

PCA Case No. 2010-9

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT
BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT
BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE
REPUBLIC OF ARGENTINA FOR THE PROMOTION AND PROTECTION OF
INVESTMENTS, SIGNED 11 DECEMBER 1990**

- and -

THE UNCITRAL ARBITRATION RULES 1976

- between -

**ICS INSPECTION AND CONTROL SERVICES LIMITED
(UNITED KINGDOM)**

(“Claimant”)

- and -

THE ARGENTINE REPUBLIC

(“Respondent”)

Award on Jurisdiction

Date: 10 February 2012

Tribunal

Professor Pierre-Marie Dupuy, presiding arbitrator
Dr. Santiago Torres Bernárdez
The Honorable Marc Lalonde

Secretary to the Tribunal

Martin Doe

Registry

Permanent Court of Arbitration

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ABBREVIATIONS

AFIP	<i>Administración Federal de Ingresos Públicos</i>
Assignment Agreement	Assignment Agreement between the Claimant and Ostram dated 13 June 2001
Bianchi Report (First and Second)	First Bianchi Report: Expert Report of Mr. Alberto B. Bianchi, dated 24 January 2011; Second Bianchi Report: Expert Report of Mr. Alberto B. Bianchi, dated 20 April 2011
BIT	Bilateral Investment Treaty, specifically the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990
C I	Claimant's Statement of Claim
C II	Claimant's Counter-Memorial on Jurisdiction
C III	Claimant's Rejoinder on Jurisdiction
C IV	Claimant's Post-Hearing Memorial
C V	Claimant's Post-Hearing Reply
C-[#]	Claimant's Exhibit No. [#]
C-LA-[#]	Claimant's Legal Authority No. [#]
Contract	Contract signed by the Parties on 11 March 1998 relating to the provision of auditing services
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and nationals of other States, signed at Washington, DC, on 18 March 1965
ILC	International Law Commission
Mata Report (First and Second)	First Mata Report: Expert Report of Mr. Ismael Mata, dated 8 November 2010; Second Mata Report: Expert Report of Mr. Ismael Mata, undated
MECON	<i>Ministerio de Economía y Obras y Servicios Públicos</i>
MFN	Most Favoured Nation
Ostram	Ostram Holdings Limited

Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration
R I	Respondent's Memorial on Jurisdiction
R II	Respondent's Reply on Jurisdiction
R III	Respondent's Post-Hearing Memorial
R-[#]	Respondent's Exhibit No. [#]
R-LA-[#]	Respondent's Legal Authority No. [#]
UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 13 December 1976
VCLT	Vienna Convention on the Law of Treaties

A. THE PARTIES TO THE ARBITRATION**The Claimant****ICS Inspection and Control Services Limited**
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benjamin.sanderson@kirkland.com**The Respondent****The Argentine Republic***Represented by:*Dra. Angelina María Esther Abbona
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B. THE TRIBUNAL

Appointed by the Claimant:

The Hon. Marc Lalonde, P.C., O.C., Q.C.
1155 Rene-Levesque Blvd West, 33rd Floor
Montréal, QC H3B 3V2
Canada

Appointed by the Respondent:

Dr. Santiago Torres Bernárdez
Calle Jorge Juan 40 - 2º Izd.
28001 Madrid
Spain

Appointed by agreement of the Co-Arbitrators:

Prof. Pierre-Marie Dupuy
Graduate Institute of International Studies and Development
Case Postale 136
16, Voie Creuse, Office No. 337
CH 1211 Geneva 21
Switzerland

C. SHORT IDENTIFICATION OF THE CASE

1. The following quotation from the Claimant's Statement of Claim summarises the main aspects of the dispute:
 5. [...] In summary, the dispute relates to the treatment accorded to ICS by Argentina in connection with the agreement entered into by ICS and the *Ministerio de Economía y Obras y Servicios Públicos* ("MECON") on March 11, 1998 relating to the provision of auditing services (the "Contract").
 6. On May 22, 1997, through Presidential Decree 477/97 ("PD 477/97"), the Respondent approved a government-supervised programme under which goods bound for import into Argentina would be inspected prior to shipment to Argentina (the "Programme"). The goods were to be inspected by private companies, authorised by the Respondent through international public tender ("Pre-Shipment Inspection Companies"). The inspections were designed to detect inaccurate import declarations and thereby help to combat the loss of tax revenue to the Respondent, which would result from such inaccuracies.
 7. The responsibility for the day-to-day supervision and enforcement of the Programme, including the coordination of its audit, was given to a special committee within MECON, known as the *Comité Ejecutivo del Programa de Inspecciones de Preembarque de Importaciones* (the "Comité"). The *Administración Federal de Ingresos Públicos* ("AFIP") was the entity within the Argentine government responsible for the Respondent's customs administration and was mainly responsible for paying the invoices approved by the Comité.
 8. The operation of the Programme was to be audited by a private company which was to be selected by the Respondent through a national and international public tender (the "Auditor"). Under the Programme, the Auditor was required to audit the services provided by the Pre-Shipment Inspection Companies and thereby enable the Respondent to identify any shortfalls in the taxable values which were attributed to imported goods which were caused by the failure of the Pre-Shipment Inspection Companies to properly perform their duties.
 9. ICS (at that time known as Swipco Limited) was awarded the role of Auditor after winning tender No. 13/97.
 10. Pursuant to Clause 3 of the Contract, ICS' fees for the auditing of inspection certificates were calculated as 0.64% of the FOB, FOR or FOT value of each inspection certificate audited. Subsequent to the execution of the Contract, on September 11, 1998, MECON altered ICS' fee structure through Resolution No. 1106/98 ("Resolution 1106/98"), such that ICS' fees for Ordinary Services were to be calculated as 80% of the fees received by the Pre-Shipment Inspection Company in respect of each inspection certificate audited by ICS. In addition, ICS fees were never to be less than 4% nor to exceed the 10% of fees paid to the Pre-Shipment Inspection Companies (the "10% Fee Cap").
 11. In order for ICS to be in a position to be able to adhere to the 10% Fee Cap, the Respondent was under the obligation to provide an adequate selection system of inspection certificates to be audited.

12. From the outset of the Contract, it was apparent that the Respondent had not set up an adequate framework for the services to be rendered by ICS. Despite several requests from ICS to the Comité requesting it to implement a suitable selection system (which would allow the Auditor to identify those inspection certificates it should audit and would thereby enable it to fall within the 10% Fee Cap), the Respondent failed to implement any selection system, making it very difficult for ICS to keep within the 10% Fee Cap.
13. The initial term of the Contract expired in March 2000. However, a year later, on March 2, 2001, the Comité retroactively confirmed a one-year extension of the Contract until March 2001.
14. Following March 2001, ICS made written requests, on at least two further occasions, to the Comité asking it to set up an adequate framework to govern the provision of the services. Indeed, the services were requested and rendered up until December 2001, despite the formal termination of the Contract.
15. By the end of 2001, ICS had not received payment for many of the services rendered since 1998.
16. On January 6, 2002, Law 25.561 (the “Emergency Law”) repealed Law 23.928 (“the Convertibility Law”). The Convertibility Law had previously stabilised the exchange rate between Argentine Peso and the US Dollar such that 1 Argentine Peso was equal to 1 US Dollar. This measure, taken after ICS had already provided and invoiced for its services, destroyed the economic framework on which ICS had relied.
17. On February 20, 2002, the Programme officially terminated.
18. On that same date, ICS filed a request before the Comité for the approval and subsequent payment of the outstanding invoices which had been submitted but remained unpaid and outstanding.
19. In light of the Respondent’s failure to respond to the Claimant’s request, ICS filed an administrative claim (the “Administrative Claim”) on March 15, 2002, seeking payment of the outstanding invoices which had been duly presented in February 2002.
20. Pending resolution of the Administrative Claim, on August 22, 2002, the Comité returned all invoices presented by ICS in February 2002 and requested some of them to:
 - (i) be changed into the equal amount in Argentine Pesos (“Pesos”) i.e. “pesified”; and
 - (ii) be reduced to fall under the 10% Fee Cap.
21. Due to its poor financial position, ICS proceeded as requested by the Comité but expressly reserved its right to claim any differences between these reduced invoices and the invoices initially submitted, together with damages and interest.
22. Further, on June 30, 2003, AFIP sought to apply a 13% reduction to the invoices already pesified in accordance with Presidential Decree 1060/01 (“PD 1060/01”).
23. Following two years of constant and repeated requests for the payment of the invoices claimed in the Administrative Claim, ICS decided to amplify its Administrative Claim on December 6, 2004 (the “Amplified Administrative

Claim”). In this way, it included all outstanding amounts and demonstrated its opposition to some of the actions which had been taken by the Respondent against ICS.

24. On January 10, 2006, almost five years after the date of termination of the Inspection Programme, the Comité authorised payment of Pesos 1,230,181.68. No monies were paid by the Respondent until March 9, 2006. Even when this payment was made, the only invoices which were paid were in respect of services provided between April and December 2001 after the application of the 10% Fee Cap, its pesification and, in the case of invoices for services provided from July 2001 to December 2001, an additional 13% reduction.
 25. To date, no further payment of the principal amount has been made to ICS.
 26. The Claimant contends that Argentina’s actions throughout this period have violated basic and fundamental standards of protection granted to ICS by the bilateral investment treaty applicable to this matter.¹
2. As set out in the Claimant’s Statement of Claim, the Claimant asks the Tribunal to award as follows:

248. In this proceeding ICS will be seeking relief including, without limitation:
 - (a) a declaration from the Tribunal that the dispute is within the jurisdiction of the Tribunal;
 - (b) a declaration that the Respondent breached Article 2(2) of the BIT by violating the standards of treatment provided therein with respect to ICS’ investment;
 - (c) an order that Argentina compensate ICS in respect of the losses it has suffered through Argentina’s unlawful conduct in an amount to be quantified precisely during these proceedings, but in no event in an amount less than US \$25,277,011.10. This sum comprises the following elements:

Amounts unlawfully pesified	US \$3,374,947.53
Amounts unlawfully reduced by 13%	US \$90,703.01
Amounts exceeding the 10% Fee Cap	US \$4,538,571.58
Unpaid invoices corresponding to Special Services performed between June 1998 and July 2001	US \$3,035,026.68
Ordering that Argentina pay pre-award interest	US \$14,237,762.29
Total	US \$25,277,011.10

- (d) damages for loss of opportunity - as a result of Argentina’s failure to fulfil the terms of the Contract, ICS has incurred a substantial cost derived from its efforts to recover the amounts due. ICS could have

¹ C I, ¶¶5-26.

employed the resources it devoted to debt recovery activities in other investments that would have yielded a return. At a minimum, ICS should be compensated for the costs devoted to its extensive debt recovery effort. Moreover, to make ICS whole, i.e. put it in the same situation as if Argentina had fulfilled the Contract, ICS should also be compensated for the return it would have earned on these costs if the resources were invested in productive uses, earning the company's usual rate of return;

- (e) further or in the alternative an order that Argentina has been unjustly enriched in the amount of the value of the benefit it received;
- (f) ordering that Argentina pay post-award interest as appropriate;
- (g) award ICS any additional relief as the Tribunal considers appropriate; and
- (h) order that Argentina pay ICS' costs occasioned by this arbitration including, without limitation, the Tribunal's fees and expenses, administrative costs fixed by UNCITRAL, the expenses of the arbitrators, the fees and expenses of any experts, and the legal costs incurred by the parties (including fees of counsel), and interest.²

² C I, ¶248.

D. PROCEDURAL HISTORY

3. By a Notice of Arbitration dated 26 June 2009, received by the Respondent on 30 June 2009, the Claimant commenced the current arbitration proceedings against the Respondent pursuant to Article 8 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed on 11 December 1990. Article 8 of the BIT provides, *inter alia*, that disputes arising under the Treaty may be submitted to an arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law.
4. The Notice of Arbitration presents a dispute which is said to have arisen from the treatment accorded to the Claimant by the Respondent in connection with the agreement entered into by the Claimant and the *Ministerio de Economía y Obras y Servicios Públicos* on 11 March 1998 relating to the provision of auditing services.
5. On 28 July 2009, the Claimant appointed Mr. Stanimir A. Alexandrov as the first arbitrator.
6. On 12 August 2009, the Respondent challenged the appointment of Mr. Alexandrov in these proceedings.
7. On 27 August 2009, the Respondent appointed Dr. Santiago Torres Bernárdez as the second arbitrator.
8. On 23 September 2009, in accordance with Article 12(1)(c) of the UNCITRAL Arbitration Rules, the Claimant requested that the Secretary-General of the Permanent Court of Arbitration designate an appointing authority to decide the Respondent's challenge.
9. On 26 October 2009, the Secretary-General of the PCA designated Mr. Jernej Sekolec as appointing authority for all purposes under the UNCITRAL Arbitration Rules.
10. On 17 December 2009, having considered the Parties' submissions with regard to the challenge made by the Respondent, Mr. Sekolec sustained the challenge against Mr. Alexandrov.
11. On 8 January 2010, the Claimant requested an extension of 14 days to the 30-day period for the appointment of a replacement arbitrator. On 11 January 2010, the Respondent consented to the 14-day extension requested by the Claimant.
12. On 28 January 2010, the Claimant appointed the Hon. Marc Lalonde as arbitrator.
13. On 26 February 2010, pursuant to agreement between the co-arbitrators, Professor Pierre-Marie Dupuy was appointed the Presiding Arbitrator.
14. On 15 March 2010, the newly-constituted Tribunal requested the Parties' comments regarding, *inter alia*, the desirability of having the PCA administer the case and the holding of a preliminary meeting to discuss further procedural issues.

15. On 16 March 2010, the Claimant indicated its agreement with the Tribunal's suggestion of having the PCA administer the case, as well as its availability for a preliminary procedural meeting in May 2010.
16. On 26 March 2010, the Respondent sent its reply to the Tribunal's letter, confirming its agreement with the Tribunal's suggestion of having the PCA administer the case, as well as its availability for a preliminary procedural meeting in May 2010.
17. On 27 March 2010, the Tribunal circulated a draft Procedural Order No. 1 to the Parties, inviting the Parties to attempt to reach agreement on procedural matters in advance of a procedural meeting to take place on 17 May 2010, either in person at the Peace Palace in The Hague or by way of a telephone or video conference.
18. On 5 May 2010, the Parties informed the Tribunal that they had been able to "reach an agreement in principle in respect of the main procedural issues" set out in the Tribunal's draft Procedural Order No. 1, and therefore believed "there should be no need for an in person hearing in the Hague on May 17 unless the Tribunal disagrees. It might, however, be useful to hold a conference call with the Tribunal on May 17."
19. On 7 May 2010, the Tribunal communicated to the Parties that it had decided to proceed with a conference call in lieu of an in-person meeting to be held on 17 May 2010. Additionally, the Tribunal requested the Parties to report back with any further developments and with information regarding the exact procedural matters agreed between them by 13 May 2010.
20. On 13 May 2010, the Parties submitted to the Tribunal a revised copy of the draft Procedural Order No. 1, setting out the Parties' agreement with respect to outstanding procedural matters.
21. On 17 May 2010, the Tribunal held a preliminary procedural meeting with the Parties by telephone conference.
22. On 18 May 2010, the Tribunal issued Procedural Order No. 1 establishing, *inter alia*, basic procedural rules and a timetable for the proceedings as follows:
 - 4 Applicable Procedural Rules**
 - 4.1 The proceedings shall be conducted in accordance with the UNCITRAL Rules.
 - 4.2 For issues not dealt with in the UNCITRAL Rules or in the Treaty, the Tribunal shall apply the rules it deems appropriate, subject to Article 1(2) of the UNCITRAL Rules.
 - 4.3 The Tribunal is empowered to issue Procedural Orders on specific procedural issues if and when needed. These Procedural Orders may be signed solely by the Presiding Arbitrator after consultation with the co-arbitrators.
 - 5 Tribunal's Fees and Expenses**
 - 5.1 Each member of the Tribunal shall be remunerated at the rate of €500 per hour for all time spent in connection with this arbitration.

- 5.2 Members of the Tribunal shall be reimbursed in respect of all disbursements and charges reasonably incurred in connection with this arbitration, including, but not limited to, travel expenses, hotels, telephone, fax, delivery, and copying.
- 5.3 Members of the Tribunal may bill for reimbursement of disbursements and charges as and when they are incurred, and may submit periodic bills in respect of fees.
- 5.4 All payments to the Tribunal shall be made from the deposits referred to in section 6.

6 Deposits

- 6.1 In accordance with Article 41(1) of the UNCITRAL Rules, the Parties shall establish an initial deposit of €100,000 (€50,000 from each Party) within 30 days of the adoption of this order. The deposit shall be placed with the PCA by wire transfer to the following account:
- Bank: ING Bank N.V., The Hague, The Netherlands
Account number: 68 55 45 369
IBAN: NL71 INGB 068 55 45 369
BIC: INGBNL2A
Account name: Permanent Court of Arbitration
Reference: ICS-AR [name of Party]
- 6.2 The PCA will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the Parties to make supplementary deposits in accordance with Article 41(2) of the UNCITRAL Rules.
- 6.3 The unused balance held on deposit at the end of the arbitration shall be returned to the Parties as directed by the Tribunal.
- 6.4 Any transfer fees or other bank charges will be charged to the account. No interest will be paid on the deposit.

7 Case Administration

- 7.1 The PCA shall administer this arbitration on the following terms:
- (i) The PCA shall maintain an archive of filings and correspondence.
 - (ii) The PCA shall handle Party deposits and disbursements as provided for above.
 - (iii) The PCA shall make its hearing and meeting rooms in the Peace Palace in The Hague or its facilities in Costa Rica and elsewhere available to the Parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the Parties in equal parts.
 - (iv) Upon request, the PCA shall carry out administrative tasks on behalf of the Tribunal, the primary purpose of which is to reduce the cost that would otherwise be incurred by the Tribunal carrying out purely administrative tasks. Work carried out by the PCA shall be billed in accordance with the PCA schedule of fees. PCA fees and expenses shall be paid in the same manner as the Tribunal's fees and expenses.

7.2 The contact details of the PCA are as follows:

Attn: Mr. Martin Doe
Permanent Court of Arbitration
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E- mail: bureau @pca-cpa.org
mdoe@pca-cpa.org

8 Procedural Meeting

8.1 Further details of the procedure shall be discussed and, as far as possible, agreed at a procedural meeting with the Parties to be held on 17 May 2010, by way of a telephone conference.

9 Communications

9.1 The Parties shall not engage in any oral or written communications with any member of the Tribunal *ex parte* in connection with the subject matter of the arbitration.

9.2 The Parties shall send all correspondence and submissions, including pleadings and memorials, by e-mail simultaneously to opposing counsel and the PCA on the date the submission in question is due. The PCA shall promptly transmit all correspondence and submissions received from the Parties to each member of the Tribunal. The e-mail delivery of pleadings and memorials will include witness statements and expert reports, but not accompanying exhibits or legal authorities. The paragraphs of the written submissions of the Parties (including witness statements and expert reports) shall be numbered.

9.3 Electronic versions in DVD or CD of all accompanying exhibits and legal authorities shall be sent by courier three days after the due date to the other party. On that date, by international courier, one original and three (3) copies of the pleadings, witness statements, expert reports and four (4) copies of the DVD or CD shall be sent to the PCA, which shall distribute one (1) copy to each of the members of the Tribunal and retain one (1) copy for its records.

9.4 Documents shall be submitted unbound in binders separated from briefs and preceded by a list of such documents consecutively numbered, with consecutive numbering in later submissions (C-1, C-2 etc. for Claimant's Exhibits and C-LA-1, C-LA-2 etc. for Claimant's Legal Authorities; A RA-1, A RA-2 etc. for Respondent's Exhibits and AL RA-1, AL RA-2 for Respondent's Legal Authorities). To the extent possible, digital copies of documents shall also be submitted in searchable Adobe Portable Document Format ("PDF").

9.5 To facilitate citations and word processing, each Party shall also provide digital copies of written pleadings, including witness statements and expert reports, in searchable PDF, preceded by a table of contents. These documents shall be submitted as attachments to the e-mail referred to in section 9.2.

- 9.6 All written communications shall be deemed to have been validly made when they have been sent:
Parties: to the respective addresses of counsel in section 1;
Registry: to the address in section 7.2.
- 9.7 The Parties shall send copies of correspondence between them to the PCA only if such correspondence relates to a matter where the Tribunal is required to take action or not to take action or if it gives notice of a relevant event that the Tribunal and the PCA should be apprised of.
- 9.8 Any change of name, description, address, telephone number, facsimile number, or e-mail address shall immediately be notified by the Party or member of the Tribunal to all other addressees referred to in sections 1, 3, and 7.
- 9.9 The date of filing of an instrument shall be the date of delivery to the PCA by e-mail of the electronic version of the submission.

10 Language of the Arbitration

- 10.1 The languages of this arbitration shall be English and Spanish.
- 10.2 Pleadings (including but not limited to, Statements of Claim and Defence, Reply and Rejoinder), witness statements, and expert reports submitted in one language shall be accompanied by a translation into the other language within fifteen (15) days from the original due date. Exhibits and legal authorities need not be translated unless required by the Tribunal and provided they are in either English or Spanish.
- 10.3 The Tribunal will provide its decisions in both languages. Communications from the PCA to the Parties will be made in either language. The PCA will arrange simultaneous interpretation services from and into English and Spanish for future hearings. In case of any conflict between English and Spanish language versions of memorials, witness statements, and expert reports, the version of the originally filed instrument shall be the authoritative version.

11 Seat of the Arbitration

- 11.1 The seat of the arbitration shall be The Hague, The Netherlands.
- 11.2 Meetings and hearings may be held at other locations if so decided by the Arbitral Tribunal, after consultation with the Parties.
- 11.3 The Arbitral Tribunal may deliberate at any convenient location, without consulting the Parties.

12 Timetable

- 12.1 Within 90 days from the day of the Procedural Meeting, the Claimant shall submit its Statement of Claim together with all relevant evidence (documents, witness statements, expert statements) it wishes to rely on in its Statement of Claim.

- 12.2 In the event that the Respondent wishes to raise objections to jurisdiction, the Respondent shall submit its Memorial on Jurisdiction within 60 days from its receipt of the Claimant's Statement of Claim.
- 12.3 Within 60 days from its receipt of the Respondent's Memorial on Jurisdiction, the Claimant shall submit its Counter-Memorial on Jurisdiction.
- 12.4 Following the submission of the Memorial and Counter-Memorial on Jurisdiction, the Tribunal shall decide whether a second round of written pleadings on jurisdiction is necessary and/or whether a Hearing on Jurisdiction is necessary.
- 12.5 The procedure set out in paragraphs 12.2 to 12.4 above, constitutes the Jurisdictional Phase. Within 90 days of the completion of the Jurisdictional Phase, should the proceedings continue, the Respondent shall submit its Statement of Defence together with all evidence (documents, witness statements, expert statements) it wishes to rely on in its Statement of Defence.
- 12.6 Within 40 days of the Respondent's submission of the Statement of Defence, the Parties may request disclosure of documents from the other Party (without a copy to the PCA).
- 12.7 Within 40 days of the documents request made by either Party, the receiving Party shall produce the requested documents.
- 12.8 If either Party objects to any of the requests for documents, it shall reply by a reasoned objection to the other Party (without a copy to the PCA) within 10 days of receipt of the other Party's request for documents.
- 12.9 If within 10 days of the reasoned objections the Parties cannot agree regarding the documents to which objections have been made, the Parties may submit reasoned applications to the Tribunal to order production of the documents.
- 12.10 As far as possible, within 10 days of the Parties' application, the Tribunal shall decide on such applications.
- 12.11 Within 10 days of the Tribunal's decision, the Parties shall produce documents as ordered by the Tribunal.
- 12.12 Within 90 days of the production of documents, the Claimant shall file its Reply Memorial with any further evidence (documents, witness statements, expert statements) but only in rebuttal to Respondent's Statement of Defence or regarding new evidence from the procedure for document production in paragraphs 12.6 to 12.11 above.
- 12.13 Within 90 days from its receipt of the Claimant's Reply Memorial, the Respondent shall file its Rejoinder Memorial with any further evidence (documents, witness statements, expert statements) but only in rebuttal to Claimant's Reply Memorial or regarding new evidence from the procedure for document production in paragraphs 12.6 to 12.11 above.
- 12.14 Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorised by the Tribunal.
- 12.15 At the end of the hearing, the Tribunal will consult with the Parties as to whether the Parties shall submit post-hearing briefs and claims for arbitration costs, and by which dates.

13 Organisation of Hearings

- 13.1 After consultation with the Parties, the Tribunal shall issue, for each hearing, a Procedural Order convening the meeting, establishing its place, time, agenda, and all other technical and ancillary aspects.
- 13.2 The Parties agree that a record of the hearings shall be kept in English and Spanish. The Parties agree to have sound recordings and written transcripts of any oral hearing and “Real Time” or “Live Note”. Also it was decided by the Parties to have simultaneous translation from English into Spanish and Spanish into English in all hearings.
- 13.3 The Parties also agree that the PCA would prepare summary minutes of the first session of the Tribunal.

14 EvidenceA) Documentary Evidence

- 14.1 All documents (including texts and translations into the languages of the arbitration of all substantive law provisions) considered relevant by the Parties shall be submitted with their pleadings and memorials, as established by the Timetable.
- 14.2 All documents shall be submitted in the form established above in the section on communications.
- 14.3 New factual allegations or evidence shall not be permitted after the respective dates for the Reply and Rejoinder Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.

B) Witness Evidence

- 14.4 Written Witness Statements of all witnesses shall be submitted together with the Statements and Memorials mentioned above by the time limits established in the Timetable.
- 14.5 Witnesses, having submitted a written Witness Statement, shall be made available for examination during the oral hearing. If a witness is not available for examination for good cause during the oral hearing, the Tribunal – after consulting the Parties – may accord such weight to the written testimony as it deems appropriate.
- 14.6 In order to make most efficient use of time at the hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the presenting Party may introduce the witness for up to 20 minutes and within that time frame may add direct examination on issues, if any, which have occurred after the last written statement of the witness has been submitted. The remaining hearing time shall be reserved for cross-examination and re-direct examination, as well as for questions by the arbitrators.

C) Expert Evidence

- 14.7 Should the Parties wish to present expert testimony, the same procedure shall apply as for witnesses.

15 Extensions of Deadlines and other Procedural Decisions

- 15.1 Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.
- 15.2 Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds.

16 Tribunal's Immunity from Suit

- 16.1 The Parties shall not seek to make the Tribunal or any of its members liable in respect of any act or omission in connection with any matter related to the arbitration.
- 16.2 The Parties shall not require any member of the Tribunal to be a party or witness in any judicial or other proceedings arising out of or in connection with this arbitration.

23. On 16 August 2010, the Claimant submitted its Statement of Claim.
24. On 21 September 2010, the Respondent requested an extension of the deadline for submission of its Memorial on Jurisdiction, in light of the Claimant's failure to file a Spanish translation of its Statement of Claim within the deadlines established in Procedural Order No. 1. The Claimant agreed to this request by letter dated 22 September 2010, and the Tribunal granted it by letter dated 27 September 2010.
25. On 28 September 2010, the Claimant submitted the Spanish translation of its Statement of Claim.
26. On 13 November 2010, the Respondent submitted its Memorial on Jurisdiction. On 26 November 2010, the Respondent submitted an English translation of its Memorial on Jurisdiction.
27. On 9 December 2010, the Claimant requested that the Tribunal grant a short extension to submit its Counter-Memorial on Jurisdiction. On the same date, the Respondent informed the Tribunal that it had no objection to this request. This request was then granted by the Tribunal by letter dated 13 December 2010.
28. On 25 January 2011, the Claimant submitted its Counter-Memorial on Jurisdiction. A Spanish translation was submitted by the Claimant on 8 February 2011.
29. On 9 February 2011, pursuant to Section 12.4 of Procedural Order No. 1, the Tribunal informed the Parties that it had decided to request a second round of written pleadings on jurisdiction and confirmed the holding of a Hearing on Jurisdiction to take place on 17 May 2011, extending to 18 May 2011 if necessary, at the Peace Palace in The Hague.
30. On 11 February 2011, the Parties jointly communicated to the Tribunal a proposed modification to the schedule fixed by the Tribunal for the second round of submissions on jurisdiction. By letter dated 14 February 2011, the Tribunal confirmed its agreement with the modified schedule proposed by the Parties.

31. On 16 March 2011, the Respondent submitted its Reply Memorial on Jurisdiction. An English translation was submitted by the Respondent on 23 March 2011. By separate e-mail on 23 March 2011, the Respondent also submitted a list of errata to its Reply Memorial on Jurisdiction.
32. On 20 April 2011, the Claimant submitted its Rejoinder Memorial on Jurisdiction. A Spanish translation was submitted by the Claimant on 27 April 2011.
33. On 25 April 2011, the Parties informed the Tribunal that they had agreed to waive their right to examine and cross-examine witnesses and experts at the Hearing on Jurisdiction.
34. On 28 April 2011, the Tribunal circulated a draft Procedural Order No. 2 to the Parties, inviting them to attempt to reach agreement on organisational and administrative matters related to the Hearing on Jurisdiction.
35. On 6 May 2011, the PCA held a pre-hearing telephone conference with the Parties in order to resolve any organisational and administrative matters related to the Hearing on Jurisdiction not already agreed upon by them or addressed in draft Procedural Order No. 2. Minutes of that conference were provided to the Tribunal and the Parties by the PCA on 6 May 2011, drawing to the Tribunal's attention, *inter alia*, a proposal by the Respondent, not objected to by the Claimant, to extend the Hearing schedule through the morning of 18 May 2011.
36. On 12 May 2011, the Tribunal issued the Procedural Order No. 2, convening the Hearing on Jurisdiction, establishing its place, time, agenda, and other technical and ancillary aspects. In particular, the Tribunal accepted the Respondent's proposed Hearing schedule.
37. On 11 May 2011, the Respondent requested authorisation to submit two additional exhibits and eight additional legal authorities, enclosed with its request, to be used at the Hearing on Jurisdiction, following disagreement between the Parties over the matter. The Respondent asserted that it had informed the Claimant of its intention to submit the referred additional documents in accordance with a procedure previously established by them for the introduction of any additional documents after the submission of their written pleadings preceding the Hearing on Jurisdiction. According to the Respondent, the Claimant did not submit any additional documents of its own and objected to the Respondent's request to that effect, as it did not accept the Respondent's explanations on the relevance of the newly submitted documents. With respect to the additional exhibits submitted, the Respondent argued that these were simply original signed versions, in English and in Spanish, of documents that had already been introduced in Spanish by the Claimant, as Exhibit C-71 to its Statement of Claim.
38. On 12 May 2011, the Claimant urged the Tribunal to reject the Respondent's request to submit additional documents and enclosed a record of its communications on that matter with the Respondent. The Claimant contended that the Respondent refused to provide a satisfactory explanation of the relevance of the additional documents and their intended use, despite several requests to that end. Additionally, the Claimant expressed concerns that the Respondent was seeking to submit new evidence and new legal authorities at a late stage, in order to advance only at the Hearing on Jurisdiction a new

argument not previously pleaded. The Claimant stated that it was being denied the ability to fully understand the burden it was required to meet as a result of the Respondent's lack of proper explanation of the relevance and intended use of the additional documents submitted. Furthermore, new expert evidence was being submitted in violation of the agreement between the Parties that no further expert evidence would be introduced and no cross-examination of experts would take place at the Hearing on Jurisdiction. If the Tribunal allowed the submission of the new documents, the Claimant requested that the Respondent be required to identify the specific issues each document was relevant to, as well as the specific paragraphs in each of the legal authorities submitted on which it intended to rely during its oral pleadings, and requested that it be afforded the right to adduce responsive material.

39. On 13 May 2011, with due regard to its powers and duties under Section 14.3 of the Procedural Order No. 1, Section 2.2 of the Procedural Order No. 2, and Articles 15(1) and 25(6) of the UNCITRAL Arbitration Rules, the Tribunal granted the Respondent leave to submit new exhibits and legal authorities. With respect to the former, the Tribunal shared the Claimant's concerns regarding the lack of proper clarification on the part of the Respondent and set a deadline for the Respondent, to the extent that its submission had any purpose other than ensuring a more complete record of the case, to indicate what specific factual matters it sought to address. With regard to the latter, the Tribunal also set a deadline for the Respondent to indicate the specific paragraphs of the Claimant's Rejoinder to which these authorities responded and the specific paragraphs within each authority to be relied on by the Respondent. Lastly, the Tribunal set a deadline for the Claimant to submit further legal authorities, provided that they were strictly limited to responding to those introduced by the Respondent and that the Claimant indicate the specific paragraphs to which they responded and the specific paragraphs within each authority on which it intended to rely.
40. On 13 May 2011, the Respondent provided an explanation regarding its intended use of its additional exhibits and identified the specific paragraphs of the Claimant's Rejoinder to which they responded, as well as the specific paragraphs within each authority on which it intended to rely.
41. On 14 May 2011, the Claimant commented that the Respondent seemed to be relying upon three additional legal authorities in relation to expert evidence matters, contrary to the Parties' agreement and without the presence of the Claimant's expert witness at the Hearing on Jurisdiction. It also asserted that the Respondent had not originally disclosed the real motivation behind its request to submit the new exhibits and objected to being "ambushed", one working day before the Hearing on Jurisdiction, with a new jurisdictional issue that had not previously been pleaded. Accordingly, the Claimant requested that the Tribunal clarify that its authorisation for the submission of the new exhibits was limited to the extent they were relevant to the Respondent's previously pleaded case.
42. On 14 May 2011, the Tribunal decided that, to the extent that the Respondent's introduction of new exhibits raised a new issue not previously pleaded, the Claimant would not be expected to respond to this issue during the Hearing on Jurisdiction. The Tribunal further decided that the issues of whether any argument constituted a new issue not previously pleaded and whether any new legal authorities were introduced in breach

of any agreement between the Parties on waiver of cross-examination would be taken up with the Parties at the start of the Hearing on Jurisdiction.

43. On 16 May 2011, the Claimant submitted the outline of its argument to be delivered at the Hearing on Jurisdiction and expressed its expectation of receiving the same or a PowerPoint presentation from the Respondent. On the same date, the Respondent replied that it had no obligation or intention of submitting its outline or PowerPoint presentation of its arguments and that it had already made this clear to the Claimant previously.
44. On 17 and 18 May 2011, the Hearing on Jurisdiction took place at the Peace Palace, The Hague.
45. On 20 May 2011, the Tribunal issued Procedural Order No. 3, in which it established, *inter alia*, deadlines for the submission of any further documents relating to jurisdiction, a schedule for the submission of simultaneous Post-Hearing Memorials on Jurisdiction by the Parties, and a deadline for the Claimant to submit a further short reply submission, restricted to rebutting any new arguments presented by the Respondent in its Post-Hearing Memorial on Jurisdiction in relation to the "Assignment Issue" which the Claimant considered that it had not had an adequate prior opportunity to address.
46. On 27 May 2011, both Parties submitted further documents relating to jurisdiction.
47. On 22 June 2011, both Parties submitted their Post-Hearing Memorials on Jurisdiction, with their respective translations following on 28 June 2011 from the Respondent, and 7 July 2011 from the Claimant.
48. On 27 June 2011, the Claimant submitted a short reply to the Respondent's Post-Hearing Memorial on Jurisdiction, in accordance with section 2.2 of Procedural Order No. 3. A Spanish translation was submitted by the Claimant on 7 July 2011.
49. On 28 June 2011, the Respondent submitted a letter to the Tribunal objecting to the filing by the Claimant of an Expert Report together with its Post-Hearing Memorial, alleging that this submission violated Procedural Order No. 3.
50. On 29 June 2011, the Claimant submitted a letter to the Tribunal contesting the Respondent's objection and requested that its Expert Report be considered together with its other submissions.
51. On 30 June 2011, the Tribunal informed the Parties that their recent submissions would be considered to the extent that they complied with the terms of Procedural Order No. 3.
52. On 11 July 2011, the Claimant submitted a letter to the Tribunal, enclosing a recently published award in another case.
53. On 13 July 2011, the Tribunal requested that the Parties refrain from submitting any further unsolicited documents.
54. On 14 July 2011, the Respondent requested leave from the Tribunal to file comments in response to the Claimant's letter dated 11 July 2011.

55. On 18 July 2011, the Tribunal rejected the Respondent's request for leave, given the fact that the Claimant's last submission had been sent after the record of the jurisdictional phase had been closed according to Procedural Order No. 3, and had consequently been ignored by the Tribunal. The Tribunal noted that it could consider any publicly-available awards rendered after the close of the proceedings on jurisdiction, and that the Tribunal might ask the Parties to comment thereon, but that the Tribunal did not consider any comments from the Parties to be necessary at that time. The Tribunal reiterated its request that the Parties refrain from making any further unsolicited submissions without first seeking leave from the Tribunal.
56. On 4 November 2011, the Claimant referred to the recent release of another publicly-available award and requested that the Tribunal indicate whether it wished to receive any comments from the Parties thereon.
57. On 7 November 2011, the Tribunal recalled that it could consider any publicly-available awards rendered after the close of the proceedings and informed the Parties that it did not consider any comments from the Parties to be necessary at that time.
58. On 14 December 2011, the Tribunal informed the Parties that it expected to issue its Award on Jurisdiction in mid-January 2012.

E. THE JURISDICTIONAL ISSUES

59. Without prejudice to the full presentation of the factual and legal details of the case by the Parties, the issues raised by the Parties in this jurisdictional phase centre around four principal subjects.
60. The first issue concerns the required 18-month period of recourse to local courts before resorting to international arbitration and whether the MFN clause permits the Claimant to circumvent this requirement by reference to other BITs that do not impose such a requirement (see Section G.I below).
61. The second issue concerns the scope of the umbrella clause invoked by the Claimant, and whether the Claimant's claims arising from the Contract are covered by the BIT. Also at issue is whether the Claimant is under an obligation to submit its claims to the Argentine courts in accordance with Article 23 of the Contract (see Section G.II below).
62. The third issue concerns whether the Claimant has acquiesced to the measures it now complains of in its claim and whether its claim is prescribed (see Section G.III below).
63. The fourth issue concerns the assignment by the Claimant of its rights under the Contract to Ostram and whether the Claimant has standing to pursue any claims in this arbitration due to the assignment to Ostram (see Section G.IV below).
64. These issues have been considered by the Tribunal in the order in which they were argued by the Parties in their submissions.

F. THE PRINCIPAL RELEVANT LEGAL PROVISIONS**F.I. UK-ARGENTINA BIT**

65. For ease of reference, the principal relevant provisions of the BIT are set out below in both authentic versions:

ARTICLE 2**Promotion and Protection of Investment**

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

ARTICLE 3**National Treatment and Most-favoured-nation Provisions**

(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

ARTÍCULO 2**Promoción y protección de inversiones**

(1) Cada Parte Contratante promoverá y creará condiciones favorables para que inversores de la otra Parte Contratante inviertan capitales dentro de su respectivo territorio y, sujeto a su derecho de ejercer los poderes conferidos por su legislación, admitirá dichos capitales.

(2) Las inversiones de inversores de cada Parte Contratante recibirán en toda ocasión un tratamiento justo y equitativo y gozarán de protección y seguridad constante en el territorio de la otra Parte Contratante. Ninguna Parte Contratante perjudicará de alguna manera con medidas injustificadas o discriminatorias la gestión, mantenimiento, uso, goce o liquidación en su territorio de las inversiones de inversores de la otra Parte Contratante. Cada Parte Contratante observará todo compromiso que haya contraído con relación a las inversiones de inversores de la otra Parte Contratante.

ARTÍCULO 3**Trato nacional y cláusula de la nación más favorecida**

(1) Ninguna Parte Contratante someterá en su territorio las inversiones y las ganancias de inversores de la otra Parte Contratante a un trato menos favorable que el otorgado a las inversiones y ganancias de sus propios inversores o a las inversiones y ganancias de inversores de cualquier tercer Estado.

(2) Ninguna Parte Contratante someterá en su territorio a los inversores de la otra Parte Contratante, en cuanto se refiere a la gestión, mantenimiento, uso, goce o liquidación de sus inversiones, a un trato menos favorable que el otorgado a sus propios inversores o a los inversores de cualquier tercer Estado.

[...]

ARTICLE 7
Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from

(a) any existing or future customs union, regional economic integration agreement or similar international agreement to which either of the Contracting Parties is or may become a party, or

(b) the bilateral agreements providing for concessional financing concluded by the Republic of Argentina with Italy on 10 December 1987 and with Spain on 3 June 1988 respectively, or

(c) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 8
Settlement of Disputes Between an Investor and the Host State

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

[...]

ARTÍCULO 7
Excepciones

Las disposiciones del presente Convenio, relativas a la concesión de un trato no menos favorable del que se concede a los inversores de una de las Partes Contratantes o de cualquier tercer Estado, no serán interpretadas en el sentido de obligar a una Parte Contratante a conceder a los inversores de la otra Parte Contratante los beneficios de cualquier tratamiento, preferencia o privilegio proveniente de

(a) una unión aduanera existente o futura, un acuerdo de integración económica regional o cualquier acuerdo internacional semejante, al que una u otra de las Partes Contratantes haya adherido o pueda eventualmente adherir; o

(b) los acuerdos bilaterales que proveen financiación concesional respectivamente concluidos por la República Argentina con Italia el 10 de noviembre de 1987 y con España el 3 de junio de 1988; o

(c) un convenio o acuerdo internacional que esté relacionado en todo o principalmente con tributación o cualquier legislación interna que esté relacionada en todo o principalmente con tributación.

ARTÍCULO 8
Solución de controversias entre un inversor y el Estado receptor

(1) Las controversias relativas a una inversión que surjan, dentro de los términos de este Convenio, entre un inversor de una Parte Contratante y la otra Parte Contratante, que no sean dirimidas amistosamente, serán sometidas a solicitud de cualquiera de las partes en la controversia a decisión del tribunal competente de la Parte Contratante en cuyo territorio la inversión se realizó.

(2) Las controversias arriba mencionadas serán sometidas a arbitraje internacional en los siguientes casos:

(a) a solicitud de una de las partes, en cualquiera de las circunstancias siguientes:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 (provided that both Contracting Parties are Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

(4) The arbitral tribunal shall decide the dispute in accordance with the provisions of

(i) cuando, luego de la expiración de un plazo de dieciocho meses contados a partir del momento en que la controversia fue sometida al tribunal competente de la Parte Contratante en cuyo territorio se realizó la inversión, dicho tribunal no haya emitido una decisión definitiva;

(ii) cuando la decisión definitiva del tribunal mencionado haya sido emitida pero las partes continúen en disputa;

(b) Cuando la Parte Contratante y el inversor de la otra Parte Contratante así lo hayan convenido.

(3) En caso de recurso al arbitraje internacional, el inversor y la Parte Contratante involucrados en la controversia pueden acordar someterla:

(a) al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones, teniendo en cuenta, cuando proceda, las disposiciones del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados, abierto a la firma en Washington D.C el 18 de marzo de 1965 (siempre y cuando ambas Partes Contratantes sean partes de dicho Convenio) y de la Facilidad Adicional para la Administración de Procedimientos de Conciliación, Arbitraje e Investigación); o

(b) a un árbitro internacional o tribunal de arbitraje ad hoc a ser designados por acuerdo especial o establecido de acuerdo con las Reglas de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (C.N.U.D.M.I.).

Si, después de un período de tres meses a partir de la notificación escrita del reclamo, no se hubiera acordado uno de los procedimientos alternativos antes mencionados, dichas partes deberán someter la controversia a arbitraje conforme al Reglamento de Arbitraje de la Comisión de las Naciones Unidas sobre el Derecho Mercantil Internacional vigente en ese momento. Las partes en la controversia podrán acordar por escrito la modificación de dicho Reglamento.

(4) El tribunal arbitral decidirá la controversia de acuerdo con las disposiciones

this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law. The arbitration decision shall be final and binding on both Parties.

(5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree to consult together as soon as possible so that they can reach a mutually acceptable solution.

de este Convenio, el derecho de la Parte Contratante que sea parte en la controversia – incluidas las normas relativas a conflicto de leyes-, los términos de acuerdos especiales concluidos con relación a la inversión y los principios de derecho internacional que resulten aplicables. La decisión arbitral será definitiva y obligatoria para ambas partes.

(5) Las disposiciones de este Artículo no se aplicarán cuando un inversor de una Parte Contratante sea una persona física que hubiese residido habitualmente en el territorio de la otra parte Contratante por más de dos años antes de la fecha de la inversión inicial y ésta no hubiese sido admitida en dicho territorio desde el extranjero. No obstante, si una controversia surgiere entre tal inversor y la otra Parte Contratante, las Partes Contratantes convienen en consultarse tan pronto como sea posible a fin de alcanzar una solución mutuamente aceptable.

F.II. ARGENTINA-LITHUANIA BIT

66. For ease of reference, the principal relevant provisions of the Argentina-Lithuania BIT are set out below in their authentic English and Spanish versions:

Article 9	Artículo 9
Settlement of Disputes between an investor and the host Contracting Party	Solución de controversias entre un inversor y la parte receptora de la inversión
<p>(1) Any dispute which arises within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.</p> <p>(2) If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it may be submitted, upon request of the investor, either to:</p> <ul style="list-style-type: none"> - The competent tribunal of the Contracting Party in whose territory the investment was made; - International arbitration according to the provisions of Paragraph (3). <p>Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party where the investment has been made or to international arbitration, this choice shall be final.</p> <p>(3) In case of international arbitration, the dispute shall be submitted, at the investor's choice, either to:</p> <ul style="list-style-type: none"> - The International Centre for the Settlement of Investment Disputes (ICSID) created by the Convention on the Settlement of Investment Disputes between States and National of other States opened for signature in Washington on 18th March 1965, once both Contracting Parties herein become members thereof. As far as this provision is not complied with, each Contracting Party consents that the dispute be submitted to arbitration under the regulations of the ICSID Additional Facility for the Administration of Conciliation, 	<p>(1) Toda controversia relativa a las disposiciones del presente Acuerdo respecto de una inversión entre un inversor de una Parte Contratante y la otra Parte Contratante, será, en la medida de lo posible, solucionada por consultas amistosas.</p> <p>(2) Si la controversia no hubiera podido así ser solucionada en el término de seis meses a partir de la fecha en que hubiera sido planteada por una u otra de las partes, podrá ser sometida, a pedido del inversor a:</p> <ul style="list-style-type: none"> - los tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión; - arbitraje internacional en las condiciones descritas en el párrafo (3). <p>Una vez que un inversor haya sometido la controversia a los tribunales competentes mencionados de la Parte Contratante en la cual se realizó la inversión o al arbitraje internacional, la elección será definitiva.</p> <p>(3) En el caso de recurso al arbitraje internacional, la controversia podrá ser llevada, a elección del inversor:</p> <ul style="list-style-type: none"> - al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.), creado por el "Convenio sobre Arreglo de Diferencias relativas a las Inversiones entre Estados y Nacionales de Otros Estados", abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado Parte en el presente Acuerdo haya adherido a aquél. Mientras esta condición no se cumpla, cada Parte Contratante da su consentimiento para que la controversia sea sometida al arbitraje conforme a las reglamentaciones del Mecanismo

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| <p>Arbitration and Fact-Finding Proceedings, or</p> <p>- An arbitration tribunal set up from case to case in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).</p> <p>(4) The arbitration tribunal shall decide in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of law, the terms of any specific agreement concluded in relation to such an investment and the relevant principles of international law.</p> <p>(5) The arbitral decisions shall be final and binding for the parties in the dispute. Each Contracting Party shall execute them in accordance with its laws.³</p> | <p>Complementario del C.I.A.D.I. para la Administración de Procedimientos de Conciliación, de Arbitraje o de Investigación, o</p> <p>- a un tribunal de arbitraje establecido para cada caso de acuerdo con las reglas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (C.N.U.D.M.I.).</p> <p>(4) El tribunal arbitral decidirá en base a las disposiciones del presente Acuerdo, el derecho de la Parte Contratante que sea parte en la controversia, incluidas las normas relativas a conflictos de leyes a los términos de eventuales acuerdos específicos concluidos con relación a la inversión como así también a los principios pertinentes del derecho internacional en la materia.</p> <p>(5) Los fallos del tribunal arbitral será definitivos y obligatorios para las partes en la controversia. Cada Parte Contratante las ejecutará de conformidad con su legislación.</p> |
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³ English translation taken from UNITED NATIONS TREATY SERIES, vol. 2033, pp. 264-265.

F.III. VIENNA CONVENTION ON THE LAW OF TREATIES

67. The principal relevant provisions of the VCLT are set out below in both English and Spanish:

SECTION 3. INTERPRETATION OF TREATIES**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 provisions;

(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.

SECCIÓN 3. INTERPRETACIÓN DE LOS TRATADOS**ARTÍCULO 31****Regla general de interpretación**

1. Un tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin.

2. Para los efectos de la interpretación de un tratado, el contexto comprenderá, además del texto, incluidos su preámbulo y anexos:

(a) todo acuerdo que se refiera al tratado y haya sido concertado entre todas las partes con motivo de la celebración del tratado;

(b) todo instrumento formulado por una o más partes con motivo de la celebración del tratado y aceptado por las demás como instrumento referente al tratado.

3. Juntamente con el contexto, habrá de tenerse en cuenta:

(a) todo acuerdo ulterior entre las partes acerca de la interpretación del tratado o de la aplicación de sus disposiciones;

(b) toda práctica ulteriormente seguida en la aplicación del tratado por la cual conste el acuerdo de las partes acerca de la interpretación del tratado;

(c) toda forma pertinente de derecho internacional aplicable en las relaciones entre las partes.

4. Se dará a un término un sentido especial si consta que tal fue la intención de las partes.

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.

ARTÍCULO 32**Medios de interpretación complementarios**

Se podrán acudir a medios de interpretación complementarios, en particular a los trabajos preparatorios del tratado y a las circunstancias de su celebración, para confirmar el sentido resultante de la aplicación del artículo 31, o para determinar el sentido cuando la interpretación dada de conformidad con el artículo 31:

- (a) deje ambiguo u oscuro el sentido; o
- (b) conduzca a un resultado manifiestamente absurdo o irrazonable.

G. SUMMARY OF THE PARTIES' ARGUMENTS

G.I. THE PRE-ARBITRATION REQUIREMENTS OF ARTICLE 8 OF THE BIT AND THE INVOCATION OF THE MOST-FAVOURLED-NATION CLAUSE IN ARTICLE 3 OF THE BIT

1. Arguments by the Respondent

68. The Respondent argues this claim falls outside the jurisdiction of the Tribunal because the Claimant has failed to comply with the requirements set forth in Article 8 of the BIT, which demand that the dispute be submitted to the Argentine courts for a period of 18 months prior to resorting to international arbitration. According to the Respondent, the Claimant cannot invoke the Most-Favoured-Nation clause in Article 3 of the BIT to avoid this jurisdictional requirement by reference to the allegedly less-demanding provisions of the Argentina-Lithuania BIT.

(i) *Prior submission of disputes to the Argentine courts for a period of 18 months is a requirement for jurisdiction*

69. The Respondent submits that Article 8 of the BIT “articulates a multi-layered, sequential dispute resolution system” in which all subsections of the Article “are interdependent and interlinked.”⁴ The BIT limits the State’s consent to arbitration to the strict fulfilment of the requirements set forth in Article 8 of the BIT. Therefore, since the Claimant has not submitted – and has not even attempted to submit – its claim to the Argentine courts for a period of 18 months as required by Article 8(1) and (2), it has failed to comply with a jurisdictional requirement under the BIT and cannot resort to international arbitration.⁵

70. To support its characterisation of the nature of Article 8(1) and (2), the Respondent refers to the *Maffezini v. Spain*⁶ and the *Wintershall v. Argentine Republic*⁷ cases, where provisions similar to the one in the present BIT were found to constitute jurisdictional requirements and not mere procedural steps. These tribunals found that the wording of the BIT imposes an obligation, and not a mere option. In the alternative, the Respondent argues that this is a matter of admissibility and that, in any event, the requirements of Articles 8(1) and (2) of the UK-Argentina BIT cannot be perceived as merely procedural, rather than jurisdictional, since they establish conditions that relate to a

⁴ R I, ¶7.

⁵ R II, ¶2; R III, ¶¶16-19.

⁶ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objection to Jurisdiction, 25 January 2000 (hereinafter “*Maffezini*”), ¶¶34-37.

⁷ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008 (hereinafter “*Wintershall*”), ¶¶133-153.

stage that precedes the arbitration proceedings.⁸ The Respondent cites several decisions from the ICJ and international arbitral tribunals to support this argument.⁹

71. Additionally, the Respondent argues that the use of the modal verb “shall” in Article 8(1) of the BIT clearly suggests the idea of an obligation to first resort to the local courts before submitting the dispute to international arbitration. Even if the requirement were to be considered procedural, it may not be set aside by anyone but the parties to the Treaty.¹⁰ In this sense, the tribunal in *Murphy v. Ecuador* recently reaffirmed that procedural requirements may not be ignored without giving rise to procedural consequences.¹¹ If the procedural conditions to a State’s consent to international arbitral jurisdiction are overlooked, there is no consent to international jurisdiction.¹²
72. Further, the *Wintershall* tribunal also rejected the idea that recourse to local courts for a period of 18 months could be treated as a mere waiting period, as contended by the Claimant. The tribunal’s analysis was as follows:

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 Article 10. The latter forms the subject matter of paragraph (2) of Article 10.¹³

73. Moreover, this jurisdictional requirement represents a vital matter of international law¹⁴ and cannot be circumvented just because it is claimed to be “burdensome,” “leads to

⁸ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 35:4-12.

⁹ *Case concerning Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Rwanda), Judgment of 3 February 2006, 2006 ICJ Reports 6, ¶¶87-88; *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Decision on Preliminary Objections, Judgment of 1 April 2011, ICJ, ¶¶133-134; *Wintershall*, *supra* note 7, ¶127 and ¶145; *Murphy Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Decision on Jurisdiction, 15 December 2010 (hereinafter “*Murphy*”), ¶142.

¹⁰ R II, ¶7.

¹¹ R II, ¶8. *Murphy*, *supra* note 9, ¶142.

¹² R II, ¶9; R III, ¶25.

¹³ *Wintershall*, *supra* note 7, ¶145.

¹⁴ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 29:2-9.

inefficiency and inequity,” or that it would be “futile as the dispute would not be resolved in eighteen months.”¹⁵

74. First, it was the Claimant who let eight years go by between the adoption of the first measures challenged and the submission of this dispute, a fact which alone defeats the Claimant’s argument regarding the futility of resorting to local courts.¹⁶ Furthermore, the fact that the Claimant had previously filed administrative claims is irrelevant. When faced with silence on the part of the administrative authorities, the Claimant could have resorted to the courts, as recognised by the Claimant’s own expert.¹⁷ Indeed, the Claimant’s assertion that it attempted to amicably resolve the dispute in observance of Article 8(1) of the BIT indicates that the Claimant has been selective in its compliance with the dispute resolution provisions, thereby contradicting its own thesis that these provisions should be replaced by a more-favourable mechanism established in another treaty.¹⁸
75. Secondly, with respect to the arguments regarding “inefficiency and inequity, in that the dispute would not be resolved in the eighteen-month period”, the Claimant has provided no evidence that it has been prevented from filing claims with the local courts, nor that it would not receive effective judicial protection of its rights.¹⁹
76. Thirdly, the Respondent notes that, according to the expert report by Mr. Ismael Mata, “the Argentine legal system provides for a wide range of possibilities for Claimant to submit its claim to the local courts in a prompt manner and to eventually have such a claim decided within the term specified by the Treaty.”²⁰ Indeed, the Respondent stresses that the BIT does not impose on the Claimant the need to exhaust local remedies or even necessarily to litigate the dispute before the Argentine courts for 18 months. Rather, the Claimant might file a suit and obtain a final decision from a competent Argentine judge (who is bound to give primacy to an international treaty such as the BIT over local laws) before the lapse of that period, thus becoming entitled to refer the dispute to international arbitration, if it so desires.²¹ Otherwise, should the dispute remain unresolved after 18 months, whether due to the lack of a final decision or otherwise, the dispute may thereafter be submitted by the Claimant to arbitration.²² The Claimant’s argument that the dispute would not have been finally resolved within 18 months is therefore irrelevant.
77. Lastly, with regard to the Claimant’s argument that it would incur additional costs, the Respondent alleges that it has been proven that the costs of judicial proceedings in

¹⁵ R I, ¶12; R III, ¶21.

¹⁶ R II, ¶11.

¹⁷ R II, ¶12; Expert Report of Mr. Albert B. Bianchi, dated 24 January 2011 (hereinafter “First Bianchi Report”), ¶38.

¹⁸ R III, ¶24; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 28:5-18.

¹⁹ R II, ¶13.

²⁰ Expert Report by Mr. Ismael Mata, dated 8 November 2010 (hereinafter “First Mata Report”); Expert Report of Mr. Ismael Mata, undated (hereinafter “Second Mata Report”), ¶¶19-20; R I, ¶14.

²¹ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 29-31.

²² Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 29:17-22.

Argentina are low enough as to not prevent anyone from resorting to judicial relief, and refers to the Second Mata Report in this respect.²³

78. In conclusion, the Claimant has not proven that the requirement to first submit the dispute to the local courts is futile and since the Claimant has failed to comply with Article 8(1) and (2) of the BIT, it has not fulfilled the requirement to establish arbitral jurisdiction.

(ii) Article 8 of the BIT is part of the “offer to arbitrate” and cannot be altered by the Claimant

79. In addition, the Respondent argues that the requirement of filing the claim with the local courts before initiating international arbitration proceedings “is part of the *offer to arbitrate* made by the Contracting Parties under the BIT.”²⁴ This standing unilateral offer must be accepted by the investor for an arbitration agreement to exist. An investor, such as the Claimant, may accept or not the offer as it appears in the BIT, but may not unilaterally modify it. In this case, the 18-month period during which the dispute must be filed before the local courts is an essential prerequisite to instituting arbitration proceedings and constitutes an integral part of the standing offer of the host State to arbitrate disputes. The host State’s consent to arbitration “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.”²⁵ The Respondent refers to several arbitral awards, as well as ICJ cases to support this view.²⁶

(iii) As a rule, MFN clauses do not apply to jurisdictional matters

80. The Respondent notes that international jurisdiction is premised on the principle of consent. It then goes on to reason that, since an MFN clause is not an arbitration agreement, and does not form part of the offer to arbitrate, it must constitute a separate consent to arbitration in order for it to apply to jurisdictional matters. Such consent would have to derive from the clear and unequivocal intention of the Contracting Parties to the BIT and therefore could not result from the incorporation of dispute resolution provisions from other treaties through the application of the MFN clause.²⁷ Doing so, according to the Respondent, would render the requirements contained in the dispute resolution provision of the BIT pointless, as any given investor would be able to side-step them.²⁸

²³ R II, ¶15; Second Mata Report, ¶¶46-49.

²⁴ R I, ¶18.

²⁵ R I, ¶22.

²⁶ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 31-35.

²⁷ R I, ¶25; R II, ¶¶17-18; R III, ¶26; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 40-42.

²⁸ Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 22::4-23::4.

81. The Respondent asserts that consent under public international law must be “unequivocal” and cites a passage from *Djibouti v. France* in which the ICJ summarised its jurisprudence on consent as follows:

The consent allowing for the Court to assume jurisdiction must be certain... As the Court has recently explained, whatever the basis of consent the attitude of the respondent State must “be capable of being regarded as ‘an unequivocal indication’ of the desire of that State to accept the Court’s jurisdiction in a ‘voluntary and indisputable’ manner.”²⁹

82. Moreover, the Respondent refers to *Democratic Republic of the Congo v. Rwanda* in which the ICJ held that the observance of a dispute settlement provision is a *conditio sine qua non* in order for an international court to exert its jurisdiction. The Respondent concludes that an MFN clause cannot be applied to modify a jurisdictional clause, unless this is expressly provided for.³⁰
83. More specific to investment treaty arbitration, the Respondent quotes the *Plama*³¹ tribunal which held that “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.” The Respondent further refers to similar rulings which were issued by the tribunals in *Berschader*,³² *Tecmed*,³³ *Salini*,³⁴ *Telenor*,³⁵ and *Wintershall*.³⁶
84. The Respondent stresses that the determination of whether consent to arbitration exists is not the same as the interpretation of the scope of an arbitration agreement the existence of which has been established. In the present case, the Claimant seeks to establish the existence of a distinct and separate arbitration agreement through the operation of an MFN clause. Therefore, for an MFN clause to serve as such a dispute settlement provision, the intention of the Contracting Parties must be clear and unequivocal, absent which the MFN clause cannot apply to jurisdictional matters. In this case, the BIT lacks such clear and unequivocal intent.

²⁹ *Case concerning Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), Judgment of 4 June 2008, 2008 ICJ Reports 177, ¶62.

³⁰ R II, ¶¶19-20. *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), Judgment of 3 February 2006, 2006 ICJ Reports 6, ¶¶91-93.

³¹ *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005 (hereinafter “*Plama*”), ¶223.

³² *Berschader and Berschader v. Russian Federation*, SCC Case No 080/2004, Award and Correction, signed 21 April 2006 (hereinafter “*Berschader*”), ¶181.

³³ *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003 (hereinafter “*Tecmed*”), ¶74.

³⁴ *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 15 November 2004 (hereinafter “*Salini*”), ¶¶118-119.

³⁵ *Telenor Mobile Communications AS v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006 (hereinafter “*Telenor*”), ¶91.

³⁶ *Wintershall*, *supra* note 7, ¶167.

85. The Respondent further challenges the Claimant's reliance upon certain academic writers to support its argument in favour of the extension of the MFN clause to dispute settlement provisions, and in particular notes that Peter Turner "does not say what Claimant states at all. Quite on the contrary, he even supports Argentina's position by contending that the Treaty contains an 'offer to arbitrate' made by the Contracting States, the terms of which must be accepted by the investor in order to be able to submit the dispute to arbitration."³⁷
86. Lastly, with reference to the Claimant's reliance on the *Maffezini* case³⁸ to invoke a broad interpretation of the MFN clause, the Respondent notes that the *Maffezini* decision was based on an erroneous interpretation of the *Ambatielos* case.³⁹ In particular, the Respondent stresses that "the citation from the Commission's statement about the MFN clause on which the Maffezini tribunal relies referred to matters of substance and had no relation whatsoever to matters of procedure."⁴⁰
87. In this regard, the Respondent refers to Professor Zachary Douglas who finds the *Ambatielos* case to be irrelevant:

This analysis of the *Ambatielos* case reveals that the Arbitration Commission's ruling in abstracto that the scope of an MFN clause expressed to relate to matters of 'commerce and navigation' might encompass 'the administration of justice' is of little significance in deciding whether an MFN clause expressed in general terms might encompass the jurisdictional framework for the submission of claims to international arbitration.⁴¹

(iv) *No clear and unequivocal intention to apply the MFN clause derives from the text of the Treaty*

88. The Respondent submits that Article 3 of the BIT is to be construed in accordance with the rules of treaty interpretation contained in Articles 31 and 32 of the VCLT. According to Article 31, the starting point for treaty interpretation is the ordinary meaning of the text, rather than attempting to extrinsically determine the intent of the parties. Thus, when the ordinary meaning of the text is clear, there should be no resort to other means of interpretation. This has been confirmed by numerous ICJ cases and scholarly works.⁴² Moreover, the Respondent argues that the only authentic interpreters

³⁷ R II, ¶¶21-24; PETER J. TURNER, Ch. 10 – *Investor-State Arbitration* in MANAGING BUSINESS DISPUTES IN TODAY'S CHINA: DUELLING WITH DRAGONS (Michael J. Moser ed., 2007), p. 235 (C-LA-47).

³⁸ *Maffezini*, *supra* note 6.

³⁹ R II, ¶¶25-26; *Ambatielos Case*, Award of the Commission of Arbitration established by the agreement concluded on 24 February 1955 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Greece, 6 March 1951, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, vol. XII (hereinafter "*Ambatielos*"), p. 106 (R-LA-22).

⁴⁰ R II, ¶¶26-34.

⁴¹ ZACHARY DOUGLAS, INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009), p. 355 (R-LA-60).

⁴² R I, ¶¶32-35; *Case concerning the Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), Judgment of 12 November 1991, ICJ, ¶48, citing *Case concerning the Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, ICJ, p. 8; *Case concerning*

of treaties are the States themselves, as they are the only parties thereto. Consequently, the Claimant's opinion regarding the Contracting Parties' intention should be disregarded.⁴³

89. Further, when interpreting an MFN clause, the *ejusdem generis* principle also applies. Accordingly, an MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates."⁴⁴ The Respondent states that "the fact that the 'dispute settlement' mechanism is not placed among the clauses which may be imported from other treaties is sufficient evidence of the fact that Contracting States did not intend to include it."⁴⁵ Although the Claimant recognises the applicability of this principle, the Respondent asserts that the Claimant erroneously argues that this principle is the primary rule to be applied in the interpretation of the MFN clause, contrary to the VCLT's provisions on treaty interpretation.⁴⁶
90. With regard to the textual interpretation of Article 3 of the BIT, the Respondent notes that both paragraphs of the Article coincide in that they establish what kind of behaviour may be contrary to the MFN clause by stating that neither of the Contracting Parties shall "subject...to treatment..." According to the Respondent, the verb "to subject" (as distinguished from "to grant" used in other BITs concluded by the Respondent) has a negative connotation, suggesting that not all conduct is covered by the MFN clause. In addition, use of the noun "treatment" implies a limitation to the substantive rights of the investors.⁴⁷
91. The Respondent cites the tribunal in the *Telenor* case, which found such a distinction between procedural and substantive rights and their relation to MFN clauses:

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 of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing *procedural* rights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.⁴⁸

92. The Respondent also cites the holding in *Berschader* to the same effect.⁴⁹ That conclusion was reinforced by the fact that the expression "in its territory" (also found in

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment of 15 February 1995, ICJ, ¶33.

⁴³ R II, ¶35; CARLOS FERNÁNDEZ DE CASADEVANTE ROMANÍ, *LA INTERPRETACIÓN DE LAS NORMAS INTERNACIONALES* (1996), p. 55 (R-LA-62).

⁴⁴ R I, ¶¶35-36. *Ambatielos*, *supra* note 39, p. 107.

⁴⁵ R II, ¶52; R III, ¶32.

⁴⁶ R II, ¶¶37-39.

⁴⁷ R I, ¶¶37-39; R II, ¶¶41-43.

⁴⁸ *Telenor*, *supra* note 35, ¶92.

⁴⁹ *Berschader*, *supra* note 32, ¶185.

Article 3 of the instant BIT) “appears to indicate that what the Contracting Parties had in view was the material rights accorded to investors within the territory of the Contracting States.”⁵⁰ The scope of the MFN clause is thus limited to matters taking place within its territory, which does not include recourse to international dispute resolution.⁵¹

93. The Respondent also draws a distinction between paragraphs (1) and (2) of Article 3 of the UK-Argentina BIT with respect to the scope of the MFN clause: while the former applies to “investments and returns of investors”, the latter applies to “investors” and is limited to the “management, maintenance, use, enjoyment or disposal” of their investments. As a result, the Respondent concludes that the parties to the BIT expressly agreed upon wider MFN protections to investments and profits than to investors.⁵² It also argues that the wilful wording of the MFN provision applicable to the investors – namely, the ones allowed to invoke the treaty’s dispute resolution provisions – indicates that the MFN treatment to which they are entitled is not absolute and that it is restricted to issues expressly referred to in Article 3(2). Accordingly, this provision is related to certain substantive protections granted to an investor rather than to dispute settlement. It refers to the daily operations or activities of the investment, which clearly do not include exceptional events such as the institution of legal proceedings against the host State. This interpretation is supported by Article 2(2) of the BIT, which also refers to “management, maintenance, use, enjoyment or disposal” in relation to “unreasonable or discriminatory measures.” The difference in nature between the dispute settlement clause and the substantive provisions is further evident in Article 21 of the UNCITRAL Arbitration Rules, which expressly recognises that the arbitration clause is to be considered independently from the other terms of the contract.⁵³
94. The Respondent further submits that the MFN clause of the BIT does not refer to “all matters” or “all issues,” phrases on which tribunals, such as in *Maffezini v. Spain*,⁵⁴ have relied when making broad interpretations of the scope of MFN provisions in other BITs. The Respondent refers to several tribunals that have refused to extend the scope of the MFN clause to dispute settlement when the wording of the clause neither envisaged it explicitly nor encompassed “all rights or all matters covered by the agreement.”⁵⁵
95. Additionally, the Respondent argues, as recognised by the Claimant itself, that the placement of the dispute settlement provision is relevant for the interpretation of the MFN clause. In addition, the Respondent argues that the placement of the MFN clause amongst provisions relating to substantive treatment is yet another indication that the parties to the BIT did not intend to extend its application to dispute resolution matters,

⁵⁰ *Berschader*, *supra* note 32, ¶185; R II, ¶40.

⁵¹ R III, ¶30; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 39:7-16.

⁵² Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 27:22-25, and p. 38:1-19. Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 18:11-19:10.

⁵³ R I, ¶¶46-50; R II, ¶¶53-54; R II, ¶¶55-56; R III, ¶28; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 39:17-40:2.

⁵⁴ R I, ¶¶46-50; *Maffezini*, *supra* note 6, ¶49.

⁵⁵ R I, ¶¶48-49; *Salini*, *supra* note 34, ¶¶118-119; *Telenor*, *supra* note 35, ¶98.

which are dealt with in the treaty's final provisions.⁵⁶ The Respondent thus concludes that the dispute resolution provision is not encompassed by the scope of the MFN clause.⁵⁷

96. Contrary to the Claimant's argument that, since the exceptions to MFN treatment in Article 7 of the BIT fail to refer to any matter connected to dispute settlement, the MFN clause must apply to the dispute settlement provision, the Respondent asserts that the *expressio unius exclusio alterius* principle is only a supplementary means of interpretation that is not determinative where a treaty contains other decisive elements. To the contrary, the Respondent notes that the fact that the exceptions enumerated in Article 7 of the BIT are not even remotely connected with dispute settlement, as recognised by the Claimant, indicates that the Contracting Parties already did not contemplate the application of the MFN clause to dispute settlement matters. The Respondent asserts that the Contracting Parties only included exceptions for those aspects about which there could be some doubt concerning the scope of the MFN clause.⁵⁸ If the Claimant's position were to be accepted, that would entail the "absurd" conclusion that the treaty's *ratione temporis* provisions are within the scope of the MFN clause as well.⁵⁹
97. Lastly, the Respondent argues that reference to the alleged purpose of the BIT does not authorise a breach of Article 8. Even if the Claimant asserts that the requirement to submit to the local courts for a period of 18 months would defeat the purpose of the BIT, the Respondent refers to the *Wintershall* tribunal who in this regard held:

Resort to the Preamble of the BIT in support of unrestricted direct access to ICSID Arbitration is also misplaced. The assertion [...] 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 [of] 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.

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

⁵⁶ R III, ¶32; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 37:8-21.

⁵⁷ R II, ¶¶46-48.

⁵⁸ R I, ¶¶51-52.

⁵⁹ R II, ¶49.

must be presumed, is contrary to the text (and context) of this BIT, *i.e.*, the Argentina-Germany BIT.⁶⁰

98. According to the Respondent, the Claimant's allegation regarding the "object and purpose" of the BIT relies on equivalent wording analyzed by the *Wintershall* tribunal and should be dismissed for the same reasons, which have been echoed by various other tribunals and scholars.⁶¹ The Respondent further notes that, contrary to the arguments advanced by the Claimant, the wording of the MFN clause before *Wintershall* was actually wider than the clause in the BIT at hand, since it encompassed "activities related to investment."⁶² The Respondent concludes that there are no grounds to maintain that the "object and purpose" of the BIT authorise a breach of the requirements of Article 8(1) and (2) of the BIT.

(v) *The usual practice of the Contracting Parties confirms that the MFN clause in the BIT does not apply to dispute settlement issues*

99. According to the Respondent, the United Kingdom's BIT practice evidences that, whenever it wanted to extend the application of the MFN clause to dispute settlement provisions, it has done so in a clear and unequivocal manner. Between 1975 and 1989, the United Kingdom concluded 35 BITs, none of which established that the MFN clause would apply to dispute settlement matters. However, since 1990, some BITs concluded by the United Kingdom have included an additional paragraph in the MFN clause that extends the MFN treatment to dispute settlement clauses. After having concluded a first BIT with this clear extension of the MFN treatment (the UK-Burundi BIT, concluded on 13 September 1990), the United Kingdom went on to execute other BITs that did not include this specific language (*e.g.*, the UK-Argentina BIT, concluded on 11 December 1990).⁶³
100. The phrase "for the avoidance of doubt..." that sometimes precedes the provision extending the scope of the MFN treatment does not affect this conclusion. This phrase, whose use is inconsistent, only shows the clear and unequivocal intention to include dispute settlement provisions within the scope of the MFN clause in a specific treaty where consent to arbitration would otherwise be unclear,⁶⁴ and does not reflect any intention with respect to the interpretation of previous BITs.⁶⁵ In this regard, the *Wintershall* tribunal held as follows:

Ordinarily, an MFN Clause would not operate so as to replace one means of dispute settlement with another. This is (presumably) why the drafters of the UK Model BIT had provided (in Article 3(3)) that "for avoidance of doubt MFN

⁶⁰ *Wintershall*, *supra* note 7, ¶¶154-155.

⁶¹ *Plama*, *supra* note 31, ¶163; DOUGLAS, *supra* note 41, p. 345.

⁶² R III, ¶29; Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 17:15-20:9.

⁶³ R I, ¶¶59-69; R III, ¶33.

⁶⁴ Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 20:10-22:3.

⁶⁵ R I, ¶¶63-64.

treatment shall apply to certain specified provisions of the BIT including the dispute settlement provision.⁶⁶

101. The Respondent concludes therefore that the Tribunal should not extend the scope of the MFN clause when such clause fails to contain a clear and unequivocal indication that it is applicable to dispute settlement provisions.

(vi) Alternatively, the circumstances of the case preclude the application of the MFN clause to dispute settlement provisions

102. In the alternative, the Respondent argues that even if the Tribunal were to adopt a broad interpretation of the MFN clause, it still cannot be applied to dispute settlement provisions given the circumstances of the present case.
103. First, the 18-month clause is an essential clause of the Treaty that was specially negotiated by Argentina, not only in this BIT, but also in many others. Yet, it is not uniformly included in every single Argentine BIT. This evidences the Contracting Parties' intention to include it as a special and binding provision. Moreover, the Respondent notes that, after executing treaties that did not include the 18-month clause, Argentina continued executing treaties that did include this requirement.⁶⁷ This constitutes further proof that the 18-month clause was not meant to be covered by the MFN clause: why else would Argentina have continued to conclude BITs with this requirement, when the MFN clause would have already rendered it nugatory? Any other conclusion would render the 18-month provision useless. As soon as Argentina signed a BIT without this requirement, any such provision in future BITs would be automatically suppressed through the effect of the MFN clause.⁶⁸
104. The Respondent stresses that the importance of the 18-month provision is also reflected in the United Kingdom's BIT practice. Only two of its treaties contain this requirement. Both BITs were signed after the United Kingdom had begun its practice of including explicit provisions where it intended to extend the scope of the MFN clause to dispute resolution provisions, but neither of the treaties which contain the 18-month provision include the more broadly-worded MFN clause.⁶⁹
105. Moreover, the Respondent refers to the UK-Paraguay BIT, which shows that the expression "for the avoidance of doubt it is confirmed that..." is not aimed at clarifying a prior intention, but is actually included in order to distinguish the BIT from other BITs in which the MFN clause does not apply to dispute settlement provisions. The BIT between United Kingdom and Paraguay, signed in 1981, did not extend the scope of the MFN clause to include dispute settlement provisions. However, in 1993, the Government of Paraguay proposed to amend the BIT and include a third paragraph to the MFN clause that would state that "[f]or the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions

⁶⁶ *Wintershall, supra* note 7, ¶167.

⁶⁷ R I, ¶¶70-73.

⁶⁸ R I, ¶¶73-75.

⁶⁹ R I, ¶74.

of Articles 1 to 11 of this Agreement.” The United Kingdom accepted this amendment. The Respondent concludes that this interaction demonstrates that the inclusion of an express reference to dispute settlement provision in the MFN clause constituted an amendment to the treaty, and not just a mere clarification.⁷⁰

106. Secondly, the Claimant cannot seek to import discrete parts of the arbitration provision of the Argentina-Lithuania BIT as it establishes a distinct dispute settlement system. According to the Respondent, the differences between the dispute settlement clause in the Argentina-Lithuania BIT and the UK-Argentina BIT are sufficiently pronounced (e.g., the Argentina-Lithuania BIT’s *fork-in-the-road* provision and option of ICSID arbitration at the investor’s choice) that the Claimant is precluded from importing it even under a broad conception of the MFN clause.⁷¹
107. Thirdly, the Respondent argues that Article 9 of the Argentina-Lithuania BIT expressly precludes any of its provisions from being exported by limiting the application of the dispute settlement provision to “[a]ny dispute which arises within the terms of this Agreement.”⁷²
108. Fourthly, in the event the MFN clause were applicable to Article 8 of the BIT, the Claimant would need to prove that the provision foreseen in the Argentina-Lithuania BIT grants “more favourable” treatment “within the territory” of the Argentine Republic.⁷³ According to the Respondent and scholars it cites, the mere fact that the BIT requires that potential claimants first endeavour to settle the dispute in the host State’s domestic courts cannot be axiomatically considered to be less favourable treatment. In particular, the Respondent refers to Christer Söderlund who cautions against such an assumption:

In order for the MFN clause to be considered in a procedural context, one will, for instance, need to ask whether –as a matter of principle- a possibility to proceed to international investment dispute arbitration without exhausting local remedies is “more favourable”. As an empirical experience, there is no doubt that investors will consider the latter alternative more favourable, in fact it is the perceived inadequacy of domestic judiciaries, particularly in capital-importing countries, that have created the impetus toward international arbitration in the first place. *However, on the level of principle, there is nothing that dictates that domestic court review must necessarily be less favourable alternative.*

It was noted by the Gas *Natural* Tribunal that having to submit to the minimum 18 months’ period in a local court (inappropriately referred to as “waiting” period) was “a less favourable degree of protection”. This was, indeed an axiomatic statement which even if it may be true in the particular instance, was not supported by any empirical evidence and, on the level of principle, questionable.⁷⁴

(emphasis added)

⁷⁰ R III, ¶¶34-36.

⁷¹ R I, ¶¶76-78; R III, ¶37; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 44.

⁷² R I, ¶79.

⁷³ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 45:2-14.

⁷⁴ R I, ¶¶82-83; C. SÖDERLUND, *Most Favoured Nation (MFN) Clauses in Bilateral Investment Treaties* in LIBER AMICORUM BERNARDO CREMADES (M.A. Fernandez-Ballesteros and David Arias eds., 2010), p. 1125.

109. Additionally, analyzing this matter in light of the *Maffezini v. Spain* case, Professor Jürgen Kurtz comes to a similar conclusion:

The Maffezini approach is to simply assume that access to the Spanish courts in the eighteen-month period is ‘less favourable treatment’ than direct arbitral proceedings. This view in itself seems almost reflective of an epistemological belief in the superiority of investment arbitration. The lack of a rigorous comparison between the two forms of adjudication is a serious flaw in the Tribunal’s reasoning and one which should (but most likely will not) weaken its influence amongst later arbitral tribunals.⁷⁵

110. Indeed, even the scholars cited by the Claimant, Andrew Newcombe and Lluís Paradell, recognised that one of the matters that has to be taken into account in order to determine the application of the MFN clause is whether there has been less favourable treatment or not.⁷⁶ The Respondent goes on to argue that “it cannot be reasonably concluded that there is inequality on account of the treatment accorded to Lithuanian investors, since one could consider that having the opportunity to first resort to the Argentine courts and, then, if the dispute is not settled, to international arbitration is more beneficial.”⁷⁷
111. In the present case nothing prevented the Claimant from filing a claim before the competent Argentine courts and, as stated in the Mata Report, the Claimant could have potentially received a final decision in less than 18 months.⁷⁸

2. Arguments by the Claimant

112. The Claimant rejects the Respondent’s arguments regarding the impossibility of invoking the MFN clause to benefit from a more favourable dispute settlement procedure. The Claimant argues that its ability to invoke the MFN clause to overcome a procedural hurdle, such as the 18-month provision, is based on sound treaty interpretation and is confirmed by a majority of arbitral decisions on the matter.

(i) *The majority of tribunals have adopted a broad interpretation of MFN clauses*

113. According to the Claimant, States have used MFN clauses in BITs to ensure that they obtain any advantages, privileges, and concessions that the granting State has accorded or accords in the future to third States. Therefore, the MFN treatment prohibits the granting State from discriminating between investors and ensures that the investor from one State receives no less favourable treatment than the treatment provided to the investor from a third State. Additionally, MFN clauses “promote investor-State relations, economic competition and help to harmonize the degree of investment protection.” Consequently, a broad interpretation of MFN clauses helps to satisfy these

⁷⁵ ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW & PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009), p. 229 (citing J. Kurtz, *The MFN Standard and Foreign Investment: An Uneasy Fit?*, 5 J. WORLD INVESTMENT & TRADE 861 (2004)) (C-LA 38).

⁷⁶ NEWCOMBE & PARADELL, *supra* note 75, p. 196.

⁷⁷ R II, ¶¶57-61; R III, ¶38.

⁷⁸ R I, ¶¶84-85.

goals “by viewing BITs not as expressions of quid pro quo bargains but rather components of an international economic order based on basic principles of investment protection and guarantees.” In this context, the Claimant further stresses that one of the essential rights that the MFN clause is designed to protect, is the right of an investor to initiate arbitration against a host State.⁷⁹

114. Even though the Claimant acknowledges that investment tribunals have given seemingly conflicting answers to the question of whether MFN clauses can be applied to import more favourable dispute resolution provisions, these conflicting answers can be explained by variations in the drafting of the clauses and the purpose for which the MFN was invoked. Accordingly, the Claimant contends that in cases that have involved the overcoming of procedural obstacles, tribunals have regularly allowed investors to bypass such unfavourable procedural requirements (*e.g.*, *Maffezini v. Spain*).⁸⁰ On the other hand, tribunals have not allowed investors to use an MFN clause to import entire dispute resolution mechanisms beyond those set forth in the BIT itself (*e.g.*, *Salini v. Jordan*⁸¹ and *Plama v. Bulgaria*⁸²). The Claimant further cites several authorities that support its view, for example, Professors Rudolf Dolzer and Christoph Schreuer explain that:

The two sets of cases may be distinguishable on factual grounds. The cases in which the tribunals accepted the applicability of the MFN clauses to dispute settlement all concerned procedural obstacles. The cases in which the effect of the MFN clauses was denied concerned attempts to extend the scope of jurisdiction substantively to issues not covered by the arbitration clause.⁸³

115. The Claimant refers in more detail to the tribunal’s findings in the *Maffezini* case, where it was held 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.”⁸⁴ The Claimant further rejects the arguments raised by the Respondent against the *Maffezini* tribunal’s interpretation of the *Ambatielos* and *Anglo-Iranian Oil Company* cases.⁸⁵ The Claimant contends that *Ambatielos* supports its position.⁸⁶ The decision states that the MFN clause can encompass matters belonging to the same category of subject as that to which the clause itself relates; meanwhile, in the present case, dispute settlement activities fall within the field of application of the “management, maintenance, use, enjoyment or disposal” of the investment foreseen in the MFN clause. The Claimant refutes the Respondent’s position that the ICJ, in the *Anglo-Iranian Oil*

⁷⁹ C II, ¶¶5-8.

⁸⁰ C IV, ¶¶71-74; *Maffezini*, *supra* note 6.

⁸¹ *Salini*, *supra* note 34.

⁸² *Plama*, *supra* note 31.

⁸³ C III, ¶¶12-14; RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), p. 256 (C-LA-49).

⁸⁴ *Maffezini*, *supra* note 6, ¶56; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 103-108.

⁸⁵ C III, ¶¶15-20.

⁸⁶ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 98-100.

Company case, found that the MFN clause had no relation to jurisdictional matters. According to the Claimant, the ICJ explicitly stated that it was not “considering the meaning and the scope of the most-favoured-nation-clause.”⁸⁷

116. The approach followed in *Maffezini* has also been followed in UNCITRAL cases, including cases under the UK-Argentina BIT. In *National Grid PLC v. Argentine Republic*,⁸⁸ the tribunal considered whether the MFN clause of the UK-Argentina BIT was applicable to provide the investor with a more favourable dispute resolution mechanism.⁸⁹ The tribunal “concur[red] with *Maffezini*’s balanced considerations in its interpretation of the MFN clause,” finding that “‘treatment’ under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts.”⁹⁰ This tribunal further noted that although the MFN clause does not expressly reference dispute resolution, this matter was not included among the exceptions to the clause in Article 7 of the BIT.⁹¹ The Claimant asserts that the Respondent has failed to examine and refute this case or the *AWG* case explained in further detail below.⁹²
117. Similarly, the *AWG Group Ltd. v. Argentine Republic* tribunal found that the MFN clause in Article 3 of the UK-Argentina BIT could be invoked in order to benefit from the more favourable dispute resolution procedures afforded to French investors under the France-Argentina BIT, thereby avoiding the requirement to first resort to local courts.⁹³ In particular, the wording of the UK-Argentina BIT’s MFN clause, did not pose an obstacle to its use in this manner:

Despite the difference in language of the most-favoured-nation clauses in the [UK-Argentina and Spain-Argentina] BITs, the Tribunal believes an interpretation of each leads to the same result. The Argentina-U.K. BIT, like the Argentina-Spain BIT, does not define the word “treatment.” The Tribunal gives that word the same interpretation in the two treaties: the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.⁹⁴

118. According to the Claimant, these cases confirm a well-settled approach in international investment arbitration recognizing the possibility of relying on MFN clauses to avoid procedural obstacles that are nonsensical and cumbersome.⁹⁵ The Claimant further cites

⁸⁷ C III, ¶¶15-18; *Case concerning the Anglo-Iranian Oil Company* (United Kingdom v. Iran), Judgment of 22 July 1952, 1952 ICJ Reports 93, p. 109 (R-LA-66).

⁸⁸ *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006 (hereinafter “*National Grid*”) (C-LA-42).

⁸⁹ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 112-115.

⁹⁰ *National Grid*, *supra* note 88, ¶¶92-93.

⁹¹ *National Grid*, *supra* note 88, ¶82.

⁹² C III, ¶22.

⁹³ *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006 (hereinafter “*AWG*”), ¶57 (C-LA-53); Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 108-111.

⁹⁴ *AWG*, *supra* note 93, ¶57.

⁹⁵ C IV, ¶¶68-70 and 85-86; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 98:2-13 and p. 117.

the *Case Concerning the Rights of Nationals of the U.S. in Morocco* before the ICJ as evidence that international courts have also endorsed a broad reading of MFN clauses.⁹⁶

(ii) *The MFN clause allows UK investors in Argentina to resort directly to international arbitration*

119. The Claimant contends that the MFN clause must be interpreted in accordance with Articles 31 and 32 of the VCLT, as the Respondent also argued. Additionally, the Claimant refers to the *National Grid* tribunal, which stated that the VCLT “does not establish a different rule of interpretation for different clauses. The same rule of interpretation applies to all provisions of a treaty, be they dispute resolution clauses or MFN clauses.”⁹⁷
120. According to the *ejusdem generis* principle, which is recognised as a governing principle for interpreting MFN clauses, the MFN clause can only attract rights from other treaties belonging to the same category of subject as that to which the clause itself relates. In the present case, however, even though the MFN clause at Article 3 does not include any reference to dispute resolution, Article 7 of the BIT also does not include any reference to dispute resolution among the exceptions to the scope of the MFN clause.⁹⁸ Consequently, according to the Claimant, dispute resolution mechanisms must be considered to be included under the MFN clause. In support of this argument, the Claimant refers to the *Suez/InterAgua* case, where the tribunal determined that “[t]he failure to refer among these excluded items to any matter remotely connected to dispute settlement reinforces the interpretation” that the term “treatment” in Article 3(2) “includes dispute settlement matters.”⁹⁹
121. The Claimant argues that the ordinary meaning of “treatment” encompasses “the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investment made by investors covered by the treaty.”¹⁰⁰ According to this definition, the term is not restricted to any substantive standard of treatment. Besides, the terms “management, maintenance, use, enjoyment or disposal” listed in Article 3(2) of the BIT encompass the protection of an investment and include dispute settlement activities. This was the conclusion reached by the tribunal in *AWG*.¹⁰¹ Citing the *RosInvest* decision, the Claimant also notes that the characterisation of its right to resort to arbitration as either procedural or substantive has no foundation since both concern

⁹⁶ *Case concerning the Rights of Nationals of the United States of America in Morocco* (France v. United States), Judgment of 27 August 1952, 1952 ICJ Reports 176, p. 190 (C-LA-44).

⁹⁷ *National Grid*, *supra* note 88, ¶80.

⁹⁸ C IV, ¶¶57-67; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 109:23-25 and p. 110:1-12.

⁹⁹ *Suez Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 (hereinafter “*Suez/InterAgua*”), ¶56 (C-LA-56).

¹⁰⁰ *AWG*, *supra* note 93, ¶55.

¹⁰¹ *AWG*, *supra* note 93, ¶57.

the treatment given to the bundle of rights whose protection is ensured by the applicable BIT.¹⁰²

122. Turning to the purpose of the MFN clause, the Claimant argues that tribunals have found that “[a]n MFN clause is aimed at ensuring equality of treatment to the beneficiaries in respect of its subject matter at the most advantageous level.”¹⁰³ Since foreign investment is not static, MFN clauses serve exactly the purpose of progressively maintaining a level playing field and equality of treatment between the parties involved.¹⁰⁴ In this context, the Claimant recalls that the Contracting Parties’ intention under the BIT was to promote favourable conditions for investment and to stimulate private initiative. Thus, the Claimant argues, protection of foreign investors in this regard is essential and it cannot be excluded from the context of the BIT.
123. Contrary to the Respondent’s argument, the Claimant contends that MFN clauses are not generally limited to substantive obligations. The Claimant supports this argument by citing scholars and case law, and in particular the decision in *Renta 4 S.V.S.A. et al. v. Russian Federation* which found that “access to international arbitration has been a fundamental and constant desideratum for investment protection and therefore a weighty factor in considering the object and purpose of BITs” and also that there was “no textual basis or legal rule to say that ‘treatment’ does not encompass the host state’s acceptance of international arbitration.”¹⁰⁵
124. Lastly, with regard to Argentina’s BIT practice, the Claimant notes that out of the 41 BITs signed by the Respondent since October 1992, only one (signed in 1994) includes the requirement of prior submission to local courts, thereby evidencing that Argentina has clearly abandoned any once-held policy requiring prior submission to local courts.¹⁰⁶
125. Consequently, the Claimant concludes that the ordinary meaning of the MFN clause in the BIT in context and in light of its object and purpose makes clear that the MFN clause can be extended to afford the Claimant with more favourable dispute resolution procedures found in other BITs entered into by the Respondent.
126. In order to support this conclusion, the Claimant refers to other tribunals which have considered comparable or identical MFN clauses to the one at hand, and who have reached the same conclusion as argued by the Claimant. The most analogous decision was the one issued in *National Grid*, which was also an UNCITRAL tribunal and which analysed the same BIT. Argentina raised many of the same arguments as it does before this Tribunal. The *National Grid* tribunal, however, rejected Argentina’s objections and held that “in the context in which the Respondent has consented to arbitration for the

¹⁰² Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 118; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. 079/2005, Award on Jurisdiction, 5 October 2007 (hereinafter “*RosInvest*”).

¹⁰³ C II, ¶¶29 -31; *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objection to Jurisdiction, 25 May 2006 (hereinafter “*Telefónica*”), ¶98.

¹⁰⁴ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 16.

¹⁰⁵ C III, ¶¶24-25; *Renta 4 S.V.S.A. et al. v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009 (hereinafter “*Renta 4*”), ¶¶100-101 (C-LA-117).

¹⁰⁶ C II, ¶32. Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 115:19-25.

resolution of the type of disputes raised by the Claimant, ‘treatment’ under the MFN clause of the Treaty makes it possible for UK investors to resort to arbitration without first resorting to Argentine courts.”¹⁰⁷

127. This was the same conclusion reached by the *AWG* tribunal which was also confronted with the analysis of the UK-Argentina BIT.¹⁰⁸ A line of tribunals analyzing the Spain-Argentina BIT have also reached the same conclusion, emphasizing the fact that dispute resolution does not figure among the exceptions to MFN treatment. Accordingly, the Claimant concludes that, given that tribunals faced with identical MFN clauses have consistently allowed a claimant to overcome procedural requirements in the BIT’s dispute resolution clause, this Tribunal ought to reach the same conclusion and recognise jurisdiction over its claims.
128. Lastly, in response to the Respondent’s argument regarding whether the dispute settlement provision of the Argentina-Lithuania BIT is in fact more beneficial to the Claimant, the Claimant refers to the *Gas Natural* tribunal which rejected this same argument stating that “provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors; further, that 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 the expiration of the negotiation period.”¹⁰⁹

(iii) Decisions adopting a restrictive approach to the interpretation of the MFN clause are factually distinguishable

129. The Claimant submits that the cases relied upon by the Respondent to defend a restrictive view with regard to the interpretation of the MFN clause, mainly *Salini*, *Plama*, *Telenor*, and *Berschader*, are inapposite. Unlike in *Maffezini*, the claimants in these cases attempted to import entire dispute resolution mechanisms beyond those set forth in the BITs they claimed under, and are therefore distinguishable from the situation faced by this Tribunal.
130. For example, in the *Salini* case, Article 9(2) of the Italy-Jordan BIT foresees that, “[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.”¹¹⁰ Consequently, the claimant’s contractual remedies under the Italy-Jordan BIT were specifically limited to the dispute settlement procedures contained in the investment agreement, unlike here.

¹⁰⁷ C II, ¶¶34-36; *National Grid*, *supra* note 88, ¶93. Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 112-115.

¹⁰⁸ *AWG*, *supra* note 93, ¶61.

¹⁰⁹ C III, ¶26; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Question of Jurisdiction, 17 June 2005 (hereinafter “*Gas Natural*”), ¶31 (C-LA-45). See also Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 111:20-112:7.

¹¹⁰ *Salini*, *supra* note 34, ¶72; C II, ¶¶40-42.

131. In *Plama*, Bulgaria's consent to arbitration in Article 4 of the Bulgaria-Cyprus BIT was limited to *ad hoc* UNCITRAL arbitration of disputes with regard to the amount of compensation due to an investor, and only after the merits of the investor's claim had been tried through the regular administrative and legal procedures of Bulgaria. Thus, the claimant sought to import into the basic treaty an arbitral mandate that was absent from the treaty's text. According to the Claimant, the situation before this Tribunal is completely different, as the Parties have already agreed to arbitration under the UNCITRAL Arbitration Rules, and the Claimant merely seeks to avoid a procedural obstacle that investors from other countries are not obliged to overcome.¹¹¹
132. In the *Telenor* case, the dispute resolution clause was again much narrower than the one in this case: arbitration was only available in the event of expropriation. The claimant in *Telenor* was attempting to extend the scope of jurisdiction to the consideration of the breach of other substantive standards under the BIT such as fair and equitable treatment.¹¹² The dispute resolution clause analyzed in *Berschader* was also limited to arbitration of the amount or mode of compensation in the event of expropriation and therefore also distinguishable.¹¹³
133. The Claimant next analyses the *Wintershall* case and concludes that this decision is also inapposite to this case for five reasons: (1) the dispute resolution clause in the Germany-Argentina BIT is distinct and more restrictive from that of the BIT in that it contemplated a further negotiation period following recourse to the local courts for a period of 18 months, and was wrongly characterised by that tribunal as an exhaustion of local remedies clause; (2) the MFN clause at issue contained completely different language; (3) the claimant in that case sought to benefit from a different system of arbitration in its request; (4) the case was an ICSID arbitration, and Article 25 of the ICSID Convention imposes an additional jurisdictional bar; and (5) that tribunal misinterpreted the *National Grid* decision with respect to placing on the host State the burden of proving that dispute resolution is excluded from the scope of the applicable MFN clause.¹¹⁴
134. Additionally, the Claimant notes that the *Wintershall* approach was expressly disavowed in the UNCITRAL case of *Austrian Airlines v. Slovak Republic*. The majority of the tribunal in that case stated:

Having determined that it has jurisdiction to do so, the Tribunal must now turn to the interpretation of the [MFN clause]... In this regard the Tribunal does not consider that provisions embodying a State's consent to arbitration must be strictly interpreted. This view, which was adopted by the tribunals in *Plama v. Bulgaria*, *Telenor v. Hungary*, *Berschader v. Russia* and *Wintershall v. Argentina* is not an accurate reflection of international law on this matter. As noted by [numerous decisions

¹¹¹ C II, ¶¶43-47.

¹¹² C II, ¶¶48-49; *Telenor*, *supra* note 35.

¹¹³ C II, ¶¶50-51; *Berschader*, *supra* note 32.

¹¹⁴ C II, ¶¶52-59; C IV, ¶¶75-79; *Wintershall*, *supra* note 7. Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 161-162.

referred to] there is no principle of either restrictive or extensive interpretation of an agreement to arbitrate in international law.¹¹⁵

135. Additionally, the majority tribunal in *Austrian Airlines v. Slovak Republic* found:

As a general matter, the Tribunal observes that it sees no conceptual reason why an MFN clause should be limited to substantive guarantees and rule out procedural protections, the latter being the means to enforce the former. The Tribunal notes in this connection, that the potential application of an MFN clause to procedural protections is widely accepted by investment tribunals. This view has been held mostly with respect to the avoidance of procedural requirements prior to commence [*sic*] arbitration, but also, more recently, with respect to the import of a dispute settlement clause.¹¹⁶

136. However, even if the Tribunal were to follow the *Wintershall* decision, the Claimant submits that the standard of “clear and unambiguous” intent to apply the MFN clause to dispute resolution matters is satisfied in the present case. Subsequent United Kingdom BITs concluded after 1993 demonstrate that the United Kingdom’s intent was not to exclude dispute resolution settlement from the coverage of the MFN clause.

137. This is shown by the fact that the United Kingdom started adding an additional paragraph to its MFN clauses, which stated that, “[f]or the avoidance of doubt it is confirmed that the treatment [of the MFN clause shall apply to the dispute settlement clause].” This new paragraph only clarified and emphasised what had been the United Kingdom’s pre-existing intention in negotiating BITs.¹¹⁷

138. As held by the *National Grid* tribunal, “[t]he implication in the wording of this additional paragraph is that, all along, this was the UK’s understanding of the meaning of the MFN clause in previously concluded investment treaties.”¹¹⁸ Accordingly, the Claimant submits that there is a clear and unambiguous intention to include dispute settlement in the scope of the MFN provisions.

139. With regard to the Respondent’s reliance on *Murphy v. Ecuador*, the Claimant notes that this case did not involve an MFN clause.¹¹⁹

140. The Claimant lastly notes that compelling resort to domestic courts for a limited period of 18 months is not a jurisdictional but merely a procedural matter. Therefore, requiring the Claimant to comply with the 18-month requirement would be futile, as it only postpones the timing of Argentina’s consent to arbitration; the Tribunal would later have jurisdiction over the claims in any event.¹²⁰ Moreover, according to the Bianchi Report, there is no possibility that the dispute would be resolved within 18 months by

¹¹⁵ *Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award, 9 October 2009 (hereinafter “*Austrian Airlines*”), ¶119.

¹¹⁶ *Austrian Airlines*, *supra* note 115, ¶124.

¹¹⁷ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 160:1-15 and pp. 163-164.

¹¹⁸ *National Grid*, *supra* note 88, ¶85.

¹¹⁹ C III, ¶11; *Murphy*, *supra* note 9.

¹²⁰ C III, ¶¶7-9.

the Argentine national courts.¹²¹ Lastly, the court costs to comply with this procedural requirement would be substantial and the Claimant would have no assurance that such fees would be recoverable at a later point.¹²²

¹²¹ First Bianchi Report, *supra* note 16, ¶64.

¹²² C III, ¶10.

G.II. THE UMBRELLA CLAUSE**1. Arguments by the Respondent****(i) *A contractual claim, governed by Argentine law, is distinct from a claim for violation of the BIT, governed by international law***

141. The Respondent asserts that the Claimant distorts the distinction between a contractual claim, arising out of the alleged breach of contractual provisions and governed by Argentine law, and a claim for violation of the BIT governed by international law. According to the Respondent, the Claimant's claim is premised on "the erroneous belief that it may invoke a breach of contract as if it were a violation of the BIT."¹²³ The Contract and the BIT are different instruments, governed by different legal systems and are therefore not equivalent. BITs are not instruments drafted so that investors can resort to them every time there is a dispute related to contracts they have concluded.¹²⁴
142. The Respondent asserts that both international tribunals and legal scholars agree that a contract violation is not comparable to the violation of an international treaty. This distinction has been defended by many international courts, such as in the *Serbian Loans* and *ELSI* cases.¹²⁵ Investment tribunals have also confirmed that an investor cannot bring an international claim against a host State grounded on merely contractual breaches. For example, in *Waste Management II*, the tribunal described the distinction as follows:

The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. Any private party can fail to perform its contracts, whereas nationalization and expropriation are inherently governmental acts, as is envisaged by the use of the term "measure" in Article 1110(1). It is true that, having regard to the inclusive definition of "measure", one could envisage conduct tantamount to an expropriation which consisted of acts and omissions not specifically or exclusively governmental. All the same, the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to a[] definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play.¹²⁶

¹²³ R I, ¶92.

¹²⁴ R I, ¶¶92-96.

¹²⁵ R I, ¶¶97-98. *Payment of Various Serbian Loans Issued in France* (France v. Yugoslavia), 1929 P.C.I.J. (ser. A) No. 20 (July 12); *Case concerning Elettronica Sicula S.p.A. (ELSI)* (United States of America v. Italy), Judgment of 20 July 1989, ICJ.

¹²⁶ *Waste Management, Inc. v. Mexico*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (hereinafter "*Waste Management II*"), ¶174.

143. The Respondent refers to numerous further investment arbitration cases, in particular the *Vivendi* Annulment Committee decision, that have also found that purely contractual claims cannot be brought under the BIT.¹²⁷
144. The Respondent describes all of the claims brought by the Claimant as purely contractual.¹²⁸ The Respondent contends that they relate to the *application* of Argentina's emergency laws (which have, for instance, converted into Argentine pesos all debts then held in foreign currencies), and not to their *enactment*. The Respondent accordingly submits that what gives rise to the claims in this arbitration is its application of the emergency laws as if it were a private entity or a simple merchant (*acta jure gestionis*) and not its actions as a sovereign (*acta jure imperii*). As a result, the Respondent asserts that the dispute is purely contractual and therefore not within the jurisdiction of the Tribunal, which is limited to treaty claims under the BIT.¹²⁹

(ii) *The Claimant did not conclude an investment agreement and thus cannot rely on the BIT's provisions*

145. In the present case, the Respondent argues that it did not undertake any specific commitment under the BIT regarding the investment since it did not conclude any investment agreement with the Claimant. According to scholars cited by the Respondent, an investment agreement can only exist if two requirements are met: (1) there must be an agreement concluded between a State or a State-controlled entity and a foreign investor; and (2) the agreement must be governed by international law.¹³⁰ These criteria have been followed in several notable arbitration proceedings, such as *Revere Copper Brass Inc. v. OPIC*,¹³¹ *Saudi Arabia v. ARAMCO*,¹³² and *Texaco v. Libya*,¹³³ as well as the investment decisions in *El Paso*¹³⁴ and *Pan American*.¹³⁵
146. In the present case, although an agreement exists between Argentina and the Claimant, the international element is missing. The Contract between the Parties did not provide

¹²⁷ R I, ¶¶100-107; *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002 (hereinafter "*Vivendi* Annulment Committee").

¹²⁸ R III, ¶¶45-47; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 49-51.

¹²⁹ R III, ¶¶48-49; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 51-56.

¹³⁰ R I, ¶¶109 -111. Piero Bernardini, *The Renegotiation of the Investment Contract*, 13 ICSID REVIEW – FOREIGN INVESTMENT LAW JOURNAL 411, 412-5 (1998-I); MUTHUCUMARASWAMY SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY (1986), pp. 81-86.

¹³¹ *Revere Copper & Brass Inc. v. OPIC*, 17 I.L.M. 1321 (1978), pp. 1332-1338.

¹³² *Saudi Arabia v. Arabian American Oil Company (ARAMCO)*, 27 I.L.R. 117 (1963), cited in MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT (2004), p. 418.

¹³³ *Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic*, 17 I.L.M. 1 (1978), ¶¶22, ¶¶41-42, ¶¶44-45.

¹³⁴ *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (hereinafter "*El Paso*").

¹³⁵ *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, 27 July 2006, ¶106.

for the application of international law or grant international jurisdiction.¹³⁶ Nor does the Contract refer to the BIT, expressly or impliedly. The Contract is governed by Argentine law and is subject to Argentine jurisdiction. The Parties freely agreed not to include any type of reference to the application or protection of the BIT.¹³⁷ The Respondent contends, therefore, that the Contract is a domestic contract rather than an investment agreement. Simply alleging that a foreign investor entered into an agreement with the Argentine Republic is insufficient to invoke protection under the BIT.¹³⁸

147. Additionally, the Respondent notes that the treaty violations alleged by the Claimant do not stand by themselves in any of the claims it submitted, and although the Claimant attempts to disguise these as treaty violations, the truth is that the essential basis of those claims is the Contract.¹³⁹ In this regard, Professor Georges Abi-Saab remarked in his Concurring Opinion issued in *TSA* that:

In the present case, I find that TSA's claims as formulated in Claimant's Memorial on the Merits, are all fundamentally rooted in, or based on allegation of violations of the concession contract. In other words, they turned on who violated the contract and whether its termination and consequent action by Argentina were justifiable (as contended by Argentina) or not (as maintained by TSA) according (i.e. by reference) to the terms of the contract. The TSA recharacterises the same as expropriation or another violation in terms of the BIT. But such recharacterisation would not stand by itself if the termination of the contract was found by an adjudicative body to have been legally justified as a result of grave breaches of the contract by TSA. In other words, if these were all the arguments that TSA could offer, the latter claims would not be "self standing" and should not be admissible as "treaty claims".¹⁴⁰

148. Moreover, according to the Respondent, the particular relationship existing between the Parties prevails over any other general law which may be applied thereto, including the BIT, in application of the principle of *lex specialis derogate legi generali*.¹⁴¹ The principle of *lex posterior derogate anterior* is also applicable to this case as the Contract between the Parties was signed after the execution of the BIT and therefore prevails over any provision foreseen in the BIT.¹⁴²
149. The Respondent concludes that the specific commitments referred to in Article 2(2) of the BIT (*i.e.*, the umbrella clause) do not cover the commitments of the Argentine Republic towards the Claimant under the Contract at hand. Only if the contractual commitments had been made within the ambit of the BIT would the umbrella clause extend its scope to reach the Contract. But in the present case, the umbrella clause foreseen in Article 2(2) of the BIT has no application to this dispute.

¹³⁶ R I, ¶¶108-118.

¹³⁷ R II, ¶¶87-95.

¹³⁸ R I, ¶115.

¹³⁹ R II, ¶81.

¹⁴⁰ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award, 19 December 2008, Concurring Opinion of Georges Abi-Saab (R-LA-69).

¹⁴¹ R II, ¶¶89-92.

¹⁴² R II, ¶¶92-93.

(iii) In the alternative, the umbrella clause is not as broad as the Claimant argues

150. In the alternative, even if the Tribunal were to consider that the Respondent did undertake specific commitments towards the Claimant under the BIT, the Respondent rejects the broad interpretation that the Claimant makes of the umbrella clause and asserts that the specific contractual obligations invoked by the Claimant would still fall outside the scope of the clause.
151. The Respondent rejects the Claimant's arguments regarding the history and evolution of the umbrella clause. It notes, for example, that the umbrella clause included in the Abs-Shawcross Draft, which the Claimant cites, came under substantial criticism and was finally set aside.¹⁴³ On the contrary, the Respondent alleges that umbrella clauses, when these began to be included in treaties, were meant to allow States to invoke the violations of a contractual obligation under international law. At that time, BITs did not include any direct mechanism for the settlement of investor-State disputes and claims thus had to be espoused by the State through diplomatic protection within the framework of the State-State dispute settlement regime.¹⁴⁴ However, this logic started to change in the 1980s when investor-State dispute settlement provisions were introduced.
152. The Respondent thus argues that not all contractual claims become BIT claims automatically by virtue of the umbrella clause. This ignores the difference between the domestic and international legal systems. The Respondent points to decisions where tribunals have developed a different interpretation of the umbrella clause.
153. The Respondent first cites *SGS v. Pakistan*,¹⁴⁵ the first tribunal to hear a dispute on the interpretation and effects of an umbrella clause. In that case the tribunal found as follows:

Applying these familiar norms of customary international law on treaty interpretation, we do not find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect of entitling a Contractual Party's investor, like SGS, in the face of a valid forum selection contract clause to "elevate" its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT, and accordingly to bring such contract claim to this tribunal for resolution and decision.

[...]

The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically "elevated" to the level of breaches of international treaty law.¹⁴⁶

¹⁴³ R II, ¶¶99-100.

¹⁴⁴ R II, ¶¶102-106.

¹⁴⁵ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 (hereinafter "*SGS v. Pakistan*").

¹⁴⁶ *SGS v. Pakistan*, *supra* note 145, ¶¶165-166.

154. A similar interpretation of the umbrella clause has been adopted by other tribunals as well, including in *Joy Mining v. Egypt*,¹⁴⁷ *Salini v. Jordan*,¹⁴⁸ *El Paso v. Argentine Republic*,¹⁴⁹ and *Pan American v. Argentine Republic*.¹⁵⁰ The Respondent concludes that the Contract for auditing services entered into with the Claimant falls into the category of ordinary commercial agreements referred to by these cases.¹⁵¹
155. In particular, with regard to the governmental breach approach criticised by the Claimant, the Respondent notes that this approach has been followed and thoroughly developed in numerous decisions, such as *El Paso v. Argentine Republic*, leading to a reasonable interpretation of the umbrella clause.¹⁵² The doctrine deriving from this case, and others such as *Pan American v. Argentine Republic*, is adamant in its conclusion that that the broad interpretation of the umbrella clause contained in the Argentina-US BIT would render the remaining provisions of the BIT meaningless as it would be sufficient to include any contractual claim with the scope of protection of the BIT.¹⁵³ Lastly, the Respondent states that the Claimant's criticism of these decisions, on the basis of the *Sempra v. Argentine Republic* decision, is unsound as the *Sempra* award was recently annulled by an *ad hoc* annulment committee.¹⁵⁴
156. Moreover, the Respondent rejects the Claimant's attempts to discredit the decision in the *SGS v. Pakistan* case as well as the Claimant's statement that this decision is not necessarily irreconcilable with the broad approach of interpretation. In particular, the Respondent asserts that the Claimant has implicitly acknowledged that the tribunal in that case, presented with analogous facts, adopted a restrictive approach as to the interpretation and scope of the umbrella clause. Consequently, the Respondent states that the findings of the decision are applicable *mutatis mutandis* to the instant case.¹⁵⁵

¹⁴⁷ *Joy Mining Machinery Ltd v. Arabic Republic of Egypt*, ICSID Case No. ARB/03/11, Award, 6 August 2004.

¹⁴⁸ *Salini*, *supra* note 34.

¹⁴⁹ *El Paso*, *supra* note 134.

¹⁵⁰ *Pan American Energy LLC, BP Argentina Exploration Company, BP America Production Company, Pan American Sur S.R.L., Pan American Fueguina, S.R.L. and Pan American Continental, S.R.L. v. Argentine Republic*, ICSID Cases No. ARB/03/13 and ARB/04/8, Decision on Jurisdiction, 27 July 2006.

¹⁵¹ R I, ¶¶119-137; R II, ¶¶127-128.

¹⁵² R II, ¶¶117-128.

¹⁵³ R II, ¶¶124-125.

¹⁵⁴ R II, ¶¶126.

¹⁵⁵ R II, ¶¶131-136.

(iv) The Claimant erroneously invokes the decision in *SGS v. Philippines*

157. The Respondent argues that the Claimant misinterprets the decision in *SGS v. Philippines*.¹⁵⁶ In the Respondent's view, this decision also supports its position as that tribunal advocated for a restrictive scope of the umbrella clause:

It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law of the Philippines to international law. Article X(2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.¹⁵⁷

158. The Respondent maintains that the tribunal in *SGS v. Philippines* did not find that the contractual obligations contained in the agreement between SGS and Philippines were converted into international obligations. In fact, at paragraph 128 of the decision, quoted by the Claimant, the tribunal maintains a view which is exactly opposite to the Claimant's position. The tribunal indicated that the umbrella clause in the Switzerland-Philippines BIT does not convert a contractual obligation into an obligation under international law.¹⁵⁸ The tribunal held as follows:

[I]t does not convert the issue of the extent or content of such obligations [i.e. the content of contractual obligations] into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement.¹⁵⁹

159. The Respondent further stresses that there is an essential difference between the present case and *SGS v. Philippines*: in that case, the agreement between SGS and the Philippines was an investment agreement. By contrast, in the case at hand, the Parties have concluded an administrative contract governed by Argentine law and subject to the Argentine federal courts.¹⁶⁰

¹⁵⁶ *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 (hereinafter "*SGS v. Philippines*"), ¶126.

¹⁵⁷ *SGS v. Philippines*, *supra* note 156, ¶126.

¹⁵⁸ R II, ¶¶108-116.

¹⁵⁹ *SGS v. Philippines*, *supra* note 156, ¶128.

¹⁶⁰ R II, ¶¶114-116.

(v) The Claimant disregards the forum selection clause stipulated in the Contract

160. The Respondent contends that, in its attempt to invoke the application of the umbrella clause in this arbitration, the Claimant disregards a forum selection clause freely agreed upon and incorporated into the Contract. In Article 23 of the Contract, the Parties agreed to submit any disputes arising out of the Contract to the exclusive jurisdiction of the competent federal courts of the Argentine Republic. According to the Respondent, the Claimant is thus in breach of its contractual obligation to respect the forum selection clause in the Contract.¹⁶¹
161. The inclusion of Article 23 into the Contract was neither arbitrary nor deceitful and the Claimant agreed to it freely, after assessing the advantages and disadvantages of doing so. Article 23 of the Contract was already included in the Bidding Conditions, under which the Claimant freely submitted its bid. The Respondent concludes that the clause is valid as the Claimant was never forced to sign the Contract or accept a forum selection clause against its will.¹⁶²
162. Moreover, the Respondent states that agreeing to a different manner of resolving disputes in connection with the Contract for a given bidder, to the detriment of the Bidding Conditions applicable to all participants (which included the forum selection clause), would have violated the principle of equality governing administrative contracts, thus rendering the Contract null and void.¹⁶³
163. The Respondent also refers to several tribunals that have found that the jurisdiction of an international tribunal was precluded by the commitments undertaken by individuals regarding the submission of the dispute to the jurisdiction of the local courts.¹⁶⁴ The Respondent asserts that the Claimant cannot be permitted to obtain the benefits of the Contract it executed, while ignoring its own obligations thereunder.
164. In this regard, the Respondent refers to the holding of the tribunal in *SGS v. Philippines*:

[T]he question is whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum. In the Tribunal's view the answer is that it should not be allowed to do so, unless there are good reasons, such as *force majeure*, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction. [...]

But the tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved [...] The Philippine courts are available to hear SGS's contract claim. Until the question of

¹⁶¹ R I, ¶¶145-157.

¹⁶² R II, ¶¶142-149; R III, ¶¶53-57; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 15:3-16:4; and p. 19:11-15.

¹⁶³ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 16:20-17:1; p. 18:23-19:15.

¹⁶⁴ R I, ¶¶145-157. *Woodruff* Case, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, vol. IX, p. 213; *North American Dredging Company of Texas (U.S.A.) v. Mexico*, REPORTS OF INTERNATIONAL ARBITRAL AWARDS, vol. IV, p. 34.

the scope or extent of the Respondent's obligation to pay is clarified [...] a decision by this Tribunal on SGS's claim to payment would be premature.¹⁶⁵

165. Additionally, the Respondent argues that the doctrine deriving from *Vivendi* also supports its position, because, insofar as the essential basis of the Claimant's claims is contractual, the provisions on law and jurisdiction set forth in the Contract must be observed.¹⁶⁶ The Respondent concludes that, where the essence of a claim falls within the scope of a forum choice clause agreed upon by the parties in a contract, any such clause is to be observed.
166. Moreover, the BIT contains no other provision that could prevail over the forum selection clause.¹⁶⁷ In this regard, the Tribunal in *SGS v. Philippines* found as follows:

The first consideration involves the maxim *generalia specialibus non derogant*. Article VIII is a general provision, applicable to investment arrangements whether concluded "prior to or after the entry into force of the Agreement" (Article II). The BIT itself was not concluded with any specific investment or contract in view. It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties. As Schreuer says, "[a] document containing a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application." The second consideration derives from the character of an investment protection agreement as a framework treaty, intended by the States Parties to support and supplement, not to override or replace the actually negotiated investment arrangements made between the investor and the host State.¹⁶⁸

167. In response to the Claimant's argument regarding the comparison of the forum selection clauses analyzed by the *SGS v. Philippines* tribunal and the one at hand – drawing a difference because the former includes imperative words, whereas the one at hand does not – the Respondent argues that this interpretation is contrary to the content of the Contract and would amount to a violation of the principle of good faith.¹⁶⁹
168. The Respondent concludes that, given the clear wording in Article 23 of the Contract and the fact that no provision could prevail over the specific forum chosen by the Parties in the Contract, the Claimant should have referred its claims to the Argentine courts in compliance with the Contract's terms, even if it were not already bound to do so by Article 8 of the BIT. Therefore, even in the event the Tribunal allows contract claims to be brought under the BIT, the forum selection clause in the Contract would ultimately limit their admissibility.¹⁷⁰
169. The Respondent also challenges the Claimant's English translation of the phrase "*a todo evento*", contained in the forum selection clause. According to the Respondent, this

¹⁶⁵ *SGS v. Philippines*, *supra* note 156, ¶¶154-155.

¹⁶⁶ R II, ¶¶150-151.

¹⁶⁷ R I, ¶¶153-155.

¹⁶⁸ *SGS v. Philippines*, *supra* note 156, ¶141.

¹⁶⁹ R II, ¶¶156-163.

¹⁷⁰ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 70:7-13.

phrase establishes that the Argentine courts shall have jurisdiction “*for all purposes*”. The Respondent argues that this grants the Argentine courts exclusive jurisdiction over any disputes arising out of the Contract. However, according to the Respondent, the Claimant has attempted to diminish the relevance and meaning of that provision, by mistranslating the aforementioned phrase as if, instead of having jurisdiction “*for all purposes*”, the Argentine courts would “*nevertheless*” have jurisdiction over any disputes.¹⁷¹

170. Lastly, the Respondent states that the Claimant should not be entitled to claim the non-performance of contractual obligations undertaken by the Respondent when it has not complied with its own obligations under the Contract, by breaching the forum selection clause.¹⁷²

2. Arguments by the Claimant

171. The Claimant advances four lines of argument against the Respondent’s second objection to the jurisdiction of this Tribunal. The Claimant first argues that the Respondent has disregarded the fact that the Claimant advances claims for breach of treaty. Secondly, it asserts that breaches of contractual obligations arising out of the Contract in this case amount to breaches of the BIT under the umbrella clause that was freely agreed by the contracting States. Thirdly, the Claimant contends that the Respondent has misapplied *SGS v. Philippines*, as the tribunal in that case did not deny jurisdiction. Lastly, the Claimant argues that the forum selection clause in the Contract does not deprive this Tribunal of jurisdiction over this claim. Accordingly, the Claimant requests that the Tribunal reject the Respondent’s second objection.

(i) *The Tribunal should follow a broad approach to the interpretation of the umbrella clause*

172. The Claimant traces the history of the umbrella clause and argues that, since its origins, the umbrella clause was meant to be interpreted in a broad way so as to protect contractual undertakings entered into between States and foreign private investors and it was never understood to be limited only to certain international obligations.¹⁷³ Contrary to the Respondent’s arguments, the Claimant contends that, historically, according to scholars, umbrella clauses provided “procedural remedies for breaches of host State promises” and they were “intended to stabilize investor-State cooperation more comprehensively against any form of *ex post* opportunistic behaviour of the host State by allowing for effective third-party dispute settlement. The historic perspective, in

¹⁷¹ R III, ¶54; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 56-60.

¹⁷² Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 61.

¹⁷³ C II, ¶¶64-67; Herman Abs & Hartley Shawcross, “Draft Convention on Investments Abroad” in *The Proposed Convention to Protect Private Foreign Investment: A RoundTable*, 9 J. Pub. L. 115 (1960) (C-LA-73) (hereinafter “Abs-Shawcross Draft”); Organisation for Economic Co-operation & Development (OECD), *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the O.E.C.D. on the Draft Convention*, OECD Pub. No. 23081 (1967), reprinted in 7 I.L.M. 117-43 (1968) (C-LA-79) (hereinafter “OECD Draft”).

other words, seamlessly fits in with understanding of the umbrella clauses as breaking with the dualist framework of international law and providing an enforcement mechanism for host State promises, independent of whether breaches were of a sovereign or a commercial nature.”¹⁷⁴ Lastly, the Claimant observes that, like all individuals or corporations, States have the freedom to agree upon a treaty provision whereby breaches of contract with respect to a protected investment assimilate to breaches of the treaty itself, as has been exercised by the Contracting Parties to the present BIT.¹⁷⁵

173. According to the Claimant, over the course of the last decade commentators have articulated three divergent approaches regarding the scope of the umbrella clause. Under the first approach, followed in *SGS v. Philippines*, violations of a contract automatically become treaty violations. As stated by the tribunal in *SGS v. Philippines*, the umbrella clause “means what it says” and “makes it a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.”¹⁷⁶ The second approach, also named the “governmental breach” approach and followed in *Sempra*, holds that “only governmental breaches of contract, not commercial breaches, [are] covered by the umbrella clause.”¹⁷⁷ Lastly, the third approach, adopted by the tribunal in *SGS v. Pakistan*, “simply denies any effect to the observance of undertakings clause and does not consider that the breach of a contract may amount to a violation of the investment treaty.”¹⁷⁸
174. The Claimant argues that the three approaches are not necessarily irreconcilable. According to the Claimant, the tribunal in *SGS v. Pakistan* recognised that its finding was extremely limited, restricted to the interpretation of the specific wording of and intention behind the umbrella clause in the Switzerland-Pakistan BIT. Consequently, the Claimant argues that this tribunal’s findings are not necessarily inconsistent with the broader approaches.¹⁷⁹

¹⁷⁴ C III, ¶42; Stephan W. Schill, *The Robert E. Hudec Article on Global Trade: Enabling Private Ordering, Function Scope and Effect of Umbrella Clauses in International Investment Treaties*, 18 MINN. J. INT’L L. 1 (2009), pp. 57-58 (C-LA-126).

¹⁷⁵ C IV, ¶105; *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶54; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 140:17-23.

¹⁷⁶ C II, ¶69; *SGS v. Philippines*, *supra* note 156, ¶¶119, 128.

¹⁷⁷ *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (hereinafter “*Sempra*”), ¶311.

¹⁷⁸ C II, ¶71; Emmanuel Gaillard, *Investment Treaty Arbitration and Jurisdiction over Contract Claims – the SGS Cases Considered* in INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (Todd Weiler ed., 2005), p. 388 (C-LA-83).

¹⁷⁹ C II, ¶72.

(ii) *The Respondent's breaches of its contractual obligations constituted violations of the BIT*

175. The Claimant maintains that the administrative measures carried out by the Respondent in 2001 and 2002 giving rise to its claims do not arise out of the Contract, but rather of the way in which the Respondent sought to impair, distort, and reduce the obligations that it had undertaken in the Contract through its emergency laws. As a result, its claims are based upon a violation of Article 2(2) of the BIT.¹⁸⁰
176. The Claimant's interpretation of Article 2(2) of the BIT in accordance with Articles 31 and 32 of the VCLT focuses on (1) the placement of Article 2(2) amongst the primary substantive obligations of the BIT, which suggests that it was intended to impose substantial international obligations; (2) the fact that the plain meaning of the provision is not obscure, as "shall observe" is categorical and unambiguous, and "any" is capacious, meaning not only obligations of a certain type, but all obligations; and (3) the clear reference to investment contracts without distinguishing between different categories of contracts.¹⁸¹ Furthermore, according to the Claimant, an inclusive, broad reading of the umbrella clause is also consistent with the object and purpose of the BIT.¹⁸²
177. Contrary to the Respondent, the Claimant argues that the BIT includes no requirement regarding the necessary existence of an investment agreement for the umbrella clause to become applicable. The instant BIT has no limitation in this respect; by contrast, the Argentina-US BIT does define an "investment dispute" as a dispute relating to an "investment agreement." The UK-Argentina BIT does not include this requirement.¹⁸³ The Claimant argues that the authorities cited by the Respondent do not support the idea that an investor needs to enter into an "investment agreement" in order to benefit from the BIT's protections. Moreover, the internationalisation theory does not imply that failing to include internationalised clauses into a contract would impede access to protection under the BIT. Such a conclusion would render the protection of undertakings in investment treaties meaningless.¹⁸⁴
178. The Claimant further analyses the decisions referred to by the Respondent to support its position giving a limited scope to the umbrella clause. The Claimant states that the Respondent has in certain cases misinterpreted and misapplied some of the decisions, and in other cases the decisions are distinguishable on the facts of the present case.
179. First, with regard to *SGS v. Pakistan*, the Claimant stresses that the factual matrix in that case was unique. In that case, local arbitration had been a "deal-breaker" for Pakistan, Pakistan had already commenced an arbitration against SGS, and SGS had already participated in the arbitration for a significant period before seeking to commence an

¹⁸⁰ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 125:6-126:13.

¹⁸¹ C II, ¶¶73-78.

¹⁸² C II, ¶¶79-81.

¹⁸³ C III, ¶¶27-30; C IV, ¶¶87-90.

¹⁸⁴ C III, ¶¶31-33.

ICSID arbitration.¹⁸⁵ The specific wording of the umbrella clause at issue and its placement within the BIT were also important factors in that tribunal's decision. Moreover, as certain doctrinal writers have stated, the restrictive approach adopted in *SGS v. Pakistan* “deprives the umbrella clause of any content” in contravention of the text, object, and purpose of the provision.¹⁸⁶

180. With respect to *Salini v. Jordan*, the Claimant argues that the claims in that case were solely contractual and the BIT did not contain a proper umbrella clause, but rather a clause whose content is comparable to fair and equitable treatment and legitimate expectations provisions.¹⁸⁷ Indeed, the Claimant notes that the tribunal itself deemed the wording of the umbrella clause in the Italy-Jordan BIT to be “appreciably different” from the one at hand.¹⁸⁸
181. The same reasoning applies with regard to the *Joy Mining v. Egypt* decision, where the Claimant asserts that there was no treaty claim at stake; the claim was based upon a contingent liability that did not even rise to the level of a contract claim for it had not materialised.¹⁸⁹ Additionally, the tribunal made clear that its decision was predicated on the specific wording and context of the BIT and acknowledged that differently-worded umbrella clauses might produce the effects argued for here.¹⁹⁰
182. The Claimant contends that, in *El Paso v. Argentine Republic*, a misinterpretation of the umbrella clause in view of the restrictive content of the dispute resolution clause led the tribunal to mistakenly interpret the former in a way that it would otherwise not have done if confronted with the wording of the present BIT.¹⁹¹
183. Lastly, with regard to *Pan American v. Argentine Republic*, the Claimant argues that the circumstances of that case and the particular wording of that BIT also explain the findings of that tribunal. The tribunal denied jurisdiction in that case because it found that the claims did not fall within the definition of an “investment dispute” under the BIT due to the fact that the contract at issue did not constitute an “investment agreement” as defined under that BIT. Furthermore, the tribunal's middle ground acting-as-a-sovereign test is unsupported in State responsibility or general public international law and is premised on false assumptions about the effect of a wider interpretation.¹⁹²
184. On the other hand, the Claimant refers to investment arbitration decisions that support its position. For example, *SGS v. Philippines*, although factually similar to *SGS v. Pakistan*, involves a different umbrella clause. Given the imperative wording (“shall”) used in that clause and the fact that BITs are entered into for the promotion and

¹⁸⁵ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 127-131.

¹⁸⁶ C II, ¶¶83-89; C III, ¶¶53-56; C IV, ¶¶91-94.

¹⁸⁷ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 142:16-143:22.

¹⁸⁸ C IV, ¶108.

¹⁸⁹ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 141:13 142:15.

¹⁹⁰ C II, ¶¶93-95; C IV, ¶107.

¹⁹¹ C IV, ¶¶109-113; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 143:23-146:14.

¹⁹² C II, ¶¶96; C III, ¶¶46-50.

protection of investments, that tribunal found that the umbrella clause transformed contractual disputes into treaty-based disputes. Nonetheless, while the tribunal found that it had jurisdiction over the contractual claim, the claim was still inadmissible because it dealt with a determination of the amount to be paid by the Philippines to SGS (which is not a matter of breach of contract) and there was a specific dispute resolution clause agreed upon by the parties in their contract according to which local courts were exclusively competent to resolve that issue.¹⁹³ The Claimant quotes the tribunal in this regard:

Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement.¹⁹⁴

185. The Claimant insists that this language demonstrates, contrary to the Respondent's assertions, that the tribunal held that the umbrella clause could cover contractual claims and that a host State's breach of contractual commitments can amount to a breach of the BIT.¹⁹⁵
186. The Claimant further refers to *Eureko v. Poland*, where an UNCITRAL tribunal analysed an umbrella clause that is identical to the one at hand. In that case, the wording of the clause as well as the object and purpose of the BIT also led the tribunal to rule in favour of granting jurisdiction over contractual claims arising out of the investment contract.¹⁹⁶ The *Noble Ventures* tribunal also reached the same conclusion.¹⁹⁷

(iii) The forum selection clause in the Contract does not deprive this Tribunal of jurisdiction

187. Contrary to the Respondent, the Claimant argues that the forum selection clause in the Contract does not prevail over the Respondent's more general consent to arbitration under the BIT, and that the Respondent's arguments disregard the fact that the Claimant is advancing claims before this Tribunal for treaty breaches.
188. First, the Claimant refers to *Vivendi*¹⁹⁸ where it was held that the existence of a forum selection clause in an underlying contract does not deprive a tribunal of jurisdiction over treaty claims, including those arising out of a contract. This finding was confirmed by

¹⁹³ C II, ¶¶103-108; C IV, ¶¶95-99; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 131:13-138:5.

¹⁹⁴ C III, ¶¶44-45; *SGS v. Philippines*, *supra* note 156, ¶128.

¹⁹⁵ C III, ¶¶44-45.

¹⁹⁶ C II, ¶¶109-112; C IV, ¶¶100-102; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 138:6-139:5.

¹⁹⁷ C II, ¶¶113-115; C IV, ¶¶103-105; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 139.

¹⁹⁸ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000, ¶53.

the *ad hoc* committee in the annulment proceedings of the *Vivendi* case, who added that “[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid characterization of its conduct as internationally unlawful under the treaty.”¹⁹⁹ These decisions were also followed by the tribunal in the *Eureko* case.²⁰⁰

189. The Claimant further argues that the Respondent’s argument suffers from two additional flaws: (1) the Parties did not mutually agree upon the chosen forum, as it was not specifically negotiated and it merely acknowledges a legal requirement under Argentine law;²⁰¹ and (2) the forum selection clause in Article 23 of the Contract does not provide for exclusive jurisdiction, as it contains no specific language to that end.²⁰² By contrast, the Claimant also notes that both in *SGS v. Pakistan* and *SGS v. Philippines* the exclusive jurisdiction clauses had been negotiated and agreed upon, and that their wording left no doubt that it embraced questions relating to the contracts at stake for the purpose of the particular jurisdictions designated thereunder.²⁰³
190. With regard to this second issue above, the Claimant notes that the Respondent had never before the Hearing on Jurisdiction challenged its English translation of the Contract’s forum selection clause²⁰⁴ and contends that the decisions quoted by the Respondent in this regard, namely *Woodruff, North American Dredging Company*, and *SGS v. Philippines*, are irrelevant to this Tribunal, as the forum selection clauses analyzed by those tribunals contained mandatory language that expressly limited access to other fora.²⁰⁵ Lastly, while the Claimant acknowledges that it freely opted to sign a Contract containing a forum selection clause (that was not the object of negotiation between the Parties), this does not imply a waiver of its right to accept the Respondent’s standing offer to arbitrate treaty-based disputes.²⁰⁶
191. Irrespective of whether the forum selection clause is exclusive or not, the Claimant concludes that this Tribunal has jurisdiction, as the Claimant’s claims are Treaty claims precisely because the Respondent invoked changes in Argentine law to retrospectively undermine and diminish its obligations towards the Claimant. Since the fair and equitable treatment treaty claims cannot be evaluated without considering what the Respondent did vis-à-vis the Contract, it would be inconsistent with the meaning and effect of the umbrella clause to leave apart the questions arising from the Contract.²⁰⁷

¹⁹⁹ *Vivendi* Annulment Committee, *supra* note 127, ¶101.

²⁰⁰ C II, ¶120; C III, ¶¶57-58.

²⁰¹ C II, ¶121; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 124:3-23.

²⁰² C II, ¶¶121-122. Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 124:23-125:6.

²⁰³ C IV, ¶¶114-115; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 121:18-122:8.

²⁰⁴ C IV, ¶115; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 97.

²⁰⁵ C II, ¶¶123-124; C III, ¶59.

²⁰⁶ C IV, ¶¶116-118; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 158:6-10.

²⁰⁷ C IV, ¶¶119-121.

G.III. ACQUIESCENCE AND PRESCRIPTION OF THE CLAIMANT'S CLAIMS

1. Arguments by the Respondent

192. The Respondent recalls that the Claimant filed the Administrative Claim on 15 March 2002, requesting the payment of outstanding invoices, and only after more than four years did the Claimant notify the existence of a dispute under the BIT. With regard to the present dispute, the Claimant presents three main complaints: (1) the 22 August 2002 decision which allegedly pesified the invoices; (2) the reduction of the amount to comply with the 10% Fee Cap pursuant to the same decision; and (3) the 13% reduction in the invoices following a decision adopted by AFIP. The Respondent alleges that the Claimant itself consented to each of these measures, as acknowledged by one of their witnesses.
193. The Respondent stresses that the alleged grievances that give rise to this claim occurred between August 2002 and June 2003, and that the Claimant only communicated the existence of a BIT dispute to the Argentine Republic in November 2006. Thus, the Claimant has voluntarily waited without explanation for more than four years since the alleged BIT violations took place before submitting its dispute to international arbitration.²⁰⁸
194. In response to the Claimant's argument that this objection should be dismissed as it would require that the Tribunal undertake an analysis of the underlying facts, the Respondent argues that this Tribunal is not only entitled to do so, but in fact has a duty to analyze all elements which may be necessary to render a decision on its jurisdiction. In this sense, the *Inceysa* tribunal found that:

It is obvious that because the ICSID Convention obligates the Arbitral Tribunal to decide on its own competence, it implicitly gives the Tribunal the right to analyze all factual and legal matters that may be relevant in order to fulfil this obligation.²⁰⁹

When deciding on its own competence, the Arbitral Tribunal has the power to analyze all of those issues that may have legal relevance to define it, regardless of whether these are issues that may be qualified as substantive or of 'merits' or procedural issues. If, in order to rule on its own competence, the Arbitral Tribunal is obligated to analyze facts and substantive normative provisions that constitute premises for the definition of the scope of the Tribunal's competence, then it has no alternative, but to deal with them, under penalty of infringing its obligation under Article 41 of the ICSID Convention.

In the case before the Arbitral Tribunal, the controversy concerning the competence of the Tribunal focuses on determining whether the consent given by El Salvador to submit to the jurisdiction of ICSID includes the investments not made in accordance with its law. Consequently, to decide on its own competence, this tribunal is obligated to analyze, first, whether said argument is admissible and, second, whether it is founded based on the facts of the case brought before it.

²⁰⁸ R I, ¶¶177-183; R III, ¶¶59-62, ¶69.

²⁰⁹ *Inceysa Vallisoletana SI v. El Salvador*, ICSID Case ARB/03/26, Award, 2 August 2006 (hereinafter "*Inceysa*"), ¶149 (R-LA-76).

Thus, even though it might be considered that the analysis that the Arbitral Tribunal is obligated to make involves the determination of issues of a substantive nature, such as the conformity of Inceysa's investment with the laws of El Salvador, it is obvious that these issues constitute a premise that must necessarily be examined in order to decide the issue of the competence of the Arbitral Tribunal.²¹⁰

(i) Acquiescence

195. With respect to acquiescence, the Respondent first observes that the Claimant never challenged the Argentine emergency laws of 2001 and 2002 themselves, neither at the time of their enactment nor at a later stage. Rather, the Claimant challenged only their application by the Respondent. In any case, the Respondent argues that the Claimant only did so after the lapse of considerable amount of time, by means of administrative filings of a merely contractual nature, against general measures applied to both nationals and foreigners.
196. The Respondent refers to scholars who have acknowledged that “the inaction on behalf of a State may lead to the loss of a right or claim if, under the circumstances, that State would have been expected to display some form of activity,” or if a claimant “has failed to assert its claim and that it thereby has implicitly accepted its extinction.”²¹¹ The doctrine of acquiescence is rooted in general notions of good faith and equity and can be applied to this dispute too, as it is not limited to State responsibility. Moreover, the Respondent refers to the decisions cited by the Claimant, the *Grisbdarna* case and the *Alaska Boundary* case, and states these cases in fact support its position, as they recognise the existence of the principle of acquiescence under public international law and its legal consequences.²¹² In particular, the doctrine of acquiescence has the following requirements for its application: (1) that the claimant has not made a claim; (2) the failure to bring the claim should have occurred during a reasonable period of time; (3) the claimant must have been expected to act, but failed to do so.
197. The Respondent argues that the Claimant has acquiesced since its conduct meets the three requirements mentioned above: (1) it failed to bring the claims under the BIT for more than four years; (2) it failed to do so over a long period of time – more than three years passed without notifying the existence of the claims since the last disputed event; and (3) the Claimant was inactive in a situation where it would be expected to pursue its claims. However, despite the fact that the Claimant notified the Respondent of a BIT dispute and threatened international arbitration in its 27 November 2006 letter, the Claimant did nothing further until June 2009.²¹³

²¹⁰ *Inceysa*, *supra* note 209, ¶¶155-157.

²¹¹ R I, ¶¶165-170; NS Marques Antunes, *Acquiescence* in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2008), ¶2; Christian J. Tams, *Waiver, Acquiescence, and Extinctive Prescription* in THE LAW OF INTERNATIONAL RESPONSIBILITY (J. Crawford, A. Pellet, and S. Olleson eds., 2010), p. 1043.

²¹² R II, ¶¶185-187.

²¹³ R I, ¶¶184-187.

198. The Respondent asserts that the Claimant's behaviour demonstrates that it acquiesced to the measures it now complains of, regardless of whether the relevant moment that the Claimant's inaction commenced is taken to be (a) the enactment of the emergency laws in 2001 and 2002, (b) the application of the emergency laws to the invoices under the Contract or (c) the refusal by the administrative authorities to pay the amounts claimed.²¹⁴ The Claimant's acquiescence is also clear regardless of whether its inaction is asserted to end (a) at the time of the notice of the existence of a dispute under the BIT in 2006 or (b) upon the submission of the notice of arbitration in 2009.²¹⁵
199. Additionally, even though the Claimant argues that it did not acquiesce since it filed administrative claims and pursued them from 2002 through 2006, the Respondent contends that the Claimant never alleged any violation of the BIT in that context.²¹⁶
200. Moreover, the Respondent also dismisses the Claimant's assertion that it had reserved its rights to later submit treaty claims to an international arbitral tribunal in an extendable claim jointly submitted with Ostram. Initially, the Respondent points out that to reserve a right means that the right has not been exercised yet. Secondly, no references were made in that claim as to which provisions of the UK-Argentina BIT were being violated. Thirdly, the reservation also extended to the submission of a judicial claim before the Argentine Supreme Court. Fourthly, and most importantly, the Claimant was not entitled to file that claim due to the assignment of the invoices under the Contract and Ostram is not a qualified investor under the BIT as a Cayman Islands company. Consequently, that complaint is irrelevant to the present issue.²¹⁷

(ii) Prescription

201. Extinctive prescription has also been widely recognised in international law. The ICJ in the *Nauru* case stated that "even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible."²¹⁸ Several arbitration decisions have also recognised this principle. Extinctive prescription has also been recognised as a general principle of law by civilized nations since the early 20th century. It requires that the State who wishes to rely on it prove that the conduct was attributable to the claimant and that the claimant could have made the claim at any time and that it voluntarily failed to do so.²¹⁹ It is further necessary to show that the party relying on prescription has been disadvantaged by the delay in presentation of the claim.

²¹⁴ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 81:12-20.

²¹⁵ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 78-80; Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 3:12-4:8.

²¹⁶ R II, ¶¶172-177; R III, ¶¶63-66; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 75-76.

²¹⁷ R III, ¶¶67; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 76-78.

²¹⁸ *Case concerning Certain Phosphate Lands in Nauru* (Nauru v. Australia), Judgment of 26 June 1992, 1992 ICJ Reports 240, ¶32.

²¹⁹ R I, ¶¶171-176.

202. Extinctive prescription not only seeks to avoid disadvantage to a defendant because evidence might no longer be available, as argued by the Claimant, but also seeks to achieve legal certainty. The Respondent contends that “if the foreign investor does not submit its claim within a reasonable period of time, he is deemed to have acquiesced and the claim is forfeited by virtue of the extinctive prescription rules under international law.”²²⁰
203. According to the Respondent, the Claimant’s claim is also time-barred due to the time elapsed without having activated the dispute settlement mechanism foreseen in Article 8 of the BIT. This delay is solely and entirely attributable to the Claimant who should have, *inter alia*, submitted the dispute for resolution before the Argentine courts pursuant to both Article 8 of the BIT and the forum selection clause in the Contract. Instead, the Claimant now seeks, despite substantial delay to the Respondent’s disadvantage, to subvert these requirements through its disingenuous and incorrect arguments on the scope and effect of MFN and umbrella clauses.²²¹ Indeed, the Respondent notes that none of the many investment claims filed against it before international tribunals as a result of the emergency laws have taken so long to be submitted as the present one.²²²
204. Moreover, contrary to the Claimant’s argument that the prescription period in international law “is more of decades rather than years,”²²³ the Respondent argues that there is no specific time limit and just the passing of a reasonable period of time is required. For example, the Respondent points out that human rights and regional investment treaties such as NAFTA and CAFTA provide for a short statutory prescription of claims.²²⁴
205. Further, the Respondent asserts that its position is supported by Argentine law, which governs the matter since it is the applicable law to the dispute along with the BIT itself, by operation of Article 8(4) of the BIT. The Respondent contends that the claims are contractual and the Tribunal therefore lacks jurisdiction over them; however, if the claims are deemed treaty claims as argued by the Claimant, they would be subject to a two-year prescription period applicable under Argentine law to non-contractual claims (such as those founded upon treaties and statutory rights).²²⁵
206. The relevance of domestic laws of the host State has been confirmed by the decision in *Yury Bogdanov v. Republic of Moldova*, where the arbitral tribunal found that:

The Republic of Moldova has made an objection based on statutory limitation arguing that the charges for the year 2005 are time-barred. The Treaty itself does not say anything about limitation as regards claims based on the Treaty. It would, however, appear that the limitation period applying under the laws of either Contracting Party must be applicable lest claims could be made indefinitely. Mr

²²⁰ R II, ¶¶178-182.

²²¹ R I, ¶¶188-196.

²²² Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 81:6-11.

²²³ C I, ¶156.

²²⁴ R III, ¶74; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 81:21-82:16.

²²⁵ R II, ¶¶183-184. Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 83:13-84:22.

Bogdanov does not contest that the limitation period is 3 years under Moldovan law and does not invoke any provisions of Russian law which would entail a longer period. This objection on the part of the Republic of Moldova thus appears to the Sole Arbitrator to be well founded.²²⁶

207. The Respondent adds that no interruption or suspension of the statutory prescription has taken place, since the first action by the Claimant that could have this effect was the submission of the claim to arbitration, which occurred long after the two-year time-bar had elapsed. According to the Respondent, the administrative filings by the Claimant would not be deemed as having interrupted or suspended the time-bar neither because they were contractual, while the instant claims are allegedly treaty-based. The natural consequence for the Respondent is that, if the present claims are found to be treaty-based rather than merely contractual, then they have been rendered inadmissible by operation of acquiescence or prescription.²²⁷
208. Lastly, the Respondent notes that nothing in the decisions cited by the Claimant undermines the prescription objection raised by the Respondent.²²⁸

2. Arguments by the Claimant

209. The Claimant submits that the Respondent's third objection has no basis, as neither acquiescence nor extinctive prescription are applicable to the present case.
210. In addition, the Claimant asserts that the claims are subject both to principles of international law and Argentine law, but that disregarding the applicability of the former on this point would allow respondent States to conveniently amend their laws in order to change prescription periods and avoid their commitments.²²⁹
211. The Claimant alleges that the Respondent misinterprets and misapplies both concepts in the present case. The Claimant did not let more than four years elapse since the initial violation of the BIT. On the contrary, the Claimant argues that from 2002 through 2006 it continued to pursue its claim and was in contact with the Respondent on a consistent basis.²³⁰ Moreover, whenever it complied with the Respondent's requests throughout this time it always expressly reserved its rights to claim any differences between the reduced invoices and the invoices originally submitted.²³¹
212. Additionally, the Claimant argues that the Respondent's third objection should not even be considered at this stage, as determining issues of prescription and acquiescence in international law requires an analysis of the underlying facts.

²²⁶ *Yury Bogdanov, citizen of the Russian Federation v. Republic of Moldova*, Final Award, SCC Case No. 114/2009, 30 March 2010, ¶94.

²²⁷ R III, ¶¶73-82; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 85:7-86:18.

²²⁸ R II, ¶¶188-192.

²²⁹ Transcripts of the Hearing on Jurisdiction, 1st day (English version), p. 149:4-21.

²³⁰ Transcripts of the Hearing on Jurisdiction, 1st day (English version), pp. 92:9-93:21.

²³¹ C II ¶¶142-147.

(i) Acquiescence

213. The Claimant defines the concept of acquiescence in international law as a tacit agreement or an implied consent to act. In particular, to acquiesce is to ascribe a legal consequence to certain factual circumstances. It must therefore be restrictively interpreted to ensure that acquiescence corresponds accurately with the implied intention. The Claimant notes that the ILC has stated that the “conduct of a party” is the “determining criterion” and not the “[m]ere lapse of time.”²³² In particular, “the decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued.”²³³ Moreover, any form of protest, action, or activity aimed at protecting rights or negating the status quo will preclude acquiescence.²³⁴
214. The Claimant denies that it has acquiesced to the Respondent’s measures. First, the Claimant actively asserted its rights in national proceedings through the Administrative Claim and the Claimant’s voluntary delay in notifying its international claim whilst doing so cannot constitute a sufficient form of inaction. Second, the lapse of time which has occurred is not long enough to lead the Respondent to believe the Claimant had acquiesced to its actions. Third, the circumstances as a whole in this case did not call for any specific action on the Claimant to assert its rights that it failed to take. Fourth, the Respondent has not provided any evidence as to why four years in this case is a lapse of time that would have made the Respondent believe that the Claimant was not going to bring a claim under the treaty.²³⁵ Lastly, the Respondent’s own actions, such as when it requested an extension of time in March 2007 to consider settlement of the matter, demonstrate that the Respondent itself did not consider that the Claimant had ever abandoned its claims.

(ii) Extinctive prescription

215. On the other hand, extinctive prescription is an equitable defence which occurs when a right of action becomes extinguished because the person entitled thereto neglects to exercise it. In particular, the Claimant notes that the international concept of extinctive prescription “is premised on the theory that a claim that is plagued with undue delay prejudices a defendant because evidence is no longer available to defend against the claim.”²³⁶ Extinctive prescription requires not only an element of lapse of time, but also an essential element of undue prejudice to the other party. According to scholars cited by the Claimant, extinctive prescription requires: (1) unreasonable delay; (2) the imputability of the delay to the negligence of the claimant; (3) the absence of a record

²³² C II, ¶¶128-132. *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission, Official Records of the General Assembly, 56th Session, Supplement No. 10 (UN Doc. A/56/10) (hereinafter “ILC Commentaries”), Art. 45.

²³³ ILC Commentaries, *supra* note 232, Art. 45.

²³⁴ C III, ¶61.

²³⁵ C II, ¶¶148-153; C III, ¶¶62-67.

²³⁶ NEWCOMBE & PARADELL, *supra* note 75, p. 525.

of facts; and (4) that the respondent be placed at a disadvantage in establishing its defence.²³⁷

216. The Claimant argues that this argument on behalf of the Respondent has no merit. First, with regard to the lapse of time, as opposed to domestic law, there is no set period to determine when a claim is barred in international law. The Claimant further asserts that, according to case law, the period is more of decades rather than years, citing *Ambatielos* as an example.²³⁸ As a consequence, to base a prescription objection solely on a two-year extra-contractual statutory period set forth in Argentine law as the Respondent advances is inappropriate and unsupported by any authority.²³⁹
217. Second, the Claimant's conduct has not put the Respondent at an unfair disadvantage in establishing its defence, and no proof of prejudice has been established by the Respondent.²⁴⁰ Additionally, the Respondent was aware of the existence of the dispute with the Claimant since the beginning of 2002, when the Claimant filed the Administrative Claim, engaged in continuous correspondence with the Claimant concerning the dispute, and was notified of a BIT dispute in 2006.²⁴¹
218. Lastly, the *Phoenix Action Ltd. v. Czech Republic* case cited by the Respondent simply has no relation to issues of prescription under international law.²⁴²

²³⁷ C II, ¶¶133-141; C III, ¶74; NEWCOMBE & PARADELL, *supra* note 75, p. 525; KAJ HOBER, EXTINCTIVE PRESCRIPTION & APPLICABLE LAW IN INTERSTATE ARBITRATION (2001); B.E. King, *Prescription of Claims in International Law*, 15 BRIT. Y.B. INT'L L. 82 (1934).

²³⁸ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 150:5-21.

²³⁹ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 149:21-151:7.

²⁴⁰ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 150:5-21.

²⁴¹ Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 151:8-153:13.

²⁴² C II, ¶¶154-157; C III, ¶¶70-73, 75-78; *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009 (hereinafter "*Phoenix Action*") (C-LA-131).

G.IV. THE ASSIGNMENT ISSUE

1. Arguments by the Respondent

219. The Respondent objects to the jurisdiction of the Tribunal on the basis that the Claimant lacks standing to pursue any claims in this arbitration.²⁴³
220. The Respondent argues that the Claimant's claims are inadmissible, since they are based on rights relating to the Contract between the Claimant and the MECON that were assigned by the Claimant to Ostram, a company incorporated in the Cayman Islands. The Respondent further stresses that the Claimant assigned the rights relating to the invoices due and to be issued in connection with the Contract before the measures allegedly carried out by the Respondent giving rise to the claims at stake in this arbitration took place.²⁴⁴
221. Accordingly, as the Claimant had disposed of its investment before the Respondent adopted the measures leading to the present claim, only Ostram could be entitled to pursue any rights against the Respondent. However, Ostram would have to do so before the Argentinean courts, given that the dispute is contractual, that the Contract contains a forum selection clause, and that there is no investment protection treaty between Argentina and the Cayman Islands that could allow Ostram to file a treaty claim, if any such claim existed.²⁴⁵
222. The Respondent cites the decision in the *GEA v. Ukraine* case, where the Tribunal found that "in order for the Tribunal to hear the Claimant's claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed."²⁴⁶ Following the principles established by this decision, the Respondent argues that the Tribunal must determine the dates on which the Claimant held an interest in the alleged investment and the dates when the contested measures were adopted. The Respondent concludes that since the Claimant was not the holder of any interest when the measures were adopted, it lacks legal standing to bring this case.²⁴⁷
223. As to the context within which the assignment occurred, the Respondent notes that the assignment was executed a few months before the Contract expired, and that in exchange for the assignment of the rights, the Claimant became entitled to further receive from Ostram indeterminate, non-capped loans that it would commit to reimburse. However, the Respondent submits that, by the time the assignment was

²⁴³ R III, ¶¶1-13; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 20-25; Transcript of the Hearing on Jurisdiction, 2nd day (English version), p. 17:4-7.

²⁴⁴ R III, ¶¶3-4; Transcript of the Hearing on Jurisdiction, 1st day (English version), pp. 5:14-6:6 and pp. 22-25 (English version); Transcripts of the Hearing on Jurisdiction, 2nd day (English version), pp. 14:23-16:18.

²⁴⁵ R III, ¶1; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 87; Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 3:19-4:8.

²⁴⁶ *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, ¶170.

²⁴⁷ R III, ¶¶1-4.

carried out, the Claimant was laying off some of its employees, who in turn filed lawsuits against the Claimant. According to the Respondent, these suits eventually resulted in attempts to seize assets from the Claimant in order to satisfy decisions in favour of the employees. The seizures were, however, frustrated precisely because the Claimant had previously willfully assigned its rights under the Contract to Ostram, who still received from the Respondent part of the amounts due under the invoices in its capacity as assignee. In this context, the Respondent recalls a letter sent by the Claimant to AFIP on 22 March 2006, in which the Claimant stated that “the amount payable is a receivable which does not belong to ICS but to OSTRAM; therefore, the abovementioned attachment [...] may not affect it in any way and it must be paid at once to OSTRAM.”²⁴⁸

224. The Respondent also states that no evidence has been submitted by the Claimant to support its contention that the assignment was later cancelled.²⁴⁹ Nevertheless, the Respondent points out that even if the Claimant were able to prove that the cancellation occurred, it would still lack *jus standi*, for it would have reacquired the rights underlying the dispute only after the measures were carried out by the Respondent.²⁵⁰
225. According to the Respondent, if an alleged investor acquires its assets or claims after the adoption of the contested measures it cannot benefit from the protections offered by the BIT. The Respondent supports this conclusion citing legal scholars and case law rejecting this practice.²⁵¹
226. Lastly, the Respondent asserts that the alleged cancellation of the assignment would not have had retroactive effect, since the assignment agreement itself sets forth that it will remain in force until payment of all obligations due by the Respondent under the Contract or until the assignment is cancelled – from which point on the rights at stake are re-acquired by the Claimant.²⁵²
227. The Respondent therefore concludes that the Claimant lacks the necessary *jus standi* to bring its claims as it was not the holder of the rights upon which its claim is based when the contested measures were adopted. Moreover, the lack of legal standing is aggravated by the fact that the Claimant only re-acquired the investment after the contested measures had been adopted, and therefore the Claimant should not be allowed to complain about measures that were already in force before it made its alleged investment.²⁵³

²⁴⁸ R III, ¶¶5-9; Exhibit R-3; Transcript of the Hearing on Jurisdiction, 2nd day (English version), p. 8:18-10:9, 13:9-16:6.

²⁴⁹ Transcripts of the Hearing on Jurisdiction, 1st day (English version), pp. 5:19-23, 20:17-24, 24:13-25:1.

²⁵⁰ Transcripts of the Hearing on Jurisdiction, 1st day (English version), pp. 25:1-26:1.

²⁵¹ R III, ¶10; C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2009), ¶¶350, ¶360; *Phoenix Action*, *supra* note 242, ¶¶138, 144; *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶¶154-156, 175; *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, ¶156.

²⁵² R III, ¶¶11-13; Transcript of the Hearing on Jurisdiction, 2nd day (English version), pp. 2-3.

²⁵³ R III, ¶13.

2. Arguments by the Claimant

228. First, the Claimant contends that the Respondent's argument regarding the Assignment Issue is inadmissible. Article 21(3) of the UNCITRAL Arbitration Rules bars the Respondent's late assertion of this jurisdictional objection. The Claimant asserts that "a party [should] raise jurisdictional objections as early as possible – and certainly in its pleadings on jurisdiction."²⁵⁴ Since the Respondent raised the Assignment Issue only at the Hearing on Jurisdiction, it is inadmissible.²⁵⁵
229. In response to the potential unfairness of preventing a party from raising an objection, the Claimant alleges that the "the balance of fairness" favours the Claimant, given that the Respondent never raised the Assignment Issue at any earlier stage, even though it had all the relevant documentation in its possession since July 2001.²⁵⁶
230. Secondly, the Claimant argues that, even if the Assignment Issue were admissible, the Tribunal should find that the Respondent has shown through its conduct an intention not to raise this point. According to the Claimant, the Respondent must have been aware of the facts giving rise to the Assignment Issue in at least eighteen separate moments in time, but never raised the issue before. The Respondent was mindful of the provision contained in Article 21(3) of the UNCITRAL Arbitration Rules regarding the need to advance jurisdictional objections in the pleadings; however, it never raised the Assignment Issue before.²⁵⁷
231. The Claimant considers that the Respondent never previously raised this objection because from the beginning the Respondent accepted that the Claimant was an investor that had legal standing to bring the claim it has advanced, subject only to the three objections that the Respondent raised in its Memorial on Jurisdiction.²⁵⁸
232. Furthermore, the Claimant notes that every time the Respondent sought to communicate in respect of governmental measures which had an impact on the amounts payable under the Contract, the Respondent communicated with the Claimant, not with Ostram; in particular, all communications between 2002 and 2006 relating to the material aspects of the Contract were conducted between the Respondent and the Claimant.²⁵⁹
233. In addition, that Claimant continued to be the counterparty to the Contract and maintained the status of investor is also evidenced by the fact that all correspondence during the settlement negotiations since November 2006 were carried out solely with the Claimant. During these negotiations the Respondent never challenged the Claimant's status as the legitimate counterparty.²⁶⁰

²⁵⁴ C IV, ¶¶29-33.

²⁵⁵ C IV, ¶33; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 8:19-23.

²⁵⁶ C IV, ¶¶25, 34-36.

²⁵⁷ C IV, ¶¶37-39.

²⁵⁸ C IV, ¶40; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 8:2-19 and pp. 94-95.

²⁵⁹ C IV, ¶¶41-42.

²⁶⁰ C IV, ¶43; C V, ¶¶3-9.

234. The Claimant therefore concludes that the Respondent has raised the Assignment Issue too late, as the Respondent had already accepted that the Claimant occupies the position of an investor.²⁶¹
235. Thirdly, the Claimant rejects the Respondent's position that the effect of the Assignment Agreement was to divest the Claimant of the alleged investment. The Respondent has not submitted any Argentine law authority to support this position.²⁶² The Claimant also argues that the only rights assigned under the Assignment Agreement were "account receivables" and that the Claimant continued to perform the Contract until early 2002. The Claimant pursued monies due from the Respondent thereafter and as a matter of Argentine law remained at all times a proper party to any legal proceedings whereby monies due and owing pursuant to the Contract were being recovered. Further, the cancellation of the Assignment on 14 June 2007 confirms that the Claimant is presently entitled to seek recovery of the monies due by the Respondent.²⁶³
236. The Claimant also asserts that notice of the assignment to Ostram was received by the Argentinean Federal Revenue Administration Authority to whom powers had been delegated by MECON on 14 June 2007.²⁶⁴ Additionally, the Claimant further asserts that proof of cancellation of the assignment has always existed and been available to the Respondent. In fact, the previous Attorney General of Argentina asked for proof of the Claimant's status as a foreign investor in Argentina on 4 December 2006 and received it shortly thereafter.²⁶⁵
237. According to the Claimant, the assignment included only the credit rights arising from the Contract, it did not include the Contract, nor the investment; the Claimant remained as the proper party to the Contract. The Claimant concludes that under Argentine law, the Claimant remains the contracting party and the investor, and it retains all its rights under the Contract which give rise to the Claimant's rights under the BIT.²⁶⁶
238. Fourthly, the Claimant states that the cancellation of the Assignment Agreement was notified to the Respondent on 13 June 2007. In particular, regarding the retroactive effect of the cancellation, the Claimant states that the Respondent has not provided any proof or legal doctrine that supports the Respondent's position that the cancellation has no retroactive effect. The Claimant recognises that there is no retroactive effect in respect of any credit rights which had been satisfied in full by the Respondent during the period in which the Assignment Agreement was in force. However, the cancellation does have retroactive effect with respect to credit rights which remained due to the Claimant.²⁶⁷

²⁶¹ C IV, ¶44.

²⁶² C IV, ¶¶45-46; C V, ¶¶3-15.

²⁶³ C IV, ¶¶26-28; Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 171:10-172:18.

²⁶⁴ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 95:11-21.

²⁶⁵ Transcript of the Hearing on Jurisdiction, 1st day (English version), p. 92:21-97:1.

²⁶⁶ C IV, ¶50.

²⁶⁷ C IV, ¶¶51-53; C V, ¶¶12-15.

239. The Claimant thus concludes that, upon the cancellation taking effect, it became entitled to, not only any future credits, but also, with retroactive effect, the outstanding credits which the Respondent had failed to pay. Consequently, throughout the period in which the Assignment Agreement was in force, the Claimant remained the contracting party and was the investor for the purposes of the BIT.²⁶⁸
240. Lastly, the Claimant additionally argues that, taking into account the intertwined factual nature between the contractual context of the Claimant's claims and the separate BIT claims, even if the Assignment Issue was admitted, "it must be considered within the context of the evaluation of the merits of the claim and adjudicated at that juncture – as provided for by Article 21(4) of the UNCITRAL Rules."²⁶⁹

²⁶⁸ C IV, ¶55.

²⁶⁹ C IV, ¶56.

H. RELIEF SOUGHT BY THE PARTIES REGARDING JURISDICTION

H.I. RELIEF SOUGHT BY THE RESPONDENT

241. As identified in the Respondent's Reply on Jurisdiction, the Respondent asks the Tribunal to award as follows:

193. In view of the foregoing and in light of the fact that Claimant did not comply with a condition to which the Argentine Republic's consent to international arbitration was made subject; that this case refers to contractual disputes which are subject both to Argentine law and jurisdiction, pursuant to the provisions of the Treaty and the contract in question; that Claimant has acquiesced to the Argentine Republic's actions; and that its claim is time-barred, the Argentine Republic respectfully requests that the Arbitral Tribunal:

- 1) DECIDE (pursuant to Articles 21.1. and 21.3 of the UNCITRAL Rules) to ADMIT this MEMORIAL; and
- 2) DETERMINE, pursuant to Article 21.4 of UNCITRAL Rules, the Tribunal's lack of jurisdiction over this case and thus DISMISS the Statement of Claim, ordering Claimant to pay costs and interest.²⁷⁰

H.II. RELIEF SOUGHT BY THE CLAIMANT

242. As identified in the Claimant's Rejoinder on Jurisdiction, the Claimant asks the Tribunal to award as follows:

79. For all of the reasons explained in Sections I through III above, the Claimant respectfully requests that the Tribunal:
- (a) reject all of the Respondent's arguments;
 - (b) decide as a preliminary matter that it has jurisdiction to examine the merits of the dispute pursuant to the Rules of Arbitration of the United Nations Commission on International Trade Law; and
 - (c) defer the decision on costs to the second phase of the arbitration on the merits.
 - (d) In the alternative, should the Tribunal decide to rule on costs at this stage, the Claimant respectfully submits that the Respondent should be liable for all costs of this jurisdictional phase and requests that the Tribunal allow the parties to make post-hearing submissions to that effect.²⁷¹

²⁷⁰ R II, ¶193.

²⁷¹ C III, ¶79.

I. ANALYSIS OF THE TRIBUNAL**II. THE 18-MONTH LITIGATION PREREQUISITE UNDER ARTICLE 8****1. The nature of the requirement of prior submission to Argentine courts**

243. The first question that the Tribunal must consider is the nature of the pre-arbitral requirement of submission of the dispute to the Argentine courts, both as to its mandatory or permissive nature, as well as in relation to the effects of non-compliance with this requirement.

244. Article 8 sets out a sequence of events leading to the submission of a claim by an investor to international arbitration. For ease of reference, Article 8 is set out again below:

ARTICLE 8
Settlement of Disputes
Between an Investor and the Host State

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

- (a) if one of the Parties so requests, in any of the following circumstances:
- (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
 - (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in

ARTÍCULO 8
Solución de controversias
entre un inversor y el Estado receptor

(1) Las controversias relativas a una inversión que surjan, dentro de los términos de este Convenio, entre un inversor de una Parte Contratante y la otra Parte Contratante, que no sean dirimidas amistosamente, serán sometidas a solicitud de cualquiera de las partes en la controversia a decisión del tribunal competente de la Parte Contratante en cuyo territorio la inversión se realizó.

(2) Las controversias arriba mencionadas serán sometidas a arbitraje internacional en los siguientes casos:

- (a) a solicitud de una de las partes, en cualquiera de las circunstancias siguientes:
- (i) cuando, luego de la expiración de un plazo de dieciocho meses contados a partir del momento en que la controversia fue sometida al tribunal competente de la Parte Contratante en cuyo territorio se realizó la inversión, dicho tribunal no haya emitido una decisión definitiva;
 - (ii) cuando la decisión definitiva del tribunal mencionado haya sido emitida pero las partes continúen en

dispute;

disputa;

- | | |
|---|--|
| (b) where the Contracting Party and the investor of the other Contracting Party have so agreed. | (b) cuando la Parte Contratante y el inversor de la otra Parte Contratante así lo hayan convenido. |
|---|--|

245. The provision sets forth that a prospective arbitral claimant “shall”, upon the arising of an investment dispute and the failure to reach an amicable settlement thereof, submit the dispute to the Argentine courts. Notably, the provision indicates that, not only the investor, but the State Contracting Party to the Treaty may also exercise an option to submit the dispute to its domestic courts (“at the request of one of the Parties to the dispute”). Paragraph 2 then follows by stipulating three situations where investment disputes “shall” be submitted to international arbitration, including two situations allowing unilateral invocation of arbitral jurisdiction at the investor’s request. The first of these allows resort to arbitration where the Argentine court to which the dispute was submitted has not rendered a final decision within eighteen months. The second allows submission to arbitration upon the rendering of a final decision that does not yet resolve the dispute.
246. It is common ground between the Parties that the Claimant has not submitted the present dispute to the Argentine courts and thus has not complied with the above provision, regardless of what effect is to be given to such non-compliance. The Claimant, however, argues that, according to its object and purpose, this provision establishes a mere procedural waiting period which is satisfied by the passing of 18 months from when the dispute might have been so submitted. Moreover, the Claimant submits that requiring the Claimant to litigate before the Argentine courts would be a futile exercise that would simply postpone the dispute’s inevitable return to arbitration, and that the Tribunal can set aside the requirement on this basis. The Respondent meanwhile asserts that the provision acts as a strict limit on its consent to arbitration and must be strictly complied with before the investor’s right to proceed to international arbitration arises. The Tribunal must thus assess the intention of the Contracting Parties to the UK-Argentina BIT behind Article 8’s requirement of litigation for 18 months before the Argentine courts.
247. After consideration of the language of the Treaty and the arguments of the Parties, the Tribunal finds itself in agreement with the Respondent’s view. The Tribunal finds no ambiguity as to the mandatory character of the phrase “shall be submitted...to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made” in either the English or Spanish versions of the Treaty. Article 8 of the Treaty does not exhibit the same juxtaposition between permissive language as to negotiation requirements and mandatory language for pre-arbitral submission to local courts as in the case of the Germany-Argentina BIT in the *Wintershall* case. However, Article 9 of the Treaty does: disputes between the Contracting Parties “should, if possible” be settled through diplomatic channels and “shall” otherwise be submitted to arbitration.

248. The requirement is neither a mere “waiting period”²⁷² nor a requirement of “exhaustion of local remedies”²⁷³ and falls instead between these extremes, both in respect of its content and object and purpose.

249. Given the above, the *Wintershall* tribunal’s analysis in this regard remains apt:

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 Article 10. The latter forms the subject matter of paragraph (2) of Article 10.²⁷⁴

250. Moreover, the trend in public international law has clearly favoured the strict application of procedural prerequisites. For example, in the recent case of *Georgia v. Russia* before the ICJ, despite the absence of mandatory language, a majority of the ICJ found that the phrase “dispute... which is not settled by negotiation or by the procedures expressly provided for in this Convention” established a precondition to resort to negotiations or to the procedures expressly provided for under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), prior to the seisin of the ICJ.²⁷⁵

251. The Tribunal finds no reason thus to deem this requirement as permissive and non-mandatory. Nor can the Tribunal concur with the interpretation that this requirement is satisfied by anything less than what it explicitly calls for: the submission of the investment dispute to the Argentine courts for a period of 18 months or until a final decision is rendered, whichever is shorter.

²⁷² *Contra, e.g., Gas Natural, supra* note 109.

²⁷³ *Contra, e.g., Wintershall, supra* note 7.

²⁷⁴ *Wintershall, supra* note 7, ¶145.

²⁷⁵ *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), *supra* note 9, ¶¶133-135. In the investment treaty context, the tribunal in the recent *Murphy v. Ecuador* case also rejected an argument that the six-month waiting period provided for in the US-Ecuador BIT was not a jurisdictional requirement but rather a mere procedural formality breach of which has no legal consequences. The tribunal held that the lack of mandatory language did not permit it “to ignore the existence of the norms contained in Article VI of the BIT”. The tribunal also rejected the argument about the futility of the negotiations required under Article VI of the BIT based on the alleged failure of other negotiations between Ecuador and other investors, since to find out whether negotiations would succeed or not, “the parties must first initiate them” (*Murphy, supra* note 8, ¶¶144-149).

2. Is compliance with the requirement of prior submission to Argentine courts a question of jurisdiction, admissibility, or procedure?

252. The above determination that the prior submission of the investment dispute to the Argentine courts is mandatory still leaves the Tribunal faced with the question of what effect is to be given to non-compliance with this requirement. That question, in turn, depends on whether compliance with Article 8(1) is properly considered to be a question of jurisdiction, admissibility, or procedure. In particular, it is the line between jurisdiction and admissibility that is important.
253. The Tribunal holds an inherent power over procedure. This power is implicit, but is also set out in Article 15(1) of the UNCITRAL Arbitration Rules:
- Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.
254. Within the bounds of equality, due process, and the explicit stipulations of the UNCITRAL Arbitration Rules, the Tribunal has nearly unlimited discretion in relation to procedural matters. It has even been noted that under the UNCITRAL Arbitration Rules, as opposed to other procedural frameworks, a tribunal may even enjoy broad power in certain cases to overrule the parties' agreements on procedural matters.²⁷⁶
255. By contrast, arbitral jurisdiction is based exclusively on consent. The only inherent jurisdiction held by an arbitral tribunal is its *competence-competence* power to determine its own jurisdiction, which also finds its source in both general principles²⁷⁷ and explicit provisions such as Article 21(1) of the UNCITRAL Arbitration Rules. Even *competence-competence*, however, can be conceived of as a product of consent to a function inherent and necessary to the proper functioning of international judicial bodies. Once a tribunal has conclusively determined that it has no jurisdiction, it is rendered *functus officio* and ceases to exist and act in relation to the dispute.²⁷⁸
256. Admissibility falls somewhere in between these extremes. It is not an area where a tribunal enjoys discretion to simply disregard the requirement that has not been fulfilled, but rather one in which the tribunal enjoys some discretion as to how to deal with its non-fulfillment, such as by staying instead of terminating the proceedings.
257. The *Wintershall* tribunal comprehensively analysed and demonstrated why the 18-month litigation prerequisite should not be considered merely "procedural and directory rather than as mandatory and jurisdictional in nature", as has been held by some

²⁷⁶ Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure*, 24 J. INT'L ARB. 327 (2007), p. 335.

²⁷⁷ BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1953), pp. 275-279.

²⁷⁸ There may, of course, be exceptions to this rule in respect of procedural issues, such as the allocation of costs, incidental to the procedure in which the tribunal determined its own lack of jurisdiction. See, in the investment treaty context, e.g., *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL (NAFTA), Final Award, Award in Respect of Costs, 26 November 2002; *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela*, UNCITRAL, Award on Costs, 30 August 2010.

investment treaty tribunals cited by the Claimant.²⁷⁹ The Tribunal nonetheless considers it necessary to address the finer distinctions that might be made.

258. So, what distinguishes an issue of admissibility from one of jurisdiction? The ICJ addressed the issue in the *Democratic Republic of the Congo v. Rwanda*,²⁸⁰ explaining the distinction as follows:

The Court will however first address the DRC's argument that the objection based on non-fulfilment of the preconditions set out in the compromissory clauses, and in particular in Article 29 of the Convention, is an objection to the admissibility of its Application rather than to the jurisdiction of the Court. The Court recalls in this regard that its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them (see paragraph 65 above). When that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon. The Court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application. [citations omitted]

The question is therefore whether the requirement of prior submission to the Argentine courts falls within the “conditions to which [Argentina’s] consent [to arbitration] is subject” or whether non-compliance nevertheless does not affect the underlying consent to arbitrate the present dispute.

259. Jan Paulsson has attempted to come up with a further “lodestar” to guide such determinations:

There is promise in the notion of ‘relevance to the nature of the forum’. It enables us to see that the nub of the classification problem is whether the success of the objection necessarily negates consent to the forum. Our lodestar takes the form of a question: is the objecting party taking aim at the tribunal or at the claim?²⁸¹

260. Paulsson thus posits that, if one speaks of a choice of forum for the adjudication of the claim, then the question is one of jurisdiction; if the question regards a defect particular to the claim advanced, then one is dealing with a problem of admissibility.²⁸² Paulsson then concludes that issues going to the ripeness of a claim are typical of admissibility but recognises that “[t]he exhaustion of remedies goes beyond mere *ripeness*...In the

²⁷⁹ See *Wintershall*, *supra* note 7, ¶¶133-153; *contra*, e.g., *Maffezini*, *supra* note 6, ¶64; *National Grid*, *supra* note 88, ¶74; *AWG*, *supra* note 93, ¶68; *Suez/InterAgua*, *supra* note 99, ¶¶63, 66.

²⁸⁰ *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), *supra* note 30, ¶88.

²⁸¹ Jan Paulsson, *Jurisdiction and Admissibility* in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION, LIBER AMICORUM IN HONOUR OF ROBERT BRINER (2005), p. 616.

²⁸² The recent majority decision in *Hochtief v. Argentina* adopts a nominally similar characterisation of the distinction between jurisdiction and admissibility when it states that “[j]urisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal.” The *Hochtief* majority, however, takes the distinction too far. The decision appears to substitute the tribunal-vs.-claim dichotomy for the question of consent instead of using it as an analytical tool for the determination of whether consent exists (*Hochtief AG v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, ¶¶90-96). In this respect the Tribunal therefore disagrees with the analysis of the majority in *Hochtief* and prefers the analysis contained in the Separate and Dissenting Opinion (*Hochtief v. Argentina*, *supra*, Separate and Dissenting Opinion of J. Christopher Thomas, QC, 24 October 2011, ¶31).

absence of exhaustion of local remedies, the underlying claim may still be perfectly ripe and appropriate for adjudication, but not before a particular forum that requires exhaustion as a precondition of access to it. The problem is one of jurisdiction.”

261. As already noted,²⁸³ the 18-month litigation prerequisite is not a requirement of exhaustion of local remedies in the technical sense. It cannot, however, be presumed that the prerequisite does not share many of the same rationales behind the local remedies rule. Article 8(1) is thus, according to its terms, a choice of forum for the submission of disputes in the first instance and not merely a question of ripeness. The Tribunal is therefore left with a distinction without a difference.²⁸⁴
262. The Claimant argues that consent to arbitration is merely postponed and is, for all intents and purposes, inevitable. Consent is nonetheless not yet present. The Treaty explicitly provides at Article 8(2)(b) for a mechanism by which the Respondent might agree to proceed directly to international arbitration. However, the Claimant has not claimed that any such agreement exists. As a result, the failure to respect the precondition to the Respondent’s consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute. Not only has the Respondent specifically conditioned its consent to arbitration on a requirement not yet fulfilled, but the Contracting Parties to the Treaty have expressly required the prior submission of a dispute to the Argentine courts for at least 18 months, before a recourse to international arbitration is initiated. The Tribunal is simply not empowered to disregard these limits on its jurisdiction.

3. Is the Tribunal empowered to ignore the 18-month litigation prerequisite on the basis that it would be futile or inefficient?

263. Only one decision has been drawn to the Tribunal’s attention where an element of futility has been used successfully to allow derogation from a similar domestic courts submission prerequisite: *Abaclat and Others v. Argentina*,²⁸⁵ rendered shortly after the close of proceedings in the present case.²⁸⁶ In *Abaclat*, the majority of the tribunal found that non-compliance by the Claimants with the 18-month litigation prerequisite could not preclude them from resorting to arbitration. The *Abaclat* majority considered that strict application of this requirement would be inconsistent with an object and purpose “aimed at providing the disputing parties with a fair and efficient dispute settlement

²⁸³ See ¶248, above.

²⁸⁴ The *Telefónica* tribunal also considered the requirement to be “a mitigated form of the exhaustion of local remedies requirement, to which [Latin American] countries have adhered in accordance with the Calvo doctrine” (*Telefónica*, *supra* note 103, citing H.A Grigera Naón, *Arbitration and Latin America: Progress and Setbacks* in 21 ARBITRATION INTERNATIONAL 127 (2005), p. 137). The *Siemens* tribunal’s conclusion in this regard is curious in that the tribunal recognises a certain identity of purpose behind the two rules, but then distinguishes them for purely formal reasons. In any event, that characterisation was in relation to the issue of tacit waiver and not the consequences of non-compliance (*Siemens v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (hereinafter “*Siemens*”)).

²⁸⁵ *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011 (hereinafter “*Abaclat*”).

²⁸⁶ For an example of futility applied successfully to a simple “waiting period” not combined with a *ratione fori* requirement, see *Ethyl Corp. v. Canada*, UNCITRAL (NAFTA), Decision on Jurisdiction, 24 June 1998.

mechanism.”²⁸⁷ The tribunal then weighed the interests of the parties to the dispute, *i.e.*, for the host State to have “a fair opportunity to address the issue through its domestic legal system”, and for the Claimants to be provided with “an efficient dispute resolution mechanism.”²⁸⁸ Given the “overall circumstances of the case”, and in particular the Emergency Law and other laws and decrees in effect in Argentina which precluded the relief sought by the claimants and the absence of any available mass claims process before the Argentine courts, the tribunal concluded that the opportunity to address the dispute through the domestic courts “was only theoretical and/or could not have led to an effective resolution of the dispute”, and thus “it would have been unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement.”²⁸⁹

264. In particular, the overriding preoccupation driving the *Abaclat* majority’s analysis appears to be the lack of any natural forum in the Argentine legal system for the presentation and resolution of the mass claim brought by the claimants. There was no way for the claimants to actually pursue their claim—as a mass claim—before the Argentine courts in order to satisfy the condition precedent to arbitration. The majority’s desire not to leave the claimants without any real and effective forum in which to pursue their claims is evident. The majority thus felt compelled to allow an exception to the 18-month litigation prerequisite.
265. The Tribunal agrees with the idea that limitations on the excessively strict application of a treaty provision can be implicit and need not be stated expressly. Futility has also been recognised as an exception to jurisdictional prerequisites in international law in other contexts.²⁹⁰ However, judicially-crafted exceptions must find support in more than a tribunal’s personal policy analysis of the provisions at issue. This is especially dangerous in the absence of conclusive evidence adduced to support a tribunal’s teleological inferences: the same provision may strike some as “nonsensical”²⁹¹ and others as genius.²⁹²
266. The task of the Tribunal is to decide the case according to the instrument as written by the Contracting Parties thereto, applying the rules of treaty interpretation under international law. A tribunal may take policy matters arising in the case into account in accordance with VCLT Article 31’s instructions to consider object and purpose, context, and relevant rules of international law, as well as other means of interpretation set forth in the general rule of VCLT Article 31, as they may be relevant in the case at hand. Where appropriate, policy matters may also be discussed in order to provide

²⁸⁷ *Abaclat*, *supra* note 285, ¶579.

²⁸⁸ *Abaclat*, *supra* note 285, ¶582.

²⁸⁹ *Abaclat*, *supra* note 285, ¶583.

²⁹⁰ Such as in the case of the customary international law rule of exhaustion of local remedies (see, *e.g.*, C.F. AMERASINGHE, *LOCAL REMEDIES IN INTERNATIONAL LAW*, 2ND ED. (2004), pp. 204-209; Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (2005), pp. 101-102).

²⁹¹ *Plama*, *supra* note 31, ¶224.

²⁹² See, *e.g.*, William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 *VAND. J. TRANSNAT’L L.* 1 (2006).

context in the reasoning of a decision, as well as to provide some insight for future drafting exercises.

267. Otherwise, even when the application of Article 31 of the VCLT “leads to a result which is manifestly absurd or unreasonable”, a tribunal’s “recourse” is to resort to the supplementary means of interpretation of Article 32 of the VCLT. The Tribunal cannot therefore create exceptions to treaty rules where these are merely based upon an assessment of the wisdom of the policy in question, having no basis in either the treaty text or in any supplementary interpretive source, however desirable such policy considerations might be seen to be in the abstract.
268. In this context, it is pertinent to recall the commentary of the International Law Commission to Articles 27 and 28 of its Draft Articles on the Law of Treaties (that subsequently became Articles 31 and 32 in the VCLT):

Admittedly, the task of formulating (general rules of interpretation of treaties) is not easy, but the Commission considered that there were cogent reasons why it should be attempted. First, the interpretation of treaties in good faith and according to law is essential if the *pacta sunt servanda* rule is to have any real meaning...²⁹³

As much as any given rule of interpretation is liable to produce results in certain cases that some regard as undesirable, the need for a rule, and for that rule to be respected, is unavoidable for the establishment of the rule of law.

269. In any event, futility has not been demonstrated to the Tribunal’s satisfaction in this case.²⁹⁴ Both Parties have submitted together with their Memorials expert reports by distinguished Argentinean lawyers. These reports extensively analyse this issue and arrive at conflicting conclusions.²⁹⁵ After considering this expert evidence as well as the Parties’ submissions, however, the Tribunal is not convinced that futility has been demonstrated in this case. Even if the Tribunal were to accept Mr. Bianchi’s report insofar as it suggests that a resolution of the dispute within 18 months is unlikely, this would not be sufficient to establish futility.²⁹⁶ This is not a case of obvious futility, where the relief sought is patently unavailable within the Argentine legal system. There is an open and legitimate debate between the Parties’ experts as to availability of

²⁹³ United Nations Conference on the Law of Treaties, *Official records, Documents of the Conference*, p. 38, para. (5).

²⁹⁴ See ¶¶74-78, 111, above.

²⁹⁵ While Mr. Mata concludes that a case against the Government could be submitted and adjudicated within less than 18 months (First Mata Report ¶¶22-83; Second Mata Report ¶¶19-20), Mr. Bianchi considers that a claim would not have been settled within 18 months and, had the Claimant filed it, it would have been a “jurisdictional and economical waste without any useful results whatsoever” (Second Bianchi Report p. 24; First and Second Bianchi Reports).

²⁹⁶ See, e.g., with regard to the aforementioned customary international law rule of exhaustion of local remedies, ILC DRAFT ARTICLES ON DIPLOMATIC PROTECTION WITH COMMENTARIES (2006), Article 15, comment (4):

In order to meet the requirements of paragraph (a) it is not sufficient for the injured person to show that the possibility of success is low or that further appeals are difficult or costly. The test is not whether a successful outcome is likely or possible but whether the municipal system of the respondent State is reasonably capable of providing effective relief. This must be determined in the context of the local law and the prevailing circumstances. This is a question to be decided by the competent international tribunal charged with the task of examining the question whether local remedies have been exhausted.

remedies within the Argentine legal system which may have resolved the dispute within 18 months. Therefore, in the absence of even a cursory attempt by the Claimant,²⁹⁷ the Tribunal simply cannot conclude that recourse to the Argentine courts would have been completely ineffective at resolving the dispute.²⁹⁸

270. The above analysis is bolstered by a brief consideration of the nature of arbitral jurisdiction for investor-State disputes arising under investment treaties. Whereas in public international law in the State-to-State context, the jurisdictional analysis usually focuses on the consent expressed in the instrument containing the arbitration provision, investor-State arbitration requires the additional and posterior consent by a non-signatory to that treaty: the investor. The formation of the agreement to arbitrate occurs through the acceptance by the investor of the standing offer to arbitrate found in the relevant investment treaty.
271. The terms and conditions of the offer, however, were negotiated earlier and separately by the contracting parties to the treaty and are directed at investors of the other contracting State generally, rather than at any particular investor. According to the law of treaties, when exercising a right provided for it in a given treaty, a third party like the investor, shall comply with the conditions for the exercise of that right provided for in the treaty or established in conformity with the treaty.²⁹⁹
272. At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else no agreement to arbitrate may be formed. As opposed to a dispute resolution provision in a concession contract between an investor and a host State where subsequent events or circumstances arising may be taken into account to determine the effect to be given to earlier negotiated terms, the investment treaty presents a “take it or leave it” situation at the time the dispute and the investor’s

²⁹⁷ The Tribunal is conscious of the fact that the Claimant cannot maintain its argument that it is entitled to the more favourable dispute resolution provisions of the Argentina-Lithuania BIT by virtue of the MFN clause in this Treaty and—at the same time—have submitted the dispute to the Argentine courts for resolution. The fork-in-the-road clause in the Argentina-Lithuania BIT would make the submission to the Argentine courts irrevocable. This does not, however, excuse the Claimant from the consequences flowing from its decision to forego recourse to the Argentine courts.

²⁹⁸ Moreover, beyond resolving the dispute, various other purposes might be served by the requirement: (1) the submission to domestic courts might serve to familiarize them with the State’s international obligations towards foreign investors and promote their capacity to handle and resolve international investment disputes; (2) the submission to domestic courts may help to highlight areas of inconsistency between local law and the State’s international obligations for potential reform; (3) the State may prefer to avoid the publicity of an international claim if the dispute is able to be resolved locally; and (4) the delay and process involved may better allow the State to assess the claim, gather evidence, and prepare a defence to a possible international arbitration claim.

²⁹⁹ See, in the analogous context of treaties providing for rights for third States, Article 36(2) of the VCLT: “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.”

circumstances are already known. This point is equally poignant in the context of jurisdiction grounded on an MFN clause, which will be examined next.³⁰⁰

273. To conclude on this point, the Tribunal finds that the intention of Article 8(1) was the establishment of the exclusive jurisdiction of domestic courts for a period of either 18 months or until a final decision is rendered, whichever is shorter. The Tribunal further finds that the Claimant has manifestly not complied with this prerequisite and that there is no compelling reason to exempt the Claimant from its application on the basis of futility or otherwise. The Tribunal must thus decline jurisdiction unless it can find an alternative basis for the Respondent's consent to arbitration.³⁰¹

³⁰⁰ This issue was examined recently in the dissent in the *Hochtief v. Argentina* case in relation to the issue of consent to jurisdiction by way of an MFN clause (*Hochtief v. Argentina*, *supra* note 282, Separate and Dissenting Opinion of J. Christopher Thomas, QC, ¶¶14-27).

³⁰¹ The Tribunal notes that the above analysis accords with the recent judgment of the US Court of Appeals in the proceedings to set aside the award in the *BG Group plc v. The Republic of Argentina* case, also under the UK-Argentina BIT, where the court rejected the tribunal's decision to excuse the claimant's non-compliance with the 18-month litigation prerequisite on the sole basis that the requirement would "produce an 'absurd and unreasonable result'" in the circumstances (*Republic of Argentina v. BG Group plc*, No. 11-7021 (D.C. Cir. Jan. 17, 2012)).

I.II. DOES THE MOST-FAVoured-NATION CLAUSE AT ARTICLE 3(2) APPLY TO DISPUTE SETTLEMENT PROVISIONS?**1. Preliminary considerations: consent and treaty interpretation**

274. Having found that the Claimant has not complied with the requirement of prior submission to the Argentine courts, the Tribunal turns to the question of whether the Claimant may be exempted from its application through the effect of the MFN clause found at Article 3(2). Again, for ease of reference, Article 3 is reproduced in full below:

ARTICLE 3	ARTÍCULO 3
National Treatment and Most-favoured-nation Provisions	Trato nacional y cláusula de la nación más favorecida
<p>(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.</p> <p>(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.</p>	<p>(1) Ninguna Parte Contratante someterá en su territorio las inversiones y las ganancias de inversores de la otra Parte Contratante a un trato menos favorable que el otorgado a las inversiones y ganancias de sus propios inversores o a las inversiones y ganancias de inversores de cualquier tercer Estado.</p> <p>(2) Ninguna Parte Contratante someterá en su territorio a los inversores de la otra Parte Contratante, en cuanto se refiere a la gestión, mantenimiento, uso, goce o liquidación de sus inversiones, a un trato menos favorable que el otorgado a sus propios inversores o a los inversores de cualquier tercer Estado.</p>

275. The effects of MFN provisions in general have been much disputed and tribunals have generated increasingly complex answers to the basic question of whether MFN provisions can be used to overcome jurisdictional defects. The question is an important one that has the ability to change the nature of international investment treaty arbitration from a scheme of bilateral relationships into a multilateral system nearing compulsory arbitral jurisdiction.³⁰² In the mass of different answers to this question and the many articulations of each answer, it should not be forgotten that, at its root, what is being engaged in is an exercise of treaty interpretation, the results of which are inherently particular to the treaty being interpreted. A few salient general points nonetheless bear noting in relation to the interpretation of MFN clauses and the jurisdiction of investment treaty tribunals.

276. The first principle to keep in mind is the trite statement that States are free to conclude MFN clauses that have the effects advocated by either side in the instant case. This is

³⁰² Brigitte Stern, *ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case* in *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO* (Steve Charnovitz, Debra Steger, and Peter Van den Bossche eds., 2005), pp. 252-259.

particularly so where they do so clearly and explicitly, as the UK has done in a later generation of its BITs. Such provisions will be applied and enforced in accordance with their terms pursuant to the principle of *pacta sunt servanda*. The problem arises when, as with the majority of MFN clauses, the clause is not explicit as to its application to dispute settlement matters.

277. Once again, the Tribunal's task is not to question the wisdom of the Contracting Parties in concluding a particular agreement, even if this is thought to give rise to a disruptive tendency towards treaty-shopping or general uncertainty as to the exact extent of obligations undertaken. The Tribunal cannot thus concur with the *Telenor* decision insofar as policy considerations underlie its reasoning in substitution of proper and thorough analysis of the treaty text and relevant principles of international law.³⁰³ This principle cuts both ways, however, such that the Tribunal can agree with the statements of the same *Telenor* decision that reject other tribunals' reliance on abstract policy considerations in favour of greater investor protection or the importance of international arbitration to investor protection.³⁰⁴ The comments of the *Renta 4* tribunal encapsulate well sentiments that are also shared by the present Tribunal:

To choose one of the contending policy theses as the reason to read a BIT in a particular way may be presumptuous. The stakes are high and the policy decisions appertain to the State-parties to the treaties. Speculations relied upon as the basis of purposive readings of a text run the risk of encroachment upon fundamental policy determinations. The same is true when 'confirmation' of a hypothetical intention is said to be found in considerations external to the text. The duty of the Tribunal is to discover and not to create meaning.³⁰⁵

278. Thirdly, the Respondent is correct in highlighting that in order to be of assistance to the Claimant in the present case, the MFN clause must constitute more than a mere prohibition of discrimination between investors based on their provenance: the MFN clause must also be in itself a manifestation of consent to the arbitration of investment disputes according to the rules that the MFN provision might attract from other comparator treaties. Should the MFN provision not be found to operate in a jurisdictional manner, that is to act independently as a substitute for the consent found in the basic treaty's dispute resolution clause, it cannot have the effect advocated for by the Claimant here.
279. Fourthly, the standard of consent is firmly established in international law and does not vary according to the context in which it is considered. BITs are treaties and as such are instruments belonging to the international legal order and deriving their force from the *pacta sunt servanda* rule of that order. BIT terms and provisions must therefore be interpreted according to the normal rules of interpretation of treaties and without losing sight of the principles and rules of international law applicable in the relations between

³⁰³ *Telenor*, *supra* note 35, ¶¶93-94.

³⁰⁴ *Telenor*, *supra* note 35, ¶95.

³⁰⁵ *Renta 4*, *supra* note 105, ¶93 (emphasis added).

the Contracting Parties to the BIT (particularly those of a systemic nature such as, for example, the rules regarding the State's consent to jurisdiction).³⁰⁶

280. Moreover, a State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.³⁰⁷

³⁰⁶ *Case concerning Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, *supra* note 42, ¶¶47-48:

The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.

Such manifest breach might result from, for example, the failure of the Tribunal properly to apply the relevant rules of interpretation to the provisions of the Arbitration Agreement which govern its competence. An arbitration agreement (*compromis d'arbitrage*) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties.

³⁰⁷ The Respondent's citations to the ICJ cases of *Djibouti v. France* and *Democratic Republic of the Congo v. Rwanda* are apposite in this respect. In *Djibouti v. France*, the ICJ stated as follows:

The consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*. As the Court has recently explained, whatever the basis of consent, the attitude of the respondent State must "be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner" [citations omitted]. For the Court to exercise jurisdiction on the basis of *forum prorogatum*, the element of consent must be either explicit or clearly to be deduced from the relevant conduct of a State.

(*Case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *supra* note 29, ¶93)

The ICJ's statements in *Djibouti v. France* built upon and summarised the jurisprudence of the ICJ on the subject of consent, including the *Democratic Republic of the Congo v. Rwanda* case which, not unlike the present matter, also considered the question of consent to jurisdiction in light of the failure to abide by procedural prerequisites stipulated by the treaty. In that case, the ICJ stated as follows:

The Court notes that in the present case the DRC made numerous protests against Rwanda's actions in alleged violation of international human rights law, both at the bilateral level through direct contact with Rwanda and at the multilateral level within the framework of international institutions such as the United Nations Security Council and the Commission on Human and Peoples' Rights of the Organization of African Unity. In its Counter-Memorial and at the hearings the DRC presented these protests as proof that "the DRC has satisfied the preconditions to the seisin of the Court in the compromissory clauses invoked". Whatever may be the legal characterization of such protests as regards the requirement of the existence of a dispute between the DRC and Rwanda for purposes of Article 29 of the Convention, that Article requires also that any such dispute be the subject of negotiations. The evidence has not satisfied the Court that the DRC in fact sought to commence negotiations in respect of the interpretation or application of the Convention.

The Court further notes that the DRC has also failed to prove any attempts on its part to initiate arbitration proceedings with Rwanda under Article 29 of the Convention. The Court cannot in this regard accept the DRC's argument that the impossibility of opening or advancing in negotiations with Rwanda prevented it from contemplating having recourse to arbitration; since this is a condition formally set out in Article 29 of the Convention on Discrimination against Women, the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept [citations omitted]. In the present case, the Court has found nothing in the file which would enable it to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto.

281. This principle follows from the lack of a default forum for the presentation of claims under international law. Whereas the inherent jurisdiction or hermetic division of competence over claims before general courts is a common feature of municipal judicial systems, the default position under public international law is the absence of a forum before which to present claims. The absence of a forum before which to present valid substantive claims is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection.³⁰⁸
282. This is what the Tribunal understands the *Plama v. Bulgaria* decision to mean when it says, “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”. The Tribunal believes that the *Plama* award is interpreted incorrectly when it is taken to stand for the restrictive interpretation of MFN clauses as compared to other treaty provisions. Any general rule of restrictive treaty interpretation is plainly in conflict with the VCLT and customary international law. In any event, the question of the existence or not of any purported rule of restrictive interpretation does not, in the Tribunal’s view, represent the basic distinction between the *Maffezini* and *Plama* lines of jurisprudence.

It follows from the foregoing that Article 29, paragraph 1, of the Convention on Discrimination against Women cannot serve to found the jurisdiction of the Court in the present case.

(*Case concerning Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), *supra* note 30, ¶¶91-93)

³⁰⁸ The ICJ made this clear in *Democratic Republic of the Congo v. Rwanda* even in respect of *erga omnes* and peremptory norms in international law:

The Court will begin by reaffirming that “the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation” and that a consequence of that conception is “the universal character both of the condemnation of genocide and of the co-operation required ‘in order to liberate mankind from such an odious scourge’ (Preamble to the Convention)” (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23). It follows that “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 616, para. 31).

The Court observes, however, as it has already had occasion to emphasize, that “the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things” (*East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102, para. 29), and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction : the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.

(*Case concerning Armed Activities on the Territory of the Congo (New Application: 2002)* (Democratic Republic of the Congo v. Rwanda), *supra* note 30, ¶64)

2. The terms of the most-favoured-nation clause of Article 3

283. The Tribunal thus turns to the interpretation of the text of the provision. This exercise focuses, in accordance with Article 31(1) VCLT, on the identification of the ordinary meaning of the terms of the MFN clause in context and in light of the object and purpose of the BIT. Several textual characteristics of the provision, as highlighted by both Parties, suggest broad or narrow constructions of the clause.
284. Before commencing the interpretative exercise, however, it bears noting that the Tribunal is only concerned with the MFN clause at Article 3(2). As the Respondent has noted, Article 3(1) deals with MFN treatment of investments and Article 3(2) deals with MFN treatment of investors. By its terms, dispute settlement under Article 8 is limited to “investors” and only investors can invoke international arbitration. MFN treatment can therefore only extend to dispute settlement activities through the operation of Article 3(2) of the Treaty. The Tribunal restricts itself to the consideration of this latter provision.

(i) The meaning of “treatment”

285. The key to the question of whether MFN clauses were intended to allow their use as a substitute for the consent provided in the text of the treaty that contains them is the meaning ascribed to the term “treatment”. This term, used in almost all MFN clauses, is not specifically defined in any BIT that the Tribunal is aware of. The question is then whether the term encompasses jurisdictional as well as substantive treatment.
286. The ordinary meaning of the term “treatment” is broad. Some tribunals have defined treatment as “the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.”³⁰⁹ Others have stated that “[t]reatment’ in its ordinary meaning refers to behavior in respect of an entity or a person.”³¹⁰ Such definitions may be considered as encompassing dispute resolution provisions as well as substantive treatment provisions and “[t]here is no textual basis or legal rule to say that ‘treatment’ does not encompass the host state’s acceptance of international arbitration.”³¹¹ Even decisions coming out firmly against the extension of MFN treatment to jurisdictional matters have recognised this possibility.³¹² It is here as well that the *Ambatielos* case is apposite: it clarifies that

³⁰⁹ *Suez/InterAgua*, *supra* note 99, ¶55; *AWG*, *supra* note 93, ¶55.

³¹⁰ *Siemens*, *supra* note 284, ¶85.

³¹¹ *Renta 4*, *supra* note 105, ¶101.

³¹² The *Wintershall* tribunal, for example, recognised that it rejected the application of the MFN clause to the 18-month litigation prerequisite “not because ‘treatment’ may not include ‘protection’ of an investment by the investor adopting ICSID arbitration” (*Wintershall*, *supra* note 7, ¶162). See also, *e.g.*, *Impregilo v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011, ¶36; *Hochtief v. Argentina*, Separate and Dissenting Opinion of J. Christopher Thomas, QC, *supra* note 282, ¶57.

public international law has rejected formal divisions between substance and procedure in the interpretation of treaties.³¹³

287. The Respondent, however, contends that the phrase forming the immediate context of the term, wherein the clause speaks of investments and investors being “subject...to treatment” supports the implication that the term was intended to be limited to substantive treatment standards. The first such indication is the use of the verb “to subject”. The Respondent argues that this formulation has negative connotations in comparison to other possible formulations, such as “to grant”. The argument follows that an investor’s right to initiate an international arbitration is a privilege that is “granted” and that the substantive protections under the Treaty generally constitute limits on the measures that the host State might otherwise be entitled to “subject” the investor to. This is combined with the formulation of the provision in the negative sense (“no less favourable”). The Respondent further suggests that the noun “treatment” also holds a negative connotation implying its relation to the substantive rights of investors.
288. While this might accord with meanings for “treatment” that define the term by reference to actions by others unto the person or thing being “treated” in a certain way, this element is not conclusive. For instance, Article 7 of the Treaty, in excluding certain subjects from MFN “treatment”, refers to the exclusion of “any treatment, preference, or privilege” that might otherwise have been attracted by the MFN clause. The clear implication is that positive grants by the host State are not excluded from the scope of “treatment”, even when that term is used alone. Moreover, both national treatment and MFN provisions essentially function as non-discrimination provisions. They are only engaged when the investor alleges being “subject to [differential] treatment” vis-à-vis nationals of the host State or nationals of third States. The strong negative implication involved in differential treatment sufficiently explains the choice of language.
289. There are, however, other clues that suggest that the term “treatment” was not simply intended to hold the broad ordinary meaning suggested by the Claimant. The Tribunal notes that neither party to the present case submitted direct evidence revealing the particular understanding held by the Contracting Parties of the term “treatment” as at the time of the conclusion of the Treaty. As such, it is appropriate and helpful to resort to the principle of contemporaneity in treaty interpretation, particularly pertinent in the case of bilateral treaties. This principle requires that the meaning and scope of this term be ascertained as of the time when the UK and Argentina negotiated their BIT.
290. The Treaty was concluded by Argentina and the UK late in 1990. This was a time when scholars and tribunals insisted on the autonomy or severability of the arbitral clause so as to protect the right of the investor to obtain reparation in case of arbitrary revocation of contracts by a State party, a general trend which also informed the negotiation of

³¹³ Indeed, the flaw in *Maffezini* was to extrapolate too far from this general point, as aptly noted by the *Renta 4* tribunal:

It is undoubtedly fair to compare BITs for the purpose of assessing compliance with promises of MFN treatment given their congruent objective: the promotion and protection of investments. Yet such a general statement is insufficient to decide any particular case. It is a matter of the wording of the relevant instruments. This is one of the reasons awards under BITs are of variable relevance and value in subsequent cases.

(*Renta 4*, *supra* note 105, ¶90)

bilateral treaties aimed at protection foreign private investment. This was thus long before *Maffezini* brought treaty-based questions concerning the interplay between MFN clauses and international investor-State dispute resolution mechanisms into focus; indeed, these issues remained entirely unexplored.

291. This was nonetheless a fair time after the completion of ILC's Draft Articles on MFN Clauses in 1978.³¹⁴ It has been said that the ILC's work is ultimately irrelevant to the present question.³¹⁵ Yet, the conspicuous absence of any explicit discussion of the subject is notable in itself.³¹⁶ The commentary to Draft Article 9 cites the *Anglo-Iranian Oil Company*³¹⁷ and *Ambatielos*³¹⁸ cases as the "*sedes materiae*" on the interpretation of MFN clauses as have a number of investment treaty tribunals.³¹⁹ These cases must therefore be taken into account not only as legal authorities on the proper interpretation of MFN clauses, but also as precedent that informed subsequent treaty drafting.
292. The *Anglo-Iranian Oil Company* case concerned a fact pattern that is completely different from the modern investment treaty arbitration context. Two particular distinguishing features present themselves. First, the treaties containing MFN provisions did not deal with jurisdictional questions at all. The treaties contained no arbitration provisions for disputes arising under those treaties. Second, the instrument whose benefits were sought to be accessed through the MFN clause was Iran's declaration under the Optional Clause in the ICJ Statute, not an analogous treaty. The decision nonetheless clearly expresses the finding that "the most-favoured-nation clause...has no relation whatever to jurisdictional matters between the two Governments."³²⁰
293. The *Ambatielos* case meanwhile dealt with procedural rights relating to the "administration of justice". As noted above,³²¹ the decisions, both before the ICJ and the Arbitration Commission, can thus be taken to support the idea that treaty rights of a procedural (as opposed to substantive) nature are not inherently excluded by their nature from the "treatment" guaranteed by a broadly-worded MFN clause. However, the rights in question still clearly formed the object of the treaty in question. The "treatment" examined comprised the measures taken by municipal courts as an organ of the State

³¹⁴ ILC DRAFT ARTICLES ON MOST-FAVoured-NATION CLAUSES (1978).

³¹⁵ See, e.g., Donald M. McRae, *Annex: Discussion Paper, MOST-FAVoured-NATION CLAUSE, REPORT OF THE WORKING GROUP, 59th Session (UN Doc. A/CN.4/L.719)*, p. 11:

The 1978 draft articles provide limited guidance on the question. Under draft article 9, a beneficiary State acquires under an MFN clause "only those rights which fall within the subject matter of the clause." But, determining the subject matter of the clause is the very question with which the *Maffezini* and other tribunals have been grappling.

³¹⁶ Albeit in a non-exhaustive list, the ILC Draft Articles mention a number of subjects to which MFN clauses have been applied. While matters of "administration of justice" are included, as would be expected in light of the *Ambatielos* case, no category clearly references dispute settlement matters between parties to a given treaty.

³¹⁷ *Case concerning the Anglo-Iranian Oil Company* (United Kingdom v. Iran), Judgment of 22 July 1952, 1952 ICJ Reports 93.

³¹⁸ *Ambatielos*, *supra* note 39.

³¹⁹ For a thorough analysis of the import of these decisions *supra* and other precedents on the question at hand, with which the Tribunal largely concurs below, see DOUGLAS, *supra* note 41, pp. 345-356.

³²⁰ *Case concerning the Anglo-Iranian Oil Company* (United Kingdom v. Iran), *supra* note 317, p. 110.

³²¹ See ¶286, above.

vis-à-vis a foreign national. The guidance offered by the *Ambatielos* case is therefore limited and does not contradict the statements of the ICJ in the *Anglo-American Oil Company* case.³²² The same can be said for the other precedent in this area, the *Case Concerning the Rights of Nationals of the United States of America in Morocco*,³²³ where the United States claimed expanded rights of consular jurisdiction, rather than any expansion of the jurisdiction of the ICJ by virtue of the MFN clause in the basic treaty.

294. Shortly after the time of conclusion of the Treaty, in 1992, the Development Committee of the World Bank also adopted Guidelines on the Treatment of Foreign Direct Investment.³²⁴ This instrument also does not explicitly define the term “treatment”. However, the structure of the World Bank Guidelines, and in particular Part III devoted to “treatment” and setting forth the range of common substantive standards of investment protection, suggests that the prevailing view at the time was that treatment was meant to cover discrete principles of conduct applicable to the State hosting the foreign investment: the legal regime of the investment safeguarding it from any discriminatory or unfair and inequitable practices within the host State’s territory. Meanwhile, “dispute settlement” is dealt with in Part V of those Guidelines, separately from standards of “treatment”.
295. The World Bank Guidelines are a “soft law” instrument that does not directly bear on the interpretation of the UK-Argentina BIT. Nonetheless, through the interpretative principle of contemporaneity, they provide a valuable indication of the prevailing view among the community of States during the period leading up to the adoption of the UK-Argentina BIT to which no countervailing evidence has been offered. The World Bank Guidelines therefore cast doubt upon whether the broad meaning discussed above is indeed the ordinary meaning intended by the Contracting Parties.
296. On the basis of the above examination of sources contemporary to the BIT, the Tribunal’s view is that the term “treatment”, in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary. The settlement of disputes meanwhile remained an entirely distinct issue, covered by a separate and specific treaty provision. Thus, when the text of the MFN clause is silent about extending its application to dispute settlement provisions and Article 8(1) of the same BIT provides a mechanism for dispute settlement between an investor and the host State in respect of all investment disputes which “arise within the terms of this Agreement”, the context represented by Article 8(1) plays a determinative role in the ascertainment of the ordinary meaning of the terms of the MFN clause. Further elements confirm this conclusion.

³²² *Ambatielos*, *supra* note 39.

³²³ *Case concerning the Rights of Nationals of the United States of America in Morocco* (France v. United States), *supra* note 96, p. 176.

³²⁴ World Bank, GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT (1992) (hereinafter “World Bank Guidelines”), available at <http://ita.law.uvic.ca/documents/WorldBank.pdf>.

(ii) The meaning of “treatment” as regards investors’ “management, maintenance, use, enjoyment or disposal” of investments

297. The next relevant aspect of the MFN provision at Article 3(2) is its reference to the “management, maintenance, use, enjoyment or disposal of” investments. In order to further elucidate the meaning of “treatment” intended by the Contracting Parties, this passage must be interpreted in accordance with the principle of *ejusdem generis* to determine what class of matters the MFN clause relates to and can therefore attract from other treaties.
298. The imperfect parallelism between Article 3(1) and Article 3(2) is also relevant here. While Article 3(1) speaks of according MFN treatment to “investments or returns of investors” with no qualification, Article 3(2) accords investors MFN treatment only “as regards their management, maintenance, use, enjoyment or disposal of their investments.” The clear implication is that the phrase was intended to have some limiting effect on the kinds of treatment covered.³²⁵
299. The formulation of Article 3(2) is also different and narrower in scope than clauses which provide for MFN treatment in relation to “all matters” or “all issues” relating to the BIT. The latter language has been relied upon by various tribunals, including the *Maffezini* tribunal itself, in order to support the application of the MFN clause to dispute settlement,³²⁶ whereas the absence of this phrase has also often supported a narrower interpretation of the coverage of the MFN clause.³²⁷
300. It may be said that the phrase “as regards their management, maintenance, use, enjoyment or disposal of their investments” does not itself imply any significant limitation. It is a broad formulation that would seem designed to cover almost all conceivable activities undertaken by investors in relation to their investments, and which certain tribunals have considered to encompass dispute settlement activities.³²⁸ There are again, however, reasons to doubt that the broadest scope of the phrase was what was intended by the Contracting Parties. International arbitration against the State is not a normal activity in the sense that it only happens, *per essence*, when disputes remain unsettled, unless one already takes for granted the existence of the BIT or of another agreement providing for international arbitration.³²⁹
301. Other tribunals have interpreted this language narrowly, particularly when comparing it to MFN clauses covering “all matters” under the given BIT. Other States have in practice also given this language a narrow scope. As noted by the *Plama* tribunal among others, the Free Trade Agreement of the Americas (FTAA) draft of 21 November 2003,

³²⁵ This is the interpretation given by the *Plama* tribunal to the inclusion of similar phrases in NAFTA and the FTAA draft (*Plama*, *supra* note 31, ¶¶201-202).

³²⁶ See, e.g., *Maffezini*, *supra* note 6, ¶49; *Telefónica*, *supra* note 103, ¶100.

³²⁷ See, e.g., *Salini*, *supra* note 34, ¶¶118-119; *Telenor*, *supra* note 35, ¶98.

³²⁸ See, e.g., *AWG*, *supra* note 93, ¶57; *RosInvest*, *supra* note 102, ¶130.

³²⁹ This reasoning partially underlies the *Wintershall* decision, *supra* note 7, ¶¶169-171.

inspired by similar language at Article 1103(2) of NAFTA,³³⁰ contained a footnote to its MFN clause which read as follows:

Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement:

The Parties note the recent decision of the arbitral tribunal in the Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev.-F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.³³¹

302. The parties to the CAFTA-DR went one step further in a footnote to the negotiating history of that instrument's investment chapter:

1. The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction ¶¶38-64 (Jan. 25, 2000), reprinted in 16 ICSID Rev. — F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Treatment Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.³³²

Other recent investment treaties have similarly included provisions explicitly indicating that this language intends to specifically limit the MFN clause to substantive treatment matters.³³³

³³⁰ Independently of subsequent clarifying instruments, the wording of NAFTA Article 1103(2) has also been interpreted to clearly exclude dispute settlement matters from its scope, as succinctly put by Emmanuel Gaillard: "La clause de règlement des différends ne figurant pas dans cette énumération des matières couvertes, elle s'en trouve naturellement exclue" (CIRDI, Chronique de sentences arbitrales, *Journal de droit international* n° 1/2005, p. 162).

³³¹ *Plama*, *supra* note 31, ¶202.

³³² Central American Free Trade Agreement (CAFTA) (Draft Text), January 28, 2004, available at http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/CAFTAind_e.asp.

³³³ See, e.g., Chile-Colombia Free Trade Agreement (2006), Annex 9.3; Canada-Peru Free Trade Agreement (2008), Annex 804.1.

303. As further noted by the *National Grid* tribunal, in reaction to the *Siemens* decision, Argentina and Panama exchanged diplomatic notes with a view to clarifying that the MFN clause in their 1996 investment treaty was not intended to extend to dispute resolution clauses.³³⁴
304. To the contrary, the UK has similarly manifested that its intention was to have the MFN clause include dispute settlement matters and, for that purpose, has included a third paragraph in the MFN clauses of many of its BITs and its Model BIT:

For the avoidance of doubt, it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

No such provision or other such indication of the sort is, however, to be found in the present BIT. The Respondent also aptly cites the case of the UK-Paraguay BIT where this language was inserted by way of an amendment rather than clarification. One may nevertheless find other elements demonstrative of the narrow scope of the MFN clause in the bilateral treaty at stake.

(iii) The meaning of treatment by the host State “in its territory”

305. The third key textual aspect of note is the precision that MFN treatment will be provided for activities taking place “in [the Contracting State’s] territory”. In other words, the MFN guarantees are territorially limited. This territorial limitation runs through the BIT. It applies in various places within the definition of “investment”. A similar territorial limitation to that found in the MFN clause is also found in every other provision establishing a substantive treatment standard, with the exception of Article 6 on “Repatriation of Investment and Returns”. The limitation is indeed present in every provision of the Treaty, except the aforementioned transfer provision (Article 6), the exceptions to MFN treatment (Article 7), and the dispute settlement provision (Articles 8 and 9).
306. This practice is highly suggestive. Not only does this create a textual link between all the provisions establishing substantive treatment standards in distinction to the dispute settlement provisions, but it also highlights the non-territorial nature of dispute resolution. It would have been illogical to include territorial limitations in the aforementioned provisions in which they do not appear. In the context of the dispute settlement provisions, this is because international arbitration is not an activity inherently linked to the territory of the respondent State. Just the contrary is true. The only significant territorial link may be that with the legal seat of the arbitration. The seat, however, is usually located in the territory of a neutral third State that is not party to the dispute, as it is in the present case. It is further to be noted that the Treaty also provides for the possibility of arbitration under the ICSID Convention, where there is no seat of arbitration. Nor is there likely to be any seat in an arbitration between the Contracting Parties under Article 9 of the Treaty.

³³⁴ *National Grid*, *supra* note 88, ¶85.

307. Meanwhile, the litigation of an investment dispute before the domestic courts of the host State would constitute an activity that takes place within its territory. The *Ambatielos* case, for example, dealt with treatment falling squarely within the bounds of a territorial limitation on the operation of an MFN clause. In *Ambatielos*, Greece invoked an MFN clause in order to obtain for its national a type of treatment in the *domestic courts* of the UK which the UK had accorded by treaty to the nationals of certain third States and which Greece alleged to be more favourable.³³⁵ Thus, if one Contracting Party were to accord to the investors of some third State more favourable rights in relation to domestic dispute resolution than the rights accorded to the investors of the other Contracting Party, this could give rise to a violation of the MFN clause. Yet, in the present case, what is at stake is not the recourse to domestic jurisdiction but to international arbitration which, as already noted, takes place outside the national territory of the host State.
308. Therefore, even if the term “treatment” could be understood as encompassing not only “substantive” protections but also the international dispute resolution provisions of investment treaties, the instant MFN clause still does not apply to international arbitration. The host State’s obligation extends no further than providing the covered investor with “treatment” in respect of domestic dispute resolution (*i.e.*, dispute resolution “in its territory”) that is no less favourable than the domestic dispute resolution treatment provided to investors from third States. Where an MFN clause applies only to treatment in the territory of the host State, the logical corollary is that treatment outside the territory of the host State does not fall within the scope of the clause.
309. In short, the very concept of extra-territorial dispute resolution and a host State’s consent thereto are both ill-fitted to the clear and ordinary meaning of the words “treatment in its territory” as used in the Treaty’s MFN clause. It is difficult to see how an MFN clause containing this phrase could be applied to international arbitration proceedings without discounting the explicit territorial limitation upon the scope of the clause. This pragmatic incongruity prevents the Tribunal from presuming – in the absence of any affirmative evidence – that the Contracting Parties to the present Treaty implicitly intended to include international dispute resolution within the purview of the MFN clause. If such were their intent, it would seem strange that they should impose a territorial limitation so at variance with that aim.

(iv) The expressio unius est exclusio alterius principle as applied to the exceptions to MFN treatment

310. The Claimant counters the above conclusion by resort to the Roman law maxim *expressio unius est exclusio alterius* as applied to the exceptions to MFN treatment enumerated at Article 7 of the Treaty. Several distinguished tribunals have also relied thereon – including with respect to the Treaty at hand – in order to conclude that, where a treaty lists certain exceptions to MFN treatment, any treatment not specifically

³³⁵ Other similar examples involving the administration of justice are given in the commentary to the ILC DRAFT ARTICLES ON MOST-FAVOURLED-NATION CLAUSES (1978) at 28-29.

excluded is necessarily covered by the MFN clause.³³⁶ These tribunals have pointed to these exceptions as evidence that the issue of MFN treatment of dispute settlement was live in the minds of the Contracting Parties and that they therefore must be presumed to have intended to include international dispute resolution provisions within the scope of the MFN clause.³³⁷ With due respect to the aforementioned tribunals, the present Tribunal does not view the presence of these exceptions as an indication that the Contracting Parties intended to include the Treaty's international investor-State dispute resolution provisions within the scope of its MFN commitments.

311. The MFN treatment exceptions mentioned at Article 7 the Treaty are reproduced below:

ARTICLE 7 Exceptions	ARTÍCULO 7 Excepciones
<p>The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from</p>	<p>Las disposiciones del presente Convenio, relativas a la concesión de un trato no menos favorable del que se concede a los inversores de una de las Partes Contratantes o de cualquier tercer Estado, no serán interpretadas en el sentido de obligar a una Parte Contratante a conceder a los inversores de la otra Parte Contratante los beneficios de cualquier tratamiento, preferencia o privilegio proveniente de</p>
<p>(a) any existing or future customs union, regional economic integration agreement or similar international agreement to which either of the Contracting Parties is or may become a party, or</p>	<p>(a) una unión aduanera existente o futura, un acuerdo de integración económica regional o cualquier acuerdo internacional semejante, al que una u otra de las Partes Contratantes haya adherido o pueda eventualmente adherir; o</p>
<p>(b) the bilateral agreements providing for concessional financing concluded by the Republic of Argentina with Italy on 10 December 1987 and with Spain on 3 June 1988 respectively, or</p>	<p>(b) los acuerdos bilaterales que proveen financiación concesional respectivamente concluidos por la República Argentina con Italia el 10 de noviembre de 1987 y con España el 3 de junio de 1988; o</p>
<p>(c) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.</p>	<p>(c) un convenio o acuerdo internacional que esté relacionado en todo o principalmente con tributación o cualquier legislación interna que esté relacionada en todo o principalmente con tributación.</p>

312. These exceptions, which exclude treatment in connection with any customs union, any regional economic integration agreement, two specific concessional financing agreements concluded by Argentina, and any international taxation agreement, deal exclusively with the Contracting Parties' direct treatment of foreign investments. In

³³⁶ See, e.g., *National Grid*, *supra* note 88, ¶¶82; *Suez/InterAguas*, *supra* note 99, ¶¶56; *Siemens*, *supra* note 284, ¶¶83-86.

³³⁷ *RosInvest*, *supra* note 102, ¶135.

addition, the exceptions in Article 7 refer to types of treatment that would normally occur within the territory of the host State – *i.e.*, they conform to the MFN clause's territorial limitation.

313. The exceptions to MFN treatment do not suggest any exclusion of matters relating to international dispute settlement. To the extent that the Contracting Parties may have turned their minds to the question of MFN treatment of international dispute settlement, the Contracting Parties may be taken not to have excluded dispute settlement because they never imagined that it was included in the first place. The Tribunal thus concurs with the *Plama* tribunal's conclusion that the deduction may apply with equal force in either direction and only serves to confirm a prior conclusion about the effect of the MFN clause.

3. *Effet utile* and subsequent BIT practice by Argentina

314. The Contracting Parties' prior and subsequent BIT practice is the next issue that falls to be considered in connection with the interpretation of the MFN clause. The treaty practice of the Contracting Parties is undoubtedly a relevant consideration in the interpretation of the current Treaty. However, the Tribunal doubts its usefulness in the manner deployed in this case.
315. The Respondent has argued that, if the MFN clause applies to dispute resolution and it had already concluded treaties that did not include this requirement, there would no reason to include the 18-month litigation prerequisite in future treaties. All future such stipulations would be automatically rendered null. Why would Argentina then have continued including such stillborn provisions in future BITs? This would make little sense and run counter to the principle of effectiveness ("*effet utile*") by which it is presumed that these provisions were intended to serve some purpose.
316. The Tribunal finds the Respondent's argument persuasive. Out of 29 BITs signed by Argentina with various States between 22 May 1990 and 17 May 1994, ten treaties contained the 18-month litigation prerequisite while the other 19 did not.³³⁸ If Argentina had generally intended for its BITs' MFN clauses to apply to their international dispute resolution provisions, then it concluded no less than five subsequent BITs³³⁹ which included the 18-month litigation prerequisite for no good reason, given that it had already concluded three BITs without this requirement.³⁴⁰ Two of these treaties (the BITs with Netherlands and South Korea) were even signed at a time when at least one BIT omitting the 18-month litigation prerequisite (the Poland BIT) was already in force. If one instead looks at the BITs by date of entry into force, then not a single one of Argentina's ten BITs establishing the 18-month litigation prerequisite would have come into force before the exclusion of such a requirement in the Argentina-Poland BIT would have already rendered it nugatory.

³³⁸ A table listing the BITs concluded by Argentina and indicating their date of conclusion, date of entry into force, and inclusion of the 18-month litigation prerequisite is attached to this Award (Annex 1).

³³⁹ These are Argentina's BITs with Spain, Canada, Austria, the Netherlands, and South Korea.

³⁴⁰ These are Argentina's BITs with Poland, Sweden, and France.

317. These patterns cannot be reconciled with the Claimant's assertions concerning the MFN clauses. The doctrine of *effet utile* would be violated with respect to the noted treaties, because the 18-month litigation prerequisite would have been void *ab initio* – immediately superseded by means of the treaties' MFN clauses. In this sense, and as already mentioned above, the text of the BIT, including its Article 8, serves as “context” relevant to ascertaining the ordinary meaning of the terms of the MFN clause in Article 3(2) of the BIT. The terms of the former, the MFN clause, should not be interpreted in a way that deprives the latter, the dispute resolution clause, of any meaning without a clear intention to achieve that result. The principle of contemporaneity avoids this incongruity by preferring the interpretation consistent with Argentina's demonstrated treaty practice – namely, that Argentina did not in 1990 understand the term “treatment” to include the BIT's international arbitration procedures.

I.III. DOES THE ARGENTINA-LITHUANIA BIT PROVIDE “MORE FAVOURABLE” TREATMENT?

318. The Tribunal has already concluded that the MFN clause in the Treaty does not extend MFN treatment to international dispute settlement issues. Nonetheless, given that the Parties addressed the issue in detail, the Tribunal briefly turns to address another aspect of the scope of application of the MFN clause – the question of the comparison between the basic treaty and the comparator treaty – which confirms its conclusions on its lack of jurisdiction even if the MFN clause did apply to the dispute settlement provisions of the Treaty.
319. The question of what constitutes “more favourable” treatment cannot be taken for granted. Differential treatment does not automatically constitute “less favourable” treatment.³⁴¹ The issue must be evaluated objectively and identify how investors under the basic treaty are put at a disadvantage as compared to their brethren under the comparator treaty. It may be possible in certain circumstances to identify discrete issues in which clearly differential treatment confers an advantage or imposes a disadvantage on one versus the other. The analysis cannot, however, be limited to a simple consideration of what is more or less favourable for a given investor in the particular circumstances in which they find themselves when a dispute arises. The treatment identified must be more favourable in a general manner such that the clause performs its purpose of averting distortions in the competition between investors of different provenance. On the other hand, the treatment accorded need not be found to be more favourable under all circumstances.
320. In the context of dispute settlement, the above principle requires that the dispute settlement provisions in two treaties must be compared as a whole, and not part-by-part, to determine whether the treatment accorded by the comparator treaty is indeed more favourable in general. Absent a clear apples-to-apples comparison, differential treatment in relation to dispute resolution may not necessarily equal less favourable treatment.
321. The Claimant has here invoked the Argentina-Lithuania BIT as the comparator treaty that allegedly offers “more favourable” treatment in contravention of the MFN clause in the UK-Argentina BIT, the basic treaty. The full dispute resolution provision of the Argentina-Lithuania BIT is set forth below:

Article 9	Artículo 9
Settlement of Disputes between an investor and the host Contracting Party	Solución de controversias entre un inversor y la parte receptora de la inversión
(1) Any dispute which arises within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably.	(1) Toda controversia relativa a las disposiciones del presente Acuerdo respecto de una inversión entre un inversor de una Parte Contratante y la otra Parte Contratante, será, en la medida de lo posible, solucionada por consultas amistosas.

³⁴¹ Such a distinction has been clearly recognised in the national treatment context. See, e.g., *UPS v. Canada*, UNCITRAL, Award, 24 May 2007.

(2) If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it may be submitted, upon request of the investor, either to:

- The competent tribunal of the Contracting Party in whose territory the investment was made;
- International arbitration according to the provisions of Paragraph (3).

Where an investor has submitted a dispute to the aforementioned competent tribunal of the Contracting Party where the investment has been made or to international arbitration, this choice shall be final.

(3) In case of international arbitration, the dispute shall be submitted, at the investor's choice, either to:

- The International Centre for the Settlement of Investment Disputes (ICSID) created by the Convention on the Settlement of Investment Disputes between States and National of other States opened for signature in Washington on 18th March 1965, once both Contracting Parties herein become members thereof. As far as this provision is not complied with, each Contracting Party consents that the dispute be submitted to arbitration under the regulations of the ICSID Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings, or
- An arbitration tribunal set up from case to case in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

(4) The arbitration tribunal shall decide in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of law, the terms of any specific agreement concluded in relation to such an investment and the relevant principles of

(2) Si la controversia no hubiera podido así ser solucionada en el término de seis meses a partir de la fecha en que hubiera sido planteada por una u otra de las partes, podrá ser sometida, a pedido del inversor a:

- los tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión;
- arbitraje internacional en las condiciones descritas en el párrafo (3).

Una vez que un inversor haya sometido la controversia a los tribunales competentes mencionados de la Parte Contratante en la cual se realizó la inversión o al arbitraje internacional, la elección será definitiva.

(3) En el caso de recurso al arbitraje internacional, la controversia podrá ser llevada, a elección del inversor:

- al Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.), creado por el "Convenio sobre Arreglo de Diferencias relativas a las Inversiones entre Estados y Nacionales de Otros Estados", abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado Parte en el presente Acuerdo haya adherido a aquél. Mientras esta condición no se cumpla, cada Parte Contratante da su consentimiento para que la controversia sea sometida al arbitraje conforme a las reglamentaciones del Mecanismo Complementario del C.I.A.D.I. para la Administración de Procedimientos de Conciliación, de Arbitraje o de Investigación, o
- a un tribunal de arbitraje establecido para cada caso de acuerdo con las reglas de arbitraje de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (C.N.U.D.M.I.).

(4) El tribunal arbitral decidirá en base a las disposiciones del presente Acuerdo, el derecho de la Parte Contratante que sea parte en la controversia, incluidas las normas relativas a conflictos de leyes a los términos de eventuales acuerdos específicos concluidos con relación a la inversión como así también a los principios

international law.

pertinentes del derecho internacional en la materia.

(5) The arbitral decisions shall be final and binding for the parties in the dispute. Each Contracting Party shall execute them in accordance with its laws.³⁴²

(5) Los fallos del tribunal arbitral será definitivos y obligatorios para las partes en la controversia. Cada Parte Contratante las ejecutará de conformidad con su legislación.

322. In comparison to Article 8 of the UK-Argentina BIT, this provision provides first that disputes are to be the object of amicable negotiations. Should these fail to resolve the dispute within six months, the investor may submit the dispute to its choice between the domestic courts of the host State or various international arbitration fora. The clause then makes clear that “[o]nce an investor has submitted the dispute to the aforementioned competent courts of the Contracting Party in whose territory the investment was made or to international arbitration, this choice shall be final.” This provision constitutes a “fork-in-the-road” provision common to many BITs. The Lithuanian investor is thus given a choice between local remedies and international arbitration. However, the investor cannot resort to international arbitration once the investor has made a choice in favour of local remedies, or *vice versa*.

323. By contrast, the UK investor in Argentina is required to litigate the dispute before the Argentine courts for 18 months or until a final decision is rendered, whichever is earlier. As noted by the Respondent, this effectively gives an investor two bites at the apple: once before the domestic courts of the host State, and again before an international arbitral tribunal. Although there are costs and delay involved in litigating before the Argentine courts if this fails to achieve a resolution, in many circumstances, this may be more favourable than direct access to international arbitration after only six months of amicable negotiations. The Tribunal therefore does not find that Lithuanian investors are necessarily accorded more favourable treatment as compared to the UK investor in Argentina. Accepting that “access to international arbitration has been a fundamental and constant desideratum for investment protection”³⁴³ does not change this result.

324. The Claimant’s assertion that it is improbable that investment disputes would see a first instance decision within 18 months is of only limited relevance. The requirement of litigation before the Argentine courts is set as a minimum. The Argentine courts remain seised of the matter and the investor does not waive its right to commence international arbitration by continuing its domestic action through to a decision past 18 months before deciding to resort to international arbitration.

325. If an investor were to prove a general need for urgent resort to international arbitration, such that investors who are forced to litigate for 18 months are put at a consistent disadvantage as compared to investors who may directly or more expeditiously seize an international tribunal, this might satisfy the Tribunal that this requirement leads to less favourable treatment. However, no such general disadvantage has been shown here. In this case, the only reason offered as to why the Claimant does not wish to resort to local remedies is one particular to the present Claimant. This was the Respondent’s allegation

³⁴² English translation taken from UNITED NATIONS TREATY SERIES, vol. 2033, pp. 264-265.

³⁴³ *Renta 4*, *supra* note 105, ¶100.

that the Claimant is attempting to evade debts that might be set off against its current claims by obtaining an international award that it may enforce in a jurisdiction that will not recognise such debts or allow their set-off. The Tribunal need not express any opinion on the veracity of this allegation. Suffice it to say that it does not satisfy the standard set forth above.

I.IV. CONCLUSION ON JURISDICTION

326. The Tribunal has analysed the Parties' arguments and come to four main conclusions: (1) Article 8 of the Treaty establishes a mandatory 18-month litigation prerequisite to international arbitration that the Claimant has manifestly not complied with; (2) the failure to comply with the prerequisite deprives the Tribunal of jurisdiction; (3) the MFN clause at Article 3 of the Treaty does not extend to international dispute resolution matters; and (4) even if the MFN clause extended to international dispute resolution matters, this requirement has not been shown to constitute "less favourable" treatment vis-à-vis other foreign investors. All of the above are related to the fundamental conclusion that underlies the Tribunal's finding of no jurisdiction: Argentina's consent to arbitration in absence of compliance with the 18-month litigation prerequisite in the present Treaty has not been proven.
327. In light of the above conclusions, the Tribunal finds that it must decline jurisdiction over any and all of the Claimant's claims without regard to their nature or basis. The Tribunal therefore does not need to consider the Respondent's further objections to jurisdiction.

I.V. COSTS

328. The Tribunal observes that the Treaty contains no provision on the allocation of the costs of arbitration arising out of a dispute between an investor and the host State. The provisions regarding the Tribunal's decision in the matter of costs are instead to be found in the UNCITRAL Arbitration Rules which govern the proceedings, specifically Articles 38 to 40 thereof.

329. Article 38 of the UNCITRAL Arbitration Rules defines the "costs of arbitration" as follows:

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

330. The Parties deposited a total of EUR 400,000 (EUR 200,000 by each of the Claimant and the Respondent) with the PCA to cover the costs of arbitration.

331. The fees of the Hon. Marc Lalonde, the arbitrator appointed by the Claimant, amount to EUR 74,000.00. The fees of Dr. Santiago Torres Bernárdez, the arbitrator appointed by the Respondent, amount to EUR 72,500.00. The fees and expenses of Professor Pierre-Marie Dupuy, the Presiding Arbitrator, amount to EUR 88,000.00.

332. Pursuant to Procedural Order No. 1, the International Bureau of the PCA was designated to act as Registry in this arbitration. The PCA's fees for registry services amount to EUR 64,135.00.

333. All other tribunal expenses, including travel, transcription, translation, interpretation, courier deliveries, conference calling, catering, bank charges, and all other costs relating to the arbitration proceedings, amount to EUR 62,852.22.

334. Based on the above figures, the combined tribunal costs, comprising the items covered in Articles 38(a) to (c) of the UNCITRAL Arbitration Rules, total EUR 361,487.22.
335. The Parties' respective portions of these tribunal costs, amounting to EUR 180,743.61 for each side, shall be deducted from the deposit and the PCA shall reimburse the amount of EUR 19,256.39 to each side in accordance with Article 41(5) of the UNCITRAL Arbitration Rules.
336. Having fixed the costs of the arbitration, Articles 40(1) and (2) of the UNCITRAL Arbitration Rules provide the criteria to be applied by the Tribunal in awarding costs:
1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.
337. Article 40 thus contains distinct rules regarding the awarding of arbitration costs and the costs of the parties' legal representation and assistance. The principle governing the awarding of the costs of arbitration, according to Article 40(1) of the UNCITRAL Arbitration Rules, is that the costs shall be borne by the unsuccessful party, in this case the Claimant, unless the Tribunal finds an apportionment of the costs between the parties to be reasonable under the circumstances.
338. In light of the Tribunal's conclusion that it has no jurisdiction over any of the Claimant's claims, there is a clearly successful party, the Respondent, and a clearly unsuccessful party, the Claimant. Given this outcome, the Tribunal finds no reason to deviate from the presumption in Article 40(1) and consequently awards the costs of arbitration to the Respondent. The Claimant shall thus reimburse the Respondent the amount of EUR 180,743.61 in respect of the costs of arbitration.
339. With respect to the costs of legal representation and assistance as defined in Article 38(e), Article 40(2) of the UNCITRAL Arbitration Rules provides that the arbitral tribunal, taking into account the circumstances of the case, is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. Article 40(2) thus grants near total discretion to an arbitration tribunal.
340. The traditional position in investment treaty arbitration, in contrast to commercial arbitration, has been to follow the normal practice under public international law (as exemplified in Article 9(5) of the Treaty) that the parties shall bear their own costs of legal representation and assistance. The Tribunal is aware that a number of investment treaty tribunals have opted instead to apply the principle of awarding costs of legal representation and assistance to the prevailing party as with the costs of arbitration. The Tribunal accepts that this developing practice may be appropriate in some cases, but is not convinced that it should be adopted as a rule and prefers to follow the public

international law practice unless a more holistic assessment of the circumstances of the case justifies a departure from that practice.

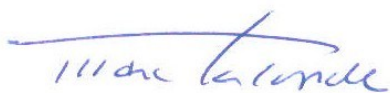
341. In this case, the Tribunal notes once again that the Respondent has been the prevailing party. Nonetheless, the Claimant's arguments can hardly be said to have been unreasonable, having been previously adopted by other tribunals even with respect to the Treaty at issue in this case. As such, while firmly convinced of its interpretation of Article 3 of the Treaty, the Tribunal is aware of the difficulty posed by the inconsistent jurisprudence on the interpretation of MFN clauses in investment treaties and their application to jurisdictional issues.
342. The Tribunal further notes that it has found for the Respondent and against the Claimant on only one of the various objections to jurisdiction that were raised by the Respondent and argued by the Parties, albeit one that disposes of the entirety of the claims. The Tribunal has made no finding on these other issues and shall not presume that the Claimant's arguments were without merit and would not have succeeded. The Respondent's success is therefore not absolute.
343. The Tribunal thus, despite its finding against the Claimant, decides that the Parties shall bear their own costs of legal representation and assistance.

J. DECISIONS

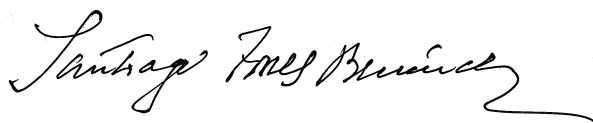
1. The Tribunal lacks jurisdiction over all of the Claimant's claims due to the Claimant's failure to comply with the mandatory 18-month litigation prerequisite set forth in Article 8 of the Treaty.
2. The MFN clause at Article 3 of the Treaty does not apply in such a way as to permit the Claimant to avail itself of the dispute resolution provisions of the Argentina-Lithuania BIT.
3. The Claimant's claims are therefore dismissed in their entirety, without prejudice to the Claimant's rights to submit them to arbitration before a new tribunal after complying with Article 8 of the Treaty.
4. The Claimant shall bear the costs of arbitration and shall consequently reimburse the Respondent the amount of EUR 180,743.61.
5. The Parties shall bear their own costs of legal representation and assistance.
6. The PCA shall reimburse EUR 19,256.39 to each Party in respect of the unexpended balance of the deposit.

Place of Arbitration: The Hague

Date: 10 February 2012



The Hon. Marc Lalonde, P.C., O.C., Q.C.



Dr. Santiago Torres Bernárdez



Prof. Pierre-Marie Dupuy
(Presiding Arbitrator)

ANNEX 1:

ARGENTINE BITS BY DATE OF SIGNATURE

(Information taken from UNCTAD, "Country-specific Lists of BITs", available at:
<http://www.unctad.org/Templates/Page.asp?infItemID=2344&lang=1>.)

Counterparty	Date of Signature	Date of Entry into Force	18-Month Requirement
Italy	22 May 1990	14 October 1993	YES
Belgium/Luxembourg	28 June 1990	20 May 1994	YES
United Kingdom	11 December 1990	19 February 1993	YES
Germany	09 April 1991	08 November 1993	YES
Switzerland	12 April 1991	06 November 1992	YES
France	03 July 1991	03 March 1993	NO
Poland	31 July 1991	01 September 1992	NO
Chile	02 August 1991	01 January 1995	NO
Spain	03 October 1991	28 September 1992	YES
Canada	05 November 1991	29 April 1993	YES
United States	14 November 1991	20 October 1995	NO
Sweden	22 November 1991	28 September 1992	NO
Turkey	08 May 1992	01 May 1995	NO
Egypt	11 May 1992	03 December 1993	NO
Tunisia	17 June 1992	23 January 1995	NO
Austria	07 August 1992	01 January 1995	YES
Netherlands	20 October 1992	01 October 1994	YES
China	05 November 1992	01 August 1994	NO
Denmark	06 November 1992	2 January 1995	NO
Hungary	05 February 1993	01 October 1997	NO
Senegal	06 April 1993	01 February 2010	NO
Armenia	16 April 1993	20 December 1994	NO
Romania	29 July 1993	01 May 1995	NO
Bulgaria	21 September 1993	11 March 1997	NO
Venezuela	16 November 1993	01 July 1995	NO
Jamaica	08 February 1994	1 December 1995	NO
Ecuador	18 February 1994	1 December 1995	NO
Bolivia	17 March 1994	01 May 1995	NO
Korea, Republic of	17 May 1994	24 September 1996	YES
Portugal	06 October 1994	03 May 1996	NO

Croatia	02 December 1994	01 June 1996	NO
Peru	10 November 1994	24 October 1996	NO
Israel	23 July 1995	10 April 1997	NO
Ukraine	09 August 1995	06 May 1997	NO
Australia	23 August 1995	11 January 1997	NO
Finland	05 November 1995	03 May 1996	NO
Lithuania	14 March 1996	01 September 1998	NO
El Salvador	09 May 1996	8 January 1999	NO
Panama	10 May 1996	22 June 1998	NO
Vietnam	03 June 1996	01 June 1997	NO
Morocco	13 June 1996	19 February 2000	NO
Czech Republic	21 September 1996	23 July 1998	NO
Mexico	13 November 1996	22 July 1998	NO
Costa Rica	21 May 1997	01 May 2001	NO
Guatemala	21 April 1998	07 December 2002	NO
Russia	25 June 1998	20 November 2000	NO
South Africa	23 July 1998	01 January 2001	NO
Nicaragua	10 August 1998	01 February 2001	NO
India	20 August 1999	12 August 2002	NO
New Zealand	27 August 1999	<i>Not in force</i>	NO
Philippines	20 September 1999	01 January 2002	NO
Greece	26 October 1999	<i>Not in force</i>	NO
Thailand	18 April 2000	07 March 2002	NO
Dominican Republic	16 March 2001	<i>Not in force</i>	NO