCIJ to the League of Nations; *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railways Officials who had Passed into the Polish Service)*, PCIJ Ser. B., No. 15, 1928.

112. But the “rules” creating and recognising these rights still remain undefined and nebulous. In an article recently published in the *American Journal of International Law*<sup>95</sup> (in the year 2002) Mr. James Crawford (ILC Special Rapporteur on State Responsibility 1997-2000) has traced the rights of an individual investor in a BIT to Article 33(2) of the ILC’s Draft Articles on State Responsibility: [The word “draft” before “Articles” was deleted after the Draft Articles on State Responsibility were adopted by the UN General Assembly in October 2002]. Article 33(1) – of the ILC’s Articles (“ILC’s Articles”) provide that the obligations of the Responsible State, “set out in this Part” (Part Two – on the Content of the International Responsibility of a State) – may be “owed to another State or to several States or to the international community as a whole” (not to an individual)<sup>96</sup>. Article 33(1) deals with the primary obligation of the Responsible State (to the other State or international community as a whole) for an “internationally wrongful act”. Article 33(2) of the ILC’s Articles, however, acknowledges the “possibility” (as yet only a possibility – the ILC having taken no definite stand on this) of a “secondary obligation” arising from a breach of a treaty accruing directly in favour of person or entity other than a State – as to which Mr. James Crawford says:

“.....at some level, a modern bilateral investment treaty disaggregates the legal interests that were dumped together under the Mavrommatis formula – though it is not accompanied by any detailed regulation in the Articles of the ways in which State Responsibility may be invoked by non-State entities”.<sup>97</sup> (Emphasis added).

113. The ILC’s Articles on State Responsibility is a detailed and official study on the subject but it contains no rules and regulations of State Responsibility *vis-à-vis* non-State actors. Tribunals are left to determine “the ways in which State Responsibility may be invoked by

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<sup>95</sup> James Crawford, “*The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect*”, *American Journal of International Law*, October 2002, p. 870 onwards. (“*ILC Articles on Responsibility of States*”).

<sup>96</sup> “ARTICLE 33: Scope of international obligations set out in this Part

1. The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.
2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”

<sup>97</sup> *ILC Articles on Responsibility of States*, p. 870.

non-State entities” from the provisions of the text of the particular Treaty under consideration.

**b) The text of the Argentine-Germany BIT provides for right of access of German investors in Argentina to ICSID arbitration – but this right of access to ICSID arbitration is conditioned strictly upon compliance with the provisions of Article 10(2) of the BIT**

114. It is a general principle of the law of treaties that a third beneficiary of a right under it must comply with the conditions for the exercise of the right provided for in the treaty or established in conformity with the treaty. On the analogy of Article 36(2) of the Vienna Convention on the Law of Treaties of 1969<sup>98</sup> (the “Vienna Convention”), the ‘secondary right-holder’ under a bilateral treaty (the investor) who is conferred certain rights, being in no different position from “the third State” (mentioned in Article 36) – must comply with the conditions stipulated for the exercise of the rights provided for in the treaty concerned, which in the instant case is the “basic” treaty.
115. The manner in which Article 10 of the BIT is worded (and it is words that determine the intention of the Parties when interpreting a treaty) it is apparent – that reference to ICSID arbitration is expressly conditioned upon *inter alia* a claimant-investor first submitting his/its dispute to a Court of competent jurisdiction in Argentina, during an 18-month period (and a three month further waiting period) and then proceeding to ICSID arbitration.
116. In the present case, therefore the BIT between Argentine/and Germany is a treaty undoubtedly providing for a right of access to international arbitration (ICSID) for foreign investors, who are German nationals – but this right of access to ICSID arbitration is not provided for unreservedly, but upon condition of first approaching competent Courts in

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<sup>98</sup> Treaties providing for rights for third States:

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
2. A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Argentina. That such a condition as that stipulated under Article 10(2) (e.g. a local-remedies-clause with an opt-out provision) can be lawfully provided for is clear from the provisions of Article 26 of the ICSID Convention – The first part of Article 26 states that “consent of the parties to arbitration under this Convention shall, unless otherwise stated be deemed consent to such arbitration to the exclusion of any other remedy.” The exclusive remedy rule mentioned in the first sentence of Article 26 is subject to modification by the terms of a particular BIT between two Contracting States. Thus, a local-remedies rule may be lawfully provided for in the BIT – under the first part of Article 26; once so provided, as in Article 10(2), it becomes a condition of Argentina’s “consent” – which is, in effect, Argentina’s “offer” to arbitrate disputes under the BIT, but only upon acceptance and compliance by an investor of the provisions *inter alia* of Article 10(2); an investor (like the Claimant) can accept the “offer” only as so conditioned.

117. In the present case the Contracting Parties, (i.e. the Republic of Argentina and the Federal Republic of Germany) have been left free to provide, (and have specifically provided for) a local-remedies clause before resorting (ultimately) to ICSID arbitration. Since the Claimant (a German national) can only make a claim under the Argentina-Germany BIT, and under no other document, when the Claimant Wintershall so makes a claim – (as it has done in the present case) – it has no option but to comply with the closely – interlinked conditions mentioned in Article 10, before exercising its right to ICSID arbitration – simply because that is the expressed will of the Contracting States.
118. Article 10(2) contains a time-bound prior-recourse-to-local-courts-clause, which mandates (not merely permits) litigation by the investor (for a definitive period) in the domestic forum – which both Contracting Parties have considered to be an appropriate judicial body. It does not mention what relief should be sought in the domestic courts, nor does it require that it should be the same or similar relief to that sought in international arbitration. Whatever may have been the object in contemplation of the Contracting States when the Argentina-Germany BIT was agreed to and adopted, (and there is no evidence of this in the present case apart from the text of the treaty – i.e. the BIT) it does definitely indicate a compulsion to comply – (not, as erroneously stated in paragraph 95 of Claimant’s Counter-Memorial on

Preliminary Objection of Jurisdiction a mere “option” to comply).

**c) Significance of the use of the word “shall” in Article 10(2) of the Argentine-Germany BIT**

119. The use of the word “shall” in Article 10(2) (“[i]f any dispute in terms of the paragraph 1 above could not be settled within the term of six months .....it shall be submitted to the Courts of competent jurisdiction of the Contracting Party in whose territory the investment was made”) – is itself indicative of an “obligation” – not simply a choice or option. The word “shall” in treaty terminology means that what is provided for is *legally binding*. During the oral hearings, in Paris (October 14-16, 2007) the Claimant’s expert Prof. Christoph Schreuer – in answer to a question by a Member of the Tribunal admitted that Article 10(2) did contain an “obligation” –

ARBITRATOR TORRES BERNÁRDEZ: “[...] My question is the following: regardless of whether you call it, “Procedural”, or you give it another adjective, do you think that Article 10 establishes an obligation? Does it or does it not establish an obligation? [...]”

A.: (Prof. Schreuer): “Of course, it contains an obligation.”

ARBITRATOR TORRES BERNÁRDEZ: “Thank you very much.”

“A.: (Prof. Schreuer) “ The whole point in my opinion was that it contains an obligation. However, this particular obligation can be avoided by reference to the MFN clause in Article 3.”<sup>99</sup> (Emphasis added).

120. In answer to a question from the President of the Tribunal Prof. Hector Mairal, another witness of the Claimant, gave precisely the same answer:

“THE PRESIDENT: ...I just wanted to know from you that in the Treaty that we are talking about, which is in Spanish, in the Spanish language is there a distinction between “*may* do something and *shall* do something?” You see, in English, Article 10(2) says, “It *shall* be submitted to the courts of the contracting party”, and in Clause 3 it says, “The dispute *may* be submitted to an International Tribunal”. I just want to know as a matter of grammar in the Spanish language with which I am not at all familiar, with, is there a distinction between the force of the word, “*Shall*”, and the force of the word, “*May*”?

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<sup>99</sup> Expert Testimony from Prof. Christoph Schreuer, Hearing Transcripts, 2nd day, October 15, 2007, pp. 161-163.

A. (Prof. Mairal): Oh yes.”<sup>100</sup>

121. A further reason why there is an obligation on the part of the investor Claimant to comply with all the paragraphs of Article 10 (including paragraph (2)) – is because of the manner in which text of the entire Article is structured: or to use the language of the Vienna Convention: “the context” of the treaty. Each of the paragraphs – paragraphs (1), (2), (3), (4) and (5) – are inter-dependent and interlinked (as shown underlined below) –

“(1) Any dispute arising between either of the Contracting Parties and the national or company of the other Contracting Party in connection with the investments under the terms of this Agreement shall, if possible, be amicably settled by the parties to the dispute.

(2) If any dispute in the terms of paragraph 1 above could not be settled within the term of six months, counted as from the date on which any of the Parties had brought it forth, at the request of any of the parties, it shall be submitted to the courts of competent jurisdiction of the Contracting Party in whose territory the investment was made.

(3) The dispute may be submitted to an international arbitral tribunal in any of the following events:

(a) At the request of any of the parties in dispute, if no decision on the merits of the case had been reached following eighteen months from the date when the judicial proceeding provided for in paragraph 2 of this Article was initiated, or if the decision had been reached and the dispute between the parties still continued.

(b) When both parties in dispute had so agreed.

(4) In the cases provided for in the preceding paragraph, disputes between the parties in the terms of this Article, shall be submitted by mutual agreement if the parties to the dispute had not otherwise agreed, either to an arbitral proceeding under the terms of the “Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 or to an arbitral tribunal ad hoc established in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

If no agreement were reached following a three-month term from the date that any of the Parties had applied for the initiation of arbitration proceedings, the dispute shall be submitted to an arbitration proceeding in the terms of the “Convention on the Settlement of Investment Disputes between States and Nationals of other States, of March 18, 1965, provided that both Contracting Parties be part of such Convention. Otherwise the dispute will be submitted to the arbitral tribunal ad hoc mentioned above.

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<sup>100</sup> Expert Testimony from Prof. Héctor Mairal, Hearing Transcripts, 2nd day, October 15, 2007, pp. 233-234.

(5) The arbitral tribunal shall render its decision on the basis of this Treaty and other valid agreements if any, in between the Contracting Parties; the national laws of the Contracting Party in whose territory the investment was made, including the rules of International Private Law; and the general principles of international law.

(6) The arbitral award shall be binding and each Party shall comply with it in accordance with its law.”

122. Under the Argentina–Germany BIT therefore recourse to ICSID arbitration is an event that cannot be insisted upon by an investor until the “event” previously prescribed has occurred. Paragraph (3) (“the dispute may be submitted to an international arbitral tribunal in any of the following events...”) applies *inter alia* only upon “the event” mentioned in clause (a) taking place (viz. “...if no decision on the merits of the case had been reached following eighteen months from the date when the judicial proceeding provided for in paragraph 2 of this Article was initiated or if the decision had been reached and the dispute between the parties still continued...”). Thus, the submission of the dispute to an International Arbitral Tribunal is conditioned upon prior fulfilment of the provision contained in Article 10(2) unless the parties to the dispute agree otherwise (also an event envisaged in Article 10(3)(b)). The paragraph that then follows – paragraph (4) – opens with the words “[i]n the cases provided for in the preceding paragraph” which refers back to paragraph 3(a) (or as the case may be to paragraph 3(b)); where there is no further mutual agreement to refer disputes to arbitration (of ICSID or UNCITRAL), or if no such mutual agreement is reached in a three–month period from the date the Claimant had applied for initiation of arbitration proceedings, it is then (and only then) that the dispute can be submitted unilaterally – to ICSID arbitration.

**d) Claimant’s Contention that Argentina had not conditioned its acceptance of the Centre’s jurisdiction and the Tribunal’s competence upon the prior exhaustion of local remedies: not accepted by the Tribunal**

123. In the Claimant’s Memorial on Merits para. 76 (substantially reproduced in the Claimant Counter–Memorial on Jurisdiction in paras. 62 and 63, page 20) it is stated that:

“76. In this case Argentina has not conditioned its acceptance of the Centre’s jurisdiction and the Tribunal [sic] competence upon the prior exhaustion of local

remedies. (Emphasis omitted).

77. The dispute resolution mechanism provided in Article 10 of the Germany–Argentina BIT only sets forth a prior submission of the dispute to the local courts for a certain period of time. In addition, the result of the proceedings in the local courts, is subject to the satisfaction of the parties. Therefore, Article 10 thereof does not condition the reference to ICSID Arbitration on the prior exhaustion of domestic remedies.”<sup>101</sup>

124. The plea that Argentina has not conditioned its acceptance of the Centre’s jurisdiction and the Tribunal’s competence “upon the prior exhaustion of local remedies” may be correct only if the emphasis be on the word “exhaustion”. However even that phrase (“exhaustion of local remedies”) in the context of BITs is now treated (in UN practice) as including pursuit of time – stipulated remedies in local courts as well. In a UN document relied on by the Claimant in these proceedings<sup>102</sup> – “Bilateral Investment Treaties in the mid–1990s” (a 1998 UN Publication (at page 93) – a clause like Article 10(2) of the Argentina-Germany BIT has been mentioned (and elaborated upon) under the general heading: – “Exhaustion of local remedies” – The passage is quoted below:

“(d) **Exhaustion of local remedies**

As has been noted, under customary international law, a home country generally may not espouse a private investor’s claim against a host State unless the private investor has first exhausted any local remedies. The question arises as to whether an investor must also exhaust local remedies before invoking a BIT’s investor-to-State dispute-settlement mechanism and proceeding against the host country directly. BIT’s have answered this question in several different ways. Particularly in the early years of BIT’s, a number of them required that the investor should first invoke local remedies by submitting the dispute to the courts or administrative tribunals of the host country.

Some BITs that prescribe recourse to local remedies allow the investor to submit a dispute to arbitration under the investor-to-State dispute-settlement mechanism after the dispute has been before the local courts or administrative tribunals for some fixed period of time, even if the local courts or administrative tribunals have not

<sup>101</sup> A similar plea is taken in the Request for Arbitration (para. 50).

“50. Although the dispute resolution mechanism contained in Article 10 of the BIT does speak of proceedings in domestic courts for a certain period of time, it does not condition the reference to ICSID arbitration *expressis verbis* on the prior exhaustion of domestic remedies. The parties are free to turn to ICSID once the period of eighteen months has elapsed or when a decision on the merits has been rendered but the dispute is still ongoing. In other words, unequivocally the BIT does not provide for the exhaustion of local remedies before ICSID arbitration may be instituted. [BIT, Art. 10(3)]”

<sup>102</sup> Claimant’s Memorial on the Merits, Legal Authorities Nos. 165-170.

concluded their proceedings. This fixed period has varied from as little as three months to as much as two years.” (Emphasis added).

125. As shown by the 1998 UN Publication (page 93) (quoted above), Article 10(2) in the Argentina-Germany BIT is by no means an unusual clause in Bilateral Investment Treaties. And there is no reason why a Tribunal should not respect a stipulation (like that contained in paragraph 2 of Article 10) by which the other Contracting State (in this case, Germany) has agreed, on behalf of its nationals, that all disputes raised by them would need to be first taken to Courts of national jurisdiction (in the present case – Courts in Argentina) before international arbitration was invoked. There can be no presumption, as between Contracting States, that a particular stipulation is *ex facie* oppressive<sup>103</sup> or that, for any other reason, it should be dispensed or disregarded.
126. Article 44 of the ILC’s Articles (under the heading “Admissibility of Claims”) provides that “the responsibility of a State may not be invoked if... (b) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted”; the local remedy (i) must be available and (ii) must be effective. But this is a stipulation of international law applicable between States or State entities – it is not applicable in the case of a secondary-right-holder like an investor. This is made clear in the commentary to Article 44.

“The present articles are not concerned with questions of the jurisdiction of international Courts and Tribunals, or in general with the conditions for the admissibility of cases brought before such Courts or Tribunals. Rather they define the conditions for establishing the international responsibility of a State and for the invocation of that responsibility by another State or States. Thus it is not the function of the articles to deal with such questions as the requirement for exhausting other means of peaceful settlement before commencing proceedings, or such doctrines as *litispence* or election as they may affect the jurisdiction of one international Tribunal *vis-à-vis* another. By contrast, certain questions which would be classified as questions of admissibility when raised before an international court are of a more fundamental character. They are conditions for invoking the responsibility of a State in the first place. Two such matters are dealt with in article 44: the requirements of nationality of claims and exhaustion of local remedies.”<sup>104</sup>

<sup>103</sup> On the principle of contemporaneity, it has to be shown to be “oppressive” or impossible of compliance at the date of the entry into force of the treaty.

<sup>104</sup> *ILC Articles on Responsibility of States*, Article 44. (Emphasis added).

127. To conclude – the manner in which Article 10 of the BIT is worded it is apparent – that consent to ICSID Arbitration is expressly conditioned upon a claimant-investor *inter alia* first submitting his/its dispute to a court of competent jurisdiction in Argentina, during an eighteen-month period (and a three month further waiting period) before proceeding to submit the dispute to ICSID arbitration. The relevant words used by the Contracting States in Article 10 of the Argentine-Germany BIT do make sense in their context and as stated by the ICJ in *Guinea – Bissau v. Senegal*, Judgement of November 12, 1991: “If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.”

**e) Claimant’s further Contention that Article 10(2) of the Argentine-Germany BIT is not a matter of Public Policy for Argentina – is not relevant in this case**

128. It is contended by the Claimant that Article 10(2) was not a matter of public policy for Argentina, and that this is evidenced by the fact that out of a totality of forty-eight BITs entered into by Argentina with third party States, the Argentina-Germany BIT was one of the very few BITs (in fact one amongst nine) that contained a provision like Article 10(2), the rest of them having provided in the Dispute Settlement Clause direct access to ICSID Arbitration. But this is not relevant. The Tribunal is concerned in this case with an interpretation of the text of one particular treaty *viz.* the Bilateral Investment Treaty between the Republic of Argentina and Federal Republic of Germany. It is the text of this treaty that has to be interpreted; and interpreted in the light of the 1969 Vienna Convention, as well as on the principle of contemporaneity. In the absence of any *travaux préparatoires* or other evidence as to what the Contracting States had in mind by making a provision for a time restricted approach to local Courts in Argentina, the only certainty is that this was the will of the two Contracting States – and the Claimant a German investor in Argentina, cannot be heard to complain that Article 10(2) is either meaningless, much less “nonsensical”, or that it has turned out to be “futile” at the time when the measures complained of were taken by

the Government of Argentina (i.e. from January 2002).<sup>105</sup>

129. The Argentina-Germany BIT entered into force in the year 1993, and there is no evidence offered – nor have the experts called by the Claimant so deposed - that when the BIT was entered into, Article 10(2) was incapable of being complied with (at the start) for the reason that the legal system or the judiciary in Argentina was not efficient or receptive to claims by foreign investors. The state of the legal system or the state of the courts in Argentina from January 2002 onwards is of little relevance: on “the principle of contemporaneity”: viz. that the terms of a treaty have to be interpreted according to the meaning they possessed (and in the circumstances prevailing), at the time the treaty was concluded. Equally irrelevant too (and for the same reason) is the submission of the Respondent – who whilst controverting the contention (in para K of the Claimant’s Counter-Memorial to Argentina’s Objections to Jurisdiction) has asserted that in two distinct cases – details of which were furnished – local Courts in Argentina had in fact granted temporary relief against emergency measures (taken by the Government of Argentine post January 2002), and that Wintershall’s own 100% Argentine subsidiary Wintershall Energia S.A. (WIAR) had benefited by successfully obtaining redress in the form of injunction (“*amparo*”) not only from local courts in Argentina, but also from the Argentine Supreme Court. When this was asserted (with relevant documentation) the Claimant’s counsel conceded (and this was repeated in paragraph 28 of the Post Hearing Brief filed by the Claimant on October 30, 2007): that “*Claimant has never denied the limited benefit obtained by its local subsidiary through these preliminary measures [in Argentine Court]. But this limited benefit does not go beyond the specific measures that were contested in the two relevant cases””; the fact that WIAR (the 100 percent Argentine subsidiary of Wintershall) had sued and obtained redress and not the Claimant – was entirely a matter of the Claimant’s choice.*

- f) Claimant’s further Contention that in case of a submission of its claim before an ICSID Tribunal under Article 10(4) the withdrawal of a local court would be impermissible in Argentine Law**

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<sup>105</sup> See the plea raised by the Claimant in its Counter-Memorial to Argentina’s Objections to Jurisdiction in para. K: “IT IS FUTILE AND DISCRIMINATORY FOR WINTERSHALL TO PURSUE AN INVESTMENT DISPUTE OF THIS NATURE THROUGH LOCAL COURTS.” (So quoted in capital letters).

130. In its Post-Hearing Brief, the Claimant has also mentioned under the head “Impossibility of obtaining redress in the Argentine Courts” *inter alia* the following:

“(ii) The claim could not be withdrawn upon the expiration of the 18 month period without Argentina’s consent, unless it is (was) done with prejudice.”

131. This point raised in the Claimant’s Post-Hearing Brief does remain without any response from Argentina. But assuming that item (ii) quoted in paragraph 130 above is founded on a legal basis, it is not relevant to the requirement mentioned in Article 10(2) – the latter provides that if any dispute cannot be settled within six months “it shall be submitted to the Courts of competent jurisdiction of the Contracting Party in whose territory the investment was made”, and if no decision on the merits has been reached following eighteen-months from the date when the proceedings provided for in paragraph (2) are initiated (Article 10(3)) then (following a three-month term) the dispute shall be submitted to an ICSID arbitration proceeding (Article 10(4)). The stipulation of Article 10(2) is that the claim should be “submitted” to local courts – and if after eighteen months no decision has been reached, the investor has a right to submit the dispute to ICSID arbitration. There is no requirement in the BIT that the claim initiated in local courts must first be withdrawn on the expiration of the eighteen-month period.

132. Therefore, even assuming that a claim could not, under Argentine law, be withdrawn upon the expiration of the eighteen-month period without Argentina’s consent (unless it was done with *prejudice*) – that would not prevent the Claimant on the expiration of eighteen months from the submission of the claim in Argentine courts to proceed, after three months, to initiate ICSID Arbitration.

**g) Plea raised by the Claimant (in paragraph 17 of its Post Hearing Brief) to the effect that prior procedural steps in the form of waiting periods are not a jurisdictional requirement and can be, therefore, overridden and dispensed**

133. Up to the date of the oral hearing held in Paris, the Request for Arbitration had proceeded on the basis that, absent application of the MFN clause, Article 10(2) of the Argentina-

Germany BIT would ordinarily have to be complied with. But (as already mentioned), it was after the conclusion of the hearing held in Paris, that Prof. Schreuer (who gave evidence at the hearing) addressed a letter dated October 19, 2007 to the Tribunal – in which letter he stated – something not previously mentioned in his Written Opinion dated September 1, 2006 or in his examination-in-Chief when giving evidence *viz.* (this is what he wrote):

“The practice of tribunals demonstrates that the principle that procedural obstacles are not jurisdictional requirements and may be disregarded where appropriate, also applies where the claimant is not a State party to the treaty but a national who may benefit from it. The requirement that an amicable settlement has been attempted through consultations or negotiations is a common condition for the institution of arbitration proceedings in investment protection treaties. This requirement is just as binding as the requirement to go to domestic courts for a certain period of time. It is subject to certain time limits ranging from three to twelve months. As mentioned in my testimony, investment tribunals have treated mandatory waiting periods for negotiations as not impeding arbitration proceedings. (Footnote: For an *obiter dictum* to the contrary: *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004, at para. 88). In a number of cases tribunals have found that non-compliance with mandatory waiting periods did not affect their jurisdiction):

In *Ethyl Corp. v. Canada*,<sup>106</sup> the Tribunal dismissed the objection based on the six-month provision under 1120 of the NAFTA since further negotiations would have been pointless.

In *Wena Hotels v. Egypt*,<sup>107</sup> the Tribunal noted approvingly that the Respondent had withdrawn its objection to jurisdiction based on the waiting period.

In *Lauder v. Czech Republic*,<sup>108</sup> the Tribunal found that the waiting period of six months was not a jurisdictional requirement.

In *Bayindir v. Pakistan*,<sup>109</sup> the Tribunal found that a requirement to give notice of the dispute for the purpose of reaching a negotiated settlement was not a precondition to jurisdiction.

In *SGS v. Pakistan*, the Pakistan–Switzerland BIT provided for a 12 month consultation period before permitting the investor to go to ICSID arbitration. SGS had filed its request for arbitration only two days after notifying Pakistan of the existence of the dispute. The Tribunal accepted the Claimant's argument that the

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<sup>106</sup> *Ethyl Corp. v. Canada* (UNCITRAL Case), Decision on Jurisdiction of June 24, 1998, 7 ICSID Reports 12, paras. 76–88. (“*Ethyl v. Canada*”).

<sup>107</sup> *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/14), Decision on Jurisdiction, June 29, 1999, 6 ICSID Reports, pp. 74, 87. (“*Wena Hotels v. Egypt*”).

<sup>108</sup> *Ronald S. Lauder v. The Czech Republic*, Final Award of September 3, 2001, 9 ICSID Reports 66, para. 187. (“*Ronald Lauder v. Czech Republic*”).

<sup>109</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A. S. v. Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction of November 14, 2005, paras. 88–103. (“*Bayindir v. Pakistan*”).

waiting period was procedural rather than jurisdictional and that negotiations would have been futile. It said:

“Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.”<sup>110</sup> (Emphasis added).

134. Relying upon the contents of this letter, (which had been copied to the parties), and relying upon the ICSID tribunal’s decisions referred to in it, the Claimant in its Post Hearing Brief dated October 30, 2007 contended (for the first time) – that apart from whether the MFN Clause could or could not be invoked for dispute settlement, the expression “shall” used in Article 10(2) of Argentina-Germany BIT was not a jurisdictional requirement and could be overridden or dispensed with. Paragraph 17 of the Claimants post-hearing summary of main arguments reads as follows:

“17. The term “shall” is also used in Art. 10(2) of the BIT when referring to the submission to local court during 18 months. In this regard, Prof. Schreuer in the aforementioned letter cites six cases, in which independently from any MFN clause, Tribunals have held that prior procedural steps in the form of waiting periods were not a jurisdictional requirement and could be overridden or dispensed.”(Emphasis omitted).

135. The decisions of ICSID tribunals mentioned in Prof. Schreuer’s letter of October 19, 2007 were relied on by the Claimant. But, before dealing with these decisions it is necessary to recall that in Article 10(5) of the Argentina-Germany BIT the present tribunal is required to render its decision on the basis, *inter alia*, of “general principles of international law”. This is also the mandate of Article 42(1) of the ICSID Convention. It is true that a clause in a treaty (about prior adjustment by diplomacy) was in issue in the *Nicaragua* case<sup>111</sup> - where the ICJ relying on a previous decision of the PCIJ, has described (in the circumstances of the case before it) that a contention of the United States to the effect that Nicaragua had never raised in negotiations with the United States the application or interpretation of the treaty to any of the factual or legal allegations in its application was a “mere defect of form, the

<sup>110</sup> *SGS v. Pakistan*, para. 184. Footnote omitted.

<sup>111</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment on Jurisdiction and Admissibility of November 26, 1984, 4 *ICJ Reports*, 1984, p. 392. (“*Nicaragua v. U.S.A.*”).

removal of which depends solely on the party concerned.”<sup>112</sup>

136. The *Nicaragua* case was expressly referred to in an earlier part of Prof. Schreuer’s letter dated October 19, 2007 as authority for the view that “waiting periods” for amicable settlement have been treated as non-essential procedural requirements, rather than as matters of jurisdiction.

137. Prof. Schreuer states (in the earlier part of his letter):

“In the *Nicaragua* case before the ICJ,<sup>113</sup> one of the bases for jurisdiction upon which Nicaragua relied was the Treaty of Friendship, Commerce and Navigation between the United States and Nicaragua of 1956. Its Article XXIV(2) contained the following compromissory clause:

“Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.”

The United States argued that an attempt to resolve the dispute by negotiations was a prerequisite for submitting the dispute to the Court. According to the United States, since Nicaragua had never raised the Treaty’s application or interpretation in its negotiations with the United States, it had failed to satisfy the Treaty’s terms for invoking the compromissory clause.<sup>114</sup>

The ICJ rejected this contention. It said:

“In the view of the Court, it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty ... It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do. As the Permanent Court observed,

‘the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerned’ (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14*).<sup>115</sup>

Therefore, the ICJ found that it had jurisdiction over claims relating to the Treaty of

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<sup>112</sup> *Ibid.*, para. 81, p. 427.

<sup>113</sup> *Ibid.*, pp. 427–429.

<sup>114</sup> *Ibid.*, pp. 427–428.

<sup>115</sup> *Ibid.*, pp. 428–429.

1956.”<sup>116</sup> (Emphasis added).

138. To understand the Court’s decision, it must be borne in mind that the jurisdiction invoked by Nicaragua *in its Application* was on the basis of the declarations of both parties accepting the compulsory jurisdiction of the Court, which were not subject to any requirement of prior negotiation. The object of the dispute defined by the application related to an ongoing armed conflict between the parties. The passages (quoted by Prof. Schereuer) on ICJ rejection of the contention of the United States were preceded by the following passage in the Judgment *viz.*:

“83. Taking account of the Articles of the Treaty of 1956 [...], there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the ‘interpretation or application’ of the Treaty. That dispute is also clearly one which is not ‘satisfactorily adjusted by diplomacy’ within the meaning of Article XXIV of the 1956 Treaty (cf. *United States Diplomatic and Consular Staff in Tehran*, I.C.J. Reports 1980, paras. 50 to 54, pp. 26-28).”<sup>117</sup>

139. In the instant case, since Article 10(2) (of the Argentina-Germany BIT) imposes an “obligation”, and not a mere “option”, the non-fulfilment of the provisions of Article 10(2) cannot possibly be described as a “mere defect of form”: especially since it is not (and cannot be) alleged that Argentina had in any way prevented the Claimant from submitting its claim to local courts.
140. A careful reading of the opinions in the *Nicaragua* case and Article XXIV(2) of the (hereinafter “the Friendship Treaty) interpreted therein,<sup>118</sup> clearly show that “negotiation” had not been specifically prescribed in Article XXIV(2) as a *sine qua non* for the parties to proceed to the Court. This has been explained in the separate Opinion of Judge Nagendra Singh (in the *Nicaragua* case itself – *ICJ Reports*, 1984, at page 446) – where, concurring

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<sup>116</sup> *Ibid.*, p. 429.

<sup>117</sup> *Ibid.*, para. 83, p. 428.

<sup>118</sup> The provisions of Article XXIV(2), are in terms which are very common in bilateral treaties of amity or of establishment, and the intention of the parties in accepting such clauses is clearly to provide for such a right of unilateral recourse to the Court in the absence of agreement to employ some other pacific means of settlement (cf. *United States Diplomatic and Consular Staff in Tehran*, *ICJ Reports*, 1980, p. 27, para. 52). In the *Nicaragua* case, the United States did not deny either that the treaty was in force, or that Article XXIV was, in general, capable of conferring jurisdiction on the Court.

with the opinion of the Court, the Judge said:

“there is no reference to negotiation in the Treaty under consideration. In the circumstances the condition necessary under Article XXIV for the case to be brought to the International Court of Justice have been fulfilled.”

141. Judge Nagendra Singh then went on to contrast Article XXIV of the Treaty of Friendship (in the case before the Court) with “other treaties” –

“There are several treaties which do categorically specify negotiations as a condition precedent to resorting to the International Court of Justice. For example, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973 has the following jurisdictional clause. Article 13, paragraph 1, of the Treaty is reproduced below :

“Any dispute between two or more States Parties concerning the interpretation or application of this Convention *which is not settled by negotiation* shall, at the request of one of them, be submitted to arbitration. If within six months from the date of request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.” (Emphasis in the original).

In the aforesaid Treaty, which was cited by the United States in the *United States Diplomatic and Consular Staff in Tehran* case (*I.C.J. Reports 1980*), it would appear that the jurisdictional clause made negotiations an essential condition before proceeding to arbitration; and a lapse of six months from the date of the request for arbitration a condition precedent to referring the dispute to the International Court of Justice.” (Emphasis added).

142. Even a requirement of prior-negotiation may therefore qualify as a jurisdictional requirement (or it may not), depending on the language and the context.
143. It follows from the above that the categorical assertion of Prof. Schreuer that “procedural obstacles are not jurisdictional requirements and may be disregarded” cannot be accepted in that unqualified formulation. It would all depend – even “procedural obstacles” can be so worded as to render them “jurisdictional”. As for instance in the ICSID Tribunal decision in the *Enron* case<sup>119</sup> (also mentioned by Professor Schreuer in a footnote to his letter dated October 19, 2007) where the six-month negotiation period (in that case) was treated as a

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<sup>119</sup> The tribunal in the *Enron* Case consisted of Prof. Francisco Orrego Vicuña (President) and Dr. Héctor Gros Espiell (Arbitrator) and Mr. Pierre-Yves Tschanz (Arbitrator). The President (Prof. Francisco Orrego Vicuña), was also the President of the ICSID Tribunal in *Maffezini v. Kingdom of Spain*.

jurisdictional requirement. The relevant passage from the ICSID decision in *Enron* reads as follows:

“The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction. In the present case, as noted, the requirement was complied with in view of the identical nature and scope of the dispute with the Argentine Provinces; the same holds true if a dispute is ruled to be ancillary or additional to an earlier claim.”<sup>120</sup> (Emphasis added).

144. Then there is the further statement in the evidence of Prof. Christoph Schreuer quoted below:

“as mentioned in my testimony, investment tribunals have treated mandatory waiting periods for negotiations as not impeding arbitration proceedings. (Footnote: for an *obiter dictum* to the contrary: *Enron v. Argentina*, Decision on Jurisdiction (14 January 2004, para. 88). In a number of cases tribunals have found that non-compliance with mandatory waiting periods did not affect their jurisdiction”.

145. It is incorrect to characterise the obligation imposed by Article 10(2) of the Argentina-Germany BIT as a “mandatory waiting period”. The obligation under Article 10(2) is two fold: being constituted both by a *ratione fori* element and a *ratione temporis* element. The circumstance that “waiting periods” are held in some decisions to be “procedural” rather than imposing a jurisdictional requirement has no bearing in the present case on the characterization of the eighteen-month requirement before the local Courts as a jurisdictional requirement. The wording used in the Argentina-Germany – BIT prescribed the two requirements differently, Article 10(1) mentions that “Disputes... shall **as far as possible** be settled amicably between the parties in dispute” (emphasis added), while the imperative word “shall” (standing alone) is used in Article 10(2), without further qualification. A waiting period for amicable settlement (or for “negotiation”) is definitely not the same as a requirement to invoke the jurisdiction of domestic Courts for a given period of time; – the former is dealt with in the Argentina-Germany BIT in paragraph (1) of

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<sup>120</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction of January 14, 2006, para. 88. (“*Enron v. Argentina*”).

Article 10. The latter forms the subject matter of paragraph (2) of Article 10.

146. An examination of the decisions of ICSID Tribunals referred to by Prof. Christoph Schreuer (and relied on in para 17 of the Claimant’s Post-Hearing Brief) do not bear out the proposition that non-compliance with mandatory provisions requiring pursuit of remedies in local Courts could be “dispensed”.
147. On the contrary, in *Maffezini v. Kingdom of Spain* (a decision strongly relied on by the Claimant in the Request for Arbitration for purposes of invoking the most-favoured-nation-clause) the tribunal (in that case) had itself declared that the requirement in a treaty for recourse to local courts with a compulsory waiting-time of 18 months was not a mere “procedural” step, but a jurisdictional requirement. In *Maffezini* – with reference to Article X(2) of the Argentina-Spain BIT (corresponding to Article 10(2) of Argentina-Germany BIT), the tribunal stated that merely because at the end of period of 18 months either party would be free to take the case to international arbitration, regardless of the outcome of domestic proceedings, did not mean that the clause (re. recourse to domestic courts) was merely “procedural” and could be dispensed with. The tribunal in *Maffezini* did not characterize such a clause as “nonsensical” or “futile”; on the contrary, it said that a clause requiring recourse to domestic courts with a waiting period of eighteen months thereafter had an avowed purpose. The relevant paragraphs in the *Maffezini* decision are quoted below:

“34. Turning to the second part of Respondent’s argument, it must now be asked whether a party to a dispute, which has not referred the case to a domestic court, as required by Article X(2), must be deemed to have waived or forfeited the right to submit the matter to international arbitration. Here it is to be noted that paragraph 2 provides that the dispute “shall be submitted” (*será sometida*) to the competent tribunals of the State Party where the investment was made, and that paragraph 3(a) then declares that the dispute “may be submitted” (*podrá ser sometida*) to an international arbitral tribunal at the request of a party to the dispute in the following circumstances: if the domestic court has not rendered a decision on the merits of the case within a period of eighteen months or if, notwithstanding the existence of such a decision, the dispute continues.

35. This language suggests that the Contracting Parties to the BIT— Argentina and Spain—wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken

to international arbitration. Claimant contends, however, that this could not have been the intended meaning of Article X(2), if only because at the end of that period either party would still be free to take the case to international arbitration, regardless of the outcome of the domestic court proceedings. (Emphasis added).

36. Had this been the Claimant’s sole argument on the issue, the Tribunal would have had to conclude that because the Claimant failed to submit the instant case to Spanish courts as required by Article X(2) of the BIT, the Centre lacked jurisdiction and the Tribunal lacked competence to hear the case. This is so because Claimant’s submission on this point overlooks two important considerations. First, while it is true that the parties would be free to seek international arbitration after the expiration of the eighteen-month period, regardless of the outcome of the domestic court proceeding, they are likely to do so only if they were dissatisfied with the domestic court decision. Moreover, they would certainly not do so if they were convinced that the international tribunal would reach the same decision. In that sense the courts of the Contracting Parties are given an opportunity to vindicate the international obligations guaranteed in the BIT. Given the language of the treaty, this is a role which the Contracting Parties can be presumed to have wished to retain for their courts, albeit within a prescribed time limit. Second, Claimant’s interpretation of Article X(2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties. (Emphasis added).

37. As noted above, had the Claimant’s contention regarding Article X(2) stood alone, the Tribunal would have had to reject it. However, in view of the fact that Claimant argues in the alternative that he has the right to rely on the most favored nation clause contained in the BIT, dismissal of the application to the Tribunal without due consideration of this other argument would be premature. The Tribunal will accordingly now address the Claimant’s alternative argument.”<sup>121</sup> (Emphasis added).

148. As for the other “cases” referred to in paragraph 17 of the Claimant’s Post-Hearing Brief, in none of them has the relevant clause used the imperative word “shall”. It has been contended that clauses requiring prior recourse to domestic courts could be “overridden” or “dispensed”, but the decisions cited in Prof. Christoph Schreuer’s letter dated October 19, 2007 do not deal with provisions analogous to Article 10(2) of Argentina-Germany BIT.
149. For instance, in *Ethyl Corporation v. Canada* (NAFTA/UNCITRAL case), Decision on Jurisdiction of June 24, 1998 24.6.1998, Canada asserted that the claimant had failed to comply with the six months waiting period from the date of the alleged events (giving rise to a claim) before submitting a claim to the arbitrator as required by Article 1120 of NAFTA

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<sup>121</sup> *Maffezini v. Spain*, para. 34-37.

("...[P]rovided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration[...]"). In *Ethyl v. Canada*, the tribunal arrived at a factual finding that though the six-month provision in Article 1120 was designed to encourage consultation or negotiation, in the facts of the case before it any attempted consultation or negotiation would have been "futile". That is why at the end of paragraph 85 of its decision the tribunal said:

“In the specific circumstances of this case the Tribunal decides that neither Article 1119 nor Article 1120 should be interpreted to deprive this Tribunal of jurisdiction.” (Emphasis added).

150. In the *Wena Hotels* case<sup>122</sup> (mentioned in Professor Schreuer letter dated October 19, 2007 and in para. 17 of the Claimant’s Post Hearing Brief) – the decision does not establish any precedent at all since the Respondent in *Wena Hotels* at the hearing withdrew its objection to jurisdiction and the tribunal accepted the Respondent’s offer to forego the objection – At page 89 the tribunal stated:

“Egypt initially objected that Wena failed to satisfy two procedural prerequisites contained in this provision. First, Egypt asserted that Wena “has failed to comply with the three month waiting requirement”. Second, it claimed that Wena’s consent should have been “given prior to the commencement of proceedings, and not at the same time”.

However, as noted above, during oral argument at the Tribunal’s second session, Respondent withdrew this objection. As Respondent appropriately noted, even if these procedural objections were granted, they could have been easily rectified and would have had little practical effect other than to delay the proceedings. Accordingly, the Tribunal accepts Respondent’s offer to forego these objections.”

This is not a “decision” by the tribunal. It is an acceptance by the tribunal of the Respondent’s offer to forego its objection to jurisdiction.

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<sup>122</sup> *Wena Hotels v. Egypt*, Decision on Jurisdiction of June 29, 1999.

151. In the matter of the UNCITRAL Arbitration case *Ronald S. Lauder v. Czech Republic*<sup>123</sup>, Article VI of the Treaty read:

183. Article VI(3)(a) of the Treaty reads as follows:

“At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration (...)”

And the relevant paragraph of the decision of the tribunal reads:

“187. However, the Arbitral Tribunal considers that this requirement of a six-month waiting period of Article VI(3)(a) of the Treaty is not a jurisdictional provision, *i.e.* a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant (*Ethyl Corp. v. Canada*, UNCITRAL June 24, 1998, 38 I.L.M. 708 (1999), paragraphs 74-88). As stated above, the purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration.”<sup>124</sup> (Emphasis added).

This last sentence quoted above shows that the *Ronald Lauder* case was dealing with a negotiation-clause corresponding to Article 10(1) of the Argentina-Germany BIT and not to any provision corresponding to Article 10(2).

152. In *Bayindir Insaat vs. Islamic Republic of Pakistan* - the tribunal’s decision was based on a concession as noted in paras. 99 and 100 quoted below:

“99. Pakistan itself admits that the notice requirement cannot constitute a prerequisite for jurisdiction when the necessary “steps [...] are impossible to take in the circumstances of the case” (Tr. J., 72:20-24). In the specific setting of investment arbitration, international tribunals tend to rely on the non-absolute character of notice requirements to conclude that waiting period requirements do not constitute jurisdictional provisions but merely procedural rules that must be satisfied by the Claimant: Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.” (Emphasis added).

“100. The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan’s position, the non-fulfillment of this requirement is not “fatal to the case of the claimant” (Tr. J., 222:34). As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole

<sup>123</sup> *Ronald Lauder v. Czech Republic*, para. 183.

<sup>124</sup> *Ibid.*, para. 187.

proceeding, which would be to no-one's advantage (Tr. J., 184:18 et seq.).”<sup>125</sup>

This again is not an authority for the proposition relied on in paragraph 17 of the Claimant's Post Hearing-Brief – since in the above case, Pakistan had itself admitted that the notice requirement could not constitute a prerequisite for jurisdiction, “when the necessary steps are impossible to take in the circumstances of the case”. The tribunal agreed with this entire proposition – not with only a part of it *viz.* that a notice requirement *simpliciter* was not a pre-requisite for jurisdiction.

153. In *SGS v. Pakistan* - the relevant Article of the BIT was quoted in the decision of the Tribunal –

“80. Article 9 of the BIT states:

- (1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 10 of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.
- (2) If these consultations do not result in a solution within twelve months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States...”<sup>126</sup>

The conclusion of the Tribunal in *SGS v. Pakistan* then reads as follows (relevant part):

“184. Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. (*E.g., Ethyl Corporation v. The Government of Canada*, Decision on Jurisdiction, June 24, 1998, 38 I.L.M. 708, 724). Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.”<sup>127</sup>

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<sup>125</sup> *Bayindir v. Pakistan*. Decision on Jurisdiction of November 14, 2005.

<sup>126</sup> *SGS v. Pakistan*, para. 80.

<sup>127</sup> *Ibid.*, para. 184.

Provision made in a BIT for “consultation” (or a “waiting period”) is different and distinct from a requirement that a claimant invoke the jurisdiction of domestic courts for a given period of time before proceeding to arbitration. Accordingly, the line of cases exemplified by *SGS v. Pakistan* has no bearing on the Tribunal’s decision in the present case.

**h) Whether resort to the Preamble of the Argentina-Germany BIT (“promotion and protection of investors”) would permit a dispensation of Article 10 (2)**

154. Resort to the Preamble of the BIT in support of unrestricted direct access to ICSID Arbitration is also misplaced. The assertion (in paragraph 23 of Claimant’s Counter Memorial on Jurisdiction) that the purpose of the Germany-Argentina BIT is to protect and promote investments and to stimulate private initiative and that therefore direct access to ICSID is in accordance with the purpose of the BIT is not a correct reading of the Preamble. The Preamble in this BIT states: (1) the desire of the States to intensify economic cooperation between the two them; (2) the aim at creating favourable conditions of investment by nationals and companies of one State in the territory of the other State; and (3) the recognition of the promotion and protection of such investments “on the basis of an agreement” would be conducive to stimulating private business initiative and enhance the well being of both nations. The “agreement” is the BIT itself.
155. Undoubtedly, the promotion and protection of investment is an object or purpose of the BIT but that promotion and protection in the Argentina-Germany BIT is to be “on the basis of an agreement” (*i.e.* on the basis of the terms of the Treaty – the BIT): which could not possibly exclude the provisions of Article 10(2). If the object and purpose had been to have an immediate unrestricted direct access to ICSID arbitration, then inclusion of Article 10(2) would have been otiose and superfluous. Therefore, the assumption and assertion made in this proceeding (and in some decisions of ICSID Tribunals as well), that since the object and purpose of a BIT is to protect and promote investments, unrestricted direct access to ICSID must be presumed, is contrary to the text (and context) of this BIT, *i.e.*, the Argentina-Germany BIT.

**4. Conclusion on the first aspect of Argentina's first Preliminary Objection to Jurisdiction**

156. To conclude – for the reasons mentioned above, the Tribunal's decision on this first part of Argentina's first Preliminary Objection to Jurisdiction is that Wintershall (the Claimant) could not avoid prior compliance with Article 10(2) of the Argentina-Germany BIT before initiating arbitration proceedings. Not having so complied with Article 10(2), the Tribunal has no competence to entertain the claim and to proceed with it on merits.
157. This decision is of course without consideration of the second aspect of Argentina's first Preliminary Objection, which deals with the Claimant's reliance on the MFN clause in Article 3 of the Argentina-Germany BIT as extending to Article 10. This second aspect will now be considered.

## Part–VIII

### VIII. ARGUMENTS AND CONTENTIONS OF THE PARTIES ON THE SECOND-PART OF ARGENTINA’S FIRST PRELIMINARY OBJECTION TO JURISDICTION: THE QUESTION OF THE EXTENSION OF THE MFN CLAUSE IN ARTICLE 3 OF THE ARGENTINA-GERMANY BIT TO ARTICLE 10 OF THE SAID BIT.

#### 1. Submissions and Arguments of the Respondent

##### a) In its Memorial on Objections to Jurisdiction

158. The submissions and arguments of the Respondent in its Memorial on Jurisdiction are summarised below:

- (1) Argentina and Germany excluded dispute settlement matters from the scope of the MFN Clause (BIT, Article 3). (Respondent’s Memorial on Jurisdiction, paras. 9-13, pp. 3-5);
- (2) The MFN clause under the Argentina-Germany BIT cannot be applied to dispute settlement provisions. (Paras. 14-21, pp. 5-6);
- (3) A different interpretation would violate the *ejusdem generis* and *effet utile* interpretation principles. (Para. 22, p. 6). The interpretation that Wintershall puts to the MFN Clause violates the *ejusdem generis* principle. (Paras. 23-28, pp. 6-8). According to the *ejusdem generis* principle, dispute settlement provisions can never be included within the scope and meaning of the MFN clause;
- (4) The interpretation that Wintershall puts to the MFN Clause also violates the *effet utile* interpretation principle. (Paras. 29-37, pp. 8-10);
- (5) The case law confirms Wintershall’s “impossibility” of relying on the MFN clause for the settlement of the dispute. (Paras. 38-45, pp. 10-11);
- (6) The *Salini v. Jordan* case shows that Wintershall’s claim is inadmissible. (Paras. 46-56, pp. 12-14);
- (7) The *Plama v. Bulgaria* case confirms the inadmissibility of the claim (and highlights the errors in the *Siemens* case). (Paras. 57-72, pp. 14-17); and
- (8) As the *Plama* tribunal has pointed out, the MFN clause of a treaty does not apply to dispute settlement provisions, unless the MFN clause of the treaty leaves no doubt whatsoever that the parties wished otherwise. In the MFN clause of the Argentina-Germany BIT there is no indication that the Parties intended to give it such scope of application. (Para. 73, p. 17).

**b) Respondent's Post-Hearing Brief dated October 30, 2007**

159.1 The Respondent submitted in its Post-Hearing Brief as follows:

- (1) The MFN clause provided in Article 3 of the Argentina-Germany BIT does not extend to dispute settlement provisions. The MFN clause, as established in the BIT, should not be applied pursuant to investors' wishes. Otherwise, the BIT, the clause contained therein and the intention of the Contracting Parties would be distorted (Respondent's Post-Hearing Brief, para. 9, p. 3).
- (2) An MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them. In the instant case, the Contracting Parties to the Treaty did not intend to extend the scope of the MFN clause to dispute settlement issues. This is clear from the wording of the MFN Clause in the BIT, which is different, for example, from the wording of a similar clause in the Argentina-Spain BIT (Respondent's Post-Hearing Brief, para. 10, pp. 3-4).
- (3) There is no justification for interpreting the MFN clause so as to import procedural rights. One thing is to accord the investor most-favoured-nation treatment, and another thing is to use the MFN clause to avoid a limitation contained in the BIT when the Parties to it have not drawn up the said clause in such a way as to reflect that intention (as it has been done in other treaties). Neither the Claimant's nor Prof. Schreuer's observations show that the Parties to the Treaty had a different intention (Respondent's Post-Hearing Brief, para. 11, p. 4).
- (4) Furthermore, it is established in international law that treaties must be interpreted in the light of the principle of effectiveness of all their provisions. This principle finds expression in Article 31 of the Vienna Convention of the Law of Treaties, in so far as that article is intended to ensure that all provisions of a treaty be given meaning and effect, and that none be left without effect. If the Claimant's and Prof. Schreuer's interpretation were to be accepted, Article 10 of the Argentina-Germany BIT would have no *effet utile*. Argentina and Germany would have had no reason to include Article 10(1) and (2) in the BIT if any German or Argentine investor could disregard it from the moment the Treaty entered into force.

At the hearing Argentina provided examples of bilateral investment treaties that do not include the eighteen-month provision which were in force for Argentina when the BIT with Germany was approved by the Argentina Congress and later when it was ratified by Argentina; bilateral investment treaties that do not include the eighteen-month clause which were in force for Germany when it ratified the BIT with Argentina; and bilateral investment treaties that do not include the eighteen-

month requirement which were concluded by the States that are Parties to bilateral investment treaties with Argentina that include such requirement. All this shows that Argentina and Germany did not intend to extend the applicability of the MFN clause to dispute settlement issues, because otherwise the eighteen-month domestic litigation requirement would have been deprived of any effect from the very entry into force of the Treaty.

## 2. Claimant's Arguments and Contentions in response

### a) In its Counter-Memorial on Jurisdiction

159.2 The Claimant submitted in its Counter-Memorial on Jurisdiction as follows:

- (1) In the first place, both parties have already consented to ICSID arbitration. Claimant merely seeks the application of the MFN clause to overcome a "timing rule" of 18 months in Argentine courts that is contemplated in the Germany-Argentina BIT. This position stems clearly from Claimant's Memorial.
- (2) Since both Argentina and Claimant have consented to ICSID arbitration, the application of the aforementioned MFN provision contained in the Argentina-Germany BIT does not involve issues of jurisdiction, consent to arbitration or the substance of the dispute settlement mechanism (in the Argentina-Germany BIT), nor overrides a provision of public policy, because it is not importing into the BIT a dispute settlement mechanism that is alien to such treaty. Further, the application of the MFN provision contained in the BIT in relation to the dispute resolution mechanisms does not relate to "requirements relating to the substantive admissibility of claims by the foreign investor".<sup>128</sup>
- (3) To overcome a timing rule, Claimant affirms that the MFN clause in the BIT applies to dispute settlement provisions because such mechanism is an essential element to the regime of protection of foreign investment. Access "to such arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period."<sup>129</sup>
- (4) As regards the extent and scope of the MFN clause in Articles 3(1) and (2) of the BIT, there is not a single element in the BIT that indicates the intention of the Parties to exclude the application of such clause to dispute settlement. To the contrary, the existence of certain limited express restrictions in Articles 3(3) and (4) of the BIT regarding economic or customs unions, a common market or a free trade area and tax

<sup>128</sup> *Técnicas Medioambientales Tecmed S. A. v. United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of May 29, 2003, para. 74, cited in Claimant's Counter-Memorial on Jurisdiction, para. 9. ("*Tecmed v. Mexico*").

<sup>129</sup> *Gas Natural v. Argentina*, paras. 29-31, cited in Claimant's Counter-Memorial on Jurisdiction, para. 10.

matters, and the exclusions made in the Protocol's Addendum to Article 3 of measures taken for reasons of public security and order, public health or morality, clearly signify that the limitations do not apply to dispute settlement.<sup>130</sup>

- (5) Practice shows that Argentina is a respondent party in thirty-five claims before ICSID. Twenty five investment treaty disputes against Argentina were submitted under BITs providing direct access to ICSID. In six out of ten arbitration claims with BITs containing dispute settlement clauses similar to those of the Germany-Argentina BIT, decisions on jurisdiction have already been issued. All of those decisions on jurisdiction have been favorable to the application of the MFN clauses to dispute settlement. The same criterion has been applied by an UNCITRAL Tribunal in the *National Grid* case. Thus, claimants in those cases gained direct access to ICSID jurisdiction through the application of a third-party treaty.<sup>131</sup>
- (6) On the basis of the foregoing, the MFN clause in the Germany-Argentina BIT applies to "investments" and to "*investors*" in respect of the "*activities related to investments*". And the direct access to ICSID, a consented forum for the settlement of disputes between both Contracting States to the BIT, is encompassed within the MFN treatment to investments and activities related to investments provided for in Articles 3(1) and (2) of the Germany-Argentina BIT, because the settlement of disputes relates directly to the "treatment of investments" and "activities related to investments."<sup>132</sup>
- (7) The BIT allows direct access to ICSID through the MFN clause because ICSID is a consented forum under the BIT. The *Plama* decision does not apply to the present case. Even if the *Plama* line of reasoning were to be followed, both the exceptional circumstances envisaged by *Plama* and its justification of *Maffezini* are clearly present in this case. Consequently, *Plama*'s findings do not contradict Claimant's invocation of Article VII of the US-Argentina BIT through the application of the MFN clause.<sup>133</sup>

#### **b) Claimant's Post-Hearing Brief dated October 30, 2007**

159.3 In its Post-Hearing Brief, the Claimant indicated that:

- (1) The MFN Clause of the Germany-Argentine BIT clearly applies to dispute settlement. The fact that dispute settlement is part of the treatment constituting the subject matter of MFN clauses was established as early as 1956, when the Ambatielos Commission using a different terminology [...] – considered that

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<sup>130</sup> *National Grid Plc. v. Argentine Republic* (UNCITRAL Case), Decision on Jurisdiction of June 20, 2006, para. 82, cited in Claimant's Counter-Memorial on Jurisdiction, para. 11. ("*National Grid v. Argentina*").

<sup>131</sup> Claimant's Counter-Memorial on Jurisdiction, para. 17.

<sup>132</sup> *Ibid.*, para. 33.

<sup>133</sup> *Ibid.*, para. 57.

“administration of justice” was related to “*the protection of the rights of the traders*” and thus extended MFN treatment to the administration of justice. (Claimant’s Post Hearing Brief, para. 1).

- (2) The MFN clause imposes an obligation to afford more favourable treatment to the beneficiary of the BIT and it is part of the BIT. (*Ibid.*, para. 2).
- (3) The Contracting Parties were also very careful in stating which specific matters should be excluded from the scope of the MFN clause. Certain limited and express restrictions were included in Art[icles] 3(3) and 3(4) of the BIT, relating to privileges accorded by virtue of membership in a customs or economic union, a common market or a free trade area or double taxation agreements. However, these exclusions do not refer to dispute settlement. This makes it obvious that dispute settlement is not excluded. (*Ibid.*, para. 7).
- (4) Further, as explained by the *Siemens* Tribunal that dealt with the Argentina-Germany BIT, the fact that an additional MFN clause was inserted in Article 4(4) of the BIT dealing with expropriation and full protection and security was aimed at emphasizing the protection in relation to these two standards that are of utmost importance to investors, but does not deprive the MFN clause of Art[icles] 3(1) and (2) of meaning, nor requires that an MFN Clause be inserted in every provision of the treaty. (*Ibid.*, para. 8).
- (5) The invocation of MFN treatment to dispute settlement does not relate to consent: its effect is merely to dispense with procedural requirements. Consent to ICSID jurisdiction is provided by the Contracting State when signing the BIT. This consent covers all the provisions of the BIT, including the MFN clause. ICSID is a forum consented by Argentina and Germany under Art[icle] 10 of the BIT. Thus, differently from the situation before the Tribunals in *Plama* and in *Telenor*, in this case, by virtue of the invocation of the MFN clause, Claimant is not seeking to import into the Germany-Argentina BIT a dispute settlement mechanism that is alien, nor to substitute a specifically agreed mechanism with one that is entirely different. Claimant is only seeking to avail itself of a more favourable treatment provided to other foreign investors. (*Ibid.*, para. 10).
- (6) Further, the possibility of “dispensing” or “overriding” a procedural step is not novel in the context of investment treaties, even outside the context of MFN clauses. (*Ibid.*, para. 13).

### **3. Discussion and Findings of the Tribunal on the second part of Argentina’s First Preliminary Objection to Jurisdiction**

- a) **The Claimant contends that since both Argentina and Wintershall have already consented to ICSID Arbitration, the application of MFN provisions in Article 3 of**

**the Argentina-Germany BIT does not involve issues of jurisdiction or consent to arbitration or the substance of the dispute-settlement mechanism**

160. The Tribunal cannot accept this contention for the reasons stated below:

- (1) The Claimant applies the MFN provision in Article 3 of the Argentina-Germany BIT only in order to reach the dispute-settlement provision in the Argentina-US BIT, and thereby contends that it is Article VII of the latter treaty that governs dispute-settlement between Argentina and a German investor in Argentina – “in lieu of” the dispute settlement provision contained in Article 10 of the Argentina-Germany BIT. Such invocation by the Claimant of the MFN provision in Article 3 of the Argentina-Germany BIT thus clearly involves “issues of jurisdiction or consent to arbitration....”
- (2) The ICSID Convention, under which this arbitration case has been registered, combines a public law system of State liability with private arbitration. In an article published some years ago<sup>134</sup>, Mr. Jan Paulsson had described investment treaty arbitration as “arbitration-without-privy”. The phrase has stuck. Arbitration-without-privy has become the other name for ICSID Arbitration. The Convention, through Article 25, defines the jurisdiction of the Centre as extending to any legal dispute arising directly out of an investment between a Contracting State (the Host State) and a national of another Contracting State – “which the parties to the dispute consent in writing to submit to the Centre.” Consent in writing of the parties (to submit to ICSID arbitration) is “the corner stone of jurisdiction of the Centre”: The general “consent” of the Host State to ICSID arbitration is expressed (and is provided) when the Host State enters into a bilateral investment treaty with another Contracting State – this is often described (in contractually familiar language) as a “standing offer” by the Host State made to the group of potential investors of the other Contracting State: the standing offer gets accepted on a case-to-case basis

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<sup>134</sup> J. Paulsson, *Arbitration without Privy*, 1995, Vol. 10, *ICSID Rev.* 232, 256.

when a particular investor requests the Centre for adjudication of his/its dispute with the Host State through ICSID arbitration.

Investment arbitration through the general “consent” expressed by the Host State therefore lacks “privity” – but only at the beginning: privity gets (notionally) established *qua* a particular investor of the other Contracting State, when that particular investor having raised a dispute with the Host-State – a-dispute connected with his/its investment – makes a request to the Centre to register his/its dispute as an ICSID Arbitration Case. And the eighteen-month requirement of a proceeding before local courts (stipulated in Article 10(2)) is an essential preliminary step to the institution of ICSID Arbitration, under the Argentina-Germany BIT; it constitutes an integral part of the “standing offer” (“consent”) of the Host State, which must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration for resolving its dispute with the Host State under the concerned BIT. Therefore, invocation by the Claimant of Article VII of the Argentina-US BIT, by relying on the MFN provision in Article 3 of the Argentina-Germany BIT, not only raise issues about consent to ICSID arbitration, but raises such issues of “consent” different from (and at variance with) the “consent” already given by the Host State (as stated above).

That the eighteen-month requirement of a proceeding in a local court constitutes a necessary preliminary step to an ICSID arbitration under the Argentina-Germany BIT is apparent from the text of Article 10 itself. Article 10 of the Argentina-Germany BIT prescribes five closely inter-related steps to be taken by a German investor before ICSID arbitration can be initiated *viz.* (1) first step: exploring the possibility of the dispute being amicably settled by parties (of Article 10(1)); (2) second step: if disputes in terms of paragraph 1 cannot be so settled within a period of six months, counted from the submission of that dispute to the court of competent jurisdiction of the Contracting Party in whose territory the investment was made (Article 10(2)); (3) third step: the dispute may be submitted to an international arbitral tribunal when both parties to the dispute have so agreed, or in the following

event: *viz.* at the request of any of the parties in dispute, if no decision on the merits of the case had been reached following eighteen-months from the date when the judicial proceeding provided for in paragraph (2) of Article 10 was initiated; even if no decision had been reached and the dispute between the parties still continues, even then the dispute could be submitted to international arbitration (paragraph 3 of Article 10); (4) fourth step: in the cases provided for in Article 10(3) disputes between the parties could be submitted by mutual agreement (if the parties had not otherwise agreed) either to an ICSID arbitration or to an *ad hoc* Tribunal established under UNCITRAL (Article 10(4)); and (5) fifth step: if no agreement is reached (about the above), following a three-month term from the date that any of the parties apply for initiation of arbitration proceedings, the dispute can be (then) – submitted to an arbitration proceeding under the ICSID Convention (Article 10(4)).

That an investor could choose at will to omit the second step is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina’s) the Host State’s “consent” (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in local courts. It is only if no decision is reached during a period of 18-months by the courts in the Host State or even if a decision is so reached but the dispute between the parties still continues – that further steps can be taken towards initiating ICSID arbitration under the Argentina-Germany BIT.

- (3) Besides, it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. The principle is often described as a corollary to the sovereignty and independence of the State.<sup>135</sup> A

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<sup>135</sup> “It is well established in international law that no State can, without its consent, be compelled to submit its disputes ... either to mediation or to arbitration, or to any other kind of peaceful settlement” (*Status of Eastern Carelia case* (1923), PCIJ, Series B, No. 5, p. 27);

“The Court is not departing from the principle, which is well established in international law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration without its consent” (*Ambatielos, Merits: Obligation to Arbitrate case* (1953), *ICJ Reports*, 1953, p. 19);

presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts – See the *Lotus case* (1927), PCIJ, Series A, No. 10, at p. 18.<sup>136</sup>

In the ICSID system, “consent” of the Host State to international arbitration is given – not generally, but *inter alia* under a particular investment treaty. The Host-State’s “consent” is given when a bilateral investment treaty is concluded with another State. The Claimant’s contention that since Argentina has already consented to ICSID arbitration in Article 10 of the Argentina-Germany BIT, the invocation by the Claimant of the MFN provisions of Article 3 of the said BIT (an invocation made to enable the Claimant to get direct access to international arbitration) would not involve any issue of jurisdiction, or of consent to arbitration of the Host State, is plainly erroneous; because as from the very moment that the MFN clause is so invoked by the Claimant on a jurisdictional ground (i.e. to enable the Claimant to invoke Article VII of the Argentina-US BIT in lieu of Article 10 of the Argentina-Germany BIT) the question of the Host State’s “consent” (or lack of it) to an alternate jurisdiction clause (in a different BIT) arises.

**b) True construction of Article 10 of the Argentina-Germany BIT in the context of Article 3 and the MFN clause contained in the latter Article**

161. Article 10 of the Argentina-Germany BIT contains the entire agreement of the Contracting Parties as to arbitration. As stated in the joint dissenting opinion in *Ambatielos-I* (the majority of the Judges of the ICJ having expressed no opinion whatever on this point) the obligation to submit to arbitration cannot be enlarged by interpretation. Relying on an earlier judgment of the PCIJ in *Phosphate in Morocco (Italy v. France – 1938)* – it is also

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“[...] to adjudicate upon international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent” (*Monetary Gold case* (1954), *ICJ Reports* 1954, p. 32).

<sup>136</sup> This applies to material law restrictions as well as to restrictions as a result of the State’s participation in a given jurisdictional title (*see* Judgment in the *Aerial incident of July 27, 1955 case* in *ICJ Reports*, 1959, p. 142). The character of a norm of international law applicable or the nature of the substantive international obligations invoked, and the rule of consent to jurisdiction are two different things (*East Timor case*, *ICJ Reports*, 1995, para. 29, p. 102).

stated (in the same joint dissenting opinion) that “a jurisdictional clause must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it”<sup>137</sup>.

162. On a plain reading of the Argentina-Germany BIT it is clear that there is no general most-favoured-nation clause applicable to all articles of the treaty. The most-favoured-nation clause is contained in Article 3, but that article does not mention that the most-favoured-nation “treatment” as to investments, and investment related activities, is to be in respect of “all relations” or that it extends to “all aspects” or covers “all matters in the treaty”. The question whether Article 3, could apply to the dispute resolution clause in Article 10 (and specifically to the eighteen-month requirement stipulated in paragraph (2) thereof) has to be answered in the negative – not because “treatment” in Article 3 may not include “protection” of an investment by the investor adopting ICSID arbitration, but primarily because of the significance that has been attached by the Contracting States to the eighteen-month requirement in Article 10(2): it is part and parcel of Argentina’s integrated “offer” for ICSID arbitration; this “offer” must be accepted by the investor on the same terms. Besides, it is well-settled, in this branch of the law, that a most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates – the issue being determined in accordance with the intention of the Contracting Parties, deduced from a reasonable, interpretation of the Treaty. But what is the category of subject (the *genus*) to which the “treatment” mentioned in Article 3 relates? That is not mentioned in Article 3 – that can only be ascertained upon reading Article 3 along with Article 4.
163. Full protection and security of investments, including expropriation or nationalisation of investment including measures tantamount to nationalisation and expropriation are “matters” expressly dealt with (not in Article 3) but in Article 4 – and paragraph (4) of Article 4 provides that “[r]egarding the matters governed by this Article the nationals or companies of either Contracting Party shall be accorded in the territory of the other Contracting Party the

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<sup>137</sup> *Phosphates in Morocco (Italy v. France)*, PCIJ, Judgment of 1938, *ICJ Reports*, 1953, p. 33. The quote from the decision of the PCIJ in A/B No. 74 p. 23-24 reads:

“[...] there is no occasion to resort to a restrictive interpretation that, in case of doubt, might be advisable in regard [24] to a clause which must on no account be interpreted in such a way as to exceed the intention of the State that subscribed to it.”

treatment accorded to the most-favoured-country”: Full protection and security of investments and investment related activities as well their expropriation and nationalisation being expressly dealt with in Article 4, the “treatment” of investment and investment related activities in Article 3 could possibly mean (in the context) any “treatment” other than full protection and security of investments and investment related activities or measures regarding their expropriation or nationalisation or measures tantamount to expropriation or nationalisation – for which provision is expressly made in Article 4.

164. The complaint of the Claimant and its wholly owned subsidiary (WIAR) in the letter dated April 2, 2003 to the President of the Republic of Argentina was principally in respect of not providing full protection and security to their investments and investment related activities and in respect of measures taken by the Government of Argentina which, according to the Claimant, were tantamount to expropriation/nationalisation: (breach of Article 4 is expressly invoked in this letter). In the Request for Arbitration (made by the Claimant Wintershall) the allegations are similar if not identical. In the context of the dispute raised in the Request for Arbitration specific items of “treatment” accorded to investments and investment related activities covered by Article 3 would stand excluded by the express provisions of Article 4; since Article 4(4) provides that in respect of “matters governed by this Article the nationals or companies of either Contracting Party shall be accorded in the territory of the other Contracting Party the treatment accorded to the most favored country.” Hence, “treatment” covered by Article 4 (full protection and security to investments and investments not being subjected to expropriation or nationalisation or measures tantamount to expropriation or nationalisation) – being the whole range of claims made in the Request for Arbitration stand excluded from the “treatment” mentioned in Article 3; and since the MFN Clause for all forms of “treatment” described in Article 4 is expressly restricted to the provisions of that Article, they would not and could not be said to extend to Article 10. (Emphasis added).
165. Nothing is better settled as a common canon of interpretation in all systems of law than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of

meaning<sup>138</sup>. This is simply an application of the wider legal principle of effectiveness which requires favouring an interpretation that gives to every treaty provision an “*effet utile*.” Article 4 applies (as it states) only to “matters governed by this Article” – not to matters governed by Article 10 (dispute-resolution). Hence, matters that impinge on full protection and security of investments and measures taken by Argentina tantamount to expropriation, or nationalisation of investments of the Claimant (the word “investment” is widely defined in Article 1 of the Treaty) – and the MFN clause contained in Article 4(4) – are plainly not intended to be extended to or be incorporated in the dispute resolution clause (Article 10). Hence, only “treatment” of investments/investment related activities which is not of the nature of expropriation or nationalisation or of measures tantamount to expropriation or nationalisation or denial of full protection and security, such as currency transfers (for instance) would remain to be comprehended by the term “treatment” in Article 3.

166. The general question as to whether the word “treatment” in an MFN clause includes the protection of the arbitration clause has been expressly left open in the award of October 2007 in Arbitration Case V 079/2005 of the Arbitration Institute of the Stockholm Chamber of Commerce (*Rosinvest Co. UK Ltd v. The Russian Federation*)<sup>139</sup>. The tribunal in that case gave its decision “without entering into the much more general question whether MFN clauses can be used to transfer arbitration clauses from one treaty to another” (paragraph 129). In *Rosinvest* however the Tribunal held that the MFN protection extended (in that case) to the treatment of investors “as regards their management, maintenance, use, enjoyment or disposal of their investment...” under Article 3(2) of the UK-Soviet BIT, and the investor’s “protection” was held (by the tribunal in that case) to include the submission to arbitration in case of interference by the State with his “use” and “enjoyment” of the investment (paragraph 130). But, on the general question which was expressly left open in *Rosinvest*, there is no guidance provided – neither in that decision nor in the ILC Draft Articles on MFN (together with the commentaries thereon).

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<sup>138</sup> See Award of UK/USA Tribunal of 1926 in the *Cayunga Indians Case*, cited in *AAPL v. Sri Lanka*, p. 542. President: Dr. Ahmed Sadek El-Koshery, Professor Berthold Goldman; and Dr. Samuel K.B. Asante.

<sup>139</sup> The attention of the Tribunal was specifically drawn to this decision by the Claimant’s letter dated February 14, 2008.

167. However, in a very recent publication, it has been stated by the authors of the text that all international arbitration must be based upon an agreement of the parties, which must be clear and unambiguous, even where reached by incorporation or by reference; States could provide expressly that they intended the MFN Clause to apply to dispute settlement, but the mere fact that the MFN Clause was expressed to apply “with respect to all matters” dealt with by the basic treaty was not sufficient to dispel the doubt as to whether the parties had really intended it to apply to the dispute settlement clause. Ordinarily, an MFN Clause would not operate so as to replace one means of dispute settlement with another.<sup>140</sup> This is (presumably) why the drafters of the UK Model BIT had provided (in Article 3(3)) that “for avoidance of doubt MFN treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.” Because, ordinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – *unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted: which is not so in the present case.*

**c) Claimant’s arguments based upon (a) exceptions in Article 3 of the Argentina-Germany BIT; and (b) The definition of “investment related activity” in the Protocol**

168. In the absence of language or context to suggest the contrary, the ordinary meaning of ‘investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State’ is that the investor’s *substantive* rights in respect to the investments are to be treated no less favourable than under a BIT between the host State and a third State. It is one thing to stipulate that the investor is to have the benefit of MFN treatment but quite another to use a MFN clause in a BIT to bypass a limitation in the settlement resolution clause of the very same BIT when the Parties have not chosen

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<sup>140</sup> See “*International Investment Arbitration: Substantive Principles*” (Oxford International Arbitration Series), Oxford University Press, (published in 2007), p. 256. General Editors: Campbell McLachlan QC, Laurence Shore and Matthew Weiniger.

language in the MFN clause showing an intention to do this<sup>141</sup>. In the opinion of the Tribunal the above principle applies *mutatis mutandis*, to “investments” as well as to “activities related to investments”.

169. But, there is a further contention of the Claimant in respect of the MFN clause in Article 3(2) of the Argentina-Germany BIT which needs to be addressed. It concerns also, eventually, the definition of “investment” in Article 1(1)(a) of the BIT. The contention concerns the insertion in point (2)(a) of the Protocol of a proviso reading: “‘Activities’ within the meaning of Article 3(2) include, in particular, but not exclusively” before the terms “the management, operation, use or enjoyment of an investment”.
170. According to the Claimant that insertion leaves open the question of the scope of the activities concerned. But on the *ejusdem generis* principle<sup>142</sup> the better view is that the inserted words “in particular, but not exclusively” do not include items of a different *genus* than those found in Article 3(2) and listed expressly in point (2)(a) of the Protocol as, for example, activities relating to proceedings on settlement of investment disputes that are “activities” not only of the foreign investor – but of the territorial State as well.
171. The ordinary meaning of expressions such as “investment related activities” or “associated activities” used in BITs refer generally to activities of the investor *for the conduct of his/its*

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<sup>141</sup> *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award of September 13, 2006, para. 92. (“*Telenor v. Hungary*”).

<sup>142</sup> The *ejusdem generis* principle has been most effectively put in paragraphs 10 and 11 of the ILC’s Commentary to Draft Articles 9 and 10 on the Most-Favoured-Nation Clause:

“(10) No writer would deny the validity of the *ejusdem generis* rule which, for the purposes of the most-favoured-nation clause, derives from its very nature. It is generally admitted that a clause conferring most-favoured-nation rights in respect of a certain matter, or class of matter, can attract the rights conferred by other treaties (or unilateral acts) only in regard to the same matter or class of matter.

“(11) The effect of the most-favoured-nation process is, by means of the provision of one treaty, to attract those of another. Unless this process is strictly confined to cases where is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated. Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.” (*Yearbook of the International Law Commission*, 1978, Vol. II, Part Two).

*business in the territory of the host State*<sup>143</sup> rather than to activities related to or associated with the settlement of disputes between the investors and the Host State.

**d) The requirement of recourse to local courts in Article 10(2) of the Argentina-Germany BIT is jurisdictional, not merely procedural: it can be dispensed with only by some “legitimate extension” of rights and benefits by means of the operation of the MFN clause**

172. The requirement of recourse to local courts for an eighteen-month period in Article 10(2) is fundamentally a jurisdictional clause, not a mere procedural provision<sup>144</sup>. The requirement of such recourse can only be dispensed with by some “legitimate” extension of rights and benefits by means of the operation of the (MFN) Clause – that is to say when the text of the MFN clause in Article 3 itself permits the interpreter of the treaty to conclude that this was the clear and unambiguous intention of the Contracting Parties. The members of the tribunal in *Maffezini* (a decision relied on by the Claimant) had so concluded based on the particular wording of the MFN clause in the case before them (“in all matters covered by this Agreement”) – such words are absent in Article 3 of the Argentina-German BIT. The MFN Clause in Article 3 of the Argentina-Germany BIT plainly does not refer to “treatment” with respect to “all matters covered by this treaty” (as in *Maffezini*<sup>145</sup>). The decision in *Maffezini* is in line with the observations of the International Commission of Arbitration in the *Ambatielos* Case (*Ambatielos II*, Award –of March 6, 1956) where the Commission opined that the subject matter of “administration of justice” though not seemingly part of the same genus as “commerce and navigation” would be covered or included (only) by the reason of the words preceding the words “commerce and navigation”: viz. “all matters relating to [...].”

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<sup>143</sup> The definitions of these expressions contained in certain BITs confirm such a general or ordinary meaning. See for example, the definition of “associated activities” (“*actividades afines*” in the Spanish text) in Article 1(1)(e) of the Argentina-US BIT of 14 November 1991, invoked by the Claimant, where there is no question of activities associated to the settlement of disputes with the Host State or related thereto.

<sup>144</sup> So stated in *Maffezini v. Spain*, para. 38.

<sup>145</sup> As also in *Gas Natural v. Argentina* (June 17, 2005); *Suez-Interagua v. Argentina* (May 16, 2006); *Suez-AWG v. Argentina* (August 3, 2006).

- e) **The invocation by the Claimant of Article VII of the Argentina-USA BIT – as a result of the plea that the MFN Clause contained in Article 3 extends to Article 10 of the Argentina-Germany BIT – cannot be countenanced nor permitted because Article VII of the Argentina-USA BIT contemplates a different system of arbitration from that envisaged in Article 10 of the Argentina-Germany BIT**

173. There is a narrower ground – on which the decision of non-applicability of MFN clause (in Article 3 of the Argentina-Germany BIT) to Article 10 can be based, even adopting the presumption made in *Maffezini*<sup>146</sup>. The Claimant’s case in this arbitration would (in any case) fall within the exception (“third. ....”) mentioned in paragraph 63 of the Decision of the Tribunal in *Maffezini*. According to this paragraph the MFN clause even if extended by interpretation to the dispute-resolution clause, would not be permitted to be invoked in order to refer the dispute to a different system of arbitration - because a dispute resolution clause is a specific provision “reflect[ing] the precise will of the contracting parties”.
174. The dispute resolution clause in Article 10 of the Argentina-Germany BIT (which obviously represents the expressed will of the Contracting Parties<sup>147</sup>) provides for ICSID as the ultimate and only arbitration forum, whereas Article VII of the Argentina-US BIT invoked by the Claimant (in lieu of Article 10 of the Argentina-Germany BIT) prescribes “a different system of arbitration” – it gives a Claimant (for example, a US investor in Argentina) a choice of fora viz. either ICSID or UNCITRAL. The contrast between Article 10(4) of the Argentina-Germany BIT and Article VII of the Argentina-US BIT is apparent; the relevant portion of the latter is reproduced (and highlighted) below -

“2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

- (a) to the courts or administrative tribunals of the Party that is a party

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<sup>146</sup> Request for Arbitration, footnote 23, citing *Maffezini v. Spain*, para. 56: “[...] if a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the ejusdem generis principle. (Emphasis added).

<sup>147</sup> It makes little or no difference that a large number of treaties entered into by Argentina with third parties contained no clause like Article 10(2) of the Argentina-Germany BIT: that could only mean that Argentina did not have any “policy” along with regard to matters mentioned in Article 10(2). But in the interpretation of treaties one important principle is contemporaneity: *i.e.*, it must be construed as at the time it was entered into.

to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) **in accordance with the terms of paragraph 3.**

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) **to the International Centre for the Settlement of Investment Disputes (“Centre”) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 (“ICSID Convention”), provided that the Party is a party to such convention; or**

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) **in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or**

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration accordance with the choice so specified in the consent.”

175. The contrast between the dispute-resolution clause in the Argentine-Germany BIT (Article 10) and the dispute-resolution provision in Argentine-US BIT (Article VII) is striking. Under the Argentina-Germany BIT, if there is no submission of the dispute to courts in Argentina, then there can be no ICSID arbitration; on the other hand, under the Argentina-US BIT, if there is a submission of the dispute to courts in Argentina (under the fork-in-the-road-provision) there can be no international arbitration; and even where there is no submission of such dispute to courts in Argentina, the arbitral forum is not necessarily ICSID; the Claimant can choose at his/its discretion either ICSID Arbitration or UNCITRAL Arbitration.

176. In the instant case, the MFN clause in Article 3 (even assuming it were to be so interpreted as to extend to Article 10), cannot avail the Claimant, since what the Claimant seeks to

invoke in its Request for Arbitration (see particularly paragraphs 55-57) is a different system of arbitration under a different BIT. Systems of arbitration in two treaties can never be the same when, under one treaty, the dispute is to be ultimately resolved only by ICSID arbitration (if both Contracting States are parties to the ICSID Convention), and under the other treaty (Argentina-US BIT) the dispute is to be resolved at the choice of the investor either under ICSID arbitration or under UNCITRAL arbitration: the latter is undoubtedly “a different system of arbitration”.

**f) “Case-Law”<sup>148</sup> – Decisions of arbitral tribunals as to whether an MFN clause extends or does not extend to a dispute-resolution provision in the same treaty are neither uniform nor consistent**

177. To adopt the words of the UN Secretary-General in his 1949 Memorandum<sup>149</sup> “the divergent interpretations of the most favoured nation Clause” which caused difficulties then, continue to cause difficulties, even now!
178. In a wide variety of cases, arbitral tribunals (ICSID and other) have been called upon to interpret an MFN Clause in a BIT to determine whether or not it extends to dispute-resolution, (a jurisdiction clause). Their decisions have been neither uniform nor consistent; different tribunals faced with differently worded treaties (sometimes even similarly worded treaties) have reached different, if not conflicting, conclusions. In the sphere of MFN Clauses (in BITs) and their reach, adjudications by *ad hoc* tribunals have proved to be an obstacle to the development of a *jurisprudence constante*. Under the ICSID system, there is no mechanism for promoting certainty and predictability. But this does not mean that decisions of tribunals (ICSID or other) are not cited by parties before an arbitration tribunal in a particular case. As a matter of fact, in this very case each side has relied on a plethora of decisions – of course, none of them binding, on the Tribunal. But the decisions do warrant examination.

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<sup>148</sup> So stated in inverted commas, because the expression “case-law” applies in common-law countries to an accumulation of decisions (on any particular topic) of Courts (or Tribunals) that are bound by the doctrine of precedent. Decision in ICSID arbitrations are on a case-to-case basis (Article 53(1)).

<sup>149</sup> “Summary of International Law in relation to the work of codification of the International Law Commission.”

**g) “Case-law” – Two separate lines of decisions reflecting two different approaches**

179. The different decisions (of ICSID and other tribunals) on the application (non-application) of MFN clauses to dispute resolution provisions (in bilateral investments treaties) reveal two separate lines of approach:

(i) The first line of decisions (which are numerous) begin with *Emilio Agustín Maffezini v. Kingdom of Spain*<sup>150</sup> – they proceed on a presumption: that dispute-resolution provisions do invariably fall within the scope of an MFN provision in a BIT, unless the contrary is plainly demonstrated.<sup>151</sup> In the opinion of the Tribunal the contracting out presumption underlying this line of decisions is not warranted in the present case – neither by the provisions in the text of the Argentina-Germany BIT nor in its preamble.

(ii) A second line of decisions of tribunals (which are fewer) begin with *Salini*

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<sup>150</sup> *Maffezini v. Spain*, Decision on Objections to Jurisdiction of January 25, 2000. The following Tribunal decisions have taken substantially the same view viz. Decision on Preliminary Question of Jurisdiction: *Gas Natural v. Argentina*, Decision of June 17, 2005, para. 29; *National Grid v. Argentina*, Decision of June 29, 2006; *Suez-AWG v. Argentina*, Decision of August 3, 2006, para. 46 et seq.; *Siemens A.G. v. Argentina Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction of August 3, 2004, para. 103 (“*Siemens v. Argentina*”); *MTD equity Sdn Bhd. and MTD Chile SA v. Republic of Chile* (ICSID Case No. ARB/01/7), Award May 25, 2004 (“*MTD v. Chile*”); *Suez-InterAgua v. Argentina*, Decision on Jurisdiction of May 16, 2006, paras. 60-66; *Suez-AWG v. Argentina*, Decision on Jurisdiction of August 3, 2006, paras. 62-68.

<sup>151</sup> But there has been some criticism of the decision in *Maffezini*: in an Article in the Journal of the World Investment of Trade (February 2006) Vol. 7, No. 1, p. 25 – “MFN and Dispute Settlement – when the Twain Meet” by Locknie Hsu, the dictum in *Maffezini* has been characterised as “Something Borrowed, Something Blown!” It is stated (p. 29):

“After the *Maffezini* Decision, there have been a few decisions which have either been supportive of or not discredited it. In *Siemens v. Argentina*, for instance, the Tribunal agreed with the *Maffezini* Tribunal’s approach and went so far as to say (probably alarmingly to many States): “In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provision unless they have been excepted.”

At the same time, in one subsequent decision, *Maffezini* was greeted with little enthusiasm, for want of a detailed explanation of its ruling. However, the most direct assault yet on *Maffezini* is found in the Arbitral Decision on Jurisdiction in *Plama Consortium Ltd v. Republic of Bulgaria*. Using a number of techniques, the Tribunal there sought to water down the opening created by *Maffezini* for investors to “borrow” dispute settlement provisions in other BITs through an MFN provision.

Accepting such a contracting out approach would amount to reversing the principle of international law that a State’s consent to an international jurisdiction is not presumed to be contracted in, it would also be ignoring in fact the different wording clauses in different BIT’s (+).”

*Costruttori S.p.A and Italstrade S.p.A v. Hashemite Kingdom of Jordan*<sup>152</sup> followed by *Plama Consortium Ltd., v. Republic of Bulgaria*<sup>153</sup>: and *Telenor Mobile vs. Hungary*<sup>154</sup> they mark a decisive step away from the expansive approach adopted by the tribunal in *Maffezini*.

This second line of “cases” proceeds on the basis that dispute resolution provisions in a specific treaty having been negotiated with a view to resolving disputes under that treaty, Contracting States cannot be presumed to have agreed that those provisions could be enlarged (or displaced) by incorporating dispute resolution provisions from other treaties negotiated by the Host State with a different party in an entirely different context. Thus, this trend – which follows closely the principle of general international law that international courts and tribunals can only exercise jurisdiction over a State with consent – does not regard as sufficient a consent of the Host State to international arbitration which would be a merely presumed consent.

180. In *Maffezini v. Spain* (followed in *Siemens v. Argentina*<sup>155</sup>) the Tribunal reasoned thus:

“54. Notwithstanding the fact that the basic treaty containing the clause does not refer expressly to dispute settlement as covered by the most favored nation clause, the Tribunal considers that there are good reasons to conclude that today dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights of traders under treaties of commerce. Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee.

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<sup>152</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction of November 29, 2004. (“*Salini v. Jordan*”). The *Salini* Tribunal also sought to distinguish the facts before it from those in *Maffezini*; see para. 118. In the event, it concluded that the MFN clause in Article 3 of the BIT before it did not apply to dispute settlement clauses, contrary to the outcome in *Maffezini*. See *Salini v. Jordan*, where the Tribunal stated at para. 115: “The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by the authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of ‘treaty shopping’.”

<sup>153</sup> *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction of February 8, 2005, paras. 212-213, p. 329, paras. 223-227, pp. 332-333. (“*Plama v. Bulgaria*”).

<sup>154</sup> *Telenor v. Hungary*, Award of September 13, 2006.

<sup>155</sup> August 3, 2004.

“55. International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts, while the host governments have traditionally felt that the protection of domestic courts is to be preferred. The drafting history of the ICSID Convention provides ample evidence of the conflicting views of those favoring arbitration and those supporting policies akin to different versions of the Calvo Clause.<sup>156</sup>

“56. From the above considerations it can be concluded that if a third party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle.”

181. But (in *Maffezini*), the expansive approach set out above was also tempered with “important limits” (or exceptions) which were then stated:

“56. [...] This operation of the most favored nation clause does, however, have some important limits arising from public policy considerations that will be discussed further below.”

[...]

“62. Notwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.

“63. Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in

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<sup>156</sup> See generally ICSID: *Analysis of Documents Concerning the Origin and the Formulation of the Convention*, 1970.

relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law. Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.” (Emphasis added).

182. The precautions mentioned by the authors of the decision in *Maffezini* have proved difficult of application, resulting in much uncertainty, as to how to distinguish in a given case between “the legitimate extension of rights and benefits by means of the operation of the (MFN) clause” on the one hand, and how to avoid the use of the MFN clause for purposes plainly of “disruptive treaty shopping”, on the other hand.<sup>157</sup> As to what is regarded (in *Maffezini*) as a “legitimate” extension of an MFN clause to a dispute resolution provision, is different from what is regarded as a “legitimate extension”<sup>158</sup> of an MFN clause in *Plama*). In *Plama*, the ICSID Tribunal had said:

“[...] [T]he principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”<sup>159</sup> (Emphasis added).

<sup>157</sup> In *Telenor v. Hungary*, Award of September 13, 2006, the Tribunal placed emphasis on the risks of “treaty shopping” by investors – which has been a concern of many Tribunals (starting with *Maffezini*).

<sup>158</sup> See *Plama v. Bulgaria*, para. 223.

<sup>159</sup> In *Suez-InterAgua v. Argentina*, para. 223, a later ICSID Tribunal had said, that it did not agree with this statement in *Plama*.

183. In *Salini v. Jordan*<sup>160</sup>, - the tribunal observed that the MFN clause - Article 3 of the BIT between Italy and Jordan (like Article 3 of the BIT between Argentina and Germany in the present case) - did not include any provision extending its scope of application to dispute settlement, and also did not envisage “all rights” or “all matters” covered by the treaty, and in addition the claimants having submitted nothing from which it might be established that the common intention of the Parties was to have the most-favoured nation clause to apply to dispute settlement, it was stated that Article 3 (MFN Clause) could not be extended so as to be applicable to the clause regarding dispute-resolution<sup>161</sup> (It is to be noted that in the above decision the burden was placed on the claimants). With reference to the decision of the Commission or Arbitration in the *Ambatielos case (Ambatielos-II)* the tribunal (in *Salini*) observed that the question of whether substantive provisions relating to the “administration of justice” could be incorporated from other treaties by virtue of an MFN clause was very different to the question of whether dispute-settlement provisions from other treaties could be so incorporated. The tribunal in *Salini* concluded that the solution adopted in *Ambatielos-II* could not be directly transposed into the case before it.<sup>162</sup>
184. However in another case – in *National Grid v. Argentina*<sup>163</sup> – the basic treaty (Argentina-UK BIT) required the investor to resort to domestic courts for a period of eighteen-months prior to submitting the dispute to international arbitration; the investor successfully relied on the MFN Clause of the Argentine-UK BIT to bypass this pre-requisite through reliance on the dispute-resolution provisions of the Argentine–US BIT, which did not impose a similar condition. The tribunal (in *National Grid v. Argentina*) placed the burden of proof on the Host State to establish that the intent of the Contracting Parties was to exclude dispute-resolution from the scope of the MFN provision, as opposed to requiring the investor to prove that the Contracting Parties intended dispute-resolution to fall within the ambit of the MFN Clause (a presumption inconsistent with the holding in *Salini* and in *Plama v.*

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<sup>160</sup> Decision dated November 29, 2004.

<sup>161</sup> *Salini v. Jordan*, paras. 118-119.

<sup>162</sup> A similar appraisal of the limited relevance of *Ambatielos II* was made by the Tribunal in *Plama v. Bulgaria*, para. 215.

<sup>163</sup> *National Grid v. Argentina*, Decision on Jurisdiction of June 20, 2006.

*Bulgaria*). It is to be noted that the MFN clause under consideration in *National Grid v. Argentina* is almost identical to Article 1103 of NAFTA, which had been identified by the *Plama* tribunal as the sort of wording which would explicitly exclude the extension of the MFN clause to the dispute resolution provision.

**h) Claimant’s contention that Article 4(4) of the Argentina-Germany BIT has been inserted as a matter of “abundant caution” – as stated in the *Siemens* Award**

185. The contention that Article 4(4) has been inserted only *ex major cautela* (for the removal of doubts) – as stated in the *Siemens* award which also interpreted the Argentina-German BIT<sup>164</sup> is to read into the Treaty (BIT) words which are not there: an impermissible exercise in treaty interpretation. It is submitted by the Claimant that the additional MFN clause was inserted in Article 4(4) of the Argentina-Germany BIT because “it was aimed at emphasising the protection in relation to the two standards of full protection and expropriation” This is a surmise not warranted by the text of the BIT. If it is suggested that this surmise is necessary to make the BIT more effective, then, as the International Court of Justice in its Advisory Opinion of July 18, 1950<sup>165</sup> said: the principle expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, could not justify a court or tribunal in attributing to a treaty provision a meaning which would be contrary to the text (“their letter and spirit”).

The decision in *Siemens*<sup>166</sup> – interpreting the Argentina-Germany BIT – first proceeds on an assumption – an assumption (not warranted by the text) that Article 3 applies to all Articles of the BIT and then proceeds with the surmise that what is mentioned in Article 4(4) is *ex*

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<sup>164</sup> *Siemens v. Argentina*, para. 90, p. 35.

<sup>165</sup> Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), *ICJ., Reports 1950*, p. 229.

<sup>166</sup> *Siemens v. Argentina*, para. 90: “90. The Tribunal concludes from this textual comparisons that reference to MFN treatment or to national treatment in Article 4 do not detract from the generality of Article 3 nor make Article 4 superfluous. To the extent that there is an overlap, it needs to be understood as covering areas of special interest to the parties. Compensation on account of expropriation or of civil war or other violent disturbances is a key issue in the treatment of foreign investment and foreign nationals and a specific reference to it would seem congruent with its importance. The Tribunal considers that the parties to a treaty are not precluded from placing emphasis on certain matters *ex abundante cautela*. The repeated provision in a particular context stresses the concern of the parties in respect of that particular matter rather than limiting the scope of clauses of general character.” (Emphasis added).

The assumption of the *Siemens* Tribunal that the matters in Article 4 of the Argentina-Germany BIT was *ex abundante cautela* goes against the text and context of Article 3 and 4 of the BIT.

*abundante cautela* – But the assumption that Article 3 applies to all other provisions of the BIT is not borne out by the text (since there are no words like “in all matters subject to this agreement .....”, “in all matters governed by the present agreement...” in Article 3). If the text had so provided, it may have been possible (perhaps) to read *sub-silentio* a prefix to Article 4(4) (like for instance the phrase “for the removal of doubts”) – which is not there. Adding words to a treaty on the basis of presumed intention must be avoided. It is an exercise that has been characterised as an interpretation that “tends to create meaning rather than to discover it.”<sup>167</sup>

186. Even words like “all matters relating to ...” in an MFN clause may not be sufficient to extend such clause to the dispute resolution provisions of the BIT. In a recent award (award of April 21, 2006) handed down by a tribunal appointed by the Stockholm Chamber of Commerce<sup>168</sup> the MFN clause (Article 2) in the bilateral treaty concerned contained the words “In all matters covered by the present Treaty and in particular in Article 4,5,6....”. Even so, the majority of the tribunal (2:1) refused to hold that “even seemingly clear language like this could be considered as having an unambiguous meaning in the context of an MFN Clause”; the majority said:

“There is a fundamental difference as to how an MFN clause is generally understood to operate in relation to the material benefits afforded by a BIT, on the one hand, and in relation to dispute resolution clauses, on the other hand. While it is universally agreed that the very essence of an MFN provision in a BIT is to afford to investors all material protection provided by subsequent treaties, it is much more uncertain whether such provisions should be understood to extend to dispute resolution clauses. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject [...].

[...] Instead, the present Tribunal will apply the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the Contracting Parties.”

187. The dissenting member of the tribunal however opined that in his view the MFN provision was “clear and unambiguous” particularly when read in the light of the “MFN principle” as

<sup>167</sup> Cf. Koskenniemi, p. 415.

<sup>168</sup> *Vladimir v. Russian Federation*, paras. 179 and 181, pp. 61-62.

well as prior jurisprudence “regarding similar application of a virtually identical provision”. According to this dissenting member the “MFN principle” was that where an MFN clause in a treaty specifically covered ‘all matters’ in the treaty (BIT), this was sufficiently clear indication that it should also extend to the dispute-resolution clause of the treaty – but the majority did not agree. As for reliance by the dissenting member on what he called “prior jurisprudence”, there is nothing like “prior jurisprudence” in the ICSID context. In ICSID arbitrations, there are no binding decisions (much less consistent decisions) that have shown the way – as to under what circumstances and in which cases MFN clauses in bilateral treaties would extend to its dispute-resolution provisions. It appears that the most-favoured-nation-clause in a BIT does not extend to the dispute settlement provision in that BIT, except where expressly so provided or clearly indicated.

188. In a book recently published by the Oxford University Press (2007) – the first of the new Oxford International Arbitration Series,<sup>169</sup> – the topic “Most-Favoured-Nation-Treatment” is summarised in the following words:

“It is submitted that the reasoning of the Tribunal in *Plama* is to be strongly preferred over that in *Maffezini*. As the ICJ pointed out in *East Timor (Portugal) v. Australia*,<sup>170</sup> the scope of application of a substantive obligation is an entirely separate question to the conferral of jurisdiction upon an international tribunal, Jurisdiction in International law depends solely upon consent. This is a difficult concept in any event in investment arbitration. Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration. In those circumstances, it is particularly important to construe the ambit of the State’s consent strictly. As the discussion in Chapter 3 above has shown, (Dispute Resolution Provisions) the balance struck in investment treaties between the various dispute settlement options is often the subject of careful negotiation between the State Parties, selecting from a range of different techniques. It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State Parties and in other circumstances. Moreover, it is in any event not possible to imply a hierarchy of favour to dispute settlement provisions. The clauses themselves do not do this, and it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration. The same point could be made with even more force in the

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<sup>169</sup> Campbell McLachlan QC, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles*.

<sup>170</sup> *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports, 1995, para. 29, p. 102.

case of a comparison between ICSID and other forms of arbitration which the State Parties may have specified in particular investment treaties.

The result, will be that the Most Favoured Nation clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide.”

(Emphasis added).

189. In a welter of inconsistent and confusing *dicta* of different tribunals, (“case-law”) the conclusion set out above does appear to have the merit of clarity and consistency.

**i) Item-wise consideration of the specific pleas taken by the Claimant with respect to the interpretation and application of the MFN clause in Article 3 in its response to the Argentina’s first Preliminary Objection Re: application of the MFN clause to the dispute-resolution clause**

190. The contention of the Claimant that the application of most-favoured-nation provision contained in the BIT between Argentina and Germany “does not affect issues of jurisdiction, consent to arbitration or the substance of the dispute settlement mechanism”<sup>171</sup> is plainly erroneous. Invocation of MFN treatment to dispute settlement does relate to and has a bearing on “consent” (of the Host State). The assertion by the Claimant in response to Argentina’s first objection to jurisdiction that “both parties have already consented to ICSID arbitration”<sup>172</sup> under the BIT between Argentina and Germany (the “consented forum” argument) gets displaced because if the most-favoured-nation provision contained in Article 3 is made applicable to Article 10 (as Claimant would contend) and if the invocation of Article VII of the Argentina-US BIT in lieu of Article 10 of the Argentina-Germany BIT is permitted by reason of the operation of the most-favoured-nation clause (as also contended by the Claimant), it does affect issues of jurisdiction, consent to arbitration and the substance of the dispute settlement mechanism as well. A different dispute settlement provision, under another treaty whether or not “alien” to the basic treaty is sufficient to negate the submission that the most-favoured-nation clause (in Article 3) applies to dispute resolution justifying abandoning the dispute resolution clause in the Argentine – Germany BIT and adopting Article VII of the Argentine – US BIT.

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<sup>171</sup> Claimant’s Counter-Memorial on Jurisdiction, para. 58.

<sup>172</sup> *Ibid.*, para. 8.

191. The assertion that since Article 10 of the Argentina–Germany BIT relates to investor-State dispute settlement and Article VII of the Argentina-US BIT also relates to investor-State dispute settlement, therefore it is *ejusdem generis* of the same kind – is a specious plea: this is not the true principle of *ejusdem generis* as applicable to an MFN clause. In the Draft Articles of the International Law Commission on Most-Favoured-Nation Clauses (with Commentaries 1978) it is stated “under the most-favoured-nation clause the beneficiary state acquire, for itself and for the benefits of persons or things in a determined relationship with it only those rights which fall within the limits of the subject matter of the clause.”<sup>173</sup> The ILC Commentary to Articles 9 and 10 (of its Draft Articles) reads:

“The scope of the Most-Favoured-Nations Clause regarding its subject matter: (1) The rule which is sometimes referred to as the *ejusdem generis* rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice.... the clause can only operate in regard to the subject matter which the two States had in mind when they inserted the clause in their treaty.” (Emphasis added).

192. The assertion that Argentina and Germany “had in mind” the dispute resolution clause when they referred to “treatment of investments” in Article 3 stands contradicted: firstly, because the words “treatment less favourable than that accorded to investments of its nationals or companies or to investments of nationals and companies of third countries.....” in Article 3 might (without more) have normally included treatment of not granting full protection and security to investments of nationals or companies of either Contracting Parties in the territory of the other Contracting party, as well as “treatment” of investments in the way of investments of either Contracting party being expropriated, nationalized or subjected to measures tantamount to nationalization or expropriation (except for a public purpose and in such case against compensation) – but Article 4(4) has made express provision for such latter “treatment” and has expressly restricted the MFN clause in that Article – only to matters governed by Article 4: matters governed by Article 4 are therefore not intended to extend either to Article 3 or to Article 10.

193. If, therefore, Parties did not “have in mind” the dispute resolution clause in connection with

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<sup>173</sup> See Article 9 of the Draft Articles on most-favoured-nation clauses with Commentaries, 1978.

adverse treatment of investments, as mentioned in paragraphs (1) and (2) of Article 4, it is not possible to say that they had in mind some other “treatment” less favourable than that accorded to investments of its nationals or investments of nationals or companies of third countries specified in Article 3. If measures tantamount to expropriation or nationalization and measures not granting full protection and security to investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party (which is the gravamen of the case in the Request for Arbitration) cannot apply to or extend to the dispute resolution clause (Article 10), it is difficult to say that when the Contracting Parties used the word “treatment” in Article 3 they “had in mind” the dispute resolution clause in Article 10.

194. The contention that BITs containing dispute settlement clauses (similar to those of the Argentina–Germany BIT) had afforded the Claimant (in those cases) to gain direct access to ICSID jurisdiction through the application of a third-party treaty is a plea in the nature of *stare decisi*; but *stare decisis* has no application to decisions of ICSID tribunals – each tribunal being constituted *ad hoc* to decide the dispute between the parties to the particular dispute – The award of such tribunal is binding only on the parties to the dispute (Article 53 of the Convention) – not even binding on the State of which the investor is a national. Decisions and Awards of *ad hoc* ICSID tribunals have no binding precedential effect on successive tribunals, also appointed *ad hoc* between different parties.
195. The contention that at the time the Germany-Argentina BIT was signed, Argentina had not yet entered into a single investment treaty under which the investor was granted direct access to arbitration and, consequently, when Argentina and Germany negotiated and agreed to the terms of the BIT, there was no investment treaty, let alone a treaty in force granting direct access to ICSID for foreign investors in Argentina is a contention that goes against the Claimant’s case (and not in its favour) because it clearly shows that the Contracting States, Argentina and Germany, never “had in mind” the possibility of the settlement resolution clause in Article VII of the Argentine-US BIT applying to dispute resolution under the Argentine-Germany BIT. If they had so contemplated, one could have expected Article 10 to have itself contained a most-favoured-nation clause.

196. The contention that it was both futile and discriminatory for Wintershall to pursue an investment dispute through local courts – because domestic courts would not have been able to decide a case of the nature of Wintershall’s claim in eighteen months or because the Argentine courts were less favorable to foreign investors because of their lack of independence is erroneous. Article 10(2) does not contemplate domestic courts deciding a case of the nature of Wintershall’s claim in this arbitration within eighteen months; on the contrary, Article 10(2) clearly provides for the dispute being “submitted to the courts of competent jurisdiction of the Contracting Party in whose territory the investment was made”; it does not state that the case should be decided within that time or that the relief prayed for in the domestic courts should be of the same nature as that which is claimed in international arbitration.

#### **4. Conclusion on the Second Aspect of Argentina’s first Preliminary Objection to Jurisdiction**

197. For all the above reasons, the Tribunal’s decision is that Wintershall, the Claimant, cannot rely on the most-favoured-nation clause in Article 3 of the Argentine-Germany BIT in order to avoid compliance with the requirements set forth in Article 10(2) of the BIT.

## **Part-IX**

### **IX. FINAL CONCLUSIONS AND DECISIONS OF THE TRIBUNAL**

198. In the light of the forgoing discussion and conclusions, the Arbitral Tribunal unanimously:

- (1) Finds – upholding the Respondent’s First Preliminary Objection to Jurisdiction – (a) that the Claimant Wintershall Aktiengesellschaft was not entitled to directly refer the dispute raised by it to ICSID arbitration, since it had not complied with the provisions contained in Article 10(2) of the Argentina-Germany BIT; and (b) that the most-favoured-nation clause in Article 3 of the Argentina-Germany BIT does not entitle the Claimant to avoid compliance with the requirements set forth in Article 10(2) of the said BIT.
- (2) Decides that, under Rule 41(5) of the ICSID Arbitration Rules, the dispute raised by the Claimant Wintershall Aktiengesellschaft (now joined by Wintershall Holding Aktiengesellschaft) is not within the jurisdiction of the Centre nor within the competence of the Tribunal.
- (3) Declares that, in the circumstances of the case, the remaining Preliminary Objections to Jurisdiction raised by Respondent in this case (other than the First Preliminary Objection to Jurisdiction) are not exclusively preliminary in character; and any discussion or findings in respect of the Second, Third, Fourth, Fifth and Sixth Objections to Jurisdiction are unnecessary.
- (4) Decides that, since there is no want of *bona fides* on the part of the Claimant in instituting the present arbitration proceedings, and taking into consideration the complexity and unsettled status of the questions involved in the First Preliminary Objection to Jurisdiction:
  - (a) the costs and expenses of the Centre shall be borne by the parties in equal shares;

- (b) the costs incurred by each of the parties in the arbitration proceedings will be borne by the respective parties themselves: in other words, there will be no recovery by one party against the other of any of the costs of the arbitration proceedings.

Made in Washington, D.C., in English and Spanish, both versions being equally authentic.

[Signed]

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Mr. Fali S. Nariman  
President of the Tribunal  
Date: November 8, 2008

[Signed]

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Dr. Santiago Torres Bernárdez  
Arbitrator  
Date: November 6, 2008

[Signed]

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Professor Piero Bernardini  
Arbitrator  
Date: November 3, 2008