Abaclat and Others v. Argentina
Dissenting Opinion, Georges Abi-Saab

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Abaclat and Others

(Case formerly known as Giovanna A Beccara and Others)

(Claimants)

and

The Argentine Republic

(Respondent)

Decision on Jurisdiction and Admissibility

Dissenting Opinion

Professor Georges Abi-Saab

I - Introductory Remarks

1 - In spite of my great respect and esteem for my co-arbitrators, I am compelled to part ways with their majority award for imperative reasons of principle, pertaining to substance and method.

2 - Substantively, I consider that this Tribunal faces two glaringly insuperable obstacles that prevent it from taking jurisdiction over the collective mass claims action submitted to it, namely:

a - that the sovereign debt instruments (whether we call them "bonds", "obligaciones", "security entitlements" or otherwise) that are at the basis of these claims, do not constitute a "protected investment" under the ICSID Convention and the Argentina-Italy Treaty (see Section III below), and

b - that this *ad hoc* ICSID International Arbitral Tribunal has no jurisdiction under the ICSID Convention and the BIT over the present collective mass claims action, absent Argentina's consent, nor does it have the power to elaborate new procedures to handle such an action (See Section IV below).

3 - Saying that does not mean that I accept the rest of the majority award. Indeed, one of the basic reasons of my unease with this excessively long award, is its style of turning around the

main issues and drowning them into an ocean of minutia and elaborated details, rather than confronting them frontally and treating them thoroughly. This is why I shall not, in this opinion, enumerate and analyze all the "objects" of my objections, but - while reserving my position on the other preliminary objections of Argentina - shall limit my remarks and analysis mainly to the two fundamental points mentioned above, which overshadow all the others; not, however, before addressing my second level of disagreement.

4 - The second ground of my disagreement with the majority award, is situated at a further remove, at the level of legal method and reasoning, as well as the understanding of some basic principles, rules and concepts of international law, such as jurisdiction and admissibility, and the principles and methods of interpretation ; that which I shall illustrate by using the example of the handling by the majority award of the fourth preliminary objection, based on the requirement of prior consultations and resort to national courts for 18 months before going to arbitration. (See Section II below).

5 - However, before turning to these objections, I have to articulate some basic premises and concepts from which my analysis proceeds.

6 - i) This is technically an international *ad hoc* arbitral Tribunal. It is "*ad hoc*" because specially established to hear one specific case, suit or action. It is "international" because it is rooted in two layers of international treaties : the ICSID Convention and the Bilateral Investment Treaty between Italy and Argentina. As such it functions under, and is governed by international law, and has to be clearly distinguished from "international" commercial

arbitration tribunals, such as those established within the framework of the International Chamber of Commerce, which function under national law and ultimate national judicial control. It is necessary to keep this distinction in mind, as solutions may vary at these two distinct levels; and what is sometimes permissible in municipal law, is not necessarily acceptable in international law.

7 - ii) In international law, all tribunals - not only arbitral, but even judicial - are tribunals of attributed, hence limited jurisdiction (*juridictions d'attribution).* There is no tribunal or system of tribunals of plenary or general jurisdiction (*juridiction de droit commun)* that covers all cases and subjects, barring exceptions falling under - i.e. attributed to - the jurisdiction of a specialized tribunal. This is because, in the absence of a centralized power on the international level that exercises the judicial function through a judicial system empowered from above (or rather incarnating the judicial power as part of the centralized power), all international adjudicatory bodies are empowered from below, being based on the consent and agreement of the subjects (i.e. the litigants, *les justiciables)* themselves (with the very limited exception of tribunals created by international organizations in the exercise of their powers under their constitutive treaties, which are also ultimately based on the consent of the subjects that concluded or adhered to these constitutive treaties).

8 - iii) This is the reason why, the fundamental principle and basic rule in international adjudication, is that of the consensual basis of jurisdiction. It also explains the prominent place of questions of jurisdiction both in the jurisprudence and in the writings on international adjudication. It explains as well the widely shared perception that the first task

of an international tribunal is to ascertain its jurisdiction; and the great care international tribunals take in establishing from the outset, the existence and limits of the consent of the parties before them, on which their jurisdiction is founded.

9 - iv) Jurisdiction as a concept in international law, partakes of its generic meaning in the general theory of law; but is further specified and particularized in function of the fundamental principle of the consensual basis of international adjudication.

10 - The term "jurisdiction" (from the latin "*jurisdictio"*, literally to "pronounce" or "enunciate the law", *dire le droit),* when used in the judicial or adjudicative context, denotes "the legal power of an organ to decide cases (in general) or a case (in particular) by application of law". In other words, it is the empowerment to exercise the judicial function. Thus, jurisdiction refers first and foremost to a *legal power* to exercise a certain type of activity, the judicial function[1].

11 - In English, however, the term "jurisdiction" is also used to designate the "ambit" or "sphere" within or over which this power is exercised, though in other languages, such as French and Spanish, another term is used to designate the "ambit", which is "competence". Some writers and arbitral decisions seem to be oblivious of the primary and more

[1] See different definitions of the term (putting emphasis on power), in *Black's Law Dictionary* (6th ed., 1990) : *Jurisdiction* : A term of comprehensive import embracing every kind of judicial action...It is *the power* of the court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties... Jurisdiction defines *the powers* of courts to inquire into facts, apply the law, make decisions, and declare judgment... The legal right by which judges exercise their authority...*Power* and *authority* of a court to hear and determine a judicial proceeding; and *a power* to render particular judgment in question..." (emphasis added).

fundamental meaning of jurisdiction as power, limiting the term to the ambit of this power. Jurisdiction as ambit is defined as a four-dimensional sphere, by its extent and limits in time (*ratione temporis)* and space *(ratione loci)*, and over subjects (*ratione personae)* and objects or subjects-matters (*ratione materiae).*

12 - v) In international law, because of its consensual basis, jurisdiction as an ambit is analyzed and scrutinized at two different levels, where adjudication is not intended for one case only, but takes place within an institutional setting, either of a standing organ (such as the ICJ) or a framework within which *ad hoc* tribunals are established (such as the PCA and the ICSID) :

a) - "general jurisdiction" which defines the objective range and outer limits of the ambit for all cases, according to the constitutive instrument of the organ (e.g. the ICJ Statute), or the framework convention (e.g. the ICSID Convention;.

b) - "special jurisdiction" which defines the subjective range and limits of the ambit of jurisdiction of the organ in a particular case, according to the specific jurisdictional title bearing the consent of the parties, on the basis of which the case is brought before the organ.

13 - The consent of the parties cannot go beyond the objective limits of the general jurisdiction of the organ, but can restrict its jurisdiction further within these objective limits, by the parties subjecting their consent to additional limits, conditions or reservations. These can relate to any of the four dimensions of the ambit. But they can also relate to the powers of the organ as such (the primary meaning of jurisdiction), as long as this does not touch the hard core requirements of the judicial function, for example by excluding from its powers the

indication of provisional measures.

14 - In case of ICSID arbitration, the jurisdictional title for general jurisdiction is the Convention itself. For "special jurisdiction", the title is usually two-tiered : the BIT between the two States and the consent in writing of the two parties to the dispute.

15 - Thus, for an ICSID *ad hoc* tribunal, a triple-layered consent is usually required. For such a Tribunal to take jurisdiction over a case, it has to ascertain :

a - that the case falls within the jurisdiction of the ICSID as defined by the ICSID Convention and related instruments (Rules of Procedure, etc.);

b - that it falls within the bounds defined by the BIT between the State party to the ICSID arbitration and the national State of the investor (which usually - but not necessarily - also carries the consent of the two states to arbitrate);

c - and that the case is covered by the specific written consent of the parties to the dispute (which can be for the State party, the BIT or another unilateral act bearing its consent. But it can also be a compromissory clause in a contract between the parties; and for the investor it can be the request of arbitration itself).

The Tribunal has to ascertain the existence and scope of the consent of the parties within the limits prescribed by them in each of the above-mentioned instruments.

16 - vii) The requirement to ascertain the existence and scope of consent, while strict and exacting in international law, does not mean the restrictive interpretation of the jurisdictional title (the old theory of interpretation in favour of sovereignty, as far as the State party is

concerned). But it does not mean either its extensive interpretation beyond "the horizon of foreseeability"; i.e. extending jurisdiction to what the party or parties could not have foreseen at the time the treaty was concluded or consent was given. Interpretation is limited here to the establishment of the reality and extent of the consent of the party or parties, at the time it was given.

17 - viii) As with jurisdiction, the concept of admissibility in international law partakes of its generic meaning in the general theory of law, but is further particularized in function of the specificities of international adjudication, including its consensual basis.

18 - Generically, the admissibility conditions relate to the claim, and whether it is ripe and capable of being examined judicially, as well as to the claimant, and whether he or she is legally empowered to bring the claim to court.

19 - It is true that these conditions were adjusted to the specificities of international law, and some additional ones were developed, by way of custom. But none of these conditions has anything to do with the determination of the scope of consent whether to the general or the special jurisdiction of tribunals, contrary to what the majority award asserts (para. 496); these questions being jurisdictional by essence.

II - The Fourth Preliminary Objection

20 - This objection is based on the non-fulfilment by the Claimants of the requirements of prior consultations (or negotiations) and, in case they fail to settle the dispute, resort to local courts for 18 months before going to arbitration. These two conditions are stipulated in paragraphs 1 to 3 of article 8 of the BIT dealing with the settlement of disputes, which constitutes the second layer of the jurisdictional title in the present case (para. 15 above), and the preliminary objection based on them is presented by the Respondent as a plea to jurisdiction.

21 - The majority award rejects this legal characterization on the basis of an incomprehensible distinction between "conditioning its [a State party's] consent to ICSID jurisdiction to the fulfilment of a pre-condition" - which, I presume, would constitute a jurisdictional limitation according to the majority award - and "conditioning the effective implementation of such consent, i.e. the possibility to resort to ICSID arbitration, to the fulfilment of such a pre-condition" (para. 494), which can lead "only - if at all - to a lack of admissibility of the claim" (para. 496).

22 - Abstruseness and the absence of any suggested criterion to effect this distinction apart, I can see no legal or logical objective reason to distinguish between the different conditions, reservations or limitations that parties attach to their consent in the jurisdictional title, be it one or a multi-layered one, as in the present case, and be these reservations or conditions related to the general or the special jurisdiction of the tribunal.

23 - It is true that, under general international law, the two requirements in question are

considered as conditions of admissibility. But when such conditions are included in the jurisdictional title, they condition, like any other reservation inserted in the jurisdictional title, the consent of the party or parties making them, to submit to the jurisdiction of the judicial or arbitral organ, and limit by that much the exercise by the organ of its jurisdiction. In other words, in this case these conditions become conventionally jurisdictional, in addition to being admissibility conditions by their legal nature.

24 - But the fatal blow to the majority opinion's distinction comes from much closer quarters. For the non-adepts at legal analysis, it suffices to read the second sentence of Article 26 of the ICSID Convention ("A contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention"), to discover that such a stipulated requirement conditions the *consent to arbitrate* and not merely "the effective implementation of such consent", whatever that means. As such, it is a limit to jurisdiction, and the plea based on it is a plea to jurisdiction and not to admissibility.

25 - Be that as it may, and regardless of the classification of the objection as a plea to jurisdiction or to admissibility, the result of the non-fulfilment of the requirements should have been the same, the dismissal of the case. But what is even more striking in the treatment by the majority award of these two conditions (under admissibility), is the short shrift it gives them and the cavalier way it disposes of them.

26 - Thus, the requirement of prior consultations, in spite of the peremptory "shall" of article

8/1 of the BIT[2], and the clear text of this paragraph, the majority award practically strikes it out of the treaty, together with the paragraph that stipulates it, on the ground, *inter alia*, that:

> "In the view of the Tribunal, the consultation requirement set forth in Article 8(1) BIT is not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way" (para. 564).

And this is because the provision contains the proviso "to the extent possible". But this proviso is inherent to all "obligations of means" or of "best efforts" (*obligations de moyen),* which would be, according to the majority award's reasoning, devoid of any legal effect and can be simply ignored, rendering the provisions stipulating them totally useless (with no *effet utile)*!

27 - More aggravating still, is the manner in which the majority award treated the second of these requirements, that of resorting to Argentinean tribunals for 18 months before initiating arbitration. Here, the majority award admits that this requirement should have been, but was not complied with by the Claimants. But it immediately adds, at para. 579 : "At the same time, the wording of Article 8 BIT itself does not suffice to draw specific conclusions with regard to the consequence of non compliance with the order established by Article 8", and, at para. 580, that "Claimants' disregard of the...requirement is in itself not yet sufficient to preclude Claimants from resorting to arbitration".

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[2] Article 8 :

1. Any dispute relating to investments that may arise between an investor from one of the Contracting Parties and the other Party, with respect to matters regulated by this Agreement, ***shall*** be, insofar as possible, resolved through amicable consultations between the parties to the dispute" (emphasis added).

28 - These last two sentences are very odd indeed. For no instrument, laying down jurisdictional limits or admissibility conditions, specifies the legal consequences of non observance of these limits or non fulfilment of these conditions. These consequences are embedded in the very legal classification of these as jurisdictional limits or admissibility conditions. According to the general rules of law and rules of general international law, non compliance begets the inevitable legal sanction of dismissing the case, as falling outside the jurisdiction of the tribunal or as inadmissible. Only if the parties want to waive or vary this sanction do they address the effect of non compliance in the instrument. Otherwise, in case of silence, it is the rules of general international law that apply.

29 - Instead, and in spite of its admission that the requirement is obligatory and that it was not fulfiled, the majority award decides to proceed to a "weighing of the interests of the Parties" (para. 582), it concludes that "it would be unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement" (para. 583); adding : "[T]his conclusion derives more from a weighing of the specific interests at stake than from the application of the general principle of futility" (para. 584); before rejecting the preliminary objection.

30 - Here again, the majority award takes the liberty of striking out a clear conventional requirement, on the basis of its purely subjective judgment; that which calls for three remarks.

31 - First, the "balancing of interests", that the majority award arrogates to itself the right to go behind the text (or across the mirror) in order to operate, has already been done, at the appropriate legislative level, by the parties themselves, introducing the requirement in the Treaty, but limiting it to 18 months. And it was reflected or registered in the clear text. It is not open to the Tribunal, which is now called upon to apply it, to put it into question in the name of a rebalancing of interests more to its liking, at the expense of the one agreed by the parties.

32 - Secondly, both the language ("it would be unfair") and the stance of the argument, are those of a tribunal judging *ex aequo et bono*, which is prohibited by the rules of general international law and the ICSID Convention, except by agreement of the parties (Article 42/3); absent which, the judgment is *ultra vires.*

33 - Thirdly, the presumed unfairness derives, according to the majority award, from the fact that "the deprivation of the investor's right to resort to arbitration would, in effect, deprive him of an important and efficient dispute settlement means" (para. 583). Elsewhere in the award, it is even contended that the dismissal of the case would deprive the securities holders of *any* effective means of dispute settlement. **But I beg to differ**. For, apart from the Argentinean courts that the Claimants had not even tried, they could have gone to the chosen fora in the security entitlement instruments, which are neutral fora of major financial centers; or to Italian courts, against the banks that sold them the security entitlements in the bonds, and whose ambiguous role, when later grouped as Task Force Argentina, is strongly contested by the Respondent as having diverted the bondholders from those normal fora for

this type of disputes, towards the extraordinary forum of ICSID arbitration, in order to circumvent their own responsibility.

III - The Ninth Preliminary Objection

34 - This objection is based on the contention that the security entitlements in the Argentinean bonds held by the Claimants, do not constitute a covered or protected "investment" under the ICSID Convention and the Bilateral Investment Treaty between Italy and Argentina; and that, in consequence, the Tribunal has no jurisdiction *ratione materiae* over the case.

35 - This is, to my knowledge, the first ICSID case that involves a sovereign debt bond (or a security entitlement therein), totally unrelated to a specific project or economic operation or enterprise in the borrowing State. It raises a major issue as to the jurisdiction of ICSID tribunals over a vast new field, with incalculable economic and political ramifications.

36 - The assessment of this preliminary objection requires defining what is a protected or covered "investment" under the ICSID Convention and the BIT, and whether the financial security entitlements in question fall within this definition.

37 - In what follows, I shall proceed to address these questions by successive approximations, indicating, where appropriate, the points of my divergence from the majority

award.

Investment under the ICSID Convention in General

38 - Starting with the ICSID Convention, the task is to identify the purport of the term "investment" in paragraph 1 of article 25, which defines the scope of jurisdiction of the Centre as extending "to any legal dispute arising directly out of an investment...". It is to be noted, however, that beyond this mention, the Convention does not provide expressly a definition of what is meant by "investment" for its purposes.

39 - This led to one opinion according to which, since the ICSID Convention does not define "investment", this task is totally abdicated or left to the BIT (or another jurisdictional title, on the basis of which the case is brought before an ICSID arbitral tribunal). In consequence, according to this opinion, there is no need for a "double-barreled" test the claim has to pass, under both the ICSID Convention and the BIT, in order to qualify as an investment. It suffices to qualify only under the BIT (or another jurisdictional title reflecting the consent of the Parties).

40 - This opinion does not withstand scrutiny. That the ICSID Convention does not provide an express definition of investment does not automatically imply that the definition is totally left to the BITs. This is because words have an intrinsic meaning, hence a limited and limiting one, however large and vague it may be (although there is always a penumbra around the limits which provides the margin of interpretation). Without limits, words would

be meaningless, because undistinguishable from one another. The intrinsic meaning of a word, which is its "ordinary" meaning, is further specified by the way it is used and the context in which it is used; and if it figures in a treaty, by the object and purpose of the treaty.

41 - A clear distinction has to be made between the use of the term "investment" in the financial context and in the ICSID context. In financial markets, "investment" covers the acquisition of any kind of assets such as deposit accounts, debt and equity securities, credit default swaps and derivatives.

42 - This over-wide financial concept of investment is fundamentally different from the concept of investment envisaged when drafting the ICSID Convention and followed in its context since. And in the words of the Annulment Committee in *Mitchell v. Democratic Republic of Congo :*

> "It is obvious that the special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to the Convention envisaged"[3].

43 - The *Travaux Préparatoires* of the ICSID Convention reveal the limiting or restricting intent behind the introduction and further qualification of the term "investment" in the provision that became article 25. Thus, in response to concerns about the over-broad jurisdiction *ratione materiae* in the Working Paper which simply referred to "disputes", the

[3] Decision on the Application for Annulment of the Award of 9 February 2004 (1 Nov. 2006). ICSID case No ARB/99/7, para. 25.

Preliminary Draft introduced the term "investment" as a qualifier before "disputes", in defining the ambit of jurisdiction ("any existing or future *investment* dispute of a legal nature")[4].

[4] *History of the ICSID Convention*, vol. I, pp. 110-112.

44 - This was further narrowed in the First Draft : "all legal disputes...arising out of or in connection with any investment"[5]. This formula was in turn strongly attacked as too wide, particularly the clause "in connection with", which was struck out by a vote of 26 to 8, while adding the further qualifier "directly" into the Second (revised) Draft that became the actual formula : "any dispute arising *directly* out of an investment"[6].

45 - The purpose for using the term "investment" in article 25/1 was thus to set objective outer-limits to the types of disputes that can be treated within the ICSID[7]; and that is enough to refute the opinion referred to in paragraph 38 above. It is true that these outer-limits bound a vast ambit, to the point of not being clearly visible to some. But they exist all the same.

[5] *Ibid*. p. 116.

[6] *Ibid.* p. 118.

[7] The exclusion of certain types of transactions, starting with ordinary commercial transactions, i.e. the purchase of goods and services in the normal course of business, was clearly on the mind of the drafters of the Convention, particularly its main architect, A. Broches (*ibid.* Vol II, p. 83). It was frequently reiterated by ICSID Tribunals, e.g. *SGS v. Pakistan*, (Decision on Jurisdiction, 6 August 2003, para. 133) : "...investment...embod[ies] certain core meaning which distinguishes it from 'an ordinary commercial transaction' such as a simple, stand alone, sale of goods or services"; *Phoenix Action v. Czech* Republic (Award 15 April 2009, para. 96) : "There is nothing like a total discretion, even if the definition [of investment] developed by ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITS that anything - like a sale of goods or a dowry for example - is an investment".

46 - Differently put, the term "investment" in article 25/1 of the ICSID Convention, whilst flexible enough, is not infinitely elastic[8]. It leaves much latitude and a wide margin of interpretation and further specification to States in their BITs; but not to the point of rendering it totally vacuous, without any legal effect. In other words, the term has a hard-core that cannot be waived even by agreement of States parties to a BIT[9].

47 - To identify this hard-core, one has to look further into the general context of the ICSID Convention and the circumstances surrounding its elaboration as well as to its object and purpose.

48 - It is most significant that the ICSID Convention was elaborated and the Centre established on the initiative and within the framework of the International Bank for Reconstruction and Development; an institution which concentrated its activities since the early sixties almost exclusively to the second facet of its mandate according to its title, i.e. the "development" of the less developed countries.

49 - The Preamble of the Convention clearly reveals its "developmental" object and purpose,

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[8] See Michael Waibel, "Opening Pandora's Box : Sovereign Bonds in International Arbitration" 101 *AJIL* (2007, No. 4), p. 711 at p. 722.

[9] See *Phoenix Action v. Czech Republic*, *supra* note 7. The Tribunal adds : "...BITs which are bilateral arrangements between two States parties, cannot contradict the definition of the ICSID Convention. In other words, they can confirm the ICSID notion or restrict it, but they cannot expand it in order to have access to ICSID. A definition included in a BIT being based on a text agreed between two States cannot set aside the definition of the ICSID Convention, which is a multilateral agreement".

as a means of encouraging "international cooperation for development, and the role of private international investment therein"; and this by making available "facilities for international conciliation or arbitration", besides the national courts of host States, to settle potential disputes arising from such investments between private foreign investors and those States.

50 - The investment that the Convention seeks to encourage by providing it with an international procedural guarantee is that which contributes to the economic development of the host country, i.e. to the expansion of its productive capacity, a contribution that presupposes a commitment to this task not only of economic resources, but also in terms of duration in time and the taking of risk, with the expectation of reaping profits and/or revenue in return.

51 - The different attempts by ICSID tribunals to capture the essence of this hard-core concept of investment in article 25 and formulate it in terms of criteria or conditions - particularly the classical *Salini* criteria[10]; but also in *Phoenix Action v. Czech Republic*[11]; as well as in the recent *Romak S.A. v. Uzbekistan* case[12] - all turn around the same idea, with minor variations.

[10] *Salini Construttori v. Morocco*, Decision on Jurisdiction, 23 July 2001, ICSID case No. ARB/09/4, para. 55-56).

[11] *Supra*, note 7, at para. 82.

[12] PCA case No. AA 280, Award of 26 Nov. 2009, para. 180, 207, quoted in the majority award, para. 370.

52 - The fact that the *Salini* criteria or the other similar formulations are not expressly laid down in the ICSID Convention does not mean that they do not articulate, perhaps imperfectly, an obligatory requirement of article 25, or that this requirement has no constraining effect if States parties to the ICSID Convention chose to ignore it in their BITs, as the muddled analysis of this issue in the majority award seems at one point to suggest (para. 364, also 351). But the award hedges the issue by contending that in any case, the investment in question satisfies the requirement, at least as formulated in the *Romak v. Uzbekistan* case (para.371); a contention subject to verification below.

53 - What type of investment corresponds to this requirement ? It is worth recalling that the main object and purpose of the Convention was to encourage the flow of private foreign investment into developing countries, by making available an additional international procedural facility or guarantee that counter-balances the host State's regulatory authority over investment and economic activities in its territory; in other words, by providing a neutral international forum in case of dispute, as an alternative to submitting to the jurisdiction of the tribunals of the host State.

54 - Such facility is basically needed by private foreign direct investment, for it is this type of investment that once it is carried out in the host country, for example by building factories or establishing enterprises, falls under the imperium of the host State in terms of legislation and adjudication.

55 - Direct foreign investment is then the "ideal type" of investment (in the Weberian sense

of the term) for ICSID purposes. But does it exhaust the ambit of ICSID jurisdiction *ratione materiae* ? And if not, how far can an alleged investment depart from the ideal type and still be covered by the Convention, i.e. and still be considered as falling within the objective outer- limits set by article 25 ?

56 - This question arises particularly in relation to "portfolio investments" and other financial negotiable products traded in the financial markets, which cover a wide spectrum ranging from standardized instruments such as shares, bonds and loans to structured and derivative products, such as hedges (of currencies, oil, etc.) and credit default swaps.

57 - Such widely dispersed off-the shelf financial products, with their high velocity of circulation and their remoteness, the same as their holders, from the State in whose territory the investment is supposed to take place (being traded within seconds at the touch of a button in capital markets, with no involvement or knowledge of the borrowing country, nor passage through the territory or the legal system of that State), seem at first blush to be worlds apart from the direct foreign investment model, which is usually long negotiated and extensively embedded in the legal environment of the host State.

58 - This raises acutely the question of the conformity of these financial products with the requirements of article 25 and evokes a kind of informal presumption that, because of their intrinsic characteristics described above, they are excluded *per se*, i.e. automatically, from the protected or covered investments under the Convention.

59 - All the same, the empirical evidence reveals that whilst the vast majority of transactions considered by ICSID tribunals to constitute covered or protected investments under the Convention consisted of direct foreign investment, some of these tribunals have also considered negotiable financial products, in certain circumstances, as covered investments. Some BITs also include financial products, or some of them, in their illustrative list of investment.

60 - This practice goes against the presumption that financial products are disqualified *per se* and automatically as protected investment under the Convention; that which led a learned commentator to observe that "[p]ortfolio investment(s)...are not excluded as a rule"[13].

61 - "Not [being] excluded as a rule" simply means that they are not excluded automatically, *per se*. But it also means that they can be excluded in certain cases. In other words, it means that the exclusion or inclusion cannot be operated automatically, on the basis of the mere classification of the instruments *per se*, but has to be done on a case by case basis, depending on other factors and criteria that lie beyond the mere categorization of the instrument in question; factors and criteria that I examine below in relation to the alleged investment in the present case.

Applying the BIT and the Convention to the Alleged Investment

[13] G. Sacerdoti "Bilateral Treaties and Multilateral Instruments on Investment Protection", *Recueil des Cours*, Hague Academy of International Law, vol. 269 (1997), p. 251, at p. 307.

62 - Article 1 (“Definitions”) of the BIT between Italy and Argentina provides in its first paragraph (in the unofficial English translation of Argentina) :

> “For the purposes of this Agreement :
>
> 1. The term ‘investment’ shall mean, in conformity with the legal system of the receiving Country and independently from the legal form adopted or from any other connected legal system, any contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party in the territory of the other, in accordance with the laws and regulations of the latter.
>
> Within this general context, the following are specifically, but not exclusively, considered to be investments :
>
> .....
>
> c. debt obligations, public or private securities or any other right to benefits or services with an economic value, as well as capitalized income;”

63 - The Claimants’ English translation of lit. c. is somewhat different :

> “c. bonds, private or public financial instruments or any other right to performances or services having economic value, including capitalized revenues;”

64 - The Tribunal’s English translation is as follows :

> “c. obligations, private or public titles or any other right to performances of services having economic value, including capitalized revenues;”

65 - Having examined the wording of this provision and the nature of the alleged investment *in casu*, the majority award concludes that : "Claimants purchase of security entitlements in Argentinean bonds constitute a contribution which qualifies as 'investment' *per se* under Article 1(1) of the BIT" (para. 371).

66 - Before reaching this conclusion, the majority award dispenses with the requirements of Article 25 of the ICSID Convention, by examining three alternative theories or views (which it paradoxically counts as two) (para.368). The first is to apply the double-barreled test; but if the alleged investment or contribution satisfies the BIT test, but not the *Salini* test, the former test should prevail, i.e. discarding the requirements of Article 25, according to *Salini* (paras. 363-368). The second view is simply to discard the double-barreled test and require only a BIT test, discarding formally and totally any requirements by the ICSID Convention in this regard! (para. 369). The third view, pays lip service to Article 25 of the Convention by maintaining that, if need be, the term "investment" *per se* in Article 1/1 of the BIT can be analyzed in the same manner as in Article 25 of the Convention, as interpreted in the *Romak v.Uzbekistan* case (para. 371). From which statement the majority award presumably expects the reader to infer and assume that the alleged investment satisfies the criteria of *Romak*, without any further proof or demonstration on the part or the award, which jumps directly to the conclusion that "Claimants' purchase of security entitlements in Argentinean bonds constitute a contribution which qualifies as investment *per se* under Article 1(1) of the BIT" (para. 371).

67 - Be that as it may, this conclusion or finding of the majority award calls for verification

on several levels, namely, (by ascending order of importance) :

i - Do the securities in question really correspond to Article 1/1/c of the BIT ?

ii - Could they be considered as protected investments in Argentina in view of their legal remoteness, the same as their present holders, from Argentina, and the bonds it initially issued ?

iii - Assuming that both preceding questions are answered in the affirmative, do these securities fulfil the substantive conditions of the Convention and the BIT relating to the contribution, particularly the territorial link ?

68 - (i) Concerning the first question : whether the alleged investment is covered by Article 1/1/c of the BIT or not, there is no need to revisit here the controversy over the correct English translation of "obligaciones", and whether it is "bonds" (Claimants), or "debt obligations" (Respondent), or merely "obligations" (Tribunal). On this question I agree with the majority analysis that Article 1/1/c covers financial instruments, and that its language is large enough to encompass the security entitlements in the Argentinean bonds.

69 - (ii) The problem raised by the second question is much more complicated than transpires from the simplistic argument by which the majority award brushes it asides, simply affirming that the bonds and the security entitlements "are part of one and the same economic operation" (para. 359).

70 - The award fails clearly to distinguish between purchases on the primary market, involving the issuer (Argentina) and the first buyers of the issue (the underwriters), and the

secondary market, where previously issued securities are traded, without any involvement of the sovereign debtor. An ICSID Tribunal cannot look only at the economics of a transaction, without taking into consideration its legal framework and structure, in order to determine whether it qualifies as a protected "investment" or not.

71 - Even from a purely economic point of view (not to mention the legal perspective), the passage from the primary to the secondary market is neither automatic nor certain. The underwriters of the bonds bear the risk of not attracting enough demand, which is one reason why they receive an underwriting spread. Moreover, they may want to keep bonds as part of their portfolio. Similarly, and also from an exclusively economic point of view, the position of Argentina in these two markets is totally different. In the primary market, Argentina received the proceeds of the initial issuance of the bonds from the underwriters. By contrast, the flow of funds triggered by transactions in the secondary market is exclusively between the buyer and seller of the security entitlements, its volume depending on the conditions prevailing in that market, and bearing no visible relation to the lump-sum received by Argentina from the underwriters at issuance[14].

72 - The Tribunal is thus bound to look at the circumstances of the individual purchases of security entitlements, and their traceability to - i.e. the strength or tenuousness of their legal *nexus* with - Argentina, before it can decide whether the dispute over each of them "aris[es] directly out of an investment"; in other words whether they satisfy the requirements of a

[14] See, Waibel, "Opening Pandora's Box", *supra* note 8. p.727.

covered or protected "investment" under the Convention and the BIT, on which hinges its jurisdiction *ratione materiae.*

The Territorial Link

73 - Assuming, *arguendo*, that the answer to the first two questions calling for verification is in the affirmative (an assumption that I refute regarding the second question, as just explained above), there remains the third, and more problematic question, namely : do these security entitlements satisfy the other, substantive, conditions of the Convention and the BIT, particularly that of a territorial nexus or link with Argentina ?

74 - A territorial link or nexus is inherent in the concept of "investment" in article 25 of the ICSID Convention. The whole idea behind the Convention was to encourage the flow of private foreign investment to developing countries by offering an international guarantee in the form of an alternative neutral adjudication of disputes arising out of such investment in the territory of the host States, typically subject to its laws and courts.

75 - In addition, the Argentina-Italy BIT unambiguously requires a territorial link between the alleged investment and the host country. The Preamble of the Argentina-Italy BIT expresses the State parties' intentions to "create favourable conditions for investments by nationals and companies of either State *in the territory of the other*" - a standard formulation found in many BITs. The definition of investment in Article 1 refers to "any contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party *in the territory of the other*", and Article 1/4 carefully delimits the BIT's territorial ambit.

76 - The BIT's substantive provisions are also conditioned on a territorial link, including :

- Article 2 (protection and promotion of investments) calls on each contracting party to "encourage the making of investments *in its territory* by investors of the other Contracting Party";

- Article 2/2 (full protection and security) obliges each party to refrain from "adopting unjustified or discriminatory measures that impair the management, maintenance, enjoyment, transformation, cessation and liquidation of investments made *in its territory* by investors of the other Contracting Party";

- Article 3 (national and most favoured treatment) likewise contains the qualifier "within its own territory";

- Article 4 (compensation for damage or loss) refers to "the Contracting Party in whose territory the investment was made".

77 - This requisite territorial link is clearly absent in the present case. The alleged investment, the security entitlements, are not located in Argentina by applying either the legal or the material criteria for determining such location

78 - 1) *The legal criteria* : the financial securities instruments that constitute the alleged investment, i.e. the security entitlements in Argentinean bonds, have been sold in international financial markets, outside Argentina, with choice of law and forum selection clauses subjecting them to laws and fora foreign to Argentina. In fact, they were intentionally situated outside Argentina and out of reach of its laws and tribunals. There is no way then to say (and no legal basis for saying) that they are legally located in Argentina.

79 - The majority award contests this clear conclusion on two grounds :

a) The first is that the above conclusion "would mean that forum selection clauses determine the place where contractual performance is supposed to take place", whilst they are merely "of a procedural nature aiming to determine the place of settlement of a dispute relating to contractual performance", but "have nothing to do with the place where a party is supposed to perform its obligations" (para. 379).

80 - The majority award appears thus to suggest that the determinative factor is the place of performance. If this criterion is applied, there can be no doubt that the place of performance under the securities instruments at issue is invariably outside Argentina, given the use of fiscal agents, paying agents, depositories and places of payment all situated outside Argentina. Factors other than the place of performance also point to the location of the securities in question outside Argentina.

81 - Among these other factors, I consider a clause selecting courts external to the host State, as a prominent one in determining where the security instruments, and the underlying right to repayment of the debt, are located[15].

[15] *Bayview v. Mexico*, Preliminary Objections, Award of 19 June 2007, paras 101-102.

82 - To answer the question whether the securities in question are located in Argentinean territory, this Tribunal needs to determine the *situs* of the debt - i.e. the alleged investment - using a systematic approach consistent with well founded and established precedents and drawing on private international law rules. The foreign governing law and foreign forum, while not determinative by themselves, are important factors in determining *situs*. Other factors include the currency of payment, the place of payment and the residence of the intermediaries. On any of these criteria, the transactions at issue here were deliberately structured so as to have their *situs* outside Argentina[16].

83 - b) - The other argument by which the majority award tries to counter the obvious conclusion that the alleged investment is legally located outside Argentina, is that forum selection clauses (ignoring the other numerous connecting factors and criteria mentioned above) are contractual stipulations and as such they are irrelevant for locating the "investment" for the purposes of a "treaty claim", which is based on other rights and obligations derived from the BIT (para. 379).

84 - But this facile escape route (*échappatoire*) is to no avail in the instant case. A treaty claim is necessarily based on a right that has been allegedly violated; here, the debt that was not repaid. If this right is created by contract, it is the contract that governs its legal existence and the modalities of this existence, including the location of this right (and its reciprocal

[16] See, Zachary Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009), p. 171; Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (Cambridge University Press, 2011), p. 239.

obligation). And the right in the present case has been purposefully located outside Argentina.

85 - The treaty claim cannot by-pass or circumvent this right, or change its modalities of existence, including its *situs* according to its legal title - the contract and the applicable law under which it exists - as this right, in its fixed legal configuration, serves as the legal basis underlying the treaty claim.

86 - A treaty claim cannot allege a violation of a right, while ignoring the specific legal configuration of this right. The treaty may define the kinds of violation, but the underlying right subject to these violations, is defined only by its legal title, and the applicable law that governs its existence.

87 - In conclusion, the alleged investment, i.e. the financial securities and their underlying debt, by all legally recognized connecting factors and criteria, have their *situs* outside Argentina; a treaty claim based on the nonpayment of this debt, or other violations of the right it represents, cannot change the legal configuration of this right, including its *situs* outside Argentina. In consequence, the alleged investment does not constitute an "investment in the territory of Argentina", and thus falls outside the ambit of jurisdiction of the Tribunal *ratione materiae.*

88 - 2) *The material criteria for determining the situs of the "investment"* : As was just explained, the majority award discards the contractual clauses and arrangements stipulated in

the securities instruments as relevant factors for the location of the *situs* of the investment under the BIT and the ICSID Convention, whilst proposing other material or economic criteria. It is noteworthy in this respect that the section under which this question is addressed in the majority award is entitled “Made in Argentina” (i.e. investment “made in Argentina”) and not “Made in *the territory* of Argentina”, following the language of article 1/1 of the BIT, an omission symptomatic of the result-oriented style of the whole award.

89 - The majority award starts by an affirmation that “the determination of the place of the investment... depends on the nature of such investment” (para. 374); to reach the conclusion that an “investment of purely financial nature” need not be “linked to a specific economic enterprise or operation taking place in the territory of the host State” (para. 375), basing itself on arguments it draws from a) Article 1/1/c of the BIT, and b) the nature of the investment. These arguments are examined in what follows.

90 - a) Arguments drawn from article 1/1/c of the BIT : The majority award states that :

i - Article 1/1/c “designates financial instruments as an express kind of investment covered by the BIT”, i.e. as a covered investment *per se*, or as such; in consequence,

ii - “it would be contrary to the BIT’s wording and aim to attach a further condition to the protection of financial investment instruments” (para. 375)

91 - First of all, it is necessary to explain what the qualification “ *per se*” (frequently used by the award) exactly means in this context. As was already explained (paras. 56-61 above), financial instruments, because of the intrinsic characteristics that appear to be incompatible

with the type of investment envisaged in article 25 of the ICSID Convention, suffered from a kind of informal presumption that they are disqualified *per se* (or as such) from constituting a covered investment under the ICSID Convention (para. 58 above). But once a BIT includes these financial instruments in its enumeration of investments covered by the treaty, this presumption is obviously rebutted. However, if these financial instruments are not excluded *per se* (or automatically) that does not mean that they are included *per se*, in the sense of being automatically considered as legally self-sufficient to constitute a protected investment. We have here to recall the distinction (dating back to Roman law) between the *instrumentum* and the *negotium*, the instrument that registers and vehicles a legal act or transaction and the legal transaction itself[17]. Article 1/1/c recognizes the financial securities *per se* as valid *instrumenta* for investment. But the investment itself, as a legal act or transaction that is attested and vehicled by these instruments, has to satisfy the substantive requirements for investment, in article 25 of the ICSID Convention as well as in the BIT, if any.

92 - Leaving aside the requirements of article 25 of the Convention discussed above (para. 47-52), does the BIT impose any other substantive conditions ? And is linking the investment "to a specific economic enterprise or operation taking place in the territory of the host State" one of them?

93 - Here, the majority award interjects its second argument drawn from article 1/1/c, namely

[17] This distinction between the *instrumentum* and the *negotium* was clearly on the mind of the drafters of Article 1/1 of the BIT. Thus, in their enumeration, where they considered that confusion between the two may arise, they expressly made the distinction e.g., under (a) "...including, *to the extent they may be used as investments*, security interests on the property of third Party; under (d) "credits *directly related to an investment*..." (emphasis added).

that, given the designation, in this provision, of financial instruments as covered investments, "it would be contrary to the BIT's wording and aim to attach a further condition to the protection of financial investment instruments" (para. 375).

94 -This argument disregards a major fact. Of course, one cannot introduce a "further condition" into the Treaty. However, two such conditions are already writ large therein. It is true that they do not figure in Article 1/1/c itself. But all one has to do is to raise his sight a few lines above this provision to the chapeau of Article 1/1, which applies to all the types and vehicles of investment enumerated under it, including (c), and which defines investment *inter alia* as that made by nationals "of one Contracting Party *in the territory of the other [Party]*, in accordance with the laws and regulations of the latter" (emphasis added).

95 - The ordinary meaning of the emphasized words could not be clearer. And how can the fact that the investment has been made or realized in the territory of the host country be proved or demonstrated, except by tracing it to a specific project, enterprise or activity in that territory that corresponds to the economic meaning of investment in article 25 of the ICSID Convention (i.e. that it contributes to the expansion of the country's productive capacity)?

96 - b) Arguments drawn from the nature of the investment : Against this clear "territorial imperative" of the Convention and the BIT, the majority award develops a second line of argument or defense, consisting of four mutually supporting affirmations, namely :

i - "The determination of the place of investment depends.... on the nature of such investment"; and for "an investment of a purely financial nature, the relevant criteria cannot

be the same as those applying to an investment consisting of business operations and/or involving manpower and property";

ii - For "investments of a purely financial nature the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred";

iii - "This is also the view taken by other arbitral tribunals";

iv - "Thus, the relevant question is where the invested funds ultimately made available to the Host State [*sic*], and did they support the latter's economic development" (para. 374).

97 - None of these affirmations withstands scrutiny.

i - There is absolutely no basis in the ICSID Convention for drawing such a distinction between "investments of a purely financial nature" and other types of investment in this or other respects. Investment under ICSID is a unified category corresponding to the economic meaning of investment. The question that is raised about financial instruments under ICSID concern their high velocity of circulation which distends their link, as well as that of their last holders, with the ultimate economic enterprise or activity that materializes the investment in the economic, i.e. ICSID, sense of the term, within the territory of the host State. The question is not about the necessity of locating this enterprise or activity in the territory of the host State.

98 - Indeed, the most persuasive legal justification for admitting financial instruments as protected investments, in spite of their stark contrast to the ideal type of investment under ICSID, the direct foreign investment (see para 55 above), is that these investments finance,

be it at several removes, specific economic projects, enterprises or activities which, had they been undertaken directly by these foreign financial investors, would have constituted foreign direct investment; which of course can only take place within the territory of the host State.

99 - ii - The governing texts, particularly article 1/1 of the BIT, are clear as to the relevant criterion for locating the *situs* of the investment. It is "where" the investment is made or realized, and not "for the benefit of whom".

100 - It is ironic that the majority award cites the *SGS v. Republic of the Philippines* decision in support of its position; an award enunciating that : "In accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT"[18]; a dictum repudiating in no uncertain terms the criterion of "for the benefit of whom" proffered by the majority award.

[18] *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6 , Decision on Jurisdiction and Admissibility, 24 January 2004, para. 99; see also *Canadian Cattleman for Fair Trade v. United States*, NAFTA, Award on Jurisdiction, 28 January 2008, para. 127.

101 - iii - Indeed, the cases cited by the majority award do not lend it as much support as it contends and are all quite distinguishable from the present case. The majority opinion cites three awards[19]. Only one of them involves financial instruments, namely *Fedax v. Venezuela.* And it is the only one of the three (as well, to my knowledge, of all other ICSID arbitral decisions) that carries a dictum suggesting the over-loose, ultimate beneficiary test which is followed by the majority award in the present case (but *Fedax* is distinguishable from the present case on facts as explained below).

102 - The *Fedax* decision was widely criticized both by other tribunals and in the literature, including by Professor Dolzer, one of the leading legal experts of the Claimants in the present case, who commented in an article that "the *Fedax* decision is not without ambiguity in its construction of 'investment'"; and in relation to the "territorial dimension of foreign investments", that :

> "...the *Fedax* decision (paragraph 41)...assumed that the absence of a physical transfer of funds will not stand in the way of the existence of an 'investment'. Without explaining the rationale for this view in any detail, the *Fedax* tribunal considered apparently that it is sufficient that the funds made available by the investor are utilized by the host country as the beneficiary of the transaction so as to finance its various

[19] In note 147 to paragraph 374. The three awards are : *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision of the Tribunal on Objections to Jurisdiction of 11 July 1997, para. 41; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003, paras. 136-140; *SGS v. Republic of the Philippines,* para. 111.

governmental needs"[20].

[20] Rudolf Dolzer, "The Notion of Investment in Recent Practice", *in* Charmovitz et al. (eds) *Law in the Service of Human Dignity : Essays in Honour of Florentino Feliciano* (CUP, 2005), p. 261 at pp. 269, 272.

103 - Similarly, the *SGS v. The Republic of the Philippines*[21] decision - that the majority award cites in support of its position! - apart from its flat repudiation of the *Fedax* test in the dictum reproduced above (para. 100), spared no effort to distance itself from that case, not only by distinguishing it, but also by pointing to certain factors that severely limit its general relevance (if any). Thus, after noting that "[t]he Tribunal in the *Fedax* case gave a very broad definition of territoriality", it observes in a footnote to that sentence that :

> "The territorial requirement in the BIT [Venezuela-Netherlands] was ...less categorical. It referred to the protection in its territory of investments of nationals of the other Contracting Party...and this only in a clause dealing with entry, not in a general clause defining the scope of the Treaty as a whole".

104 - Just after the general remark about the "very broad definition of territoriality",the Tribunal proceeds to distinguish *Fedax* :

> "...but the focus of the decision was whether the endorsee of a promissory note issued with respect to an investment had itself made an investment, and whether the dispute over non-payment of the note arise 'directly' out of an investment within the meaning of Article 25(1) of the ICSID Convention"[22].

[21] Cited in note 18 above.

[22] *Ibid.* at para. 110 and footnote 41 in that decision. The Tribunal hints that it would have gone further in the critical analysis (or rather criticism) of *Fedax*, were it not that "Counsel for the Respondent declined to argue that *Fedax* was in this respect wrongly decided, but at any rate the circumstances of the *Fedax* case were very different from the present" (*Ibid.)*.

105 - *Fedax* is an isolated case. It is an outlier. But I need not expand further on whether it was correctly decided or not, as it is clearly distinguishable in this respect (of territorial link) from the present case on facts; primarily by two significant facts. The promissory notes at issue in *Fedax* were governed by the host State's law. They were not free-standing or unhinged from any specific project or economic activity in the host country, as they were initially given in exchange for the provision of specific services in Venezuela. The issue in that case was whether an endorsement of six promissory notes outside Venezuela severed their link with the underlying transaction, and not about the necessity of the existence of such underlying transaction[23].

106 - The other two cases cited by the majority award, *SGS v. Pakistan* and *SGS v. the Republic of the Philippines*, have nothing to support the majority award's position, either in their reasoning and dicta or in their facts. Indeed, one can say the opposite as far as *SGS v. the Republic of the Philippines*, given its critical and distant position *vis à vis Fedax*, as exposed above. In both *SGS* cases the issue was whether services provided by SGS and attendant expenses largely undertaken outside the territory of the host State, could be considered as an investment "in the territory" of the host State. And in both cases the Tribunals found that a reasonable part of the service and the expenses, though perhaps not the major part, took place in the territory of the host State; and that the service was not constituted of two operations : one outside and the other inside the territory of the host State, but one overall service straddling the frontier of that State, and as such well anchored in its

[23] See Waibel, *Sovereign Defaults*, supra note 16, p. 225.

territory.

107 - In none of these cases, including *Fedax*, or others in which the question of territoriality was raised, was the need to trace the alleged investment to an underlying specific project or activity within the territory of the host State, questioned. The issue in all these cases was whether what takes place outside the territory of the host State, such as the payment of funds or the endorsement of the promissory notes, distends this link to the point of legally severing it.

108 - The situation in the present case is totally different. The security entitlements in question are free-standing, and totally unhinged. They do not form part of an economic project, operation or activity in Argentina. Nor are they issued in support of a public project or a commercial undertaking there. In other words, they have no specific economic anchorage in Argentina, allowing them to be seen and considered as an investment "in the territory of Argentina".

109 - The inescapable conclusion of this rapid survey of cases invoked by the majority award in support of its position, is that, unlike these cases, there is a missing link in the present case that prevents the alleged investment from being recognized as covered or protected investment under the BIT and article 25 of the Convention, namely the traceability of the alleged investment (or its link, be it tenuous) to an underlying specific economic project or operation taking place in the territory of Argentina.

110 - iv - In order to surmount this tough obstacle, the majority award resorts to an

astounding exercise of logical gymnastics, operating a double logical somersault that ends up standing the sequence of legal reasoning on its head, by way of two unverifiable (and for one totally untenable) assumptions,

111 - a) As concerns the first of these assumptions, the majority award asserts that : "*There is no doubt that the funds* generated through the bonds issuance process were *ultimately made available to Argentina* [and here comes the first logical jump dissimulated by the first assumption] and *served to finance Argentina's economic development*" (para. 378, emphasis added). Thus, according to the majority award, any loan or funds made available to a government (and regardless of the way it uses them, which is "irrelevant") must be deemed, by virtue of an unrebuttable presumption, to be contributing to the development of the country of that government, and thus corresponding to the economic concept of investment of article 25 of the ICSID Convention (i.e. contributing to the expansion of the productive capacities of the country).

112 - But this presumption is rebuttable on two grounds. First, not every loan can constitute an investment in the sense of the Convention. A simple loan in itself is merely an "ordinary commercial transaction". For it to become an investment, it has to fulfil the conditions discussed above. This is why, for example, in the enumeration of the various types of protected investment in article 1/1 of the BIT, under (d), "credits", which are a species of loans, are qualified by the clause "which are directly linked to an investment".

113 - The other ground on which this first presumption is rebuttable is the mere fact that not

all funds made available to governments are necessarily used as "investment" in projects or activities contributing to the expansion of the productive capacities of the country. Such funds can be used to finance wars, even wars of aggression, or oppressive measures against restive populations, or even be diverted through corruption to private ends. This is why, for such loans to constitute investments under the ICSID Convention, they have to be concretely traced, even at several removes, to a particular productive project or activity in the territory of the host country; and not merely by postulating a stop-gap abstract assumption that does not hold its ground.

114 - b) The second assumption is even more remarkable than the first, and totally dependent on it. In fact, it is undetachable from it; thus one has to formulate them together, in something like the following : Because the funds were made available to Argentina and used by it (whatever the use which is "irrelevant" and which is not traceable or proven, but assumed), these funds "as such, must be considered to have contributed to Argentina's economic development [first assumption] *and thus* [and here comes the second assumption dissimulating the second logical jump] to have been made in Argentina" (para. 378, emphasis added). Put in straight forward language, without the ellipsis, the proposition would be : As the funds made available to Argentina *must be considered* (i.e. assumed) to have contributed to Argentina's economic development, they also, and as a necessary consequence, *must be considered* (or assumed) to have been made in Argentina.

115 - Thus, by assuming a contribution to the economic development of Argentina, one necessarily assumes also its location in Argentina, without having to demonstrate or prove

either. The falsity of such reasoning is too evident to need further elaboration.

116 - Moreover, the presumed logical necessity of drawing or deducing the second presumption from the first is also false. It suffices to recall in this regard the dictum of *SGS v. the Republic of the Philippines* that "investment made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT", and the example it gives of "the construction of an embassy in a third State or the provision of security services to such an embassy" which "would not involve investments in the territory of the State whose embassy it was, and would not be protected by the BIT"[24].

117 - Here again, the logical legal sequence is stood on its head. Rather than demonstrating the contribution by tracing the alleged investment to (or proving its link with) a productive project or activity in the territory of the host State, the majority award deduces a *situs* from a presumed contribution hanging in the air.

118 - *In conclusion*, the present case is, to my knowledge, the first one to come before an ICSID tribunal in which the alleged investment is totally free-standing and unhinged, without any anchorage, however remote, into an underlying economic project, enterprise or activity in the territory of the host State. None of the logical short-cuts put forward by the majority award to palliate this absence, holds water.

[24] Case cited in note 16 above, at para. 99.

119 - As both the ICSID Convention and the BIT require that the investment be made in the territory of the host State for the investment to be covered by the treaty and fall within the jurisdictional ambit of ICSID, and as this territorial link is lacking in the present case, I conclude that in the absence of a "protected investment", the case has to be dismissed, as falling outside the jurisdiction *ratione materiae* of the Tribunal.

IV - The First Preliminary Objection : Collective Mass Claims Actions and the Consent of the Respondent

120 - This preliminary objection is based on the contention of the Respondent that its consent to arbitrate by acceding to the ICSID Convention and concluding the BIT does not cover collective mass claims actions, including the present one; that handling mass claims in a single arbitral case or proceeding, or as one arbitral suit or action, necessarily undermines the due process rights of the Respondent and would be unmanageable; and that, in any case, the Tribunal is not empowered, under the Convention and the Rules of Procedure, to effect the procedural changes enabling it to handle such an action.

121 - The preliminary objection raises three issues :

1 - Does the consent of Argentina cover collective mass claims actions ? and is this a question of jurisdiction or of admissibility as contended by the majority award ?

2 - What is the legal nature of collective mass claims actions or suits, and what are the problems and questions they raise, particularly as to the due process rights of the parties and

to the interpretation of the scope of arbitral clauses - i.e. the jurisdictional title - both in municipal and in international law.

3 - Finally, does the Tribunal have the power to effect the procedural changes, or "adaptations" as it calls them, that it needs to be able to handle the case (para. 491).

A - A Plea to Jurisdiction or to Admissibility ?

122 - The majority award adopts, "for distinguishing issues of jurisdiction from issues of admissibility", the following criterion :

> "If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim ? If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction" (para. 249).

123 - Applying this criterion to the present case, the majority award "answers in the negative" the question "whether a specific consent regarding the specific conditions in which the present arbitration would be conducted is required", on the basis of the following argument :

> "Assuming the Tribunal has jurisdiction over claims of several individual claimants ...it is difficult to conceive why and how the Tribunal could 'loose' jurisdiction where the number of claimants outgrows a certain threshold...what is the relevant threshold? And can the Tribunal really 'loose' jurisdiction it has when looking at Claimants individually ?" (paras. 484-490).

124 - On that basis, the majority award dismisses Argentina's objection :

> "Issue 1(a) : Argentina's consent to jurisdiction of the Centre includes claims presented by multiple Claimants in a single proceeding" (para. 502).

125 - The majority award considers that :

> "...the relevant question is not 'has Argentina consented to the mass proceedings', but rather 'can ICSID arbitration be conducted in the form of 'mass proceedings' considering that this would require an *adaptation and/or modification* by the Tribunal of certain procedural rules provided for under the current ICSID framework"? (para.491); "which is a question of admissibility" (para. 492).

126 - This legal recharacterization of Argentina's plea by the majority award is, in my view, conceptually wrong. It adopts an extremely narrow, in fact partial, concept of jurisdiction, limiting it to the ambit within which jurisdiction is exercised. But, as explained above (para. 10 ff), jurisdiction is first and foremost a power, the legal power to exercise the judicial or arbitral function. Any limits to this power, whether inherent or consensual, i.e. stipulated in the jurisdictional title (consent within certain limits, or subject to reservations or conditions relating to the powers of the organ) are jurisdictional by essence. They are no less jurisdictional, in fact more so, than the limits relating to one of the four dimensions of the ambit within which jurisdiction is exercised (para. 13 above).

127 - The preliminary objection of Argentina draws precisely upon this category of limits to jurisdiction as a power, maintaining that Argentina's consent cannot be interpreted to cover

the power of the Tribunal to hear collective mass claims actions requiring resort to atypical or abnormal procedures. If that is the purport of the preliminary objection, then finding that the Tribunal has jurisdiction *ratione materiae* over the subject-matter of one claim or even the 60.000 claims (a finding that I already refuted, for absence of a protected investment in the previous section), neither disposes of this preliminary objection, nor does it address it in anyway.

B - The Legal Nature and Specificities of Collective Mass Claims Actions and their Bearing on the "Consent to Arbitrate"

128 - To address this preliminary objection, one has first to examine the legal nature and specific characteristics of mass claims actions, and the abnormal or atypical procedures their handling requires, to be able to evaluate whether a mere consent to submit to arbitration can be construed as extending to include them or not.

129 - In their pleadings, particularly during the oral phase, the Parties and their legal experts paid special attention to the legal characterization of the present proceedings. The Respondent considered it not a simple multi-party action, but a collective mass claims action; one of the leading experts in the field called by the Respondent, Professor Richard Nagareda, classified it as a class action. Counsel to the Claimants, by contrast, argued that it is a mere multi-party action; as there is no limit to the number of parties in such an action and no known threshold that separates a multi-party from a collective mass claims action. Later on, Counsel to the Claimants spoke of a non-class aggregate proceeding.

130 - The majority award tries to skirt round the subject (in order not to tie its hands) by using the neutral expression " 'mass proceedings'...as referring simply to the high number of Claimants appearing together as one mass, and without any prejudgement on the procedural classification of the present proceedings as a specific kind of 'collective proceedings' recognized under any specific legal order" (para. 480). But it does not quite succeed in keeping this neutral stance; for after summarizing part of a recent article surveying different types of collective proceedings[25], it ends up classifying the present proceedings as a hybrid, partaking of two species. But this exercise in legal genetic engineering, like all genetic engineering, risks producing a monster. In any case, it does not work here for reasons expounded below.

131 - The survey of different types of collective proceedings, based on Strong's article, classifies them in two categories :

[25] Stacy I. Strong, "From Class to Collective : The De-Americanization of Class Arbitration". *Arbitration International*, vol. 26, No 4(2010), pp. 493-548. Footnote 176 of the Award, wrongly cites the author's name as Stark, and not Strong.

i - *Aggregate procedures* : I use advisedly “procedures” rather than “proceedings”, because the aggregation takes place before the “proceedings” properly speaking, i.e. the adjudicative or judicial phase of examining the claims. It consists of aggregating or centralizing the different individual claims arising “out of the same fact pattern”, as in the present case, in different ways. In England, the Group Litigation Order establishes a judicial registry of these claims, which are then assigned to the same judge for management purposes. In the US, such related claims are “consolidated in a single federal venue to ensure efficiencies of scale during the pre-trial period”, beyond which “the cases are separated and heard individually regarding issues of liability and/or damages”[26].

132 - Both methods are legal techniques for rationalizing the distribution of individual claims arising from the same events, upstream, at the pre-trial or pre-judicial stage. But once the individual claims are before the tribunals for judgment, they are handled as such i.e. as individual claims, according to the normal procedures, though the tribunals can use procedural devices normally available to them, such as joinder and consolidation, for purposes of procedural economy. But there is no change or alteration of the procedure followed to handle these claims other than as normal individual claims. And it is on this last point that the “aggregate procedures” model does not suit the purposes of the majority award.

133 - ii - *Representative proceedings* : This is the most important type of collective proceedings, its prime example being “class actions” that emerged relatively recently in the

[26] Strong, *ibid.* p. 504.

US and elsewhere. The other species of representative proceedings are in fact minor variations on the theme of class actions.

134 - Class actions or representative proceedings can be brought either by a member of the class, acting as a kind of *negotiorum gestor* on behalf of the other members of the class (who can join in or take their distance from the action through the techniques of "opting in" or "opting out") or by an agent representing the whole class, such as a consumers association or the Sierra Club.

135 - What makes class actions or representative proceedings (unlike aggregate claims subject to aggregate procedures only at the pre-trial or pre-judicial stage), feasible or amenable to be treated judicially or adjudicatively in one single proceedings or as one action, is that in a class actions or representative proceedings there is, in the final analysis, only one claim, albeit with many, or even a mass of claimants. The tribunal deals thus with one claim and can examine every aspect of it specifically, through adversarial debate and scrutiny that guarantees to the parties, particularly the respondent, all their due process rights.

136 - The first attempts to introduce class actions, which are the prime model of representative proceedings, were related to issues of public interest such as the protection of the environment or the consumers. In this, they recall (at least in their rationale, without necessarily assimilating them to) an ancient ancestor, the institution of *actio popularis*, whereby a citizen, in the name of the community, acts in defense of an indivisible public good. And the remedies sought in class actions were geared to the nature of these types of

public interest claims, namely declaratory judgments and injunctive relief, i.e. orders to cease and desist, that are the same for all claimants and which are formulated as a function of the subject-matter of the claim, and not as a function of the personality, or the number of the claimants, or their individual subjective grievances.

137 - It is true, as is stated in the majority award, that in some jurisdictions, the relief "can take the form of individual damages or representative relief (e.g. declaratory or injunctive relief)" (para. 483). But the majority award omits to reproduce from Strong's article it excerpts the following comment on the cumulation of the two types of relief :

> "One approach allows class claimants to pursue individual damages as well as other types of relief. This technique, which is common in the US, has met with a great deal of criticism internally, since the provision of individual damages in a representative suit is seen in many (but not all) civil law systems as violating the defendant's right to defend against individualized, as opposed to generalized claims, as well as the rights of individualized members of the collective to conduct their own individualized cases"[27].

138 - After this brief survey of the two main types of "collective proceedings", the majority award proposes a legal characterization of the present case as "a sort of hybrid kind of collective proceedings, in the sense that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of claimants

[27] Strong, *ibid*, at p. 504.

involved" (para. 488).

139 - However, as mentioned above, this exercise of legal genetic engineering does not work. First of all, there is no explanation whatever of the reason or cause nor of the trigger of such a transmutation of the proceedings, starting as one thing that no sooner transforms itself into quite another. It is understandable that the case starts as aggregate proceedings, in the sense explained above and in the majority award, considering that it groups a multitude of individual claims arising out of the same fact pattern. But these remain individualized claims. Following the aggregate procedures model simply means that they would be collected and managed during the pre-trial or strictly pre-judicial or pre-arbitral phase, in order to rationalize their funneling to other tribunals that will examine them judicially as individual claims. But they would not change nature or characteristics as a result of their prior aggregation. They remain individualized claims.

140 - For the proceedings to change suddenly into a representative one, the individual claims have to be cast into one claim or transformed into identical fungible claims, which comes down to the same thing (one claim, multiplied by the number of claimants) to enable the tribunal to treat them judicially as one. But this is not possible here, as the claims retain their individualized character.

141 - To skirt round this fundamental problem, the majority award resorts to the slippage technique, considering that "group examination of claims is acceptable where claims raised by a multitude of claimants are to be considered identical or *at least sufficiently*

homogeneous" (para 540; emphasis added).

142 - However, homogeneity is in the eyes of the beholder. One can always reach a sufficient level of homogeneity, i.e. common denominators, by climbing up the ladder of abstraction and/or by weeding out all the specificities of the claims that appear inconvenient. And that is precisely what the majority award does with the claims under consideration.

143 - Indeed, the majority award sets aside all the specificities of the claims concerning the security entitlements (price, date of purchase, place of purchase, in which currency, applicable law, chosen forum, etc.) as characteristics relevant only to the contractual rights of their holders, i.e. to contract claims; while what counts here, according to the majority award, are the treaty claims, which are homogeneous (paras. 541-543). And the majority award harps on the adjective "homogeneous", by repeating it throughout this part in almost every line. But no amount or repetition can exorcize the fundamental flaws in this line of argument. Indeed, it suffices to ask, how can the Tribunal for example evaluate a treaty claim for compensating damages caused to an asset, without knowing (or while making abstraction of) the time the asset was acquired, the price paid for it and the currency of denomination ?

144 - If one examines what the majority award calls "the claims deriving from the BIT" (para. 543), which it considers "homogeneous", the result is clear. They are claims related to the Argentinean economic crisis that led to Argentina's cessation of payment. In other words, this crisis constitutes "the same fact pattern" out of which the claims arose, and which is the criterion used for resorting to "aggregate proceedings", according to the majority award. But

as the award itself states, this aggregation takes place only at the pre-trial, or pre-judicial phase. By contrast, during the judicial phase, the claims are treated individually. In other words, the "level of homogeneity" resulting from the circumstance that the claims arose "out of the same fact pattern", is sufficient for aggregating and registering them for purposes of pre-trial management and rationalizing their funneling towards the tribunals that will ultimately examine them as individual claims; but not sufficient for what the majority award calls "group examination", i.e. their examination as if they are one claim (as in a class action or a representative proceedings), which they are not, either in fact or in law.

145 - The efforts of the majority award at legal genetic engineering lead nowhere. The hybrid proceedings, brain-child of the majority award's legal imagination, lacks a theoretical basis to stand on, let alone a solid legal basis. It also raises the question of the extent to which such an imaginary "hybrid action" and, for that matter, the particularities of collective proceedings in general, have a bearing on the interpretation of the "consent to arbitrate".

C - Judicial Innovation, Collective Proceedings and "Consent to Arbitrate"

146 - In their pleadings, counsel and legal experts for the Claimants argued - to incite this Tribunal to do the same - that in the US, courts foreshadowed class actions and devised their procedures, before they were formally adopted by legislation and integrated in the codes of civil procedure.

147 - Regardless of the veracity of this narrative and assuming it is true, it does not help

much supporting the conclusion sought to be drawn from it, i.e. that the same can be done by this *ad hoc* international arbitral Tribunal. This is because courts in general are part of the judiciary, the judicial branch or arm of the State. Their judicial power, i.e. jurisdiction, thus stems from above, and not from the consent of the parties or litigants before them. As repositories of the judicial power of the State, they have some leeway, particularly in common law jurisdictions, to develop the law and engage, within reasonable limits, in legal experimentation; unlike arbitral tribunals that draw their jurisdiction from the consent of the parties and have to confine their judicial activities within the bounds of this consent.

148 - Even in the U.S, the national jurisdiction where it is contended that the courts foreshadowed class action and devised procedures for them before they were enshrined in legislation, the US Supreme Court, in two successive decisions in 2010 and 2011, has been quite strict in interpreting consent and underscoring the need to respect its bounds, when it came to arbitration, in response to exactly the same question that is put to this Tribunal, i.e. "Does a regular arbitration clause cover class actions ?"

149 - I realize that the majority award, following in this the Claimants, refuse to consider the present collective mass claims action as a class action, although its "hybrid model" ends up being a "representative proceeding", which is more or less the same thing. But the US Supreme Court's reasoning and answer turns on the "mass" character of the action rather than on its characterization as a class action or otherwise.

150 - In the first of these cases, *Stolt-Nielsen S.A. v. Animal Feeds International Corp*[28], the Court held :

> "An implicit agreement to authorize class-action arbitration... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator".[29]

151 - The Court also noted that the "changes brought about by the shift from bilateral arbitration to class-action arbitration [are] fundamental"; and concluded that consent to class-action arbitration cannot be "presumed" from the parties "mere silence", given the fundamental differences between class-action arbitration and bilateral arbitration[30].

[28] 130 S.Ct.1758 (2010).

[29] *Ibid.* at 1774.

[30] Slip Opinion, at 22-23.

152 - In the second case *AT&T Mobility LLC v. Concepcion ET UX* (2011)[31], the Court, while referring to *Stolt-Nielsen*, and building on it, goes even further, in highlighting the difference between the two types of arbitration :

> "Class arbitration...interferes with fundamental attributes of arbitration...class arbitration greatly increases risks to defendants. The absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes"[32].

153 - The powerful reasoning of these two judgments and the strong arguments they put forward - the fundamental differences between the two modes of arbitration, the regular bilateral one and the class action or representative proceedings arbitration; differences that "change the nature of arbitration"; and the great risks to which the later mode exposes defendants - all converge to highlight the necessity of a special consent of the parties in order to resort to class action or representative proceedings arbitration; consent that cannot be merely deduced or assumed from a simple consent to go to arbitration.

D - The Interpretation of Silence

154 - The majority award totally ignores this widely known and commented upon

[31] 563 US (2011), (decision of 27 April 2011).

[32] Slip Opinion, at 2.

jurisprudence and arguments. Instead, it goes into a cursory "interpretation of the silence of the ICSID Framework".

155 - The reasoning of the majority award can be summarized as follows : given the "object" of the BIT and the "spirit" of the ICSID Convention, which are presumably, according to the majority award, reduced solely to affording "effective protection" to investments and investors, "where the BIT covers investments which are susceptible to involve a high number of investors...it would be contrary to the purpose of the BIT and the spirit of ICSID to require in addition to the consent to ICSID arbitration in general a supplementary express consent to the form of such arbitration" (para. 518); i.e. "it would be contrary to the purpose of the BIT and to the spirit of ICSID to interpret this silence as a 'qualified silence' categorically prohibiting collective proceedings, just because it was not mentioned in the ICSID Convention" (para. 519). And if consent to ICSID arbitration covers collective proceedings, it has also - presumably by necessity or necessary implication - to cover the power of the Tribunal to devise the adequate procedures to deal with them, in derogation of "the standard procedure" (para. 519).

156 - This wobbly line of argument by affirmation, assumption and reasoning by necessity, does not withstand scrutiny. In the first place, it is premissed on the assumption that the Tribunal has jurisdiction *ratione materiae* over the subject-matter of the mass claims; an assumption that I have refuted in the previous section.

157 - Secondly, the reasoning is also premissed on and proceeds from a purely subjective, truncated and partial representation of the object and purpose of the ICSID Convention and

the BIT, which is a recurrent theme throughout the award. The reader cannot but be struck by the repetition *expressis verbis* in two successive paragraphs (para. 518 and 519), at a few lines interval, of the reference to the "spirit" of the ICSID Convention and the "purpose" of the BIT. Spiritism apart, the object and purpose of these two treaties - the ICSID Convention and the BIT - are described as being exclusively to afford maximum protection to foreign investment and foreign investors; as if these treaties were "unilateral contracts" creating rights for the benefit of one party only. In consequence, according to this vision, all the provisions of these treaties have to be interpreted exclusively with this aim in mind.

158 - Viewed from this perspective, all the limitations to the jurisdiction of ICSID tribunals, whether inherent or patiently and carefully negotiated and stipulated in the treaty to protect the interests of the State party (which are after all, the collective interests of its population) are seen as obstacles in the way of achieving the "purpose" of the treaties, which have to be overcome at any price and by whatever argument.

159 - This unilateral vision is in stark contrast to the "object and purpose" of the ICSID Convention, as expressed in the Report of the Executive Directors in the following terms :

> "While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States".[33]

[33] Report of the Executive Directors on the Convention, para. 13.

160 - Proceeding from these premisses, the majority award simply affirms that "it would be contrary to the purpose of the BIT and to the spirit ICSID to interpret this silence [of the ICSID Convention or Framework as it calls it] as a 'qualified silence' categorically prohibiting collective proceedings, just because it was not mentioned in the ICSID Convention" (para. 519).

161 - The majority award does not explain at any length what it exactly means here by "qualified silence", nor why it considers that this concept does not apply in the present case or the consequences of its application or non application. This results in confusion at two levels, the first of which relates to the meaning and relevance of the term *in casu*. "Qualified silence" is not a term of art; for example, it does not appear in law dictionaries. Occasionally, however, one encounters, in writings on American constitutional law, such expressions as "the qualified silence of the law-maker" (or "the intentional imperfection of the law"). They describe, in a piece of legislation dealing with a particular subject, its silence over certain substantive issues falling within the subject treated, that were left intentionally open (for future legislative treatment, for lack of consensus, etc.). In consequence, analogy cannot be used to extend the legal regulation to these issues by those who subsequently interpret and apply the law, as this would go against the intent of the law-maker. But this is a completely different context, poles apart from that of establishing the existence and scope of the individual consent of a State to submit to arbitration, which is what is at issue here.

162 - This brings me to the second level of confusion in the majority award. Indeed, the award, in its analysis, confuses here two layers of consent (see above para.15) :

a) the consent or acceptance to be bound by the ICSID Convention as such, by ratifying or acceding to it, which by itself does not contain any consent or obligation to arbitrate; and

b) the specific acceptance by a State to submit a dispute or certain disputes to arbitration within ICSID, whether by way of a BIT or otherwise (a compromissory clause, etc.), which constitutes the specific jurisdictional title.

The two do not coincide in time nor necessarily in their scope (para. 13 above).

163 - Argentina's jurisdictional plea is directed more specifically to the second layer of consent, though it covers both layers; whilst the majority award addresses only the first layer, ignoring almost totally the second layer of consent, which is the crux of Argentina's plea.

164 - If what is at issue here is Argentina's specific consent to arbitrate, then what counts most in the interpretation of the jurisdictional title is the establishment of the validity and scope of that consent at the time it was given. It is thus paradoxical, that in order to support its affirmation that the ICSID Convention's silence over "collective proceedings", is not a "'qualified silence' categorically prohibiting [such] proceedings", the majority award advances the argument that "at the time of conclusion of the ICSID Convention, collective proceedings were quasi inexistent, and although some discussions seem to have taken place with regard to multi-party arbitrations, these discussions were not conclusive on the intention to either accept or refuse multi-party arbitrations, and even less so with regard to admissibility of collective proceedings" (para. 519).

165 - It is paradoxical because this argument supports exactly the opposite proposition to that which the award is attempting to prove. The fact that class actions or representative proceedings were almost unknown in national jurisdictions, and more so on the international level, at the time of the conclusion of the ICSID Convention in the mid-sixties of the last century, proves that these representative proceedings were way beyond the "horizon of foreseeability" of the drafters of the ICSID Convention. Those drafters could not have envisaged such proceedings; nor is there any basis to assume that they would have included them, had they envisaged them, given the fundamental differences between these proceedings and the arbitration model familiar to them (as discussed below). Those drafters were simply creating a framework for *ad hoc* international arbitration, within the parameters of *ad hoc* international arbitration as they knew them at that time, particularly its specific consensual basis for every case, as with all international adjudication. They were not establishing an open-ended standing court of general jurisdiction (*juridiction de droit commun*) covering all possible present and future disputes. This is clearly reflected in the last paragraph of the Preamble of the ICSID Convention :

> "Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration"

166 - Thus, the above argument of the majority award based on the unforeseeability of collective actions at the time of drafting the Convention, paradoxically bears in favour of interpreting the silence of the ICSID Convention as not extending to cover such an extra-

ordinary type of judicial activity as representative proceedings or class actions. However, even if we assume *arguendo* that the ICSID Convention can be over-stretched by subsequent interpretation, pushing back its outer-limits to accommodate collective proceedings, this would not apply to the second layer of consent, the specific consent to arbitrate within the ICSID framework.

167 - Here, the interpretation of the jurisdictional title has to establish the reality, validity and scope of consent, as it was given, at the time it was given, by each party. And it is here that the "interpretation of silence" of the jurisdictional title becomes crucial : Does the mere "consent to arbitrate" within the ICSID framework cover mass claims actions and proceedings (whatever we call them) ?

168 - As a rule, silence does not have a meaning in itself. It cannot be made to speak one way or another; unless it is surrounded by circumstances that impregnate it with a certain meaning; what is called in civil law and in French "*silence circonstancié*", a more expressive term than "qualified silence" which is also used, on rare occasions, in international law in the same sense[34].

169 - The circumstances that surround and impart meaning to silence, can be factual or legal. Both these types of circumstances exist and can easily be identified *in casu*.

[34] See for example the WTO Panel Report *Guatemala - Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico,* Report of the Panel of 24 October 2000, at para. 8.23 : "We note that 'acquiescence' amounts to 'qualified silence', whereby silence in the face of events that call for a reaction of some sort may be interpreted as a presumed consent". See also, in the same sense, Mark Villiger, *Customary International Law and Treaties* (The Hague, Kluwer, 1977), p. 39.

170 - The elements of fact or factual circumstances that qualify the silence of a jurisdictional title by which a State consents to ICSID arbitration, in the sense of limiting it to normal bi-lateral (or limited multiparty) arbitration, thus excluding collective mass claims actions or representative proceedings, are simply the great differences between these two types of proceedings.

171 - The sheer difference in volume and number of claims and claimants between the bilateral or even the limited multiparty arbitration (14 Claimants in the largest case in ICSID)[35], which permits an individual, detailed and adversarial examination of every claim and claimant, and the 60.000 claimants in the instant case, is staggering. It constitutes what is called in physics a "quantum leap" (*saut qualitatif*) which transforms quantitative change beyond a certain point into qualitative change[36]. The change here is from the micro-analysis and treatment of individual phenomena (i.e. claims and claimants) individually, into the

[35] *Bernardus Henricus Funnekotter and others v. Zimbabwe*. ICSID Case No. ARB/05/6, Award of 22 April 2009.

[36] The argument raised at one point by the Claimants, but not taken up by the majority award (though occasionally it seems to imply it), that collective mass claims actions are mere multi-party actions as there is no recognized threshold that separates them, is extremely tenuous, verging on the absurd. International law knows several such situations. For example, up to now there is no agreed or generally recognized threshold that separates air space, which is part of the territory of the State, from outer-space which is a *res communis*. Similarly, until the Montego Bay UN Convention on the Law of the Sea of 1982, there was no general agreement on the width of the territorial sea, i.e. on the threshold that separates that sea, which is part of the territory of the State, from the high seas. But here again, the absence of an agreed threshold did not mean that these two areas did not have, or prevented them from having two radically different legal status. In any case, whatever the threshold that separates, or the criterion for distinguishing, multi-party actions from collective mass claims actions, it is obvious that 60.000 claims fall on the side of collective mass claims actions.

macro-analysis and treatment of large masses of individual phenomena as an impersonal whole, that cannot take into consideration the individuality of the components.

172 - It is precisely this fundamental difference that the US Supreme Court highlighted in the *Stolt Nielsen* judgement when it found that representative proceedings or "class action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator"[37].

173 - The other type of circumstances that can surround silence and impart it with meaning and significance, are of a legal nature, pertaining to the legal context of the interpreted instrument, such as the concepts of "course of performance", "course of dealing" and "trade usages", in interpreting contracts, or other legal concepts and principles that form part of the legal environment of the interpreted instrument. One such legal concept or rule which is well known in the arbitration environment but over which the majority award passes in silence, is described in a very recent article by the same author quoted by the majority award, S.I. Strong[38] , as follows :

[37] *Supra* note 29, and accompanying quotation.

[38] S.I. Strong, "Does Class Arbitration 'Change the Nature' of Arbitration ? *Stolt Nielsen, AT&T* and Return to First Principles", 17 *Harvard Negotiation Law Review* , (forthcoming 2012), available electronically at http://ssm/abstract=179128.

"[T]he first question raised in every arbitration is whether the parties have agreed to arbitrate this particular dispute. This issue ... can be termed 'primary consent'... Instead, class arbitration focuses for the most part on what can be called 'secondary consent', meaning consent to this particular type of procedure". She adds : "*This concept is by no means unique to class disputes, since traditional multiparty arbitrations are also required to establish secondary consent in cases where the arbitration agreements are silent or ambiguous as to multiparty treatment*"[39].

174 - According to this concept or rule, the need to establish secondary consent applies to both multi-party arbitration and *a fortiori* to collective mass claims actions or representative proceedings.

[39] *Ibid*, pp. 55-56, emphasis added, footnotes omitted. In footnote 255, Strong cites Lew et al, *Comparative International Commercial Arbitration* (2003), on the need to establish secondary consent in both class and traditional multiparty arbitration; and in note 256 she cites numerous cases on the requirement of secondary consent in multiparty arbitrations.

175 - This applies also in the ICSID context. That we have no precedents or writings about the subject is simply because the issue did not arise until now before an ICSID tribunal as concerns collective mass claims actions. Concerning multi-party arbitrations, as the majority award states, the issue was raised during the drafting of the ICSID Convention, but the question was left open. It was debated during the latest revision of the Rules, but again was not expressly addressed in the revised Rules of 2006. But the absence of written regulation does not mean absence of rules. Indeed, the few cases of multi-party arbitrations that took place within the ICSID framework (and also NAFTA), were always either with the clear agreement of the parties or with no objection from the Respondent, which amounts to an implied consent. Thus, the rule of "secondary consent" was consistently upheld in multi-party arbitration[40]. And if this is the case in multi-party arbitrations, *a fortiori* it has also to be the case for collective mass claims actions.

E - Mass Claims Processes in International Law

176 - Most of the analysis up to now has been of the "consent to arbitrate" and its limits in national legal systems, including international commercial arbitration which is, in the final analysis, subject to national law and national judicial control. But of course ICSID arbitration is situated on the international level, i.e. in international law, which is, as described above (paras. 8,16) much more strict and exacting as regards the requirement of consent and its

[40] Schreuer, *The ICSID Convention. A Commentary* (2d edition, 2009), p. 163, para. 279, cites the *Klöckner v. Cameroon* case, where Cameroon initially raised the objection that the use of the word "national" in singular in Article 25(1) of the ICSID Convention barred an arbitration with multiple parties on the Claimants side, but subsequently dropped the objection.

ascertainment as basis of jurisdiction.

177 - The foregoing analysis thus applies *a fortiori* and with greater legal force when it comes to *ad hoc* international arbitral tribunals, such as the ICSID tribunals, and the interpretation of the "consent to arbitrate" before them. The analysis leads inexorably to the conclusion that a mere "consent to arbitrate" does not cover the fundamentally different and atypical proceedings of collective mass claims actions, such as the present one (whether we qualify them as collective, class, representative, aggregate or otherwise), and that a "secondary consent" is required for such proceedings to be covered.

178 - In their written and oral pleadings, counsel and legal experts for the Claimants argue that several mass claims processing programs took place on the international level in recent time, with a view to convincing the Tribunal a) that such procedures are possible and admissible on the international level; and b) that the Tribunal, by analogy, has jurisdiction and is empowered to do the same, which also implies, according to them, the Tribunal's power to devise the appropriate procedures to handle such mass claims.

179 - Although the majority award chose to ignore this aspect, I consider it important and highly relevant to examine the other experiences of processing mass claims in international law, in order to establish what can or cannot be done in the present case.

180 - The analogy that counsel and legal experts for the Claimants sought to draw between the mass claims processing programs that existed up to now on the international level and the

present collective mass claims action, is a false analogy. It glosses over fundamental differences between these programs and the present case.

181 - First and foremost among these differences is the legal basis on which these programs were established, and which is the crux of the matter here under discussion, namely whether the Respondent, by merely consenting to arbitration within the ICSID framework, has also consented to arbitrate the present collective mass claims action.

182 - If we examine all the examples of international mass claims programs that have been mentioned by counsel and legal experts for the Claimants, and which are discussed in one of the Claimants legal annexes to which recurrent reference was made[41], covering indeed all the known instances, we note the following common major features that distinguish them from the present case :

183 - a) Each one of them, without exception, was specifically established to process a particular set of mass claims. None of them was set in motion by an application to a standing Tribunal, or on the basis of a prior compromissory clause (or another prior jurisdictional title) as in the present case.

184 - b) In all these cases, with one exception, the program, as a specific response to a specific crisis ("the same set of facts" giving rise to the claims), was established by an

[41] CLA 185. In fact, it is an excerpt of a book edited by Judge Howard Holtzman and Edda Kristjansdottir, *International Mass Claims Processes : Legal and Practical Perspectives* (OUP 2007), prepared under the auspices of the PCA Steering Committee on International Mass Claims.

agreement between the parties, i.e. on the basis of the consent of all parties concerned. The one exception is the United Nations Compensation Commission (the UNCC), which was established by the Security Council, using its exceptional powers (mandatory on all member States) under Chapter VII of the UN Charter.

185 - The fact that all known cases, save for the UNCC, which is of no relevance to the present case, are based on a special agreement between the parties, is of particular significance to the present case, and to the point under discussion here, namely whether a mere consent to arbitrate within the ICSID framework covers subsequent collective mass claims actions. If in all known international cases (barring the fiat of the Security Council) a special agreement is needed, then, in the absence of such agreement, but within an already existing arbitral framework, at least a "secondary consent" is needed.

186 - c) All these mass claims processing programs on the international level, with one notable exception (and another minor one, see below note 42) took the form of administrative compensation commissions, quasi-judicial bodies rather than fully judicial or arbitral tribunals. Of course, they are subject to certain due process requirements, but this is not the same as judicial or arbitral due process. Thus, the procedure is normally non-adversarial, and the remedies can be in terms of flat-rate compensation, etc. The treatment of claims is not necessarily individual. Although, in the UNCC for example, for State claims and large individual claims, the examination was individual. This type of procedure is not relevant to the present case, where the requirements of the judicial or arbitral function and the judicial or arbitral due process have to be completely and strictly observed.

187 - The one notable exception is the Iran-US Claims Tribunal. And this exception proves the rule. Claims are dealt with individually, though occasionally related claims were dealt with in one case (as is done in all ordinary tribunals). The Iran-US Claims Tribunal was established by special agreement to deal with a specific set of claims. And it functions not as an *ad hoc* tribunal dealing with all these claims at one go, in one suit or action, but as a standing regular Tribunal examining claims individually and adversarially[42], the same as the old Mixed-Arbitral Tribunals of the 19th and early 20th century.

188 - d) None of these mass claims processing programs, whether called Tribunal, Commission or otherwise, took on itself or was authorized to invent its own procedures from scratch. The main parameters of these procedures, particularly the ones that deviate from the normal patterns and are thus more controversial, were set out in the agreement or the legal instrument establishing the body (or their drafting and revision were kept in the hands of the Parties or the organ that established the program).

189 - On all these crucial points, the international precedents and experiences make it abundantly clear the necessity of the agreement of all parties in order to establish a mechanism with jurisdiction to process a particular set of mass claims - or collaterally, to endow an already existing body or framework with such jurisdiction - and to devise the procedures for so doing; in stark contradiction with the findings of the majority award in the

[42] The other minor exception is the first phase of The Claims Resolution Tribunal for Dormant Accounts in Switzerland (CVRT-I), which also functioned along similar lines.

present case.

190 - ***My conclusion*** on the first preliminary objection of Argentina is that, in conformity with what is followed both on the national law level, including in international commercial arbitration, and on the international law level, which is the applicable law in the present case, a mere acceptance to arbitrate does not cover collective mass claims actions (regardless of the denomination) and that a special or secondary consent is needed for such collective actions.

191 - In consequence, Argentina's consent to the ICSID Convention and the BIT does not extends to collective mass claims actions, and this Tribunal lacks jurisdiction to hear the present case.

192 - And if the Tribunal has no jurisdiction to hear the case, the question of whether it has the power to devise, revise or adapt the rules of procedure to handle it, becomes moot.

193 - But as the majority award found that the Tribunal has jurisdiction over the present collective mass claims action and that, in consequence - reasoning by necessity - it also has to have the power to devise or "adapt" the rules of procedure to handle it, I feel duty bound to address this last question.

F - The Limits of Procedural Improvisation

194 - Even if *arguendo* the Tribunal had jurisdiction to hear the present collective mass claims action (which I already refuted), it still faces a fundamental obstacle that prevents it from proceeding as the majority award proposes to do. This insuperable obstacle is that the Tribunal is not authorized, nor has the power, under the ICSID Convention and the Arbitration Rules, to adopt *proprio motu* (on its own motion or initiative), a whole set of rules of procedure, replacing the normal "Arbitration Rules" or large segments thereof, without the agreement of the Parties or the approval of the Administrative Council, even if it is only for the purposes of handling the present case.

195 - Two points of clarification are here in order. First, although this question was raised as part of Argentina's first preliminary objection, it is based on different grounds, as it assumes *arguendo* that Argentina's double consent to the ICSID Convention and the BIT covers collective mass claims actions, which is precisely what Argentina contests in its first preliminary objection. If Argentina's consent is also mentioned here, it is as a third type or layer of consent envisaged in Article 44 of the ICSID Convention, when it refers to rules of procedure "agreed by the parties", in the context of elaborating rules of procedure for a specific case; on the assumption that the Tribunal has already established its jurisdiction over the case. The distinction between these three layers of consent (to Convention, BIT and within Article 44), should always be kept in mind, which is not the case of the majority award.

196 - The second point of clarification concerns the legal nature of this preliminary point. What is in question here is the inherent and institutional limitations on the power of the

Tribunal to devise, revise or "adapt" the rules of procedure in a specific case, i.e. certain limits on its powers in exercising its judicial or arbitral function. As such, it is essentially a question of jurisdiction - jurisdiction in its first and foremost sense of the legal power to exercise the judicial or arbitral function (see above para.10) - and not a question of admissibility as maintained by the majority opinion.

197 - Be that as it may, the results of the examination of this issue must be the same. For if it leads to a finding that the Tribunal is not empowered to undertake the "revisions" or "adaptations" set out in the majority award, the award would be *ultra vires,* regardless of the legal characterization by the award of this preliminary issue.

198 - The majority award, having determined that the silence of the "ICSID framework" over collective mass claims actions constitutes a "gap" - i.e. an unintended omission - and not a "qualified silence" - i.e. a deliberate exclusion or limitation (while glossing over the limits of Argentina's consent to arbitrate), seeks to rest its power to fill this so-called "gap" on Article 44 of the ICSID Convention and Article 19 of the Arbitration Rules, describing them as "the mere expression of the inherent power of any tribunal to resolve procedural questions in the event of lacunae" (para. 521).

199 - Article 19 of the Arbitration Rules, entitled "Procedural Orders", provides :

"The Tribunal shall make the orders required for the conduct of the proceedings".

This Article has nothing to do with filling gaps. It merely states the obvious, that the Tribunal controls and directs the unfolding of the proceedings through procedural orders, frequently

reflecting also the agreement of the parties. It thus decides such matters as fixing the time-limits, the language or languages used, whether the case will have one or two phases, etc., as well as deciding on the different requests of the parties and the incidents of procedure.

200 - Article 44 of the ICSID Convention is more to the point here under discussion. Enunciating the applicable procedural law, it provides, in its second sentence :

> "If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question".

201 - It is clear from this text that the situation envisaged in that provision is that of an issue arising in the course of the proceedings which is not addressed by any specific rule of the applicable procedural law. In other words, it is a situation where no rule exists at all; and not one where a rule exists, but may not provide the best or most suitable solution to the issue at hand, which raises the question of revising or replacing the existing rule rather than filling a gap.

202 - It is also clear from the text that what is envisaged in terms of "filling a gap" is the odd missing rule (by inadvertence or oversight) or a small missing element or cog of a rule necessary for its implementation, what is called in the general theory of law a "technical gap"; and not whole sets or chapters of rules that cover complete segments of procedure (such as the administration of proof or the role and due process rights of the parties in the proceedings). Such major subjects require a "legislative jurisdiction" (the jurisdiction of the

parties or the organ that adopted the initial legal regulation), going far beyond the limited power of filling gaps that can be encompassed within the judicial or arbitral function.

203 - Indeed, all the examples that can be found of the exercise of such a power, whether in the ICSID framework or by other international tribunals, never go beyond such limited gaps calling for one specific norm or rule to fill it. Thus, in the ICSID context, the examples that can be found of decisions taken in the exercise of the power granted by Article 44 are limited to admitting an *amicus curia* submission (in *Suez and AWG v. Argentina);* or staying proceedings pending the determination, by some other competent forum, of an issue relevant to the tribunal's own decision (*SGS v. the Republic of the Philippines)*[43].

204 - The majority award is conscious of these limitations. Thus, after affirming its power to fill gaps under article 44, it adds : "...this does not mean that the scope of this power is unlimited...the Tribunal is bound by the limits set forth by Article 44" (para. 520). It then proceeds to articulate these limits as follows :

> "[T]his power is limited to filling gaps left by the ICSID Convention and the Arbitration Rules...[i]n contrast [to] a *modification* of existing rules [which] can only be effected subject to the parties' agreement.."(para. 522, emphasis added). It is "further limited to the filling of gaps... in the specific proceedings at hand... [i.e.] limited to the design of specific rules to deal with specific problems arising in the proceedings at hand" (para. 523). Thus, "the Tribunal cannot i) modify the current

[43] See Schreuer, *The ICSID Convention. A Commentary* (2nd ed. 2009), Art. 44, paras 57, 58).

arbitration rules [presumably in a specific case] without the Parties consent; ii) adopt a full set of procedure unless the Parties have agreed that the Arbitration Rules.... should not apply without substituting their own rules" (para. 524).

205 - Problems however arise when the majority award tries to demonstrate how what it proposes to do, by designing specific rules to replace a good part of the "Arbitration Rules", falls within these limits. The award starts by posing the key question :

"Can the Tribunal fill the gap created by the collective aspect of the claim on an *ad hoc* basis and through *the design of specific rules*, or would this require the creation and/or modification of general rules which are under the competence of the Administrative Council ?" (para. 526, emphasis added).

206 - Responding to this question by the simple application of the limits on the power of the Tribunal under Article 44, as formulated by the majority award itself, leads logically, and inescapably in my submission, to a clear negative answer.

207 - But the majority award tries to fudge this clear answer by considering that "[t]his question cannot (and should not) be answered in the abstract...[but] in a concrete manner, i.e. asking itself (i) what are the [needed] specific rules...and (ii) can [they] be considered to fall within [the power of] Article 44 ?" (para. 527).

208 - The majority award then embarks on a tortuous argumentation , ending with the Tribunal arrogating to itself the power to set aside, in large measure, the existing Rules of

Procedure, and replacing them by another set of rules of its own; acting as a legislator, be it for one case.

209 - In order critically to examine the reasoning of the majority award in a comprehensible manner, rather than analyzing it statement by statement, I propose to divide the arguments into three categories, corresponding to the three lines of the shifting strategy of justification followed by the award in defense of its proposed course of action :

i) that it is merely filling a gap;

ii) that in any case it is introducing innocuous changes that do not affect the substantive rights of the parties and only minimally their procedural rights;

iii) and to the limited extent to which these latter rights are affected, their limitation is justified by a balancing of the interests of the parties.

a) - On Filling Gaps :

210 - Having declared that the power of the Tribunal under Article 44 of the Convention "is limited to filling gaps" and does not extend to "a modification of existing rules" (para. 522), the majority award proceeds to describe the method it proposes to fill the gap, consisting in "the design of the specific rules... that would be necessary in order to be able to conduct the present proceedings" (para. 526-527); "...the adaptations required relat[ing] strictly to the manner of conducting the present proceedings" (para. 534). In other words, "it is the manner in which the Tribunal will conduct such examination [of the claims, i.e. the controverted rights and obligations of the Parties] which may diverge from the usual ICSID proceedings" (para. 534).

211 - But if the new specific rules cover "the manner in which the Tribunal will conduct [the] examination of the [claims]" or "the conduct of the present proceedings", this obviously covers most of what is usually covered by the rules of procedure, including those in the Convention and the Arbitration Rules. And these new rules "*diverge from the usual ICSID proceedings***"**, i.e. Rules of Procedure (emphasis added). In other words, they set them aside and replace them *in casu.*

212 - Obviously, this has nothing to do with filling gaps. First we are not speaking here of a gap, in the current sense in rules of procedure of a "technical gap" - the odd, inadvertently unprovided for contingency, or the small missing detail (like a cog or a screw) necessary for implementing a rule - which can be filled by a tribunal or another implementing organ. We are speaking here of whole chapters, segments or sections of regulation. Technically, this is an "unauthentic" or "legislative gap", calling not for filling a small gap, but for a complement of the legal regulation, which needs a "legislative jurisdiction", belonging to the organ or the parties who adopted the original instrument to be complemented, but which lies beyond the "adjudicative jurisdiction" of the implementing organ.

213 - Secondly, what the majority award proposes to do is not "filling a gap", but modifying ("diverging from") the existing rules of procedure. A gap or lacuna is a void, an empty legal space not covered by any rule. But here we have a complete legal regulation, covering almost every instance of the proceedings. What the majority award proposes is to replace most of it by another set of rules, which cannot be seen, by any stretch of imagination, as filling a void.

It is clearly a modification or revision of the existing rules, though limited to the current case.

214 - The majority award tries to defend its position as follows :

> "The Tribunal...can and ought to fill gaps left where the application of existing rules are not adapted to the specific dispute submitted to ICSID arbitration. In such a case, *the filling of the gap does not consist of an amendment of the written rule itself, but rather of an adaptation of its application in a specific case"* (para. 525, emphasis added).

215 - This statement is extraordinary in at least two ways : first, it insists on using the language of "filling gaps", in the presence of norms dealing with the matter, i.e. where no gap exists, while realizing full well that the suitability of the existing rules is another matter that raises the question of their amendment, and not of filling gaps.

216 - Whence the second extraordinary feature of this argument, the distinction between "an amendment of the written rule itself" and "an adaptation of its application in a specific case" by "deviating" from its prescriptions, i.e. replacing it by another "specific rule", as abundantly described in the majority award. This baffling distinction is reminiscent of that other mystifying one between "conditioning... consent to ICSID jurisdiction to the fulfillment of a condition" and "conditioning the effective implementation of such consent... to the fulfillment of such a precondition" (discussed above, paras. 21-24).

217 - But no amount of sophistry and playing on words or newspeak can conceal the fact that the proposed adaptations "diverge from the usual ICSID proceeding" (para.533), i.e. from the existing Rules of Procedure. Nor can they transform the legal nature of this act or operation, dubbed here as "adaptation" which does not consist of providing for an inadvertently overlooked minor contingency or a small missing detail in an existing rule needed for its implementation that would correspond to the meaning of "filling a gap"; but of *changing* or *substituting* the existing rules by other "specific rules", which clearly constitute an amendment, modification or revision of the existing rules; an operation which lies beyond the limited power granted to the Tribunal under Article 44 of the Convention.

218 - Nor does the fact that this so-called "adaptation" is effected only for the purposes of the current case, change the legal nature of the act or operation. After all, the jurisdiction of the Tribunal is limited to the case before it and its powers and even existence, do not extend beyond that. But in the specific case before it, the Tribunal will not follow the normative prescriptions of the written rule, but will substitute for them other normative prescriptions that "diverge" from them (rather than merely complement something that is missing in the normative prescriptions, which would correspond to the description of "filling a gap"). This means that in this specific case, the existing rule or rules have been "amended", "modified", "revised" or more radically discarded and totally replaced. In other words, the arbitrators would have exercised a "legislative jurisdiction" or "power", that lies beyond what is provided for in Article 44 of the Convention.

219 - And if in every case or whenever the arbitrators in a specific case consider that there

are more suitable or appealing rules of procedure, according to their will of whim, these arbitrators can brush aside the written rules of procedure in deciding the case before them, what would remain of the "written rule" and its binding normative effect ? It would be reduced to a mere recommendatory directive at the discretion of the Tribunal. It is true that the "Arbitration Rules" are largely *jus dispositivum*. But they can be replaced in a specific case only by the agreement of the parties, and not by the fiat of the Tribunal over the objection of a party.

220 - The artificial and tenuous character of this argument of the majority award, concerning the legal nature of the operation or act of "adaptation" (and whether it is "filling a gap" or an "amendment" of the Rules of Procedure), explains the slippage of the award's reasoning to a second line of defense, namely that, in any case, the "adaptations" envisaged are innocuous, with no or negligible consequence on the rights of the parties.

b) The Scope of the Proposed "Adaptations" and their Incidence on the Rights of the Parties

221 - In its second line of defense or justification, the majority award starts by trying to minimize the magnitude of the "adaptations" it proposes to undertake by such statements as: "...the adaptations...relate strictly to the manner of conducting the present proceedings, and in particular how to collect and weigh evidence" (para. 534; see also paras. 530,531,533).

222 - But once the rules governing the manner in which the proceedings are conducted

throughout a case (particularly the presentation and adversarial examination of the controverted claims and their supporting evidence by the parties and the assessment of these claims and the weighing of the evidence by the Tribunal) are covered by the "specific rules" designed by the Tribunal for the particular case under consideration, how much else is left to be governed by the regular rules of procedure ? In fact, the proposed "adaptations" cover large expanses, if not most of what is included in any rules of procedure.

223 - Another argument in the same vein of minimizing the import of the proposed changes or "adaptations" of the rules of procedure, is the insistence of the majority award that these "adaptations" do not affect the merits, i.e. the controverted claims, but only the manner in which they will be examined and the way the Tribunal will conduct the proceedings. In other terms, the majority award contends that these "adaptations" will not affect the substantive rights and obligations of the parties (para. 530-534). This implies, however, that by contrast they may touch their procedural rights (which the award acknowledges, and tries to justify later on, as discussed below). And after briefly describing the proposed "adaptations" in terms of simplification of the marshalling and weighing of evidence and the examination of the claims[44], the award states that "such simplification of the examination process is to be distinguished from the failure to proceed with such examination" (para. 531).

[44] [I]t is undeniable that the Tribunal will not be in a position to examine all elements and related documents in the same way as if there were only a handful of Claimants.... [but will resort to] a simplified verification of evidentiary material concern[ing] either the depth of examination of a ducument... or the number of documents to be examined, and if so their selection process..." (Para. 531).

224 - These affirmations and statements are properly baffling, for several reasons : first, Article 44, which is here under discussion, deals exclusively with rules of procedure. It goes without saying that the Tribunal has no power under this article or in general to touch the controverted substantive rights and obligations of the parties, that constitute the "object" or "subject-matter" of the claims before the Tribunal. The Tribunal is here to judge, not to retouch, these rights and obligations. If what the Tribunal does on the procedural level affects these substantive rights and obligations, such action of the Tribunal is clearly both illegal and *ultra vires*.

225 - Secondly, the implication that as long as the "adaptations" by the Tribunal are confined to "set[ting] strict boundaries to certain of the Parties' procedural rights" (para. 538), in fact abridging or curtailing these rights, without touching directly the Parties' substantive rights, such adaptation would be justified, is based on a clear fallacy. This fallacy consists of the radical distinction between substantive and procedural rights, and the treatment of the later as a second class category of rights at the disposal and discretion of the Tribunal (a distinction reminiscent of the manner in which the majority award distinguishes between jurisdiction and admissibility).

226 - This radical distinction is false because if a substantive right, or a right *tout court*, is defined in the general theory of law as "an interest (or a value) protected by law", then the procedural rights or guarantees that back it up are an essential part of this legal protection; their curtailment, abridgement, or violation in any way, automatically puts in serious jeopardy the substantive rights they protect. It is a sheer aberration to try radically to separate

the two the way proposed by the majority award, pretending that the limitation of one (the procedural rights) does not affect the other (the substantive rights).

227 - In the third place, the statement that the "simplification" of the examination of the claims and the evidence should be distinguished from failure to operate such an examination at all, is off the mark. Obviously, if the Tribunal does not examine the claims and the evidence, it would have totally failed to exercise its judicial or arbitral function. The question is not whether it has undertaken such an examination or not, but whether the so-called "simplified examination" it proposes to do, meets the judicial and arbitral standards of due process. The answer to this question depends on the extent to which the simplification affects the procedural rights of the parties, particularly the defense rights of the Respondent.

228 - The majority award tries to minimize the impact of its proposed "simplification" of the procedure (linguistic slippage again from the more alarming "adaptations" to the rather virtuous "simplification"), to hide the real legal nature of the operation, i.e. "modification". It does so by describing briefly the effects of the "adaptation" on the respective rights of the two parties.

229 - Starting with the *Claimants*, which is the easier case, the majority award states that the adaptation would concern only "the way [they] are represented" (para. 530), acknowledging "that TFA has been provided with powers which may go beyond the power granted to a normal agent under Rule 18 ICSID Arbitration Rules" (para.532). But the award immediately adds : "Admitting the present collective proceedings would thus also mean accepting TFA's

role as due representative of Claimants" (para. 532).

230 - This last sentence is yet another extraordinary statement. By which leap of faith, does the taking of jurisdiction by the Tribunal over the case, even in the form of a collective action, (assuming that the Tribunal has jurisdiction, an assumption I refuted above), justify and render legal and acceptable to the Tribunal the exorbitant status and powers of TFA ? Again reasoning by necessity that is not evident.

231 - Later on, the majority award justifies the exorbitant character of "the TFA Mandate Package [which] has the effect to depriving [sic] Claimants of a substantial part of their procedural rights", by the fact that it "has been consciously accepted by Claimants" (para. 546). This can be a valid justification, subject to public policy limitations, if this consent were fully informed and not tainted by fraud or forgery; that which is ascertained by the majority award, but which is contradicted by certain recent criminal condemnations for forgery (of the signatures of the mandates given to TFA) by Italian courts, that the majority award refused to take into consideration.

232 - Be that as it may, what counts most here is the effects of the new "specific rules" or "adaptations" on the rights of the Respondent, who has contested throughout the power of the Tribunal to introduce these "adaptations"; unlike the Claimants who have defended the power of the Tribunal to do so, and thus can be legitimately presumed to have accepted the incidence of these adaptations on their procedural rights, in their own self-interest.

233 - The "[*e*]*ffects on Argentina's defense rights"* of the proposed "adaptations" are assessed by the majority award as follows :

> "It *appears* that the effect of such examination method and procedure on Argentina's defense rights is *limited and relative*. Whilst it is true that Argentina may not be able to enter into full length and detail into the individual circumstances of each Claimant, it is *not certain* that such approach is at all necessary to protect Argentina's procedural rights in the light of the homogeneity of Claimants' claims"" (para. 545, emphasis added; see also para. 536).

234 - This minimalist representation of the effects of the "adaptations" on the rights of the Respondent - which contrasts with their more constraining description elsewhere in the majority award (e.g. para. 538) - calls for the following critical comments :

235 - i) Justifying the abridgement and curtailment of the procedural rights of the Respondent, particularly as concerns the individual examination of claims (and claimants) by the argument that the mass claims in question are sufficiently homogeneous, does not stand scrutiny (see above, paras. 139-142).

236 - This is because it is an absolute due process right of a respondent in a judicial or arbitral proceeding, to have every element of the claim or claims presented against him, examined by the tribunal, through adversarial debate that affords him full opportunity to contest and refute these elements one by one, if he can..

237 - This procedural right of respondents does not necessarily preempt any and all "group examination of claims" (para. 540). For as long as the mass claims are cast into one claim (with a mass of claimants) or are identical claims (which comes to the same thing as the tribunal, by examining one, would have examined them all) - which is the case for example of "class actions" - the tribunal can examine adversarially all the aspects and components of this one claim, in spite of the multitude of the claimants, totally safeguarding the due process rights of the respondent[45].

238 - But in the present case, the Claimants vigourously refute the characterization of their collective mass-claims action as class action. And although these mass-claims can be considered as arising "out of the same fact pattern", and thus share some common features (whence a degree of homogeneity), they are not identical and preserve some individualized features that distinguish them from one another. To the extent that the individual claims in the mass differ from each other, it is the absolute due process right of the defense, and the obligation of the Tribunal, to have them examined individually and adversarially by the Tribunal. The Tribunal has also to address and pass judgement on each of them and state the reasons on which it bases its judgement (Article 48/3 of the ICSID Convention). Failure to meet these requirements is a cause of annulment under the ICSID Convention (Art. 52/d).

239 - A "group examination" of mass claims that feature certain individual differences

[45] Even in class actions, as noted by the US Supreme Court in the *AT&T Mobility LLC v. Concepcion ET UX* case, "class arbitration greatly increases risks to defendants" (see above para. 152). These risks are exponentially greater when the mass is composed of differentiated claims.

among themselves, can at best deliver rough or approximate justice. It may satisfy the due process requirements of an emergency mass claims program or an administrative compensation commission. But it definitely falls well below the stringent due process standard of judicial or arbitral proceedings.

240 - ii) One cannot but note the hesitant and guarded language of the above-quoted assessment by the majority award of the effect of the "adaptations" on Argentina's defense rights : - "it *appears*" that the effect "*is limited and relative*"; "*it is not certain that such approach*" of individual examination of differentiated claims "*is at all necessary to protect Argentina's defense rights*" (above, para. 234).

241 - This language of "appearance" (of an effect being "limited and relative") and of "uncertainty" (whether a due process guarantee is "at all necessary" to protect a right), reflects an evident unease of the majority award with its own argument, and its awareness of its frail and risky character. For good reason. For here, the majority award is treading rather heavily on the highly sensitive due process grounds.

242 - In the first place, the individual adversarial examination of differentiated (or non-identical) claims is an essential part of the very "object" or "subject-matter" of the Respondent's procedural defense rights, and is not a mere "approach", as the majority award calls it, which it has decided to dispense with, because it considers that "it is uncertain" that such an examination "is at all necessary to protect Argentina's procedural rights". In other words, according to the majority award, "it is not certain" that the subject-matter of a right -

what it prescribes and legally guarantees for its holder - "is at all necessary" for the protection of that same right!

243 - Apart from logical confusion, this statement of the majority award reveals something even more serious, namely, that the Tribunal has substituted itself for the Respondent and decided in his place the question whether it is necessary for him to exercise some of his procedural defense rights or not. Moreover, it has answered the question on the basis of impressions and "appearance", almost by guesswork - "it is uncertain" - in order to reach the result it wanted to reach.

244 - Procedural rights, the same as substantive rights, are not at the disposal and the discretion of the Tribunal. If they are ascertained, they have to be upheld and enforced by the Tribunal; not confiscated, scuttled, abridged or curtailed by it. But this is exactly what the majority award has done in the present case. By imposing the "adaptation" or "simplified procedures", that deny Argentina an individual adversarial examination of the differentiated mass claims, the majority award has unlawfully curtailed the Respondent's defense rights and thus flagrantly violated the due process arbitral standards, apart from being manifestly *ultra vires*.

c) Balancing of Interests Redux

245 - The majority award tries to evade this inexorable conclusion by shifting its argument, through yet another slippage, to a third line of defense or justification of the "adaptations", to wit, the balancing of the interests of the Parties. A balancing that the majority award operates

by comparing the consequences or effects of the "adaptations" on the rights of the Parties "with the consequences of rejecting the claims for lack of admissibility" (para. 537), in order to answer the question "whether it would be justified to set strict boundaries to certain of the Parties' procedural rights, so as to give actual effective protection to the investment" (para. 538).

246 - According to the majority award, the consequences of *admitting* the "adaptations" ("special rules, "simplified examination", etc.) on the procedural rights of the Parties are minimal, and the outcome beneficial ("the effective protection of the investment"). The "adaptations" pose no problem for the *Claimants*, who have requested and defended them all along, and accept their consequences in their own self-interest of protecting their investment. As far as the *Respondent* is concerned, according to the majority award (discussed above, para.232ff.), "[i]t appears that the effect of such [simplified] examination... on Argentina's defense rights is limited and relative", and "it is not certain" that the due process guarantees curtailed by the "adaptations" are "at all necessary to protect Argentina's procedural rights" (para. 545).

247 - By contrast, the consequences of *dismissing the case on grounds of inadmissibility* would be serious and prejudicial, according to the majority award. The "only alternative" left to *Claimants* would be for each of them "to file an individual ICSID claim" which would be "cost prohibitive to many claimants...[and] may equal a denial of justice" (para. 537). It would also "be a much bigger challenge to Argentina's [the *Respondent's*] effective defense rights...to conduct 60.000 separate proceedings... than [their] mere limitation" by the

"adaptations" (para. 545).

248 - On the basis of this exercise of "balancing the interests" of the Parties' at stake, according to its own subjective representation and evaluation of these stakes, the majority award finds that the "adaptations", i.e. "the procedure necessary to deal with Claimants' claims in a collective way", are "admissible and acceptable under Article 44 ICSID Convention, Rule 19 Arbitration Rules, as well as under the more general spirit, object and aim of the ICSID Convention" (para. 547).

249 - This exercise of balancing of interests calls for critical examination. It is intrinsically wrong, lies beyond the powers of the Tribunal and is based on wrong premises, as shown in what follows.

250 - The "balancing of interests" as operated by the majority award is intrinsically wrong because, by making the admissibility of the "adaptations" depend on the comparison of the consequences of their admission on the procedural rights of the Parties "with the consequences of rejecting the claims for lack of admissibility" (para. 537), the majority award is *treating these rights as "variables"* (or rather as dependant variables), whose recognition, scope and enforceability by the Tribunal are to be determined as a function of the Tribunal's subjective evaluation of the right balance of interests between the parties, which thus becomes, according to this logic, the parametric gauge of these rights. This is standing the legal logic on its head. A tribunal is duty bound to apply the law, i.e. to enforce rights not to put them in question, according to its own evaluation of extra-legal (or opportunity) considerations, be they its subjective representation of the interests of the

Parties.

251 - Such "balancing of interests" lies beyond the powers of the Tribunal. For, as explained earlier (para. 31), the Tribunal thus acts as if the rules do not exist, and are not themselves the result or outcome of a balancing of interests by those who adopted them. It is at that level, the legislative or conventional level, that the balance of interests takes place, the level of establishing the rules, not of applying them, which is that of tribunals. It is not open to the Tribunal to arrogate to itself the legislative jurisdiction or power of re-examining the rules in order to revise of refashion them, in the name of a rebalancing of interests of its own, according to its will or whim. In other words, such an exercise of "balancing of interests" is clearly *ultra vires* the powers of the Tribunal.

252 - Apart from the illegality and *ultra vires* character of the "balancing of interests", as represented and operated in the majority award, substantively the exercise is based on false premisses of law and fact.

253 - i - To say that the only alternative open to the securities holders if the present collective action is found inadmissible would be for each of them to file an individual ICSID claim, is wrong in fact. For as already shown (above para 33), apart from the Argentinean tribunals, that were not even tried, all the emphasis in the securities entitlement instruments was put on the chosen forum therein for dispute settlement, i.e. the tribunals of some of the major financial centres of the world as *the* judicial guarantee of the financial investment, beyond the reach of Argentina's law and tribunals. ICSID arbitration was never mentioned in

these instruments, nor in the advertisements and the road-shows for the sale of the instruments (as abundantly shown in the pleadings). The one judicial guarantee or recourse that stood out was the chosen forum.

254 - Moreover, one should not forget the Italian courts which were seized by some of the securities entitlement holders who succeeded on numerous occasions in obtaining relief against the banks that sold them the securities. This largely explains the creation by these very banks of the TFA and their belated discovery of ICSID arbitration as a way of deflecting responsibility from themselves.

255 - ii - To say that dismissing the case for inadmissibility of the adaptations, "may equal a denial of justice" is triply wrong, because it is based on three false assumptions. In the first place, to imply that this would deprive the claimants from any efficient dispute settlement means, is wrong as just explained.

256 - Secondly, in order to speak of a denial of justice, a tribunal must first have jurisdiction over the case. But this Tribunal lacks jurisdiction *ratione materiae* over the claims (Part III above). It lacks jurisdiction to hear collective mass claims actions, as falling outside Argentina's consent to arbitrate (Part IV, *A* to *E* above), and it lacks the power to revise the Arbitration Rules in the instant case, in the absence of both Parties consent, as just discussed. Speaking of "denial of justice" in these circumstances is out of place.

257 - Thirdly, it is also out of place and even odd in international law to speak in general of

an absence of a competent forum (which is not the case here, as per para 253-254 above), in terms of "denial of justice". This is because international law, given its a-centralized character, has no system of courts or tribunals of plenary or general jurisdiction (*juridictions de droit commun*) covering all cases and litigants, barring a specific exception attributing jurisdiction over a particular type of matter or litigant to another specialized organ, and where every dispute or every claim can ultimately and necessarily find a competent forum to handle it. By contrast, as explained earlier (para 7), all international courts and tribunals are tribunals of attributed jurisdiction (*juridictions d'attribution*); a jurisdiction based on the consent of the parties or litigants and confined within the limits of this consent.

258 - iii - In fact, the majority award tries to claim the same powers as a tribunal of plenary or general jurisdiction through interpretation by calling on the "spirit", "aim" and/or "object and purpose" of the ICSID Convention and the BIT, "in accordance with the principles of interpretation of treaties" (para. 528). But the principles of treaty interpretation, as codified in articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969, prescribe starting with the text in its context and be guided by the object and purpose of the treaty, if need be, to clarify any subsisting ambiguity. These principles do not prescribe nor justify, the invocation left and right by the Tribunal, of the object and purpose, as subjectively represented by it, in order to deduce directly from them the solutions it seeks to reach, jumping over text, context and general rules of international law applicable to the matter. Yet, this is exactly what the majority award does all along, as already noted (see e.g. para. 24, 157-159 above).

259 - In the specific context of "balancing of interests" discussed here, the majority award sollicites the object and purpose of the ICSID Convention and the BIT, according to its subjective and partial interpretation of them as being exclusively the effective protection of the investment, notwithstanding the legitimate interests of the host State, in order to answer in the affirmative the rhetorical question it put at the outset. To recall, this question was "whether...it would be justified to set strict boundaries to [i.e. abridge] certain of the Parties' procedural rights [but in fact only to the Respondent's, as the Claimants requested the "adaptations" in their self-interest]... so as to give actual effective protection to the investment", i.e. the Claimants (para 538). And the answer, reached through the involved reasoning discussed above, is the award's finding that the "adaptations" are "admissible and acceptable under article 44 ICSID Convention, Rule 19 Arbitration Rules, as well as under the more general spirit, object and aim of the ICSID Convention (para. 547).

260 - Put in simple words, the answer is that the Tribunal can abridge the procedural rights of one party, the Respondent, against its will, in order to give greater ("actual effective") protection to the investment, i.e. to the other Party, the Claimants' investors. The one-sidedness of this alleged balancing of interests is too glaring to need any further elaboration.

261 - This is symptomatic of a general strategy followed throughout by the majority opinion, consisting of three stages :

i - starting with a subjective, partial and truncated representation of the object and purpose of the ICSID Convention and the BIT, as being exclusively the effective protection of investment, all but totally disregarding the legitimate interests of the host State;

ii - considering, in consequence, that all limitations on the jurisdiction and powers of the Tribunal are obstacles in the way of achieving this object and purpose, that should be "down-graded", (even with untenable arguments) from "jurisdictional" to "admissibility" issues; wrongly assuming that admissibility is less important in its function and legal effects than jurisdiction;

iii - assuming wrongly again that questions of admissibility, are at the discretion of the Tribunal, which can dismiss them at will as a result of its own subjective "balancing of interests" in the light of "the more general spirit, object and aim of the ICSID Convention" (para. 547), as interpreted by the Tribunal.

Needless to say, this strategy has very little to do with rigourous legal reasoning and deciding by law and all the characteristics of sheer policy.

262 - My *conclusion* on this sub-section (IV F) in general is that the "adaptations" of the Arbitration Rules that the majority award prescribes for hearing the present case are manifestly *ultra vires* the powers of the Tribunal under Article 44 of the Convention and Rule 19 of the Arbitration Rules.

G - Epilogue on Policy Considerations

263 - Considering what has just been said, it is ironic that the majority award dismisses offhand the "Respondent's arguments regarding the appropriateness of ICSID proceedings in the context of sovereign debt restructuring" (para. 548); adding that

> "[P]olicy reasons are for States to take into account when negotiating BITs and consenting to ICSID jurisdiction in general, not for the Tribunal to take into account in order to repair an inappropriately negotiated or drafted BIT" (para. 550).

264 - The majority award should have heeded its own directive, rather than read, or in effect write, into the Convention, the BIT and the Arbitration Rules, what is not there, but what it wishes to see there.

265 - Indeed, the majority award accepts, in full and without reasoning, the Claimant's contention that Argentina's policy arguments are "outdated and irrelevant" (para. 514), calling them - in only slightly varied terms - "irrelevant and inaccurate" (para. 429(v). It also seemingly subscribes to the Claimant's policy argument that "opening the door to ICSID arbitration would create a supplementary leverage against such rogue debtors and therefore be beneficial to the efficiency of foreign debt restructuring" (ibid.). In order to create such leverage over sovereign debtors, which the ICSID Convention did not foresee and which financial markets did not contemplate, then or now, the majority award fashions an unprecedented procedure for adjudicating the present claim of more than 60.000 holders of Argentinean debt, out of the thin air of the tribunal's gap-filling powers under article 44 of the ICSID Convention. Driven in part by controversial policy considerations, hidden behind references to the spirit of the ICSID Convention and the purpose of the BIT, the majority award blows hot and cold at the same time, uncritically adopting the Claimant's policy arguments over the Respondent's, to which it hardly gave any attention.

266 - Up to this point, the reasoning in this dissenting opinion has kept to strict law, and this is how a judicial or arbitral decision should be. But a judge or an arbitrator, particularly an international one, cannot be totally blind to the social, economic and political environment which constitutes the larger context of the case. Policy considerations should never be determinative of a judicial or arbitral decision. But, within the permissible margin of interpretation, they can shed light on what makes sense or nonsense among possible alternative solutions, when seen against the larger background.

267 - In this respect, the following three major policy issues or queries, collaterally raised and necessarily affected by any decision taken in this case, should have been given more attention:

268 - i - As noted earlier (para. 35), this is the first ICSID case that involves a sovereign debt financial instrument (but I leave the sovereign debt aspect to the following point), that is totally unhinged and detached from any specific economic activity or project in the host country; in other words, completely detached from any form of investment in the economic sense of the term, which is also that of ICSID Convention. Affirming the jurisdiction of ICSID Tribunals over such instruments, would extend it over a vast new field. It would cover virtually all capital market transactions, ranging from standardized financial instruments, such as shares and bonds to structured and derivative products, such as hedges and credit default swaps. It would thus open the way to converting them from specialized tribunals, dealing with disputes arising out of a special type of investment, into commercial tribunals of general jurisdiction, covering all manners of financial transactions, including the most

speculative varieties, which have nothing to do, in fact are light years away from the economic investment for the encouragement of which the ICSID Convention was concluded.

Is this the direction for ICSID tribunals to follow?

269 - ii - This is also the first ICSID case, to my knowledge, that involves sovereign debt. It raises *prima facie* a crucial question : do ICSID tribunals have jurisdiction over sovereign debt instruments issued internationally, expressed in foreign currency and payable abroad, governed by various external laws and subject to the jurisdiction of various external courts, and traded as dematerialised security entitlements in global capital markets ?

270 - The majority award evades addressing this question frontally and on its merits, by purportedly deciding the issue on another ground, i.e. finding that these are financial instruments that are, as such, covered by the BIT (a finding refuted in Section III above). But evading the question does not dispose of it. For it remains central not only for the jurisdictional reach of ICSID arbitration in this particular case, but in relation to financial market transactions in general, as discussed in the previous point. The answer also matters greatly for the larger problem of sovereign debt crisis management, i.e. for the manner in which the international community and countries borrowing abroad will resolve the present and future sovereign debt crises and how the burden for such crises will be shared between taxpayers and creditors; a perennial challenge that is now occupying the daily headlines and confronting countries at all levels of development.

271 - Indeed, in view of the actual profound structural crisis of the international financial system; the absence of agreed international procedures regulating State bankruptcy; and the intense international discussions and efforts to improve the sovereign debt restructuring process, the present case raises, in an accute manner, an international public policy issue about the workability of future sovereign debt restructuring, should ICSID tribunals intervene in sovereign debt disputes. It suffices to ponder the potential disrupting effect of different *ad hoc* tribunals following separate ways or deciding at cross purposes with the desperate international efforts to reconstruct a semblance of a coherent international financial architecture. Such decisions can also potentially unravel patiently negotiated settlements (through the effect of the most favoured creditor clause inserted in most settlements). Ramifications that are depicted in a recent article as "opening Pandora's box" for sovereign debt[46].

Is this a proper role for ICSID's tribunals ?

272 - iii - Finally, the third policy consideration is a cautionary one. It is to caution against the tendency of certain ICSID tribunals to consider any limitation on their jurisdiction - whether inherent in the adjudicative function or carefully negotiated and stipulated in the ICSID Convention or the BITs, to protect the legitimate interests of State parties - as an obstacle in the way of achieving the object and purpose of these treaties, which they interpret as being exclusively to afford maximum protection to investment, notwithstanding the legitimate interests of the host State.

273 - Viewed as such, these limitations have to be disposed of, according to the tribunals in

[46] Michael Waibel, *supra* note 8.

question, at any price, be it the proper interpretation of the law. This leads to tenuous and untenable interpretations, particularly of jurisdictional titles, over-stretching the text beyond the breaking point, in order to extend jurisdiction to where it does not exist, particularly beyond its underlying consent.

274 - This misguided tendency, purporting to serve progress by expanding the rule of law and the role of adjudication in international society, is the worst disservice that can be rendered to the very positive movement that has characterized the last two decades towards increasing resort to adjudication and the multiplication of adjudicative fora on the international level. It is undermining the credibility not only of the ICSID system, but of the very idea of objective international adjudication, by eroding the confidence of States, whose consent remains the basis of jurisdiction, in the objectivity and good judgement of those to whom they may entrust the ascertainment of their rights. The risk of a back-lash is already pointing its head, it threatens to stop net, if not roll back the movement of progressive judicialisation of international law.

What is the proper and prudential course for ICSID tribunals to take in this regard?

V - Conclusion

275 - In conclusion, and while reserving my position on the other preliminary objections raised by Argentina, I consider and find that the first and ninth objections are valid and

should have been accepted and given effect by the Tribunal.

276 - In consequence, I consider and find

a) that this Tribunal has no jurisdiction *ratione materiae* over the sovereign debt instruments (security entitlements in Argentinean bonds) that are at the basis of the mass claims before the Tribunal, because they do not constitute a covered or protected investment under the ICSID Convention and the BIT, in the absence of a territorial link with Argentina;

b) that this Tribunal has no jurisdiction under the ICSID Convention and the BIT over the present collective mass claims action, absent the consent of Argentina, nor does it have the power to devise new procedures to hear such an action.

277 - For these reasons, and with all due respect for my co-arbitrators, I cannot concur in the majority award and enter this dissenting opinion.

Georges Abi-Saab

28 October 2011