

DISSENTING OPINION OF JUDGE CHARLES N. BROWER

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I. INTRODUCTION

1. I respectfully dissent from the Award on Jurisdiction (“Award”) because I believe it misconstrues the Argentina-Germany BIT (“Treaty”) with respect to the effect of the Treaty’s Most Favored Nation (“MFN”) clause on that Treaty’s clause requiring that Claimant take its claim to the host State’s courts for 18 months prior to resorting to arbitration (“18-month domestic courts clause” or “18-month clause”).¹

II. THE FLAWS IN THE AWARD’S ANALYSIS

2. I cannot accept the leap the Award makes between its general references to the requirement that a State consent in order to be bound by its international obligations, including resort to arbitration, and the Award’s *ex cathedra* pronouncement of an interpretive presumption requiring that consent to international arbitration via an MFN clause “requires affirmative evidence.”² I address this analytical flaw at some length because, despite the Award’s protestations to the contrary, it effectively endorses the otherwise discredited holding in *Plama* that “the intention to incorporate dispute settlement provisions [into MFN clauses] must be clearly and unambiguously expressed.”³

¹ As I am in agreement, however, with the Award’s dismissal of the remainder of Respondent’s jurisdictional objections, I do not address them.

² Award ¶ 175. The Award does not specify what “affirmative evidence” means, but holds that “it is not possible to presume that consent has been given by a state.” Award ¶ 175. The Award later employs the phrase “demonstrated expression” of consent, apparently equivalent to “affirmative evidence.” Award ¶ 176. The most plausible way of interpreting the Award’s position is that such consent cannot be established by interpretation in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“VCLT” or “Vienna Convention”), but that instead a higher level of proof is required. *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. As shown *infra*, the Award has not cited a single relevant authority in support of this standard.

³ *See Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) ¶ 204, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC521_En&caseId=C24. The so-called “*Plama* principle” has been criticized by various tribunals. *See, e.g., Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) ¶ 64, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC514_En&caseId=C18 (“The *Plama* tribunal also stated, in its reasons, that an arbitration agreement must be clear and unambiguous, especially where it is incorporated by reference to another text. This Tribunal does not share this statement. As stated above, it believes that dispute resolution provisions are subject to interpretation like any other provisions of a treaty, neither more restrictive nor more liberal.”) (emphasis in original). Even in *Berschader*, which is usually included in the “*Plama* line of cases” (over the spirited dissent of one of the panel members), the Award

A. The Award's Requirement Of "Affirmative Evidence"

3. According to the Award, the presumption it establishes "should not be taken as a 'strict' or 'restrictive' approach" because it reflects "the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure."⁴ With all due respect, the Award's requirement of "affirmative evidence" is precisely what the Award contends it is not: an interpretation of the requirement of consent that is restrictive, in violation of the very interpretive principles the Award purports to accept.⁵ To state that "the uniform applicability of the Vienna Convention's customary law interpretive principles to all treaty clauses is beyond doubt"⁶ while contending that "[e]stablishing consent [by a State to international arbitration] . . . requires affirmative evidence"⁷ is to withdraw with one hand what the other has put forward. The Award does not cite to a single source of public international law that embraces the principle that "affirmative evidence" is required in interpreting dispute

criticized *Plama's ex cathedra* interpretive presumption. *Berschader v. Russian Federation*, SCC Case No. 080/2004, Award (21 Apr. 2006) ¶ 177, available at <http://italaw.com/documents/BerschaderFinalAward.pdf> ("The *Plama* tribunal states that an arbitration clause in a BIT is an agreement to arbitrate, and such agreements should be clear and unambiguous. If this means that, generally speaking, arbitration agreements should be construed in a manner which is different in principle from that applied to the construction of other agreements, this Tribunal finds it doubtful whether such a general principle can be said to exist."); see also *Renta 4 S.V.S.A., et al. v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections (20 Mar. 2009) ¶¶ 95-101, available at <http://italaw.com/documents/Renta.pdf>.

⁴ Award ¶ 175.

⁵ See, e.g., Award ¶¶ 170-71 (quoting with approval the *Amco Asia* Tribunal's holding that: "[L]ike any other convention, a convention to arbitrate is not to be construed *restrictively*, nor, as a matter of fact, *broadly or liberally*. It is to be construed in a way which leads to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common, indeed, to all systems of internal law and to international law." *Amco Asia Corp. v. Indonesia*, Award on Jurisdiction (25 Sept. 1983), 1 ICSID Reports 389 (1983), reprinted in 22 I.L.M. 351, 359 (1983)); see also *Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) ¶ 43 (Sir Ninian Stephen, Prof. James Crawford, Judge Stephen M. Schwebel), available at <http://www.state.gov/documents/organization/14442.pdf> ("In the Tribunal's view, there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties. In the end the question is what the relevant provisions mean, interpreted in accordance with the applicable rules of interpretation of treaties. These are set out in Articles 31-33 of the Vienna Convention on the Law of Treaties, which for this purpose can be taken to reflect the position under customary international law."); *Oil Platforms (Islamic Republic of Iran v. United States)*, Preliminary Objections, Separate Opinion of Judge Higgins, 1996 ICJ Rep. at 857 (12 Dec.) ("The Court has no judicial policy of being either liberal or strict in deciding the scope of compromissory clauses: they are judicial decisions like any other.").

⁶ Award ¶ 172.

⁷ Award ¶ 175.

resolution or other investment treaty clauses.⁸ Nowhere does the Award even seek to reconcile its notion of “affirmative evidence” with the VCLT’s recognition (in its Article 32(a)) that any Treaty term may be, for example, “ambiguous” and therefore subject to supplementary means of interpretation in order to “determine [its] meaning.” Nor does the Award explain the international legal grounds on which its stated “respect” for a legal requirement must entail a higher standard of proof with respect to that requirement.⁹

4. Tellingly, the Award’s analysis of “consent” addresses neither of the two treaties that vest this Tribunal with jurisdiction, *i.e.*, the Argentina-Germany BIT and the ICSID Convention. Even the most cursory review of them reveals that neither contains a requirement of “affirmative evidence” establishing consent—in fact, the Treaty does not include a single reference to the term “consent,” let alone to a requirement that consent be established by “affirmative evidence.”¹⁰ The ICSID Convention is similarly devoid of any support for the Award’s

⁸ The Award’s focus on “affirmative evidence” appears to be in tension with the Award’s observation in note 310 that: “Even in the case of customary international law, it can be argued that consent, or at least the consent of a majority of the world’s states, underlies all of the norms reflected in customary international law. Without such consent . . . those norms would not have evolved into customary law in the first place.” This statement is accurate insofar as “consent” underlies the individual State acts that, given their sufficiently broad and lasting recurrence (State practice), combined with evidence of the acting States’ view that their actions are based on existing obligations (*opinio juris*), give rise to customary international law. Ordinarily, however, an individual State need not “consent” to the establishment of customary international law itself; that “consent” is inferred via the combination of State practice and *opinio juris*. See generally MALCOLM M. SHAW, INTERNATIONAL LAW 70-72 (5th ed., 2003). Thus, established rules of customary international law can bind States that never granted, explicitly or otherwise, consent to individual acts of the type that gave rise to the principles in question. Those States’ consent to be bound is presumed. As the Award points out in note 310, a non-consenting State is obliged then to give “affirmative evidence” of its non-consent via the “persistent objector doctrine.”

⁹ The Tribunal in *Tokios Tokeles* made specific reference to the discretion of State Parties in setting the limits of their consent: “We emphasize here that Contracting Parties are free to define consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it” *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004) ¶ 39, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220. The Award does not explain how its interpretive presumption of “affirmative evidence” can be reconciled with the ability of State Parties to choose the terms in which they consent to jurisdiction and tribunals’ concomitant obligation to give effect to the terms of that consent in accordance with widely accepted rules of treaty interpretation. See also *infra* n.34.

¹⁰ Of course the absence of the term “consent” from the Treaty does not obviate the need for such consent. In fact, the Treaty bears on its face the hallmarks of properly granted consent, including, *inter alia*, signatures of duly authorized representatives of the State Parties; explicit reference to the State Parties having “agreed” to all the terms of the Treaty; and explicit statements to the effect that the terms of the Treaty are “binding” on both State Parties. Neither Party in this arbitration has questioned the validity of the Treaty, or the Treaty’s binding effect on the State

“affirmative evidence” standard. The Convention’s Preamble states in relevant part 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”; and refers to “mutual consent” to arbitrate as constituting a “binding agreement which requires . . . that any arbitral award be complied with”. In addition, regarding the establishment of ICSID jurisdiction, Article 25 of the Convention requires “consent in writing” that cannot be withdrawn unilaterally, while Article 26 introduces a term in State Parties’ subsequent statements of “consent” to arbitrate, namely that such consent be to the exclusion of any other remedy. Finally, the Report of the World Bank’s Executive Directors on the ICSID Convention, under a sub-heading titled “Consent,” refers merely to “consent” (and not to “affirmative evidence” thereof) as being “the cornerstone of the jurisdiction of the Centre.”¹¹ In sum, nothing in the ICSID Convention or in the applicable BIT lends credence to the notion that the Tribunal’s jurisdiction must be based on “affirmative evidence” of consent.

5. Furthermore, the Award’s requirement of “affirmative evidence” of consent contravenes the overall structure as well as the specific provisions of the VCLT. As the Award notes, the Convention codifies “with the acceptance of an overwhelming number of the world’s states . . . the now customary law rules on the interpretation of treaties,”¹² including the Treaty at issue here. Despite the lip service it pays to the Vienna Convention, the Award fails to consider or

Parties. The same cannot be said, however, of a standard such as “affirmative evidence” that would need to be explicitly memorialized in the Treaty or in another source that this Tribunal is bound to respect.

¹¹ Addressing the manner in which consent can be given, the Report includes a non-exhaustive list of examples of validly granted consent:

Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. Nor does the Convention require that the consent of both parties be expressed in a single instrument. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.

Nothing in the Report’s treatment of consent sustains the Award’s “affirmative evidence” standard. *See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, International Bank for Reconstruction and Development (18 Mar. 1965) ¶ 23, available at [www. http://icsid.worldbank.org/](http://icsid.worldbank.org/).

¹² Award ¶ 169.

apply the Convention's provisions in its analysis. No Article of the Vienna Convention refers to "affirmative evidence" of consent,¹³ rendering pointless the Award's observation that the VCLT "employs the word 'consent' no fewer than 62 times."¹⁴ Attempting to derive an additional and stringent condition *ex nihilo*, as the Award does, contravenes the mechanism established by the VCLT for the establishment of consent.

6. The Award's approach likewise violates Article 42(1) of the VCLT, according to which "[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention." In other words, the existence (or absence) of consent must be determined based on an investigation of the formal indicia of such consent as outlined in the relevant articles of the Convention, and not on the arbitrary requirement that such consent be established by "affirmative evidence."

7. Similarly, the Award's attempt to tie its requirement of "affirmative evidence" of consent to the interpretation of the *scope* of consent is unsupported by the provisions of the ICSID Convention, the Vienna Convention, or any other generally accepted authority.¹⁵ For example, Article 46 of the ICSID Convention explicitly empowers tribunals to interpret the scope of consent given by the parties before them for purposes of asserting jurisdiction over counterclaims.¹⁶ Article 46 says nothing about "affirmative evidence" of consent. Besides,

¹³ Tellingly, the Vienna Convention's drafters modified the word "consent" in other ways, *e.g.*, by using "free consent" in the Preamble or "unanimous consent" in Article 8. VCLT Art. 17(2) provides: "The consent of a State to be bound by a treaty which permits a choice between differing provisions is effective only if it is *made clear* to which of the provisions the consent relates." (emphasis added). That provision is plainly irrelevant to the question of whether consent must be established by "affirmative evidence," however, in that or any other circumstance.

¹⁴ Award ¶ 173. There is no necessary correlation between the number of times a legal requirement is repeated in relevant legal instruments or sources and the level of proof needed to meet that requirement.

¹⁵ The Award fails to distinguish between the establishment and the scope of consent, although the evaluation of the former usually relies on formal indicia of validity (signature, ratification, etc.) while the latter is a matter of textual interpretation. The Award is content merely to note that "[w]hat is true of the very existence of consent to have recourse to a specific international dispute resolution mechanism is also true as far as the scope of this consent is concerned." Award ¶ 175. The Award's branding of this note as a "red herring" in its note 325 underscores its misunderstanding of the point, elaborated in the text accompanying the present note, that if "affirmative evidence" be required to establish consent to arbitration, equally it must be required in establishing the scope of consent for which latter proposition the VCLT likewise provides no support.

¹⁶ ICSID Convention Art. 46 reads in its entirety:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the

since the scope of consent must result from the interpretation of the plain language of the treaty,¹⁷ its determination is governed by Articles 31 and 32 of the VCLT. Neither of those Articles refers to “affirmative evidence” of consent. Nor can such a requirement be derived, as the Award implies, from the requirement of Article 31 that the interpretation of a treaty be performed in “good faith.”¹⁸ The good faith requirement is meant to encapsulate well-established principles such as *effet utile*, honesty, fairness and reasonableness in interpreting a treaty, protection of legitimate expectations, avoidance of abuse of rights,¹⁹ and, as the ILC noted in its Draft Articles on the Law of Treaties, the fundamental principle of *pacta sunt servanda*.²⁰ These familiar rules, however, can hardly be invoked as an interpretive *carte blanche* that a tribunal can use to promote a novel and textually unsupported legal standard.

8. The Award’s reference, without further elaboration, to a “*jurisprudence constante*”²¹ in support of its position is equally unconvincing. Upon closer scrutiny, none of the six ICJ cases cited as part of that “*jurisprudence*” adopts or endorses the standard of “affirmative evidence” of consent, or, as the Award rephrases it there, “the demonstrated expression of the states’ will.” For example, the cited part of the *Ambatielos* judgment mirrors the ruling the Award quotes from *Status of Eastern Carelia*²² by ruling that “[t]he Court is not departing from the principle, which is well-established in international law and accepted by its own jurisprudence as well as that of

dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

¹⁷ See, e.g., *Inceysa Vallisoletana SL v. El Salvador*, ICSID Case No. ARB/03/26, Award (2 Aug. 2006) ¶¶ 200-07, available at http://italaw.com/documents/Inceysa_Vallisoletana_en_001.pdf (interpreting the plain terms of the definition of investment in the Spain-El Salvador BIT and holding that “this Arbitral Tribunal considers that the consent granted by Spain and El Salvador in the BIT is limited to investments made in accordance with the laws of the host State of the investment”).

¹⁸ Award ¶ 173.

¹⁹ MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 425-26 (2009). The Award’s express concurrence with this passage in its note 317 is noted.

²⁰ International Law Commission, Draft Articles on the Law of Treaties (1966), Art. 23 cmt.1.

²¹ Award ¶ 176. To the extent the Award could show that the cases cited reflect a rule of international law, that rule would be relevant to the interpretation of the Treaty under VCLT Art. 31(3)(c) (requiring that in interpreting a treaty “[t]here shall be taken into account, together with the context: . . . any relevant rules of international law applicable to the relations between the parties”); see also International Law Commission, Draft Articles on the Law of Treaties (1966), Arts. 27 and 28, cmt.16.

²² See Award ¶ 174 (“[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes . . . either to mediation or to arbitration, or to any other kind of pacific settlement.”) (citation omitted).

the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration without its consent”²³ Similarly, in *Monetary Gold*, the ICJ opined simply that “[t]o adjudicate upon the international responsibility of [a State] without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.”²⁴ Notably, in the same paragraph the Court recorded that neither Party had argued that the State in question had provided its consent “either expressly or *by implication*”²⁵—suggesting that the Court could have accepted consent provided in either of these two forms. In any event, it is clear that none of the above cases referred, either explicitly or implicitly, to a requirement of either “affirmative evidence” of consent or “the demonstrated expression of the states’ will.”

9. Yet, the Award proceeds “[a]gainst this background” to conclude without more that “[e]stablishing consent . . . requires affirmative evidence,”²⁶ calling this approach “simply the result of respect for the rule according to which state consent is the incontrovertible requisite for any kind of international settlement procedure.”²⁷ The Award states further that “[t]his was already established” in the *Lotus* case before the PCIJ and in the ICJ cases *Aerial Incident of July 27, 1955* and *East Timor*.²⁸ Careful examination of the relevant judgments, however, reveals that, similar to the “background” cases above, they do not support the Award’s position.

10. Specifically, *Lotus* adopts the uncontroversial proposition that “[t]he rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . Restrictions upon the independence of States cannot therefore be presumed.”²⁹ Similarly, in *Aerial Incident of July 27, 1955*, the ICJ

²³ *Ambatielos case (United Kingdom v. Greece)*, Merits, Judgment, 1953 I.C.J. Rep. 10, 19 (19 May), available at <http://www.icj-cij.org/docket/files/15/1983.pdf>.

²⁴ *Case of Monetary Gold (Italy v. France et al.)*, Preliminary Question, Judgment, 1954 I.C.J. Rep. 19, 32 (15 June), available at <http://www.icj-cij.org/docket/files/19/4761.pdf>.

²⁵ *Id.*

²⁶ Award ¶ 175.

²⁷ Award ¶ 175.

²⁸ Award ¶ 175 (citations omitted).

²⁹ *Case of the S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A No. 10) at 18, available at http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf. The French Government was claiming that Turkish courts could not

held that Bulgaria's acceptance of the PCIJ's jurisdiction necessarily had lapsed with the expiry of the PCIJ Statute in 1946, and therefore was not revived by Bulgaria's later becoming a Member State of the United Nations and therewith Party to the ICJ Statute, Article 36, paragraph 5 of which automatically converted acceptances of PCIJ jurisdiction to acceptances of ICJ jurisdiction "for the period which they still have to run."³⁰ Since Bulgaria's acceptance of PCIJ jurisdiction was not "still in force" at the time it became Party to the ICJ Statute, the Court ruled that to exercise jurisdiction over it "would be to disregard . . . the principle according to which the jurisdiction of the Court is conditional upon the consent of the respondent, and to regard as sufficient a consent which is merely presumed."³¹ Finally, in *East Timor* the ICJ held that it could not evaluate the lawfulness of the acts of a State that had not consented to the Court's jurisdiction: "Whatever the nature of the obligations invoked, the court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case."³²

11. Given their underlying facts and legal reasoning, it is unclear how the Award can construe *Lotus*, *Aerial Incident of July 27, 1955*, and *East Timor* as being applicable to the case at hand, let alone supportive of the Award's novel legal standard of "affirmative evidence" or "demonstrated expression" of consent. Argentina has accepted the validity and the binding character of the BIT at issue,³³ so it is decidedly not in the same position as a State that has not

exercise jurisdiction over a French national in charge of a French ship that made port in Constantinople after colliding with a Turkish vessel in the high seas absent a showing that the exercise of such jurisdiction was compatible with international law. *Case of the S.S. Lotus*, 1927 P.C.I.J. at 5.

³⁰ *Case Concerning the Aerial Incident of July 27, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment, 1959 I.C.J. Rep. 127, 135-36 (27 July), available at <http://www.icj-cij.org/docket/files/35/2325.pdf> (quoting Article 36, paragraph 5, of the Statute of the International Court of Justice which states as follows: "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."); see also *infra* the discussion on *Anglo-Iranian Oil* in ¶ 16.

³¹ *Case Concerning the Aerial Incident of July 27, 1955*, 1959 I.C.J. Rep. at 142.

³² *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. Rep. 90, 102 (30 June), available at <http://www.icj-cij.org/docket/files/84/6949.pdf>.

³³ See Award ¶ 258 ("[O]ne must bear in mind that the Contracting State Parties adopted all of the provisions of the Treaty together as a whole. In one fell swoop they nodded their assent not only to the BIT's objects and purposes, as expressed in the Preamble, but also to the various treatment standards set forth in Articles 1 to 9 (including the MFN clauses) as well as the international dispute resolution procedures set forth in Article 10.").

consented at all to its purported international obligations, like Indonesia in *East Timor*. Nor is Argentina's position similar to that of a State whose consent to jurisdiction has lapsed and cannot be reinstated by judicial fiat, like Bulgaria in *Aerial Incident*. Under international jurisprudence, including the cases cited in the Award and discussed *supra*, a State cannot be presumed to have consented to an international obligation unless it has actually done so. Starting from this relatively uncontroversial point, however, the Award seems to be suggesting that even after the State has granted its consent to be bound by certain obligations, as Argentina has done by signing and ratifying the BIT at bar, it cannot be "presumed" to have consented with respect to one of those obligations unless there is "affirmative evidence" or a "demonstrated expression" that it has done so. This syllogistic leap finds no basis in the cases, in logic, or in any source of international law.³⁴

B. Satisfaction Of The Dispute Resolution Clause As "Condition Precedent" To Jurisdiction Over The MFN Clause

12. The Award fails to link explicitly its adopted standard of "affirmative evidence" of consent to its analysis of the effect of the MFN clause on the BIT's 18-month domestic courts clause.³⁵ Still, in my view, the Award's MFN analysis remains problematic as it stands. With respect to the text of the Treaty, I agree of course that the employment of the term "shall" in the

³⁴ In fact, both investor-State jurisprudence and ICJ practice include instances of broad or implicit construction of consent for purposes of jurisdiction as well as arbitral procedure. These authorities cannot be reconciled with the Award's presumption that consent be based on "affirmative evidence" or a "demonstrated expression." *See, e.g., Ceskoslovenska Ochozni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) ¶¶ 49-59, available at http://italaw.com/documents/CSOB-Jurisdiction1999_000.pdf (finding that Slovakia had consented to ICSID arbitration by including in a commercial contract reference to a BIT allegedly not yet in force); *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment, 1928 PCIJ (ser. A) No. 15 at 24 (26 Apr.), available at http://www.icj-cij.org/pcij/serie_A/A_15/46_Droits_de_minorites_en_Haute_Silesie_Ecoles_minoritaires_Arret.pdf ("[T]here seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it."); *see also Noble Energy, Inc. and Machala Power Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction (5 May 2008) ¶ 194, available at <http://italaw.com/documents/Noblev.EcuadorJurisdiction.pdf> ("In the present case, there is in any event an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration. Even though there is no express language to this effect in the dispute resolution clauses, the consent is manifest from a number of elements which the Tribunal will review . . ."). Besides, States remain at liberty to define in broad or narrow terms their grant of consent in the applicable instrument(s). *See supra* n.9. The Award's concurrence with this note in its note 321 is noted.

³⁵ For purposes of its analysis, the Award has defined the Argentina-Germany BIT as the "Basic Treaty" and the Argentina-Chile BIT as the "Comparator Treaty". Award ¶ 244. This Opinion uses those terms in the same sense.

BIT's dispute resolution clause, including with respect to litigation in domestic courts for 18 months, denotes an obligation, not an option. I note, however, that the term "shall" appears equally in each paragraph of Article 3, the MFN clause, according to which "[n]either Contracting Party *shall* accord investments in its territory by nationals or companies of the other Contracting Party . . . treatment less favourable" (emphasis added). Consequently, the existence of mandatory language alone does not define the relationship between the two clauses.

13. The Award, nonetheless, defines their relationship as follows:

[T]he BIT clearly empowers investors to claim and receive compensation for MFN violations. The immediately foregoing analysis . . . has indicated that fulfilment of the 18-month domestic courts submission provision constitutes a condition precedent to the host State's consent to submit a particular dispute to investor-state arbitration . . . Taken together, these two conclusions suggest that a claimant wishing to raise an MFN claim under the German-Argentine BIT – whether on procedural or substantive grounds – lacks standing to do so until it has fulfilled the domestic courts proviso. To put it more concretely, since the Claimant has not yet satisfied the necessary condition precedent to Argentina's consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore presently without jurisdiction to rule on any MFN-based claims unless the MFN clauses themselves supply the Tribunal with the necessary jurisdiction.³⁶

In other words, according to the Award, "shall" in Article 10 of the BIT somehow trumps "shall" in Article 3 of the same treaty. The Award's disavowal of such a "trumping" in its note 355 is unpersuasive. The Award's basic threshold problem is that it regards the BIT's 18-month provision as a jurisdictional hurdle rather than an issue of admissibility. The Award should have adopted the very cogent reasoning of the recent *Hochtief* Award, which concluded at the end of an exhaustive analysis of the identical issue under the identical Argentina-Germany BIT as follows: "It regards the 18-month period as a condition relating to the manner in which the right to have recourse to arbitration must be exercised – as a provision going to the *admissibility* of the claim rather than the *jurisdiction* of the Tribunal."³⁷

³⁶ Award ¶¶ 199-200.

³⁷ *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011) ¶ 96, available at http://italaw.com/documents/Hochtief_v_Argentina_Jurisdiction_24Oct2011_En.pdf (majority opinion) (emphasis added).

14. Before addressing the question whether “the MFN clauses themselves supply the Tribunal with the necessary jurisdiction,” however, it is necessary to make three observations regarding the cited “foregoing analysis.”³⁸ First, I do not see the relevance of the Award’s discussion of “cooling-off” or “good faith negotiation” periods, since that requirement is not at issue here, nor can it properly be analogized to an 18-month domestic court provision.³⁹ Tribunals have allowed claimants to circumvent a “cooling-off” period, even if the latter is cast in mandatory terms in the applicable treaty, based on the determination that any attempt at settlement would have been futile.⁴⁰ A prominent example of such an approach is the Award on

³⁸ Award ¶¶ 200-01.

³⁹ The Award’s concurrence with this sentence recorded in its note 341 is noted. Treaty clauses providing for, or even requiring, amicable consultations between the parties prior to engaging in dispute resolution have been considered as matters of procedure and not jurisdiction. *See, e.g., Biwater v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) ¶ 343, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1589_En&caseId=C67 (holding that the clause establishing a consultation period was “procedural and directory in nature, rather than jurisdictional and mandatory” because “[i]ts underlying purpose is to facilitate opportunities for amicable settlement . . . not to impede or obstruct arbitration proceedings, where such settlement is not possible”); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/10/13, Decision on Jurisdiction (6 Aug. 2003) ¶ 184, available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC622_En&caseId=C205 (“Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction”); *see also Lauder v. Czech Republic*, UNCITRAL, Award (3 Sept. 2001) ¶ 187, available at <http://italaw.com/documents/LauderAward.pdf> (“[T]he Arbitral Tribunal considers that this requirement of a six-month waiting period . . . of the Treaty is not a jurisdictional provision, i.e. a limit set to the authority of the Arbitral Tribunal to decide the merits of the dispute, but a procedural rule”). The *Lauder* Tribunal held further that staying the arbitral proceedings to satisfy the waiting period in the BIT would “amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties.” *Id.* ¶ 190. *But see Enron Corp. and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 Jan. 2004) ¶ 88, available at <http://www.asil.org/ilib/Enron.pdf> (stating in *dicta* that the amicable consultations requirement is jurisdictional in nature). Given the divided investor-State jurisprudence on this question, the author of this Opinion is not prepared to accept either the Award’s analogy of time-limited consultation clauses to 18-month clauses, which in any event is useless for purposes of this case, or the Award’s sweeping generalization that “[a]ll BIT-based dispute resolution provisions . . . are by their very nature jurisdictional.” Award ¶ 193.

⁴⁰ The author of this Opinion is reluctant to accept the analysis of amicable consultation clauses as jurisdictional requirements in *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 June 2010) ¶ 310 ff., available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1530_En&caseId=C300, and *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction (15 Dec. 2010) ¶ 140 ff., available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1811_En&caseId=C267. Neither of those cases showed convincingly that such clauses are indeed jurisdictional, or, more critically, addressed the question whether the parties were even remotely likely to reach amicable settlement with respect to the claims that were dismissed for lack of jurisdiction. Thus, their respective rulings on this issue appear formalistic and inefficient. *See Murphy Exploration*, Partial Dissenting Opinion of Dr. Horacio A. Grigera Naón (19

Jurisdiction in *Ethyl Corp. v. Canada*, where the Tribunal dispensed claimant from the six-month “cooling-off” period required under Articles 1118 and 1120 of the NAFTA although claimant had filed for arbitration *five days* after the enactment of the allegedly injurious legislation.⁴¹

15. Second, the Award dismisses too hastily the argument that it would have been futile for Claimant to attempt to fulfill the BIT’s 18-month domestic courts provision by resorting to Argentine courts. According to the Award, “[w]hile the Claimant submitted an expert opinion suggesting that it would have been ‘impossible’ for the Argentine courts to deliver a final judgment on the Claimant’s claims within 18 months, the Respondent rebutted this opinion by citing examples of cases which the Argentine Courts have indeed resolved in 18 months or less.”⁴² Note that the Claimant submitted credible evidence in the form of an expert opinion on Argentine law showing that it would have been impossible for the Argentine courts to deliver a final judgment on Claimant’s claims within the Treaty-prescribed 18 months.⁴³ Argentina, however, submitted no expert evidence to the contrary. Instead it submitted examples of disputes solved by domestic tribunals within 18 months, including an “Amparo” and other “expeditious” actions.⁴⁴ The mere fact of attempted rebuttal cannot carry the day. The Award fails even to attempt an evaluation of the evidence before it on this issue.⁴⁵

Nov. 2010), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1813_En&caseId=C267 (opining that the Tribunal committed factual error in finding that the consultation period had not been satisfied and observing that “forcing [Claimant], after more than two years and a half in arbitration, to envisage now a negotiating stage of uncertain future given the history of the relationship of the Parties . . . does not marry well with the concept of a reasonably fast and efficient access to the arbitral instances provided for in the BIT and seriously impairs [Claimant’s] right to access arbitral justice . . .”).

⁴¹ The *Ethyl* Tribunal found that: “The Tribunal has been given no reason to believe that any ‘consultation or negotiation’ pursuant to Article 1118 . . . was even possible. It is argued, therefore, that no purpose would be served by any further suspension of Claimant’s right to proceed.” *Ethyl Corp. v. Canada*, NAFTA/UNCITRAL, Award on Jurisdiction (24 June 1998) ¶ 84, *available at* <http://www.naftaclaims.com/Disputes/Canada/EthylCorp/EthylCorpAwardOnJurisdiction.pdf>.

⁴² Award ¶ 191.

⁴³ See Expert Opinion of Javier Errecondo dated 4 June 2008 (submitted with Claimant’s Rejoinder on Jurisdiction); Claimant’s Rejoinder on Jurisdiction ¶¶ 65-80.

⁴⁴ See Argentine Republic’s Reply Memorial on the Centre’s Jurisdiction and Tribunal’s Competence, 5 May 2008, Exhs. A RA 20 (“Judgments of the Argentine Supreme Court”) and A RA 22 (“Final Judgments”).

⁴⁵ For example, Claimant had argued that: “The fact that such proceedings can be resolved within 18 months has no relevance to whether an Argentine Court could determine, in what apparently would be a case of first impression, the rights of a foreign shareholder for a violation of a treaty and the amount of compensation therefore [sic]. The

16. Third, the Award improperly relies on *Anglo-Iranian Oil* to support its conclusion that the BIT's 18-month domestic courts provision is a "condition precedent" to Argentina's consent to be bound by the MFN clause. The Award analogizes the 18-month clause to "Iran's acceptance of the ICJ's jurisdiction over disputes arising under the two [UK treaties which] was a condition precedent to the UK's standing to raise its MFN claims before the Court."⁴⁶ This analogy is false in that the legal issue in *Anglo-Iranian* was fundamentally different from this case. *Anglo-Iranian* addressed a scenario in which Iran had not consented to adjudicate in a certain forum obligations undertaken prior to a specific date—including the treaties the United Kingdom wished to rely on for purposes of its MFN claim. Iran's consent thus being absent, the Court lacked any power to "re-construct" that consent via the MFN clause in the Basic Treaties. This holding is consistent with more recent rulings in investor-State cases that have refused to extend MFN protection in the absence of jurisdiction *ratione temporis*,⁴⁷ but it is plainly inapposite to the question of the effect of MFN on the Basic Treaty's 18-month domestic courts clause when the State's consent to the obligations contained in both the Basic Treaty and the Comparator Treaty remains valid.

C. The Award's Interpretation Of The MFN Clause

17. Similar to its "affirmative evidence" and "demonstrated expression" analysis, the Award's view on the manner in which the MFN clause affects the 18-month domestic courts requirement is misplaced. In the course of its discussion, the Award misconstrues: i) the meaning of the word "treatment"; ii) the position taken by the overwhelming majority of investor-State tribunals on whether an MFN clause can operate to bypass an 18-month clause; iii) the significance of the State Parties' treaty practice; iv) the MFN clause's requirement that the relevant "treatment" be "in the territory" of the host State; v) the consequences of the

issue is whether [Claimant] could submit its claims against Argentina for breaches of the Treaty and obtain an acceptable quantification of damages for those breaches within an 18-month period, not whether it or any other entity could have contested the constitutionality of the provisions." See Claimant's Rejoinder on the Objections of the Argentine Republic to the Centre's Jurisdiction and the Tribunal's Competence, 9 June 2008, ¶¶ 76-77.

⁴⁶ Award ¶ 203.

⁴⁷ See *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) ¶ 74, available at http://italaw.com/documents/Tecnicas_001.pdf (ruling that the Contracting Parties' consent to arbitration was premised on the condition, contained in a temporal limitation clause, that such arbitration commence within three years from the time of the claimant's injury; consequently, claimant could not circumvent the temporal limitation by operation of the MFN clause).

explicitly stated exceptions to MFN treatment in the BIT; and vi) the question whether the 18-month clause constitutes “less favorable treatment”. I address sequentially these flaws in the Award’s reasoning, each of which in my view is fatal to the Award’s overall ruling.

i. **The Meaning Of “Treatment”**

18. The Award begins its evaluation of the scope of the MFN clause appropriately by examining the plain language of the MFN clause, and specifically the meaning of the word “treatment.” The basis on which it conducts its examination, however, is puzzling, since it relies exclusively on the meaning of “treatment” in a single extraneous document, the World Bank Guidelines on the Treatment of Foreign Direct Investment.⁴⁸ Before addressing the content of the Guidelines, it is important to note that the Award has offered no analysis under the Vienna Convention, which governs the interpretation of the Treaty, of the reasons that led it to ascribe such great significance to materials so marginally related to the Treaty at issue. It is plain that the Award has omitted several mandatory steps of that analysis, which must commence with the inquiry as to the “ordinary meaning” of the treaty’s terms “in their context and in the light of [the treaty’s] object and purpose.”⁴⁹ The Vienna Convention does allow the use of “supplementary” materials such as the Guidelines “to confirm the meaning resulting from the application of article 31” or if the Article 31 inquiry “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”⁵⁰ The Award, however, has not applied any of

⁴⁸ World Bank, Guidelines on the *Treatment* of Foreign Direct Investment (1992), *reprinted in* 31 I.L.M. 1363 (1992) (“World Bank Guidelines” or “Guidelines”), *available at* <http://ita.law.uvic.ca/documents/WorldBank.pdf> (emphasis added).

⁴⁹ See VCLT Art. 31; *see also* International Law Commission, Draft Articles on the Law of Treaties (1966), Arts. 27-28 (from which VCLT Articles 31 and 32 emerged virtually unchanged), cmt. 8 (“Once it is established . . . that the starting point of interpretation is the meaning of the text, logic indicates the ‘ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’ should be the first element to be mentioned. Similarly, logic suggests that the elements comprised in the ‘context’ should be the next to be mentioned since they form part of or are intimately related to the text. Again, it is only logic which suggests that . . . a subsequent agreement regarding the interpretation, subsequent practice establishing the understanding of the parties regarding the interpretation and relevant rules of international law applicable in relations between the parties – should follow and not precede the elements in the previous paragraphs.”).

⁵⁰ See VCLT Art. 32.

these provisions.⁵¹ In this connection, the Award does not address adequately the fact that at least nine prior awards, either through detailed analysis or by necessary implication, have concluded that “treatment” is broad enough to include dispute settlement and allow circumvention of the 18-month clause.⁵²

19. Regarding the Guidelines themselves, I cannot accept the Award’s construction of “treatment” in the BIT based on the interpretation of a document that, by its own terms, expressly eschews any intention to define, let alone substitute for, the terms of the Treaty.⁵³ Relying on the classical rule of interpretation known as the “principle of contemporaneity,” the Award rests its entire textual analysis exclusively on the Guidelines, which date to 1992, because allegedly they are the source most “contemporaneous” with the Treaty, which was signed in 1991.⁵⁴ The Award then proceeds to argue that the Guidelines provide “some evidence” that in 1991-92 the term “treatment” did not include dispute settlement, solely because the section titled “Treatment” within the Guidelines does not refer to dispute settlement, which appears in a different section of the Guidelines.⁵⁵ For all its emphasis on document titles, however, the Award fails to answer this first-order question: Since the overall title of the document is “Guidelines for the *Treatment* of Foreign Direct Investment,” why then would not the term “Treatment” apply equally to the section on “Settlement of Disputes” contained in that document?⁵⁶

20. More importantly, the Award’s reasoning betrays a profound misunderstanding of the protections that the Guidelines list as elements of “treatment”. As the Award notes, the

⁵¹ The analysis of the Treaty’s “object and purpose” near the end of the Award’s analysis of the MFN clause (*see* Award ¶¶ 254-60) illustrates starkly the Award’s failure to comply with the interpretive framework of the Vienna Convention.

⁵² *See infra* n.67.

⁵³ The Guidelines’ preamble states that “these guidelines *are not* ultimate standards but an important step in the *evolution* of generally acceptable international standards which complement, but *do not substitute for*, bilateral investment treaties.” World Bank Guidelines, Preamble (emphasis added).

⁵⁴ Award ¶¶ 220, 222-24.

⁵⁵ Award ¶¶ 223-24.

⁵⁶ The Award’s only response to this point is to say in its note 393 that “[t]his suggestion is puzzling” since “[a] document’s title cannot function as more than a summary of its general topic, let alone an exhaustive statement of its entire contents.”

Guidelines' discussion of "treatment" covers, *inter alia*, "fair and equitable treatment; treatment as favorable as that accorded to national investors in similar circumstances; full protection and security; treatment that does not discriminate among foreign investors on the grounds of nationality; . . . and finally the prevention and control of corrupt business practices and the promotion of accountability and transparency in dealings with foreign investors."⁵⁷ According to the Award, none of these species of "treatment" "*even touches upon* the international (as distinguished from domestic) settlement of disputes."⁵⁸ It has been the rule for *decades* before the Guidelines came into existence that fair and equitable treatment includes proper and timely access to dispute settlement, as well as observance of judicial and administrative due process.⁵⁹ Relatedly, there is no doubt that under customary international law as well as modern investor-State jurisprudence denial of justice is closely linked to, if not a part of, the fair and equitable treatment requirement.⁶⁰ Thus, I am unable to comprehend the Award's utter failure to

⁵⁷ Award ¶ 223 (citations omitted).

⁵⁸ Award ¶ 223 (emphasis added).

⁵⁹ The Award's "agree[ment]" with this sentence and the following one in its note 391 is noted. That note's distinction between domestic and international proceedings, however, is not accepted by the author of this Opinion as being relevant. *See* Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners (1929) (also known as the "1929 Harvard Draft Convention") (identifying as elements of the minimum standard of treatment, *inter alia*, responsibility for denial of justice, including delay or obstruction of access to courts and gross deficiency in the administration of the judicial or remedial process); *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, Final Award (26 June 2003) ¶ 123, available at <http://naftaclaims.com/Disputes/USA/Loewen/LoewenFinalAward.pdf> (reasoning in the context of the fair and equitable treatment requirement under NAFTA that: "[It is] the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice."); *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000) ¶¶ 85-101, available at <http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladFinalAward.pdf> (holding, *inter alia*, that the absence of a transparent and predictable framework of administrative issuance and review of construction permits violated the NAFTA's fair and equitable treatment standard); *Pey Casado and President Allende Foundation v. Chile*, ICSID Case No. ARB/98/2, Award (22 Apr. 2008) ¶¶ 650-63, available at <http://italaw.com/documents/Peyaward.pdf> (holding that a seven-year delay in the adjudication of claimant's claims in the first instance before the Chilean courts constituted a fair and equitable treatment violation); OECD, Directorate for Financial and Enterprise Affairs, *Fair and Equitable Treatment Standard in International Investment Law* (Sept. 2004) at 28-36, available at <http://www.oecd.org/dataoecd/22/53/33776498.pdf> (discussing the fair and equitable treatment standard and its interpretation by tribunals as requiring open access to courts and efficient and fair administration of justice).

⁶⁰ *See, e.g., Mondev Int'l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) ¶ 127, available at <http://www.state.gov/documents/organization/14442.pdf> ("In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned [US court] decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment."); *see also*

recognize the well-established and intimate relationship between an investor’s “treatment” by the host State and dispute settlement, whether in the context of the Guidelines or as a matter of international law.⁶¹ It is difficult to imagine a more fundamental aspect of an investor’s “treatment” by a host Government than that investor’s ability to exercise and defend its legal rights by prompt access to dispute settlement mechanisms, and fair and efficient administration of justice.⁶²

21. Additionally, if “treatment” can encompass dispute settlement when it is used in a BIT as part of legal standards such as “fair and equitable treatment,” it should include dispute settlement when it is used, in the same BIT, as part of the MFN provision requiring that the investor receive

Loewen, Award ¶ 137 (“[In this case] the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment.”).

⁶¹ To the extent the Award means to raise the familiar argument that “treatment” applies to “primary rules” such as substantive protections, and not to “secondary rules” such as remedies, the *Renta 4* Tribunal has addressed and rejected that argument convincingly:

It may be that some international lawyers reflexively adopt the dichotomy of primary/secondary obligations made familiar by the International Law Commission. This might explain the temptation to consider “treatment” a matter of primary or substantive rules and thus distinct from “secondary” rules – such as remedies – in the event of a breach.

...

There is no authority for the proposition that MFN is limited to “primary” rules. The established proper criterion is rather *ejusdem generis*.

Renta 4 ¶¶ 99-100. Certain tribunals have opined that dispute settlement actually is a substantive protection covered by the MFN clause. See, e.g., *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 June 2005) ¶ 31, available at <http://italaw.com/documents/GasNaturalSDG-DecisiononPreliminaryQuestionsonJurisdiction.pdf> (“The Tribunal holds that provision for international investor-state arbitration in bilateral investment treaties is a significant substantive incentive and protection for foreign investors.”).

⁶² The Award’s approval of this “uncontroversial observation” in its note 378 is noted. See also *Siemens*, Decision on Jurisdiction ¶ 102 (ruling that a “distinctive feature” of BITs is “special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments”); *Suez*, Decision on Jurisdiction ¶ 57 (“From the point of view of the promotion and protection of investments, the stated purposes of the Argentina-Spain BIT, dispute settlement is as important as other matters governed by the BIT and is an integral part of the investment protection regime that two sovereign states, Argentina and Spain, have agreed upon.”); *Gas Natural*, Decision on Jurisdiction ¶ 49 (“We remain persuaded that assurance of independent international arbitration is an important – perhaps the most important – element in investor protection.”); *Hochtief*, Decision on Jurisdiction ¶¶ 68, 72 (“The Tribunal considers that the provisions of Article 10, which on any interpretation confer upon investors the possibility of recourse to arbitration in addition to the right to have recourse to national courts, are a form of protection that is enjoyed within the scope of ‘the management, utilization, use and enjoyment of an investment’ . . . Article 10 is a benefit conferred on investors and designed to protect their interests and the interests of a State Party in its capacity as a host State party to a dispute with an investor: it is a protective right that sits alongside the guarantees against arbitrary and discriminatory measures, expropriation, and so on . . . Accordingly, the Tribunal is satisfied that the MFN provision is in principle applicable to the pursuit of dispute settlement procedures.”).

“treatment no less favorable” than investors of third countries. It is a well-established canon of treaty interpretation that the use of the same term within the same instrument denotes the same ordinary meaning, absent evidence to the contrary.⁶³

22. The Award, furthermore, does not address the fact that BIT Article 3(2) accords Claimant MFN treatment with respect not only to “investments” but also to “activities in connection with investments in [the host State’s] territory”. Ad Article 3(a) of the Treaty provides that the term “activity” in Article 3(2) includes “the management, use, enjoyment, and disposal of an investment.” Taken in their ordinary meaning, the “management, use, enjoyment, and disposal of an investment” necessarily entail the defense and exercise of legal rights via dispute settlement mechanisms,⁶⁴ bolstering the argument that the Award’s narrow view of “treatment” is unsustainable under the terms of the Treaty.

ii. **Nine Of The Eleven Public Awards To Date Have Held That The 18-Month Provisions In Argentina’s BITs Are Overcome Via Their MFN Clauses**

23. In addition, the Award’s attempt to describe an absence of “common state practice” with respect to the scope of MFN “treatment” is irrelevant for purposes of answering the question before us, namely how the BIT’s MFN provision affects the Treaty’s 18-month domestic courts requirement. According to the Award, “[a] brief look at the ways in which various investor-state tribunals and states have since resolved the question proves that neither the arbitral community

⁶³ In this respect it is telling that the Guidelines consider “most favored nation” and “fair and equitable” as different protections pertaining to the same “treatment.” World Bank Guidelines at 3-5. Notably, the Respondent in this case has not argued, based on Art. 31(4) of the VCLT or any other evidence, that a “special,” more restrictive meaning should be given to the term “treatment” for purposes of applying the MFN clause as opposed to the “fair and equitable treatment” clause. The burden of showing the applicability of a “special” meaning of a term lies with the party pleading such a meaning. *See Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 PCIJ (ser. A/B) No. 53 at 49 (5 Apr.), available at http://www.icj-cij.org/pcij/serie_AB/AB_53/01_Groenland_Oriental_Arret.pdf (holding that “[i]f it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to [a treaty term], it lies on that Party to establish its contention”).

⁶⁴ *See RosInvestCo v. Russian Federation*, SCC Arbitration No. V 079/2005, Award on Jurisdiction (Oct. 2007) ¶ 130, available at http://italaw.com/documents/RosInvestjurisdiction_decision_2007_10_001.pdf (holding, in the context of the UK-Russia BIT, that “the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him, in case of interference with his ‘use’ and ‘enjoyment’, procedural options of obvious and great significance compared to the sole option of challenging such interference before the domestic courts of the host state”).

nor more importantly . . . common state practice has yet reached a consensus”⁶⁵ The Award proceeds to state that “at least nine” tribunals “have found that a particular BIT’s MFN clause” includes dispute settlement, “while another ten have reached the opposite result . . . This relatively even split shows that there is as yet no established *opinio juris*.”⁶⁶

24. This conclusion lumps together cases concerning such diverse applications of the MFN clause that the Award’s attempt at presenting a “divided field” is meaningless. The Award’s description of this point in its paragraph 269 as “a distinction without a difference” is unpersuasive. The fact that some awards are critical of others does not do away with the palpable differences in their underlying facts and legal arguments. Here, to the contrary, we are confronted with the specific issue of whether the MFN clause is broad enough to permit Claimant to eschew resorting to the Argentine courts for 18 months. In this respect, the weight of authority overwhelmingly favors one answer: of the eleven known investor-State tribunals that have considered this particular question, all of them interpreting Argentine BITs, nine have ruled in the affirmative.⁶⁷

25. The only “outliers” have been *Wintershall v. Argentina* and *ICS v. Argentina*,⁶⁸ whose reasoning thus is not only contrary to the *opinio juris*, but also flawed in important respects. For example, the *Wintershall* Tribunal held that the claimant in that case sought to rely on the MFN

⁶⁵ Award ¶ 268.

⁶⁶ Award ¶ 268.

⁶⁷ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004); *Camuzzi Int’l S.A. v. Argentine Republic*, ICSID Case No. ARB/03/7, Decision on Jurisdiction of 10 June 2005; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 June 2005); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006); *National Grid plc v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 June 2006); *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic/AWG Group Ltd. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (3 Aug. 2006); *Impregilo S.p.A v. Argentine Republic*, ICSID Case No. 07/17, Award (21 June 2011); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011). All the above decisions are available at <http://italaw.com>.

⁶⁸ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1492_En&caseId=C39; *ICS Inspection and Control Services Limited v. Argentine Republic*, UNCITRAL, Award on Jurisdiction (10 Feb. 2012), available at http://italaw.com/documents/ICS_v_Argentina_AwardJurisdiction_10Feb2012_En.pdf.

clause to gain access to a “different system of arbitration” because, while the Basic Treaty provided for ICSID arbitration, the Comparator Treaty provided for both ICSID and UNCITRAL arbitration.⁶⁹ The Tribunal’s reasoning, however, failed to take into account that the claimant in *Wintershall* never attempted to gain access to UNCITRAL arbitration—as the *Wintershall* Award explicitly acknowledged: “Claimants assert that the BIT gives them the option to submit the investment dispute with Argentina to ICSID arbitration without prior referral to the domestic courts of Argentina”⁷⁰ Besides, the Basic Treaty also contained a choice between ICSID and UNCITRAL, albeit one that was premised on the existence of agreement between the parties to the arbitration and on the State Parties being parties to the ICSID Convention.⁷¹ That difference between the Basic and Comparator Treaties hardly justifies the *Wintershall* Tribunal’s conclusion that claimant sought to avail itself of a “different system of arbitration.” Such significant errors cannot help but call into question any analysis based on them.⁷²

26. Thus, the eleven relevant cases, being nine-to-two, are far from being “dramatically split.”⁷³ Moreover, while it is true that “public international law is not made *primarily* by arbitrators,”⁷⁴ such “judicial decisions” are commonly accepted pursuant to Article 38(1)(d) of the ICJ Statute as “subsidiary means for the determination of rules of law.”

⁶⁹ See *Wintershall* ¶ 174 (holding that the Basic Treaty “provides for ICSID as the ultimate and only arbitration forum,” while the dispute resolution provision in the Comparator BIT “prescribes ‘a different system of arbitration’ – it gives a Claimant . . . a choice of fora viz. either ICSID or UNCITRAL”).

⁷⁰ *Wintershall* ¶ 18.3 (quoting Claimants’ Request for Arbitration ¶ 41) (emphasis added).

⁷¹ *Wintershall* ¶ 121 (“[D]isputes between the parties in the terms of this Article, shall be submitted by mutual agreement if the parties to the dispute had not otherwise agreed, either to an arbitral proceeding under the terms of the Convention on the Settlement of Investment Disputes between States and Nationals of other States . . . or to an arbitral tribunal ad hoc established in accordance with the Arbitration Rules of the [UNCITRAL]. If no agreement were reached following a three-month term from the date that any of the Parties had applied for the initiation of arbitration proceedings, the dispute shall be submitted to an arbitration proceeding in the terms of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, of March 18, 1965, provided that both Contracting Parties be part of such Convention. Otherwise the dispute will be submitted to the arbitral tribunal ad hoc mentioned above”) (quoting Article 10(4) of the Argentina-Germany BIT) (emphasis omitted).

⁷² The purpose of the Award’s note 457, frankly, is obscure.

⁷³ Award ¶ 284.

⁷⁴ Award ¶ 268 (emphasis added).

iii. The State Parties' Treaty Practice

27. In addition, the Award's discussion of the State Parties' relevant treaty practice is both incomplete and misconceived.⁷⁵ Specifically, the Award argues that if Argentina meant the MFN clause to apply to the 18-month clause it would not have had reason to include, as it did, 18-month clauses in its *subsequent* investment treaties.⁷⁶ Having initially relied on "the classical rule of interpretation known as the principle of contemporaneity" in basing itself on the "soft law" of the World Bank Guidelines, the Award thus inexplicably abandons this "classical" rule and proceeds to consider only events post-dating the BIT. Had the Award continued to abide by that principle, on its own analysis the result would *not* have been, as the Award concludes, that Article 10 was "for no good reason at all,"⁷⁷ since the Argentina-Germany BIT was the fourth of Argentina's very first five BITs to be concluded, all five of which included the 18-month provision.⁷⁸

28. Moreover, the Award's syllogism assumes improperly that MFN clauses obligate claimants to rely on their protections, leading to automatic ineffectiveness of 18-month clauses in subsequent Argentine BITs; each claimant, however, is master of its own plea, and can comply with a BIT's 18-month clause if it so chooses. Thus, the circumvention of the 18-month clause by operation of the MFN clause in this case hardly deprives the 18-month clauses of effectiveness in subsequent Argentine BITs.⁷⁹

29. The Award's argument as to the import of the exchange of diplomatic notes on the Argentina-Panama BIT after the *Siemens* Tribunal's Decision on Jurisdiction, quite apart from its

⁷⁵ See *RosInvestCo*, Award on Jurisdiction ¶ 42 ("[T]he main focus of . . . [the Tribunal's] attention has to be not the policies which either one or the other Contracting Party brought to the negotiating table (and which might of course have been widely different from one another) but what they agreed on, as embodied in the terms of their treaty.").

⁷⁶ Award ¶¶ 263-64.

⁷⁷ Award ¶ 263. The Award's criticism of this sentence and paragraph 28 at its notes 445 and 449 is premised on conclusions of the Award which this Opinion rejects.

⁷⁸ See Award, Appendix 1. Dates of entry into force, set forth in Appendix 2 to the Award, are of little use, since, as the Appendix demonstrates, entry into force is rarely contemporaneous with signature.

⁷⁹ The Award in its note 445 brands this point "disingenuous." It overlooks: (1) the fact that this Opinion agrees with other awards that a choice among alternative dispute settlement procedures is more favorable than no choice; and (2) the fact that "shall" in the 18-month provision is predicated on a party invoking it, which neither did.

sudden abandonment of the “classical rule” of contemporaneity, is far from relevant. According to the Award, in the wake of the *Siemens Award*, Argentina and Panama exchanged notes with respect to the BIT between them, clarifying that the MFN clause in that treaty does not apply to dispute settlement, and that this was always their intention.⁸⁰ The Award finds it significant that the Argentina-Panama BIT does not contain an 18-month clause, and that “[i]ts dispute resolution provisions are instead similar to those of the Chile-Argentina BIT relied upon by the Claimant.”⁸¹ Even if the stated intentions of Panama and Argentina with respect to the MFN clause could somehow be transposed successfully onto the BIT between Chile and Argentina, which they cannot, one is quite unable to see the significance of the purported scope of the MFN clause in either the Panama-Argentina BIT or the Chile-Argentina BIT, when the issue in this case is the scope of the MFN clause in the Germany-Argentina BIT. The Award’s view that the post-*Siemens* exchange of notes between Panama and Argentina constitutes “supplementary means” of interpreting the Basic Treaty appears confused in important respects⁸² and is ultimately wrong.

30. Similarly, apart from its lack of “contemporaneity,” I am mystified by the Award’s statement that “the only known clarifications issued by other states since the advent of the *Maffezini* decision have gone in the direction of confirming that the contracting state parties did

⁸⁰ Award ¶ 272. Ironically, the Award quotes the *National Grid* decision as factual support for the exchange of notes between Panama and Argentina. The Tribunal in that case, however, dismissed those same notes for purposes of interpreting the Argentina-UK BIT in the following categorical terms: “The Tribunal has not been furnished with any evidence that at any point in time an interpretation of such nature was considered by either party to the [Argentina-UK] Treaty. Neither has the Tribunal received any evidence that the Argentine Republic adopted similar interpretations of the MFN clause incorporated in the more than 50 bilateral investment treaties concluded with other States parties.” *National Grid*, Decision on Jurisdiction ¶ 85.

⁸¹ Award ¶ 272.

⁸² One possible explanation for this confusion is that the Award assumes that the provisions of the Comparator Treaty relate to the jurisdiction of this Tribunal, which they certainly do not. See International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses* (1978), Art. 8 (“The right of the beneficiary State to most-favoured-nation treatment arises only from the most-favoured-nation clause . . . in force between the granting State and the beneficiary State.”); see also *id.* Art. 8, cmt. 1 (the MFN clause “is the source of the beneficiary State’s rights”); *id.* Art. 8, cmt. 3 (“the right of the beneficiary State to a certain advantageous treatment does not derive from the treaty concluded between the granting State and the third State”); *id.* Art. 8, cmt. 7 (“The root of the right of the beneficiary State is obviously the treaty containing the clause. The extent of the favours to which the beneficiary of that clause may lay claim will be determined by the actual favours extended by the granting State to the third State.”).

not intend for their MFN clauses . . . to reach international dispute resolution.”⁸³ The Award’s evidence for this statement consists of a single citation to a footnote in the negotiating history of CAFTA, which simply cannot be accepted as an adequate sample of the “known clarifications [on the scope of MFN] issued by other states since the advent of . . . *Maffezini*”. What’s more, the Award’s statement contradicts the fact that, in 2002, *i.e.*, two years after the issuance of the *Maffezini* decision, the United Kingdom entered into a BIT with Bosnia-Herzegovina that explicitly applies that BIT’s MFN clause to that treaty’s dispute settlement provisions.⁸⁴

31. The Award embraces an even more sweeping proposition: “It is striking,” the Award observes, that “Argentina, Panama, Colombia, the DR-CAFTA countries (including the US), the EU Commission, and Switzerland (the latter three together representing a majority of the world’s highly developed and capital exporting countries) all converge in signaling that the specified MFN clauses do not, and *were never intended to*, reach the international dispute resolution provisions of the respectively mentioned investment agreements.”⁸⁵

32. The evidence for the Award’s diagnosis of a “common understanding” with respect to the scope of MFN clauses consists of the CAFTA footnote referenced above, the 2006 BIT between Switzerland and Colombia, and a 2006 Issue Paper by the European Commission containing a recommendation as to the scope of MFN treatment in “future EU BITs.”⁸⁶ Since, as the Award accepts, the policy of the United States, the only major capital-exporting member of CAFTA, is inconclusive,⁸⁷ the CAFTA footnote does not support the Award’s point. It also seems trivial to

⁸³ Award ¶ 273.

⁸⁴ See *Bilateral Investment Treaties*, United Nations Conference on Trade and Development, available at http://www.unctadxi.org/templates/docsearch___779.aspx. The Award’s note 466 stating that this neither “constitute[d] a change in or clarification of the UK’s policy” nor can it “imply an evolution in the general understanding shared by the majority of states” is of no effect. Clearly a State continuing its MFN practice in BITs following *Maffezini* implies acceptance of its results. This Opinion obviously rejects the Award’s notion that there is a “majority of states” favoring this Award’s conclusions.

⁸⁵ Award ¶ 276 (emphasis added). The Award has swept along the United States as one of the “capital exporting countries” that allegedly share the Award’s theory of the scope of MFN. See Award ¶ 277. According to 2010 data, the United States is by far the world’s highest capital exporter as measured by Foreign Direct Investment, with more such investment than France and the United Kingdom combined. See <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2199rank.html>. As the Award implicitly concedes, however, at its note 465, no clarity exists currently as to United States policy on the MFN issue.

⁸⁶ Award ¶¶ 273-76.

⁸⁷ See *supra* n.85.

observe that a non-binding, general recommendation in a European Commission Issue Paper hardly translates into established EU-wide treaty policy,⁸⁸ just as a single Swiss-Colombia BIT cannot be considered as serious evidence of those countries having “clarified” their investment treaty practice in reaction to *Maffezini* more than on that “one occasion.”⁸⁹ More significantly, all of these materials post-date the Treaty at issue by several years, and none of these materials purports to apply retroactively. Yet, still disregarding the principle of “contemporaneity” on which it has based much of its analysis, the Award suggests that these minimal and inconclusive sources are sufficient to infer not only the state of affairs in 2006 and beyond, but also what was *always intended* by “the majority of the world’s . . . capital exporting countries” with respect to the scope of MFN. This conclusion simply lacks any foundation.

iv. What “Treatment” Must Be “In The Territory” Of Argentina?

33. The Award also misapplies the MFN clause’s requirement that the “treatment” of which the investor complains take place “in the territory” of the host State. After setting aside appropriately the question whether the MFN clause applies to dispute settlement, the Award proceeds on the assumption that the relevant “treatment” is “international arbitration,” and devotes several paragraphs to the exploration of arguments that place such arbitration outside the realm of the host State.⁹⁰ However, Article 3 of the BIT provides a cause of action when the “treatment” of the foreign investor is “less favorable than the treatment accorded [by the host

⁸⁸ In fact, nothing in the European Commission’s recently published Proposed Regulation on Transitional Arrangements for Bilateral Investment Agreements suggests the official establishment of an EU-wide policy on MFN similar to that recounted in the Award. See Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries (7 July 2010), available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf. Even if such a policy were established today, it would have been irrelevant for purposes of interpreting the BIT, which dates to 1991. The fact, as the Award states, in its note 464, that “no EU document has yet been issued endorsing the *Maffezini* approach or suggesting its incorporation into EU policy” is, accordingly, a *non-sequitur*.

⁸⁹ Award ¶ 274. The Award fails to recognize that its finding of a “clarification” in 2006 does not preclude that prior to 2006, which includes the relevant period for purposes of interpreting the Germany-Argentina BIT, Switzerland and Colombia *did* extend MFN protection to dispute settlement. In any case, there is credible evidence that the Award’s understanding of Swiss investment policy is simply wrong – and ultimately irrelevant to the interpretation of the BIT, as it is based on *ex post* evidence. See Anne K. Hoffmann, *Bilateral Investment Treaty Overview – Switzerland* (2008) § B.1, available at www.investmentclaims.com (“The Swiss authorities maintain that there is no particular policy concerning the BITs concluded by Switzerland. It continues to negotiate BITs, thereby further enlarging its already extensive treaty network. Most favoured nation (‘MFN’) as well as umbrella clauses are constant features of Swiss BITs and will continue to be.”).

⁹⁰ Award ¶¶ 226-32. While discussing the meaning of “in its territory” the Award engages in piecemeal application of the Vienna Convention without acknowledging its primacy as interpretive guide.

State to] . . . investments of nationals or companies of any third country.” In this case, the “less favorable” treatment that gives rise to the MFN violation is the requirement to resort to local courts for 18 months. As the Award accepts, “[t]he host state’s obligation extends . . . [to] providing the covered investor with ‘treatment’ in respect of . . . domestic dispute resolution treatment . . . to third-state investors.”⁹¹ It is precisely in recognition of this fact that the Tribunal in *Hochtief* recently has ruled under the identical Argentina-Germany BIT that: “[T]he relevant treatment is the reliance by [Argentina], not having invoked Article 10(2), upon Article 10(3) and the refusal of Argentina to submit to immediate arbitration as the Claimant wishes. That conduct cannot be said to be conduct outside the territory of [Argentina] for the purposes of Article 3 of the BIT.”⁹² The Award has once again committed conceptual error by considering the “more favorable” treatment in the Comparator Treaty as the basis of the Tribunal’s jurisdiction.⁹³ Thus, the Award’s entire discussion on the MFN clause’s requirement that “treatment” occur “in the territory” is utterly irrelevant for purposes of this case.⁹⁴

v. The Exceptions To The MFN Clause Involve Extraterritorial Dispute Resolution

34. The Award’s two arguments regarding the enumerated exceptions to the BIT’s MFN clauses are also misplaced. The first one relies on the mistaken assumption that the relevant “treatment” for MFN purposes is international arbitration.⁹⁵ Specifically, the Award argues that “the MFN treatment exceptions mentioned in the German-Argentine BIT – like those found in most BITs – refer exclusively to types of treatment normally occurring within the territory of the host state.” According to the Award, since the MFN clause also applies only within the territory of the host State, extraterritorial treatment such as international arbitration need not be part of the

⁹¹ Award ¶ 228.

⁹² *Hochtief*, Decision on Jurisdiction ¶ 111.

⁹³ *Cf. supra* n.82. Thus it is not, as the Award states in its note 396, a question of this writer’s lapsed “affinity for the Roman law maxim *expressio unius est exclusio alterius*.”

⁹⁴ The Award adds that “the absence of the expression ‘all matters’ . . . [in the Treaty] is consistent with the conclusions which the Tribunal has already reached on the basis of its analysis of the terms ‘treatment’ and ‘in its territory’” Award ¶ 236. The author of this Opinion, to the contrary, finds that the absence of such language does not affect this analysis, a conclusion the Award agrees was reached by the *Siemens*, *National Grid*, and *RosInvest* Tribunals. Award nn.413-14 and accompanying text.

⁹⁵ Award ¶ 238.

enumerated exceptions.⁹⁶ As explained above, the “treatment” that gives rise to the MFN violation, *i.e.*, the requirement to resort to local courts, satisfies the territorial requirement; thus, the Award’s argument actually supports the conclusion that such “treatment” is covered by the MFN clause here.

35. The Award’s second argument is that “all of the typical exceptions to MFN treatment observed in international investment treaties . . . deal exclusively with the contracting states’ direct treatment of foreign investments, never with the international resolution of investor-state disputes arising out of that treatment.”⁹⁷ Again, the Award misattributes application of the MFN clause to international arbitration rather than the 18-month domestic litigation provisions. Thus any “sleight of hand” mentioned in the Award’s note 417 is the Award’s own. Moreover, assuming the focus were on international arbitration outside of Argentina, the Award neglects to mention that most if not all species of allegedly “direct” treatment enumerated as exceptions to MFN treatment in the BIT entail specific mechanisms of dispute settlement, usually outside the territory of the host State. For example, “preferential treatment” under a customs union such as MERCOSUR, of which Argentina is a full member, includes access to a dedicated international dispute settlement mechanism.⁹⁸ Similarly, both “regional economic integration” agreements such as those underlying the European Union, and taxation-related treaties such as the UK/Argentina Double Taxation Convention, contain international dispute settlement provisions.⁹⁹ It is appropriate to infer, by operation of the well-established canon *inclusio unius*

⁹⁶ Award ¶ 238.

⁹⁷ Award ¶ 239.

⁹⁸ See Treaty Establishing a Common Market between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Protocol of Ouro Preto (17 Dec. 1994), Chapter VI, arts. 43-44, *available at* http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp (providing that disputes between the State Parties shall be settled in accordance with the Brasilia Protocol for the Settlement of Disputes, which provides, *inter alia*, for international arbitration).

⁹⁹ See Consolidated Version of Treaty on European Union Art. 35, appended to Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts, Off. J. C 340 (10 Nov. 1997), *available at* <http://eur-lex.europa.eu/en/treaties/dat/11997D/hm/11997D.html#0145010077> (providing that “[t]he Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions, and decisions on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them”); UK/Argentina Double Taxation Convention (3 Jan. 1996), ratified 1 Aug. 1997, Art. 26, *available at* <http://www.hmrc.gov.uk/international/argentina-dtc.pdf> (“Where a resident of a Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, *irrespective of the remedies provided by the domestic*

est exclusio alterius, that dispute settlement in all its variances is encompassed by the Treaty’s MFN clause.

vi. **What “Treatment” Is “Less Favorable?”**

36. Finally, the Award’s discussion as to whether the requirement to resort to the Argentine courts for 18 months is “less favorable” amounts to mere theorizing. The Award does not explain why requiring Claimant to comply with the 18-month clause is not “less favorable” than providing Claimant with the option to circumvent that clause. As the Tribunal in *Renta 4* opined, “[h]aving options may be thought to be more ‘favoured’ for MFN purposes than not having them.”¹⁰⁰ Likewise, the Tribunal stated in the recent *Hochtief* Award that “it is always more favourable to have the choice as to which to employ than it is not to have that choice.”¹⁰¹ The Award’s discussion on the costs of domestic litigation versus arbitration¹⁰² is irrelevant for purposes of deciding this question.¹⁰³ Since offering an investor a choice is inherently more favorable than offering it no choice, regardless of which alternative the investor chooses, there is no occasion for any “invidious . . . finding . . . that host State adjudication of treaty rights [is] necessarily inferior to international arbitration.”¹⁰⁴

37. In this connection, and given the high standard of proof for the delict of denial of justice or related claims, it is difficult to take seriously the Award’s proposed solution of Claimant

law of those States, address his case to the competent authority of the Contracting State of which he is a resident, or . . . to that of the Contracting State of which he is a national.”) (emphasis added). This latter Convention, providing as it does for a resident investor-taxpayer to “address his case to the competent authority” of his host State, refutes the statement in note 417 of the Award that “all of the examples cited by the Dissenting Opinion involve state-to-state international dispute resolution, not investor versus state.”

¹⁰⁰ *Renta 4* ¶ 92.

¹⁰¹ *Hochtief*, Decision on Jurisdiction ¶ 100.

¹⁰² Award ¶ 245.

¹⁰³ Even if the determination of whether the 18-month clause constitutes “less favorable treatment” required consideration of case-specific evidence, as the Award seems to suggest, its arguments on the issue are feeble. Similar to its futility analysis (*see supra* ¶ 15 and n.43) the Award fails completely to take into account expert evidence in the record, uncontradicted by any expert evidence submitted by Argentina, showing the highly burdensome and ultimately fruitless ordeal Claimant would have to undergo in the Argentine courts before ending up precisely where it currently finds itself: in international arbitration proceedings. The evidence submitted by Claimant here shows that requiring it to resort to the Argentine courts for 18 months is an exercise in waste and futility—which, despite evidence of delay and cost cited by the Award (Award ¶ 246 and n.430) — cannot be said of international arbitration.

¹⁰⁴ Award n.426.

trying to recoup significant amounts of time and money by bringing additional treaty claims based on its treatment by the Argentine courts.¹⁰⁵ Nor am I able to understand the Award’s passing comment that Claimant would not have to show denial of justice but “whether the Claimant, in order to vindicate its legal rights, was discriminatorily (on the grounds of its nationality) forced to bear costs in excess of those imposed upon investors from third countries.”¹⁰⁶ If the Claimant, a foreign investor with a claim that has no domestic equivalent, subjected itself willingly to a process prescribed under the BIT, foregoing MFN protection in the process, on what grounds would it then claim “discriminatory” treatment “on the grounds of its nationality”?

* * *

38. In all, the Award’s discussion of the manner in which the BIT’s MFN clause affects the Treaty’s 18-month clause is not simply unconvincing; it is profoundly wrong. Regrettably, the type and quality of arguments raised by the Award leave no room for agreement with my Tribunal colleagues. In the absence of such agreement, I can only hope my observations above will serve to dispel for others the Award’s substantial confusion, and correct the numerous errors that permeate the Award’s understanding of the MFN mechanism in investment treaties.

¹⁰⁵ Award ¶¶ 247-50. In this regard, notes 431-34 are especially noteworthy—for two reasons. First, the Award constructs a hypothetical scenario under which Claimant would recover under the MFN clause for actual delay and costs caused by the Argentine courts. Such a scenario, however, is mere fanciful conjecture that misunderstands the manner in which MFN protections operate. At the outset, an advocate for the host State would point out that Claimant waived the objection with respect to the 18-month clause being “less favorable” treatment by not raising it prior to appearing before local courts. Moreover, a complaint about “less favorable treatment” within the court system is different from arguing that the requirement to resort to the court system itself constitutes “less favorable treatment.” All foreign investors that end up in the Argentine courts, for example, likely face the same obstacles, while Argentine litigants by definition cannot bring the same types of claims as foreign investors. Consequently, Claimant could not prove “less favorable treatment” based on nationality, and its MFN claim would simply be rejected on the merits. Second, as part of applying MFN to domestic court “treatment” the Award finds the MFN clause’s territorial requirement satisfied, in direct contradiction to its actual holding. Other than the Award’s reference to an actual incurrence of costs by the Claimant, which does not affect the manner in which MFN is applied, the Award does not and cannot explain the difference between its analysis of “in its territory” in ¶¶ 225-31 of the Award and the hypothetical scenario mentioned in notes 431-34. The Award finds that this concern is “unfounded” in its note 435. It misses the point, namely that the foreign investor, having been treated equally with other foreign investors, could not prove discrimination.

¹⁰⁶ Award n.434.

III. THE STANCE OF PROFESSOR BELLO JANEIRO

39. I must also address the fact that my co-arbitrator, Professor Bello Janeiro, in joining with the Tribunal's President to form the majority in this case, has departed from his position in *Siemens*. It will be recalled that in its Decision on Jurisdiction the *Siemens* Tribunal, of which Professor Bello Janeiro was a member by appointment of Argentina, ruled "unanimously" that under Article 31 of the Vienna Convention the term "treatment" in the identical Argentina-Germany Treaty as is at issue in the present case encompasses dispute settlement; therefore Claimant could rely on the Treaty's MFN clause to circumvent the Treaty's requirement that it resort to the courts of Argentina for 18 months before being entitled to commence arbitration.¹⁰⁷ In the present case, however, in forming a majority with the Tribunal President for dismissal he rejects that conclusion.

40. Professor Bello Janeiro consciously expressed himself as joining substantively in the unanimous *Siemens* Decision on Jurisdiction. His signature is subscribed thereon together with those of the *Siemens* Tribunal President and myself with no expression of any dissent on his part. Professor Bello Janeiro is not of the school that believes that an arbitrator should never express a dissenting view, irrespective of his or her true conclusions. Indeed, in the *Siemens* case he subscribed a Separate Opinion on 30 January 2007 dissenting from two holdings of the "unanimously decide[d]" Award on the Merits he had signed 11 January 2007 together with the *Siemens* Tribunal President and myself.¹⁰⁸ To his credit, in his Concurring Opinion Professor Bello Janeiro dispels any uncertainty regarding his earlier views, confirming that he in fact has changed his mind since *Siemens*.¹⁰⁹

¹⁰⁷ See *supra* ¶ 18 and n.52.

¹⁰⁸ See *Siemens*, Separate Opinion of Professor Bello Janeiro (30 Jan. 2007), available at <http://italaw.com/documents/Siemens-Argentina-Opinion.pdf>.

¹⁰⁹ Professor Bello Janeiro's asserted reliance in changing his mind on the examples he cites of Professors Albert Jan van den Berg and Gabrielle Kaufmann-Kohler is, however, clearly misplaced. The fact of the former joining in awards arriving at totally contrary conclusions was not a product of a change of mind, but rather of his declared practice of *nemine dissente* in investor-State disputes. Compare *Enron*, Decision on Jurisdiction (14 Jan. 2004) (holding, *inter alia*, that Argentina could not rely on the necessity defense to avoid liability for acts relating to its 2001 crisis) with *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC627_En&caseId=C208 (holding, *inter alia*, that Argentina could rely on the necessity defense with respect to certain acts

41. Professor Bello Janeiro summarizes the reasons for his revised opinion as follows: “1) judicial practice has become more varied and more awards have been rendered that disagree with the position maintained in the *Siemens* arbitration; 2) several States, including Argentina, have since refined the focus of the *Maffezini/Siemens* awards, leading me to rethink my original conclusion and Argentina’s consent to this type of application of the MFN clause; and 3) the *Siemens* tribunal did not conduct an analysis of several of the points now covered extensively and very carefully by this award”¹¹⁰ The result is that he embraces *Wintershall* and *ICS*¹¹¹ and spurns *Hochtief* and its eight predecessors.

relating to its 2001 crisis that it committed within a specific period of time); see Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in MAHNOUSH ARSANJANI ET AL. (EDS.), LOOKING TO THE FUTURE: ESSAYS IN INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 822, 828 (2010) (arguing that dissenting opinions by party-appointed arbitrators in investment arbitration not only undermine “the neutrality of the arbitrator and the development of investment law,” but also “weaken the authority of the award”); *id.* at 836 (adopting as an “aspired principle” the rule “*nemine dissentiente*”). Yet, precisely because of his devout adherence to this rule, Professor van den Berg was challenged, albeit unsuccessfully, by Argentina in the UNCITRAL case *BG Group Plc v. Argentine Republic*. See Luke Eric Peterson, *Analysis: Decrying past “contradictory” rulings, Argentina challenges arbitrator*, Investment Treaty News (1 Apr. 2008), available at www.investmenttreatynews.com. Argentina later moved to set aside the award in the United States District Court for the District of Columbia, arguing, *inter alia*, that: (i) Professor van den Berg’s stance in treating Argentina’s necessity defense evidenced partiality against Argentina; and (ii) the appointing authority had exceeded its authority in rejecting Argentina’s challenge to Professor van den Berg. See *Republic of Argentina v. BG Group Plc.*, U.S. District Court for the District of Columbia, Petition to Vacate or Modify Arbitration Award, Civil Action No. 08-485 (RBW), 21 Mar. 2008, ¶ 76. The district court rejected Argentina’s application and ordered that the arbitral award be enforced against Argentina, but this decision was later overturned by the United States Court of Appeals for the District of Columbia Circuit on other grounds. See *Republic of Argentina v. BG Group Plc.*, 665 F.3d 1363 (D.C. Cir. 2012); *Republic of Argentina v. BG Group Plc.*, U.S. District Court for the District of Columbia, Memorandum Opinion, Civil Action No. 08-485 (RBW), 21 Jan. 2011.

Professor Kaufmann-Kohler, on the other hand, cannot be regarded as having changed her mind as regards the possibility of an MFN clause importing into a treaty more favorable dispute resolution provisions of other treaties. She has accepted that an MFN clause is broad enough to encompass dispute resolution, while she also has declined to allow use of the MFN clause in a specific case to expand the tribunal’s arbitral jurisdiction. Compare *Suez*, Decision on Jurisdiction (16 May 2006) with *Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award (9 Oct. 2009), available at <http://italaw.com/documents/AustrianAirlinesv.Slovakia.pdf>. Although I have expressed disagreement with the merits of Professor Kaufmann-Kohler’s position in the latter case, her view reflects careful consideration of MFN doctrine and jurisprudence and is entitled to respect. See *Austrian Airlines*, Separate Opinion of Charles N. Brower.

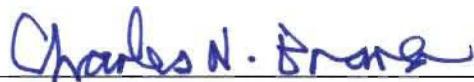
¹¹⁰ Opinion of Professor Domingo Bello Janeiro 8.

¹¹¹ For the avoidance of doubt, the “direct experience in the Hague International Court of Justice” cited by Professor Bello Janeiro in respect of “Arbitrator Torres-Bernardez,” who sat in the *Wintershall* and *ICS* cases, was as Registrar of the Court 1980-86 and subsequently as Judge *ad hoc* in certain cases.

42. As I have already indicated, however, (1) the “case law” as to 18-month clauses in Argentinean BITs has been that nine out of eleven such cases have ruled that the MFN clause in the Argentinean BIT did enable the claimants to access provisions in other treaties for immediate access to international arbitration, thus avoiding any need to spend 18 months in the courts of Argentina;¹¹² (2) subsequent pronouncements in other contexts by States, including Argentina, are irrelevant for purposes of interpreting the Treaty here in issue;¹¹³ and (3) the Award’s discussion of “several of the points now covered extensively and very carefully” therein which Argentina had not raised in *Siemens* is profoundly wrong. Professor Bello Janeiro adds nothing to the weak reeds on which the present Award rests.

IV. CONCLUSION

43. For the reasons stated above, I dissent from the Award on Jurisdiction.



Charles N. Brower

August 15, 2012

¹¹² See *supra* ¶¶ 23-26.

¹¹³ See *supra* ¶¶ 27-32.