

International Centre for Settlement of Investment Disputes
Washington, D.C.

Daimler Financial Services AG
(Claimant)

v.

Argentine Republic
(Respondent)

ICSID Case No. ARB/05/1

AWARD

Members of the Tribunal
Professor Pierre-Marie Dupuy, President
Judge Charles N. Brower, Arbitrator
Professor Domingo Bello Janeiro, Arbitrator

Secretary of the Tribunal
Ms. Anneliese Fleckenstein

Representing the Claimant:

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Representing the Respondent:

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Procuradora del Tesoro de la Nación
Procuración del Tesoro de la Nación
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Defined Terms

Argentine Subsidiaries	DCS, DCCF and DCLA collectively
Argentine Subsidiary	DCS (the parent company of DCCF and DCLA)
Basic Treaty	German-Argentine BIT
BITs	Bilateral investment treaties
Comparator Treaty	Chilean-Argentine BIT
Convertibility Law	Argentine Law 23,928 of 1 April 1991
DAG	Daimler AG
DCAG	DaimlerChrysler AG
DCCF	DaimlerChrysler Compañía Financiera S.A.
DCFS	DaimlerChrysler Financial Services AG
DCLA	DaimlerChrysler Leasing S.A.
DCS	DaimlerChrysler Services, Argentina S.A.
DFS	Daimler Financial Services AG
Domestic courts proviso	Article 10(2) of the German-Argentine BIT
Emergency Law	Argentine Law 25,561 of January 2002
German-Argentine BIT	Treaty Between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments (1991)
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Parent Company	DCAG, subsequently DAG
PCIJ	Permanent Court of International Justice
MFN	Most-favored nation
Vienna Convention	Vienna Convention on the Law of Treaties (1969)
18-month proviso	Article 10(2) of the German-Argentine BIT

Introduction

1. This Award sets forth the Tribunal's findings concerning the Respondent's objections to the Tribunal's jurisdiction in the matter of *Daimler Financial Services A.G. v. Argentine Republic*. The Tribunal herein makes no findings as to the merits of any of the disputing parties' claims or defenses.

I. PROCEDURE

2. On 2 August 2004, as supplemented by two letters of 5 August and 21 October 2004, DaimlerChrysler Services AG, a company incorporated under the laws of Germany, with its principal offices in Berlin, filed with the International Centre for Settlement of Investment Disputes (the "Centre" or "ICSID") a request for arbitration against the Argentine Republic.

3. On 4 August 2004, the Centre acknowledged receipt of the Request in accordance with **Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings**, and transmitted a copy of the Request and its accompanying documents to the Attorney General of Argentina and to the Ambassador of Argentina in Washington D.C.

4. On 14 January 2005, the Secretary-General of ICSID registered the Request and in accordance with **Institution Rule 7** notified the parties of the registration, inviting them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

5. On 18 March 2005, the Claimant requested that the Tribunal should be constituted in accordance with the formula set forth in **Article 37(2)(b) of the ICSID Convention**, according to which one arbitrator was to be appointed by each party, and the third arbitrator, who would serve as president of the tribunal, would be appointed by agreement of the parties.

6. On 4 April 2005, the Claimant appointed Judge Charles N. Brower, a U.S. national, as an arbitrator.

7. On 13 April 2005, the Respondent appointed Professor Domingo Bello Janeiro, a Spanish national, as an arbitrator.

8. By letters of 11 and 17 October 2005, the parties informed the Centre of their agreement that the President of the Tribunal should be appointed by the two party-appointed arbitrators.

9. Given that more than ninety days had elapsed since the date of registration without any Tribunal being constituted, on 30 June 2006 the Claimant invoked **Article 38 of the ICSID Convention** and **ICSID Arbitration Rule 4**, and requested the Chairman of the Administrative Council to appoint the President of the Tribunal.
10. On 31 August 2006, the Centre proposed Professor Pierre-Marie Dupuy, a French national, to serve as President of the Tribunal. By letters of September 8, 2006, the parties agreed to the appointment of Professor Dupuy as President of the Tribunal.
11. On 21 September 2006, the Secretary-General of ICSID, in accordance with **ICSID Arbitration Rule 6(1)**, notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The Tribunal was composed of Professor Pierre-Marie Dupuy (French), President; Professor Domingo Bello Janeiro (Spanish); and Judge Charles N. Brower (U.S.). On the same day, the parties were informed that Ms. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary to the Tribunal.
12. On 27 January 2007, the Tribunal held a first session with the parties at the World Bank headquarters in Paris.
13. On 10 August 2007, the Claimant filed its Memorial on the Merits.
14. On 4 January 2008, the Respondent filed a Memorial raising some objections to jurisdiction (“Memorial on Jurisdiction”).
15. On 16 January 2008, following the Respondent’s Memorial on Jurisdiction, the Tribunal confirmed the suspension of the proceeding on the merits in accordance with **ICSID Arbitration Rule 41(3)**.
16. On 17 March 2008, the Claimant filed its Counter-Memorial on Jurisdiction. On the same day, the Claimant notified the Centre of the Claimant’s change of name from DaimlerChrysler Services AG to Daimler Financial Services AG.
17. On 5 May 2008, the Respondent filed its Reply on Jurisdiction.
18. On 9 June 2008, the Claimant filed its Rejoinder on Jurisdiction.

19. On 19 December 2008, the parties were informed that due to Ms. Claudia Frutos-Peterson's extended leave of absence the Acting Secretary-General of ICSID had, in accordance with **ICSID Administrative and Financial Regulation 25**, appointed Mr. Gonzalo Flores, Senior Counsel, ICSID, to serve as Secretary of the Tribunal.

20. From October 2007 to March 2009, the parties filed a series of requests for the production of documents. The Tribunal gave the parties opportunities to comment on these requests and issued its decisions concerning the requests in the form of a series of Procedural Orders.

21. On 27 February 2009, the Claimant referred to its letter of 17 March 2008 and requested that the Centre change its name from DaimlerChrysler Services AG to Daimler Financial Services AG.

22. On 4 March 2009, the Centre notified the parties that the Claimant's name would be changed to Daimler Financial Services AG, as requested by the Claimant.

23. On 27 August 2009, at the request of the parties, the Tribunal issued **Procedural Order No. 4** joining the objections to jurisdiction raised by the Respondent to the merits in accordance with **ICSID Arbitration Rule 41(4)**, and establishing the procedural calendar for the submissions on the merits of the dispute.

24. On 17 April 2009, the Respondent filed its Counter-Memorial on the Merits.

25. On 3 August 2009, the Claimant filed its Reply on the Merits.

26. On 27 October 2009, the Respondent filed its Rejoinder on the Merits.

27. From 30 November through 7 December 2009, the Tribunal held a hearing on jurisdiction and merits at the seat of the Centre in Washington, D.C. Present at the hearing were Professor Pierre-Marie Dupuy, President; Professor Domingo Bello Janeiro, arbitrator; and Judge Charles N. Brower arbitrator; Ms. Anneliese Fleckenstein, Case Counsel, ICSID and Mr. Gonzalo Flores, Senior Counsel, ICSID. For the Claimant, Mrs. Paul Doyle, Philip Robben, Michael H. MacMahon, Nafees Nuruddin, Keith Vena, and Ms. Cathleen Condren, Julia A. Garza Benítez, of Kelley Drye & Warren LLP. For the Respondent, Dr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación; Dr. Adolfo Gustavo Scrinzi, Sub-Procurador del Tesoro de la Nación; Dr. Gabriel Bottini, Director Nacional de Asuntos y Controversias Internacionales – Procuración



del Tesoro de la Nación; Mr. Mauricio Rosales Markaida, Director de Coordinación Técnica y Administrativa – Procuración del Tesoro de la Nación; Mr. Ignacio Torterola, Enlace Procuración del Tesoro de la Nación/CIADI; and from the Dirección Nacional de Asuntos y Controversias Internacionales, Drs. Cintia Yaryura, Silvina González Napolitano, Mariana Lozza, Carolina Coronado, and Mrs. Igancio Pérez Cortés, Alejandro Turyn, Patricio Arnedo Barreiro, Nicolás Duhalde, Diego Brian Gosis.

28. On 9 December 2009, the Tribunal was informed that due to the re-distribution of the Centre’s workload, Ms. Anneliese Fleckenstein, Case Counsel, ICSID, was assigned to serve as Secretary to the Tribunal.

29. On 29 March 2010, the Respondent filed its Post-Hearing brief.

30. On 30 March 2010, the Claimant filed its Post-Hearing brief.

31. On 20 August 2010, the Tribunal requested from the parties further information regarding the Share Purchase Agreement of 12 June 2002 concluded between DCS Berlin (later DCFS, “the Claimant”) and DCAG Stuttgart (“the Parent Company”).

32. On 28 September 2010, the parties submitted their responses to the Tribunal’s request of 20 August 2010.

II. THE FACTS

33. Daimler Financial Services AG (variably “DFS”, “DCFS”, or “the Claimant”) is a corporation organized and existing under the laws of the Federal Republic of Germany, with a principal place of business at Eichhornstrasse 3, D - 10785 Berlin, Germany.¹ DFS is and was at all relevant times throughout the history of this case wholly-owned by Daimler AG (“DAG” or “the Parent Company”) or its predecessor DaimlerChrysler AG (“DCAG” or “the Parent Company”), with a principal place of business at Epplestrasse 225, D - 70567 Stuttgart, Germany.²

¹ Claimant’s Request for Arbitration, para 1.

² Ibid. At the time of the filing of the Request for Arbitration, the Claimant and its Parent Company were known, respectively, as DaimlerChrysler Services AG and DaimlerChrysler AG. The reference to Chrysler was dropped subsequent to the break-up of the Daimler and Chrysler corporations in 2007, and the Claimant’s corporate name was eventually changed to Daimler Financial Services. The case name in the present proceedings has been adjusted accordingly. Nonetheless, portions of the parties’ pleadings make reference to the old names, and the Tribunal, where necessary, has followed the lead of the parties in

34. The Respondent is the Argentine Republic, represented in these proceedings by its Public Prosecutor's Office, *Procuración del Tesoro de la Nación*, with its principal business address at Posadas 1641, C1112 Buenos Aires, Argentina.

35. The Claimant bases its claim upon provisions of the Treaty Between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments ("the German-Argentine BIT", "the Treaty", or "the BIT"). This Treaty was signed by the Contracting State Parties on 9 April 1991 and entered into force on 8 November 1993.³

36. The facts alleged to underpin the claim, insofar as they are relevant to this Tribunal's jurisdiction, are as follows. In the early 1990s, Argentina undertook a series of legal and policy reforms designed to stabilize its economy, which had previously been plagued by episodes of rampant inflation and dramatic vacillations in economic growth. Among the reforms enacted by the Government at that time were several that were intended to encourage foreign investment, including, according to the Claimant's description of the claim, the following:

- a) Law 23,928 of 1 April 1991 ("the Convertibility Law")⁴, which *inter alia*:
 - i) Made the Argentine peso convertible with the U.S. dollar on a 1:1 basis, thereby "pegging" the value of the peso to the dollar; and
 - ii) Amended Section 619 of the Argentine Civil Code to provide that a debtor obliged to deliver foreign currency would fulfill that obligation by payment in foreign currency on the maturity date, rather than payment in local currency according to the applicable exchange rate on the maturity date.
- b) Law 21,382, as implemented by Decree 1853/1993⁵, together permitting foreign investors to:
 - i) Invest in Argentina without registration or prior government approval, including through merger, acquisition, or joint venture arrangements, on the same terms as Argentine investors; and
 - ii) Repatriate capital and remit earnings abroad at any time.
- c) A series of bilateral investment treaties ("BITs") concluded with numerous countries – including the above-mentioned German-Argentine BIT – which guaranteed foreign

referring to the Claimant variably as DFS and DCFS. The details of the corporate break-up between Daimler and Chrysler have no bearing upon the jurisdictional questions now before the Tribunal.

³ Exhibit B to Claimant's Request for Arbitration.

⁴ Exhibit G to Claimant's Request for Arbitration.

⁵ Claimant's Request for Arbitration, paras 39-40.

- investors important protections against, *inter alia*, capital movement restrictions, expropriations, unfair treatment, and arbitrary or discriminatory treatment.⁶
- d) The ratification of the **ICSID Convention**,⁷ which in concert with the newly enacted BITs provided foreign investors with direct access to a neutral international arbitration forum in the event of an investment-related dispute between a foreign investor and the Government of Argentina.

37. The Claimant further points to various written and oral representations made by Argentine government officials underscoring that the new regulatory regime established by these reforms could be relied upon and would remain permanently in effect.⁸ Key among these, in the Claimant's view, was a 1993 publication prepared in English and aggressively distributed by Argentina's newly created Undersecretariat of Investment, entitled "**Argentina, A Growing Country, A Compendium for Foreign Investors**".⁹ As described by the Claimant, this Compendium:

“stated that the Convertibility Law, which was the ‘cornerstone’ of the economic reform, ‘*virtually removed currency risk.*’ It further explicitly represented to prospective investors that, under Argentina’s laws, ‘*[c]ontracts can be denominated and legally enforced in foreign currencies.*’”¹⁰

38. Beginning in 1995, in reliance upon the legal protections afforded by this new regulatory framework, the Claimant resolved to make a series of investments in the commercial financing business in Argentina. To effectuate this, the Claimant purchased a 99.9971% interest in a local Argentine company then owned by Mercedes-Benz Argentina. Subsequent to the purchase, this local company eventually became known as DaimlerChrysler Services, Argentina S.A. (“DCS Argentina” or “the Argentine Subsidiary”). The Claimant describes the business of DCS Argentina and its subsidiaries DCCF and DCLA (collectively “the Argentine Subsidiaries”) as one of “extend[ing] loans and leases to Argentine dealers and purchasers of automotive goods

⁶ Respondent's Reply Memorial on Jurisdiction, paras 24-27 and corresponding footnotes; Claimant's Exhibit 80, Core Bundle 16.

⁷ Signed by Argentina on 21 May 1991, entered into force 18 November 1994.

⁸ Claimant's Request for Arbitration, Exhibit I; Claimant's Memorial, paras 61-65.

⁹ Claimant's Memorial, paras 34-36.

¹⁰ *Ibid* at para 35 (emphasis in original).

manufactured primarily in Argentina by Mercedes Benz Argentina, as well as other non-automotive capital goods”.¹¹

39. Following this initial acquisition, the Claimant made additional capital contributions into the Argentine Subsidiary at various points.¹² Throughout the history of the investment, the Claimant funded the operations of the Argentine Subsidiary primarily with foreign financing denominated in U.S. dollars.¹³ The Claimant asserts that this type of funding was both common practice within the industry internationally and necessary to its particular investment in Argentina, due to the unavailability of sufficient and economically viable domestic financing sources.¹⁴ The liabilities column of the Claimant’s balance sheet thus largely consisted of U.S. dollar denominated obligations. To offset this, the Claimant’s Argentine Subsidiary also wrote all of its lease and loan contracts with its domestic Argentine customers in U.S. dollars, as was permitted under the then-existing legal regime.¹⁵ The Claimant emphasizes that the promised stability of that legal regime was therefore essential to its decision to invest in Argentina. In the Claimant’s words:

“because DCFS needed to ensure that the Argentine Subsidiaries would have U.S. dollars on hand to repay the foreign U.S. dollar loans, a corresponding legally protected right to denominate and enforce the domestic lease and loan contracts in U.S. dollars was fundamental to undertaking the investment. DCFS would never have entered the market without the legally guaranteed ability to require repayment of the domestic lease and loan contracts in U.S. dollars.”¹⁶

40. The Claimant submits that the business of its Argentine Subsidiaries steadily grew and prospered between 1995 and 2001.¹⁷ By 2001, however, as is by now well known, the Argentine economy had again begun to experience grave difficulties.¹⁸ A full-fledged currency crisis ensued, provoking political, social, and economic consequences so devastating that the

¹¹ Claimant’s Request for Arbitration, para 7.

¹² Ibid at paras 52, 57.

¹³ Ibid at para 75.

¹⁴ Claimant’s Memorial, paras 58-59.

¹⁵ Claimant’s Memorial at para 60.

¹⁶ Ibid.

¹⁷ Ibid at para 98.

¹⁸ The Tribunal need not, for purposes of its jurisdictional findings, probe the precise counters of the crisis or its causes.

Government of Argentina has termed them a “collapse of the state.”¹⁹ The Government responded by enacting numerous measures in an attempt to stem the crisis. Some of these measures, promulgated in 2001 and 2002, significantly altered the regulatory environment governing the investment, and it is those measures which now form the basis of this claim.

41. In particular, the Claimant alleges that the following measures, as applied to its investment, violated its rights as a foreign investor under the **German-Argentine BIT**:

- a) The Government’s December 2001 limitations on cash withdrawals from bank accounts, restrictions on access to foreign exchange, and prohibitions on transferring cash abroad;²⁰
- b) **Law 25,561 of January 2002 (“the Emergency Law”)**,²¹ which *inter alia*:
 - i) Abrogated many provisions of the **1991 Convertibility Law**, including the convertibility of the peso into US dollars;²²
 - ii) Authorized the National Executive “to create a new currency system and to restructure the obligations of certain debtors”;²³ and
 - iii) Provided that “certain dollar-denominated obligations in domestic transactions conducted with financial entities... would be ‘pesified’ and could be settled by payments in Argentine Pesos at the exchange rate of AR \$1 to U.S. \$1”;²⁴
- c) **Executive Decree 214/2002**, which made permanent the “mandatory pesification or compulsory conversion of all U.S. dollar debt governed by domestic law into Argentine pesos”;²⁵
- d) **Laws 25,563 and 25,589**, which together modified earlier **Law 24,522**, thereby suspending “important provisions of the bankruptcy law that had previously provided protection for creditors such as DCS Argentina”;²⁶ and
- e) The Government’s repeated failures to:
 - i) Carve out necessary exceptions to pesification;²⁷

¹⁹ Respondent’s Counter-memorial, Part VI.B.

²⁰ Claimant’s Request for Arbitration, para 72.

²¹ Ibid at paras 64-71 and Exhibit J.

²² Ibid at para 66.

²³ Ibid.

²⁴ Claimant’s Memorial at para 121.

²⁵ Ibid at para 125.

²⁶ Claimant’s Request for Arbitration, paras 73-74; Claimant’s Memorial, para 132.

²⁷ Claimant’s Memorial at paras 130-131.

- ii) Provide compensatory bonds to non-regulated financial entities such as DCS Argentina on the same terms as those provided to regulated financial entities in similar circumstances;²⁸ and
- iii) Otherwise adequately compensate DCS Argentina, whose liabilities remained denominated in foreign currency but whose assets were forcibly converted to devalued pesos.²⁹

42. The Claimant asserts that the combined impact of Argentina's contested measures caused "unique and devastating" losses to its investment,³⁰ bringing its once profitable Argentine Subsidiary to the brink of bankruptcy.³¹ In the Claimant's view, these measures violated several provisions of the German-Argentine BIT, including: the fair and equitable treatment provision, the protection against arbitrary and discriminatory measures, the most-favored nation provisions, the protection against expropriation without adequate compensation, the umbrella clause, and the guarantee of free transfers of capital.³² The Claimant requests compensation for its alleged losses as a result of these purported violations.

43. The Tribunal emphasizes that it makes no findings at present with respect to the veracity of the above-listed assertions or any of the defenses raised by Argentina thereto. That analysis is reserved for the merits of the case. Rather, the basic contours of the claim are noted here solely for the purposes of determining the jurisdiction of the Tribunal.

44. Before proceeding to an analysis of the Tribunal's jurisdiction, one further factual detail bears mentioning. The Claimant's Request for Arbitration was filed in August of 2004 and officially registered by the ICSID Secretariat on 14 January 2005. It is common cause, however, that the Claimant (DFS Berlin) had transferred the entirety of its shares in the affected Argentine Subsidiary to its Parent Company (DCAG Stuttgart) with effect from 1 April 2002.³³ This transfer was done pursuant to a Share Purchase Agreement (SPA) between the Claimant and its Parent Company, dated 12 June 2002. The transaction was approved by the Argentine Central Bank on 19 June 2003. The Agreement set the initial purchase price at negative EUR 250 million

²⁸ Ibid at paras 164-172.

²⁹ Ibid at paras 173-191.

³⁰ Claimant's Request for Arbitration, para 76.

³¹ Ibid at paras 79-81.

³² Ibid at paras 91-102.

³³ Claimant's Exhibit 70.

and provided that the final price would be adjusted in order to take into account any expenditures which either the buyer or seller might undertake on behalf of the Argentine Subsidiary up until the date of the sale closing. The negative purchase price – which was meant to represent the fair market value of the Argentine Subsidiary in an arm’s length transaction between disinterested parties³⁴ – reflected the large outstanding liabilities of the Argentine Subsidiary relative to its assets subsequent to the pesification of its domestic loan portfolios. The impact of this share transfer upon the Tribunal’s jurisdiction will be evaluated below.³⁵

III. APPLICABLE LAW

45. In the course of discussing particular objections to jurisdiction, both parties have referred at various points to Article 25 of the ICSID Convention and to the sources of law enumerated in Article 10(5) of the German-Argentine BIT. To the extent that these submissions are relevant, they will be addressed below together with the specific jurisdictional objections to which they refer. The Tribunal nevertheless finds it convenient to set out, as a preliminary matter, its conception of the applicable law for purposes of the Tribunal’s jurisdictional findings.

46. This claim arises under the German-Argentine BIT, in conjunction with the ICSID Convention. As both the BIT and the ICSID Convention are international treaties concluded between sovereign States, both are subject to the usual customary law rules governing treaty interpretation under public international law, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna Convention”). The Tribunal will apply these rules in discerning whether all of the jurisdictional requirements of the ICSID Convention and the BIT have been met.

47. The ICSID Convention sets forth its jurisdictional requirements in Chapter II. The relevant provision, for present purposes, is Article 25, which states:

(1) “The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) ‘National of another Contracting State’ means:

(a) [...]

³⁴ Ibid at Article 5(2).

³⁵ See Part V of this award below.

- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration... .”

48. It is common cause that the Respondent is a Contracting State Party to the **ICSID Convention**³⁶ and that the Claimant is a national of the Federal Republic of Germany,³⁷ the latter State also being a Party to the **ICSID Convention**. It is further common cause that the Claimant has consented in writing to submit the dispute to the Centre. The sole questions for the Tribunal to determine under the **ICSID Convention** are therefore: a) whether the Claimant has raised a “legal dispute” between itself and the Respondent; b) whether the dispute arises “directly out of an investment”; and c) whether the Respondent has also consented in writing, pursuant to the relevant provisions of the **German-Argentine BIT**, to submit the dispute to the jurisdiction of ICSID and consequently the competence of this Tribunal. These questions, in turn, depend upon the specific legal obligations undertaken by the Respondent in the **German-Argentine BIT** and upon that **BIT’s definition of “investment”**. The Tribunal will therefore apply the relevant provisions of the **BIT** in assessing its jurisdiction in light of the Claimant’s claims and in responding to each of the Respondent’s objections to the Tribunal’s jurisdiction.

49. **Article 10(5) of the BIT** specifies as follows the law to be applied by an arbitral tribunal in the context of a dispute between an investor and one of the BIT’s Contracting State Parties:

“The arbitral tribunal shall arrive at its decisions on the basis of this Treaty and, if applicable, other agreements made between the parties, the internal law of the Contracting Party in whose territory the investment was made – including the rules of international private law – and general principles of international law.”³⁸

50. As to the internal law of Argentina, the Tribunal notes that the Claimant’s claim is based in large part upon changes to the domestic regulatory framework governing the investment. The law of Argentina may therefore become relevant, directly or indirectly, to an evaluation of the merits of the claim. For purposes of the Tribunal’s jurisdiction, however, the proper law to be

³⁶ Above note 7.

³⁷ Above note 1.

³⁸ Unless otherwise specified, all citations to the **German-Argentine BIT** refer to the agreed English translation of the **BIT** as prepared by the disputing parties. In the context of the present quote, the Tribunal notes that the disputing parties’ agreed translation is not entirely accurate. The phrase “other agreements made between the parties” actually refers to other treaties in force between the Contracting State Parties (Spanish: “otros tratados vigentes entre las Partes”; German: “anderer zwischen den Vertragsparteien geltender Übereinkünfte”).

applied is the German-Argentine BIT itself, in concert with the ICSID Convention, as interpreted in the light of the general principles of international law.

51. As will become clear below, Argentina has also raised the 2002 Share Purchase Agreement between the Claimant and its Parent Company as an objection to the Tribunal's jurisdiction. The law to be applied to the interpretation of this Share Purchase Agreement is a distinct matter and will be addressed separately below.³⁹

52. Finally, as both parties have in their submissions cited extensively to the awards of various other international investor-State and State-to-State tribunals, the Tribunal deems it appropriate to comment upon the weight to be attributed to such decisions. The Tribunal agrees with the parties in noting that there is no system of precedent in investor-State arbitration,⁴⁰ nor indeed could there be, given the large and diverse set of treaties presently applicable to various investor-State claims. Each case must be decided on the basis of the applicable treaty texts and in the light of the relevant facts. On the other hand, the Tribunal acknowledges that it is a fundamental principle of the rule of law that “‘like cases should be decided alike,’ unless a strong reason exists to distinguish the current case from previous ones.”⁴¹ This latter consideration will weigh more or less heavily depending upon: a) how “like” the prior and present cases are, having regard to all relevant considerations; b) the degree to which a clear *jurisprudence constante* has emerged in respect of a particular legal issue; and c) the Tribunal's independent estimation of the persuasiveness of prior tribunals' reasoning.

53. In analyzing the questions raised by the parties in this proceeding, the present Tribunal will therefore have regard for the decisions of prior tribunals in accordance with these criteria.

³⁹ See below, paras 134-139.

⁴⁰ Both parties have urged the Tribunal to embrace the solutions adopted by particular previous tribunals and to disregard the solutions adopted by others.

⁴¹ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v. The Argentine Republic* (UNCITRAL) (jointly decided), Decision on Liability (30 July 2010), para 189.

IV. THREE PRELIMINARY OBJECTIONS TO JURISDICTION

A. First Objection: The Claim Refers to Contractual Matters over which the Tribunal Has No Jurisdiction in Light of the Contracts' Forum Selection Clauses

1. Position of the Respondent

54. In both its original memorial on objections to jurisdiction and its reply memorial on jurisdiction, Argentina formulated this objection under two separate headings. The first formulation reads: “the claim refers to contractual matters over which the ICSID has no jurisdiction”.⁴² The second states: “the Tribunal lacks competence because all disputes relating to the instruments invoked by Claimant must be submitted to the Argentine courts, pursuant to the provisions of said instruments and the agreements between the parties.”⁴³ Argentina’s arguments on these two points are virtually indistinguishable, as both relate to whether ICSID is the proper forum for the Claimant’s claims. The Tribunal will therefore deal with them together.

55. Argentina’s submissions concerning these objections are essentially four-fold. First, it asserts that the claims are based upon losses allegedly suffered by the Claimant under its various leasing agreements with its customers, which – according to their explicit forum selection clauses – are subject to dispute resolution not before ICSID but before the domestic Argentine courts.⁴⁴ Secondly, Argentina argues that the Claimant’s contractual claims may not be brought within the jurisdiction of the Tribunal by means of the BIT’s umbrella clause.⁴⁵ Relying upon several previous investor-State cases, Argentina asserts that the umbrella clause cannot transform ordinary contract claims into treaty claims, because the contracts’ jurisdictional clauses constitute a *lex specialis*, which must prevail over the more general treaty provision.⁴⁶

56. Thirdly, apparently in the alternative, even if the BIT’s umbrella clause could theoretically be understood to encompass contractual claims, the Respondent asserts that this cannot be the case here. It points out that it is the Claimant’s Argentine Subsidiaries, and not the Claimant itself, who are parties to the leasing contracts.⁴⁷ The suggestion seems to be that since

⁴² Respondent’s Memorial on Jurisdiction, part IV.B; Respondent’s Reply on Jurisdiction, part II.B.

⁴³ Respondent’s Memorial on Jurisdiction, part IV.C; Respondent’s Reply on Jurisdiction, part II.C.

⁴⁴ Respondent’s Memorial on Jurisdiction, paras 86-87, 93, 108-110; Respondent’s Reply on Jurisdiction, paras 90-97.

⁴⁵ Respondent’s Memorial on Jurisdiction, paras 88-89.

⁴⁶ Ibid at paras 97-104.

⁴⁷ Respondent’s Reply on Jurisdiction, para 86.

only the direct parties to a contract may rely upon its provisions, and since only German (and not Argentine) investors may bring claims under the BIT, the German Claimant's contract-based claims on behalf of its Argentine Subsidiaries must be excluded from the purview of the Tribunal's jurisdiction.⁴⁸

57. Finally, Argentina asserts that there can be no jurisdiction for claims brought under the BIT's umbrella clause because Argentina has made no specific undertakings to the Claimant.⁴⁹ It asserts that only specific investment agreements between the Host State and the concerned investor may potentially be covered by the Treaty's umbrella clause⁵⁰ and stresses that no such specific investment agreement exists in the present case.⁵¹ Argentina points out that the Claimant's financial and leasing contracts with its customers cannot be classified as specific investment agreements between Argentina and the Claimant.⁵²

2. Position of the Claimant

58. Following Argentina's lead, the Claimant has also bifurcated its submissions on this objection into two headings. Under the first heading, it asserts that its claims are "based upon Argentina's violations of the German-Argentine BIT and are subject to ICSID jurisdiction".⁵³ The Claimant stresses that it does not raise any breach of contract claims as between itself and its customers under the lease contracts.⁵⁴ Rather, it seeks damages from Argentina caused by Argentina's sovereign interference with its contract rights, which, according to the Claimant, violated several BIT provisions.⁵⁵

59. With respect to the umbrella clause, the Claimant suggests Argentina has confused DFS' treaty-based claims under this clause with the unrelated question of "purely contractual"

⁴⁸ The question as to whether the Claimant may bring "indirect" claims on behalf of its Argentine subsidiary is addressed separately in the next part of the award.

⁴⁹ Respondent's Reply on Jurisdiction, paras 76-77, and 85.

⁵⁰ Ibid at para 78.

⁵¹ Ibid at paras 78 and 80.

⁵² Ibid at para 85.

⁵³ Claimant's Counter-Memorial on Jurisdiction, Point II.

⁵⁴ Ibid at para 113. The Tribunal notes that the Claimant, in its submissions, does not always distinguish between its own contractual rights and those of its Argentine Subsidiary. The relevance of such a distinction for purposes of this claim is addressed in part IV.B. of the Award below.

⁵⁵ Ibid at paras 110, 112-114.

matters.⁵⁶ In its counter-memorial on jurisdiction, the Claimant posits its umbrella clause claim as follows:

“Argentina, in officially written and disseminated documents upon which DFS relied in making its investment, undertook an obligation to investors to permit contracts to be written and enforced in U.S. dollars, and backed that promise with a regulatory and legal regime that entrenched contract rights and the rule of law that it promised it would be ‘irreversible’. DFS invested, and maintained its investment, in reliance on those written representations and that legal regime. After freely assuming and proclaiming these obligations, Argentina, by a sovereign act, overrode the very laws that it had represented were permanent and ‘irreversible’, and unilaterally and fundamentally changed the terms of the Argentine subsidiaries’ contracts, ultimately destroying, in significant measure, DFS’ investment.”⁵⁷

The Claimant thus asserts that its **umbrella clause** claim stems not from the leasing contracts themselves but from Argentina’s sovereign abrogation of DFS’ rights under those contracts.⁵⁸ The Claimant also disputes Argentina’s interpretation of the various investor-State cases cited in its memorials and asserts that they are in any event inapposite or contrary to Argentina’s position.⁵⁹

60. Under a second heading, the Claimant asserts that “the dispute resolution provisions contained in the lease and loan contracts between the Argentine Companies and their domestic customers are irrelevant to the issue of this Tribunal’s jurisdiction to decide DFS’ treaty-based claims against Argentina.”⁶⁰ The Claimant points out that there was never any contract between Argentina and itself, either with respect to the leasing contracts or otherwise.⁶¹ As such, there is no basis for Argentina’s assertion that the Claimant was contractually obligated to submit its claims against Argentina to the domestic courts of Argentina. More fundamentally, the Claimant emphasizes that the question before the Tribunal is whether Argentina violated its **Treaty** commitments by using its sovereign power to abrogate certain of DFS’ rights altogether.⁶² As this question arises under the **Treaty**, the Claimant argues, the dispute resolution provisions

⁵⁶ Ibid at para 111.

⁵⁷ Ibid at para 112.

⁵⁸ This argument is further elaborated in the Claimant’s Rejoinder on Jurisdiction, Point II.

⁵⁹ Claimant’s Counter-Memorial on Jurisdiction, paras 116-122.

⁶⁰ Ibid at Point III; see also Claimant’s Rejoinder on Jurisdiction, Point III.

⁶¹ Claimant’s Counter-Memorial on Jurisdiction, paras 115, 125.

⁶² Ibid at para 126.

contained in the commercial contracts between DFS' Argentine Subsidiaries and their customers are entirely irrelevant.⁶³

3. *Considerations of the Tribunal*

61. Argentina's objections under this heading appear to be based upon a fundamental misconception of the Claimant's case. The forum selection clauses contained within DCS Argentina's lease and loan contracts with its customers pertain only to disputes arising between the Claimant's Argentine Subsidiary and its customers in relation to those contracts.⁶⁴ Neither DCS Argentina nor its customers are parties to this proceeding. Moreover, the Claimant does not assert before this Tribunal any claims arising out of alleged breaches of the contracts between DCS Argentina and its customers. Thus, the forum selection clauses of the lease and loan contracts can have no bearing upon this Tribunal's jurisdiction.

62. What the Claimant does allege is that the Republic of Argentina used its sovereign powers to substantially diminish the value of the Claimant's rights to returns from its investment.⁶⁵ The Claimant asserts that Argentina's sovereign interference with the contract rights held by DCS Argentina and its subsidiaries violated not the contracts (to which Argentina is in any event not a party) but rather several provisions of the **German-Argentine BIT**, including its **provisions on expropriation, fair and equitable treatment, and arbitrary or discriminatory treatment**.⁶⁶ The Claimant's allegations, if proven, would amount to violations of Argentina's international obligations under the **BIT**. This brings the claims within the purview of the **ICSID Convention's requirement that the Claimant must raise a "legal dispute" between itself and the Respondent**. It also brings the claims at least *prima facie* within the purview of the investor-State dispute resolution mechanism set forth in **Article 10 of the BIT**, which applies to "disputes which arise between a Contracting Party and a national or company of the other Contracting Party concerning an investment under the Treaty..."⁶⁷ Since the Claimant's claims clearly arise out of

⁶³ Ibid.

⁶⁴ The same is true of the lease and loan contracts between DCS Argentina's own subsidiaries and their respective customers.

⁶⁵ The question as to whether the Claimant, as shareholder, may make claims for damages suffered by reason of the abrogation of contractual rights held by its Argentine Subsidiary is addressed in the next part of this Award.

⁶⁶ Claimant's Request for Arbitration, paras 91-102.

⁶⁷ Emphasis added.

the Treaty and not the contracts, Argentina's objections concerning the contracts' forum selection clauses must be rejected.

63. As to the parties' arguments with respect to the Treaty's umbrella clause (Article 7(2) of the BIT),⁶⁸ the Tribunal notes that there exists in this case no investment agreement or other specific contractual agreement between the Claimant and the Respondent in respect of the investment. This absence of a contract between the disputing parties distinguishes the present case from other investor-State cases in which tribunals have had to grapple with whether the presence of a forum selection clause within a specific investment or concession agreement could "oust" the jurisdiction of a BIT-based arbitral tribunal with respect to claims concerning violations of the contractual agreement.⁶⁹ That question simply does not arise here.

64. In the present matter, the Claimant does not attempt to equate a violation of its Argentine Subsidiaries' customer contracts with a violation of the Treaty's umbrella clause. Instead, the Claimant alleges that Argentina, in making certain representations regarding the stability of its legal and regulatory framework, assumed additional obligations toward the Claimant's investment under Article 7(2) of the BIT.⁷⁰ The precise scope of Argentina's obligations under Article 7(2) and whether Argentina violated those obligations on the facts are questions for the merits of the case. They need not be decided for purposes of determining the Tribunal's jurisdiction. What matters for present purposes is that the umbrella clause claim, as with the Claimant's other claims, arises directly under the Treaty.⁷¹ Argentina's jurisdictional objections based upon the BIT's umbrella clause therefore also fall to be rejected.

⁶⁸ Article 7(2) of the German-Argentine BIT provides that "[e]ach Contracting Party shall fulfill any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party."

⁶⁹ See e.g. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction (6 Aug 2003) [hereinafter "*SGS v. Pakistan*"]; *Salini Costruttori S.p.A. and Italstade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (12 Nov 2004) [hereinafter "*Salini*"]; and *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction (6 August 2004).

⁷⁰ See above note 68.

⁷¹ As noted by the *Siemens* tribunal:

"At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by [the Claimant] are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them."

Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/03/07, Decision on Jurisdiction (3 Aug 2004) [hereinafter "*Siemens*"], para 180.

B. Second Objection: the Claimant, as Shareholder, Lacks *Ius Standi* to bring an indirect claim for damages allegedly suffered by the Argentine Subsidiaries

1. Position of the Respondent

65. Argentina asserts that the Claimant lacks *ius standi* to bring any claims arising out of the damage allegedly suffered by its Argentine Subsidiaries.⁷² Argentina points out that a company and its shareholders are legally distinct entities and asserts that the latter cannot – absent an explicit legal authorization – exercise any rights on behalf of the former.⁷³ Thus, in the Respondent’s view, the Claimant as a mere shareholder in DCS Argentina cannot claim damages on its behalf.⁷⁴ In support of this conclusion, Argentina argues that none of the four sources of applicable law mentioned in Article 10(5) of the BIT – namely the Treaty, other treaties in force between the State Parties, the law of the Host State, and the general principles of international law – allows for “indirect” actions by shareholders.⁷⁵

66. With respect to the Treaty itself, Argentina alleges that the BIT only authorizes indirect claims by shareholders in the limited circumstances set forth in Article 4, as supplemented by Article 3 of the Protocol.⁷⁶ Article 4 of the BIT deals with expropriation and nationalization of investments, while Article 3 of the Protocol states:

“A claim to compensation shall also exist when, as a result of measures named in Article 4 regarding the company in which the investment is made, it suffers a serious economic harm.”⁷⁷

Argentina asserts that this protection would apply only if the company in which the investment was made had been expropriated or nationalized. In Argentina’s view, since the Claimant has failed to allege that its Argentine Subsidiary was actually expropriated, nationalized or seized, this Protocol provision does not apply.⁷⁸ It further asserts that since the BIT does not authorize

⁷² Respondent’s Memorial on Jurisdiction, paras 119, 121-122.

⁷³ Ibid at para 120.

⁷⁴ Ibid at para 121.

⁷⁵ Ibid at paras 123-124. Article 10(5) of the German-Argentine BIT is set forth above in para 50 of this award.

⁷⁶ Respondent’s memorial on Jurisdiction, paras 125-126.

⁷⁷ Unless otherwise noted, all English language quotations from the German-Argentine BIT reproduced in this award are taken from the disputing parties’ agreed English translation of the Spanish and German original texts.

⁷⁸ Respondent’s Memorial on Jurisdiction, paras 132-134.

indirect claims in any situation outside of Article 4, all of the Claimant's other claims must necessarily fall outside of the Tribunal's jurisdiction.⁷⁹

67. Argentina next argues that derivative or indirect actions are not permitted under Argentine law.⁸⁰ It asserts that the Claimant's Argentine Subsidiary, given its status as a local Argentine company, is governed by the Argentine Commercial Companies Law (No. 19550).⁸¹ Under this law, only the Argentine Subsidiary – through its management – may exercise defense of the company's rights. The law limits shareholders to two discrete types of remedies: 1) corporate actions (claiming damages allegedly caused to the company by its managers) and 2) individual actions (for alleged direct damage to the shareholder's property).⁸² Argentina notes that the Claimant has not attempted to exercise either of these two types of shareholder rights and concludes that its claims are therefore inadmissible under Argentine law.⁸³

68. Concerning international law, Argentina raises three separate points in its memorial on jurisdiction. First, it asserts that general international law does not allow for indirect actions by shareholders.⁸⁴ Instead, Argentina submits, claimants “can only claim for direct damages to their specific rights” as shareholders.⁸⁵ The Respondent quotes extensively from the ICJ decision in *Barcelona Traction*,⁸⁶ which held that “a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.”⁸⁷ Argentina asserts that this formulation of shareholders' rights under international law is applicable to the present case, notwithstanding the fact that *Barcelona Traction* dealt with a case of diplomatic protection whereas the present proceedings

⁷⁹ Ibid at para 127.

⁸⁰ Ibid at para 134.

⁸¹ Ibid.

⁸² Ibid at paras 137-140.

⁸³ Ibid at para 141.

⁸⁴ Ibid at para 142.

⁸⁵ Ibid at para 144.

⁸⁶ Ibid at para 147.

⁸⁷ *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, at p. 37, para 47.

arise under the ICSID Convention and BIT.⁸⁸ It argues that the ICJ's conclusions were not specific to the case of diplomatic protection.⁸⁹ In Argentina's view:

“the difference between diplomatic protection and the protection afforded by the ICSID Convention is related to who files the action: the State of which the affected party is a national in the first case, and the affected party directly in the second case. However, this is not related to what rights can be claimed.”⁹⁰

69. Argentina's second contention under the “international law” heading is that “the ICSID Convention does not allow indirect or derivative claims”.⁹¹ The Respondent points to the Convention's drafting history as summarized by Professor Schreuer, who remarked, in connection with Article 25(2)(b), that a “suggested solution to give access to dispute settlement not to the locally incorporated company but directly to its foreign owners was discarded.”⁹² Argentina notes that Article 25(2)(b) of the Convention instead provides for the possibility that a company having the nationality of the Host State but subject to foreign control may be treated as a national of another Contracting State by agreement of the Parties.⁹³ It asserts, however, that no such agreement exists in this case.⁹⁴

70. Thirdly, Argentina submits that in “conventional international law, indirect claims are exceptional and must be expressly provided for, which is not the case here.”⁹⁵ It points to the NAFTA, the US-Chile Bilateral Free Trade Agreement, and the US 2004 Model BIT, all of which expressly provide for indirect actions.⁹⁶ Argentina stresses that the German-Argentine BIT, by

⁸⁸ Respondent's Memorial on Jurisdiction, para 149.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid at IV.D.4.b).

⁹² Ibid at para 151, citing CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press, 2001) p. 291 (internal references omitted). The Tribunal notes, however, that the Respondent appears to have taken this quote out of context. In fact, Professor Schreuer states that this suggestion was discarded only because “this would not be feasible where shares are widely scattered and their owners are insufficiently organized.” Professor Schreuer was nonetheless unequivocal in stating that Article 25(2)(b) was included because a majority of the delegates who participated in the drafting of the Convention “found that it would be unwise to exclude locally incorporated but foreign controlled companies”. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY*, 2d Ed (Cambridge University Press, 2009), with Loretta Malintoppi, August Reinisch, and Anthony Sinclair [hereinafter “SCHREUER – 2009”], p. 297 (internal references omitted).

⁹³ Respondent's Memorial on Jurisdiction, para 152.

⁹⁴ Ibid.

⁹⁵ Ibid at para 153.

⁹⁶ Ibid.

contrast, contains no such special provision.⁹⁷ Argentina expands upon this line of argument in its reply memorial on jurisdiction, adding also a discussion of the U.S. federal law on derivative suits by shareholders.⁹⁸ It does so in order to underscore the important policy reasons underlying what it identifies as a general presumption against the admissibility of indirect actions.⁹⁹

71. Having thus addressed what it considers to be the applicable bodies of law under Article 10(5) of the BIT, Argentina then adds a further argument. It asserts that the Chile-Argentina BIT, which the Claimant has invoked for other purposes by means of the German-Argentine BIT's most-favored-nation clause, also does not allow for indirect claims.¹⁰⁰ Argentina cites the Chilean BIT's failure to include a provision similar to that of the German BIT's Protocol Article 3 as evidence that the former treaty did not intend to allow indirect claims even in the limited circumstances envisaged by the latter treaty.¹⁰¹ The Respondent therefore argues that the Claimant's lack of *ius standi* cannot be cured by reference to the Chile-Argentina BIT.¹⁰²

72. Finally, in its reply memorial on jurisdiction, Argentina adds yet another dimension to its arguments concerning *ius standi* by raising a factual challenge. It submits that the Claimant has not sufficiently proven its alleged investor status nor what precisely constitutes its alleged qualifying investment under the BIT.¹⁰³ After surveying the information contained in the Claimant's balance sheets for the years 1994-2005, Argentina points out that the shareholdings in the affected Argentine Subsidiary changed hands and the companies holding those shares changed names several times during that period.¹⁰⁴ Argentina particularly notes that the Claimant entered into a purchase and sale agreement on 12 June 2002, by which the Claimant sold the entirety of its shares in the Argentine Subsidiary to its parent company, DaimlerChrysler A.G.¹⁰⁵ Then, in 2005, Argentina alleges, the parent company transferred the entire shareholding in the

⁹⁷ Ibid at para 154.

⁹⁸ Respondent's Reply on Jurisdiction, paras 106-118.

⁹⁹ Ibid at paras 119-128.

¹⁰⁰ Respondent's Memorial on Jurisdiction, Part IV.D.5.

¹⁰¹ Ibid at para 155.

¹⁰² Ibid at para 158.

¹⁰³ Respondent's Reply on Jurisdiction, para 98.

¹⁰⁴ Ibid at para 99.

¹⁰⁵ Ibid at para 100.

Argentine Subsidiary to DaimlerChrysler Argentina – a separate Argentine subsidiary of the parent company.¹⁰⁶

73. Argentina’s reply memorial on jurisdiction does not well explain its motivation for raising these points. The Respondent appears to draw two conclusions from this set of facts. First, Argentina seems to suggest that these share transfers demonstrate that the Claimant’s shareholding in the affected Argentine Subsidiary is at most an indirect investment. Since indirect claims are, in Argentina’s view, precluded under the BIT, the Claimant lacks *ius standi*.¹⁰⁷ Second, Argentina remarks cryptically that even if the Claimant did have a protected investment in Argentina, its claim “refers to investments that do not belong thereto (at least not directly as the BIT applicable to this case requires).”¹⁰⁸

74. There are two possible ways of reading this latter assertion. Either it reiterates the Respondent’s objection to the indirect nature of the investment (as suggested by the parenthetical), or it raises a separate objection to the effect that the Claimant lacks *ius standi* because it does not itself own the claims which it is now asserting before the Tribunal (by reason of the share transfers pointed out above). Unfortunately, the Respondent’s intended meaning does not appear clearly from its reply memorial. The assertion that the Claimant does not actually own the claims before the Tribunal does emerge clearly, however, in the Respondent’s rejoinder on the merits.¹⁰⁹ This has led the disputing parties to address the question of ownership during the hearings and in their post-hearing submissions. As such, the Tribunal will address this objection separately below.

2. Position of the Claimant

75. The Claimant counters that it has standing under well-established law to assert claims for harm done to its Argentine Subsidiaries.¹¹⁰ It begins by noting that it was the sole shareholder of DCS Argentina and through that company it indirectly owned 100% of the subsidiaries DCCF

¹⁰⁶ Ibid at para 101. Argentina did not document its source for this assertion. Section V of the Respondent’s Rejoinder on the Merits, however, indicates that the Argentine subsidiary allegedly harmed by Argentina’s sovereign measures (DCSA S.A.) and the Argentine subsidiary to which the parent company transferred that subsidiary’s shares in 2005 (DC Arg. S.A.) are two separate companies.

¹⁰⁷ This seems to be the implication of paras 102-103 of the Respondent’s Reply Memorial on Jurisdiction.

¹⁰⁸ Ibid at para 105.

¹⁰⁹ Respondent’s Rejoinder on the Merits, paras 67-69.

¹¹⁰ Claimant’s Counter-Memorial on Jurisdiction, point IV.

and DCLA.¹¹¹ The Claimant asserts that this ownership position gives it standing to bring claims for harms done to those companies.¹¹²

76. As a preliminary matter, the Claimant submits that Argentina has raised this same objection concerning indirect ownership “in some 22 other international investment arbitrations, each time without success”.¹¹³ It also highlights seven other investment cases not involving

¹¹¹ Ibid at para 127. The Tribunal notes, however, that according to the documents filed by the Claimants, DFS owned 99% of each of the three Argentine Subsidiaries, with the other 1% belonging to a Mr. Macarenhas. Claimant’s Exhibit 70.

¹¹² Claimant’s Counter-Memorial on Jurisdiction, para 127.

¹¹³ Ibid at para 129, citing: *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, Decision on Jurisdiction (8 December 1998), paras 9-10; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Jurisdiction (17 July 2003) [hereinafter “*CMS – Jurisdiction*”], paras 59, 63-65; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007) [hereinafter “*CMS – Annulment*”], paras 68-76; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction (8 December 2003), para 73; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004), para 39; *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim) (2 August 2004), paras 16-22, 25-46; *Siemens*, above note 71 at paras 137-140; *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005) [hereinafter “*AES*”], paras 86-89; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Jurisdiction (11 May 2005), paras 67-79; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (11 May 2005) [hereinafter “*Camuzzi I*”], paras 67-79; *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (10 June 2005) [hereinafter “*Camuzzi 2*”], paras 43-46; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Jurisdiction (30 April 2004), paras 60-63; *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006), paras 84-87; *Gas Natural v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction (17 June 2005) [hereinafter “*Gas Natural*”], paras 33-35; *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006) [hereinafter “*National Grid*”], paras 155-160; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/03/13 and *BP American Production Company et al v. The Argentine Republic*, ICSID Case No. ARB/04/8 (jointly decided), Decision on Preliminary Objections (27 July 2006), paras 217-218; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) [hereinafter “*InterAguas*”], paras 50-51; *Suez, Sociedad de Aguas de Barcelona S.A., and Vivendi S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Limited v. The Argentine Republic* (UNCITRAL Rules) (jointly decided), Decision on Jurisdiction (3 Aug 2006) [hereinafter collectively “*AWG*”], paras 50-51; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction (25 August 2006), paras 77-81; *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Decision on Jurisdiction (27 April 2006), paras 86-98; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction (27 April 2006), paras 137-139; and *Compañía del Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Jurisdiction (14 November 2005) [hereinafter *Vivendi II – Jurisdiction*], paras 36-41, 88-94. Note that while the Claimant specifically cited to each of these cases, the Tribunal has in some instances altered the citation formats and paragraph references, both to clarify the citations and to more precisely identify what the Tribunal considers to be the relevant passages. The Claimant also appears

Argentina in which it asserts that investment tribunals have allowed indirect claims.¹¹⁴ The Claimant cites these decisions as evidence that both the **ICSID Convention** and the **German-Argentine BIT**, as well as virtually all other BITs, give corporate shareholders the status of investors, “regardless of whether they are majority or minority shareholders.”¹¹⁵

77. The Claimant then proceeds to raise three main points in support of its right to bring claims for harm done to its Argentine Subsidiaries. First, it submits that the clear language of the **BIT** permits indirect claims.¹¹⁶ It argues that the **BIT’s broad definition of investment** encompasses indirect claims and the **BIT** nowhere requires direct ownership of the assets in question.¹¹⁷ It points particularly to the **Siemens** tribunal’s analysis. That tribunal found that the **German-Argentine BIT**’s references to “investor” and “investment” make no explicit reference to direct or indirect investments and therefore do not exclude indirect investments.¹¹⁸ The Claimant also disputes Argentina’s assertions concerning **Article 3 of the Protocol** and **Article 4 of the BIT**. Again quoting **Siemens**, the Claimant states “there is ‘no merit in the allegation that the provision for indirect claims in Article 4 and the corresponding provision of the Protocol are an indication that such claims are not permitted under other provisions of the Treaty.’”¹¹⁹

78. With respect to Argentina’s reliance upon **Barcelona Traction**, the Claimant submits that this reliance is entirely misplaced.¹²⁰ It argues that the reasoning of **Barcelona Traction** applies

to have cited to one additional award in error, as the passage cited deals with the calculation of interest and not the question of foreign shareholders’ rights under the **ICSID Convention** or BITs.

¹¹⁴ Claimant’s Counter-Memorial on Jurisdiction at para 130, citing: **Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka**, ICSID Case No. ARB/87/3, Final Award (27 June 1990) [hereinafter **AAPL v. Sri Lanka**]; **American Manufacturing and Trading, Inc. v. Republic of Zaire**, ICSID Case No. ARB/93/1, Award (21 February 1997); **Antoine Goetz et consorts c. République du Burundi**, ICSID Case No. ARB/95/3, Award (10 February 1999); **Alex Genin and others v. Republic of Estonia**, ICSID Case No. ARB/99/2, Award (25 June 2001); **CME Czech Republic B.V. v. Czech Republic**, UNCITRAL, Partial Award (13 September 2001); **GAMI Investments Inc. v. the Government of the United Mexican States**, UNCITRAL/NAFTA, Final Award (15 November 2004); and **Maffezini v. Spain**, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan 2000) [hereinafter “**Maffezini**”].

¹¹⁵ Ibid at para 131.

¹¹⁶ Claimant’s Counter-Memorial on Jurisdiction, Point IV.A.

¹¹⁷ Ibid at para 134.

¹¹⁸ Ibid at para 133; see also **Siemens**, above note 71 at para 137.

¹¹⁹ Ibid at para 136, quoting **Siemens**, above note 71 at para 140.

¹²⁰ Ibid at para 141.

only to cases involving diplomatic protection and not to cases under BITs, wherein investors enjoy a direct treaty-based right to arbitrate claims with Host States.¹²¹

79. Secondly, the Claimant submits that the Treaty's protections extend to the substance of its investment, not merely the free enjoyment of the shares.¹²² It underscores the Treaty's provisions protecting the management, use, and enjoyment of the company comprising the investment as evidence that the Treaty's protections are "not confined to the exercise of rights inherent in the position of the investor as a shareholder".¹²³ On this logic, the Claimant asserts: "rights under a contract held by a local company in which a company of a foreign investor of the other Contracting Party has invested constitute an investment protected by the BIT."¹²⁴ The Claimant again cites the decisions of several previous investor-State tribunals in support of this argument.¹²⁵

80. Thirdly, the Claimant denies that Argentine law is relevant to a determination of whether it may bring indirect claims under the BIT.¹²⁶ In the Claimant's view, Article 10(5) of the BIT (the BIT's "applicable law" provision) applies solely to the merits of the dispute.¹²⁷ For purposes of determining jurisdiction, on the other hand, "only Article 25 of the ICSID Convention and the terms of the Treaty are relevant."¹²⁸ This is so, the Claimant submits, because the claims concern breaches of the Treaty, not breaches under Argentine law.¹²⁹ The Tribunal's jurisdiction must therefore be established by reference to the provisions of the Treaty, irrespective of whether Argentine law would authorize a derivative suit by shareholders in similar circumstances.¹³⁰ Moreover, the Claimant contends, Argentine domestic law is irrelevant because the Treaty takes precedence over Argentina's internal law to the extent that there is any conflict between the

¹²¹ Ibid.

¹²² Ibid at Point IV.B.

¹²³ Ibid at para 142.

¹²⁴ Ibid.

¹²⁵ Ibid at paras 143-144.

¹²⁶ Ibid at Point IV.C.

¹²⁷ Ibid at para 148.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

two.¹³¹ The Claimant asserts that this is so both under **Articles 27 and 31 of the Argentine Constitution** and under **Article 27(1) of the Vienna Convention on the Law of Treaties**.¹³²

81. Finally, in a footnote, the Claimant disagrees with Argentina's submissions as to the **Chile-Argentina BIT's preclusion of indirect claims**. It argues that even if Argentina's assertions concerning that **BIT** were correct (which the Claimant disputes):

“a claim for more favorable treatment under a provision of the Chile-Argentina BIT does not entail being subject to all provisions of that BIT, including those that may be less advantageous, and the Chile-Argentina BIT is therefore irrelevant to the issue.”¹³³

3. Considerations of the Tribunal

82. The Tribunal has already noted that the Claimant's claims, as posited, give rise to a “legal dispute” as required by the **ICSID Convention**.¹³⁴ Argentina's second jurisdictional objection essentially raises the question as to whether this dispute arises out of an “investment” in the sense defined by the **German-Argentine BIT**. **Article 1(1) of the BIT** defines investment as follows:

“The term ‘investment’ shall include any kind of investment in accordance with the laws of the Contracting Party in whose territory the investment is made in accordance with this Treaty, in particular, but not limited to,

- a) moveable and immovable property and any other property rights such as mortgages and liens;
- b) shares or stock in a company or any other form of participation in a company;
- c) claims to money which has been used to create an economic value or claims to any performance hailing an economic value;
- d) intellectual property rights, in particular copyrights, patents, utility model patents, industrial designs or models, trade or service marks, trade names, trade or business secrets, technical processes, knowhow, or goodwill;
- e) business concessions under public law, including concessions to search for or exploit natural resources”¹³⁵.

¹³¹ Ibid at para 149.

¹³² Ibid.

¹³³ Ibid at note 158.

¹³⁴ See para 63 above.

¹³⁵ Emphasis added.

83. Subparagraph b) of this definition makes clear that the Claimant's 99% shareholding in DCS Argentina indeed constitutes a protected investment under the Treaty. Argentina argues that this limits the Claimant's protections under the Treaty to the free exercise of its rights as a shareholder, which, it submits, have not been impinged by the Government's disputed actions. This assertion, however, completely overlooks the fact that shareholdings are only one element in an otherwise broad and non-exhaustive definition that protects "any kind of investment." The Claimant's additional capital infusions into the Argentine Subsidiary, for example, would constitute "claims to money which has been used to create an economic value". Likewise, its right to returns¹³⁶ from the repayment (with interest) of the lease and loan contracts falls squarely within the concept of "claims to any performance hailing an economic value" under subparagraph c) of the BIT's definition of investment.

84. That the BIT's protection extends beyond the mere free enjoyment of the Claimant's shares in the Argentine Subsidiary is confirmed by the Protocol, which states:

"(1) Ad Article 1

- a) [...]
- b) Income from the investment and, in the case of its reinvestment, income from such reinvestment, shall enjoy the same protection as the investment."
- c) 'Any other form of participation' within the meaning of Article 1(1)(b) shall in particular include such investments which do not convey any voting or control rights to the holder of the investment.
- d) The claims to money referred to in Article 1(1)(c) encompass claims arising from loans related to participation in a company and which in their purpose and scope have the character of participation in a company. The foregoing shall not include loans from third parties such as bank loans under commercial conditions."

Subparagraph b) specifies that not merely the shareholdings themselves but also the income to be generated by the investment (whether through shares or otherwise) is protected by the BIT. Subparagraph c) extends this protection to types of participation which do not include voting or control rights, while subparagraph d) further extends it to forms of participation which do not even constitute a shareholding. Investors falling within the latter category would enjoy no rights as shareholders at all, and yet their participation in "any kind of investment" is protected under the BIT. The breadth of these Protocol provisions thus confirms that the BIT's protections are

¹³⁶ Also broadly defined by Article 1(2) of the BIT to include "amounts yielded by an investment and includes profits, dividends, interests, license fees, and other remunerations".

not limited to shareholders' rights *qua* shareholders. The fact that the BIT nowhere distinguishes between "direct" investments or claims and "indirect"/"derivative" investments or claims further supports this conclusion.¹³⁷

85. The Respondent's arguments concerning article 4 of the BIT and article 3 of the Protocol are misguided and do not lead to a different result. Article 3 of the Protocol (ad article 4 of the BIT) provides that "[a] claim to compensation shall also exist when, as a result of measures named in Article 4 regarding the company in which the investment is made, it suffers a serious economic harm."¹³⁸ The only portion of article 4 referring to "measures" is found in article 4(2), which states, in relevant part:

"Investments by nationals or companies of a Contracting Party may not be expropriated, nationalized, or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation."¹³⁹

86. The Respondent submits that article 4 thus authorizes compensation only in cases of "direct" expropriations (*e.g.* the actual expropriation of the shares themselves), whereas article 3 of the Protocol "also" and exceptionally authorizes "indirect" claims by the foreign shareholder for serious economic harm to the local company where that harm is caused by the types of directly expropriatory measures referred to in article 4.

87. The Tribunal, however, notes that neither article 4 of the BIT nor article 3 of the Protocol makes any reference whatsoever to "direct" versus "indirect" measures or harms. There is simply no reason to infer that article 4 applies to "direct" expropriation claims while article 3 of the Protocol applies to "indirect" claims. On its face, article 4 guarantees investors compensation in case of expropriation or measures tantamount to expropriation. Article 3 of the Protocol then adds that investors will "also" be entitled to compensation if the government's expropriatory-like measures cause a "serious economic harm" to the investment. A natural and ordinary reading of the Protocol provision, then, suggests that the Contracting State Parties wished to additionally specify the level of harm necessary to establish a claim to compensation in case of governmental measures that fall short of full and outright expropriation. But the Tribunal need not explore the

¹³⁷ On this point, see the analysis by the *Siemens* tribunal, which considered a nearly identical objection by Argentina in relation to the same German-Argentine BIT. *Siemens*, above note 71 at paras 136-144.

¹³⁸ Emphasis added.

¹³⁹ Emphasis added.

precise scope of these compensation obligations here. It is sufficient to note that these provisions in no way limit the scope of the term “investment” as discussed above. They can therefore have no bearing upon the Claimant’s standing to bring the present claims.

88. As to the Respondent’s assertion that Argentine law does not authorize derivative actions by shareholders in circumstances such as the present ones, the Tribunal has already stated that its competence in this matter is determined by the relevant provisions of the **ICSID Convention** and the **German-Argentine BIT**.¹⁴⁰ The Tribunal has concluded that the Claimant has raised treaty-based legal claims in respect of a protected investment as defined under the **BIT**. The Argentine law concerning the admissibility of derivative shareholder actions is simply irrelevant to the analysis.

89. The Tribunal also finds Argentina’s assertions concerning *ius standi* under international law unpersuasive. As to the **ICSID Convention**, it is true that **article 25(2)(b) of that Convention** allows disputing parties to agree to treat a locally incorporated subsidiary as a qualifying foreign investor for purposes of the **Convention** and that there is no evidence to suggest that the parties in the instant case entered into any such agreement. However, DCS Argentina is not a party to the claim and the Claimant has made no attempt to join its former subsidiary to the proceedings before this Tribunal. **Article 25(2)(b) of the ICSID Convention** therefore has no application. **Article 25(2)(a) of the Convention**, on the other hand, does apply, and the Tribunal has already noted that the Claimant satisfies the necessary nationality requirement under that provision.¹⁴¹

90. Argentina’s arguments regarding the **Barcelona Traction** decision and what Argentina terms “conventional international law” are equally unpersuasive. As noted both by the Claimant and by numerous other investor-State tribunals, the **Barcelona Traction** decision dealt with an attempt by one State to exercise diplomatic protection in favor of its nationals who had invested in a company incorporated in a second State with respect to disputed measures taken against the company by a third State.¹⁴² This is a significantly different factual scenario from the present one. Moreover, in reaching its decision to disallow the claim in **Barcelona Traction**, the ICJ itself noted that international treaties could provide shareholders with a direct right of action against foreign governments for certain claims.¹⁴³ The present instance is precisely such a case. As

¹⁴⁰ See part III of the award above.

¹⁴¹ See above para 49.

¹⁴² **Barcelona Traction**, above note 87 at paras 30-31.

¹⁴³ **Ibid** at paras 61-63.

noted by the CMS tribunal and affirmed by the ad hoc Committee in the CMS annulment decision:

“nothing in general international law prohibits the conclusion of treaties allowing ‘claims by shareholders independently from those of the corporation concerned... even if those shareholders are minority or non-controlling shareholders.’ Such treaties and in particular the ICSID Convention must be applied as *lex specialis*.”¹⁴⁴

91. The present Tribunal agrees with this conclusion. Indeed, some two-dozen previous investor-State tribunals have confirmed that the ICSID Convention, in concert with the definition of “investment” offered by numerous BITs, allows shareholders to bring claims for harms to their investments in locally incorporated companies.¹⁴⁵ The Respondent has not been able to point to a single case in which this objection to an investor-State tribunal’s jurisdiction has been upheld. While the Tribunal is not bound to follow the example of prior tribunals, it can find no justification either in the text of the German-Argentine BIT or in general international law to depart from the overwhelming *jurisprudence constante* that has emerged around this particular legal question.¹⁴⁶

92. Nor does the Respondent’s reliance upon the recent U.S. treaty practice provide such a justification. The Respondent has provided no evidence to suggest that the U.S. decision to specifically authorize “indirect” claims in its recent investment agreements was prompted by a desire to depart from what Argentina terms a “conventional international law” rule to the contrary. It is equally plausible that the U.S. introduced this change in order to explicitly endorse as correct the findings of the numerous investor-State arbitral tribunals referenced above. In any event, the Respondent has not proven nor even suggested anything in the treaty practices of Argentina or Germany – the relevant Contracting States for present purposes – that would support its position.

93. Finally, Argentina’s reliance upon the Chile-Argentina BIT is equally misguided and must be rejected. The Tribunal expresses no opinion as to whether that BIT does or does not authorize shareholders to bring claims for harms suffered by their locally incorporated investments. What matters, in terms of the present Tribunal’s jurisdiction, is that the German-

¹⁴⁴ CMS – Annulment, above note 113 at para 69 (quoting CMS – Jurisdiction, above note 113 at para 48).

¹⁴⁵ See above notes 113 and 114.

¹⁴⁶ Indeed, none of the considerations mentioned above in para 53 of this Award would justify the Tribunal in adopting a different resolution of the question in this case.

Argentine BIT allows such claims, and nothing in the BIT requires qualifying German investors to be subject to the potentially more restrictive jurisdictional provisions of any third treaty. The Chilean-Argentine BIT is therefore inapposite to the question at hand.

C. Third Objection: The claim refers to the adoption of general measures which exceed the jurisdiction of the Centre

1. Position of the Respondent

94. Argentina asserts that all of the Claimant's claims relate to general measures adopted by the Argentine Government in response to a national emergency,¹⁴⁷ and in particular, to the Government's decision to abandon the currency exchange system.¹⁴⁸ Citing the PCIJ decision in *Serbian Loans*, Argentina insists that the regulation of its currency is a matter falling within its exclusive sovereignty under international law.¹⁴⁹ It argues that since the BIT's preamble indicates its purpose is to increase the welfare of both countries,¹⁵⁰ the Treaty "cannot be interpreted to prevent any of the party States from adopting measures aimed at safeguarding the Nation's welfare."¹⁵¹

95. In addition, Argentina submits that the Tribunal does not have competence to review general economic measures unless the Claimant can show not merely that it suffered adverse *factual* effects as a result of the measures but that one of its *legal* rights was prejudiced.¹⁵² Argentina asserts that the Claimant has not shown any adverse legal effect for two reasons. First, it submits that the Claimant does not itself possess any legal rights that could have been affected by the Government's measures, because all of its claims relate to contractual rights held by separate legal entities.¹⁵³ This argument repeats Argentina's second objection above and therefore will not be dealt with again here. Second, Argentina reiterates that it never made any specific commitments towards the Claimant.¹⁵⁴ The Respondent acknowledges the CMS

¹⁴⁷ Respondent's Memorial on Jurisdiction, para 160.

¹⁴⁸ Ibid at paras 164 & 165.

¹⁴⁹ Ibid at paras 162 & 164

¹⁵⁰ According to the agreed English translation, the relevant phrase of the BIT's preamble reads: "Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both States...".

¹⁵¹ Respondent's Memorial on Jurisdiction, para 163.

¹⁵² Ibid at para 166.

¹⁵³ Ibid.

¹⁵⁴ Ibid at para 168.

tribunal's finding that general measures "adopted in violation of specific commitments given to the investor in treaties, legislation or contracts" could fall within the jurisdiction of an ICSID tribunal.¹⁵⁵ However, it asserts, this principle is not applicable in the present case, where the Claimant has not proven any "specific commitments undertaken to it, negotiated with it, and particularly, specifically and exclusively promised to it."¹⁵⁶ This argument was raised by Argentina under its first jurisdictional objection.¹⁵⁷ The Tribunal has already noted that the tenability of the Claimant's **umbrella clause** claims is a question for the merits.¹⁵⁸ That analysis will therefore not be repeated here.

96. In its reply memorial on jurisdiction, Argentina adds two further arguments. It asserts that the Claimant's position cannot be accepted, because allowing investment tribunals to review the Government's sovereign monetary policy would effectively nullify the existence of that sovereign power, as it would render it impossible for Argentina to exercise the power without incurring international responsibility.¹⁵⁹ Lastly it argues that the fact that the Claimant does not agree with the general measures taken by Argentina in response to the crisis or does not otherwise appreciate the remedies made available to its subsidiaries under the new laws is not sufficient to bring the claims within the jurisdiction of the Tribunal.¹⁶⁰

2. Position of the Claimant

97. The Claimant responds that it has clearly raised a legal dispute.¹⁶¹ It notes that it has explicitly alleged Argentina's violation of its legal rights under the **BIT**.¹⁶² These allegations, it contends, meet the **ICSID Convention's Article 25** requirement of a "legal dispute" as that phrase is understood in international law.¹⁶³ Citing several international courts and tribunals and the writings of academic commentators, the Claimant explains that the claims "must raise legal issues in relation with a concrete situation and the determination of the issue must have some practical

¹⁵⁵ Ibid at para 167, quoting **CMS – Jurisdiction**, above note 113 at para 27.

¹⁵⁶ Ibid.

¹⁵⁷ See para 58 of the Award above.

¹⁵⁸ Above, para 65.

¹⁵⁹ Respondent's Reply Memorial on Jurisdiction, para 135.

¹⁶⁰ Ibid at paras 136-137.

¹⁶¹ Claimant's Counter-Memorial on Jurisdiction, para 152.

¹⁶² Ibid.

¹⁶³ Claimant's Memorial on the Merits at paras 212-213.

and concrete consequences.”¹⁶⁴ It asserts that its claims arising under the BIT meet this definition.¹⁶⁵

98. As to the contention that general economic measures cannot fall within the jurisdiction of ICSID tribunals, the Claimant responds, “ICSID tribunals confronting claims related to Argentina’s emergency legislation have uniformly found the requisite ‘legal dispute.’”¹⁶⁶ The Claimant asserts that some 16 ICSID and UNCITRAL tribunals have confronted the same objection from Argentina, and:

“[i]n each case, the tribunal found that, although Argentina, as a sovereign State, was able to enact any measure that it saw fit, the tribunal had jurisdiction to determine whether those measures violated binding commitments made by Argentina to its investors and that the dispute thus arose specifically and ‘directly’ out of the investment rather than out of measures of general applicability.”¹⁶⁷

The Claimant does not dispute Argentina’s sovereign right to regulate its currency and economy.¹⁶⁸ However, the Claimant asserts, if in so doing Argentina violates its treaty obligations, it must pay compensation.¹⁶⁹

99. Finally, the Claimant disputes Argentina’s contention that ICSID jurisdiction may arise only where Argentina has violated a specific commitment made to a specific investor, negotiated individually with that investor.¹⁷⁰ It asserts that the very nature of BITs is to provide specific protections to a broad class of investors.¹⁷¹ This purpose, it submits, would be thwarted if only investors in possession of an individually negotiated commitment from the Host State could invoke the protection of BITs.¹⁷²

¹⁶⁴ Ibid at para 214.

¹⁶⁵ Ibid at para 215.

¹⁶⁶ Ibid at para 217.

¹⁶⁷ Ibid at para 222.

¹⁶⁸ Claimant’s Counter-Memorial on Jurisdiction, para 155.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid at para 156.

¹⁷¹ Ibid.

¹⁷² Ibid.

3. *Considerations of the Tribunal*

100. The Tribunal is mindful of the Respondent's right to regulate its economy as it sees fit. This right adheres in the sovereign Government of Argentina both in times of economic crisis and otherwise. But the Respondent's general sovereignty is not at issue in these proceedings. What is at issue is the Respondent's obligation to observe its treaty commitments under the **German-Argentine BIT**. The Claimant has not alleged that Argentina may not exercise its powers to regulate its economy nor that such regulation may never negatively affect the Claimant. Rather, it has alleged that where Argentina elects to exercise its powers in a manner that contravenes one of Argentina's voluntarily assumed international obligations to German investors under the **German-Argentine BIT**, and where such contravention specifically harms the Claimant's investment, Argentina must compensate the Claimant for the violation.

101. As stated by the **AES** tribunal in response to a nearly identical objection by Argentina:

“What is at stake in the present case, as it was in the *CMS* one, are not the measures of a general economic nature taken by Argentina in 2001 and 2002 but their specific negative impact on the investments made by [the Claimant]. As a sovereign State, the Argentine Republic had a right to adopt its economic policies; but this does not mean that the foreign investors under a system of guarantee and protection could be deprived of their respective rights under the instruments providing them with these guarantees and protection. Without anticipating, at this stage, on the consideration of the issue, whether this delicate balance between the respective rights of the Host State and those of the investor were respected in substance, the present Tribunal states that it has jurisdiction for considering [sic] this issue.”¹⁷³

102. The present Tribunal agrees with this analysis. As readily conceded by the Claimant, the Tribunal is not authorized to pass judgment in an abstract way upon the measures adopted by Argentina in 2001 and 2002 in response to its economic crisis. Its jurisdiction is limited to deciding the specific impact of those measures upon the Claimant's investment under the **German-Argentine BIT**.

103. To return to the jurisdictional requirements of **Article 25 of the ICSID Convention**, the Tribunal has already found that the Claimant meets the **Convention's** nationality requirement, that it has raised a treaty-based “legal dispute” with the Respondent under the **ICSID Convention** and the **German-Argentine BIT**, and that the Claimant's investment is a protected “investment” as that term is defined by the **BIT**.

¹⁷³ **AES**, above note 113 at para 57 (emphasis added).

104. The Claimant has pleaded that its investment suffered specific damages as a direct consequence of the Respondent's disputed measures. In particular, the Claimant has alleged that the value of its lease and loan contracts – which the Tribunal has already found to be a protected stream of income falling within the BIT's definition of "investment" – was substantially reduced by the Government's revocation of the legal regime governing dollar-denominated contracts. The Claimant has moreover alleged that this alteration of the legal regime violated some of Argentina's obligations under the BIT and brought its entire investment to the brink of financial collapse, thereby giving rise to a duty of compensation. It is therefore clear that the Claimant's claims, as pleaded, satisfy the ICSID Convention's requirement of a legal dispute "arising directly out of an investment." For all of these reasons, the Respondent's third jurisdictional objection is also rejected.

V. FOURTH OBJECTION TO JURISDICTION: DFS IS NOT THE PROPER CLAIMANT BECAUSE IT NO LONGER OWNS THE CLAIM

A. Admissibility of the objection

1. Position of the Respondent

105. As noted above, the Respondent's reply memorial on jurisdiction alludes to the factual underpinnings for this objection.¹⁷⁴ Namely, according to the Claimant's Exhibit CX 70, the Claimant (DFS Berlin) sold its shares in the allegedly harmed Argentine Subsidiary (DCS Argentina) to its parent company (DaimlerChrysler AG Stuttgart), by a share purchase agreement dated 12 June 2002 ("the Share Purchase Agreement" or "SPA").¹⁷⁵ It is not until the Respondent's rejoinder memorial on the merits, however, that the essence of Argentina's objection to jurisdiction in consequence of this Share Purchase Agreement becomes clear. In that memorial, Argentina notes that the request for arbitration was filed on 2 August 2004 and objects that by virtue of the sale, DFS no longer owned a protected investment under the BIT as of that date.¹⁷⁶ "As a consequence," Argentina states, "the present case is inadmissible since at the moment of expressing its consent to this arbitration Daimler Financial Services AG was not the

¹⁷⁴ Respondent's Reply on Jurisdiction, para 100. These facts are summarized at para 45 above.

¹⁷⁵ The Tribunal notes that at the time of the share purchase agreement, the Claimant was called DaimlerChrysler Services, AG. Sometime later, however, pursuant to the break-up between the Daimler and Chrysler companies, the Claimant changed its name to Daimler Financial Services (DFS). This is how the Claimant has referred to itself throughout these proceedings.

¹⁷⁶ Respondent's Rejoinder on the Merits, paras 67-68.

owner and/or controlling company of the subsidiaries [which are the] object of the claim.”¹⁷⁷ Argentina reiterated this objection during the oral hearings and in its post-hearing written submissions.

106. Argentina points to the ICJ’s decision in the *Serbia Genocide* case as evidence that the Tribunal retains the authority to decide upon its own jurisdiction, if necessary *proprio motu*, even at this late stage of the proceedings, since there have not yet been any jurisdictional findings by the Tribunal constituting *res judicata*.¹⁷⁸ The suggestion seems to be that Argentina’s late raising of the objection should not render the objection inadmissible.

2. Position of the Claimant

107. At the hearings, the Claimant objected that Argentina raised this point too late and took the position that it is therefore inadmissible. In its post-hearing submissions, the Claimant emphasizes that Argentina first broached the point in its rejoinder memorial on the merits, only one month before the hearings.¹⁷⁹ Therefore, the Claimant asserts, Argentina must be deemed to have waived the objection in accordance with *ICSID Arbitration Rule 41(1)*,¹⁸⁰ which states:

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

3. Considerations of the Tribunal

108. *ICSID Arbitration Rule 41(1)* aims at promoting arbitral efficiency by requiring disputing parties to raise jurisdictional objections in a timely fashion, and the present Tribunal does not doubt of its authority to dismiss an untimely objection in appropriate circumstances. The goal of efficiency must be balanced, however, against the Tribunal’s duty not to exceed its competence, as evidenced by *ICSID Rule 41(2)*, which permits the Tribunal “on its own initiative [to] consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is

¹⁷⁷ Ibid at para 69.

¹⁷⁸ Respondent’s Post-Hearing Legal Submissions, pp. 6-7, citing *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Judgment of 26 Feb 2007, paras 118, 127.

¹⁷⁹ Claimant’s Post-Hearing Submissions of Fact, paras 1211-1212.

¹⁸⁰ Claimant’s Post-Hearing Legal Submissions, para 68.

within the jurisdiction of the Centre and within its own competence.” The Tribunal must in addition observe its duty to ensure that both parties receive a full and fair opportunity to present their cases. These are all matters for the Tribunal’s discretion.

109. Under the circumstances, the Tribunal finds that it would not be appropriate to dismiss the Respondent’s objection on timeliness grounds. First, both parties here bear some responsibility for the tardy discussion of the objection. The factual bases for the objection were disclosed to the Respondent at an early stage of the proceedings, and certainly before the completion of the written jurisdictional pleadings. The Respondent’s failure to sufficiently articulate the objection within the time frame set by **Rule 41(1)** is therefore regrettable.¹⁸¹ On the other hand, the Claimant’s initial presentation of its claim was worded in such a manner as to lead a reasonable reader to believe that the Claimant still owned the Argentine Subsidiary at the time of the filing of the claim.¹⁸² Moreover, while the Claimant disclosed the fact of the share transfer in its memorial on the merits, it did so fleetingly in a section of its argument dedicated to quantum issues, not jurisdictional matters. The Tribunal can therefore appreciate how the Respondent might have failed to immediately realize the potential jurisdictional implications of the disclosure, which comprised a single paragraph within the Claimant’s 229-page memorial. This is particularly the case as the objection raises issues that appear to be novel within ICSID jurisdictional practice, as will become clear below. Indeed, for this reason the Tribunal eventually requested and received from both parties an additional round of briefing devoted solely to the question of the effect of the SPA upon the Tribunal’s jurisdiction.

110. Second, the parties here resolved – of their own initiative – to join the jurisdictional and merits proceedings in this case. Thus, while the Respondent’s allusions to the SPA in its written jurisdictional pleadings were oblique at best, it nonetheless clarified the grounds for its objection before the close of the jurisdictional proceedings. Third, from the standpoint of fairness, both parties received ample opportunity to address the objection not only at the oral hearings but also in their post-hearing submissions and in a subsequent round of written briefs. There can therefore be no unfairness to the Claimant from considering the objection at this point.

¹⁸¹ The Claimant first disclosed the sale in its 7 August 2007 Memorial on the Merits, at para 160. It submitted a copy of the disputed Share Purchase Agreement (Claimant’s Exhibit CX 70) on the same date. This was nearly a year before the 5 May 2008 filing of Argentina’s Reply Memorial on Jurisdiction and more than two years before Argentina’s 27 October 2009 Rejoinder on the Merits, in which Argentina first clarified its objection concerning the SPA.

¹⁸² See e.g. Claimant’s Request for Arbitration at para 20, stating “this is a legal dispute arising directly out of an investment in Argentina by DCS in its wholly-owned subsidiary, DCS Argentina...”.

B. Substance of the objection

1. The Tribunal's request for further submissions concerning the SPA

111. During the oral hearings the Tribunal requested, from both parties, post-hearing written submissions concerning the law applicable to determining the correct meaning and impact of the disputed Share Purchase Agreement. Regrettably, neither Party provided a clear response to this request. The Tribunal therefore wrote to the parties on 20 August 2010 and again requested further clarification of their respective positions. In that letter, the Tribunal provided a list of specific questions to assist the parties in addressing the Tribunal's concerns. The essential thrust of the letter was as follows:

“The Tribunal notes that the referenced Share Purchase Agreement pre-dates the present ICSID claim, which was registered on 3 August 2004. The Tribunal further notes that the Parties did not, in their post-hearing briefs, respond to the question posed by the Tribunal at the oral hearing concerning the law applicable to the meaning of the Share Purchase Agreement and the corresponding relevance of that Agreement in relation to the Tribunal's jurisdiction (Transcript of Oral Hearings, Day 7, p. 2023, lines 16-22 - p.2024, lines 1-19).

The question as to whether the ICSID claim was transferred to the Claimant's Parent Company along with the shares may turn upon the intention of the contracting parties to the Share Purchase Agreement. The Tribunal invites the Parties, within 25 days, to file any supplementary submissions, including supporting legal authorities, they may wish to lodge concerning the following questions:

1. The law applicable to the interpretation of the Share Purchase Agreement, whether German law or international law.
2. The proper interpretation of the Share Purchase Agreement under the applicable law in relation to the ICSID claim, including whether, and if so how, the Agreement governs the ownership of the ICSID claim and/or the legal entitlement to any recovery from the ICSID claim.”

112. Both parties duly filed full written responses to the Tribunal's questions, along with supporting witness statements and expert legal opinions. They also provided brief responses to one another's arguments. These submissions have greatly assisted in clarifying the questions before the Tribunal. The key contentions of the parties relating to the SPA objection, as they eventually emerged through these various submissions, are set forth below.

2. Position of the Respondent

113. Argentina stresses that the Claimant, before filing the present claim, transferred the entirety of its shares in the Argentine Subsidiary to its Parent Company and that it did so without reserving for itself any right to retain any BIT-based legal claims pertaining to the investment subsequent to the transfer.¹⁸³ In support of its assertion that the Claimant did not reserve its right to bring any ICSID claims, Argentina quotes the relevant portion of the 2002 Share Purchase Agreement:

“... the Buyer [aka the Parent Company] hereby purchases from the Seller [aka the Claimant] all the Seller’s present shares in the Company... and all rights to future shares which result from any increase to capital until the Closing Date (hereinafter referred to collectively as “the Sold Shares”), including all the rights to dividends, all the voting rights, and any other rights pertaining to the Sold Shares for all the Company’s profits which have not been appropriated to shareholders of the Company until the date of signing of this Agreement.”¹⁸⁴

114. Argentina’s position is that the phrase “any other rights pertaining to the Sold Shares” *prima facie* includes the right to bring an ICSID claim for damages allegedly done to the shareholding. In support of this position Argentina makes two alternative arguments, one under international law and the other under Argentine law. Its primary argument is that international law should apply in determining the effects of the SPA upon the Claimant’s standing to file an international arbitration claim.¹⁸⁵ The Tribunal should therefore apply the ICSID Convention, the Argentina-Germany BIT, and the relevant rules of international law.¹⁸⁶

115. As to the latter source of law, the Respondent cites three ICJ cases for the proposition that general international law requires a claimant to hold a legally protected right or interest at the time of filing the claim.¹⁸⁷ Here, it submits, the Claimant no longer held a legally protected right or interest when it filed the claim because it had already transferred the investment to its Parent Company. With respect to the ICSID Convention, Argentina submits that the critical date for

¹⁸³ Respondent’s Post-Hearing Summary of Arguments, para 2.

¹⁸⁴ Exhibit CX 70, “Share Purchase and Assignment Agreement”, Article 1(1) (parenthetical in original) (emphasis added by the Tribunal) (quoted by Argentina in its Post-Hearing Submissions of Fact, p. 69).

¹⁸⁵ Respondent’s post-hearing SPA submission of 28 Sep 2010, part I, para 1. Unless otherwise noted, all paragraph numbers referring to this submission refer to the paragraph numbers appearing in parts I-V of the submission and not to the paragraphs appearing in the introduction to the submission (which are separately numbered).

¹⁸⁶ Ibid at paras 2-3, 20-21.

¹⁸⁷ Ibid at paras 5-9 (citing the ICJ’s *Barcelona Traction*, *Nottebohm*, and *South West Africa* cases).

determining *jus standi* is the date on which the arbitral proceedings are commenced.¹⁸⁸ It notes that although other ICSID tribunals have held that the transfer of an investment to a third party did not affect their jurisdiction, these tribunals dealt with scenarios in which the transfer was made after the initiation of the arbitral proceedings.¹⁸⁹ Here, the transfer occurred before. For these reasons, the Respondent submits, the Claimant lacks *jus standi* under both the **ICSID Convention** and general international law.

116. The Respondent's alternative argument is that Argentine law applies in determining the Tribunal's jurisdiction subsequent to the share transfer. It reaches this conclusion in two ways. First, it argues, the international law relevant to the question includes **article 10(5) of the BIT**, which refers *inter alia* to Argentine law, thereby confirming that Argentine law applies.¹⁹⁰ Second, it submits, if the Tribunal finds that the effects of the SPA upon its jurisdiction are to be determined by a source of law other than international law, then German law applies to the interpretation of the SPA per the SPA's explicit choice of law clause.¹⁹¹ That clause, found in article 8(4) of the SPA, states:

“So far as legally permitted, this Agreement shall be subject exclusively to the laws of Germany barring the application of the international private law of both Germany and Argentina.”¹⁹²

117. Citing the expert opinion of Professor Wurmnest, a German specialist in private international law, the Respondent maintains that “German law makes a distinction between the agreement to transfer the shares in consideration for the payment of an amount of money [aka the sale obligations under the SPA], and the actual assignment of the shares, rights and/or claims – including ICSID claims.”¹⁹³ On this basis the Respondent submits that German law applies to the interpretation of the SPA in determining the obligations of the SPA contracting parties *inter se* but that Argentine law – including its rules on private international law and in turn its substantive law – applies to the determination of whether or not the ICSID claim was actually assigned to the

¹⁸⁸ Ibid at para 23 (citing **SCHREUER – 2009, above note 92 at p. 92, section 36**).

¹⁸⁹ Ibid at paras 24-26 (citing **CSOB v. Slovakia, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999), para 31**; and **Vivendi II – Jurisdiction, above note 113, paras 60-63**). The text of **Article 10(5) of the BIT** is set forth in para 50 of this award.

¹⁹⁰ Respondent's post-hearing SPA submission of 28 Sep 2010, at paras 18-19.

¹⁹¹ Ibid at paras 10-11.

¹⁹² Article 10(4) of the SPA, Claimant's Exhibit CX-70.

¹⁹³ Respondent's post-hearing SPA submission of 28 Sep 2010, at para 12, citing expert opinion of Prof. Wurmnest.

Parent Company.¹⁹⁴ Pointing to the expert opinions of Argentine law professors Nissen and Kielmanovich, who stress that Argentine law prohibits domestic derivative actions by former shareholders except in very limited circumstances not present in this case,¹⁹⁵ the Respondent then reaches the following conclusion:

“[C]onsidering that, from the very beginning, Claimant has claimed in its capacity as shareholder of the Subsidiaries that were purportedly affected by the measures challenged in the instant case, and that, under Argentine law, the transfer of shares entails the assignment of all claims related to the ownership of such interest, DFS has no standing to bring a claim before ICSID.”¹⁹⁶

118. The Respondent raises several additional points in support of its position. First, it asserts that the defect in the Tribunal’s jurisdiction caused by the share transfer is fatal and cannot be cured. It emphasizes that the Claimant has no standing under international law to bring a claim on behalf of its Parent Company and points out that it has not in fact attempted to do so here.¹⁹⁷ It adds that joining the Parent Company to the proceedings at this stage is impossible, as this would require the consent of the Government of Argentina, which consent it emphatically refuses.

119. Second, the Respondent disputes the testimony of the Claimant’s witnesses to the effect that the contracting parties to the SPA did not intend to transfer the ICSID claim. According to the Respondent:

- the plain language of the SPA shows that the claim was in fact transferred, whatever the parties’ *ex post facto* assertions, because the claim is included in the SPA’s use of the phrase “any other rights pertaining to the sold shares”¹⁹⁸;
- email exchanges between Daimler officials which form part of the record and which were brought to the Tribunal’s attention at the hearings indicate that the possibility of an ICSID claim was not even considered by DFS until sometime in 2004 (thus, since the SPA was concluded in 2002, the contracting parties to the SPA cannot have intended for the ICSID claim to be excluded from the scope of the transfer);¹⁹⁹ and

¹⁹⁴ Ibid at paras 13-16, 22.

¹⁹⁵ Ibid at paras 29-30.

¹⁹⁶ Ibid at para 31.

¹⁹⁷ Ibid at paras 23, 27.

¹⁹⁸ Respondent’s Observations on the New Evidence Presented by Daimler Together with its Responses to the Tribunal’s Additional Post-Hearing Questions, 3 December 2010, at para 24.

¹⁹⁹ Ibid at paras 25-28.

- neither the DFS board’s resolution approving the share transfer nor the minutes of the meeting at which it was approved mention anything about reserving the right to an ICSID claim.²⁰⁰

120. Third, the Respondent asserts that the evidence submitted by the Claimant in corroboration of its witnesses’ testimony (set forth in the Claimant’s contentions below) is of no probative value and should be disregarded by the Tribunal, because that evidence was not contemporaneous to the conclusion of the SPA, was prepared solely for the purposes of this arbitration, and does not derive from independent sources.²⁰¹

121. Finally, the Respondent disputes that any ambiguity in the meaning of the SPA (as to whether or not the ICSID claim was intended to be transferred) can be cured by the execution of an *ex post facto* interpretive agreement between the SPA contracting parties. This is so, the Respondent argues, because the ICSID claim was undoubtedly transferred upon the transfer of the shares by operation of law – both international and Argentine law – irrespective of the contracting parties’ intent.²⁰²

3. Position of the Claimant

122. The Claimant denies that its rights in the ICSID claim were transferred to the Parent Company under the Share Purchase Agreement.²⁰³ It asserts that the Share Purchase Agreement’s reference to “any other rights pertaining to the sold shares” is modified by the subsequent phrase “for all the Company’s profits which have not been appropriated to shareholders.”²⁰⁴ The Claimant therefore alleges that the phrase “any other rights”, under a plain language reading, encompasses only those rights referring to the Argentine Subsidiary’s non-allocated (and presumably already existing) profits, which would not include any potential recoveries pursuant to an investment treaty claim. In the Claimant’s view, “[t]here is nothing in the Share Purchase Agreement to indicate that the right to investment treaty claim [sic] was transferred and it was not

²⁰⁰ Ibid at para 29.

²⁰¹ Ibid at para 2. These claims are further elaborated in, inter alia, paras 16-21 and 41-43. The Respondent also complains of certain formal defects in the Claimant’s evidence (ibid at paras 13-16), which the Tribunal finds unnecessary to address in light of its below decision.

²⁰² Respondent’s Observations on the New Evidence Presented by Daimler Together with its Responses to the Tribunal’s Additional Post-Hearing Questions, 3 December 2010, at para 24.

²⁰³ Claimant’s Post-Hearing Submissions of Fact, para 1199.

²⁰⁴ Ibid.

necessary to specifically reserve those right [sic].”²⁰⁵ The Claimant buttresses this basic position with arguments from both German law and international law.

123. As to the former, the Claimant states that German law is the law applicable to the interpretation of the SPA. This is so, it argues, because the SPA contracting parties explicitly selected German law to govern the contract (article 8(4) of the SPA) and also because “under the BIT and general international law which applies to ICSID jurisdictional questions, questions specifically pertaining to a corporation, including its capacity, corporate authority and governance are all determined by the law of the state of incorporation or its legal seat, which, in this case is Germany.”²⁰⁶ The Claimant points out that German law, international law, and Argentine law all recognize and give effect to the choice of law selected by the parties to a contract.²⁰⁷ It further stresses that Argentine legal advice obtained by Daimler at the time of conclusion of the SPA confirmed that German law could govern the contract.²⁰⁸ Moreover, the Claimant argues, “[t]he Argentine Government expressly accepted the application of German law to the interpretation of the Share Purchase Agreement.”²⁰⁹ The Claimant notes that Argentina, when reviewing the proposed transfer for the purpose of registering the transfer of title to the shares, requested the Claimant to submit legal opinions confirming the legality of the SPA under German law and EC competition law. In approving the transfer, the Argentine Central Bank referenced the German legal opinions provided by Daimler and stated that “[t]he agreement, insofar as it is permitted by Law, will be exclusively subject to German law, preventing the application of both German and Argentine international private law.”²¹⁰

124. As to the contention – raised by Argentina’s expert, Professor Wurmnest – that German law distinguishes between the law applicable to the interpretation of the contract and the law applicable to the transfer and assignment of the shares, the Claimant and its witnesses appear to accept that this is correct. The Claimant explains that, because the transferred company was an Argentine company and, as a financial entity, subject to regulation by the Argentine Central

²⁰⁵ Ibid.

²⁰⁶ Claimant’s post-hearing SPA submission, para 3.

²⁰⁷ Ibid at paras 8-16

²⁰⁸ Ibid at para 17.

²⁰⁹ Ibid at para 20.

²¹⁰ Ibid.

Bank, its share titles were subject to registration with the Argentine authorities.²¹¹ The phrase “so far as legally permitted” in the choice of law provision in Article 8(4) of the SPA, it submits, was inserted solely “to allow for the approval of the transfer of the shares by the Argentine Central Bank and perfection of the transfer by notification and registration under Argentine law.”²¹² In short, the Claimant contends that Argentine law applies to the formalities of the title transfer and registration, while German law governs the interpretation of the SPA itself.

125. German law, the Claimant submits, establishes that the right to assert the ICSID claim was not transferred. First, German law would require such a transfer to be explicitly stated in the SPA in order to be valid, and no such explicit transfer was recorded here.²¹³ Second, German law gives effect to the “wirkliche Wille” or “true intention” of the parties, and it was not the intent of the Claimant or its Parent Company to transfer the ICSID claim under the SPA.²¹⁴ This is evidenced, the Claimant submits, both by the terms of the SPA itself and by the subsequent conduct of its contracting parties, including in particular the following facts:²¹⁵

- i. The negative purchase price paid for the local Argentine Subsidiary allocated all losses allegedly arising out of the ICSID claim to DFS, not to its Parent Company.
- ii. The SPA contracting parties did not adjust the negative purchase price in any way for the estimated value of the ICSID claim.
- iii. Financial statements submitted by DFS show that all losses associated with the ICSID claim were not only intended to be born by DFS but were actually born by DFS.
- iv. DFS requested and received authorization to pursue the ICSID claim from its own board and not from the board of the Parent Company.
- v. Bookkeeping entries submitted by DFS show that DFS, and not the Parent Company, has born the costs of the present arbitration.
- vi. The Parent Company has not attempted to participate in the present arbitration in any way and has not filed its own ICSID claim.

²¹¹ Ibid at para 19.

²¹² Ibid at para 19.

²¹³ Ibid at paras 36-42.

²¹⁴ Statement of Wolfgang Bauder, Senior Counsel of Daimler AG, at para 5(c).

²¹⁵ Ibid at paras 25-36, 40-41, and Claimant’s post-hearing SPA submission at paras 90-118.

vii. The Claimant and the Parent Company have submitted an “Interpretive Agreement and Undertaking” confirming that the SPA contracting parties did not intend to, nor did they, transfer the ICSID claim to the Parent Company, and this Interpretive Agreement is valid and binding under German law in light of article 8(3) of the SPA.²¹⁶

126. As to international law, the Claimant asserts that “neither the ICSID Convention nor the Treaty require [sic] that the foreign investor retain continuous ownership of the investment for jurisdictional purposes.”²¹⁷ The Claimant makes several interrelated points with respect to the ICSID Convention. First, it asserts, the ICSID Convention does not require continuous ownership of the investment, nor that the investor continue to own the investment at the time of the request for arbitration or at any other defined time.²¹⁸ Instead, the ICSID Convention’s only jurisdictional requirement is that there is a legal dispute arising out of an investment between a Contracting State and a national of another Contracting State.²¹⁹ This, the Claimant asserts, it has duly shown.²²⁰

127. Next, the Claimant stresses that Article 25 of the Convention defines the protected party by its status as a “national” of the other Contracting State, not by its status as a current “investor”.²²¹ It asserts that the Convention’s only temporal requirement lies in article 25(2), which specifies that the nationality of the investor is to be determined as of the date of the request for arbitration.²²² It therefore maintains:

Daimler Financial’s claim fully complies with any ICSID or other authority standing for the proposition that jurisdiction is determined on the date of the request for arbitration, because on that date, it was a foreign national, with a legal dispute that arose out of an investment.²²³

²¹⁶ Article 8(3) of the SPA states: “All amendments and supplements to this Agreement including this clause must be in writing in order to be legally effective...”. The Claimant stressed the validity of the subsequent Interpretive Agreement in its Post-hearing SPA submission at paras 70-73.

²¹⁷ Claimant’s Post-Hearing Legal Submissions, Part III.A.(d).

²¹⁸ Ibid at paras 59, 61, 65, & 66.

²¹⁹ Ibid at paras 59, 64.

²²⁰ Ibid at paras 69-84.

²²¹ Ibid at para 60.

²²² Ibid at para 62.

²²³ Ibid at para 64.

128. Even if this were not the case, the Claimant asserts, it is enough that the Claimant is the investor who suffered the actual harm at the time of the measures complained of. This is because “it is not share ownership *per se* which gives standing; it is the share ownership at the time the damage was done to the investment that accords standing.”²²⁴ The Claimant cites the decisions in *EnCana v. Ecuador*, *Mondev v. United States*, and *El Paso v. Argentina* as evidence that the arbitral jurisprudence has not recognized any criterion of continuous ownership in investor-State arbitration.²²⁵

129. As to the BIT, the Claimant submits that the Contracting State Parties to the BIT could have required the investor to own the investment at the time of the registration of the claim. In the Claimant’s view, the fact that they did not do so in either the BIT or the Protocol – despite narrowing the concept of qualifying investors and investments in other ways – shows that the Contracting State Parties did not intend to require continuous ownership.²²⁶

130. The Claimant submits that declining jurisdiction on the basis that the shares were transferred to the Parent Company would also be inconsistent with the objects and purposes of both the ICSID Convention and the BIT. It submits:

“Such a requirement [continuous ownership of the investment] would foreclose an investor from divesting itself of an investment which is failing due to the treaty breaches of the host State, forcing it to choose between suffering continuing harm or giving up its ICSID claim. It would also permit the State to expropriate an investment with impunity because the foreign investor could not bring a claim since it no longer owns the investment, despite the fact that it suffered the harm and has a legal dispute with the State. Such a requirement would frustrate the very purpose of the applicable treaty and deter foreign investment.”²²⁷

131. Moreover, the Claimant asserts, even if the parties had intended to transfer the ICSID claim (which it denies), the only thing that legally could have been transferred would have been the right to assert damages associated with the investment after the effective date of the transfer of shares.²²⁸ This is because under international law, “the claims of an investor under a BIT arising from damage to its investment at the time it held the investment are not bound to the

²²⁴ Claimant’s post-hearing SPA submission at para 34.

²²⁵ Ibid at paras 60-63.

²²⁶ Claimant’s Post-Hearing Legal Submissions at paras 66-67.

²²⁷ Ibid at para 63.

²²⁸ Ibid at para 33.

shares of the vehicle that the investor used to make its investment. Rather, such claims are personal to the investor and cannot be transferred merely by the transfer of the shares the investor owns.”²²⁹

132. Finally, the Claimant maintains that the notion of a transfer of the claim makes little sense on the facts, since both DFS and its Parent Company each already possessed an independent right to bring the present ICSID claim against Argentina as a result of the measures complained of – DFS in its capacity as the direct investor, and the Parent Company in its capacity as the indirect investor (given its 100% shareholding in DFS).²³⁰ It cites several ICSID cases in support of the proposition that the existence of multiple potential qualifying investors within a corporate chain does not deprive a tribunal of its jurisdiction over any given qualifying investor’s claim.²³¹ Rather, the Claimant submits, any concerns as to possible multiple recoveries against a Respondent arising out of the same set of facts can be dealt with at the damages phase.²³² The Claimant asserts that such concerns are in any event inapposite here, as “Daimler AG has given an undertaking that should the Tribunal accept jurisdiction over the claims in this proceeding and accept the right of Daimler Financial to assert those claims, Daimler AG will not assert a claim for the damages which has been asserted by Daimler Financial AG in this proceeding.”²³³

4. Considerations of the Tribunal

133. It is convenient to begin by summarizing the points on which the disputing parties agree:

- German law applies to the interpretation of the SPA and the question of intent. Both parties and their relevant experts and witnesses agree that the choice of law clause contained in article 8(4) of the SPA is a valid expression of the consent of the contracting parties to the SPA. Therefore, German law governs the proper interpretation of the SPA, including the question as to whether or not the contracting parties intended, by transferring the shares, to transfer the ICSID claim.
- Argentine law governs the domestic formalities relating to the transfer of the shares. Because the transferred shares were issued by a domestically incorporated and

²²⁹ Ibid at para 45. See also paras 57-64.

²³⁰ Claimant’s Post-Hearing SPA Submission at para 75.

²³¹ Ibid at paras 77-83, 88.

²³² Ibid at paras 84-86.

²³³ Ibid at para 89.

domestically regulated Argentine company, the parties and their experts and witnesses agree that Argentine law governs the transfer of title to the shares and the approval of the sale and registration of the title transfer by the Argentine Central Bank. Both parties also agree that the Argentine Central Bank did in fact approve the sale and that the necessary formalities for transferring the title to the shares were observed. The requirements of Argentine law in these respects were therefore fully met.

- International law applies in determining the Tribunal's jurisdiction and in determining the effect of the SPA upon the Tribunal's jurisdiction. Both parties agree that the **ICSID Convention**, the **BIT**, and the relevant rules of general international law apply to this determination.

The Tribunal concurs with the parties in the above-listed points of agreement.

134. The parties' submissions also indicate numerous points of disagreement, the most significant being as follows:

- Which specific provisions of the **ICSID Convention** and **BIT** apply in determining the Tribunal's jurisdiction;
- Whether or not Argentine law has any relevance to that determination;
- In what capacity the Claimant brings its claims, whether as a shareholder or otherwise;
- Whether or not the intent of the SPA contracting parties is relevant in determining the effect of the SPA upon the Tribunal's jurisdiction;
- Whether the right to bring the ICSID claim was actually transferred along with the shares by operation of law, irrespective of the SPA contracting parties' intent;
- Whether there exists a continuous ownership criterion under the **ICSID Convention**, and if so until what relevant date; and of course
- Whether or not the Tribunal ultimately has jurisdiction over the claims.

135. Having carefully reviewed all of the disputing parties' contentions, the submissions of their witnesses and experts, and all of the relevant legal authorities and evidence, the Tribunal concludes that the transfer of the shares occasioned by the SPA does not deprive the Tribunal of its jurisdiction over the Claimant's ICSID claims. This is so whether one analyzes the question as one under international law (the law principally applicable to ICSID claims) or under German law

(the law applicable to the SPA). As will become clear below, Argentine law is irrelevant to the analysis.

a) Applicable law

136. While the disputing parties agree that international law applies in determining this Tribunal's jurisdiction, they disagree as to which specific provisions of the ICSID Convention and BIT govern the resolution of the present objection. The Tribunal has, however, already decided this point above.²³⁴ That is, article 25 of the ICSID Convention applies, along with the relevant jurisdictional provisions of the BIT – including the BIT's definitions of “investment”, “national”, “company”, “returns”, etc along with article 10(2)'s pre-requisites to jurisdiction – all as interpreted in light of the relevant principles of general international law. As noted above, the Claimant has shown that it satisfies all of the requirements of article 25 of the ICSID Convention and that it meets the BIT's definitional requirements as a “national” or “company” of the Federal Republic of Germany having made a qualifying “investment” in Argentina. Also as noted above, Argentine law is irrelevant in determining whether the Claimant has met these treaty-based requirements. The Respondent's assertion that article 42 of the ICSID Convention and article 10(5) of the BIT compel the Tribunal to analyze the question under Argentine law must therefore be rejected.

137. Argentina's alternative argument that German law, as the law governing the SPA, also requires the Tribunal to apply Argentine law in determining the ownership of the ICSID claim is likewise misguided. It appears to be based upon a misconstrual of the testimony of its expert, Professor Wurmnest, a German specialist in private international law. Professor Wurmnest indeed stressed that German law distinguishes between the law applicable to the interpretation of a share purchase contract and the law applicable to the formal transfer and assignment of the shares sold. On this basis he concluded that German law applies to the interpretation of the SPA while Argentine law governs the formalities of the assignment such as the registration of the title transfer. As to the ownership of the ICSID claim, however, Professor Wurmnest concluded that this must be determined not under Argentine law but under international law. This much is clear from the following excerpts of Professor Wurmnest's carefully considered opinion:

“Under the German conflict-of-law rules, the law governing the transfer of title to shares is the law applicable to the corporation whose shares are assigned (*lex societatis*). Assuming that Argentine law follows a similar approach... the

²³⁴ See above, Part III.

proper law of the corporation is Argentine law because the Argentine subsidiaries are incorporated in Argentina.²³⁵ [...] From a German perspective, the *lex societatis* governs the assignability of the shares as well as the formal and substantive requirements for an effective transfer of title to the shares. Moreover, the *lex societatis* determines which membership, management or financial rights a shareholder enjoys vis-à-vis the corporation.²³⁶

The law applicable to the assignment of the ICSID claim has to be analysed from a different perspective.²³⁷ [...] “With regard to the law governing the formal and substantive requirements to be met in order for DFS to effectively transfer the ICSID claim to Daimler, the German conflict-of-law rules, as has been stated earlier, call in principle for the application of the law governing the assigned claim.”²³⁸ [...] “Assuming that Argentine conflict-of-law rules follow a similar approach, the issue whether the ICSID claim has been effectively transferred to Daimler is governed by the law applicable to the ICSID claim.”²³⁹ “The ICSID claim arises from the Bilateral Investment Treaty concluded between Germany and Argentina itself. Thus, the preconditions for an effective assignment are in principle governed by international law. The same result follows if all legal aspects of the assignment of the ICSID claim are considered to be governed directly by international law without reference to a conflict-of-laws analysis.”²⁴⁰

138. In short, Argentina’s own expert witness agrees with the Claimant and its deponents, all of whom affirm that Argentine law was relevant solely to the formalities of perfecting the share transfer, and it is common cause that these formalities were duly observed. Professor Wurmnest was careful to offer no opinion on the separate question he identified – namely, whether the “preconditions for an effective assignment” of the ICSID claim were actually met under international law.²⁴¹ It is upon the answer to this latter question that the Tribunal’s jurisdiction hinges.

b) Was the ICSID claim effectively assigned under international law (and does international law have a “continuous ownership requirement”)?

139. As a preliminary matter, the Tribunal notes that the opinions of Argentina’s experts Nissen and Kielmanovich unfortunately provide no assistance in plumbing the requirements for an effective assignment of an ICSID claim under international law. Professor Kielmanovich, an

²³⁵ Expert Opinion of Prof. Dr. Wolfgang Wurmnest, at para 18.

²³⁶ Ibid at para 20.

²³⁷ Ibid at para 21 (emphasis added).

²³⁸ Ibid at para 22.

²³⁹ Ibid at para 23.

²⁴⁰ Ibid at para 24 (emphasis added).

²⁴¹ See *ibid* at para 9, stating: “This Opinion will limit itself to issues of conflict-of-laws under German law. It will not touch upon issues pertaining to international law or Argentine law.”

expert in Argentine civil procedure and family law, opens his opinion by stating: “I have been requested to provide a legal opinion on the effects of the Share Purchase Agreement ... under Argentine Law with regard to the Claimant’s right to file a claim.”²⁴² Professor Nissen, a specialist in Argentine corporate law, similarly opens by noting: “I was asked to issue a legal opinion regarding the rights that, under the Argentine legal system, derived from the holding of a share in an Argentine company, and regarding the effects of a transfer of shares of the same kind as the one established in the Share Purchase Agreement... under Argentine law.”²⁴³ Both experts eventually conclude that under Argentine law, DFS could no longer bring a claim in its capacity as shareholder for damages done to the Argentine Subsidiary once it had transferred the entirety of its shareholding in the Subsidiary to DCAG.²⁴⁴

140. This conclusion may well be correct. But as the Argentine law on derivative shareholder actions does not govern the right to bring an ICSID claim under a bilateral investment treaty, it is of no relevance to the question at hand. Moreover, both experts make clear in their reports that their conclusions rest upon the assumption – apparently fed to them by the Respondent – that DFS’s present claim is brought in its capacity as a shareholder.²⁴⁵ The Tribunal has, however, already considered and rejected this assertion above, noting that: a) DFS explicitly grounds its standing on its capacity as an investor, not as a shareholder; b) not all of DFS’ claims arise exclusively from its shareholding in the Argentine Subsidiaries; c) the **BIT** authorizes qualifying investors to bring claims for damages suffered even independent of any shareholding; and d) in any event, the **ICSID Convention** and the **BIT** establish a different regime from the one prevailing

²⁴² Kielmanovich Statement on SPA at para 1 (emphasis added).

²⁴³ Nissen Statement on SPA at para 2 (emphasis added).

²⁴⁴ See Kielmanovich Statement on SPA at para 5, stating: “[i]f DFS brought a claim in its capacity as shareholder of the two Argentine subsidiaries and it currently (in fact, since 2002) is not a shareholder thereof, it would lack procedural standing to make its claim”; and Nissen Statement on SPA at para 22(3), stating:

“Pursuant to Argentine law, in order to file a claim for alleged damages directly suffered by the corporation, a person who alleges having suffered said damages in his or her capacity as shareholder for the same cause that affected the corporation and who, after filing the claim, ceased to be a shareholder as a result of relinquishing his or her shares do not have any legal standing.”

²⁴⁵ Professor Kielmanovich, in fact, explicitly acknowledges the possibility that DFS might still retain other claims deriving from other sources of law. He notes that if DFS is attempting to bring a claim before ICSID not in its capacity as a shareholder but rather by virtue of “those rights that remained in its equity once the assignment was completed”,²⁴⁵ then the feasibility of the claim would “depend on the relevant jurisdiction and admissibility rules; that is, the rules allowing the submission of disputes to international arbitration proceedings by relying on the Argentina-Germany BIT and the ICSID Convention. In this report, I do not pose an opinion on the scope and interpretation of these international law instruments.”

under customary international law by specifically authorizing investors to claim compensation for certain damages done to their shareholdings.²⁴⁶ For the same reasons, the Respondent's renewed arguments to the effect that general international law also prohibits derivative actions by shareholders (citing *Barcelona Traction*) are once again inapposite and fall to be rejected.²⁴⁷

141. Turning then to the requirements for the effective assignment of an ICSID claim under international law, the parties have focused much attention on the so-called "continuous ownership criterion." Both the Claimant and the Respondent cite to investor-State cases in which a claimant had sold its investment to a third party after initiating the arbitration. These cases have uniformly held that the subsequent sale of an investment does not deprive an investor-State tribunal of its jurisdiction to hear the claim. Some of the decisions have suggested that this is so because the "critical date" under international law is the date upon which the arbitration is commenced.²⁴⁸ The Respondent argues that this implies that where an investment is sold before the commencement of the arbitration, the tribunal will necessarily lack jurisdiction. However, as pointed out by the Claimant, none of the tribunals cited by Argentina actually addressed that question, and certain *obiter dicta* in the decisions suggest that at least some tribunals would have been prepared to accept jurisdiction even if the sale had occurred prior to the arbitration's commencement. For example, the *EnCana* tribunal held:

"Provided loss or damage is caused to an investor by a breach of the Treaty, the cause of action is complete at that point; retention of the subsidiary (assuming it is within the investor's power to retain it) serves no purpose as a jurisdictional requirement, though it may be relevant to questions of quantum."²⁴⁹

142. Other tribunals have noted there may be good reasons not to impose a continuous ownership requirement. For example, in cases of expropriation, an investor will by definition no longer own the investment at the time of lodging the arbitration claim. Yet this should not

²⁴⁶ See the Tribunal's discussion in part IV.B.3. above.

²⁴⁷ Ibid.

²⁴⁸ See e.g. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION, A COMMENTARY* (2009), at p. 92, section 36, stating:

"Apart from specific rules about critical dates, the date of the commencement of the proceedings is decisive. It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction."

²⁴⁹ *EnCana Corporation v. Ecuador*, Award, LCIA Case No. UN3481, ILC 91 (3 February 2006), para 131.

preclude the investor from obtaining the compensation due under the BIT.²⁵⁰ Moreover, to impose a continuous ownership requirement may defeat the ends of justice in cases where the sale of the investment was forced – e.g. under domestic bankruptcy laws, where the bankruptcy itself may have been caused by some act of the respondent state in violation of the BIT.

143. To this Tribunal’s knowledge, only the *Loewen* tribunal has actually declined jurisdiction on a parallel (though not identical) ground. In that case, a NAFTA tribunal found that it lacked jurisdiction on the basis that the investor failed to maintain a continuous nationality after a cross-border bankruptcy proceeding forced the investor to undergo a corporate re-organization which changed the investor’s nationality from Canadian to U.S.²⁵¹ But the *Loewen* tribunal’s imposition of this continuous nationality requirement has been criticized from many quarters.²⁵² As one commentator noted:

“Indeed, in 2000 the International Law Commission’s rapporteur on diplomatic protection concluded that there was no rule of customary international law with respect to continuous nationality because opinions and practice as to the range of dates on which a claimant must have the requisite nationality had varied so much.”²⁵³

144. Of course, there is no problem with continuous nationality in the present case, since both DFS and its Parent Company have remained German corporations throughout the history of the present proceedings. But similar arguments can be made against the imposition of the continuous ownership requirement proposed by the Respondent here. As the large and thriving global market for distressed debt attests, most jurisdictions allow for legal claims to be either sold along with or reserved separately from the underlying assets from which they are derived. The reason is that such severability greatly facilitates and speeds the productive re-employment of assets in

²⁵⁰ See *Mondev Int’l Ltd v. United States*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2001) at para 91, finding that the international protection of investment should not “be overshadowed by technical questions of the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment.”

²⁵¹ *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003), at paras 225-238.

²⁵² See e.g. EMMANUEL GAILLARD, *LA JURISPRUDENCE DU CIRDI* 788 (2004); Maurice Mendelson, *The Runaway Train: The “Continuous Nationality” Rule from the Panavezys-Saldutiskis Railway case to Loewen*, in *INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW* (Todd Weiler ed., 2005); Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Arbitration Claim*, 21 *ARB. INT’L* 1 (2005); Jan Paulsson, *Continuous Nationality in Loewen*, 20 *ARB. INT’L* 213 (2004).

²⁵³ Andrea K. Bjorkland, “The Emerging Civilization of Investment Arbitration”, 113 *PENN STATE L. REV* 169 (2009) at p. 1280 (citing International Law Commission, Report to the International Law Commission on Diplomatic Protection, A/CN.4/506/Add.1 (April 20, 2000)).

other ventures. The Respondent has pointed to no rule of general or customary international law which would prohibit a similar result from obtaining for ICSID claims. Indeed, the rationale for recognizing the severability of a damages claim from the underlying asset may be even stronger in the case of ICSID claims, since a strong argument can be made that the **ICSID Convention** and many BITs accord standing only to the original investor and not to any subsequent would-be purchasers of the underlying investment.²⁵⁴

145. The better view would seem to be that ICSID claims are at least in principle separable from their underlying investments. The Tribunal therefore rejects the Respondent's contention that the Claimant's ICSID claims (or at least those connected with the shareholding) were necessarily and automatically transferred along with the shares by operation of law. Rather, the Tribunal finds that it should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken – provided that the investor did not otherwise relinquish its right to bring an ICSID claim.

146. The next question to address is then whether the right to bring an ICSID claim was in fact relinquished by the Claimant in favor of its Parent Company on the facts of the present case. As noted above, the disputing parties disagree as to whether the SPA's use of the phrase "any other rights pertaining to the Sold Shares for all of the Company's profits" indicates that the right to bring an ICSID claim was intended to be transferred along with the shares. This is a question of interpretation, and in interpretational matters, international law typically defers to the intentions of the authors of the instrument in question.²⁵⁵ As stated by the tribunal in ***Sapphire v. National Iranian Oil Company***, "[i]t is a fundamental principle of law, which is constantly proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda* is the basis of every contractual relationship."²⁵⁶ It is for this reason that international law also respects the choice of law clauses stipulated by parties to international contracts. On the facts, the Claimant and its Parent Company chose German law to govern the interpretation of their Share Purchase Agreement, and both the Claimant and the Respondent in the present

²⁵⁴ This follows from the nationality requirement of the **ICSID Convention** and most BITs, as well as from the fact that most BITs afford standing to bring ICSID claims only to "nationals" or "companies" of the other State Party which made an investment in the Respondent State prior to the advent of the facts or circumstances giving rise to the dispute.

²⁵⁵ Exceptions may exist in certain circumstances, for example where the parties' intentions violate a peremptory norm of international law, but no such exceptions arise on the present facts.

²⁵⁶ ***Sapphire v. National Iranian Oil Co.*, Arbitral Award (15 March 1963), I.L.R. 1967, 136 at 181**

proceedings have accepted the validity of this designation. The Tribunal will therefore apply German law in considering the meaning to be ascribed to the disputed phrase under the SPA.

c) Was the ICSID claim effectively assigned under German law?

147. As summarized above, the Claimant has submitted extensive arguments concerning the proper interpretation of the SPA under German law. In particular, Dr. Wolfgang Bauder, Senior Counsel of Daimler AG – who is a German lawyer with more than 25 years of experience and was the individual responsible for drafting the SPA – has testified:

“Under German law, a right or claim owned by a shareholder against third parties is not inherent in the share ownership, and cannot be and is not transferred by operation of law. Instead, it must be explicitly delineated as being transferred in the agreement. Consistent with German law in this regard, the Share Purchase Agreement did not explicitly list or delineate any potential claim held by Daimler Financial against the Argentine Republic as one of the rights transferred and assigned by the parties.”²⁵⁷

This position is commensurate with the above findings of the Tribunal under international law, and the Respondent has not attempted to rebut Dr. Bauder’s characterization of German law on this point.

148. As to whether or not the ICSID claim was encompassed by the phrase “any other rights pertaining to the Sold Shares,” Dr. Bauder’s statement stresses the following principles of German law on the interpretation of contracts:

- i) § 157 of the German Civil Code specifies that “[c]ontracts are to be interpreted as required by good faith, taking customary practice into consideration.”²⁵⁸
- ii) § 133 of the German Civil Code “gives particular weight to ascertaining the will of the parties” and “provides that the ‘true intention’ or ‘true will’ (the ‘wirkliche Wille’) of the parties should prevail over the literal meaning of a declaration.”²⁵⁹
- iii) While “both the subjective intent – ‘innere Wille’ – and objective factors – ‘bekundete Wille’ – must be considered,”²⁶⁰ “[t]he focus in German law is so strongly on the parties’ subjective intent that the legal maxim *falsa demonstratio non nocet* (‘an erroneous designation does not vitiate’) is at times applied by the German courts. If the subjective

²⁵⁷ Statement of Wolfgang Bauder on SPA at para 5(b).

²⁵⁸ Ibid at para 16 (Dr. Bauder’s translation).

²⁵⁹ Ibid at para 15.

²⁶⁰ Ibid at para 16.

intent of the parties differs from the express agreement, the court will give effect to the subjective intent.”²⁶¹

Dr. Bauder then devotes five pages of his testimony to explaining how the factual evidence submitted by the Claimant and recorded by the Tribunal in paragraph 126 above proves that neither DFS nor DCAG intended to transfer the ICSID claim to the Parent Company.

149. This interpretation is likewise endorsed by Gösta Dobler, Senior Counsel of DFS, who executed the SPA at the time of its conclusion on behalf of the Claimant.²⁶² It is further affirmed by Thomas Gruber, Director of Accounting and Financial Reporting for DFS, who – in explaining how the contracting parties arrived at the SPA’s negative purchase price for the shares – categorically states: “I am certain that the calculation of the negative purchase price did not include any sums attributable to the value of any potential legal claims, including the claims asserted in this arbitration.”²⁶³ And lest there be any doubt, the SPA contracting parties have now taken the extra step of reaffirming their intent by concluding an Interpretive Agreement and Understanding which “confirms that the Contracting Parties did not intend to, nor did they, transfer the claims at issue in this proceeding.”²⁶⁴ The Claimant submits that German law authorizes this sort of subsequent interpretive confirmation between contracting parties²⁶⁵ and notes that “[a]rticle 8(3) of the Share Purchase Agreement contemplates the possibility of such a supplemental agreement and specifically authorizes it, provided it is in writing.”²⁶⁶

150. Again, the Respondent does not call into question the Claimant’s characterization of German law on any of these points, and the Tribunal’s own analysis of the relevant provisions of the **German Civil Code** has unearthed no major flaws in the Claimant’s analysis. Nor has the Respondent attempted to directly rebut the Claimant’s factual evidence or the testimony of its witnesses. Instead, the Respondent questions the probative value of the Claimant’s evidence and urges the Tribunal to discount it on the grounds that it does not derive from neutral sources and was prepared solely for the purposes of this arbitration.

²⁶¹ Ibid at para 17.

²⁶² Statement of Gösta Dobler on SPA at para 6.

²⁶³ Statement of Thomas Gruber on SPA at para 9.

²⁶⁴ Claimant’s Post-Hearing SPA Submission at para 114.

²⁶⁵ Ibid at para 70.

²⁶⁶ Ibid at para 71.

151. The Tribunal notes, however, that of the items of evidence submitted by the Claimant in corroboration of its assertion that the SPA contracting parties did not intend to transfer the ICSID claim to DCAG, items i) and ii) listed in paragraph 126 above were contemporaneous to the conclusion of the SPA while items iii) through v) were prepared in the normal course of business operations. These items therefore do have probative value and the Tribunal finds them to be highly persuasive indicators of the SPA contracting parties' intent. In particular, by instituting the present arbitration, the Claimant has signaled that it expects the value of its claim to be positive and in fact rather substantial.²⁶⁷ It would be counter-intuitive for the Parent Company to "pay" a €250 million negative price to the Claimant for the transferred shares while acquiring a valuable claim in exchange.

152. The Claimant's sixth item of evidence concerns the Parent Company's abstention from participation in the present arbitration proceedings. This decision, obviously taken in advance of the Claimant's filing of the ICSID claim, would also make no sense if indeed the SPA contracting parties had intended to transfer the claim to the Parent Company. Finally, with respect to item vii) of the Claimant's evidence, it is undeniable that the Interpretive Declaration was executed by the SPA contracting parties in response to developments in this arbitration. However, given that the Declaration is nonetheless authoritative and binding upon DFS and its Parent Company under applicable German legal principles, the Tribunal would be ill-advised to disregard it entirely. At the very least, it constitutes a relevant circumstantial confirmation of the SPA contracting parties' original intentions.

153. There remains one final evidentiary matter to address. Argentina has pointed to certain email exchanges between DFS and DCAG tending to indicate that the two companies did not even become aware of the possibility of filing an ICSID claim until sometime in 2004 – that is, two years after the conclusion of the SPA. In the Tribunal's view, this can only serve to confirm that the SPA contracting parties did not intend to include the ICSID claim among the rights to be transferred. One obviously cannot intend to transfer a right whose existence is unknown. The Tribunal has already found that the claim was not transferred by operation of law, whether German law or international law. And even if the Tribunal could accept Argentina's assertion that the ICSID claim *prima facie* falls within the scope of the phrase "any other rights pertaining to the Sold Shares", the large negative purchase price set for the shares would have to be read as

²⁶⁷ The Claimant's damages estimates under various different theories of liability range anywhere from \$US 45.7 million to €272.7 million in 2002 currency, not including relevant interest up to the present date.

an implied reservation of the ICSID claim in favor of DFS. In short, all of the available evidence points to the conclusion that DFS did not relinquish its right to bring the ICSID claim upon execution of the SPA.

d) Conclusions

154. The foregoing analysis shows that DFS enjoys standing as a qualifying investor to bring the present ICSID claim for damages sustained during the time when it owned the investment notwithstanding the subsequent transfer of its shareholding in the Argentine Subsidiary to DCAG. As suggested by the *EnCana* tribunal, in the event that the evidence indicates that DFS has already been compensated for its losses in some fashion, the Tribunal can address this at the quantum stage of the proceedings. The fact that DCAG, as the Parent Company and 100% owner of DFS, will be the ultimate beneficiary of any recovery by DFS is not relevant to the question of the Tribunal's jurisdiction to hear DFS' present claim.

155. The Tribunal's jurisdiction is likewise unaffected by the fact that certain investor-State jurisprudence suggests that DCAG may – as the indirect owner of the Argentine Subsidiary at the time of the allegedly offending governmental measures – also enjoy an independent right to bring its own claim for the same damages. The present Tribunal is not called upon to decide whether the *German-Argentine BIT* authorizes claims by indirect investors and it expresses no opinion on the matter. It notes, however, that in the event that some future tribunal should find itself faced with a parallel claim by DCAG, that tribunal would have ample legal tools at its disposal to prevent any double recovery against the Respondent arising out of the same set of facts and circumstances as the present claim.

156. For all of these reasons, the Respondent's fourth objection to jurisdiction falls to be rejected.

VI. FIFTH OBJECTION TO JURISDICTION: THE MOST-FAVORED NATION CLAUSE DOES NOT AUTHORIZE THE CLAIMANT TO BYPASS THE REQUIREMENTS OF ARTICLES 10(2) AND 10(3) OF THE TREATY

157. Not surprisingly, this objection has given rise to the most heated debate between the disputing parties. Both parties have filed voluminous submissions concerning the *Treaty's MFN clauses* and their relation to: a) the dispute settlement provisions of the *German-Argentine BIT* ("the Basic Treaty"), and b) the dispute settlement provisions of other treaties – in particular the *Chilean-Argentine BIT* ("the Comparator Treaty") invoked by the Claimant. In support of their

respective positions, both parties have extensively discussed numerous investor-State arbitral awards, scholarly commentary, and the decisions of other international courts and tribunals. A complete recitation of all of the parties' arguments is, however, unnecessary and would overly burden this award. The Tribunal instead finds it convenient to enumerate in outline form only the parties' principal submissions. The Tribunal will refer to certain of the cited legal opinions in its below considerations to the extent that it finds these relevant to its analysis.

A. Position of the Respondent

158. Argentina denies that the **Basic Treaty's MFN clauses** allow this Tribunal to base its jurisdiction upon the Claimant's satisfaction of the pre-arbitral requirements of **article X of the Comparator Treaty** rather than those of **Article 10 of the Basic Treaty**.²⁶⁸ Its principal submissions in support of this position are as follows:

- a) The **Basic Treaty** requires the Claimant, before resorting to an arbitral tribunal, to submit the dispute to the competent Argentine courts for a period of 18-months, which the Claimant has not done.²⁶⁹ Moreover:
 - i) This requirement constitutes a necessary condition of Argentina's consent to arbitration;²⁷⁰ and
 - ii) The requirement is not excessively formalistic.²⁷¹
- b) The **MFN clauses of the German-Argentine BIT** cannot be applied to the **BIT's provisions on dispute resolution** because to do so would:
 - i) Conflict with the language of the **MFN clauses** themselves;²⁷²
 - ii) Run counter to the demonstrated practice of the Argentine Republic;²⁷³
 - iii) Violate the *ejusdem generis* principle;²⁷⁴ and
 - iv) Violate the principle of effectiveness (*effet utile*).²⁷⁵

²⁶⁸ Respondent's Memorial on Jurisdiction, Part IV.A.

²⁶⁹ Ibid at paras 7-13.

²⁷⁰ Ibid at paras 8,9, & 11; Respondent's Reply on Jurisdiction, paras 70-75.

²⁷¹ Respondent's Memorial on Jurisdiction, para 12; Respondent's Reply on Jurisdiction, paras 54-69.

²⁷² Respondent's Reply on Jurisdiction, paras 5-17.

²⁷³ Ibid at paras 18-28.

²⁷⁴ Respondent's Memorial on Jurisdiction, part IV.A.2.a); Respondent's Reply on Jurisdiction, paras 47-50.

²⁷⁵ Respondent's Memorial on Jurisdiction, part IV.A.2.b); Respondent's Reply on Jurisdiction, paras 51-52.

- c) “Case law” confirms that MFN clauses do not apply to the Basic Treaty’s dispute resolution provisions.²⁷⁶ In particular:
- i) The decisions in *Salini v. Jordan*, *Plama v. Bulgaria*, *Telenor v. Hungary*, and *Wintershall v. Argentina* support Argentina’s position;²⁷⁷
 - ii) Cases such as *Maffezini* and *Gas Natural* differ from the one under consideration and should be distinguished accordingly,²⁷⁸ or in the alternative, they should not be followed.²⁷⁹

B. Position of the Claimant

159. The Claimant maintains that no prior recourse to the domestic Argentine courts was necessary, because this requirement has been superseded by operation of the Basic Treaty’s MFN clauses.²⁸⁰ In support of this position, the Claimant submits the following arguments:

- a) The language of the Treaty shows that the Contracting State Parties intended for the MFN provisions to apply to dispute resolution.²⁸¹ In particular:
 - i) The Treaty’s context, including its title and Preamble, support a broad reading of the MFN clauses.²⁸²
 - ii) The ordinary meaning of the Treaty’s terms support a broad application of the MFN clauses.²⁸³
 - iii) The Contracting State Parties did not limit the definition of “activities in connection with investments” so as to exclude dispute resolution.²⁸⁴
 - iv) The additional MFN provision in Article 4 of the Treaty does not limit the broad scope of the MFN provision in Article 3.²⁸⁵

²⁷⁶ Respondent’s Memorial on Jurisdiction, part IV.A.3.

²⁷⁷ Ibid. Argentina raised the *Wintershall* decision, which was issued after the parties’ jurisdictional submissions had already been made, on the first day of hearings. See Hearing Transcripts, day 1, pp. 148ff.

²⁷⁸ Respondent’s Memorial on Jurisdiction, paras 42-49.

²⁷⁹ Respondent’s Reply on Jurisdiction, Part II.A.2.

²⁸⁰ Claimant’s Memorial, part III.E.

²⁸¹ Claimant’s Counter-Memorial on Jurisdiction, Point I.A.

²⁸² Claimant’s Rejoinder on Jurisdiction, Point I.A.1.

²⁸³ Ibid at Point I.A.2.

²⁸⁴ Ibid at Point I.A.3.

²⁸⁵ Ibid at Point I.A.4.

- b) Access to international dispute resolution is an essential treaty protection and is encompassed by a treaty's MFN provisions unless explicitly excluded.²⁸⁶
- c) Access to international dispute resolution following a 6-month negotiating period is more favorable than the requirement to submit the dispute to the domestic courts for 18-months before proceeding to arbitration.²⁸⁷
- d) The cases cited by Argentina are inapposite because they dealt with factual situations distinguishable from the present one.²⁸⁸
 - i) On the contrary, investment tribunals have “uniformly” upheld the application of MFN provisions to domestic dispute settlement requirements of arbitration clauses.²⁸⁹
- e) The *ejusdem generis*²⁹⁰ and *effet utile*²⁹¹ principles both support the application of the MFN clause to the Treaty's dispute resolution provisions.
- f) Argentina's treaty practice shows it has no overarching policy to require domestic dispute resolution and therefore the Basic Treaty's MFN provisions should be read to allow the domestic courts requirement to be superseded.²⁹²
- g) The Basic Treaty's 18-month domestic courts provision is a matter of procedure, the strict application of which is unnecessary and would be excessively formalistic.²⁹³ In particular:
 - i) The provision is in essence a waiting period and is not a true exhaustion of domestic remedies requirement;²⁹⁴
 - ii) Mere waiting periods have been repeatedly waived by other tribunals;²⁹⁵

²⁸⁶ Claimant's Memorial on Jurisdiction, Point I.B.

²⁸⁷ Claimant's Memorial, para 235.

²⁸⁸ Claimant's Counter-Memorial on Jurisdiction, Point I.C.

²⁸⁹ Claimant's Rejoinder on Jurisdiction, Point I.C. The Tribunal notes that this submission was lodged prior to the publication of the *Wintershall* decision, which found to the contrary.

²⁹⁰ Claimant's Counter-Memorial on Jurisdiction, Point I.D.

²⁹¹ Ibid at Point I.E.

²⁹² Claimant's Rejoinder on Jurisdiction, Point I.B.

²⁹³ Claimant's Counter-Memorial on Jurisdiction, Point I.F. This argument is further developed in the Claimant's Rejoinder on Jurisdiction, Point I.E.

²⁹⁴ Claimant's Counter-Memorial on Jurisdiction, para 96.

²⁹⁵ Ibid at paras 97-102.

- iii) Despite Argentina's assertions to the contrary, it is "virtually impossible that the dispute would be resolved in or outside Argentina within 18 months to the satisfaction of both parties."²⁹⁶
- h) Requiring the Claimant to satisfy the 18-month domestic courts provision would run contrary to the Treaty's purpose of promoting favorable conditions for investment²⁹⁷ and would be futile and lead to a situation which is manifestly absurd,²⁹⁸ because:
 - i) It would subject the Claimant to costs and delays not faced by other investors;²⁹⁹
 - ii) It would lead to major, nonsensical inefficiencies in the dispute resolution process;³⁰⁰ and
 - iii) In any event, enforcing the provision on the facts of this case would be unjust on account of Argentina's efforts to impede domestic resolution.³⁰¹

C. Considerations of the Tribunal

1. Tribunal's Interpretive Approach under Public International Law

160. The Tribunal is keenly aware that the interpretation and application of MFN clauses has proven to be one of the most controversial issues not only between the disputing parties in this case but also within the world of international investment law more generally.³⁰² For this reason, the Tribunal considers it prudent to preface its analysis by setting out the general interpretive approach it will apply in considering the parties' respective submissions.³⁰³

²⁹⁶ Ibid at para 104. See also *ibid* at para 107.

²⁹⁷ Ibid at para 105.

²⁹⁸ Claimant's Rejoinder on Jurisdiction at Point I.D.

²⁹⁹ Claimant's Counter-Memorial on Jurisdiction at para 105.

³⁰⁰ Ibid at paras 107-108.

³⁰¹ Claimant's Rejoinder on Jurisdiction, paras 62-69.

³⁰² For an overview of the divided case law, see Julie A. Maupin, "MFN-based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?," *Journal of International Economic Law* 14(1), 157-190 (March 2011)

³⁰³ It will be noted that portions of the analysis contained in this section overlap with the recently issued decision in *ICS Inspection and Control Services Limited (United Kingdom) v. the Argentine Republic, PCA Case No. 2010-9 (UNCITRAL Rules), Award on Jurisdiction (10 February 2012) [hereinafter ICS v. Argentina]*. This is because the two tribunals shared the same President, who presided over the drafting of the two awards during the same time period and elected not to burden the parties with duplicative drafting costs in respect of certain general points of law common to both cases.

a) Interpretive principles flowing from the bilateral nature of BITs

161. The investment treaty at the heart of this case is a bilateral investment treaty. In considering its interpretation, it is essential to recall that BITs are reciprocal bilateral treaties negotiated between two sovereign State parties. The general purpose of BITs is of course primarily to protect and promote foreign investment; but it is to do so within the framework acceptable to both of the State parties. These two aspects must always be held in tension. They are the *yin* and *yang* of bilateral investment treaties and cannot be separated without doing violence to the will of the states that conclude such treaties. It is in this context that the exact wording of dispute resolution clauses plays a key role, as such clauses are one of the privileged places where the imbalances between the interests of both parties are often precisely defined as a result of the treaty's negotiation process.

162. It would be an error to start from the assumption that the bilateral and synallagmatic dimension of such treaties is of a mere rhetorical nature. In the present era of globalization and rapid economic change at the world level, a growing number of investments are indeed bi-directional, flowing not only from highly developed to developing countries but also in the opposite direction.³⁰⁴ Moreover, the very essence of treaties is precisely to protect the respective sovereign international policy decisions of the State parties by means of the formality inherent in the legal nature of such instruments.

163. The Tribunal must also bear in mind the important differences between ordinary contracts and treaties. While both are based upon the will of the parties, the latter are concluded between sovereign States. In this respect, the ever-increasing number of claims based upon an alleged violation of the rules and principles of public international law as incorporated in the provisions of BITs ("treaty claims" as opposed to "contract claims") has changed the overall physiognomy of the international arbitration of investment disputes. Where a treaty claim is invoked, arbitral tribunals are called upon to interpret not merely the asymmetric contractual relationship between a sovereign state and a private foreign investor, but to adjudicate whether a sovereign state has actually respected or violated the international obligations which it accepted with regard to the

³⁰⁴ For instance, in the *Maffezini* case, the investor was an Argentine citizen and the Host State was Spain, not the contrary. *Maffezini*, above note 114.

investments made by nationals of the other sovereign state party to the same treaty. Jan Paulsson very suggestively qualified this as “arbitration without privity.”³⁰⁵

164. Now as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations.³⁰⁶ For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.

165. As explained by Professor Charles de Visscher, one of the most eminent judges at the ICJ, when summarizing the jurisprudence of the Court:

“The judge is not asked to penetrate the intimate designs of the contracting parties; he is expected to discover by the means at his disposal that part of their intentions that external signs reveal. Now the words freely chosen by the parties are par excellence or at least primarily the instrument of this externalization. This, in turn, is a security factor. The security that the treaty affords the contracting parties is measured by its capacity to withstand pressures that might be brought to promote changes. Of this fundamental contractual guarantee the text, the common work of the parties, is the essential instrument.”³⁰⁷

[...]

What the Court does not allow is that in the course of interpretation the text should be prematurely eclipsed by a teleological scrutiny that might distort its

³⁰⁵ J. Paulsson, “Arbitration Without Privity,” (1995) *ICSID Review – Foreign Investment Law Journal* 232. See also A. El-Koshery, “ICSID Arbitration and Developing Countries”, (1998) *ICSID Review – Foreign Investment Law Journal* 107.

³⁰⁶ The International Court, as far back as the PCIJ’s *Wimbledon* decision, has consistently emphasized that international treaties are exercises – and not abdications – of State sovereignty, and for this reason, the will of the contracting State parties must be respected:

“The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”

Case of the S.S. “Wimbledon”, Judgment of 17 August 1923, Permanent Court of International Justice, Ser. A, no. 1, p. 16, 25

³⁰⁷ CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (revised ed.), translated from the French by P.E. Corbett, (New Jersey, Princeton, 1968), p. 395.

meaning. Such precipitate reasoning may result in sacrificing respect for the text to subjective considerations...³⁰⁸

166. This reasoning carries equal force in the context of international arbitration – whether *ad hoc* or institutionally-based – between investors and States. International treaties must be presumed to create objective obligations among contracting State parties. The basic interpretive approach applied to such treaties should therefore remain consistent across adjudicative fora. The *Renta4* tribunal recently came to a conclusion similar to Professor De Visscher’s, stating in the context of a BIT-based investor-State arbitration:

“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.”³⁰⁹

167. The present Tribunal agrees with this approach. It will therefore endeavor to ascertain the interpretation of the German-Argentine BIT that is at once most consistent with the Treaty’s stated objects and purposes and most respectful of the specific framework adopted by the Contracting State Parties as their chosen means for furthering those objects and purposes. Only by satisfying both criteria can the Tribunal properly fulfil its interpretive mandate.

b) Consent as the cornerstone of all treaty commitments

168. Stepping back from the specific case of bilateral treaties, all international treaties – whether bilateral, plurilateral or multilateral – are essentially expressions of the contracting states’ consent to be bound by particular legal norms. They encapsulate voluntarily accepted restraints upon the universally recognized principle of state sovereignty. Consent is therefore the cornerstone of all international treaty commitments, at least insofar as those commitments exceed

³⁰⁸ *Ibid* at p. 396. It should be noted that the teleological method of interpretation was also soundly rejected by the International Law Commission in its drafting work concerning the law of treaties, which eventually culminated in the text of the 1969 Vienna Convention on the Law of Treaties. See ILC Commentary on Draft Article 27 of the law of treaties, Yearbook of the International Law Commission, 1966, Vol. II, Reports of the Commission to the General Assembly [hereinafter “ILC Commentary on Draft Articles on the Law of Treaties”], at pp. 220ff.

³⁰⁹ *Renta4 S.V.S.A. v The Russian Federation*, Arbitration Institute of the Stockholm Chamber of Commerce, Award on Preliminary Objections to Jurisdiction (20 Mar 2009) [hereinafter “*Renta4*”], para 93 (emphasis added).

the minimum requirements of customary international law.³¹⁰ The primacy of the principle of consent runs through all types of treaty commitments entered into by states. There is no distinction between substantive treatment provisions, MFN clauses, dispute resolution clauses, or otherwise. All are equally valid and equally binding to the full extent of the contracting State parties' consent.

169. Since all international treaty commitments arise from the same source (consent) all must logically be interpreted according to the same basic interpretive principles without distinction as to the type of treaty or type of commitment. This is precisely why the International Law Commission was able to codify into a single convention – with the acceptance of an overwhelming number of the world's states – the now customary law rules on the interpretation of treaties reflected in articles 31 and 32 of the Vienna Convention.³¹¹

170. In this vein, several investor-State tribunals have rightly pointed out that dispute resolution clauses of BITs should be interpreted no differently than any other treaty clause.³¹² This has been the prevailing position in investment arbitration at least since the first *Amco Asia* matter, wherein the tribunal held:

“[L]ike any other convention, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly or liberally*. It is to be construed in

³¹⁰ Even in the case of customary international law, it can be argued that consent, or at least the consent of a majority of the world's states, underlies all of the norms reflected in customary international law. Without such consent (as demonstrated by the combination of a sufficiently broad, lasting and consistent state practice and supported by *opinio juris*), those norms would not have evolved into customary law in the first place. The *Dissenting Opinion* correctly points out that the consent underlying customary international law is of an implied and not express nature. It stresses that “established rules of customary international law can bind States that never granted, explicitly or otherwise, consent to individual acts of the type that gave rise to the principles in question.” *Dissenting Opinion of Charles N. Brower at note 8*. Yet the existence of the persistent objector doctrine – which allows states not in agreement with an evolving customary norm to avoid becoming legally bound by it – demonstrates that consent is nevertheless fundamental to customary international law. The only major exception to the foundational nature of state consent within public international law arises in the context of peremptory norms, among which a state's submission to the jurisdiction of an international arbitral tribunal cannot be counted.

³¹¹ Whether or not these articles reflected customary international law at the time of their drafting is of course open to debate. Even so, most scholars would concede that they have by now attained customary law status.

³¹² See eg *InterAguas*, above note 113 at para 59 (“the Tribunal finds no reason for interpreting the most-favored-nation treatment clause any differently from any other clause in the Argentina-Spain BIT”) and para 64 (“dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal”). An identically composed tribunal made nearly identical statements in a joint award concerning two closely related matters in *AWG*, above note 113 at paras 59-60. Further examples of such statements can be found in: *Siemens*, above note 71 at para 81; and *Renta4*, above note 309, Separate Opinion of Charles N. Brower at paras 7-9.

a way which leads to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law.”³¹³

171. More recently, the prominent tribunal in *Mondev v United States* echoed this *ex ante* neutral approach, observing:

“there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties”.³¹⁴

Judge and President Higgins came to a similar conclusion when considering a slightly different question in her separate opinion in the *Oil Platforms* case, stating:

“[i]t is clear from the jurisprudence of the Permanent Court and of the International Court that there is no rule that requires a restrictive interpretation of compromissory clauses. But equally, there is no evidence that the various exercises of jurisdiction by the two Courts really indicate a jurisdictional presumption in favour of the plaintiff. [...] The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.”³¹⁵

172. Indeed, as a matter of public international law, the uniform applicability of the *Vienna Convention*'s customary law interpretive principles to all treaty clauses is beyond doubt. This truism, however, in no way diminishes the underlying requirement of state consent. In interpreting dispute resolution provisions in BITs – just as with any other treaty provision – the ultimate goal is to determine what the contracting parties actually consented to. Thus, the fact that dispute resolution clauses should be construed neither liberally nor restrictively does not authorize international tribunals to interpret such clauses in a manner which exceeds the consent

³¹³ *Amco Asia Corporation v. Indonesia (Jurisdiction)*, 1 ICSID Reports 389 (1983), Award of 25 Sept. 1983 (B. Goldman, I. Foighel and E. Rubin, arbs), reprinted in 22 I.L.M. 351, 359 [1983] (emphasis in original) [hereinafter “*Amco P*”].

³¹⁴ *Mondev*, above note 250 at para 43 (citing *Amco I*, *ibid.*, at p. 394 of ICSID Reports); and *Ethyl Corporation v. Canada*, UNCITRAL/NAFTA, Award on Jurisdiction (24 June 1998) [hereinafter *Ethyl*], at para. 55

³¹⁵ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, I.C.J. Reports 1996*, p. 857, para 35. It is important to note, however, that Judge Higgins was not specifically addressing whether compromissory clauses should be read more narrowly than other treaty clauses. Rather, she was arguing that the Court should make its jurisdictional findings in the same manner as its findings on the merits – namely, on a definitive (as opposed to provisional) basis.

of the contracting parties as expressed in the text. To go beyond those bounds would be to act *ultra vires*.

173. The Vienna Convention itself unequivocally emphasizes the foundational role of State consent in the law of treaties. The Convention employs the word “consent” no fewer than 62 times, including in the titles to six articles.³¹⁶ Within the Convention’s interpretive prescriptions, it is well-known that article 31(1) begins by instructing interpreters to interpret a treaty “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.” While the article does not explicitly mention consent, the reference to “good faith” nevertheless reinforces the duty of tribunals to limit themselves to interpretations falling within the bounds of the framework mutually agreed to by the contracting state parties. As stated by the International Law Commission in its commentary to the draft version of Article 31, the requirement of interpretation in good faith “flows directly from the rule *pacta sunt servanda*.”³¹⁷

174. General respect for State consent is also manifested by the fundamental principle of public international law according to which international courts and tribunals can only exercise jurisdiction over a State on the basis of its consent. As noted by the Permanent Court of International Justice in one of its first judgments, “[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes ... either to mediation or to arbitration, or to any other kind of pacific settlement”.³¹⁸

175. This basic rule was often recalled by the International Court of Justice, as in particular in the *Ambatielos* case³¹⁹ as well as in the *Monetary Gold* case.³²⁰ Against this background, it is not possible to presume that consent has been given by a state. Rather, the existence of consent must be established. This may be accomplished either through an express declaration of consent to an

³¹⁶ Articles 11-15, 17.

³¹⁷ ILC Commentary on Draft Articles on the Law of Treaties, above note 308 at p. 221. The Dissenting Opinion adds, and the Tribunal agrees, that the good faith principle is also “meant to encapsulate well-established principles such as *effet utile*, honesty, fairness and reasonableness in interpreting a treaty, protection of legitimate expectations [those of the Contracting State Parties, that is, and] avoidance of abuse of rights” (Dissenting Opinion of Charles N. Brower at para 7).

³¹⁸ *Status of Eastern Carelia Case*, Advisory Opinion, (1923) P.C.I.J. Series B. No. 5, p. 27.

³¹⁹ *Ambatielos case (merits : obligation to arbitrate)*, Judgment of May 19th, 1953 : I.C.J. Reports 1953, p. 10, 19 [hereinafter “*Ambatielos I*”].

³²⁰ *Case of the monetary gold removed from Rome in 1943*, Preliminary Question, Judgment of June 15th, 1954, I.C.J. Reports 1954, p. 19, 32.

international tribunal's jurisdiction or on the basis of acts "conclusively establishing" such consent.³²¹ What is not permissible is to presume a state's consent by reason of the state's failure to proactively disavow the tribunal's jurisdiction. Non-consent is the default rule; consent is the exception. Establishing consent therefore requires affirmative evidence. But the impossibility of basing a state's consent on a mere presumption should not be taken as a "strict" or "restrictive" approach in terms of interpretation of dispute resolution clauses. It is simply the result of respect for the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure. This was already established by the Permanent Court of International Justice in the famous *Lotus case of 1927*³²² and further recalled by the ICJ in the case of the *Aerial Incident of July 27, 1955*³²³ as well as in the *East Timor case of 1995*.³²⁴ What is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned.³²⁵

176. On the basis of the ICJ's *jurisprudence constante* mentioned above, it must be clear that states may elect whatever means of settlement of disputes relating to international investment they so choose. They may also perfectly well decide in the framework of a BIT to extend the bearing of a most-favored nation (MFN) clause to the international settlement of their disputes

³²¹ See *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment, 1928 PCIJ (ser. A) No. 15 (26 April), p. 24, stating: "[T]here seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it." (Emphasis added.) Note 34 of the Dissenting Opinion cites this passage with approval. The Tribunal notes that the *Noble Energy* decision, also cited in note 34 of the Dissenting Opinion, is not to the contrary, finding as it did that "consent is manifest from a number of elements which the Tribunal will review...". *Noble Energy, Inc. and Machala Power Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 May 2008), para 194 (emphasis added).

³²² *Case of the S.S. Lotus*, P.C.I.J. Series A. No. 10 (7 Sep 1927), p. 18.

³²³ *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of May 26th, 1959: I.C.J. Reports 1959, p. 127, at 142.

³²⁴ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 90, at 102, para 29.

³²⁵ The Dissenting Opinion attempts to draw a neat dividing line between the establishment of consent to be bound by a specific dispute resolution mechanism and the scope of that consent, suggesting that the former can be founded on purely "formal indicia" such as the fact of signature and ratification of a treaty, while the latter is a matter of textual interpretation (Dissenting Opinion at n. 15). This distinction is a red herring. If the interpretive analysis reveals that the scope of Argentina's consent to submit to the jurisdiction of an international arbitral tribunal does not extend to the matter at hand, it is difficult to understand in what sense the State's consent to submit to that jurisdiction will have nevertheless been "established" on the basis of the State's mere signature and ratification of the Treaty. The relevant question is not whether the Treaty was ratified – which it was – but what precisely the States consented to in ratifying the Treaty. See e.g. *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 177, at paras 65ff (finding it necessary to determine the "extent of the consent given by the Parties to the Court's jurisdiction").

relating to investments.³²⁶ But this choice cannot be presumed or artificially constructed by the arbitrator; it can only result from the demonstrated expression of the states' will.

177. In addressing the different issues raised by the disputing parties in the present case, the main task of the Tribunal is therefore to identify the true will of the Federal Republic of Germany and the Republic of Argentina as it was stated in the 1991 Treaty which they agreed upon for the "promotion and reciprocal protection of investments". In particular, the Tribunal must determine whether the State Parties, in concluding the German-Argentine BIT, intended to submit to the jurisdiction of an international arbitral tribunal in circumstances wherein the investor has satisfied the procedural requirements for international dispute resolution under a Comparator Treaty but has not fully complied with the investor-State dispute resolution process laid down in the Basic Treaty.

178. Following the order of arguments made respectively by Argentina and by the Claimant, the Tribunal will in turn address the formulation and content of Article 10, which deals with the international settlement of investor-State disputes, and of Articles 3 and 4, which set out the most-favored nation clauses binding upon the two State Parties. The meaning and effect of each of these articles will be examined in accordance with Articles 31 and 32 of the Vienna Convention. That is, the interpretation of each article will be conducted "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".³²⁷ The Tribunal will also look to supplementary means of interpretation as appropriate in accordance with Article 32 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."³²⁸

³²⁶ This appears to have been done by the United Kingdom in some of its BITs. See eg Article 3(3) of the Agreement Between the United Kingdom of Great Britain and Northern Ireland and Bosnia and Herzegovina for the Promotion and Protection of Investments, signed 2 Oct 2002, which stipulates: "For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above [MFN treatment] shall apply to the provisions of Articles 1 to 11 of this Agreement."

³²⁷ Vienna Convention on the Law of Treaties, art. 31(1).

³²⁸ Vienna Convention on the Law of Treaties, art. 32.

2. Analysis of the Dispute Resolution Clause in the German-Argentine BIT

a) Mandatory and sequential nature of the Treaty's investor-State dispute resolution provisions

179. Article 10 of the BIT regulates the settlement of disputes between foreign investors and Host States arising under the Treaty. Article 10 provides:

- (1) “Disputes which arise between a Contracting Party and a national or company of the other Contracting Party concerning an investment under the Treaty, shall, to the extent possible, be settled amicably.
- (2) If a dispute *referred to in paragraph 1* cannot be settled within six months from the date either of the parties to the dispute formally announced it, it shall be referred upon the request of either party to the dispute to the competent courts of the Contracting Party in whose territory the investment was made.
- (3) Under either of the circumstances referred to below, the dispute may be submitted to an international arbitral tribunal:
 - (a) at the request of a party to the dispute if, within a period of 18 months of initiation of the judicial proceeding *in accordance with paragraph 2*, the tribunal has not rendered a final decision or if such a decision has been rendered but the dispute between the parties continues;
 - (b) if both parties have so agreed.
- (4) Unless otherwise agreed between the parties to the dispute, *in the instances outlined in paragraph 3* of this Article, disputes between the parties shall either be presented for arbitration in connection with the March 18, 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States or to an ad hoc tribunal established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

If within three months of a party to the dispute instituting an arbitration proceeding no agreement has been arrived at, and providing both Contracting Parties are party to the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, the dispute shall be subject to an arbitration proceeding under the said convention. Otherwise, the dispute shall be referred to the ad hoc tribunal mentioned above.
- (5) The arbitral tribunal shall arrive at its decisions on the basis of this Treaty and, if applicable, other agreements made between the parties, the internal law of the Contracting Party in whose territory the investment was made – including the rules of international private law – and general principles of international law.

(6) The arbitral decision shall be binding and shall be enforced in accordance with national law.³²⁹

180. Three observations are immediately evident from this recitation. First, the article phrases its dispute resolution process in mandatory terms. The repeated use of the word “shall”, which faithfully reflects similar mandatory language used in both the Spanish and German original versions of the text, indicates that the process laid down in **Article 10** is of an obligatory and not an optional character.

181. Among other obligations, the disputing parties shall attempt amicable settlement, failing which the dispute shall be submitted to the domestic courts for at least 18 months. If the matter proceeds to international arbitration, it shall be submitted to either an ICSID or UNCITRAL tribunal. If there is no agreement between the two disputing parties, it shall be submitted to an ICSID tribunal if both States are parties to the Convention; otherwise it shall be submitted to an *ad hoc* UNCITRAL tribunal. This language makes clear that the disputing parties’ dispute resolution options are tightly circumscribed under the **Treaty**. The parties shall – not may, but shall – comply with the provisions as set down. As noted by the **Wintershall** tribunal, “[t]he word ‘shall’ in treaty terminology means that what is provided for is *legally binding*.”³³⁰

182. Second, by ordering the basic steps of the dispute resolution process into four discrete paragraphs (**paras 1-4**) and imbuing each step with a mandatory character, **Article 10** makes clear that the Contracting State Parties intended for the steps to follow one another in sequential fashion. **Article 10** does not provide a menu of dispute settlement options available to disputing parties on an *a la carte* basis. Rather, it provides a specific sequential process whose order must be strictly observed. This is confirmed by the fact that each subsequent step refers explicitly back to the prior step. Thus, **paragraph 2** applies only to “a dispute referred to in paragraph 1”; **paragraph 3(a)** comes into play only after fulfilment of the circumstances mentioned in **paragraph 2**, and **paragraph 4** operates only “in the instances outlined in paragraph 3” of **the article**. The intention of the Contracting Parties to make each step in the dispute settlement process contingent upon the fulfilment of the prior step could not be clearer.³³¹

³²⁹ Disputing Parties’ agreed English translation of the **German-Argentine BIT** (emphasis added).

³³⁰ **Wintershall Aktiengesellschaft v. Argentine Republic**, ICSID Case No. ARB/04/14, Award (8 Dec 2008) [hereinafter “*Wintershall*”], para 119 (emphasis in original).

³³¹ See **ibid** at paras 121-122.

183. Thirdly, the “if-then” structure of paragraph 3 underscores that this mandatory and sequential process applies also in the case of international arbitration. That is, a dispute may be submitted to international arbitration only if: a) it has already been submitted to the domestic courts for 18-months and no final decision has been rendered or the dispute otherwise continues after that time, or b) the disputing parties so agree. The paragraph lists these two circumstances and only these two circumstances. There is no mention of possible alternate scenarios under which international arbitration against the Host States may be commenced. The paragraph does not employ expansive phrases such as “*inter alia*” or “in circumstances including, but not limited to, the following... .” The clear implication is that satisfaction of one of the two stipulated scenarios is a pre-requisite to commencing international arbitration.

b) Does the 18-month domestic courts requirement constitute a condition precedent to Argentina’s consent to arbitrate or merely a procedural directive or admissibility requirement?

184. The Claimant argues that the German-Argentine BIT’s 18-month domestic courts requirement constitutes a mere procedural directive and not a true jurisdictional pre-requisite. In support of this contention, it cites several investor-State cases wherein tribunals found they had jurisdiction notwithstanding the claimants’ non-satisfaction of waiting periods prescribed by certain BITs. It quotes, for example, the *SGS v. Pakistan* tribunal, which held:

“Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction. ... Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant’s BIT claims to this Tribunal.”³³²

185. The Claimant highlights five other cases in which waiting periods were waived by investor-State tribunals.³³³ It asserts that the German-Argentine BIT’s 18-month domestic courts provision is “tantamount to a waiting or cooling off period”,³³⁴ because “it is virtually impossible

³³² *SGS v. Pakistan*, above note 69 at para 184 (quoted in Claimant’s Counter-Memorial on Jurisdiction, para 101).

³³³ Claimant’s Counter-Memorial on Jurisdiction, paras 98-102.

³³⁴ *Ibid* at para 104.

that the dispute would be resolved in or outside Argentina within 18 months to the satisfaction of both parties.”³³⁵

186. The Claimant however overlooks the fact that, in *SGS v. Pakistan*, the respondent government had shown no interest in entering into negotiations with the claimant during the long period that had elapsed prior to the registration of the BIT claim. Moreover, the tribunal noted, the Government of Pakistan had no incentive to do so, since the Supreme Court of Pakistan had already issued a binding decision adverse to the claimant’s position.³³⁶ The tribunal was therefore of the opinion that requiring the claimant to observe any further negotiation period would have been futile under the circumstances.

187. Likewise, in each of the five other cases cited by the Claimant, the tribunals allowed claimants to skip prescribed waiting periods not as a general principle but rather on the basis of the peculiar factual circumstances of each case.³³⁷ In each and every case, the tribunals stressed that the prescribed waiting periods had, in any event, passed in the interim.³³⁸ It must be noted also that not all investor-State tribunals have agreed that waiting periods may be treated as procedural, rather than jurisdictional, provisions. In *Enron v. Argentina*, the tribunal found that the 6-month waiting period had been satisfied on the facts. But it added, in *obiter dictum*:

“the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of

³³⁵ Ibid.

³³⁶ *SGS v. Pakistan*, above note 69 at para 107.

³³⁷ See e.g. *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 Sep 2001), paras 187-91 (waiving waiting period “in the circumstances of this case” because the respondent had failed to accept the claimant’s invitation to enter into negotiations and had in fact not responded in any manner to the claimant’s original notice of dispute prior to the filing of the request for arbitration); *Bayinder Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov 2005), paras 97-102 (finding government had sufficient actual notice of the dispute and numerous opportunities to engage in negotiations, which it declined to do); *Link-Trading Joint Stock Company v. Moldova*, UNCITRAL, Award on Jurisdiction (16 Feb 2001), pp. 5-6 (noting respondent’s refusal to respond to claimant’s complaints and fact that more than a year had passed since registration of arbitration without any settlement); *Ethyl*, above note 314 at paras 84-85 (evidence suggested no negotiations were possible and no purpose would be served by requiring claimant to wait, since 6-month waiting period had in any event lapsed in the meantime); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (29 June 1999), 41 ILM 881, 885-86 (2002) (respondent had, in any event, withdrawn the objection as to the 3-month waiting period on the grounds that it could have been easily rectified).

³³⁸ See generally *ibid.*

the Tribunal very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.³³⁹

188. Thus, with respect to negotiation periods, the prevailing line of reasoning appears to rest upon two considerations: 1) the futility of the provision in the circumstances of the case, and 2) whether the period has in any event passed.³⁴⁰

189. In the present case, it is certainly true that more than 18 months have passed since the institution of the proceedings. Moreover, it is not clear whether a further waiting period would lead to a voluntary settlement between the parties. However, these considerations are not in dispute. What is in dispute is not a mere waiting period but a requirement that the dispute be submitted to the domestic Argentine courts for potential judicial resolution for a period of at least 18 months. The above reasoning must therefore be applied not by rote but rather *mutatis mutandis*.

190. Analogizing the logic of the negotiation period analysis to the case of an 18-month domestic courts submission requirement (as the Claimant has urged the Tribunal to do), the relevant questions become: 1) whether the dispute has, at least in the interim, been litigated for 18 months before the Argentine domestic courts, and 2) whether it would be futile to require the Claimant to do so under the circumstances – as would be the case, for example, if Argentine law permitted no remedy for the Claimant’s claims in the domestic courts.³⁴¹

³³⁹ *Enron Corporation and Ponderosa Assets L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, (14 Jan 2004), para 88. At least two other ICSID tribunals have recently taken a similar position. See *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010), paras 310-318; and *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 December 2010), paras 140-157.

³⁴⁰ Professor Schreuer, upon whom the Claimant also relies, concludes:

“It would seem that the decisive question is whether or not there was a promising opportunity for a settlement. There is little point in declining jurisdiction and sending the parties back to the negotiating table if negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, the waiting period will often have expired by the time a decision on jurisdiction is rendered. Under these circumstances, compelling the claimant to start the proceedings anew would be uneconomical. A better way to deal with non-compliance with a waiting period is a suspension of proceedings to allow additional time for negotiations if these appear promising.”

SCHREUER – 2009, above n. 92 at p. 239

³⁴¹ As should be evident from this analysis, the Tribunal agrees with Judge Brower’s objection, in para 14 of his Dissenting Opinion, that the analogy between the 18-months proviso and “cooling-off” or “good

191. On the facts, the first question must be answered in the negative. The second cannot, based upon the evidence submitted to the Tribunal, be answered in the affirmative. The Claimant has not demonstrated the futility of resorting to the Argentine courts in the circumstances of this case. While the Claimant submitted an expert opinion suggesting that it would have been “impossible” for the Argentine courts to deliver a final judgment on the Claimant’s claims within 18 months,³⁴² the Respondent rebutted this opinion by citing examples of cases which the Argentine Courts have indeed resolved in 18 months or less.³⁴³ It may be that the delimitation of an 18-month period, after which claimants would be free to proceed instead to international arbitration, would induce the domestic Argentine courts to ensure the prompt and fair adjudication of investment disputes. One can only speculate in the present instance, as the Argentine courts were never presented with DFS’ claims. In any event, nothing in either the BIT or in any other source of applicable law guarantees the Claimant the right to have its claims finally resolved within 18 months.³⁴⁴ The point of Article 10(2) of the German-Argentine BIT is to afford the domestic courts an opportunity to attempt to resolve investment claims in a prompt manner, not to guarantee a specific time horizon for their final resolution. The Claimant has not asserted that it lacked a cause of action before the Argentine courts or that it was in some other way prevented from complying with the requirements of Article 10(2).³⁴⁵ As such, it has failed to

faith negotiation” periods is not an apt one. The Tribunal nevertheless finds it necessary to discuss this analogy because the Claimant has specifically raised it in its pleadings.

³⁴² Expert Opinion of Javier Errecondo dated 4 June 2008 (submitted with Claimant’s Rejoinder on Jurisdiction); Claimant’s Rejoinder on Jurisdiction, paras 65-80.

³⁴³ Respondent’s evidentiary submissions A RA 20 (“Judgments of the Argentine Supreme Court”) and A RA 22 (“Final Judgments”), both submitted with the Respondent’s Reply Memorial on Jurisdiction.

³⁴⁴ If the ability to reach a final decision within 18 months were the relevant metric, then the present Tribunal would be forced to declare its own proceedings futile, along with the proceedings of the vast majority of investor-State arbitration tribunals. See below at n. 430 (noting the average length of proceedings in ICSID cases).

³⁴⁵ The recent *Hochtief* award makes much of the fact that Article 10(2) of the German-Argentine BIT allows either disputing party to “request” that the dispute be referred to the domestic courts. The suggestion seems to be that Argentina’s failure to institute proceedings against the claimant in its domestic courts constituted a waiver of its right to subsequently invoke the BIT’s 18-month proviso. See *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 October 2011) [hereinafter *Hochtief* – Majority Opinion], paras 35-37, 89. This argument overlooks the fact that Argentina most likely lacked a cause of action with which to seize its domestic courts. In the context of a treaty-based investor-State dispute, it is the claimant, and not the respondent, whose treaty rights have allegedly been violated. Thus, the only practicable way for Argentina to “request” a referral to the domestic courts is to exercise its right to insist that the claimant satisfy the BIT’s 18-month proviso before instituting arbitral proceedings. If Argentina had wished to waive its right to object to the arbitral tribunal’s jurisdiction on these grounds, it could have done so in terms of Article 10(3)(b) of the BIT.

meet the burden necessary to invoke a waiver of the 18-month domestic courts provision on the grounds of futility.

192. One may ask whether the Tribunal may nonetheless waive the 18-month domestic courts requirement on the grounds that it is merely procedural, not jurisdictional, and therefore within the discretionary power of the Tribunal to observe or discard. Such is the case, for example, with admissibility objections before domestic courts and tribunals. However, admissibility analyses patterned on domestic court practices have no relevance for BIT-based jurisdictional decisions in the context of investor-State disputes. In the domestic context, admissibility requirements are judicially constructed rules designed to preserve the efficiency and integrity of court proceedings. They do not expand the jurisdiction of domestic courts. Rather, they serve to streamline courts' dockets by striking out matters which, though within the jurisdiction of the courts, are for one reason or another not appropriate for adjudication at the particular time or in the particular manner in question.³⁴⁶

193. All BIT-based dispute resolution provisions, on the other hand, are by their very nature jurisdictional. The mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators. They set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties' consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts. That this is so is particularly evident in the case of the German-Argentine BIT, which describes its dispute resolution process in mandatory and necessarily sequential language. In the words of the *Wintershall* tribunal:

“That an investor could choose at will to omit the second step [the 18-month domestic courts requirement] is simply not provided for nor even envisaged by the Argentina-Germany BIT – because (Argentina's) the Host State's 'consent' (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts.”³⁴⁷

³⁴⁶ Such is the case with the doctrines of ripeness *et* *forum non conveniens*, etc.

³⁴⁷ *Wintershall*, above note 330 at p. 99, para 160(2) (parentheticals in original).

194. Since the 18-month domestic courts provision constitutes a treaty-based pre-condition to the Host State's consent to arbitrate, it cannot be bypassed or otherwise waived by the Tribunal as a mere "procedural" or "admissibility-related" matter.³⁴⁸

c) Relevance of whether or not the 18-month domestic courts requirement is "nonsensical"

195. The *Plama* tribunal, commenting upon the *Maffezini* tribunal's decision to evade, by means of the MFN clause, the 18-month domestic courts requirement of the Spain-Argentina BIT, stated the following:

"The decision in *Maffezini* is perhaps understandable. The case concerned a curious requirement that during the first 18 months the dispute be tried in the local courts. The present Tribunal sympathizes with a tribunal that attempts to neutralize such a provision that is nonsensical from a practical point of view. However, such exceptional circumstances should not be treated as a statement of general principle guiding future tribunals in other cases where exceptional circumstances are not present."³⁴⁹

196. This raises the question as to whether the Tribunal may waive the 18-month domestic courts requirement on the grounds that it is "nonsensical". Unfortunately, the *Plama* tribunal nowhere explained in what sense the requirement was "curious", "nonsensical", or "exceptional". Perhaps the tribunal referred merely to the fact that the requirement is found only in Latin American BITs. Or perhaps it meant to suggest, as does the Claimant here, that 18 months would not prove sufficient, in most cases, to lead to a satisfactory resolution of the dispute.

197. Whatever the *Plama* tribunal's meaning may have been, Argentina insists that the requirement is sensible, as it was included "for the purpose of giving domestic courts the opportunity to settle the dispute".³⁵⁰ Such a purpose cannot be said to be nonsensical, particularly in light of the Government's assertions that the Argentine courts can and do frequently resolve disputes in less than 18 months.³⁵¹ Even if this were not the case, one can easily imagine good

³⁴⁸ See in this regard *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections (Decision of 1 April 2011), available at: <http://www.icj-cij.org/docket/files/140/16398.pdf>, at paras 115-184 (finding that the relevant treaty's requirement of good faith negotiations between the parties constituted a procedural condition for the seisin of the Court and further finding that the Court had no jurisdiction because this precondition had not been met).

³⁴⁹ *Plama v. Republic of Bulgaria*, Decision on Jurisdiction (8 Feb 2005), ICSID Case No. ARB/03/24 [hereinafter "*Plama*"], para 224.

³⁵⁰ Respondent's Reply on Jurisdiction, para 54.

³⁵¹ Ibid at para 55.

reasons why a country might wish to include such a provision in some, but not all, of its BITs. In the case of Argentina, it may have wished, for example, to provide its courts with occasional opportunities to gain experience in administering treaty-based investor-State claims without running the risk of overwhelming its courts with too many claims under too many treaties at once.³⁵²

198. More importantly, however, even if Argentina had not asserted sensible reasons for including the provision, and even if the Tribunal were unable to posit such reasons of its own initiative, the requirement for waiving treaty-based jurisdictional pre-requisites in international law is not nonsensicality but futility. Sovereign States are free to agree to any treaty provisions they so choose – whether concerning substantive commitments or dispute resolution provisions or otherwise – provided these provisions are not futile and are not otherwise contrary to peremptory norms of international law. As discussed above, futility has not been established on the facts of the present case.³⁵³ Thus, the Tribunal’s estimation of the apparent sensibility of the Treaty’s prescribed dispute resolution process is irrelevant to the inquiry.³⁵⁴

d) The timing aspect of standing – when may an MFN claim be raised before an international arbitral tribunal?

199. The mandatory and sequential nature of the German-Argentine BIT’s dispute resolution provisions raises an important temporal question: when, chronologically speaking, does an aggrieved investor acquire standing to raise an MFN claim before an investor-State arbitral tribunal under Article 10? As will be seen later in this decision, the BIT clearly empowers investors to claim and receive compensation for MFN violations. The immediately foregoing analysis, however, has indicated that fulfilment of the 18-month domestic courts submission

³⁵² It may be argued that such a policy would be akin to placing a tax on certain nationalities of foreign investors for the purposes of developing the Argentine judicial system. This may well be so. But this does not change the fact that the development of a Host State’s judiciary cannot be assailed as an illegitimate or arbitrary – let alone nonsensical – policy goal. Instead, the decision to saddle only particular groups of foreign investors with the costs of that development would clearly be discriminatory and therefore compensable under the BIT to the extent that these costs exceed the costs of otherwise directly available investor-State arbitration under other BITs. The Tribunal will return to this issue below.

³⁵³ Nor can the subjugation of a sovereign State to the jurisdiction of an international arbitral tribunal be said to constitute a peremptory norm of international law.

³⁵⁴ The imprudence of engaging in debates as to the desirability of particular treaty provisions within the context of international arbitral deliberations was neatly demonstrated in the recent *Hochtief* matter. There, the majority found the procedure prescribed in Articles 10(2)-(3) of the German-Argentine BIT to be “pointless” and of “no necessary benefit”, while the dissent was able to point out several sensible justifications for the 18-month proviso. Contrast *Hochtief* – Majority Opinion, above note 345, paras 51 & 87-88 with the Separate and Dissenting Opinion of J. Christopher Thomas, Q.C., paras 4-10.

provision constitutes a condition precedent to the Host State's consent to submit a particular dispute to investor-State arbitration.

200. Taken together, these two conclusions suggest that a claimant wishing to raise an MFN claim under the German-Argentine BIT – whether on procedural or substantive grounds – lacks standing to do so until it has fulfilled the domestic courts proviso. To put it more concretely, since the Claimant has not yet satisfied the necessary condition precedent to Argentina's consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the Tribunal with the necessary jurisdiction.³⁵⁵

201. That a prospective claimant wishing to raise an MFN claim must satisfy the conditions precedent to international dispute resolution under the basic treaty is supported by the reasoning of the ICJ in the *Anglo-Iranian Oil* case.³⁵⁶ In that case, the United Kingdom invoked an obligation in a 1934 treaty between Iran and Denmark to the effect that Iran would provide “the most constant protection” of the persons and property of Denmark's nationals “in accordance with the principles and practice of ordinary international law.”³⁵⁷ The UK attempted to enforce this protection on behalf of a UK company by invoking the MFN clauses contained in two treaties that the UK had concluded with the Government of Persia in 1857 and 1903, respectively.³⁵⁸ The difficulty was that Iran, in its 1932 Declaration accepting the Court's compulsory jurisdiction, had limited its acceptance to disputes arising out of treaties concluded *after* the coming into effect of the Declaration. Thus, the Iran-Denmark treaty (the “comparator treaty”) fell within the scope

³⁵⁵ This in no way implies that the word “shall” in Article 10 of the BIT somehow trumps the word “shall” in Article 3 [one of the MFN clauses] of the same treaty.” (Dissenting Opinion of Charles N. Brower at para 13.) First, the Tribunal's underscoring of the word “unless” stresses that the MFN clause may well provide the Tribunal with jurisdiction to hear the case. The Award's separate analysis of both Article 10 (the dispute resolution clause) and Articles 3 and 4 (the MFN clauses) as independent potential bases for the Tribunal's jurisdiction evinces no “trump” of one type of clause over the other. Second, the word “shall” in the context of the MFN clauses relates to Argentina's obligation to provide protected German investors and investments with treatment, in the territory of the Host State, which is no less favorable than the treatment provided to investors and investments from other countries. Argentina's obligation to observe this commitment toward German investors and investments (an obligatory “shall”) remains in force irrespective of whether or not a particular German claimant fulfills the necessary conditions precedent to institute an international arbitration proceeding against Argentina under Article 10. Thus, both “shalls” retain their obligatory character within their respective spheres of operation.

³⁵⁶ *Anglo-Iranian Oil Co. case (jurisdiction)*, Judgment of July 22nd, 1952: I.C.J. Reports 1952, p. 93.

³⁵⁷ *Ibid* p. 108.

³⁵⁸ *Ibid* p. 108. The 1857 Treaty appears to have related to consular protection, while the 1903 Treaty was a “Commercial Convention.” Both parties accepted that the Government of Iran was legally bound by the treaties in question as the legal successor to Persia under international law.

of Iran’s Declaration of consent to ICJ jurisdiction, while the two UK treaties (the “basic treaties”) did not.³⁵⁹

202. In explaining why it lacked jurisdiction to hear the UK’s MFN-based claims, the Court said the following:

“But in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter treaty. The treaty containing the most-favoured-nation clause is the basic treaty upon which the UK must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta*.”³⁶⁰

203. In other words, in *Anglo-Iranian Oil*, Iran’s acceptance of the ICJ’s jurisdiction over disputes arising under the two “basic treaties” (the UK-Persia treaties) was a condition precedent to the UK’s standing to raise its MFN claims before the Court. Because that condition precedent had not been fulfilled, the UK had no standing and the ICJ had no jurisdiction.³⁶¹

204. In the present matter, of course, Argentina’s consent to international arbitration is contained within the same instrument as the MFN guarantees giving rise to some of the Claimant’s jurisdictional arguments. But the physical location (external instrument versus within the same treaty) of a State’s consent to a particular type of dispute resolution does not eviscerate the requirement, stressed by the ICJ, that the State must have consented to the particular type of dispute settlement in question before the claimant may raise any MFN claims before the

³⁵⁹ The important point to note here is that – just as in the proceedings before the present Tribunal – the ICJ would have had jurisdiction over disputes arising out of the comparator treaty but did not have jurisdiction over disputes arising out of the basic treaties. It was for this reason that the basic treaty’s MFN clause could not be invoked.

³⁶⁰ *Ibid* p. 109 (emphasis added).

³⁶¹ The core problem in *Anglo-Iranian* was one of *ratione temporis*. That is, the ICJ did not have jurisdiction over disputes arising out of the two pre-1932 basic treaties because Iran’s declaration was limited to disputes arising out of its post-1932 treaties. The *ratione temporis* problem in the present arbitration differs in that the present Respondent chose to tie its prospective consent to the Tribunal’s jurisdiction not to a specific date (as was done in *Anglo-Iranian*) but rather to the satisfaction of a time-bound condition precedent to arbitration. This difference in form does not, however, give the present Tribunal license to disregard the temporal constraint laid down by the Contracting State Parties to the German-Argentine BIT. The principle illustrated by the *Anglo-Iranian Oil* case remains apposite. Namely, a tribunal must have jurisdiction under the basic treaty in order for a claimant to invoke the MFN clause of that treaty and thereby reach the more favorable provisions of a comparator treaty.

designated forum. According to this logic, the Claimant may not yet have standing to raise any MFN arguments at all before the Tribunal. This raises a significant impediment to the Claimant's attempts to bypass the 18-month proviso. However, this impediment might be surmounted by the content of the MFN clauses in question, in particular if those clauses evince an intention, on the part of the Contracting State Parties, to allow the Treaty's conditions precedent to accessing international arbitration to be altered by operation of its MFN provisions. The Tribunal will therefore next consider the parties' arguments as to the scope and meaning of the MFN clauses in the Germany-Argentina BIT.

3. Analysis of the MFN Clauses in the German-Argentine BIT

a) The Treaty's MFN texts and their interdependence

205. The German-Argentine BIT contains two MFN clauses. The first and most general MFN clause appears in Article 3, which addresses both MFN treatment and national treatment. According to the disputing parties' agreed English translation of the German and Spanish original texts, Article 3 reads as follows:

“Article 3

- (1) Neither Contracting Party shall accord investments in its territory by nationals or companies of the other Contracting Party, or investments in which nationals or companies of the other Contracting Party are participating, treatment less favorable than the treatment accorded investments of its own nationals or companies or investments of nationals or companies of any third country.
- (2) With respect to their activities in connection with investments in its territory, nationals and companies of the other Contracting Party shall not be accorded treatment less favorable by a Contracting Party than its own nationals and companies or nationals and companies of third countries.
- (3) Such treatment shall not refer to privileges granted by a Contracting Party to nationals or companies of third countries by virtue of their membership in a customs or trade union, a common market, or a free trade area.
- (4) The treatment granted in this Article shall not refer to advantages accorded by a Contracting Party to nationals or companies of third countries under an agreement for the avoidance of double taxation or other agreements regarding tax matters.”

206. The second MFN clause appears in Article 4 of the Treaty. Paragraphs (1)-(3) of that article deal with particular substantive protections, while paragraph (4) sets out a special MFN

provision relating exclusively to the subjects covered in **Article 4**. The full English text is set out in a footnote,³⁶² but for present purposes the operative portions proceed roughly as follows:

“Article 4

- (1) ... [Full legal protection and security]
- (2) ... [Expropriation, nationalization, and equivalent measures]
- (3) ... [Losses owing to war or internal strife]

Nationals or companies of a Contracting Party shall enjoy most-favored-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.”

207. Finally, **paragraph 2 of the BIT’s Protocol** relates to MFN treatment:

“Protocol

- (1) [...]
- (2) Ad Article 3
 - a) “Activity” within the meaning of Article 3(2) shall in particular, but not exclusively, include the management, use, enjoyment, and disposal of an investment. The following shall, in particular, but not exclusively, be deemed treatment “less favorable” within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or

³⁶² The English translation of the article reads:

- (1) Investments by nationals or companies of a Contracting Party shall enjoy full legal protection and security in the territory of the other Contracting Party.
- (2) Investments by nationals or companies of a Contracting Party may not be expropriated, nationalized, or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting Party except for the public benefit and against compensation. Such compensation shall be equivalent to the market value of the expropriated investment before the date on which the actual or threatened expropriation, nationalization, or comparable measure has become publicly known. The compensation shall be paid immediately and shall carry interest at a normal commercial rate until the time of payment; it shall be effectively realizable and freely transferable. The legality of any such expropriation, nationalization, or comparable measure and the amount of compensation shall be subject to review by due process of law.
- (3) Nationals or companies of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war or other armed conflict, revolution, state of national emergency, or revolt, shall not be accorded treatment less favorable by such other Contracting Party than that which the latter Contracting Party accords to its own nationals and companies as regards restitution, indemnification, compensation, or other consideration. Such payments shall be freely transferable.
- (4) Nationals or companies of a Contracting Party shall enjoy most-favored-nation treatment in the territory of the other Contracting Party in respect of the matters provided for in this Article.

auxiliary materials; of energy or fuel, or of means of production or operation of any kind and unequal treatment in the case of impeding the marketing of products inside or outside the country. Measures which have to be taken for reasons of public safety and public order, public health, or morality shall not be deemed treatment “less favorable” within the meaning of Article 3.

- b) The provisions of Article 3 do not oblige a Contracting Party to extend to natural persons and companies residing in the territory of the other Contracting Party tax privileges, exemptions, and tax reductions which according to its tax law are granted only to natural persons and companies resident in its territory.

[...]”

208. From these recitations, three observations concerning the interrelation of these provisions merit notice. First, the Protocol sheds light on the proper interpretation of Article 3 of the BIT. It does so by illustrating, albeit in a non-exclusive fashion, the potential meanings of the terms “activity” and “less favorable”. This makes it necessary to interpret Article 3 in tandem with the relevant portions of the Protocol.

209. Secondly, Article 3, Article 4(4), and the Protocol all make use of the word “treatment”, although none of them defines it explicitly. It thus falls to the Tribunal to establish, in good faith, the ordinary meaning of this term in its context and in the light of the Treaty’s object and purpose.

210. Thirdly, the MFN clause in Article 4(4) applies only to the particular treatment standards mentioned in Article 4. The MFN clause in Article 3, however, contains no such limitation. On its face, the application of Article 3 is limited only by the proper meaning to be ascribed to such words as “treatment”, “activities” and “less favorable”. In this sense, one may conceive of Article 3 as a general MFN clause, while Article 4(4) is a more limited one. To the extent that Article 3 – interpreted in the light of its own wording – may also be broad enough to cover the substantive protections listed in Article 4, it may therefore prove necessary to clarify the relationship between the two articles. This will depend upon the meaning that emerges from an interpretive analysis of the two articles, which follows below.

b) Potential reach of the MFN clauses in light of the *ejusdem generis* rule

211. Before scrutinizing the specific texts of the MFN clauses in accordance with the Vienna Convention, it is useful to consider the implications of the *ejusdem generis* rule as a preliminary matter, since both of the disputing parties have raised it in their submissions. As summarized by

the Commission of Arbitration in the **Ambatielos** case, the *ejusdem generis* rule specifies that an MFN clause “can only attract matters belonging to the same category of subject as that to which the clause itself relates”.³⁶³ The International Law Commission has characterized the *ejusdem generis* rule as one that is “generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice”.³⁶⁴ Indeed, the ILC codified the rule as follows in **Article 9(1) of its 1978 Draft Articles on Most-Favoured-Nation Treatment**:

“Under a most-favoured-nation clause the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject-matter of the clause.”³⁶⁵

212. Thus defined, the *ejusdem generis* rule advocates a common sense approach to the interpretation of **MFN clauses**. It is probably for this reason that the rule appears to have gained acceptance. The **ILC’s Commentary on the Draft Articles on MFN Clauses** sheds further light on the operation of the rule:

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

The effect of the most-favoured-nation process is, by means of the provisions of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated. Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.”³⁶⁶

213. In the present matter, both the **Basic Treaty** and the **invoked Comparator BIT**³⁶⁷ provide not only substantive protections for investments but also investor-State dispute resolution

³⁶³ **Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)**, decision of the Commission of Arbitration (6 March 1956), United Nations Reports of International Arbitral Awards, Vol. XII p. 83 [hereinafter “*Ambatielos II*” to distinguish it from the ICJ matter (*Ambatielos I*), in which the Court upheld the UK’s agreement to arbitrate with Greece], at p. 107.

³⁶⁴ **Draft Articles on Most-Favoured-Nation Clauses, with Commentaries**, text adopted by the International Law Commission at its thirtieth session, *Yearbook of the International Law Commission*, 1978, vol. II, Part Two [hereinafter “ILC Commentary on Draft MFN Articles”], at p. 27.

³⁶⁵ **Ibid.**

³⁶⁶ **Ibid** at p. 30, paras 10-11 (internal citations omitted).

³⁶⁷ **The dispute resolution provisions of the invoked Comparator BIT** are set forth in note 427 below.

mechanisms for disputes arising out of qualifying investments. There is, in this sense, not only an identity between the subject matter of the two invoked dispute resolution clauses but also between the subject matter of the whole of both treaties.³⁶⁸ In this respect the two invoked treaties fall within the mainstream of modern international investment agreements, almost all of which include some sort of provision concerning the administration of justice in relation to the private rights of investors arising under the agreements.

214. One may observe in the two treaties, to use the ILC's words, "a substantial identity between the subject-matter of the two sets of clauses concerned".³⁶⁹ Moreover, there is a clear and logical connection between the subject matter of the clauses and the subject matter of the invoked treaties.³⁷⁰

215. As such, the application of the *ejusdem generis* rule cannot on its own categorically exclude international dispute resolution from the potential ambit of the German-Argentine BIT's MFN clauses. Nor, however, can it demonstrate that the ambit of the Treaty's MFN clauses

³⁶⁸ The Tribunal notes that the *ejusdem generis* rule does not require the overall subject matter of the basic and comparator treaties to be identical, but only the subject matter of the invoked clauses of the basic and the comparator treaties. As the ILC Commentary notes:

"It is also not proper to say that the *treaty* or *agreement* including the clause must be of the same category (*ejusdem generis*) as that of the benefits that are claimed under the clause. To hold otherwise would seriously diminish the value of a most-favoured-nation clause."

ILC Commentary on Draft MFN Articles above note 364 at p. 30, para 12 (emphasis in original).

³⁶⁹ Ibid at p. 30, para 11. An interpreter can require no more than a substantial identity between the subject matters of the two clauses. For if the complete identity between the clauses were required, there would be no need to invoke the MFN clause in the first place.

³⁷⁰ As to the connection between the subject matter of the overall treaties and the subject matter of the specific clauses in relation to which MFN treatment is invoked, the Arbitral Commission in the *Ambatielos II* matter observed more than 50 years ago:

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

Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favoured-nation clause, when the latter includes 'all matters relating to commerce and navigation'. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty."³⁷⁰

The same logic prevails here, although there are some important differences between the *Ambatielos* matter (which involved the domestic administration of justice) and the present one (which involves international dispute settlement).

necessarily includes international dispute resolution. The *ejusdem generis* rule merely identifies the outer limit of the clauses' field of application; it cannot tell us which particular subject matters, within that outer limit, the clauses were actually intended to cover. As stressed by the *Ambatielos* Commission, the latter question "can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty".³⁷¹ This is so, in the ILC's words, because "States cannot be regarded as being bound beyond the obligations they have undertaken."³⁷²

216. As applied to the *German-Argentine BIT*, then, the outer limits set by the *ejusdem generis* rule are broad enough to encompass international dispute resolution within the meaning of the *Treaty's MFN clauses*. Argentina's assertions to the contrary must therefore be rejected. This conclusion renders the Claimant's proposed interpretation plausible. It does not, however, in any way diminish the present Tribunal's duty to determine, upon a preponderance of all the arguments, whether Germany and Argentina intended to include international dispute resolution within the reach of the *Treaty's MFN clauses*. The Tribunal therefore turns to examine the meaning of those *MFN clauses* in light of their wording and context.

c) Ordinary meaning of the term "treatment" in the BIT's two MFN clauses

217. The Treaty nowhere defines what constitutes "treatment", despite employing the word 13 times across *five different provisions of the Treaty and Protocol*.³⁷³ What may be observed, however, is that in none of these instances does the text indicate that the word carries a special or technical meaning. Nor has either of the disputing parties attempted to attach a special meaning to the term, in the sense of *Article 31(4) of the Vienna Convention*. The Tribunal must therefore endeavour to interpret the word in a manner which makes sense of all 13 usages in an ordinary fashion.

218. In common usage, "treatment" evokes one party's manner of dealing with or behaving towards another party. In the international law setting, the term typically carries with it the sense of how a State or other legal authority regulates, protects, or otherwise interacts with specified actors, whether public or private. Within the investment law context, one arbitral tribunal has defined treatment to include "the rights and privileges granted and the obligations and burdens

³⁷¹ *Ambatielos II*, above note 363 at p. 107.

³⁷² ILC Commentary on Draft MFN Articles, above note 364 at p. 30, para 11.

³⁷³ "Treatment" is used in arts 1(1), 2(1)-(4), 4(3)-(4), 7(1), and Protocol para (2)(a).

imposed by a Contracting State on investments made by investors covered by the treaty.”³⁷⁴ Another has stated that “[t]reatment’ in its ordinary meaning refers to behavior in respect of an entity or a person.”³⁷⁵ Each of these formulations is extremely broad, and none suggests anything inherent in the word “treatment” which would automatically include or exclude certain categories of acts or omissions in relation to a defined investor. What is nevertheless beyond dispute is that “treatment” deals with the actual behavior of the Host States towards a foreign private investment as measured against the international obligations binding upon the State on the basis of treaty law and general international law.

219. Notwithstanding this generality, public international lawyers have in recent years engaged in a lively debate over whether the term should be understood to comprise only “substantive” treaty protections, or whether it may also include “procedural” ones.³⁷⁶ Commentators also split over whether international dispute resolution provisions in treaties should be viewed as substantive protections in and of themselves, or whether they are merely procedural mechanisms for enforcing the treaty’s other (presumably substantive) obligations.³⁷⁷ The present Tribunal is not convinced that this debate is the most appropriate one.³⁷⁸ What matters is not how the general term treatment potentially could or “should” be interpreted but rather what meaning the Contracting State Parties to the specific Treaty in question have attached to the term.

³⁷⁴ *InterAguas*, above note 113 at para 55.

³⁷⁵ *Siemens*, above note 71 at para 85.

³⁷⁶ There appears to be broad consensus among the community of scholars, as well as between the disputing parties in this case, that the term “treatment” in treaties relating to international trade, investment, and commerce generally encompasses most, if not all, of the so-called substantive protections of such treaties. In the case of BITs, this would typically comprise guarantees relating to expropriation, fair and equitable treatment, etc – provided, of course, that the MFN clause in question does not itself indicate limits to its subject matter scope. The question at hand, however, is whether the term treatment as used in MFN clauses, or more precisely the German-Argentine BIT’s MFN clauses, also extends to its international dispute resolution provisions.

³⁷⁷ See, in this regard, the comments of the *Renta4* tribunal, above note 309 at paras 88-101, and especially its conclusion in para 101, stating: “Rights and obligations may be classified as substantive or jurisdictional or procedural. Such classifications are not watertight and in any event primarily of pedagogical use.”

³⁷⁸ In this respect, the Tribunal agrees with the Dissenting Opinion’s position that “it is difficult to imagine a more fundamental aspect of an investor’s ‘treatment’ by a host Government than that investor’s ability to exercise and defend its legal rights by prompt access to dispute settlement mechanisms, and fair and efficient administration of justice.” Dissenting Opinion of Charles N. Brower at para 20. This uncontroversial observation does not however imply an automatic entitlement to initiate international dispute settlement against a State.

220. In order to shed light on whether the Contracting State Parties intended for the term “treatment” to encompass the BIT’s international dispute settlement provisions, one must apply the classical rule of interpretation known as the principle of contemporaneity. This principle, particularly pertinent in the case of bilateral treaties, requires that the meaning and scope of the term “treatment” be ascertained as of the time when Germany and Argentina negotiated the BIT. This BIT was adopted in 1991. Unfortunately neither disputing party has submitted any direct evidence – for example from the Treaty’s drafting history – revealing the particular understanding of “treatment” maintained by Germany and Argentina as of that date. The Tribunal must therefore look for clues to the meaning generally ascribed to the term by the broader international community of States at the time.

221. 1991 was a time when the distinction between “treaty claims” and “contract claims”, as inaugurated by the *AAPL v Sri Lanka* award³⁷⁹ (facilitating the direct access of private investors to ICSID tribunals) remained obscure. As a consequence, dispute resolution clauses were still predominantly perceived in the context of international contracts, whether “state contracts” or otherwise, between a private foreign investor and a sovereign state. At that time, inspired by international commercial arbitration, scholars as well as arbitral awards insisted on the autonomy or severability of the arbitral clause, aimed at protecting in any situation the right of the investor to obtain reparation in case of arbitrary revocation or nullity of the contract by the state party³⁸⁰. Treaty-based questions concerning the relation of MFN clauses to international investor-State dispute resolution mechanisms had not yet arisen and remained entirely unexplored.

222. Also at that time, as reflected one year later by the *World Bank Guidelines on the Treatment of Foreign Direct Investment*,³⁸¹ and in particular its Part III devoted to “treatment”, the prevailing view among the Development Committee of the World Bank (an essentially universal international organization and the host body of ICSID) was that treatment was meant to cover discrete principles of conduct applicable to the State hosting the foreign investment, with a view to safeguarding the investment from any discriminatory or unfair and inequitable practices

³⁷⁹ *AAPL v. Sri Lanka*, above note 114.

³⁸⁰ Fouchard, Gaillard, Goldmann, *On International Commercial Arbitration*, Kluwer Law Int’l (1999), 197-217; S. Schwebel, *International Arbitration: Three Salient Problems*, 2 (1987); P. Sanders, “L’autonomie de la clause compromissoire,” in *Hommage à Frédéric Eisemann* 32 (1978); C.M. Svernlöv, *The Current Status of the Doctrine of Separability*, *Journal of International Arbitration*, 1991, Vol. 8, N° 4, 37-50.

³⁸¹ *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>.

within the Host State's territory. That is, the treatment of investments was perceived as dealing with the legal regime of the investment to be respected by the Host States in conformity with its international obligations, whatever the national organs (whether legislative, executive, or judicial) concerned with the actual application of this regime.

223. Part III of the World Bank Guidelines illustrates this basic approach. In its discussion of "treatment", it covers in particular: fair and equitable treatment;³⁸² treatment as favorable as that accorded to national investors in similar circumstances;³⁸³ full protection and security;³⁸⁴ treatment that does not discriminate among foreign investors on the grounds of nationality;³⁸⁵ the prompt issuance of necessary licenses and permits;³⁸⁶ authorizations for the employment of key foreign personnel;³⁸⁷ the free transfer of revenues earned by or related to the investment;³⁸⁸ the reinvestment of proceeds of the investment within the territory of the Host States;³⁸⁹ and finally the prevention and control of corrupt business practices and the promotion of accountability and transparency in dealings with foreign investors.³⁹⁰ While some of these concepts encompass well-known customary international law obligations binding upon States in respect of foreign investors' access to fair and efficient procedures for the domestic administration of justice,³⁹¹ nothing within the Guidelines' discussion of "treatment" even touches upon the international (as

³⁸² World Bank Guidelines, above note 381, Part III.2.

³⁸³ Ibid at Part III.3(a).

³⁸⁴ Ibid.

³⁸⁵ Ibid at Part III.3.(b).

³⁸⁶ Ibid at Part III.5(a).

³⁸⁷ Ibid at Part III.5(b).

³⁸⁸ Including salaries earned by foreign personnel, debt payments related to the investment, liquidation proceeds of the investment, and any amounts paid to the investment by reason of the Host State's expropriation of or other interference with the rights of the investment. Ibid at Part III.6.1(a)-(e).

³⁸⁹ Ibid at Part III.7.

³⁹⁰ Ibid at Part III.8.

³⁹¹ The Dissenting Opinion points out that the concept of fair and equitable treatment "includes proper and timely access to dispute settlement, as well as observance of judicial and administrative due process. Relatedly, there is no doubt that under customary international law as well as modern investor-State jurisprudence denial of justice is closely linked to, if not a part of, the fair and equitable treatment requirement." (Dissenting Opinion of Charles N. Brower at para 20.) The Tribunal agrees. Yet this does not alter the fact that these concepts, along with all of the case law to which the Dissenting Opinion points in its footnotes 59-60, concern States' obligations in carrying out the domestic administration of justice. There is no basis for asserting that the inability of a claimant to proceed directly to international arbitration against a State constitutes a denial of justice, or that the 18-months proviso somehow prevents claimants from obtaining proper and timely access to dispute settlement or otherwise violates Argentina's duty to observe judicial and administrative due process.

distinguished from domestic) settlement of disputes. In fact, the **Guidelines** reference the international settlement of investor-State disputes only once, and in an entirely separate section,³⁹² thus suggesting that “treatment” and international dispute settlement were viewed at the time as separate issues.³⁹³

224. The Tribunal recognizes that the **World Bank Guidelines of 1992** were and are a “soft law” instrument by nature and that they do not purport to shed any direct light on the meaning of the word “treatment” as used in the **German-Argentine BIT’s MFN clauses**. The **Guidelines** nevertheless provide an indication of the prevailing view among the community of states during the period contemporaneous to the adoption of the **German-Argentine BIT**. Neither disputing party has adduced any evidence to suggest that either Argentina or Germany maintained a distinctive definition of treatment in the early 1990s that departed from the basic concept prevailing among the international community of states at that time, as reflected in the **Guidelines**. This leads the Tribunal to observe that there is, at the least, some evidence that the term “treatment” was likely meant by the two State Parties, at the time of the conclusion of the **BIT**, to refer to the Host State’s direct treatment of the investment and not to the conduct of any international arbitration arising out of that treatment. While this evidence runs counter to the Claimant’s position, it is not of a sufficient weight to be outcome determinative. The Tribunal would indeed hesitate to make a definitive pronouncement as to the intended scope of the **Treaty’s MFN clauses** on the basis of an isolated examination of the quite general word “treatment”. The **Treaty** however provides several other textual clues all pointing in the same direction. When considered in the aggregate, these textual clues do lead to a definitive conclusion. The Tribunal now continues to examine each in turn.

³⁹² In a most classical way, **Section V of the Guidelines** provides for the possible resolution of investment disputes either by recourse to national courts or to “the agreed mechanisms including conciliation and binding independent arbitration”, the latter including “any ad hoc or institutional arbitration agreed upon in writing by the State and the investor or between the State and the investor’s home State where the majority of the arbitrators are not solely appointed by one party to the dispute”.

³⁹³ The **Dissenting Opinion** suggests that, because the overall document title is “World Bank Guidelines on the Treatment of Foreign Direct Investment,” this somehow implies that each and every topic discussed within the **Guidelines** constitutes a type of “treatment”. This suggestion is puzzling. A document’s title cannot function as more than a summary of its general topic, let alone an exhaustive statement of its entire contents. Shakespeare’s *Hamlet*, for example, contains many passages which do not directly refer to the fictional person in question.

d) Limiting effect of the words “in its territory” on the scope of the MFN clauses

225. One salient textual feature of the German-Argentine BIT’s three MFN provisions is that all three guarantee MFN treatment by the Host States in its territory.³⁹⁴ In other words, the MFN guarantees are territorially limited. Notably, the concept of territorial application is explicit throughout the German-Argentine BIT. Article 1(1) defines qualifying investments territorially; Article 2 territorially limits the States’ obligations in respect of fair and equitable treatment and arbitrary or discriminatory measures; Article 4 does likewise for the States’ obligations concerning full legal protection and security, expropriation, and losses in cases of war or other conflict. Indeed, nothing in the Treaty obligates the State Parties to act in any particular manner outside of their own territories.

226. The territorial limitation upon the German-Argentine BIT’s MFN formulations appears quite standard within the investment treaty universe. Indeed, with only one exception, every MFN clause addressed in each of the publicly available investor-State awards that the Tribunal has been able to examine has contained a territorial reference.³⁹⁵ The ubiquity of the phrase is striking. This is particularly so when one considers how the words “in its territory” may operate

³⁹⁴ The English translation of Article 4(4), as prepared by the disputing parties, faithfully conveys the territorial limitation of the original languages, translating the German (“genießen... im Hoheitsgebiet der anderen Vertragspartei Meistbegünstigung”) and Spanish (“gozarán en el territorio de la otra Parte Contratante del trato de la nación más favorecida”) as “shall enjoy most-favored-nation treatment in the territory of the other Contracting Party”. In Articles 3(1) and 3(2), however, the disputing parties’ English translation misconstrues the qualifier “in its territory” by attaching it to the word “investments” rather than to the word “treatment”. The mistake is perhaps understandable, as the translation was prepared primarily from the German original, which – because of the highly complex sentence structure of the German language – arguably renders the intended reference point of the phrase “in its territory” uncertain. By contrast, Articles 3(1) and 3(2) of the Spanish both clearly attach the phrase “in its territory” to the word “treatment”. Since the final sentence of the BIT states that both the Spanish and German versions of the text are equally “binding” or “authentic”, this minor inconsistency is easily resolved by Article 33(3) of that Vienna Convention, according to which the terms of a treaty are presumed to have the same meaning in each authentic text. In case of difference, Article 33(4) directs that the meaning which “best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.” Applying these rules to the present discrepancy: since the Spanish text is clear as to the proper placement of the qualifier “in its territory” while the German text leaves the question open, the interpretation given by the Spanish text must be preferred.

³⁹⁵ The sole exception is the MFN clause in the Belgium/Luxembourg-Soviet BIT discussed in *Vladimir Berschader and Moise Berschader v. The Russian Federation*, Case No. 080/2004, Arbitration Institute of the Stockholm Chamber of Commerce, Award (21 April 2006) [hereinafter “*Berschader*”] (Todd Weiler dissenting). That BIT states rather generically that “the most favoured nation clause shall be applied to investors of the other Contracting Party in all matters covered by the present Treaty”, without bothering to define the content of “the most-favoured nation clause” so referenced. However, given that the words “in its territory” have been consistently included in nearly all other BITs’ MFN clauses, it seems at least likely that the BelgoLux-Soviet BIT’s reference to “the MFN clause” also implicitly incorporates this phrase.

to limit an MFN clause's use of the general word "treatment". 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.³⁹⁶

227. This observation is of critical importance. It is noteworthy that the resolution of an investor-State dispute within the domestic courts of a Host State would constitute an activity that takes place within its territory. Thus, if a Host State were to accord to the investors of some third State more favorable rights in relation to domestic dispute resolution than the rights accorded to the investors of the other contracting State party to the BIT, this could give rise to a violation of the MFN clause.³⁹⁷ This position indeed accords with general international law principles on the international responsibility of States.³⁹⁸ As is well known, a state is internationally responsible for the conduct of its internal organs, including judicial ones, as reflected in Article 4 of the ILC's Draft Articles on State Responsibility.³⁹⁹

228. The same cannot be said, however, of international arbitration, which almost without exception takes place outside the territory of the Host State and which per definition proceeds independently of any state control. This leads to an important result. Assuming, contrary to the Tribunal's above findings, that an unbounded reference to the word "treatment" was generally understood by the international community of states in 1991 as encompassing not only

³⁹⁶ Despite its professed affinity for the Roman law maxim *expressio unius est exclusio alterius*, the Dissenting Opinion overlooks this problem with the Claimant's proposed interpretation of the MFN clauses.

³⁹⁷ The *Ambatielos* dispute provides a classic example of a case falling squarely within the bounds of the traditional territorial limitation on the operation of MFN clauses. In *Ambatielos*, Greece invoked an MFN clause in order to obtain for its national a type of treatment in the domestic courts of the Host State (the UK) which the UK had accorded by treaty to the nationals of certain third states and which Greece alleged to be more favorable than the treatment accorded to Greek nationals within the UK's domestic courts.

³⁹⁸ Under a State responsibility analysis, there is no doubt that a number of principles of treatment – including in particular the non-discrimination and fair and equitable treatment principles – bind Host States not only during the period of the carrying out of the investment but also after it, if and when the occasion for dispute resolution arises. This much is certain at least in so far as the adjudicative bodies engaged in this dispute resolution are acting at the national level. In other words, a State must be held responsible for any breach of the rules of treatment binding upon it which has been committed by any of its organs, including its national courts when acting at the "procedural" stage. If, knowing of the investor's claim, a national court ignores one of the rules of treatment binding upon the Host State, it will create a situation giving rise to the international responsibility of that State toward the other State party to the BIT. Within the framework of a treaty claim under a BIT, this implies that the Host State also becomes directly internationally responsible toward the foreign investor having the nationality of the other State.

³⁹⁹ Article 4 states: "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions..." (emphasis added).

“substantive” protections but also the international dispute resolution provisions of investment treaties, the German-Argentine BIT’s specific MFN clauses nevertheless do not reach international arbitration here. The Host State’s obligation extends no further than providing the covered investor with “treatment” in respect of domestic dispute resolution (aka dispute resolution “in its territory”) that is no less favorable than the domestic dispute resolution treatment provided to third-State investors.⁴⁰⁰

229. Nor can it be said that a Host State’s consent to grant foreign investors access to particular forms of international dispute resolution under particular conditions necessarily takes place within the Host State’s territory, such that the Host State’s consent to such arbitration would fall within the scope of the MFN obligation. States are at liberty to give their consent to international treaty commitments anywhere in the world; they need not do so within their own territories.⁴⁰¹

230. In short, it seems that 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 found in many BIT’s MFN clauses, including those in the present matter. 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 supporting evidence – that the Contracting Parties to the present Treaty implicitly intended to include international dispute resolution within the purview of the MFN clauses. If such were their intent, it would seem strange that they should impose a territorial limitation so at variance with that aim.

231. More importantly, to base a conclusion solely upon the arguably open-textured nature of the word “treatment” without giving due account to the limiting effect of the words “in its territory” would be to run afoul of the Vienna Convention’s requirement that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context”. To do so would also risk violating the principle of effectiveness in relation to the limiting phrase “in its territory”, as those words would essentially be

⁴⁰⁰ The present Claimant has not alleged that it would receive less favorable treatment than other foreign investors within the Argentine courts.

⁴⁰¹ Indeed, many international treaties are concluded in locations lying outside of the territory of both of the contracting state parties. They are not, for this reason, any less binding, nor is their territorial application altered by the place of their conclusion.



disregarded.⁴⁰² With respect, the **Dissenting Opinion** commits a fundamental error in finding that **Article 10(2) of the BIT** (the domestic courts proviso) itself constitutes treatment “in the territory” of Argentina. **Article 10(2)** is a provision of an international treaty – nothing more or less. It no more constitutes treatment in the territory of Argentina than does the **BIT’s preamble**, its **definition of investment (Article 1)**, or for that matter its **provisions on ratification and entry into force (Article 12)**.⁴⁰³ The present Tribunal therefore holds that the **Treaty’s** clearly expressed territorial limitation upon the scope of its **MFN clauses** establishes that the Contracting State Parties to the **German-Argentine BIT** did not intend for the **Treaty’s** extra-territorial dispute resolution provisions to fall within the scope of those clauses.

e) Significance of distinction between treatment of investments and treatment of investors “with respect to their activities in connection with investments”

232. Turning to the next textual query, it has already been noted that the **Treaty** contains more than one MFN provision. **Article 3(1)** guarantees MFN treatment to qualifying investments, while **Articles 3(2)** and **4(4)** guarantee MFN treatment to qualifying investors “with respect to their activities in connection with investments”. This raises the question as to whether the Contracting State Parties intended for the word treatment to mean something different when used in connection with “investments” as opposed to “investors.” The Tribunal finds no support in the

⁴⁰² The **Maffezini** tribunal appears to have erred in this respect when it cited Spain’s practice of pursuing direct access to international arbitration for Spanish investors abroad as evidence of its intent to allow direct access to international arbitration for foreign investors in Spain (in circumvention of the **basic BIT’s clear 18-month domestic remedies requirement**). Whatever may have been **Spain’s** practices in soliciting protections for its own investors abroad, those were activities which occurred outside the territory of Spain, and thus could not possibly run afoul of either the **MFN standard** or the **national treatment standard**. In the **BIT** that was under consideration in **Maffezini**, both of those standards contained the usual limiting territorial phrase. See **Maffezini**, above note 114 at paras 61 and 64.

⁴⁰³ For the same reason, the Tribunal cannot accept the **Hochtief majority’s** recent characterization of Argentina’s decision to invoke the **Treaty’s 18-months proviso** as an act taking place within the territory of Argentina. (See **Hochtief – Majority Opinion**, above note 345, paras 107, 111.) If sovereign states are free to conclude international treaty provisions amongst themselves, then surely they are entitled to rely upon those treaty provisions without this reliance itself constituting a treaty-violating or treaty-altering type of “treatment” of third-party beneficiaries. The **Hochtief** tribunal posited an alternative ground for finding that the **German-Argentine BIT’s** territorial limitation was satisfied – namely, because the consequences or effects of the domestic courts proviso would be felt by the claimant within Argentina.⁴⁰³ This argument, though more subtle, is equally misplaced. One can conceive of myriad international agreements whose provisions may impact upon investors operating within the territorial boundaries of Argentina. Examples include treaties addressing climate change, intellectual property rights, financial regulation, competition policy, human rights, peace and security, and countless other topics. Argentina’s negotiation of and adherence to such treaties would not automatically constitute direct “treatment” of foreign investors by Argentina within its territory merely because they generate some effects which are felt within Argentina.

text for such a difference. The Treaty defines both “investment”⁴⁰⁴ and “activities in connection with an investment” in broad terms.⁴⁰⁵ The parallel breadth of these definitions suggests that the Treaty’s grant of MFN treatment to both investors and investments was intended to be complementary and not differential. The MFN guarantees offered to the two categories might even be co-extensive, for it is difficult to imagine a type of MFN treatment enjoyed by an investment that could not correspondingly be claimed by a qualifying investor in connection with that investment.⁴⁰⁶

233. Moreover, the explanation for the Treaty’s distinction between investments and investors in Article 3 becomes evident when one recalls the second major guarantee provided by Article 3: that of national treatment. Investors are granted MFN and national treatment only in respect of their “activities in connection with investments” so that they may not lay claim to the myriad of non-investment-related personal rights and privileges that may be afforded by the Host State to its own citizens.⁴⁰⁷ No such limitation was necessary in Article 4(4), since that MFN clause applies only in respect of the particular investment protections enumerated in sub-paragraphs 4(1)-(3). In

⁴⁰⁴ Article 1(1) of the Treaty provides:

“The term ‘investment’ shall include any kind of investment in accordance with the laws of the Contracting Party in whose territory the investment is made in accordance with this Treaty, in particular, but not limited to:

- (a) moveable and immovable property and any other property rights such as mortgages and liens;
- (b) shares or stock in a company or any other form of participation in a company;
- (c) claims to money which has been used to create an economic value or claims to any performance hailing an economic value;
- (d) intellectual property rights, in particular copyrights, patents, utility patent models, industrial designs or models, trade or service marks, trade names, trade or business secrets, technical processes, know-how, or goodwill;
- (e) business concessions under public law, including concessions to search for or exploit natural resources”.

⁴⁰⁵ Paragraph 2 of the Protocol, reproduced in para 208 above, is careful to emphasize that its broad definition of “activity” is illustrative and not exclusive.

⁴⁰⁶ The *Renta4* tribunal articulated it well:

“Whether MFN treatment is stated in the relevant BIT to relate to investors rather than investments is in principle of no moment. Investors will not claim access to international arbitration by way of MFN treatment in the abstract. They will assert a breach and harm in connection with a qualifying investment under the relevant BIT.”

Renta4, above note 309 at para 101

⁴⁰⁷ Examples might include rights to health care, education, pension schemes, or even the right to vote in political elections.

any event, since all three MFN provisions utilize the general word “treatment” and all three are limited by the territorial qualification, the Treaty’s distinction between MFN treatment for investors and MFN treatment for investments cannot constitute evidence that one or the other type of MFN protection was intended to encompass the Treaty’s international dispute resolution provisions. The Tribunal’s above analysis applies equally to all three MFN clauses.⁴⁰⁸

f) Significance of the MFN clauses’ failure to refer to “all matters” subject to the Treaty

234. The disputing parties have also debated whether the German-Argentine BIT’s promise of MFN treatment to investors and their investments evinces a narrower intended field of application than other BITs promising MFN treatment “in all matters subject to” the BIT. Several arbitral tribunals interpreting BITs of this latter variety have stressed the “broader” formulation of this phrase, citing it as evidence that such BITs were intended to include international dispute resolution within the scope of the MFN clause, even if BITs specifying only MFN “treatment” were not. Likewise, some tribunals interpreting BITs lacking the phrase “all matters” have cited the omission in support of their decisions to deny the extension of the MFN clause in question to the treaty’s dispute resolution provisions.⁴⁰⁹ Within the investor-State dispute context, this line of argument extends back to the *Maffezini* tribunal, which stated:

“The Tribunal also notes that of all the Spanish treaties it has been able to examine, the only one that speaks of ‘all matters subject to this Agreement’ in its most favored nation clause, is the one with Argentina. All other treaties, including those with Uruguay and Chile, omit this reference and merely provide that ‘this treatment’ shall be subject to the clause, which is of course a narrower formulation.”⁴¹⁰

235. The *Berschader* tribunal, however, devoted ten paragraphs to the observation that “all matters” cannot really refer to all matters, since some matters covered in BITs – such as their

⁴⁰⁸ For this reason the Tribunal finds it unnecessary to parse the meaning of Article (2)(a) of the BIT’s Protocol. The Tribunal agrees that, “[t]aken in their ordinary meaning, the ‘management use, enjoyment, and disposal of an investment’ necessarily entail the defense and exercise of legal rights via dispute settlement mechanisms” (Dissenting Opinion of Charles N. Brower at para 22). This explains why the MFN clauses must be read as guaranteeing most-favored nation treatment to German investors in respect of Argentina’s domestic administration of justice. But the Protocol nowhere authorizes the Tribunal to jettison the MFN clauses’ clear territorial limitation.

⁴⁰⁹ This was in particular the view of the *Wintershall* tribunal, which addressed the interpretation of the very same BIT that is at issue here. See *Wintershall*, above note 330 at para 172.

⁴¹⁰ *Maffezini*, above note 114 at para 60. See also *Gas Natural*, above note 113 at para 30; *InterAguas*, above note 113 at para 55. Indeed, even before *Maffezini*, the arbitral commission in the *Ambatielos* matter seemed to suggest that this type of phrase might be particularly significant. See *Ambatielos II*, above note 363 at p. 107.

temporal and territorial application, their provisions on denunciation and renewal, etc – cannot be extended by means of an MFN clause.⁴¹¹ By logical inference then, if some matters are necessarily omitted from the MFN clause’s reference to “all matters”, who is to say whether international investor-State dispute resolution is or is not among the omitted matters? The *Plama* tribunal, which denied extension of an MFN clause to a BIT’s international dispute resolution provisions, considered that the omission of the phrase “with respect to all matters” could “not alleviate the doubt”.⁴¹² The *Siemens* tribunal, which reached the opposite outcome, seems to have agreed that the phrase was not determinative,⁴¹³ and at least two tribunals besides *Siemens* have found that a BIT’s MFN clause could extend to international dispute settlement provisions even absent any reference to “all matters” subject to the agreement.⁴¹⁴

236. The position of the present Tribunal is simply that the absence of the expression “all matters” – a phrase that is indicative of an intention on the part of some contracting State parties to cover the largest scope possible – is consistent with the conclusions which the Tribunal has already reached on the basis of its analysis of the terms “treatment” and “in its territory” in the *German-Argentine BIT*. The omission constitutes a supplementary indication that Germany and Argentina, at the time of the conclusion of the *Treaty*, did maintain a distinction between the Host State’s direct treatment of investments within its territory and the international settlement of investor-State disputes.

g) Significance of the exceptions to MFN treatment listed in Articles 3(3) and 3(4)

237. Some tribunals have relied upon the Roman law principle *expressio unius est exclusio alterius* to conclude that, where a treaty lists certain exceptions to MFN treatment, any treatment not specifically excluded is necessarily covered by the MFN clause.⁴¹⁵ These tribunals have pointed to exceptions concerning preferential treatment accorded by one State to investors of a third State by reason of a customs union, regional economic integration area, or double taxation

⁴¹¹ See *Berschader*, above note 395 at paras 184-194.

⁴¹² *Plama*, above note 349 at para 205.

⁴¹³ *Siemens*, above note 71 at para 103.

⁴¹⁴ See *National Grid*, above note 113 and *RosInvest v. The Russian Federation*, Case No: Arbitration V 079/2005 Arbitration Institute of the Stockholm Chamber of Commerce, Award on Jurisdiction (Oct 2007) [hereinafter “*RosInvest*”].

⁴¹⁵ See eg *National Grid*, above note 113 at para 82. See also *InterAguas*, above note 113 at para 56 (applying the principle without naming it); and *Siemens*, above note 71 at paras 83-86 (same).

treaty as evidence that the contracting parties intended to include international dispute resolution provisions within the scope of the MFN clause.

238. The **German-Argentine BIT** also includes these standard exceptions.⁴¹⁶ The present Tribunal does not, however, view the presence of these exceptions as an indication that the State Parties intended to include the **Treaty's** international investor-State dispute resolution provisions within the scope of its MFN commitments. This is so for two reasons. First, the **MFN treatment exceptions mentioned in the German-Argentine BIT** – like those found in most BITs – refer exclusively to types of treatment normally occurring within the territory of the Host State. Tax treatment, the extension of trade advantages resulting from customs unions, etc – all of these standard exceptions conform to the MFN clause's territorial limitation while the availability or form of international dispute resolution does not. It is therefore necessary for contracting State parties to explicitly exclude the former but not the latter from the scope of a territorially bound MFN clause if such is their intent.

239. Second, wherever one may stand on the debate over “substantive” investment protections versus “procedural” dispute resolution mechanisms – it cannot be denied that all of the typical exceptions to MFN treatment observed in international investment treaties (at least in treaties concluded prior to the advent of the **Maffezini** decision) deal exclusively with the contracting States' direct treatment of foreign investments, never with the international resolution of investor-State disputes arising out of that treatment.⁴¹⁷ Overlooking the obvious differences between rights and remedies would seem to push the principle *expressio unius est exclusio alterius* too far. One cannot use the principle to prove the non-existence of apples based upon the existence of

⁴¹⁶ See **Articles 3(3) and 3(4) of the BIT**, reproduced in para 206 above.

⁴¹⁷ The **Dissenting Opinion** attempts to explain away this fact, stating: “the Award neglects to mention that most if not all species of allegedly ‘direct’ treatment enumerated as exceptions to MFN treatment in the BIT entail specific mechanisms of dispute settlement, usually outside the territory of the host State” (**Dissenting Opinion of Charles N. Brower at para 35**). This argument amounts to a sleight of hand, since all of the examples cited by the **Dissenting Opinion** involve State-to-State international dispute resolution, not investor versus State. There would have been no need for the Contracting State Parties to specify that the **BIT's MFN clauses** could not be invoked by investors to reach the State-to-State international dispute resolution provisions of these other treaties. Investors may not initiate such proceedings in any event. It must further be noted that at the time of the conclusion of the **German-Argentine BIT**, there were no known examples of regional trade agreements containing investor-State dispute settlement provisions. The first such hybrid agreement – the **North American Free Trade Agreement** – was signed by Canada, the United States and Mexico in 1992 and went into force in 1994. (See generally the materials available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta>). And even the **Maffezini** tribunal disavowed the invocation of a BIT-based MFN clause to reach the international investor-State dispute settlement provisions of that “highly institutionalized system of arbitration.” (**Maffezini**, above note 114 at para 63.)

oranges. The exclusion of certain types of domestic substantive treatment from the German-Argentine BIT's Article 3 MFN clauses therefore does not imply the inclusion of particular types of extra-territorial dispute resolution procedures. Indeed, it seems more likely that the Contracting State Parties, acting as they were prior to *Maffezini*, did not explicitly exclude international investor-State dispute resolution provisions from the scope of the MFN clauses simply because they never considered such an invocation of the clause to be possible.⁴¹⁸

h) Requirement that the comparator treatment invoked must be more favorable

240. Pursuant to the MFN guarantees in Article 3 of the BIT, the Contracting State Parties may not, in their territory, subject the investments or investors of the other Contracting Party to treatment that is “less favorable” than that accorded to third States’ investors and investments. Article 4(4), within its more limited sphere of application, articulates the same idea in inverse terms, requiring the Contracting States to afford “most-favored-nation treatment”. Thus, the BIT's MFN clauses apply only where the treatment accorded under the Basic Treaty is less favorable or the treatment under a comparator treaty is more favorable. Since this Tribunal has already concluded that the wording of Articles 3 and 4 of the BIT as centred on the phrase “treatment in its territory” does not permit it to agree with the Claimant’s thesis, it is not strictly necessary to examine the requirement that the comparator treatment invoked must be more favorable. Even if such an examination were necessary, the Tribunal could not at present reach the same conclusion as the Claimant on this point.

241. The words “less” and “more” are, by their nature, relative terms. They necessitate a comparison between the two types of treatment invoked. Arbitral tribunals have adopted varying approaches, but surprisingly few have actually engaged in any kind of comparative scrutiny. Some appear to have accepted without question the claimant’s characterization of a comparator treaty’s dispute resolution provisions as more favorable. This was the case, for example, with the *Maffezini* and *Siemens* tribunals.⁴¹⁹ Other tribunals have made explicit findings, but in

⁴¹⁸ The Tribunal addresses this issue in paras 262-279 below (discussing the relevance of prior and subsequent treaty practice).

⁴¹⁹ *Maffezini*, above note 114 and *Siemens*, above note 71. A variation on this approach was employed by the *Renta4* majority, which suggested that since investors rationally believe international arbitration may be more favorable to them than domestic dispute resolution, this necessarily renders “greater access” to international arbitration more favorable. *Renta4*, above note 309 at paras 86 and 100.

conclusory fashion, without providing any reasoning.⁴²⁰ Still other tribunals appear to have equated “no less favorable” with “same”. In the words of one tribunal:

“granting a treatment to Spanish investors that is no less favorable than that granted to French investors would mean that the Spanish investors would be able to invoke international arbitration against Argentina on the same terms as French investors.”⁴²¹

242. Yet neither the ILC in its Draft Articles on MFN clauses nor the much-cited *Ambatielos* arbitral commission conflated MFN treatment with equal treatment, nor did they express any unease with the task of objective comparison. The ILC specifically eschewed any reference to the word “equal” in its Draft Articles on MFN clauses.⁴²² In explaining why, the Commission’s Commentary acknowledged that “the notion of ‘equality of treatment’ is particularly closely attached to the operation of the most-favoured-nation clause.”⁴²³ It also pointed out, however, that “equal” is not the same as “identical”. This implies “different” does not automatically mean “less favorable”. Rather, the point of MFN clauses is to ensure overall equality of treatment in the sense of creating a level playing field between foreign investors from different countries, even if this is sometimes accomplished through non-identical means.

243. More fundamentally, however, the “different = less favorable” hypothesis proves false in situations where the provisions of the basic treaty may actually be more favorable than those of the comparator treaty. As the ILC noted, “while most-favoured-nation treatment excludes preferential treatment of third States by the granting State, it is fully compatible with preferential treatment of the beneficiary State by the granting State”.⁴²⁴ Any tribunal called upon to interpret and apply an MFN clause must therefore satisfy itself that the comparator treaty provision invoked by means of the clause is indeed more favorable than that of the basic treaty. This

⁴²⁰ See eg *Gas Natural*, above note 113 at para 31 (“access to [international] arbitration only after resort to national courts and an eighteen-month waiting period is a less favorable degree of protection than access to arbitration immediately upon expiration of the negotiation period”).

⁴²¹ *InterAguas*, above note 113 at para 55 (emphasis added). See also *AWG*, above note 113 at para 55 (same quote, but referring to investments rather than investo

⁴²² ILC Commentary on Draft MFN Articles, above note 364 at p. 22, para 5.

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*

requires an objective determination by the tribunal; an invoking party's bald assertions will not suffice.⁴²⁵

244. Applying these principles to the present matter, the Tribunal could not endorse the Claimant's proposed use of the MFN clause unless it could determine that the dispute resolution provisions of Article 10 of the German-Argentine BIT (the "Basic Treaty") are objectively less favorable than those of Article X of the Chilean-Argentine BIT (the "Comparator Treaty").⁴²⁶ Article X of the Comparator Treaty allows investors to proceed to international arbitration immediately upon fulfilment of a 6-month negotiation period.⁴²⁷ The Claimant asserts that this is

⁴²⁵ The arbitral commission's decision in *Ambatielos* provides a classic example. In that decision, the tribunal undertook a searching comparative analysis of the basic and comparator treaties' provisions on the administration of justice. It eventually found that the comparator treaties' provisions were not actually more favorable, and therefore the MFN clause did not apply to the matter before it. *Ambatielos II*, above note 363 at pp. 107-110. Despite frequently citing to the decision and lauding its finding that dispute resolution provisions may potentially fall within the reach of an MFN clause, many recent investor-State arbitral tribunals seem to have overlooked this crucial aspect of the commission's approach.

⁴²⁶ As noted by one commentary, "it would be invidious for international tribunals to be finding (in the absence of specific evidence) that Host State adjudication of treaty rights was necessarily inferior to international arbitration." McLACHLAN, SHORE AND WEININGER, *INTERNATIONAL INVESTMENT ARBITRATION, SUBSTANTIVE PRINCIPLES* (Oxford University Press, 2008), p. 257.

⁴²⁷ Article X of the Chile-Argentina BIT, titled "Settlement of disputes relating to investments", provides as follows:

- (1) "Any dispute relating to an investment within the meaning of the present Treaty, between one Contracting Party and a national or company of the other Contracting Party, shall, to the extent possible, be resolved by amicable consultations between the parties to the dispute.
- (2) If the dispute has not been resolved within a period of six months from the moment when a complaint was lodged by one or other of the parties, it shall be submitted at the option of the national or company:
 - either to the national jurisdiction of the Contracting Party implicated in the dispute;
 - or to international arbitration in the conditions described in paragraph 3.

Once a national or company has submitted the dispute to the jurisdiction of the relevant Contracting Party or to international arbitration, this election of one or the other of these proceedings shall be definitive.

- (3) In case of recourse to international arbitration the dispute shall be raised before one of the following designated arbitral organs at the election of the national or company:
 - The International Centre for Settlement of Investment Disputes (ICSID), created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature in Washington the 18th of March 1965, if each State party to the present agreement has ratified that Convention. So long as this condition is not fulfilled, each Contracting Party gives its consent that the dispute may be submitted to arbitration in accordance with the Additional Facility Rules of ICSID;

more favorable than **Article 10 of the Basic Treaty**, which requires investors to first submit the dispute to the domestic courts of Argentina for 18 months before proceeding to international arbitration. On the other hand, **Article X of the Comparator Treaty** contains a **fork-in-the-road clause**, whereas **Article 10 of the Basic Treaty** does not. Thus, an investor operating under the **Basic Treaty's dispute resolution provisions** receives two bites at the apple: once before the domestic courts, and – if the investor is still not satisfied – again before an international arbitral tribunal. An investor operating under the **Comparator Treaty**, by contrast, receives only one chance to obtain a satisfactory outcome. Such an investor must choose either domestic or international dispute resolution, and once the choice is made, it is irrevocable.⁴²⁸ Which provision is more favorable, then?

245. It might be tempting to simply accept the Claimant's assertion that the **Comparator Treaty** is more favorable under the assumption that it must be more favorable if the Claimant prefers it. The problem, however, is that claimants' preferences are subjective. It is certainly conceivable that some future claimant may instead prefer to have two successive chances for a favorable outcome under the **Basic Treaty** rather than proceed immediately to international arbitration under the **Comparator Treaty**. This is particularly so since recent trends indicate that the costs of international arbitration may be quite high relative to the costs of domestic dispute

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- An ad hoc arbitral tribunal established in accordance with the rules of the United Nations Commission on International Trade Law (UNCITRAL).
- (4) The arbitral tribunal shall decide on the basis of the provisions of the present Treaty, the law of the Contracting Party to the dispute, including its rules on conflict of laws, and the terms of any specific agreement concluded in relation to the investment as well as the relevant principles of international law.
 - (5) The decisions of the arbitral tribunal shall be definitive and binding upon the parties to the dispute.
 - (6) The Contracting Parties shall abstain from pursuing, through diplomatic channels, arguments concerning any arbitration or judicial process in progress and up until after the proceedings have been concluded, unless the parties to the dispute have not complied with the award of the arbitral tribunal or the sentence of the ordinary court under the terms of implementation established in the award or sentence.”

(Tribunal's translation).

⁴²⁸ See **Article X(2) of the Chile-Argentina BIT** *ibid.* The Tribunal notes that the both of the other comparator BITs invoked by the Claimant contain similar fork-in-the-road clauses. See **United States-Argentina BIT at Article VII(3)(a)** and **Panama-Argentina BIT at Article 9(2)**.

resolution,⁴²⁹ and the average time required to resolve disputes via international arbitration may equal or exceed that of domestic court processes.⁴³⁰

246. Simply accepting a claimant's assertions, therefore, could lead to a situation wherein the terms "more" and "less" favorable have no objective meaning at all, but rather depend upon the whim of the individual claimant in each particular case. It is difficult to believe that the Contracting State Parties to the BIT intended to commit themselves to international legal obligations which derive not from an objective appreciation of the text of the Treaty but from the subjective perceptions of individual claimants.

247. Moreover, under Article 10 of the Germany-Argentina BIT, if the Claimant submits its claims to the domestic courts of Argentina for 18 months and does not obtain satisfactory results within that period, it remains at liberty to pursue international arbitration thereafter. Should it opt to do so, it will be in a position to submit to an international arbitral tribunal objective evidence of its treatment in the domestic courts of Argentina – including the actual costs expended therein, any recompense obtained, and any opportunity costs suffered by reason of the delay in the full satisfaction of its claims. In other words, the Claimant could add to its other claims an additional claim concerning its treatment in the Argentine courts, which if proven would be fully compensable, with interest, in the same manner as any other treaty violation. That is to say, any

⁴²⁹ A 2005 UNCTAD study (now probably somewhat outdated) stated the following concerning the costs of international investment arbitration:

"A cursory review of cost decisions in recent awards suggests that the average legal costs incurred by Governments are between \$1 million and \$2 million, including lawyers' fees, the costs for the tribunal of about \$400,000 or more, and the costs for the claimants, which are about the same as those for the defendant."

"Investor-State Disputes Arising from Investment Treaties: A Review", UNCTAD Series on International Investment Policies for Development (2005), available at: www.unctad.org/en/docs/iteiit20054_en.pdf at p. 8.

⁴³⁰ The present arbitration, which was first registered on 2 August 2004 (nearly 8 years ago), provides a case in point. As a statistical matter, one recent study found that the average duration of ICSID cases decided through 1 July 2009 was 3.6 years (1325 days), with the shortest case lasting 1.2 years and the longest lasting 10.5 years. Sinclair, Fisher, and Macrory, "ICSID Arbitration: How long does it take", *Global Arbitration Review Journal*, Vol. 4, Issue 5 (2009). The present arbitration has already exceeded the ICSID average. The Tribunal was not provided with reliable independent information indicating the average duration and cost of domestic Argentine court proceedings. Argentina has asserted, however, that its courts can and do regularly dispose of some matters within less than 18 months. Respondent's Reply Memorial on Jurisdiction, para 55 and note 81, citing Respondent's Exhibits: "Judgments of the Argentine Supreme Court" (A RA 20), "Injunctions (A RA 21), and "Final Judgments" (A RA 22).

violation due to less favorable or discriminatory treatment would be compensated in accordance with the ordinary general international law principle of full reparation.⁴³¹

248. The BIT provides two avenues under which the Claimant could proceed. The first is provided by the MFN clauses themselves⁴³² and the second by its arbitrary and discriminatory treatment clause.⁴³³ Both sets of clauses protect German investors such as the Claimant from suffering less favorable treatment than that enjoyed by foreign investors under other BITs. If domestic dispute resolution turns out to be ineffective, the Claimant can recuperate the costs of this process in its subsequent international arbitration proceedings.⁴³⁴ On the other hand, if the Claimant's claims are resolved to its satisfaction in the Argentine courts in a timely and cost efficient manner, then the Claimant will have no basis for either an MFN claim or a discriminatory treatment claim and will have no need to proceed to international arbitration.

⁴³¹ This principle would allow the Tribunal to take account not only of the Claimant's actual legal costs within the Argentine courts for the duration of the 18-month requirement, but also the opportunity costs associated with the delay in the resolution of the claims. Such a calculation presents its challenges, to be sure, but no more so than the calculation of damages due for the violation of any other treaty provision.

⁴³² Since the treatment received by the Claimant in the Argentine courts would constitute treatment within the territory of the Host State, the territorial limitation of the BIT's MFN clauses would no longer pose a problem. The subsequently concerned arbitral tribunal could therefore consider, in light of the objective evidence, whether Argentina has violated its MFN commitments by forcing the Claimant – in order to vindicate its legal rights – to incur costs and delays in excess of those faced by similarly situated claimants under third-state BITs. This would, of course, require said tribunal to make a definitive finding to the effect that the treatment of an investor within the Host State's domestic courts does fall within the purview of the Treaty's MFN clauses, even if international dispute resolution does not. In this Tribunal's view, such a finding follows naturally from a plain reading of the MFN clauses.

⁴³³ Even if the BIT's MFN clauses did not provide sufficient protection, Article 2(3) of the BIT provides the Claimant with a second avenue for remedying any less favorable treatment ultimately experienced by reason of its compliance with the 18-month domestic courts requirement. Under Article 2(3):

“Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, use, enjoyment, or disposal of investments of nationals or companies of the other Contracting Party in its territory.”

Requiring German investors to fruitlessly (if such turns out to be the case) expend time and resources in the domestic Argentine courts in order to vindicate their treaty-based legal rights while exempting Chilean investors from the same requirement could be viewed as a discriminatory impairment of German investors' rights. This is so even if Argentina could articulate a good policy reason for requiring some foreign investors, but not others, to first submit their claims to the domestic courts.

⁴³⁴ It should be noted that this would not require the Claimant to make out a denial of justice claim concerning its treatment in the Argentine courts. Nor would it require the subsequent arbitral tribunal to sit in review over the actions of the domestic courts. Rather, the sole question would be whether the Claimant, in order to vindicate its legal rights, was discriminatorily (on the grounds of its nationality) forced to bear costs in excess of those imposed upon investors from third countries.

249. In either case, the basic purpose of the MFN clauses will have been fulfilled. The Claimant will have been treated at least as well as the investors of third States. It will have experienced no competitive disadvantage as a result of the 18-month domestic courts submission requirement.⁴³⁵ At the end of the day, the Claimant will have enjoyed, alongside other foreign investors, a “fundamental equality without discrimination among all of the countries concerned”.⁴³⁶

250. This Tribunal need not worry, therefore, that rejecting the Claimant’s bid to skip over the Basic Treaty’s 18-month domestic court submission requirement will result in the Claimant receiving treatment, in the territory of the Host State, that is ultimately less favorable than that extended to Chilean investors under the Comparator Treaty. The Claimant may have to follow a different procedural route than similarly situated Chilean investors. But that route will, at worst, ultimately protect the Claimant’s rights⁴³⁷ on an equal par with those investors. At best, it may even do so more quickly or cheaply. The weight of the arguments therefore does not indicate that the Comparator Treaty’s dispute resolution provisions are objectively more favorable than those of the Basic Treaty. As a consequence, the Basic Treaty’s MFN clauses do not presently come into play. This finding is without prejudice to any MFN claims the Claimant may present at the merits stage upon satisfaction of the Treaty’s jurisdictional pre-requisites.

i) Relationship between the Article 3 MFN clauses and the Article 4 MFN clause

251. The final textual puzzle to be addressed is as follows: does the relationship between the MFN clauses in Articles 3 and 4 of the Treaty reveal anything about whether or not the Treaty’s international dispute resolution provisions fall within the ambit of one or more of the clauses? The parties have once again made disputing submissions concerning this question. As the Tribunal has noted, Article 4(4)’s MFN clause applies only in respect of the specific protections enumerated in Article 4, whereas the MFN clauses in Articles 3(1) and 3(2) appear to apply more generally. In the present matter, the Claimant’s claims concerning expropriation as well as full

⁴³⁵ The Dissenting Opinion expresses concern that if a foreign investor “subjected itself willingly to a process prescribed under the BIT, foregoing MFN protection in the process,” it would then be foreclosed from bringing an MFN claim in a subsequent arbitral proceeding (Dissenting Opinion of Charles N. Brower at para 38). This concern is unfounded, since the claimant would not have “foregone” MFN protection but would have rather fulfilled the necessary condition precedent to claiming such protection before an international tribunal.

⁴³⁶ *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952, I.C.J. Reports 1952, p. 176.

⁴³⁷ Including its MFN rights.

legal protection and security fall within the scope of Article 4(4). Its claim concerning fair and equitable treatment, arbitrary and discriminatory treatment, and the free transfer of payments all fall within the scope of Articles 3(1) and 3(2). What is not clear is whether the specific protections provided in Articles 4(1)-(3) of the Treaty simultaneously enjoy the MFN guarantees of Articles 3(1)-(2) and that of Article 4(4), or whether the latter MFN clause ousts the operation of the former two in respect of Article 4.

252. The *Siemens* tribunal concluded that Article 4(4) of the German-Argentine BIT was inserted *ex abundante cautela*, because the protections listed in Articles 4(1)-(3) are of particular importance to foreign investors.⁴³⁸ This may be so, although recent trends in investor-State arbitration suggest that the fair and equitable treatment guarantee (which appears in Article 2) may be at least as important to many investors, if not more so.

253. Whatever the explanation for the separate MFN clauses, it is in any event irrelevant to the present inquiry. The disputing parties have submitted no persuasive evidence as to the overlapping or distinctive scope of application of the Treaty's MFN clauses. Even if they had done so, a determination one way or the other would have no effect upon the outcome. As discussed above, the use of the word "treatment" is common to all three MFN clauses, as are the limitations that the treatment invoked must be one occurring within the territory of the Host State and must be either "more" or "less" favorable than the parallel treatment under some comparator treaty. It makes little difference, therefore, whether the Claimant requests that an allegedly more favorable comparator dispute resolution provision be applied to all of its claims under Articles 3(1) and 3(2) or whether it invokes Articles 3(1)-(2) in relation to some claims and Article 4(4) in relation to others. The same considerations apply in either case.

j) Meaning of the MFN clauses in light of the objects and purposes of the BIT

254. The Tribunal has analyzed the meaning of the constituent components of the German-Argentine BIT's MFN clauses by probing their ordinary meaning in context. In so doing, the Tribunal has throughout its analysis born in mind the objects and purposes of the Treaty, as required by Article 31(1) of the Vienna Convention. It has not undertaken a separate three-step analysis of each Treaty term – one step focusing on ordinary meaning, another on context, and another on the "light" of the Treaty's object and purpose – because in the Tribunal's view the

⁴³⁸ *Siemens*, above note 71 at para 90.

Vienna Convention posits these as interrelated elements of a holistic approach to treaty interpretation rather than as a set of discrete and sequential steps. It nevertheless seems prudent to make a few explicit comments about the objects and purposes of the **BIT** so as to clarify the Tribunal's approach.

255. The **German-Argentine BIT** expresses its objects and purposes in rather general terms in its **Preamble**, which reads:

“Desiring to intensify economic cooperation between both States,
Intending to create favorable conditions for investments by nationals or companies of one State in the territory of the other State,
Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both States,
Have agreed as follows:”

256. As formulated, the States resolved to encourage, protect, and create favorable conditions for investments in order to: a) intensify economic cooperation (an amity objective); b) stimulate private business initiative (an economic growth objective); and c) increase the prosperity of both States (a welfare objective). It is important to note that these latter three points represent the ultimate or outcome-based objectives of the States in concluding the **Treaty**, for which the encouragement, protection, and creation of favorable conditions for investment serve as the chosen instruments.

257. **Articles 1 through 11 of the Treaty**, as well as the **Protocol**, go on to specifically define the manner in which the Contracting Parties mutually agreed to promote and protect investments in pursuit of the **Treaty**'s specified objectives. The **German-Argentine BIT** thus conforms to the classical nature of bilateral treaties between States: it commits the Contracting Parties to mutually and reciprocally pursue a chosen set of objectives within a framework that both Parties have deemed to be acceptable.

258. In considering the application of this framework to the present matter, one must bear in mind that the Contracting State Parties adopted all of the provisions of the **Treaty** together as a whole. In one fell swoop they nodded their assent not only to the **BIT**'s objects and purposes, as expressed in the **Preamble**, but also to the various treatment standards set forth in **Articles 1 to 9 (including the MFN clauses)** as well as the international dispute resolution procedures set forth in **Article 10**. This indisputably evinces the State Parties' belief that all of these provisions –

including Article 10's requirement of an 18-month submission of any claims to the domestic courts of the Host State – are perfectly consistent with the objects and purposes of the Treaty.

259. The Claimant asserts that dispensing with the 18-month requirement, as the Argentina-Chile BIT has done, would be more consistent with the objective of investment protection and promotion. In a similar vein, the Dissenting Opinion asserts that allowing investors to choose between different types of international dispute settlement “options” is inherently more favorable to investors and therefore more conducive to investment promotion than not providing them with options.⁴³⁹ With respect, both of these approaches confuse the real issue. The question is not whether allowing the Claimant to import all or portions of a comparator BIT's investor-State dispute resolution clause would better protect and promote investment,⁴⁴⁰ nor whether the Claimant would prefer to be able to do so,⁴⁴¹ but rather whether Germany and Argentina, in concluding the BIT, agreed to protect and promote investment in that particular manner. This question cannot be answered by reference to external opinions as to which types of dispute resolution may best protect and promote investment in the abstract. Nor can it be answered by reference to a claimant's preference for more options over fewer options. It can only be answered by reference to the scope of the State Parties' consent as expressed in the German-Argentine BIT.

260. The foregoing analysis of the Treaty's text has revealed no indication whatsoever that the Contracting Parties did, in fact, consent to protect and promote investment in the specific manner invoked by the Claimant. Indeed none of the formal textual indicia examined herein – let alone the balance of the indicia when examined collectively – affirmatively establishes the Contracting State Parties' consent to submit themselves, at the whim of individual investors, to a wide variety of different possible combinations of international dispute resolution provisions contained within third-party treaties.⁴⁴² The same conclusion holds even if one were to limit the Claimant's

⁴³⁹ Dissenting Opinion of Charles N. Brower at para 36.

⁴⁴⁰ Whether in the Claimant's view or that of the Tribunal.

⁴⁴¹ For another critique of this investor “choice” argument, see *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (21 June 2011) [hereinafter “*Impregilo*”], Concurring and Dissenting Opinion of Brigitte Stern, at paras 11-12 and 105-107.

⁴⁴² In this regard, the Tribunal notes that the Dissenting Opinion of Judge Brower provides no indication whatsoever that the State Parties consented to submit to the jurisdiction of an international arbitral tribunal in the circumstances raised by this case. The most that can be said is that the word “treatment,” standing on its own, is general enough to potentially encompass international investor-State dispute settlement. But this argument falls away as soon as the word “treatment” is examined in connection with the limiting phrase “in its territory.” Thus, the open-textured nature of the word “treatment” falls well short of fulfilling the international law requirement that a State's consent to submit to the jurisdiction of an international tribunal must be established and not merely presumed.

“options” to supplanting the entirety of the Basic Treaty’s investor-State dispute resolution article with the entirety of the Comparator Treaty’s corresponding article. Since, as noted above, the international dispute resolution provisions of Article 10 of the Basic Treaty are not objectively less favorable than those of the applicable Comparator Treaty,⁴⁴³ it would be incorrect to characterize the Claimant’s position as more compatible with the Treaty’s objects and purposes than the Respondent’s position. For these reasons, a separate consideration of the Treaty’s objects and purposes does not assist the Claimant here.

k) Supplementary indications from state practice and international jurisprudence

261. The Tribunal’s interpretation of the Treaty’s text in accordance with Article 31 of the Vienna Convention has shown that the Claimant’s proposed use of the BIT’s MFN clauses does not fall within the scope of the ordinary meaning of those clauses in their context and in the light of the Treaty’s object and purpose. An examination of relevant supplemental materials pursuant to Article 32 of the Vienna Convention serves to confirm this conclusion. The Tribunal will begin with a consideration of the state practice of Argentina in the period immediately surrounding the conclusion of the German-Argentine BIT.

262. In relation to the 18-month domestic courts proviso, Argentina presented evidence of its prior and subsequent treaty practice in its submissions at the oral hearings. Appendices 1 and 2 below show 29 of Argentina’s bilateral investment treaties in chronological order according to the date of signing and the date of entry into force, respectively. The tables also indicate, for each treaty, whether or not it included the 18-month domestic courts requirement that is in contention in this case. According to this evidence, of the 29 BITs signed by Argentina with various States between 22 May 1990 and 17 May 1994, ten treaties contained the 18-month domestic courts submission requirement while the other 19 did not. Only 17 of the 29 treaties concluded have so far entered into force. Of these, nine contain the 18-month domestic courts requirement while eight do not.

263. It is instructive to consider the chronology of these treaties in light of the principle of contemporaneity and the principle of effectiveness (“*effet utile*”). As can be seen from Appendix 1, if Argentina had intended for its BITs’ MFN clauses to apply to their international dispute resolution provisions, then it included the 18-month domestic courts submission requirement in

⁴⁴³ See above, paras 241-251

no less than five subsequent treaties (those with Spain, Canada, Austria, the Netherlands, and South Korea) for no good reason at all. If one takes dates of entry into force (Appendix 2) as the relevant metric, then Argentina needlessly and inexplicably included the domestic courts provision in nine subsequent treaties,⁴⁴⁴ including the German-Argentine BIT

264. These patterns would seem strange indeed if the Claimant's assertions concerning the MFN clauses were accepted. In that case, the principle of effectiveness would be violated with respect to the noted treaties, because the 18-month domestic courts requirement would have been void *ab initio* – immediately superseded by means of the treaties' MFN clauses.⁴⁴⁵ The principle of contemporaneity avoids this incongruity by preferring the interpretation consistent with Argentina's demonstrated treaty practice – namely, that Argentina did not in 1991 understand the phrase “treatment in the territory of the host state” as extending to the BIT's international arbitration procedures.

265. As to the state practice of Germany, a cursory examination reveals that the 18-month proviso does not feature in the vast majority of Germany's other contemporaneous BITs. This suggests that while Germany was willing to agree to the proviso in the context of its negotiations with specific Latin American countries,⁴⁴⁶ it did not place particular importance upon the 18-month domestic courts requirement as a general policy matter. This does not imply, however, that the German Government in 1991 embraced the Claimant's proposed interpretation of the MFN clauses. On the contrary, there are indications within Germany's state practice suggesting that the German Government – like the Argentine Government – never contemplated (let alone endorsed) a possible invocation of the MFN clauses in the manner now proposed.

⁴⁴⁴ Those with Spain, Sweden, the UK, Canada, Italy, Germany, Belgium/Luxembourg, the Netherlands, and Austria. The Tribunal notes that two of these treaties (the Netherlands and South Korea treaties) were negotiated and signed at a time when at last one treaty omitting the 18-month requirement (the Poland treaty) was already in force.

⁴⁴⁵ The Dissenting Opinion suggests that Argentina's practice of including the 18-month proviso in some later treaties would not have been pointless, since claimants remain at liberty to comply with the proviso should they so wish (Dissenting Opinion of Charles N. Brower at para 28). This “choice” argument is disingenuous in light of the Dissenting Opinion's insistence that direct access to international arbitration is inherently more favorable to claimants than international arbitration only following a mandatory 18-month domestic court proceeding. In addition, if, in concluding its later treaties, Argentina understood compliance with the 18-month proviso to have become optional, then it is difficult to understand why it continued to word the proviso in mandatory terms.

⁴⁴⁶ See also Treaty between the Republic of Chile and the Federal Republic of Germany concerning the promotion and reciprocal protection of investments, signed 21 October 1991, at art. 10 (containing the same 18-month domestic courts requirement), available at: http://www.unctad.org/sections/dite/ia/docs/bits/chile_germany_sp.pdf.

266. Prior to concluding its BIT with Argentina, Germany had concluded other BITs authorizing investors to access international arbitration without any sort of prior recourse to the domestic courts.⁴⁴⁷ The Claimant's theory would imply that Germany, upon signing the German-Argentine BIT, already recognized and accepted the inapplicability of the 18-month domestic courts proviso to any potential investment claims by Argentine investors against the German Government. In that case, one would expect Article 10 of the BIT to reflect this asymmetrical state of affairs. Yet the Contracting State Parties worded Article 10 in entirely symmetric language. There is no indication that – despite the reciprocal and bilateral nature of the rest of the Treaty – Germany consciously consented to proceed directly to binding international arbitration with Argentine investors in circumstances in which similarly situated German investors would not be entitled to proceed directly to binding international arbitration against Argentina.⁴⁴⁸ This inconsistency provides yet another indication that the Contracting State Parties did not subscribe to the Claimant's proposed interpretation of the MFN clauses at the time of the Treaty's conclusion.

267. From this starting point, it becomes necessary to examine whether the meaning of the phrase “treatment in its territory” has evolved over time in order to see whether an evolutive interpretation is required in the present instance.⁴⁴⁹ Such an interpretation would only be permissible in the face of convincing evidence, reflected by state practice, doctrinal analysis and international case law, that a coherent and generally accepted new meaning of the phrase has since been accepted by states, and in particular by Argentina and Germany. In this regard, it is striking to note that movements towards an enlargement of the scope of this phrase have stemmed not primarily from state practice but from the investor-State arbitral case law. It was the Maffezini decision of 25 January 2000 that, for the first time, initiated an enlarged interpretation of the scope of “treatment” so as to cover not only investment protection standards but also

⁴⁴⁷ See e.g. Treaty between the Federal Republic of Germany and Bolivia concerning the promotion and mutual protection of investments (with protocol), signed 23 March 1987, at art. 11, available at: http://www.unctad.org/sections/dite/ia/docs/bits/germany_bolivia.pdf.

⁴⁴⁸ Since Argentina had not yet concluded any BITs omitting the 18-month requirement.

⁴⁴⁹ Contrary to the assertion of the Dissenting Opinion, this does not entail an “abandonment” of the principle of contemporaneity. (Dissenting Opinion of Charles N. Brower at para 27.) Rather, the principle of contemporaneity has revealed that the Contracting States did not likely endorse the Claimant's proposed interpretation of the MFN clauses' use of the phrase “treatment in the territory of the host State” at the time of the conclusion of the BIT. The Tribunal now turns to consider whether, in the alternative, the Contracting States have since altered their original understanding of the Treaty's terms so as to subsequently embrace the Claimant's proposed interpretation.

international dispute resolution provisions of BITs.⁴⁵⁰ It need hardly be stated that a BIT's MFN clause should not now be interpreted in an evolutionary manner solely because some investor-State tribunals have followed, either in toto or in part, the interpretation initiated by one arbitral award which, with due respect to its talented authors, remains one of the most highly controversial awards in the history of contemporary investor-State arbitration.

268. A brief look at the ways in which various investor-State tribunals and States have since resolved the question proves that neither the arbitral community nor more importantly (as public international law is not made primarily by arbitrators) common state practice has yet reached a consensus whereby an MFN clause's reference to "treatment in the territory of the host State" may nowadays be understood as covering the international settlement of disputes. To-date, at least nine known investor-State arbitral panels have found that a particular BIT's MFN clause could be used to modify its international dispute resolution provisions⁴⁵¹ while another ten have reached the opposite result.⁴⁵² Eminent arbitrators have come down on opposite sides of the debate, sometimes with respect to the very same treaty – including the Treaty presently under consideration.⁴⁵³ This relatively even split shows that there is as yet no established *opinio juris*.

269. The Dissenting Opinion attempts to discount the bulk of the contrary authority by asserting that those cases dealt with factually distinct situations.⁴⁵⁴ With respect, this is a distinction without a difference. It is true that nine out of eleven arbitral panels have allowed claimants to circumvent the 18-month domestic courts requirement of various Argentine BITs in

⁴⁵⁰ Maffezini, above note 114 at paras 38-64.

⁴⁵¹ See RosInvest, above note 414; Maffezini, above note 114; Siemens, above note 71; National Grid, Gas Natural, Camuzzi 2, InterAguas, and AWG, all above note 113 (in contrast to the dissent, the Tribunal considers the InterAguas and AWG awards as comprising only a single finding, as they were issued around the same time by the same panel of arbitrators and are, in large part, nearly verbatim identical); Impregilo, above note 441 (Brigitte Stern dissenting); and Hochtief, above note 345 (Christopher Thomas dissenting).

⁴⁵² See Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003); Salini v. Jordan, above note 69; Plama, above note 349; Berschader, above note 395; Telenor Mobile Communications A.S. v. The Republic of Hungary, ICSID Case No. ARB/04/15 Award (13 Sep 2006); Wintershall, above note 330; Renta4, above note 309 (Charles Brower dissenting); Mr. Tza Yap Sum v. The Republic of Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (19 June 2009); Austrian Airlines v. the Slovak Republic, UNCITRAL, Final Award (9 Oct 2009) (redacted version) (Charles Brower dissenting); and ICS v. Argentina, above note 303.

⁴⁵³ The Wintershall and Siemens tribunals reached opposite conclusions concerning the German-Argentine BIT whose interpretation is at issue in the present case. Most recently, the Hochtief majority came down on the side of the Siemens tribunal, while the dissent sided with the Wintershall outcome.

⁴⁵⁴ Dissenting Opinion of Charles N. Brower at paras 23-24.

reliance upon MFN clauses.⁴⁵⁵ It is also true, however, that several of the ten arbitral tribunals denying the applicability of MFN clauses to BITs' international dispute resolution provisions have severely criticized both the reasoning and the outcome of the cases embraced by the **Dissenting Opinion**.⁴⁵⁶ This is not surprising, given that none of the cases finding in favor of MFN-generated extensions of jurisdiction has pointed to any principled textual basis for distinguishing between those international dispute settlement provisions which may be altered by operation of an MFN clause and those which may not. Nor does the **Dissenting Opinion** identify any such basis.⁴⁵⁷

270. The legal question before the Tribunal is: did the Contracting State Parties intend for the **MFN clauses of the Basic Treaty** to alter the scope of their consent to submit to the jurisdiction of an international arbitral tribunal, at the option of the investor, by reference to the international dispute settlement provisions of all existing and future comparator treaties? The particular type of alteration sought by the Claimant is of no moment in answering this question, because the treaty clauses themselves do not distinguish as to type. The **Dissenting Opinion**'s attempt to draw a distinction is especially baffling in light of the fact that its distinguished author has already

⁴⁵⁵ **Ibid** at n. 67.

⁴⁵⁶ See e.g. *Salini*, above note 69 at paras 113-115; *Plama*, above note 349 at paras 216-227; *Wintershall*, above note 330 at paras 179-184. See also *Impregilo*, above note 451; **Separate Opinion of Brigitte Stern**. For scholarly critiques, see Zachary Douglas, "The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation Off the Rails," *Journal of International Dispute Settlement*, Vol. 2, No. 1, (2011), pp. 97-113; Brigitte Stern, "ICSID Arbitration and the State's Increasingly Remote Consent: A Proposal for the Maffezini Case," in STEVE CHARNOVITZ, DEBRA STEGER AND PETER VAN DEN BOSSCHE (EDS) *LAW IN THE SERVICE OF HUMAN DIGNITY. ESSAYS IN HONOUR OF FLORENTINO FELICIANO* (Cambridge University Press, 2005), pp. 246-260.

⁴⁵⁷ The **Dissenting Opinion** criticizes the *Wintershall* tribunal for expressing concern that expansive interpretations of MFN clauses could allow claimants even to change the **Basic Treaty**'s designated arbitral forum, e.g. from ICSID to UNCITRAL (**Dissenting Opinion of Charles N. Brower** at para 25). But the Tribunal notes that the **Dissenting Opinion** is careful not to disapprove of that possibility. In fact, Judge Brower has on at least one occasion gone so far as to suggest the application of MFN clauses to achieve a still greater feat. Namely, in **footnote 6 to his Austrian Airlines dissent** (above note 452), he stated:

"While we need not decide the point, as it has not been put before us, I pose the question whether, even if the Treaty is interpreted as barring arbitration of all claims for violation of substantive provisions of the Treaty itself, it properly can be construed as precluding an importable 'new' substantive provision [an umbrella clause, in that case] from bringing with it an associated right to arbitration."

In other words, Judge Brower envisions some circumstances wherein an MFN clause may authorize a claimant to engage in international arbitration against a state under a basic treaty which contains no investor-State arbitration clause at all.

found in favor of MFN-generated enlargements of a tribunal's jurisdiction in some of the very circumstances he now distinguishes and on the basis of the same reasons he now cites.⁴⁵⁸

271. As far as the evolution of state practice is concerned, one must respectively consider the practice of the Treaty's Contracting State Parties and that of other states. The disputing parties have submitted no evidence concerning the subsequent state practice of Germany that would tend to indicate any change in or clarification of that country's position.⁴⁵⁹ The Tribunal notes that the most recent German Model BIT neither explicitly accepts nor rejects the Maffezini holding. It does, however, retain the territorial limitation upon the scope of the MFN clause.⁴⁶⁰

272. As for Argentina, as noted by the National Grid tribunal:

“after the decision on jurisdiction in *Siemens*, the Argentine Republic and Panama exchanged diplomatic notes with an ‘interpretive declaration’ of the MFN clause in their 1996 investment treaty to the effect that, the MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.”⁴⁶¹

Obviously, an interpretive declaration issued by a State after a treaty-based interpretive dispute has already arisen cannot be considered as a definitive guide to the State's original intentions – particularly when the declaration relates to a different treaty. It merits notice, however, that the Panama-Argentina BIT does not include the 18-months domestic courts proviso. Its dispute resolution provisions are instead similar to those of the Chile-Argentina BIT relied upon by the Claimant. The fact that Argentina and Panama nevertheless went out of their way to distance themselves from the understanding adopted by the *Siemens* tribunal is therefore indicative of their mutual disapproval of that holding.

⁴⁵⁸ See *Austrian Airlines*, above note 452, Separate Opinion of Charles N. Brower (finding, in circumstances where the basic treaty stipulated that the scope of an international arbitral tribunal's jurisdiction was limited to claims concerning the amount or method of payment of compensation once the occurrence of an expropriation had already been found by the domestic authorities, that an MFN clause nevertheless entitled the tribunal to: 1) determine the preliminary question as to whether an expropriation had occurred, and 2) decide the claimant's fair and equitable treatment and full protection and security claims); see also *Renta4*, above note 309, Separate Opinion of Charles N. Brower, at paras 5-24 (reaching the same result on the basis of an MFN clause whose application was expressly limited to the fair and equitable treatment standard).

⁴⁵⁹ The Tribunal is not aware of any instance in which Germany, as a respondent State in a BIT-based arbitral claim, has had to take a position on the legal question raised by these proceedings.

⁴⁶⁰ German Model BIT, 2008, available at: <http://www.italaw.com/investmenttreaties.htm>.

⁴⁶¹ *National Grid*, above note 113 at para 85 (emphasis added).

273. Like the Contracting States' own treaty practices, the recent treaty practices of other States may prove illuminating. This is so because they may clarify whether the understanding of the MFN clause's scope of operation that prevailed among the general international community at the time of the conclusion of the **German-Argentine BIT** has since evolved to acquire a larger scope. In this regard, it should be noted that the only known clarifications issued by other States since the advent of the **Maffezini** decision have gone in the direction of confirming that the Contracting State Parties did not intend for the MFN clauses that are the subject of the clarifications to reach international dispute resolution. This is the case, for example, with the **Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA)**, wherein the parties inserted a footnote into the negotiating history indicating:

“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 dispositions 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.”⁴⁶²

274. **Switzerland and Colombia** likewise appear to have clarified **their investment treaty** practice in reaction to **Maffezini** on at least one occasion. In an agreement signed on 17 May 2006, the parties included an annex, which reads:

“For greater certainty, it is further understood that the most favourable nation treatment ... does not encompass mechanisms for the settlement of investment disputes provided for in other international agreements concluded by the Party concerned.”⁴⁶³

275. Finally, the European Commission (DG Trade), in view of its impending competence to negotiate investment treaties on behalf of the European Community, published an **Issue Paper on 30 May 2006** in which it advanced its suggested scope for any MFN clauses to be included in future EU BITs. It recommended that “[t]he scope of the MFN clause is focused and limited to

⁴⁶² Reprinted in **A.R. Ziegler, “The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)”**, *European Yearbook of International Economic Law* 77 (Dec 2009), p. 93 (emphasis added). The same “vanishing footnote” was also inserted in the draft text of the Free Trade Area of the Americas, which has yet to be adopted. (See fn. 13 to chap. XVII, Free Trade Area of the Americas, draft of 21 November 2003, FTAA.TNC/w/133/Rev.3, available at: http://www.ftaa-alca.org/ftaadraft03/ChapterXVII_e.asp.)

⁴⁶³ **Ibid** at p. 95.

establishment, thus clearly signaling that it could not extend to BIT provisions on expropriation and dispute settlement.⁴⁶⁴

276. It is striking that these statements by Argentina, Panama, Colombia, the DR-CAFTA countries (including the US⁴⁶⁵), the EU Commission, and Switzerland (the latter three together representing a majority of the world's highly developed and capital exporting countries) all converge in signaling that the specified MFN clauses do not, and were never intended to, reach the international dispute resolution provisions of the respectively mentioned investment agreements. By contrast there have been no known clarifications issued in which states have embraced the *Maffezini* holding.⁴⁶⁶

277. The *Dissenting Opinion* attempts to turn all of this evidence on its head, arguing that the clarifications issued by some states in respect of particular treaties prove that the MFN clauses in all other treaties were in fact intended to extend to international investor-State dispute settlement provisions. This argument once again gets the default rules of public international law

⁴⁶⁴ *Ibid* at p. 94. It is of course obvious that this *White Paper* does not represent settled European policy on the question, since the EU organs are still in the process of charting the future EU-wide investment treaty policy. (See *Dissenting Opinion of Charles N. Brower at para 32*.) What may nevertheless be observed is that no EU document has yet been issued endorsing the *Maffezini* approach or suggesting its incorporation into EU policy.

⁴⁶⁵ The Tribunal notes that the United States recently concluded a review of its *2004 Model BIT*. As part of that process, the US State Department commissioned an expert report from the Advisory Committee on International Economic Policy. A sub-group of the Committee members addressed the question of the scope of application of the Model BIT's MFN clause and recommended that the BIT be revised so as to clarify that the MFN commitment does not extend to any international commitments – whether substantive or procedural – undertaken by the United States in its treaties with third countries. (See *Report of the Advisory Committee on International Economic Policy Regarding the Model Bilateral Investment Treaty*, presented to the Department of State, 30 Sep 2009, Annex B: Particular Viewpoints of Subcommittee Members, Collective Statement from Sara Anderson, Linda Andros et al, Part III, Recommendation 5, available at: <http://www.state.gov/e/eeb/rls/othr/2009/131118.htm#1>.) The newly released *US Model BIT of 2012*, however, includes no new provisions relevant to the proper interpretation of any MFN clauses as may in future appear in any new US treaties to be concluded subsequent to the adoption of the *2012 US Model BIT*. It remains to be seen whether the US will adopt the same tactic of incorporating “vanishing footnotes” into its BIT negotiations as it has used when negotiating the investment chapters of its recent preferential trade agreements. In short, no conclusions as to the future state practice of the United States can yet be drawn. All one can say at present is that the US has chosen to disavow the *Maffezini* holding on at least one occasion.

⁴⁶⁶ The *Dissenting Opinion* points to the *UK-Bosnia BIT* as an example of a post-*Maffezini* treaty which “explicitly applies that BIT's MFN clause to that treaty's dispute settlement provisions” (*Dissenting Opinion of Charles N. Brower at para 30*). The *UK-Bosnia BIT*, however, does not appear to constitute a change in or clarification of the UK's policy, as it appears to have been based on a UK model BIT that was already in effect prior to *Maffezini*. The UK's distinctive and consistent policy thus does not imply an evolution in the general understanding shared by the majority of states comprising the international community.

backwards. International law does not construe a State's silence as consent. Neither does it require states to run around disavowing the jurisdiction of international tribunals in order to avoid being ensnared by unanticipated jurisdictional tentacles every time a claimant invents a clever new argument. Each state's consent to submit to the jurisdiction of an international tribunal must be established on the basis of objective indicators. The fact that some States – including Argentina – have chosen to speak out against what they regard as errant rulings by certain investor-State arbitral tribunals provides no such indication here.

278. In sum, none of the treaty materials which the Tribunal has been able to examine in any way suggests that the Contracting State Parties to the **German-Argentine BIT** intended to include international dispute resolution within the purview of the **MFN clauses'** references to the Host State's treatment of investments within its territory. Nor do these materials authorize the Tribunal to interpret the **MFN clauses of the German-Argentine BIT** in an evolutive way so as to achieve the enlarged meaning desired by the Claimant. On the contrary, all of the relevant supplementary materials confirm the conclusion reached by the Tribunal on the basis of the **Treaty's** text.

1) The Dissenting Opinion and the Concurring Statement

279. Judge Brower has seen fit to append a **Dissenting Opinion** in which he disagrees with the Tribunal's MFN analysis in vivid terms. The Tribunal has carefully considered each of the points raised but has found that they fail to establish the consent of the Contracting State Parties to submit to the jurisdiction of an international arbitral tribunal in the circumstances of the present case. Notwithstanding this disagreement, the Tribunal has greatly benefited from the exchange of views which has taken place among the Tribunal members in the course of the deliberations. The Tribunal expresses its sincere gratitude to Judge Brower for the technical precision which his criticisms have contributed to this Award.

280. Professor Bello Janeiro appends a Concurring Statement. He does so in order to explain his reasons for subscribing to this Award, the result of which differs from that of the earlier **Siemens** case, in which Professor Bello Janeiro also participated.

4. Summary of Tribunal's MFN analysis

281. The Tribunal's above analysis has led to the following conclusions:

- (1) The Claimant does not yet have standing to assert its claims under the German-Argentine BIT, because it has not yet satisfied the Treaty's Article 10 conditions precedent to invoke international arbitration. As such, the Tribunal lacks jurisdiction at present to entertain the Claimant's MFN or any other claim.
- (2) The most-favored-nation clauses contained in Articles 3(1), 3(2), and 4(4) of the BIT do not alter this conclusion, as they do not authorize the Claimant to circumvent the conditions precedent to arbitration laid down in Article 10 of the BIT.
- (3) The Treaty's MFN guarantees do not presently apply in any event, as the Claimant has not shown that the dispute resolution process prescribed by Article 10 of the German-Argentine BIT is objectively less favorable to the Claimant than that of any comparator treaty.
- (4) The Claimant remains at liberty, however, upon satisfaction of the Treaty's conditions precedent to arbitration, to assert any retrospective MFN claims it may have in any future arbitration proceeding, including any claims relating to its treatment by Argentina pursuant to the Treaty's 18-month domestic courts proviso.

VII. COSTS

283. Each disputing party has requested the Tribunal to assess the costs of these proceedings against the other party. The Tribunal sympathizes with the Claimant's request in respect of Argentina's first three jurisdictional objections. The first objection was patently groundless while the second and third objections largely repeated objections which Argentina has raised in myriad other cases – each time without success. Nevertheless, the Respondent's assertion of these objections in the context of the present proceedings cannot be said to have been vexatious, particularly considering that it chose to rest on its written pleadings without insisting upon any further discussion of the issues at the oral hearings.

284. With respect to the fourth and fifth objections, the analysis of these questions was difficult and complex. The fourth objection concerned a question that is novel in ICSID jurisdictional practice, while the fifth concerned a point on which the existing jurisprudence is dramatically split. Both parties presented sound legal arguments, and each side ultimately prevailed on some points but failed on others.

285. In light of these considerations, the Tribunal finds it appropriate for the costs of the arbitration to be split evenly between the parties, with each side bearing its own legal costs.

VIII. DECISION OF THE TRIBUNAL

286. For the reasons stated above:

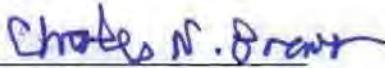
- (1) The Tribunal rejects the Respondent's first, second, third, and fourth objections to the jurisdiction of the Tribunal.
- (2) The Tribunal upholds the Respondent's fifth objection to jurisdiction, and all claims are accordingly dismissed in their entirety.
- (3) All costs of the present arbitration proceedings to-date shall be split evenly between the disputing parties, with each party bearing its own legal costs.

287. It is so ordered.

Done in English and Spanish, both versions being equally authoritative.

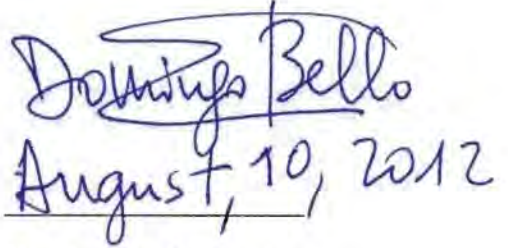


Pierre Marie Dupuy
President of the Tribunal



Charles N. Brower
Arbitrator

AUGUST 15, 2012



Domingo Bello Janeiro
Arbitrator

August 7, 2012

APPENDIX 1: SELECT ARGENTINE BITS BY DATE OF SIGNING

BITs Entered into by Argentina	Signed	18-Month Requirement
Italy	22 May 1990	YES
Belgium/Luxembourg	28 June 1990	YES
United Kingdom	11 Dec 1990	YES
Germany	09 April 1991	YES
Switzerland	12 April 1991	YES
France	03 July 1991	NO
Poland	31 July 1991	NO
Chile	02 Aug 1991	NO
Spain	03 Oct 1991	YES
Canada	05 Nov 1991	YES
United States	14 Nov 1991	NO
Sweden	22 Nov 1991	NO
Turkey	08 May 1992	NO
Egypt	11 May 1992	NO
Tunisia	17 June 1992	NO
Austria	07 Aug 1992	YES
Netherlands	20 Oct 1992	YES
China	05 Nov 1992	NO
Denmark	06 Nov 1992	NO
Hungary	05 Feb 1993	NO
Armenia	14 Apr 1993	NO
Romania	29 July 1993	NO
Bulgaria	21 Sep 1993	NO
Finland	05 Nov 1993	NO
Venezuela	16 Nov 1993	NO
Jamaica	08 Feb 1994	NO
Ecuador	18 Feb 1994	NO
Bolivia	17 Mar 1994	NO
South Korea	17 May 1994	YES

APPENDIX 2: SELECT ARGENTINE BITS BY DATE OF ENTRY INTO FORCE

BITs Entered into by Argentina	Entered into Force	18-Month Requirement
Poland	01 Sep 1992	NO
Spain	28 Sep 1992	YES
Sweden	28 Sep 1992	YES
Switzerland	06 Nov 1992	NO
United Kingdom	19 Feb 1993	YES
France	03 Mar 1993	NO
Canada	29 Apr 1993	YES
Italy	14 Oct 1993	YES
Germany	08 Nov 1993	YES
Egypt	03 Dec 1993	NO
Belgium/Luxembourg	20 May 1994	YES
China	01 Aug 1994	NO
Netherlands	01 Oct 1994	YES
United States	20 Oct 1994	NO
Armenia	20 Dec 1994	NO
Austria	01 Jan 1995	YES
Chile	01 Jan 1995	NO