

In the Proceeding between
Hochtief AG (Claimant)
and
The Argentine Republic (Respondent)

ICSID Case No. ARB/07/31

Separate and Dissenting Opinion of J. Christopher Thomas, Q.C.

Introduction

1. After exchanging views with my distinguished colleagues in the manner described at paragraph 124 of the Decision on Jurisdiction, I have found that I do not agree with their interpretation of the Treaty. There are many points made in the Decision with which I agree, and other points with which I would have agreed had I concurred with their interpretation, but in the end I have a different view. I do however subscribe to the Decision's dispositions of the Second Objection, the rejection of the declaration sought in respect of the Centre's jurisdiction and the deferral of the consideration of the "contract claims and double recovery" issue.¹
2. I can readily see how my colleagues have formed a different view on the MFN issue. The reason why the MFN clause has been invoked of course is that the Respondent has agreed to different investment protection treaties with different arbitral regimes. Had it maintained a single treaty model, the MFN issue would not arise in the first place. Thus, when, as here, the basic treaty requires a claimant to submit the dispute to the respondent's local courts for a period of time while another treaty concluded by the respondent does not contain the requirement, it is not difficult to conclude that many, if not all, putative claimants would prefer the latter. Some tribunals, including the present one, have agreed, emphasizing the value of such a choice from the claimant's perspective.²
3. There is also the pragmatic concern that when an objection such as the instant one is heard, the tribunal has been constituted, at least some pleadings on the merits have been filed, and often, as here, there is a substantial dispute between the parties. In the circumstances it could be seen as a waste of time and money to insist on compliance with the treaty's conditions on access to international jurisdiction.³ Accordingly, some tribunals have applied the relevant MFN clause

¹ See Sections X to XII of the Decision on Jurisdiction.

² Decision on Jurisdiction, paragraph 100.

³ This sentiment is expressed in the Decision at the end of paragraph 88 where the majority considers that: "While not logically or legally decisive, the fact that adherence to the 18-month rule would bring no necessary benefit, and no necessary result other than the delay of the arbitration proceedings, is a fact from which the Tribunal derives some encouragement to believe that its decision is correct."

and have concluded that their jurisdiction has been established, even though the claimant has not met the conditions stipulated in the treaty's arbitration clause. I fully appreciate this reasoning and can see the attractiveness of the result, but there are other issues that need to be considered.

4. It is also the case that when MFN clauses have been invoked by claimants seeking to be relieved of compliance with the basic treaty's conditions for gaining access to international jurisdiction, tribunals have tended to form judgements about the merits of different treaty structures. The requirements of the basic treaty have sometimes been seen as unduly burdensome to would-be claimants.
5. This has been reflected in the majority's characterizing the 'prior recourse' step between consultations and international arbitration as "pointless", "to some extent perfunctory and insubstantial", the 18-month limit for litigation as "arbitrary", and the regime's giving "no certain benefit".⁴
6. One can wonder why the Contracting Parties decided to require the prior submission of a legal dispute to the courts of a Party for a period of 18 months before granting the investor/claimant an unconditional right of direct access to international jurisdiction. At first glance it seems odd that the requirement can be satisfied by the simple effluxion of time without its requiring a decision of at least a court of first instance before the dispute can be elevated to the international level. It is possible that a claim submitted to the local courts might never get to the merits, let alone result in a judgment, during the 18-month period. This would imply no apparent benefit from the prior submission of the dispute to the local courts and an attendant loss of time and expense. The Claimant has argued forcefully that this is the effect of Article 10(3)(a) and the majority accepts this to be the case.⁵
7. The 18-month period is plainly a product of compromise between the States Parties. Bearing in mind that under Article 26, second sentence, of the ICSID Convention a Contracting State can require the exhaustion of local remedies as a condition of its consent to arbitration under the Convention, it is open to two States to agree to a limited recourse to local remedies as a condition of their consent to arbitration under their bilateral treaty. Their having made such a choice, the period selected had to be of sufficient time to permit a Contracting Party's legal system to at least have an opportunity to address the dispute. A prior recourse provision of say, 6 months would hardly permit any real opportunity for the parties to frame the issues, let alone permit a court to consider the dispute. On the other hand, from a claimant's perspective, a limited period of time is preferable to a requirement of full exhaustion of local remedies (and 18 months would be seen as preferable to 36 months or more).
8. Moreover, there are reasons why a "prior recourse" stage in the dispute settlement process can contribute to a resolution of a dispute, or at least to a narrowing of the issues in dispute. One cannot rule out the possibility that the local court could uphold the investor's claim that the measures complained of violate municipal law or that a contested legal right claimed to exist

⁴ Decision on Jurisdiction, paragraphs 51, 87-88.

⁵ Decision on Jurisdiction, paragraph 88.

under that law does in fact exist.⁶ Even if such findings did not lead to a settlement, they would enhance the prospects of success in any subsequent international claim.⁷ On the other hand, the local courts might find the measures at issue to be lawful. While this would not bind a subsequent international tribunal applying an international treaty, it might lead it to find that there has been no breach of the treaty. It might alternatively lead to a finding that the respondent's courts have compounded a treaty breach. There are many such examples in the cases.

9. The majority acknowledges the possible *res judicata* effect of a local court decision on a subsequent international proceeding but puts that to one side.⁸ This is an important issue that underlies the interaction between a 'prior recourse' proceeding and a subsequent international claim and helps to explain its rationale. The late Keith Hight's dissent in *Waste Management Inc. v. Mexico* set out how, through the application of *res judicata*, the decisions of the local courts can alter the scope of a subsequent international proceeding through the expansion or reduction of the international claim, depending upon how the local courts treat the investor's local law claim.⁹ In many investment treaty cases, prior proceedings between the disputing parties have been given *res judicata* effect by international tribunals.¹⁰ Thus, an invocation of prior remedies as contemplated in Article 10 can have significant constructive juridical effects for a subsequent international claim or may obviate the need for such a claim.
10. It is one thing to determine, based on evidence, that the submission of a particular dispute to the local courts would be futile (an exercise that the Tribunal has not engaged in, although evidence on this point was led by both parties). It is, in my view, quite another thing to make a rather

⁶ Campbell McLachlan QC, Laurence Shore and Mathew Weiniger, *International Investment Arbitration: Substantive Principles*, (Oxford University Press 2007), p. 257: "It would be invidious for international tribunals to be finding ... that host State adjudication of treaty rights was necessarily inferior to international arbitration." One can agree with this assertion about the general utility of local court proceedings even while acknowledging that there will be cases where the local courts cannot adequately adjudicate the dispute. The point is made by the majority in *Renta 4 S.V.S. A. et al v. Russian Federation*, SCC Arbitration V (024/2007), that: "History is replete with examples of investment disputes which have overwhelmed the capacity of national institutions – in countries of all stages of development – for dispassionate judgment." (Award on Preliminary Objections, paragraph 100.)

⁷ A claimant that enjoyed some success in the local courts would surely advert to that fact in support of any claimed breach of the treaty. Likewise, if the respondent demonstrated an obstructionist defensive posture in the local proceedings, that too would figure in the way in which a subsequent claim was formulated. It might lead to an additional cause of action.

⁸ Decision on Jurisdiction, paragraph 49.

⁹ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Hight of June 2, 2000, paragraphs 50-51. This analysis was based on a different regime for the initiation of an international claim. The analysis remains on point for the purposes of the current discussion.

¹⁰ See, for example, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award of July 3, 2008, paragraphs 123-125, 143; *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award of February 7, 2011, paragraph 103.

sweeping judgement as to a treaty provision's utility based on a "worst-case" scenario of an assumed useless and expensive recourse to the local courts. It is not the place of international tribunals to second-guess the choices of the States Parties even when one can envisage instances where such choices might lead to inefficiency and additional cost to a would-be claimant. One cannot avoid the fact that the Federal Republic of Germany and the Argentine Republic were satisfied with the inclusion of this provision in their Treaty. Hence, I believe that the majority's characterization of the prior recourse requirement devalues the States Parties' policy choice manifested in the Treaty.

11. One other point warrants mention at the outset. I agree with the prevailing view that the Treaty's dispute settlement provisions are to be interpreted neither broadly nor restrictively. As the *Amco Asia et al. v. Indonesia* Decision on Jurisdiction observed, 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 to, indeed, to all systems of internal law and to international law.

Moreover, - and this is again a general principle of law - any convention, including conventions to arbitrate, should be construed in good faith, that is to say by *taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged*.¹¹ [Emphasis in first paragraph in original; emphasis in second paragraph added.]

12. While the first paragraph of the *Amco Asia* tribunal's approach is often quoted with approval by investment tribunals, the second paragraph, which is equally relevant, tends not to be cited as frequently. The tribunal postulated a general approach to interpretation not confined to the interpretation of agreements to arbitrate. The Argentina-Germany Treaty's MFN clause likewise must be construed neither broadly nor restrictively and its interpretation should also take into account the commitments that the parties may be considered as having reasonably and legitimately envisaged.
13. With these introductory points in mind, I turn to the main issues raised in the First Objection.

The need for an agreement to arbitrate

14. Before examining the Treaty, I wish to note an important issue on which we are all agreed. At paragraph 22, the Decision correctly notes that the "Tribunal's jurisdiction depends upon the existence of an agreement between the two parties to the dispute – Hochtief and the Republic of Argentina." It is only if such agreement exists that the Tribunal is then vested with jurisdiction to apply the Treaty.

¹¹ *Amco Asia et al. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction of September 25, 1983, paragraph 14(i).

15. It is helpful to conceive of the issue in the terms put by the tribunal in *RosinvestCo UK Ltd. v. Russian Federation*, namely, “Is there a binding consent to arbitration with the effect that a prospective party to the arbitration proceedings does not need the agreement of the other prospective party to start arbitration proceedings?”¹²
16. As discussed below, two avenues to international arbitration are specified under Article 10(3) of the Treaty: (i) by agreement between the disputing parties (whereby the respondent’s consent obviates the need for prior recourse to the local courts and the dispute can proceed directly to international arbitration); or (ii) by a party’s submitting a claim to an international tribunal after having submitted the dispute to the local courts for 18 months. Absent the respondent’s agreement to proceed directly to arbitration, unconditional access to international arbitration is permitted only after compliance with the 18 month prior recourse condition. To revert to *RosInvestCo*, at that point and only at that point, under this Treaty, the initiation of the arbitration proceedings depends “solely on the unilateral decision by either party and ... the other party does not have to agree again in order to permit the arbitration to start.”¹³
17. It is common ground between the parties, agreed by all members of the Tribunal, and well accepted in investment treaty arbitration that the State’s prior treaty-based offer must be accepted by the claimant. The Decision correctly observes that, “The question is whether the ‘offer’ and the ‘acceptance’ have resulted in an agreement which provides the basis for the jurisdiction of the Tribunal.”¹⁴
18. With no contemporaneous meeting of the minds, the existence of the agreement to arbitrate is determined by examining the two consents. Campbell McLachlan, QC observed in this respect:

... Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration.¹⁵
19. Many tribunals have examined the consent given in a claimant’s request for arbitration in light of the State’s prior treaty-based offer to consent to arbitration and have had little difficulty concluding that the two consents matched and an agreement to arbitrate was formed. The

¹² *RosinvestCo UK Ltd. v. Russian Federation*, SCC Arbitration V 079/2005, Award on Jurisdiction, paragraph 71(1). At paragraph 84 of the Decision, the majority asserts that on “any interpretation of Article 10 of the Argentina/Germany BIT, an investor can ultimately exercise its rights so as to submit the dispute unilaterally to arbitration, without the need for the further specific consent of the State party to the dispute.” This is only partly true in my view. It is correct that the investor/claimant can do so after having submitted the dispute to the local courts for a period of 18 months. On a plain reading of Article 10(3), however, it cannot do so before then, absent securing the agreement of the other party. This bears on my view of the majority’s acquiescence point, discussed below.

¹³ *Id.*, paragraph 72.

¹⁴ Decision on Jurisdiction, paragraph 24.

¹⁵ McLachlan, Shore and Weiniger, *supra* note 6, p. 257.

difficult issue arises when, as here, a claimant disavows the conditions attached to the respondent's offer expressed in the basic treaty and seeks to change or eliminate them by invoking the treaty's MFN clause.¹⁶

20. In the pre-*Maffezini* days, it was clear that the offer and the acceptance must match. In the 2001 edition of his treatise, Prof. Schreuer commented that:

Where ICSID's jurisdiction is based on an offer made by one party, subsequently accepted by the other, the parties' consent exists only to the extent that offer and acceptance coincide... It is evident that the investor's acceptance may not validly go beyond the limits of the host State's offer. Therefore, any limitations contained in the ... treaty would apply irrespective of the terms of the investor's acceptance. If the terms of acceptance do not coincide with the terms of the offer there is no perfected consent.¹⁷

21. In my view, the need for matching consents, once clear under the ICSID Convention, remains the case.

The situation in the case before the Tribunal

22. In the case before us the disputing parties' consents do not match. The conditions stipulated in the offer to arbitrate expressed in Article 10 have not been met by the Claimant. Hochtief consented to arbitration under the Argentina-Germany Treaty yet simultaneously sought to vary the conditions attached to Argentina's consent by invoking the Treaty's MFN clause to bring into play the Argentina-Chile Treaty's access to arbitration provisions so as to "displace" the conditions stipulated in the basic treaty.¹⁸
23. The majority has characterized the Claimant's position as being that "its agreement is contained in the Request for Arbitration which is intended, in effect, to be an acceptance of Argentina's offer contained in Article 10 and Article 3 of the Argentina-Germany BIT."¹⁹ [Emphasis added.] That is, they find the State's offer to arbitrate to lie in two articles (one which establishes the investor-State arbitration mechanism and the other being the MFN article).

¹⁶ Although one tends to focus upon a specific respondent's consent once a dispute arises, it is axiomatic that in an investment treaty context based upon reciprocity and equality of obligations undertaken by both States Parties, the conditions on consent stipulated in the treaty apply to either State Party.

¹⁷ Christoph Schreuer, *The ICSID Convention: A Commentary*, (Cambridge University Press, 2001), para. 356, p. 238. The need for matching consents in order to form the arbitration agreement was also noted by Paul Szasz in an early article on the ICSID Convention entitled, "The Investment Disputes Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)." In a section of the article entitled, "Cautions" the author noted: "The related point to be observed when consent is expressed in diverse instruments, is the extent to which these overlap – for it is only in the area of coincidence that the consent is both effective and irrevocable."

¹⁸ Hochtief's Rejoinder on Objections to Jurisdiction, paragraph 68.

¹⁹ Decision on Jurisdiction, paragraph 23.

24. I have some difficulty in describing the MFN article as part of the offer to arbitrate under the Treaty. The offer to arbitrate set out in Article 10, it seems to me, expresses the entirety of the Treaty's investor-State arbitral mechanism.
25. At paragraph 25 of the Decision, the majority correctly records its agreement with both parties that "it is necessary to establish a consensus: i.e., that it is necessary to demonstrate that Hochtief's Request for Arbitration was an acceptance of the offer to arbitrate on the terms on which the offer was made, and not a counter-offer on different terms."
26. I find it difficult to see that the Claimant's invocation of a dispute settlement mechanism found in another treaty in order to vary the terms of the present Treaty is "an acceptance of the offer to arbitrate on the terms on which the offer was made." If Hochtief accepted Argentina's prior offer in its terms by complying with Article 10(3)(a), the two consents would match, the prior offer would be accepted, and the agreement to arbitrate would thereby be established. But that is not what occurred. In my view, regardless of how one puts it, e.g., as the Argentina-Chile Treaty's "displacing" Article 10(3) (as the Claimant puts it) or as the Claimant's having accepted an offer contained in Articles 10 and 3 (as the majority puts it), there has been no true meeting of the minds in the sense of matching consents.
27. It appears to me that when a claimant seeks to change or eliminate the conditions attaching to the respondent's consent, the requisite mutuality of an offer and matching acceptance thereof is not present and, to use Prof. Schreuer's words, "there is no perfected consent".²⁰ Rather, the Claimant has made a "counter-offer on different terms." The only possible way out of this conundrum is to find (as the majority has found) that the MFN clause varied the terms of the offer, which revised terms were then accepted by Hochtief. But for that to occur, the Tribunal must necessarily apply Article 3, not in the sense of conducting an appraisal of whether the Claimant has the requisite standing to bring a claim that *prima facie* appears to fall within the scope of the Treaty, but rather to establish the very jurisdiction that is at issue.

The principal points of my disagreement with the majority

28. The principal basis for my separate opinion is that I do not share the view that the MFN obligation stated in Article 3(2), as further elaborated by *Ad Article 3* of the Protocol, interpreted in accordance with the rules of treaty interpretation, reaches the conditions attached to a State Party's consent to arbitration expressed in Article 10. I will go through the Treaty in some detail in order to develop the point.

²⁰ In this respect, the legal issue raised in the instant case differs from that at issue in *RosInvestCo* and *Renta 4*, where the tribunals grappled with the impact of an MFN clause on an established jurisdiction. In the former case, the tribunal plainly had jurisdiction to determine the level of compensation for an expropriation and used the MFN clause to enlarge that established jurisdiction. In the latter, the tribunal found that the inclusion of the word "due" in the relevant treaty text permitted it to consider whether the predicate to an expropriation had been made out. In the instant case, I believe that the issue differs; lacking jurisdiction conferred by two matching consents, the Tribunal is using the MFN clause to create the agreement to arbitrate and thereby establish its jurisdiction.

29. As a subsidiary point, I also have reservations about what the Tribunal is actually doing when it gives effect to the MFN clause in this case. I accept that upon the Treaty's entry into force, unless otherwise indicated in its text, all of its provisions enter into force at the same time. The question in a jurisdictional challenge such as the present one is not whether some or all of the treaty's provisions are in force²¹, but rather whether in the specific case arising under this Treaty the Tribunal has been seised with jurisdiction. That requires the Tribunal to satisfy itself of the existence of an arbitration agreement and to do so it must see how such an agreement is formed under the Treaty's arbitration clause.
30. There is no doubt that, as observed in paragraph 11 of the Decision, when considering an objection to its competence, a tribunal plainly has the power to interpret the treaty as a whole in order to determine whether it is properly seised with jurisdiction. However, I do not believe that the *Kompetenz-Kompetenz* power can be used to create the Tribunal's jurisdiction. In my respectful view the approach taken seems to elide the question of competence and the application of the provisions of the Treaty.
31. The disagreement manifests itself in another difference in view. The majority does not see Hochtief's noncompliance with Article 10 as going to the Tribunal's jurisdiction, but rather to the claim's admissibility.²² I disagree and prefer the view expressed by other tribunals, namely, that the prior recourse provision is both mandatory and is jurisdictional in nature.
32. I will address these reservations in turn, beginning with an examination and discussion of the relevant provisions of the Treaty.

The terms of the Treaty

Article 10

33. One simple point can be made at the outset: Article 10 does not contain an MFN obligation within the article itself that would have made it perfectly clear that if one of the Contracting Parties agreed to a treaty containing more favourable conditions for access to international jurisdiction, those conditions would enure to the benefit of an investor bringing a claim under the Argentina-Germany Treaty. The absence of an explicit MFN undertaking in Article 10 of course is not dispositive of the interpretative issue, but it warrants noting as a point of departure. There are four additional inter-related points.
34. First, Article 10 contemplates a three step process. In respect of the first two steps, the article is stated in mandatory terms, using the word "shall" rather than "should," "may" or some other formulation of words that would suggest that the submission of the dispute to the local courts is

²¹ I am not to be taken as arguing that the Tribunal has the power to interpret only Article 10 at this stage of the proceedings.

²² Decision on Jurisdiction, paragraph 96.

anything other than obligatory if a party wishes to be in a position ultimately to proceed to international jurisdiction.²³

35. The most recent discussion of the characterization of this type of provision (albeit worded slightly differently) is found in *Impregilo S.p.A. v. Argentine Republic*.²⁴ That tribunal reviewed the analogous dispute settlement provision of the Argentina-Italy Treaty, concluding that the prior recourse provision was a “general condition that must be complied with by the investor who wishes to submit the dispute to international arbitration.”²⁵
36. The tribunal described Article 8(3) of that treaty as a “mandatory – but limited in time – jurisdictional requirement before a right to bring a case to ICSID can be exercised...” [Emphasis added.] It found support for its conclusion in the decisions of the *Maffezini* and *Wintershall* tribunals.²⁶ At the end of its analysis of the dispute settlement clause, the tribunal concluded that: “In sum, Article 8(3) contains a jurisdictional requirement that has to be fulfilled *before an ICSID tribunal can assert jurisdiction*” (my emphasis), observing further that this conclusion found support in the *Wintershall* award which found that “Article 10(2) contains a time-bound prior-recourse-to local-courts-clause, which *mandates* (not merely permits) litigation by the investor (for a definite period) in the domestic forum”²⁷ (Emphasis added). After reciting that passage from *Wintershall*, the *Impregilo* tribunal added that this mandatory clause applies “*before the right to ICSID can even materialize.*”²⁸ [Emphasis added.]
37. The majority in *Impregilo* went on to hold that the MFN clause applied so as to relieve the claimant of having to comply with this mandatory jurisdictional requirement. For present purposes, I refer to the award because its characterization of the prior recourse provision as “mandatory” and “jurisdictional” in nature accords with my understanding of Article 10(3)(a) of

²³ While expressing some doubt about the structure of Article 10 and whether it actually requires prior submission in order to permit a claimant to proceed to international arbitration, the Decision, at paragraph 55, proceeds on the assumption, and without deciding the point, that Article 10 imposes a mandatory 18-month submission to the national courts as a precondition of unilateral recourse to arbitration under the BIT.

²⁴ Since *Impregilo*, the Decision on Jurisdiction in *Abaclat and others (Case formerly known as Giovanna Beccara and others) v. The Argentine Republic*, ICSID Case No. ARB/07/5 has been released. The majority of that tribunal did not find it necessary to address the characterization of Article 8 of the Argentina-Italy treaty and whether the Treaty’s MFN clause entitled the claimants to rely on the allegedly more favourable dispute resolution clause in the Argentina-Chile BIT. (Decision on Jurisdiction of August 4, 2011, paragraph 589.) The dissenting opinion, which was said to be forthcoming, has not yet been published, so the views of the dissenting arbitrator cannot be ascertained.

²⁵ *Impregilo S.p.A. v. Argentina Republic*, ICSID Case No. ARB/07/17, Award of June 21, 2011, paragraph 90.

²⁶ *Id.*, paragraphs 91-94.

²⁷ *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award of December 8, 2008, paragraph 118.

²⁸ *Impregilo*, paragraph 94.

the present Treaty. I also find its comment that compliance with the clause is required before the right to ICSID can even materialize to be correct. This is relevant to my analysis because it goes to the question of what the Tribunal can do when determining its competence.

38. To revert to Article 10 of the Argentina-Germany Treaty, as noted previously, Article 10(3)(a)'s application can be avoided only by agreement of the two parties. This is an important point to bear in mind when considering the majority's admissibility analysis. At paragraph 94, they note in respect of questions of admissibility, that "disputing parties are entitled to raise objections based upon questions of admissibility, but they are not bound to do so; and if they do not raise those objections, they will have acquiesced in any breach of the requirements of admissibility and that acquiescence will 'cure' the breach." The critical point is the next one: "The tribunal, *if it has jurisdiction*, will proceed to hear the case." [Emphasis added.]
39. The majority considers that the Tribunal has such jurisdiction by virtue of the MFN clause's disapplication of Article 10; I see the Tribunal as having the jurisdiction to determine its jurisdiction, but not as empowered to apply the Treaty's substantive terms (including the MFN clause) so as to *create* its jurisdiction. That drives the analysis back to whether the Claimant has met the mandatory conditions for establishing such jurisdiction, because as *Impregilo* notes, compliance with such conditions must occur before the right to ICSID (arbitration) can materialize.
40. The Tribunal's acquiescence analysis would moreover be more persuasive, in my respectful view, if Article 10(3)(b) was not present in the Treaty. By including the possibility for a respondent State to agree to waive the prior recourse requirement, the drafters have explicitly addressed the acquiescence point in the text. Why read in a power to acquiesce into the conditions stipulated in Article 10(3)(a) when the respondent's power to agree to proceed immediately to international arbitration is explicitly recognized in Article 10(3)(b)? I would have thought that the latter's presence in the Treaty should lead to the opposite conclusion, namely, that if the power to waive the requirement is expressed in one sub-paragraph, it ought not to be read into the other.
41. If both paragraphs are given effect, the logical conclusion would be that absent the Respondent's agreement, under the framework of this Treaty the 18 month prior recourse period is mandatory and jurisdiction cannot vest in the Tribunal until there is compliance therewith.
42. On this approach, as held in *Impregilo*, *Maffezini* and *Wintershall*, non-compliance with the mandatory terms of subparagraph 3(a) goes to jurisdiction rather than to admissibility and the Respondent's insistence on the Claimant's compliance with the condition expressed in the Respondent's offer is properly characterized as an objection to jurisdiction, not to admissibility.
43. The third and related interpretative point about Article 10 is that unlike some investment protection treaties where the States Parties unconditionally submit to investor-State arbitration, Article 10 is worded conditionally. That is, absent compliance with the 18-month recourse

requirement, the claimant has no *unconditional* right to proceed to arbitration.²⁹ Absent the respondent's waiving prior recourse, it is only when prior recourse has occurred that there is, to revert to *RosInvestCo*, a binding consent to arbitration with the effect that a prospective party to the arbitration proceedings does not need the agreement of the other prospective party to start arbitration proceedings.³⁰

44. Finally, Article 10 stands in contrast to the Treaty's other dispute settlement mechanism, Article 9. That is, while Article 10(3)(a) stipulates a condition that must be met before the claim can be elevated to the international level, Article 9 gives the Contracting Parties direct and immediate access to international arbitration to settle disputes arising between them (in providing that if a dispute cannot be settled amicably, "it *will* be submitted to an arbitral tribunal upon the request of either Contracting Party"). [Emphasis added.] In such a case, there is no question as to the Contracting Parties' unconditional consent to State-to-State arbitration and any tribunal created under Article 9 is vested with jurisdiction to claims related to the interpretation and application of the Treaty.

Article 3

45. Article 3 will be reviewed in detail because it contains a number of phrases which taken collectively lead me to conclude that it does not apply to Article 10.
46. Paragraph 1 deals with "investments of nationals or companies of the other Contracting Party, or the investments in which the nationals or companies of the other Contracting Party have interests." Paragraph 2 addresses "nationals or companies of the other Contracting Party, as regards its activities related to investments." The paragraphs thus differentiate between the investor and its investment.
47. Paragraphs 3 and 4 then set out two types of treatment that are not considered to be "treatment" at all within the meaning of Article 3. "Treatment", as understood in paragraphs 1 and 2, "shall not include privileges which may be extended by either Contracting Party to nationals or companies of third States on account of" preferential trade agreements, nor shall it "extend to privileges accorded by a Contracting Party to nationals or companies of a third State by virtue of an agreement for the avoidance of double taxation or other tax agreements." In other words, paragraphs 3 and 4 deem two types of treatment that could otherwise be seen to be as less favourable as not even being "treatment" as that term is understood by the Contracting Parties.

²⁹ Obviously, proceeding directly to international arbitration pursuant to Article 10(3)(b) after having obtained the respondent's consent cannot be considered an unconditional right to arbitration. It arises from a specific consent from the respondent which is otherwise entitled to insist on compliance with the Treaty's mandatory terms.

³⁰ For that reason, I do not share the majority's view that the "jurisdiction of the Tribunal remains unaffected by" the Respondent's acquiescing in the Claimant's non-compliance with the 18-month period. (Decision on Jurisdiction, paragraph 96.)

Article 3(2) in particular

48. Paragraphs 1 and 2 of Article 3 do not have the same coverage. Paragraph 1 applies to any less favourable treatment accorded to the investment without any specification of the universe of activities in which the investment might engage. Paragraph 2, in contrast, does not purport to capture any less favourable treatment accorded to the investor, but rather less favourable treatment “as regards their activity in connection with investments in [the State’s] territory.” It is necessary to refer to the Protocol to gain further insight into the meaning of the word “activity” as used in Article 3(2). I will revert to this below.

What Article 3(2) does not contain

49. It is useful at this point to consider what Article 3(2) does not contain. Three points come to mind.
50. First, Article 3(2) does not refer to Article 10, nor does it expressly include dispute settlement activities within its scope. (This stands in contrast to the United Kingdom’s Model BIT which confirms that its MFN clause does apply to dispute settlement.)
51. It is equally true that dispute settlement under the Treaty has not been expressly “carved out” of Article 3(2)’s coverage. The majority (in line with some other tribunals) has noted this.³¹ It is used to support the inference that dispute settlement is therefore covered (on the basis that the drafters knew how to exclude something from the Article’s coverage and therefore anything not excluded must have been intended to be included).
52. This does not necessarily follow. In addition to examining Article 3 and other articles of the Treaty, I examine the Treaty’s structure and the grouping of provisions within it because this can provide interpretative clues as to the meaning of particular provisions. If, as I conclude, the Contracting Parties conceived of Articles 8-12 as institutional provisions relating to the Treaty’s application generally, there would have been no need to expressly list any of the matters addressed in those articles as matters to be carved out from Article 3’s coverage. The Decision correctly observes at paragraph 77 that it is well understood that MFN clauses are subject to implicit limitations.
53. Moreover, it is entirely plausible that the Contracting Parties did not specifically exclude the conditions for gaining access to dispute settlement under Article 10 from Article 3’s application because it did not occur to them that the MFN clause could be used to modify Article 10’s stipulations.³² Prior to *Maffezini*, that was not only a reasonable and legitimate view, it was the

³¹ Decision on Jurisdiction, paragraph 74.

³² Zachary Douglas observes that “across hundreds of years of activity of international courts and tribunals” until *Maffezini* there “has only been judicial pronouncements against such a device...” (i.e., using the MFN clause to override the State’s conditions of consent). He notes further that prior to *Maffezini*, “there does not appear to be any support in the writings of publicists for the extension of the MFN clause to jurisdictional matters.” Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, *Journal of International Dispute Settlement*, Vol. 2, No. 1 (2011), pp. 97-113, at 101. If this was the case, the drafters would see no need to

orthodox view³³ (buttressed in the ICSID context by the commonly held view as expressed by Professor Schreuer that the consents of the two disputing parties under a treaty must coincide).³⁴

54. Drafters need not exclude matters addressed in another article of a treaty from the MFN obligation if they do not think that there is a relationship between the two articles. To revert to the words of *Amco Asia* quoted earlier, we are to take into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.
55. Second, it warrants noting that when Article 3(2) is compared to the other substantive obligations of treatment there is nothing in its formulation that suggests that it is any different from any of the other obligations in terms of its application. That is, Article 3 is like every other provision, to be applied by a tribunal, but only once it is properly seised with jurisdiction.
56. Third, this Treaty does not contain the “all matters” language that some tribunals have found to be highly relevant to their decision that the relevant MFN clause applies to access to international jurisdiction.³⁵
57. I readily acknowledge the majority’s point that if one focuses on the word “activity,” one can say that an investor’s commencing a lawsuit or an arbitration in relation to its investment is an activity.³⁶ I also accept that the word “treatment” in and of itself is capable of a broad meaning. But the interpretative exercise does not end with a consideration of the words “activity” and “treatment” in isolation of the rest of the Treaty and of general international law. Plainly, as the majority observes at paragraphs 61-70, an investor might engage in the activity of bringing a lawsuit in relation to its investment, but it does not necessarily follow that an international claim regulated by the terms of Article 10 is also an “activity” within the meaning of Article 3, as further interpreted by *Ad Article 3* and when considered in light of the overall context of the Treaty and general international law.

exclude something from the MFN clause’s reach because they would not consider it to be related to MFN in the first place. The clause would not be operating in regard to the subject-matter of Article 10.

³³ An indication of the surprise with which *Maffezini* was received in many quarters is reflected by a distinguished tribunal’s comment in *Salini v. Jordan* where, after reviewing *Maffezini*’s analysis, the tribunal commented that: “The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case.” *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of November 29, 2004, paragraph 115.

³⁴ See paragraph 20 *supra*.

³⁵ In *Impregilo*, the majority observed at paragraph 104 of the Award that: “The Arbitral Tribunal further notes that there is a massive volume of case-law which indicates that, at least when there is an MFN clause applying to “all matters” regulated in the BIT, more favorable dispute settlement clauses in other BITs will be incorporated. Relevant cases are *Maffezini*, *Gas Natural*, *Suez*, *Suez* and *Camuzzi*.” [Footnotes omitted.] The dissenting arbitrator, Prof. Brigitte Stern, rejected the view that the “all matters” formulation reaches dispute settlement.

³⁶ Decision on Jurisdiction, paragraphs 66-72.

Ad Article 3

58. Article 3 is supplemented by *Ad Article 3* in the Protocol which forms an integral part of the Treaty. I believe that the Protocol's interpretation of Article 3(2) lends support to my analysis.
59. The Protocol clarifies the meaning of the word "activity" as used in Article 3(2). It defines "activity" (labelled as "activities" in the plural) through a non-exhaustive, but illustrative, list.³⁷
60. The use of the phrasing "in particular but not exclusively" creates a focus in identifying what is covered by "activities." The phrase "[i]t will be considered in particular but not exclusively..." signals to the interpreter that the drafters were concerned with some *genus* of activities as opposed to activities writ large. Otherwise, why include the "will be considered in particular" phrase in *Ad Article 3* at all?³⁸ If the meaning of "activities" was intended to capture all possible activities of the investor in relation to its investment, there would have been no reason to employ this phrasing. There must be a relationship between the particular types of activities expressly listed and those not expressly listed.
61. It also warrants noting that while Article 3 simply used the general word "activity", the range of activities specified by the Protocol is narrower than that used in many other treaties. The Protocol does not, as many investment treaties do, apply the MFN obligation to the full range of an investor's activities from pre-establishment to the disposition of an investment. Rather, it focuses more on the day-to-day management and operation of the investment (its "management, the exploitation, the use and the enjoyment...").
62. Having regard to Article 3(2)'s scope, therefore, the Protocol's drafting technique tends to narrow the range of an investor's activities related to its investment. But this too does not dispose of the interpretative issue.
63. The most important clue lies in the next part of the Protocol: Article 3's purpose is to protect investors or their investments, as the case may be, from less favourable treatment than that accorded to investors or investments of third States.³⁹ It is of seminal importance that when taking the opportunity to give interpretative guidance as to what actually constitutes "less favourable treatment" within the meaning of Article 3(2), the examples used by the States Parties were far removed from the conditions of access to international jurisdiction stipulated in Article 10 of the Treaty.

³⁷ There seems to be a slight drafting error here since Article 3 uses the phrasing "their activity" in the singular while *Ad Article 3* uses "activities" in the plural. Nothing appears to turn on this.

³⁸ The majority and I differ on this point. Decision on Jurisdiction, paragraphs 65-66.

³⁹ It warrants noting parenthetically that in the last sentence of *Ad Article 3* the Parties introduced an entirely new *genus* of measures that were not to be considered "treatment less favourable" within the meaning of Article 3. These sorts of measures (adopted for reasons of internal or external security or public order, public health or morality") were not even mentioned in Article 3 itself.

64. Once again, the Protocol's drafters used the "in particular but not exclusively" drafting technique. The "in particular" examples of less favourable treatment given by the Parties ("measures affecting the acquisition of raw materials and further supplies, energy and fuels as well as means of production and of exploitation of any kind or the sale of products inside the country or abroad") all fall within a *genus* of less favourable treatments that are directly related to the management, the exploitation, the use and enjoyment of the investment in the host State's territory.
65. It warrants emphasizing that *all* of the listed types of measures are concerned with access to materials, the production and sales processes, and measures of governments that can adversely affect the competitiveness of investments, e.g. access to inputs within the host State as well as access to the internal and export markets. They are closely related types of less favourable treatment and they must provide a sense of what sort of "activities" the Contracting Parties had in mind, since logically there must be a connection between the investor's activities and the types of treatment that the Contracting Parties agreed would put it at a disadvantage *vis-à-vis* investors of the host State and investors of third States.
66. To be sure, the list is not exhaustive, but even considering the penumbra of less favourable treatments that are not specified "in particular", the Treaty's stipulation of the conditions for gaining access to international arbitral jurisdiction seems to me to be distant from the listed types of less favourable treatments.⁴⁰
67. Since the Protocol's drafters were seeking to give the interpreter a better sense of the Parties' shared intent in respect of the kind of less favourable treatment covered by Article 3(2), Article 3, as clarified and elaborated by the Protocol (which forms an integral part of the Treaty), does not reach the Treaty's conditions applicable to an investor seeking access to international jurisdiction.

Article 4

68. I will refer to Article 4 only in passing. It is not insignificant in my view that when it comes to "full legal protection and security", protection against expropriation, compensation for losses due to war or other armed conflict, etc. the drafters inserted an article-specific MFN clause. This too

⁴⁰ I leave aside the question of whether a respondent's seeking to have the claimant comply with the Treaty's conditions for initiating arbitration thereunder even constitutes a "measure" that could give rise to less favourable treatment in the first place. See *Pope & Talbot Inc. and Government of Canada*, UNCITRAL, Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Dismiss Claim Because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven "measure relating to investment" Motion, 26 January 2000, paragraphs 36-37, for a NAFTA tribunal's differentiation between an international agreement between Canada and the United States, which did not constitute a "measure" within the tribunal's jurisdiction and the Canada's measures implementing that agreement that were being challenged in that case, which were held to be measures capable of falling within NAFTA Chapter Eleven.

is not dispositive of the overall interpretative result, but the Parties' insertion of such an MFN clause for three types of State action lends weight to the idea that the MFN clause in Article 3 is concerned only with a specific *genus* of less favourable treatments and in relation to a specific *genus* of investor activities.⁴¹

69. I now turn to consider the broader context of the Treaty.

The general structure of the Treaty

70. The foregoing interpretation of Articles 3, 4, 9 and 10 should be grounded not only having regard to the ordinary meaning of a word or words, but to the words in their context which, under Article 31(2) of the Vienna Convention on the Law of Treaties, includes the entire text of the Treaty. This leads me to consider the Treaty's general structure.

71. Like many BITs, the Argentina-Germany Treaty is short, comprising a preamble, followed by twelve articles and a protocol. It does not employ article titles, nor is it divided into sections. However, a structure can be discerned from reviewing the Treaty as a whole.⁴²

Preamble

Article 1 [Definitions]

Article 2 [Encouragement and admission of investments in the territories of the Contracting Parties]

Article 3 [National treatment and MFN treatment]

Article 4 [Full legal protection, prohibition against uncompensated expropriation, and disciplines for losses suffered through armed conflict, revolution, *etc.*]

Article 5 [Transfers]

Article 6 [Subrogation]

Article 7 [Extension of more favourable treatment under domestic law or from obligations under international law not included in the Treaty and fulfillment of commitments made]

⁴¹ Given the inclusion of two MFN clauses in Articles 3 and 4, one can ask why the drafters did not include an MFN clause in Article 10 itself if they intended to permit the terms of access in other treaties to flow through to claimants under this Treaty. Given the drafting technique used in this Treaty, that would be the logical place to put it.

⁴² For purposes of illustrating its structure given the absence of article titles, I have inserted a description of each provision.

Article 8 [Application of the Treaty to matters arising under it but relating to pre-existing investments by nationals or companies of the other Contracting Party]

Article 9 [Disputes between the Contracting Parties]

Article 10 [Disputes between an investor of one Contracting Party and the other Contracting Party]

Article 11 [Application of the Treaty in cases provided by Article 63 of the Vienna Convention on the Law of Treaties]

Article 12 [Ratification, entry into force, and survival of Articles 1-11 for fifteen years after termination]

72. A perusal of the Treaty suggests three subject-matter groupings: (i) Article 1, definitions; (ii) Articles 2-7, substantive obligations undertaken by the Contracting Parties and enjoyed by Argentinean and German investors, as the case may be, in the territories of the relevant Party; and (iii) Articles 8-12, institutional features of the Treaty (i.e., provisions addressing the Treaty's application to pre-existing investments, the creation of two dispute settlement mechanisms, the impact of the severing of diplomatic or consular relations on the Treaty, its entry into force and the basis for its termination together with the survival of rights for a certain time).
73. In my opinion, Article 10, when viewed in the context of the Treaty as a whole, is not *ejusdem generis* to the Treaty's substantive obligations of treatment of investors and/or their investments, including Article 3.

Summary

74. In sum:
- Article 10 sets out a staged dispute settlement regime. Compliance with Article 10(3)(a) is as other tribunals have recognized mandatory and is a matter going to the Tribunal's jurisdiction.
 - Article 10 does not contain an MFN clause stating that more favourable treatment accorded by either Contracting Party to investors of a third State will flow through and apply to disputes brought under that article.
 - Article 3 does not expressly refer to Article 10, nor does it expressly include the subject matter of dispute settlement under the Treaty within its scope. Nothing in Article 3 explicitly states that the Contracting Parties intended it to apply to the procedures for the submission of disputes prescribed by Article 10.
 - Article 3(2) does not even specify that the MFN obligations apply to "all matters subject to this Agreement" as was the case in the treaty considered by, for example, the *Maffezini*

and *Impregilo* tribunals. It uses the bare words “activity” in relation to the investor and “treatment” in relation to the measures of the State.

- Of seminal importance, the Protocol’s elaboration of what sorts of treatment considered by the Contracting Parties to be “less favourable” addresses State conduct that is entirely different in nature from the conditions governing access to international jurisdiction prescribed in the Treaty. While the less favourable measures are not listed exhaustively, those not covered under the “particularly but not exclusively” phrasing must logically be related to those which are expressly listed. Access to international jurisdiction regulated under Article 10 is simply not *ejusdem generis* to restrictions on availability of natural resources, the sale of products inside the country or abroad, etc.
- The fact that Article 3 is silent in terms of whether it applies to dispute settlement, yet its paragraphs 3 and 4 contain matters (benefits accruing from preferential trade agreements and double taxation treaties⁴³), which are explicitly carved out from being considered to be “treatment”, does not inexorably support the argument that dispute settlement must therefore fall within its terms because the Parties knew how to exclude such matters as from Article 3’s coverage. As noted, if one considers the orthodox view prior to *Maffezini* was that the MFN clause did not override the State’s conditions of consent, it seems difficult to conceive that dislodging Article 10(3)(a) was a consequence of Article 3 which the Contracting Parties may be considered as having reasonably and legitimately envisaged.
- Finally, nothing in Article 3 or in *Ad Article 3* confers any special temporal quality upon the MFN obligation; there is no indication that the MFN obligation, uniquely amongst the other standards of treatment contained in the Treaty, is to be given any kind of “pre agreement to arbitrate” status that would authorize a tribunal to use it to create an agreement to arbitrate.

International law’s distinction between substantive obligations and jurisdiction-conferring provisions

75. Under the general rule of interpretation set forth in Article 31 of the Vienna Convention, the interpreter is mandated to examine the treaty in light of various elements which are, to use the International Law Commission’s words, “thrown into the crucible” and from their interaction “would give the legally relevant interpretation.”⁴⁴ The text of the Treaty is to be considered not simply in its own terms, but also having regard to other elements.⁴⁵ Paragraph 3 of Article 31 adds that there should also be taken into account together with the context “any relevant rules of international law applicable in the relations between the parties.” As Sir Ian Sinclair noted in his

⁴³ As well as the exclusions from “less favourable treatment” set out in *Ad Article 3(b)* and (c).

⁴⁴ A/CONF.39/11/Add.2, 39, paragraph 8.

⁴⁵ *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, ICJ Reports 1991, 53.

commentary on the Vienna Convention, “Every treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary.”⁴⁶ The Vienna Convention’s preamble itself specifies that: “disputes concerning treaties, like other international disputes, should be settled ... in conformity with the principles of justice and international law.”

76. At paragraphs 35-37, I expressed agreement with the prior tribunals that have characterized the “prior recourse” provision as being jurisdictional in nature. This leads me to consider the Treaty in light of the distinction between substantive obligations and jurisdictional provisions of treaties. In a number of cases where an objection has been taken against its jurisdiction to hear claims of alleged breach of treaties, the ICJ has considered that there is a clear distinction between a treaty’s substantive obligations and its conferral of adjudicative jurisdiction.⁴⁷
77. This has been reaffirmed as recently as April of 2011, when the ICJ found that the preconditions established in Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination “establish preconditions before the seisin of the Court.”⁴⁸
78. Professor Campbell McLachlan QC, among others, has adverted to this general distinction in his treatise co-authored by Shore and Weiniger:

... As the ICJ pointed out in *East Timor (Portugal) v. Australia*, the scope of application of a substantive obligation is an entirely separate question to

⁴⁶ Ian Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester University Press) (2nd ed.) p. 139.

⁴⁷ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Jurisdiction and Admissibility*, Judgment of February 3, 2006, ICJ Reports 2006, 6, paras. 64-65, where the Court noted that it had previously emphasized that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. See also the *Case Concerning East Timor (Portugal v. Australia)*, Judgment of June 30, 1995, ICJ Reports 1995, p. 90, where the Court stated:

“26. The Court recalls in this respect that one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction. This principle was reaffirmed in the Judgment given by the Court in the case concerning *Monetary Gold Removed from Rome in 1943* and confirmed in several of its subsequent decisions (see *Continental Shelf (Libyan Arab Jarnahiryu/Malta)*, *Application for Permission to Intervene, Judgment*, I. C. J. Reports 1984, p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, I. C. J. Reports 1984, p. 431, para. 88 ; *Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment*, I. C. J. Reports 1986, p. 579, para. 49; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, *Application to Intervene, Judgment*, I. C. J. Reports 1990, pp. 114-1 16, paras. 54-56, and p. 112, para. 73; and *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I. C. J. Reports 1992, pp. 259-262, paras. 50-55).”

⁴⁸ Article 22 of the Convention states: “Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.” Case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment of 1 April 2011. The Court makes the point about seisin at paragraph 141.

the conferral of jurisdiction upon an international tribunal, Jurisdiction in international law depends solely upon consent.⁴⁹

79. Thus, to treat the Treaty's dispute settlement provisions as being the same as the substantive obligations that precede it seems to be at variance with how general international law and practice has distinguished between the two.

The sequential issue

80. I have already alluded to my concern about the majority's application of the MFN clause in its interpretation of the Treaty pursuant to the *Kompetenz-Kompetenz* power. It seems to me that consistent with the approach articulated by the ICJ, just noted, there is a sequential issue in the establishment of a tribunal's jurisdiction under an investment treaty. During the hearing I asked both parties to comment on this issue because it seems to me to be bound up in the analysis of how the specific MFN clause at issue in this case can relate to the investor-State arbitration mechanism.⁵⁰
81. The sequential element comes into play as follows: to avoid Article 10's effects, the Claimant invokes an obligation contained in the Treaty to "displace" the Treaty's requirements for initiating an international claim.⁵¹ Seeking the application of a particular rule of treatment in the Treaty in order to create jurisdiction seems to me to be putting the cart before the horse.⁵²

⁴⁹ McLachlan, Shore and Weiniger, *supra* note 6, p. 257. See also Douglas, *supra* note 32, at p. 103.

⁵⁰ Transcript, Day 2, pp. 24-31, pp. 91-94.

⁵¹ Hochtief's Rejoinder on Objections to Jurisdiction, paragraph 68.

⁵² Rather than using the "substantive/jurisdictional" or "substantive/procedural" distinctions found in the literature, in her recent dissenting and concurring opinion in *Impregilo*, Professor Brigitte Stern distinguishes between "rights and ... fundamental conditions for access to the rights". This accords with my understanding of the distinction between a treaty's protections and the means for enforcing such protections but I have used the term "substantive" to refer to obligations of treatment such as the duty not to expropriate except in accordance with the treaty's terms, the fair and equitable treatment standard, etc.

82. If one were to consider any other substantive provision of an investment treaty, such as the protection against an uncompensated expropriation, were a claimant to file a claim asserting that an expropriation had been effected in breach of a treaty without the claimant's having first consented to the arbitration in the manner specified by the treaty, the tribunal's response would be that absent an agreement to arbitrate it was without jurisdiction to entertain the claim. A tribunal cannot adjudicate someone's rights if they have not met the threshold jurisdictional requirements to be able to claim such rights. Yet the Decision on Jurisdiction is plainly applying this treatment clause in order to dis-apply the 18 month litigation period in Article 10(3)(a).⁵³

83. For the foregoing reasons I cannot fully subscribe to the Decision. That said, I accept my colleagues' decision and agree that the objection has illustrated the difficulty of the question. As noted in paragraph 1, I do subscribe to the balance of the Tribunal's disposition of Argentina's objections.

[signed]

J. Christopher Thomas, Q.C.

Date: 7/10/2011

⁵³ Decision on Jurisdiction, paragraph 82. The Treaty between Argentina and Germany has not been amended by the treaty between Argentina and Chile. Douglas makes the point in similar terms: "The claimant must assert a right to more favourable treatment by claiming through the MFN clause in the basic treaty. It can only do so by instituting arbitration proceedings and thus by accepting the terms of the standing offer of arbitration in the basic treaty. At that point an arbitration agreement between the claimant and the host state comes into existence. And the existence of that arbitration agreement is critical to the viability of the arbitration regime envisaged by the investment treaty..." *supra*, note 32, pp. 106-107. Correctly, in my view, Douglas argues that MFN clause does not automatically incorporate the terms of a third treaty into the basic treaty and for this reason HOCHTIEF's submission that the Argentina-Chile Treaty "displaces" Article 10 of the Argentina-Germany Treaty is misplaced.