

**Ambiente Ufficio S.P.A. and Others**  
(Case formerly known as **Giordano Alpi and Others**)  
(**Claimants**)

**and**

**The Argentine Republic**  
(**Respondent**)

(**ICSID Case No. ARB/08/9**)

**Decision on Jurisdiction and Admissibility**

**Dissenting Opinion of Santiago Torres Bernárdez**

## TABLE OF CONTENTS

INTRODUCTION .....	1
1. The overall scope of my dissent .....	1
2. The relief sought by the Claimants and the basis of jurisdiction invoked .....	7
3. The preliminary objections submitted by the Respondent .....	11
4. The general economy of the present Opinion.....	13
Chapter I – A preliminary issue raised by the Majority Decision: the so-called “special relationship” of the present case with the <i>Abaclat</i> case .....	15
1. Reaffirmation of the autonomy of the present case as a main case.....	15
2. The appeal of <i>Abaclat</i> majority decision for the present Majority Decision .....	16
3. The fallacy of the “continuity argument” underlying the present Majority Decision’s position .....	17
4. The attitude of the present Majority Decision towards Professor Abi-Saab’s dissenting opinion in <i>Abaclat</i> .....	19
5. Selective referral by the present Majority Decision to the summary factual background of the <i>Abaclat</i> majority decision.....	22
Chapter II – Comments on some hinged conclusions and omissions of the Majority Decision .....	25
1. The distinction between “mass claims”, “class action” and “representative proceeding” and “collective claims”, “multi-party action” and “aggregate proceeding”: a distinction without a difference for the Majority Decision which ignores the rule of consent to arbitration of general international law and the general rule of interpretation of treaties codified by the VCLT .....	25
2. The agreement to arbitrate between the parties to the dispute under the BIT system: the disregard by the Majority Decision of paramount aspects of the formation of that agreement and its execution .....	38
3. The definition of the “protected investors” (jurisdiction <i>ratione personae</i> ): the prejudging and errors of the Majority Decision in the interpretation and application of the relevant provisions of the ICSID Convention and the Argentina-Italy BIT .....	41
Chapter III - The “investment” requirement of Article 25(1) of the 1965 ICSID Convention and the definition of “investment” of Article 1(1) of the 1990 Argentina-Italy BIT: an analysis of the “protected investments” (jurisdiction <i>ratione materiae</i> ) .....	50
1. The alleged general economic unity of the transactions concerned.....	51
2. The characterization of the affirmed general economic unity of the transactions concerned as an “investment operation” .....	56

3. The concept of “investment” in Article 25(1) of the 1965 ICSID Convention and its relevancy for establishing the competence of ICSID arbitral tribunals (the “double-barrelled” test) .....	62
4. The determination of the ordinary meaning of the term “investment” in Article 25(1) of the ICSID Convention by application of the rules of international law on interpretation of treaties codified by the VCLT .....	68
(a) The recourse by the Majority Decision to the supplementary means of interpretation of treaties of Article 32 of the VCLT.....	68
(b) The ordinary meaning of the term “investment” in Article 25(1) of the ICSID Convention ascertained by the application of the general rule of interpretation of treaties of Article 31 of the VCLT and the so-called “ <i>Salini</i> ” test .....	73
5. The definition of “investment” of Article 1(1) of the 1990 Argentina-Italy BIT ....	89
(a) Authentic texts and general economy of the definition .....	89
(b) The text of the definition of “investment” in the <i>chapeau</i> of Article 1(1) of the BIT and its interpretation.....	90
(c) Requirements qualifying the expression “contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party” of the <i>chapeau</i> of Article 1(1) of the BIT .....	93
(i) General considerations.....	93
(ii) The investment shall be made “in the territory” of the other Contracting Party .....	95
(iii) The investment shall be made “in accordance with the laws and regulations” of the other Contracting Party .....	102
6. Conclusion .....	104
Chapter IV- The consent to arbitration of the Parties to the dispute.....	106
1. The consent of the Respondent State.....	106
(a) Some questions of public international law .....	106
(i) The international law rule of State’s consent to jurisdiction .....	106
(ii) State’s consent to jurisdiction must be voluntary, certain and unequivocal whatever the form of its manifestation or the title or basis of jurisdiction invoked.....	110
(iii) The distinction between substantive or material provisions, dispute-resolution provisions and final clauses in treaties .....	112
(iv) The scope of application of generally drafted MFN clauses and the <i>ejusdem generis</i> principle.....	116

(v) As secondary right holders, foreign private investors have access to international arbitration only by accepting the “standing arbitration offer” in the terms and with the general preconditions and prior requirements formulated by the Contracting States in the BIT.....	120
(vi) Non-applicability of the customary international law rules on prior exhaustion of local remedies and diplomatic protection to the present case....	122
(b) The extent of the Respondent’s consent to international arbitration manifested in the “standing arbitration offer” of Article 8 of the 1990 Argentina-Italy BIT..	123
(i) The Respondent’s consent to international arbitration as confined within the dispute-resolution system of the BIT.....	123
(ii) General preconditions .....	124
(iii) The prior requirement of “amicable consultations” .....	125
(iv) The prior requirement of “18 month litigation in local courts” .....	130
(v) The jurisdictional nature of the obligations enshrined in Article 8(1)-(3) of the Argentina-Italy BIT. ....	133
2. Consent of the Claimants.....	138
(a) The international arbitration consented by Claimants in their Request for Arbitration.....	138
(b) The invocation of the MFN clause in Article 3(1) of the Argentina-Italy BIT as an alternative base of jurisdiction .....	145
(c) The inadmissibility of the Request for Arbitration: untimely filing and internal incongruity .....	151
(i) The question of the existence of a dispute between the Parties prior to the date of filing of the Request.....	151
(ii) The internal incongruity of the Request .....	153
V. CONCLUDING FINDINGS .....	157

## INTRODUCTION

### 1. The overall scope of my dissent

1. I regret to dissent from the majority's decision entirely, the reason being that I uphold most of the preliminary objections submitted by the Respondent in the present case, except the second part of objection (b) because it has not been proved to my satisfaction that Claimants consciously committed a bad faith abuse of right by instituting the present proceeding through the filing with ICSID of the Request for Arbitration of 23 June 2008. Moreover, the relationship between NASAM and Claimants in the present case is not as stringent as the relationship between TFA and Claimants in the *Abaclat and others v. Argentine Republic* case.

2. I part ways therefore with my co-arbitrators for a series of outstanding reasons which, in my opinion, prevent the present Tribunal - an ICSID international tribunal - from taking jurisdiction in the case. These reasons, grounded on public international law considerations and the submitted argument and evidence, may be summarized as follows:

(1) The Argentine sovereign debt instruments at the basis of the Claimants' claims ("security entitlements" in Argentine sovereign bonds) do not constitute a "protected investment" under the ICSID Convention because the alleged "investments" were made without any intent to perform any economic activity in the host country or in connection with any particular project related to an activity of that kind in that country, as confirmed by the fact that none of the alleged "investments" were done "in the territory of the Argentine Republic" in the sense of Article 1(1) and (4) of the 1990 Argentina-Italy BIT;

(2) Consequently, the Italian holders of the said "security entitlements" as defined in Article 1(2), of the Argentina-Italy BIT are not *prima facie* "protected investors" either because they are not physical or juridical persons of a Contracting Party who have made, are making or have assumed an obligation to make investments in the territory of the other Contracting Party, but in the circumstances of the case the objection does not possess an exclusively preliminary character.

(3) The ICSID Convention and Arbitral Rules, as well the Argentina-Italy BIT, are silent about all kinds of collective proceedings (including "multi-party arbitrations") and, therefore, the Respondent cannot be deemed to have submitted itself to multi-party arbitration treatment unless it gave an *additional consent* to that particular type of procedure, consent which is missing in the present case;

(4) In the light of the above conclusions - as well as the fact that under general international law the restructuring of its sovereign debt by a State (or the devaluation of its national currency) in situations of national emergency are not *prima facie* an internationally wrongful act - it is difficult to visualize how the Respondent might have committed a *prima facie* breach of the material provisions of the Argentina-Italy BIT;

(5) As holders of the above “security entitlements” the Claimants have however contractual rights for the protection of which they are not without legal remedies to recover from the alleged wrongs because the entitlements in question relate to Argentine sovereign bonds which are held in Italy by the Italian Banks which sold the said entitlements to the Claimants and the bonds issued by Argentina: (i) advise purchasers of the risks involved in the acquisition of that financial product and (ii) provide that bonds are governed by a foreign law and submitted to the jurisdiction of foreign courts. It must also be added that the Claimants purchased their “security entitlements” from the Italian Banks in the retail market in Italy, not in Argentina, and that the question of the validity of the corresponding transactions are subject to the Italian law;

(6) By not complying with the pre-arbitral requirements of Article 8 of the Argentina-Italy BIT (amicable consultations followed by prior submission to Argentina courts for a period of 18 months), Claimants disavow the jurisdictional agreement reached between Argentina and Italy in the BIT which on no account provides for direct access to international arbitration of foreign private investors nationals of the other Contracting Party and, consequently, ignore the scope of the Respondent’s consent to arbitration defined by the arbitration offer set forth in the BIT. Claimants admit their non-compliance with those mandatory and sequential preconditions of the BIT alleging mainly “futility”, as well as the MFN clause in Article 3 of the BIT. As explained below in this Opinion, I find these two justifications for non-compliance alleged by the Claimants without merit in the light of the applicable international law, the circumstances of the present case and argument and evidence submitted by the Parties;

(7) Claimants chose, as admitted by the practice, to manifest their consents to ICSID arbitration through the filing with ICSID a Request for Arbitration on 23 June 2008, but the reality of the said consents has not being established because: (i) the filing of the Request was in point of time premature; (ii) the scope of the consent as expressed in the Request went beyond the Respondent’s consent manifested in the “arbitration offer” contained in the Argentina-Italy BIT; and (iii) the Request is vitiated by incongruity and authenticity defaults which cannot but have also a negative bearing in the determination of validity, formal and essential, of Claimants’ consent as manifested in the said Request for Arbitration.

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3. With respect for my co-arbitrators, I regret to say that I cannot concur in the Majority Decision and enter this Dissenting Opinion. The Decision of the majority taking as a whole does not live up to the above listed items of mine because of an excessive zeal in the protection of the interests of alleged foreign investors (noticeable also in several other investor-host State arbitral decisions). This policy approach does not fit well into the realities of international public law system and disregards the rules governing the interpretation of treaties that, curiously enough, are at the same time affirmed as the rules which should be applied by investor-host State arbitral tribunals to decide jurisdictional issues under the BIT system.

4. The following passage of the recent Award in *Daimler Financial Services v. Argentine Republic* of 22 August 2012 describes quite accurately my position on the point above:

“The general purpose of BITs is of course to protect and promote foreign investments; *but it is to do so within the framework acceptable to both of the State parties*. These two aspects must always be held in tension. They are the *yin and yang* of bilateral investment treaties and cannot be separated without doing violence to the will of the states that conclude such treaties. It is in this context that the exact wording of dispute resolution clauses plays a key role, as such clauses are one of the privileged places where the imbalances between the interests of both parties are often precisely defined as a result of the treaty’s negotiation process” (*italics in first and second lines supplied*).<sup>1</sup>

5. BITs are not ordinary contracts but reciprocal bilateral treaties governed by public international law and negotiated between two sovereign States, the very essence of which “is precisely to protect the respective sovereign policy decisions of the States parties by means of the formality inherent in the legal nature of such instruments”.<sup>2</sup> It should not be forgotten either that when an investor makes a treaty claim pursuant to a given BIT, the arbitral tribunal concerned is called “to adjudicate whether a sovereign state has actually respect or violate the international obligations it accepted with regard to the investments made by nationals of the other sovereign state party to the same treaty”.<sup>3</sup>

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6. The wording of the BITs reflects the “balance of interests” achieved through negotiations by both sovereign States Parties thereto. This should be born in mind by the interpreters of BITs when interpreting its provisions, including in particular its dispute resolution clauses. It is indeed by interpreting those clauses that the interpreter is supposed to ascertain the existence and intended scope of the consent of the States Parties to the BIT to submit investment disputes with investor nationals of the other Contracting Party to a given form or forms of international arbitration.

7. It follows that when interpreting BIT-based dispute resolution provisions the only “balance of interests” which counts is the one achieved by the two Contracting Parties in the text of these provisions or necessarily implied thereby. It would not make sense to disregard that “balance of interest” and invoke in its place a “balance of interest” between the parties to dispute because one of the latter parties, namely the private foreign investor, is a third vis-à-vis the BIT. For a different conclusion which I do not share, see the *Abaclat* majority decision of 4 August 2011.<sup>4</sup>

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8. I agree indeed with the statements in the *Telenor Mobile Telecommunications v. Hungary* Award of 13 September 2006 that reject other tribunals’ reliance on abstract policy considerations in favour of greater investor protection, or on the importance of international

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<sup>1</sup> *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award of 22 August 2012 (“*Daimler*” or “*Daimler v. Argentina*”), para. 161.

<sup>2</sup> *Ibid*, para. 162.

<sup>3</sup> *Ibid*, para. 163.

<sup>4</sup> *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility of 4 August 2011 (“*Abaclat*” or “*Abaclat* majority decision”), paras. 579-91.

arbitration to investor protection, because what has to be ascertained is the intention of the Contracting Parties such as recorded in the wording of the BIT at issue:

“The importance to investors of independent international arbitration cannot be denied, but in view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties”.<sup>5</sup>

9. Practice shows the risks of ignoring the limits within which host States’ consent to the sequence and peaceful settlement means given in the BIT-based dispute resolution provisions. Such ignorance may become indeed a cause for instituting annulment procedures before an *ad hoc* ICSID Committee or competent domestic courts of a given State.<sup>6</sup> In any case, the interpretation of the BIT is not in public international law a legal operation allowing interpreters to inject therein elements alien either to the BIT object of the interpretation (or to international law rules governing treaty’s interpretation), while disregarding the plain text of the provisions of the BIT subject to the interpretation.

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10. It should also be noted that the question of non-compliance with the preconditions to international arbitration in a BIT-based dispute resolution provision sets up - in public international law - an issue concerning “jurisdiction”, not “admissibility”. The jurisprudence of the International Court of Justice (“ICJ”) and the generality of arbitral decisions and awards on investment disputes confirm that assertion. However, the recent *Abaclat* majority decision deals with such kind of claimants’ non-compliance as if they would constitute an eventual cause of “admissibility” of the claim.<sup>7</sup> This is however one of the few points in which the present Majority Decision departs from *Abaclat*; an unusual fact deserving to be noted in this Introduction.

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<sup>5</sup> *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award of 13 September 2006 (“*Telenor*”), para. 95.

<sup>6</sup> See, for example the recent judgments of (i) the US Court of Appeals for the District of Columbia Circuit in the proceedings to set aside the Final Award of 24 December 2007 in the *BG Group PLC v. Republic of Argentina* case (UNCITRAL Arbitration Rules), where the Court rejected the Tribunal’s decision to excuse the Claimant’s non-compliance with the 18- month litigation prerequisite on the basis that the requirement would “produce” “an absurd and unreasonable result” in the circumstances (*Republic of Argentina v. BG Group PLC*, No. 11-7021 (U.S. App. D.C. January 17, 2012); and (ii) the Stockholm District Court’s Default Judgment, declaring with respect to the 2007 decision of the arbitral tribunal in the *RosInvestCo UK Ltd. v. The Russian Federation* case (“*RosInvestCo*”), that the arbitrators did not have competence to determine whether the measures adopted by the Russian Federation concerning *RosInvestCo* were expropriation measures and directing *RosInvestCo* to reimburse to the Russian Federation the arbitration costs with interests (Default Judgment of 9 November 2011, Case No. T24891-07). Thus, the finding of the *RosInvestCo* arbitral tribunal to the effect that under Article 3(2) of the UK-Soviet BIT (the MFN clause) the investor’s “protection” included the submission to arbitration in case of interference by the host State with his “use” and “enjoyment” of the investment was therefore voided by the Stockholm District Court.

<sup>7</sup> For example, in connection with the non-compliance by the claimants with the pre-condition to international arbitration of Article 8(2) of the Argentina-Italy BIT (*Abaclat* majority decision, *supra* note 4, para. 496).



11. The distinction does not operate at the international law level as in domestic contexts as rightly and clearly explained in the following passages the *Daimler Award*:

“[...] admissibility analyses patterned on domestic court practices have no relevance for BIT-based jurisdictional decisions in the context of investor-State disputes. In domestic context, admissibility requirements are judicially constructed rules designed to preserve the efficiency and integrity of court proceedings. They do not expand the jurisdiction of domestic courts. Rather, they serve to streamline courts dockets by striking out matters which, *though within the jurisdiction of the courts*, are for one reason or another not appropriate for adjudication at the particular time on in the particular manner in question”<sup>8</sup> (*emphasis added*).

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12. The tasks of the interpreters of BITs is certainly not to render symmetric what, under the BIT system, is by definition asymmetric, namely the formation of the contractual relationship established between the private foreign investor and the host State when the former accepts the “arbitration offer” made in the BIT by the latter. The private foreign investor has indeed the right by virtue of the BIT to accept or reject that offer *but not the right to alter or modified the terms of the offer which are and remain those defined in the BIT by the States Parties thereto*. In the words of the *Wintershall v. Argentine Republic Award* of 8 December 2008:

“That an investor could choose at will to omit the second step (the 18-month domestic court requirement) is simply not provided for nor even envisaged by the Argentina-German BIT - because (Argentina’s) the Host State’s ‘consent’ (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in the local courts.”<sup>9</sup>

13. What is at stake here is *pacta sunt servanda*, namely the rule from which flows directly the requirement of the interpretation in good faith set forth in Article 31 of the Vienna Convention on the Law of Treaties.<sup>10</sup> In a passage frequently quoted by other arbitral tribunals, the 2009 award in the case of *Quasar de Valores v. Russian Federation* observed in that respect that:

“To choose one of the contending policy theses as the reason to read a BIT in a particular way may be presumptuous. The stakes are high and the policy decisions appertain to the State-parties to the treaties. Speculations relied upon as the basis of purposive readings of a text run the risk of encroachment upon fundamental policy determinations. The same is true when ‘confirmation’ of a hypothetical intention is said to be found in considerations external to the text. The duty of the Tribunal is to discover and not to create meaning”<sup>11</sup> (*emphasis supplied*).

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<sup>8</sup> *Daimler*, *supra* note 1, para.192.

<sup>9</sup> *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award of 8 December 2008 (“*Wintershall*”), para. 160(2).

<sup>10</sup> International Law Commission (“ILC”) Commentary on Article 27 of the Draft Articles on the Law of Treaties, *Yearbook of the International Law Commission*, 1966, vol. II, p. 221.

<sup>11</sup> *Quasar de Valores SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009 (“*Quasar de Valores*”), para. 93.

14. Furthermore, to do otherwise would be self-defeating for the aim pursued by the private foreign investor because it would mean that, as happened in the present instance, the undertaking to arbitrate (*convención de arbitraje*) between the private foreign investor and the host State cannot be considered as having been executed.

15. The Award on jurisdiction of 10 February 2012 in *ICS Inspection and Control Services v. the Argentine Republic* explained that legal conclusion in the following crystal clear terms:

“At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, or else not agreement to arbitrate may be formed. As opposed to a dispute resolution provision in a concession contract between investor and the host State where subsequent events or circumstances arising may be taken into account to determine the effect to be given to earlier negotiated terms, the investment treaty presents a ‘take it or leave it’ situation at the time the dispute and the investor’s circumstances are already known. This point is equally poignant in the context of jurisdiction grounded on an MFN clause [...]”<sup>12</sup>

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16 Likewise, it is worthwhile to note that in the present case the cause of action invoked by the Claimants are alleged breaches by the Respondent of some obligations assumed by it by virtue of the Argentina-Italy BIT and by public international law as well. In this case, Claimants are not invoking wrongs concerning both “BIT and international law rights” and “contractual rights”, but only the former. It is therefore only with respect to the Claimants alleged “BIT and international law rights” that the jurisdiction and admissibility issues in the present phase of the case must be determined by the Tribunal.

17. Furthermore, the task of the Tribunal in the present phase is in fact circumscribed to the determination of jurisdiction and admissibility issues pursuant to the ICSID Convention and the Argentina-Italy BIT. Claimants did not plead jurisdiction and admissibility with respect to Respondent’s alleged violations of general international law. Moreover, the elements of fact invoked by them in the Request for Arbitration instituting the case— essentially the 2005 Exchange Public Offer (“EPO”) and the legislation which follows the Republic Argentina’s declaration of default of 24 December 2001 cannot be described as being *prima facie* constitutive of an international wrongful act, without prejudice that it might be so under the Argentina-Italy BIT, question to be decided at the merits phase of the present case. As has been stated by the *Saluka v. Czech Republic* Tribunal:

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<sup>12</sup> *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (PCA-UNCITRAL Arbitration Rules), Award on Jurisdiction of 10 February 2012 (“*ICS Inspection and Control Services*”), para. 272.

“It is now established in international law that states are not liable to pay compensation to a foreign investor when in the normal exercise of their regulatory powers they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare”.<sup>13</sup>

18. The further question of whether the facts invoked by the Claimants in the Request may constitute *prima facie* a violation of the Argentina-Italy BIT is, in my opinion, to be decided at the merits phase because the Respondent’s objection at the present phase that there is not *prima facie* such a violation does not possess, in the circumstances of the present case, an exclusively preliminary character. Matters being so, the right procedural solution is to join that objection to the merits as provided for in Rule 41(4) of the ICSID Arbitration Rules. It follows that I reject as unjustified and premature the conclusions on the matter contained in paragraphs 536-37 of the Majority Decision.

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19. Finally, it seems necessary to recall again that, as stated so many times at so many places, that the international arbitration procedures applicable to private foreign investors-host States disputes are not all-embracing compulsory procedures as may be found in domestic legal systems. The ICSID arbitral tribunals established, *as the present Tribunal*, to deal with a given investment dispute are international tribunals of *limited jurisdiction*, the latter being defined by international conventional instruments concluding between States as primary subjects of international law (the ICSID Convention and the corresponding BIT in the instant case).

20. It follows that it is quite contradictory to affirm, on one hand, that “questions of jurisdiction do not follow Article 42 but Article 25 of the ICSID Convention and are *exclusively* governed by international law”<sup>14</sup> (*emphasis supplied*) and, on the other hand, to commit an oversight, or to give a cursory consideration, in reasoning and conclusions to basic principles and rules of public international law, including some which are systemic in nature. This is basically the *raison d’être* of my dissent with the Majority Decision of the Tribunal in the present phase of the case.

## **2. The relief sought by the Claimants and the basis of jurisdiction invoked**

21. On the basis of the facts alleged in a Request for Arbitration dated 23 June 2008 and filed on that date with ICSID, the Claimants alleged to be individual and entities of Italian nationality and holders of debt instruments issued by the Argentine Republic (“security entitlements” in different series of Argentine sovereign bonds purchased to the Italian Banks in possession of the bonds). They were amongst the minority holders who refused a Public Offer of Exchange (“POE”) made

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<sup>13</sup> *Saluka Investments BV (The Netherlands) v. The Czech Republic*, (PCA-UNCITRAL Arbitration Rules), Partial Award of 17 March 2006, para. 254. The award of 26 July 2001 in the *Eudoro A. Olgún v. Republic of Paraguay* (ICSID Case No. ARB/98/5), mentioned by the Parties in the present proceedings, rejected a claim that loss of an investment arising from a bankruptcy involved conduct tantamount to an expropriation of the investment by the State because it would imply “a departure from the general principles of law and the rules of substantive law that define and regulate expropriation” (*see paras. 83-4*).

<sup>14</sup> Majority Decision, para. 132. As to the “exclusiveness” argument a frequently made assertion in doctrine and case law, it must be recalled that under Article 25(2) of the ICSID Convention the jurisdiction *ratione personae* of the private investors is defined by reference to the national law of their respective State.

in 2005 by the Argentine Government and did not tender then their entitlements in the bonds for exchanges with the new bonds.<sup>15</sup>

22. The Claimants affirm that the Respondent has violated its obligations under the Argentina-Italy BIT and under international law - in particular the duty to accord fair and equitable treatment and to refrain from expropriating their property and, through the MFN clause of the said BIT, the full protection and security treatment – by the measures adopted by the Legislative and Executive branches of Government of the Argentine Republic in the aftermath of the Argentine economic and financial crisis, leading to the declaration of the moratorium of foreign debt of 24 December 2001.<sup>16</sup> Thus, the object of the dispute relates to actions whereby the Argentine Republic would allegedly deprive the Claimants of “all their rights with respect to the bonds held by them.”<sup>17</sup>

23. Among those actions, the Request for Arbitration singled out: (i) the adoption of the Public Emergency and Foreign Exchange System Reform Law No. 25.561 (the “Emergency Law”) of 6 January 2002 which abrogated a previous 1991 Convertibility Law abolishing thereby the one-to-one peg of the Argentine peso to the US dollar; (ii) the enactment of the Presidential Decree No. 214 of 3 February 2002 providing for a currency conversion scheme under which all obligations payable in US dollars existing on the date of the enactment of the Emergency Law were converted into pesos at the fixed one-to-one exchange rate (the so-called “pesificacion”); (iii) the Public Offer of Exchange (the “POE”) of 14 January 2005 of the Argentine Government aiming at restructuring the foreign debt by the exchange of all outstanding public debt instruments, including the bonds, with new financial instruments which provide for a huge reduction of the net present value of the outstanding instruments,<sup>18</sup> offer stating to expire on 25 February 2005; and (iv) the adoption of the Law No. 26.017 of 9 February 2005 forbidding the Government from presenting any further offers with respect to the bonds not exchanged under the POE (Article 2) and laying down a prohibition to make judicial, extra judicial or private settlements with respect to those bonds (Article 3). The Request for Arbitration also alleged that by virtue of Article 6 of the Law No. 26.017: “Argentina effectively precluded the ‘non-complying’ bondholders from bringing any action before its domestic courts.”<sup>19</sup>

24. The Request for Arbitration provides a list of 119 initial Claimants who, as indicated in the Majority Decision, “were grouped in 68 segments [...], testifying to the fact that a number of individual Claimants are co-owners of the same entitlements”.<sup>20</sup> Subsequently, a number of the original Claimants accepted a new Exchange Offer made in 2010 by Argentina. Following the application of ICSID Arbitration Rule 44, the Tribunal took note that the proceedings were discontinued for 29 original Claimants. Given that fact, a quarter of the initial 119 Claimants have left the case, therefore leaving 90 Claimants in the case.<sup>21</sup>

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<sup>15</sup> Request for Arbitration, para. 31.

<sup>16</sup> *Ibid*, paras. 13-38.

<sup>17</sup> *Ibid*, para. 12.

<sup>18</sup> Estimated by Claimants at approximately 70-75% of that value (*Ibid*, para. 27).

<sup>19</sup> *Ibid*, para. 29.

<sup>20</sup> Majority Decision, para. 334.

<sup>21</sup> *Ibid*, paras. 336-47.

25. In the Request for Arbitration, the Claimants formulate the relief sought as follows:

“90. The Claimants seek an Arbitral Award:

- declaring that the Respondent has breached its international obligations under the BIT and international law by failing to ensure fair and equitable treatment and full protection and security to their investments and by expropriating such investments without prompt, adequate and immediate compensation;

- ordering the Respondent to refund to each Claimant the entire nominal value of the bonds held by it, plus accrued interest until maturity, plus compounded interest from the date of expiry to the date of the Request for Arbitration, plus all other damages that shall be demonstrated to be a direct consequence of the Respondent’s international law violations.

- ordering the Respondent to pay compounded interest on the total amount indicated above from the date of the present Request for Arbitration until the date of actual payment.

The exact amounts will be determined more precisely during the proceedings.

91. Finally, the Claimants request that the Respondent be ordered to reimburse them for all costs incurred and to be incurred by them in connection with the present arbitration, including legal fees, plus compounded interest at the normal commercial rate applicable from the payment of each bond until the date of effective reimbursement

92. The Claimants reserve the right to refine and expand the foregoing prayers for relief in the course of the proceedings.”

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26. Regarding jurisdiction of ICSID and the competence of this Arbitral Tribunal the Claimants’ Request for Arbitration begins stating that this is a Request made pursuant to (i) Article 36 of the Washington ICSID Convention of 18 March 1965 and (ii) Article 8, para. 5(a) of the Argentina-Italy BIT signed on 22 May 1990 and in force from 14 October 1993 and that it is submitted in accordance with the ICSID Institution Rules.<sup>22</sup> But the central question of *whether both parties to the dispute have consented in writing to refer it to the ICSID jurisdiction for arbitration* is dealt with much later, namely in section XII of chapter III of the Request.<sup>23</sup>

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<sup>22</sup> The official versions of the 1990 Argentina-Italy BIT are in Spanish and Italian languages. There is not authenticated English version of the BIT. This fact was a source of considerable confusion at the beginning of the present proceedings because in certain English translations circulated to the Tribunal the Spanish term “*obligaciones*” and the Italian term “*obbligazioni*” in Article 1(1)(c) of the Argentina-Italy BIT were rendered in those translations by the term “*bonds*”. None of the provisions of the Argentina-Italy BIT uses a term corresponding to the English “*bonds*”, term that in Spanish, at the least, is rendered by “*bonos*” and currently used. Likewise, the English expression “*security entitlements*” used by the Parties is alien to the Spanish and Italian terminology of the BIT.

<sup>23</sup> Request for Arbitration, paras. 81-9.

27. On the above matter, the Request for Arbitration states the following: (i) that Article 25(1) of the ICSID Convention does not require a specific form for the manifestation of the parties' written consent to refer disputes to ICSID, but merely that the consent be given *prior to the filing of the Request for Arbitration*; (ii) that it is commonly admitted a Contracting State's consent to submit a dispute or category of disputes to ICSID arbitration may result from a *unilateral undertaking or a public offer of that State* to submit such disputes to ICSID, as expressed in national law or in an international treaty on the protection of foreign investments; (iii) that in the present case, *Argentina's offer to Italian investors* to refer investment disputes to ICSID is expressed in Article 8 of the BIT; (iv) that it is commonly admitted that the *investors' acceptance of the host State's offer can be manifested, inter alia*, by filing a request for arbitration to ICSID; (v) that for that purposes, the Claimants *hereby accept* to submit the dispute to ICSID arbitration *by signing and filing this Request for Arbitration*; and (vi) that pursuant to Article 2(3) of the ICSID Institution Rules *the date of consent* is considered to be the date on which the second party (i.e. the investor) acted that in the present case is the date of the submission of the Request for Arbitration, namely *23 June 2008*.<sup>24</sup>

28. However, Claimants did not accept Argentina's arbitration offer as formulated in Article 8 of the Argentina-Italy BIT with its conditions and sequence (but something else) because as stated in the Request for Arbitration itself Claimants self-judged that "*the conditions set out in Article 8 of the BIT are clearly inapplicable in the present case*"<sup>25</sup> and acted and pleaded accordingly. The alteration of the terms of the offer agreed upon by Argentina and Italy in Article 8, paragraphs 1 to 5(a), of their BIT by the Claimants is obvious. The Request for Arbitration tries to justify it by the following considerations:

"87. As to the requirement of an attempt at amicable settlement (Article 8(1)), it is apparent from the description of the facts that Argentina has always displayed a hostile and uncooperative attitude towards the Claimants. The possibility of reaching an amicable settlement was also precluded by Law No. 26017 (Exhibit C-4), which prohibited all Governments bodies from taking any kind of action (judicial, extrajudicial or private) with the Claimants. Argentina's behaviour in the present case is similar to the ones held by it since the beginning of 2001, for which Argentina has already been held liable for breaches of international law in the numerous other cases brought against it.

88. As to the condition that the parties must first attempt to settle the dispute before domestic courts of the host State for a period of 18 months prior to resorting to international arbitration (Article 8(2)) the consistent jurisprudence of international arbitral tribunals demonstrates that this provision does not constitute an obstacle to the offer of arbitration contained in the BIT. Furthermore, as noted (par. 29), in the present case the Claimants were effectively inhibited from challenging Argentina's preposterous POE in light of Article 6 of Law No. 26.017.

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<sup>24</sup> *Ibid*, paras. 81-5.

<sup>25</sup> *Ibid*, para. 86.

89. Finally, resort to local courts would have been an entirely futile exercise, since it is clearly impossible for the local courts to decide a case of such magnitude in only 18 months.”<sup>26</sup>

29. It follows from the above that the first issue to be determined concerning Claimants’ consent to the arbitration is whether or not on the critical date, namely on 23 June 2008, the scope of the consent manifested by them by the act of filing their Request for Arbitration was *ad idem* with the consent of Argentina manifested in the arbitration offer to Italian investors embodied in Article 8 of the Argentina-Italy BIT.

### **3. The preliminary objections submitted by the Respondent**

30. In international litigation questions of jurisdiction and competence deserve special attention because they carry with - by operation of public international law - the need to ascertain the existence and scope of the consent of the State or States involved to submit to the peaceful settlement means or procedure concerned. As stated years ago by the Award in the *Mihaly International Corporation v. Sri Lanka* case:

“As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined *proprio motu*, i.e. without objection being raised by the Party. *A fortiori*, since the Respondent has raised preliminary objections to the jurisdiction, the existence of consent to the jurisdiction must be closely examined.

In the case under review, the fact of the registration of this case [...] is naturally without prejudice to the further examination of the arguments of evidence presented by the Parties on issues of jurisdiction. The Tribunal is competent to determine the limits of its own competence.”<sup>27</sup>

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<sup>26</sup> Concerning the alleged “numerous cases for which Argentina would have already been liable” (para. 87 of the request for arbitration), the Claimants refer back to the *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003; the *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004; the *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA-UNCITRAL Arbitration Rules), Award of 1 July 2004; the *Eureko B.V. v. Republic of Poland* (*Ad Hoc* arbitration), Partial Award of 19 August 2005; the *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006 (“*LG&E Energy Corp.*”); and the *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Award of 22 May 2007 (“*Enron Creditors Recovery*”). With respect to the alleged “consistent jurisprudence of international arbitral tribunals” (para. 88 of the Request), Claimants mention: the *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision of 3 August 2004 (“*Siemens*”); the *Camuzzi International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/7), Decision on Jurisdiction of 10 June 2005; the *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Jurisdiction of 16 May 2006; and the *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A v. Argentine Republic* (ICSID Case No. ARB/03/19), Decision on Jurisdiction of 3 August 2006.

<sup>27</sup> *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2), Award of 15 March 2002 (“*Mihaly*”), paras. 56-7.

31. In the first session of the Tribunal on 24 February 2009, Claimants and Respondent agreed that there should first be a preliminary phase in the proceedings covering jurisdiction and admissibility. The preliminary phase would deal with preliminary objections of a general character only, but not with jurisdictional issues that may arise in relation to individual claimants, which would be dealt at a later stage as necessary and appropriate. In the event of disagreement as to whether a given objection is of a “general character only” the matter will be decided by the Tribunal.<sup>28</sup>

32. In execution of the agreement above, the Respondent filed with ICSID on 11 June 2009 a Memorial on Jurisdiction and Admissibility making submissions by way of *preliminary objections*.<sup>29</sup> These preliminary objections were maintained in the Respondent’s Reply of 12 March 2010<sup>30</sup> as well as in its Post Hearing Brief of 28 March 2011. However, the wording of the preliminary objections as appeared in the Memorial got some drafting corrections in the subsequent written pleadings as indicated with accuracy in paragraph 65 of the Majority Decision. The text of the preliminary objections quoted below is one reproduced in the last relevant document, namely of the Respondent’s Post Hearing Brief:

“[...] the Argentine Republic reiterates the request made in its Memorial on Objections to Jurisdiction and Admissibility, its Reply on Jurisdiction and Admissibility and in its closing statement given at the Hearing on Jurisdiction and Admissibility to the effect that the Tribunal issue an award:

- (a) Determining that it lacks competence and that the ICSID lacks jurisdiction to entertain collective actions of this nature;
- (b) In the alternative, determining that it lacks competence and the ICSID lacks jurisdiction because neither the Argentine Republic nor Claimants gave valid consent to these proceedings, and, further, that Claimants’ abuse of right in bringing these proceedings – in the name of a third party – renders any consent they may have given null and void;
- (c) In the alternative, determining that there is no *prima facie* violation of the Argentina-Italy BIT;
- (d) In the alternative, determining that it lacks jurisdiction *ratione materiae*;
- (e) In the alternative, determining that it lacks jurisdiction *ratione personae* or that Claimants lack legal standing to institute these proceedings;
- (f) In the alternative, determining that Claimants have not satisfied the necessary prerequisites to bringing a claim under the Argentina-Italy BIT;

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<sup>28</sup> Majority Decision, paras. 3 and 5.

<sup>29</sup> Respondent’s Memorial, para. 299.

<sup>30</sup> Respondent’s Reply, para. 498.



(g) Ordering Claimants to pay all costs, expenses and attorneys' fees incurred by the Argentine Republic (plus interest); and

(h) Granting any further relief against Claimants as may have been requested by the Argentine Republic and deemed to be fit by the Tribunal".<sup>31</sup>

33. Likewise, it should be recalled that, at the beginning of the third day of the Hearing, the Respondent made a motion to the effect that the Tribunal resolves, at the proper procedural time, a request presented by the Argentine Republic regarding "the lack of legal representation in these proceedings by the Claimant Parties".<sup>32</sup> Upon request by one member of the Tribunal, the Respondent explained that the Prayer of Relief presented by it at the end of the Hearing was identical with that presented in its previous written submission (the Reply at that time), "complemented by the procedural issue that was raised at the beginning of the third day of the Hearing".<sup>33</sup> The material aspects of this so-called procedural issue are dealt within point II of the Majority Decision (under the heading "Consent of the Claimants") and in Chapter IV of the present Opinion.

34. The Claimants in their Counter-Memorial request that the Tribunal "dismiss all the Respondent's objections and decided that it has jurisdiction"<sup>34</sup> and in their Rejoinder that the Tribunal "dismiss all the Respondent's objections and decided that it has jurisdiction and that the present proceedings are admissible".<sup>35</sup> In their Post Hearing Brief, Claimants' reiterated their Prayers of Relief and requested that the Tribunal "declare that it has jurisdiction over the present case rejecting all Respondent's objections to jurisdiction and admissibility".<sup>36</sup> Furthermore, in their Rejoinder and Post Hearing Brief the Claimants request that the Respondent be ordered to reimburse the Claimants for the legal fees and the costs of the arbitration.

#### **4. The general economy of the present Opinion**

35. As stated at the beginning of this Introduction, I dissent from the present Majority Decision entirely. In the light of this, I consider necessary to explain my dissent in this Opinion with some detail on the main items on which my legal conviction differs from the Decision on Jurisdiction and Admissibility of my co-arbitrators.

36. In addition to the Introduction, the present Opinion has four Chapters and an overall general conclusion. Chapter I explains my position on a preliminary issue raised by the Majority Decision under the heading "Relationship of the present Decision to the *Abaclat* case". Chapter II contains comments and considerations on some hinged conclusions and omissions of the Majority Decision relating to: (i) the distinction between "multi-party proceedings" and "representative proceedings" and their respective different legal effects from the standpoint of

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<sup>31</sup> Respondent's Post Hearing Brief, para. 185.

<sup>32</sup> See Transcript, p. 443/3.

<sup>33</sup> See Transcript, p. 13 and Majority Decision, footnote to para. 67.

<sup>34</sup> Claimants' Counter-Memorial, para. 426.

<sup>35</sup> Claimants' Rejoinder, para. 218.

<sup>36</sup> Claimants' Post Hearing Brief, para. 183.

the consent to arbitration rule (chapter I of the Majority Decision); (ii) the mechanism of formation and execution of the Parties' agreement to arbitrate the present dispute (a non-issue in the Majority Decision); and (iii) the question of the definition of protected investors (jurisdiction *ratione personae*) (chapters II and III of the Majority Decision). Chapter III deals with the central question of the definition of protected investments (jurisdiction *ratione materiae*) under both the ICSID Convention and the Argentina-Italy BIT (chapter IV of the Majority Decision). Lastly, Chapter IV of the Opinion is devoted to consider a series of questions arising in connection with the determination of the existence and scope of the consent to arbitrate the present dispute of both the Respondent State and the Claimants (chapter VI of the Majority Decision). My position on the question of the existence of *prima facie* treaty claims is explained in the Introduction to the Opinion (paras. 16-18).

37. The Opinion ends with an overall general conclusion, entitled "Concluding Findings" summarizing the main conclusions on the basis of which I find the present case to fall outside the jurisdiction of the Centre and, for the matter, of the competence of this Tribunal to decide the dispute submitted to it by the Claimants.

## Chapter I – A preliminary issue raised by the Majority Decision: the so-called “special relationship” of the present case with the *Abaclat* case

### 1. Reaffirmation of the autonomy of the present case as a main case

38. Under the heading of “Relationship of the present Decision to the *Abaclat* case”, the Majority in the present case tries to explain somewhat the far reaching and excessive *determinative* effects attributed as a whole to the *Abaclat* majority decision in the adjudication of the Respondent’s preliminary objections in the present case. The *Ambiente Ufficio and Others* (formerly *Giordano Alpi and Others*) case (this case) relates to (i) a dispute between different Parties than the *Abaclat* case; (ii) does not involve mass claims processes (namely large-scale litigation) as the *Abaclat* case does; (iii) the factual and legal context is not the same or identical to *Abaclat*; (iv) the Claimants’ representation is not organized as in *Abaclat*; and (v) the present Tribunal has been established as an ICSID arbitral tribunal equal in rang, independent and with a different composition that the *Abaclat* or any other ICSID arbitral tribunal.<sup>37</sup>

39. The ICSID arbitration system does not allow the Centre or any one of its arbitral tribunals, to direct that proceedings in two or more cases be joined and, in fact, no such kind of direction occurred with respect to the *Ambiente Ufficio and Others* case. The present case has not been formal joined to the *Abaclat* case or to any other investor-host State dispute case. Neither was there any parties’ agreement to the effect of directing common action with respect to one aspect or another of the proceedings in each of the three instituted cases dealing at present with disputes relating to Argentina sovereign default, as happen sometimes in investor-host State cases by agreement or leave of the parties thereto.

40. Nevertheless and from the very beginning, my co-arbitrators insisted in placing in the shade of *Abaclat* case the unfolding of the organization of the proceedings of the present Tribunal. By recalling this past, I would like simply to say that without such an attitude the present phase in the *Ambiente Ufficio and Others* case could have been concluded long before the delivery of the majority decision on jurisdiction and admissibility of 4 August 2011 in the *Abaclat* case.

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<sup>37</sup> The *Abaclat* majority decision, *supra* note 4, was referred to the present Tribunal by Claimants after their Post-Hearing-Brief, and the dissenting opinion of Professor Abi-Saab in the *Abaclat* case (hereinafter “Professor Abi-Saab’s dissenting opinion in *Abaclat*”), as well as the award in the case *ICS Inspection and Control Services* case, *supra* note 12, by the Respondent also after its Post-Hearing-Brief. The referral of those three case-law pieces was admitted by the Tribunal. Thus, from the standpoint of the procedure these documents are part and parcel of the whole of the case-law and legal authorities submitted by Parties in the case. Not less, but not more either and, in particular, not exclusively, because the Parties submitted before quite a number of case-law and other legal authorities which are as relevant for the adjudication by the tribunal of the Respondent’s preliminary objections as those referred by the Parties after their Post-Hearing-Briefs. Furthermore, the Respondent submitted written and oral experts’ reports and views having a bearing on jurisdiction and inadmissibility aspect with respect in particular to the concepts of “protected” investment and investors.

41. For my part, I did not acknowledge as a member of the present ICSID Arbitral Tribunal (and continue not to acknowledge) the existence of any “sister” tribunal or tribunals<sup>38</sup> or, up to the moment at the least, aspects of the other proceedings in common or in parallel to those of the present Tribunal, either within or outside the ICSID system. It follows that the explanations given in the paragraphs 10-13 of the present Majority Decision are far from currying with my conviction. They appear rather as the result of a firm inclination to follow the *Abaclat* majority decision all the way notwithstanding that such decision raises more question than it answers, prompting thereby a recent Case Comment to say that: “The Tribunals in the next Argentine bond holders case at ICSID are not to be envied” (Hans van Houtte and Bridie McAsey, “Case Comment. *Abaclat* and others v. Argentine Republic. ICSID, the BIT and Mass Claims”, *ICSID Review*, Vol. 27, No. 2 (2012), at p. 233).

## **2. The appeal of *Abaclat* majority decision for the present Majority Decision**

42. The present Majority Decision tries to present the fact that its conclusions on jurisdiction and admissibility are essentially the *same* as the conclusions of the majority in the *Abaclat* decision as a kind of *natural coincidence*, resulting from the normal application by different arbitrators of the same Vienna Convention on the Law of Treaties (“VCLT”) rules on the interpretation and application of treaties to the facts, in the light of alleged “substantial parallels” between the two cases and the submission by the Respondent “to a large degree” of same preliminary objections in both cases. Hence, it is pointed out that “no doubt there is a special, particularly close relationship” between the two cases. And this is followed by the declaration that the present Tribunal - namely the arbitrators who have signed the present Majority Decision - will “not hesitate to benefit, where applicable and appropriate, from the reasoning of the *Abaclat* Tribunal”, following by the usual formal disclaimer from adhering to any doctrine of *stare decisis*.

43. The Majority Decision describes that what has been done by the Majority implied a process of critically engaging not only with the majority decision of *Abaclat*, but also with the counter-arguments containing in the dissenting opinion of Professor Abi-Saab. Concluding again that the Majority “agrees with many, though not all, considerations and views expressed in the *Abaclat* majority decision”, subject to the caveat below:

“The Tribunal wishes to emphasize, however, that it is well aware that it is called upon to decide the case submitted to it by the Parties on its own needs and merits. The reasoning of the *Abaclat* Decision can thus be of relevance to that of the present Tribunal only if and to the extent that the Parties in the present case have submitted arguments similar to, and compatible with, those marshalled in the *Abaclat* case.”<sup>39</sup>

I must add that when the *Abaclat* majority decision is obviously untenable as a proposition of public international law, for example, by sidestepping “jurisdictional requirements” or

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<sup>38</sup> Furthermore, the term “sister” is in the context is equivocal because the relationship affirmed in fact by my co-arbitrators between the present Decision and the *Abaclat* case is not a relation between equal tribunals. In family terms, it appears more accurate to describe it as a relation between a mother and her under-age daughter.

<sup>39</sup> Present Majority Decision, para. 13.

introducing instead “admissibility” as a self-made criteria, the present Majority Decision does not spare efforts to reach the same conclusion that *Abaclat* by other ways, including if necessary to what I consider *ultra vires* solutions amounting to a redefinition of the “law” applicable to the subject-matter at issue. The treatment by the Majority Decision of the so-called “futility exception” is a good example in that respect.

44. Thus, the majority in the present Decision admits not only that they have reached similar “conclusions” as the *Abaclat* majority, but also (i) that they agree with many (though) not all “considerations” and “views” expressed in the *Abaclat* decision and (ii) that the “reasoning” of the *Abaclat* majority decision is relevant to the present Tribunal to the extent that the Parties have submitted arguments similar to, and compatible with, those marshalled in the *Abaclat* case. The use of the word “marshalled” is in itself already revealing of a certain unusual attitude of enfeoffment to somebody else. I must say that I cannot but reject altogether the limitations inherent to these conclusions of the Majority for the adjudicative functions of the arbitrators composing the present Tribunal.

45. The fact that members of different international arbitral tribunals seated in different cases at different moments of time coincide essentially in conclusions, reasoning, considerations and views to the extent indicated is indeed an extraordinary event, a rare bird in the practice of international arbitration, deserving as such scrutiny. Some observations on the matter seem therefore in order on what may be described *prima facie* as an attempt to establish rules of general application through case-law independently of the ICSID Convention and Rules.

### **3. The fallacy of the “continuity argument” underlying the present Majority Decision’s position**

46. First of all, it should be underlined that in the face of an arbitration procedure such as the one provided for by the ICSID Convention (arbitral tribunals of limited jurisdiction constituted *ad hoc* for individual cases) to justify findings, decisions or awards on the ground of the *convenience of assuring case-law continuity* amounts to invoke something alien to the system. To expect, ask for or pretend continuity from a system which as structured cannot deliver it does not make sense. It cannot be consequently right to invoke continuity as a ground or explanation for justifying without further ado any given conclusion as a matter of law, propriety or policy.

47. The ICSID arbitral tribunals are not permanent international tribunals, and they have also different compositions. To remedy this situation by placing some ICSID arbitral tribunals in the shade other ICSID arbitral tribunals under the pretence of continuity in decisions and awards is a false and unreal pretention, because is it unfitting within the structures and procedures of the arbitration system established by the ICSID Convention. This is confirmed by the fact that the ICSID Convention does not contain any form of appeal jurisdiction and that the admitted annulment procedure is limited to the grounds expressly listed in the Convention to the exclusion of others (Article 52 ICSID Convention and 50 of the ICSID Arbitration Rules).

48. If there is an actual need for changing the system as established, the proper ambit to raise the issue is with the Contracting Parties to the 1965 ICSID Convention and, certainly not, within ICSID arbitral tribunals for the purpose of justifying the adoption of a given finding, decision or

award by a majority. I deny therefore the pertinence of the main underlying premises on which, according to my understanding, the passages of the present Majority Decision on the question of the relationship between the present case and the *Abaclat* case are based.

49. I must add that the underlying appeal to “continuity” of the present Majority Decision in order to justify its own conclusions is particularly shocking when the *Abaclat* interpretation of Article 8(3) of the Argentina-Italy BIT is not the first interpretation of that very provision by an ICSID arbitral tribunal. The provision was already interpreted differently by at the least another ICSID arbitral tribunal before the adoption of the *Abaclat* decision of 11 August 2011, namely by the *Impregilo v. Argentina* award of 21 June 2011. The following question arises therefore: What does “continuity” mean for the present Majority Decision? The *Impregilo* award’s interpretation of Article 8(3) of the Argentina-Italy BIT cannot be more opposite in all respects to the interpretation of the provision arrived at by the *Abaclat* majority decision and the present Majority Decision.

50. However, the lack of “continuity” of the *Abaclat* with *Impregilo* has not been an obstacle for the Majority Decision in the present case for siding with the interpretative conclusions of *Abaclat* and not with the prior *Impregilo* interpretation. For my part, I side with *Impregilo*’s unanimously adopted interpretation which is, in my opinion, a VCLT good-faith interpretation in harmony with both (i) the text of Article 8(3) of the BIT in its context in the light of the object and purpose of the Argentina-Italy BIT and (ii) the *rule of State’s consent to jurisdiction*, embodied in the public international law principle of peaceful settlement of international disputes, applicable in the relations between Argentina and Italy (VCLT, Article 31(3)(c)).

51. It is worthwhile to quote below the interpretation in *Impregilo* of Article 8(3) of the Argentina-Italy BIT:

“In sum, Article 8(3) (of the Argentina-Italy BIT) contains a jurisdictional requirement that has to be fulfilled before an ICSID tribunal can assert jurisdiction. This decision is in accordance with the decision in *Wintershall*, where it was found for a very similar clause in the Argentina-Germany BIT 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’ *before the right to ICSID can even materialize*. *Impregilo* not having fulfilled this requirement, the Tribunal cannot find jurisdiction on the basis of Article 8(3) of the Argentina-Italy BIT”<sup>40</sup> (*emphasis supplied*).

52. Contrary to my co-arbitrators, I cannot but side with Professor Abi-Saab’s dissenting opinion in the *Abaclat* case on the paramount role played by the State’s consent to jurisdiction rule in determining competences, functions and tasks of international courts and tribunals which are judicial or arbitral organs of limited jurisdiction, as well as with the distinction to be made in that respect between “general jurisdiction” and “special jurisdiction” whose scopes are defined in the instant case by the ICSID Convention and the Argentina-Italy BIT respectively.

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<sup>40</sup> *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award of 21 June 2011 (“*Impregilo*”), para. 94.

53. I am likewise in agreement with the conclusions of Professor Abi-Saab on the following corollaries of the State's consent to jurisdiction rule in public international law concerning (i) the legal effects of the non-fulfilment by Claimants of the requirements set forth in Article 8(1) to (3) of the Argentina-Italy BIT, effects which are in line with the *Impregilo* finding; (ii) the concept of "investment" under the ICSID Convention in general and of "protected investment" under the Argentina-Italy BIT in particular; and (iii) the distinction between a "State's consent to arbitration" formulated in general terms and a "State's consent to 'collective arbitral actions'" with the ensuing need of "adaptation" of ICSID Regulations and Rules revised not a long time ago, namely on 10 April 2006.

54. The reason for that was already explained in the 2005 *Plama v. Bulgaria* decision on jurisdiction in the following terms:

"Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisites for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous. In the framework of a BIT the agreement to arbitrate is arrived at by the consent to arbitration that the state gives in advance in respect to investments disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desire."<sup>41</sup>

#### **4. The attitude of the present Majority Decision towards Professor Abi-Saab's dissenting opinion in *Abaclat***

55. In the present Decision the Majority proclaims that it proceeded also to a "process of critically engaging with the dissenting opinion of Professor Abi-Saab" and not only with the *Abaclat* majority decision.<sup>42</sup> However, that proclaimed critically engaging process ended systematically with the rejection of the conclusions of Professor Abi-Saab. The question on which the Majority in the present proceedings appears the nearest to Abi-Saab's opinion provides a good illustration of that affirmation. It concerns Professor Abi-Saab's statement to the effect that non-compliance with jurisdictional limits or admissibility conditions in treaties begets *by operation of international law* the inevitable legal sanction of dismissing the case, as failing outside the jurisdiction of the tribunal or as inadmissible.<sup>43</sup> The endorsement by the majority of that legal conclusion of Professor Abi-Saab is however followed by a usual "but" which voids the apparently initial admission of Professor Abi-Saab's conclusions by the Majority in the present proceedings of any practical effect.

56. Let see it. First, the admission was done in the face of an odd proposition in the *Abaclat* majority decision to the effect that "the wording of the Article 8 of the BIT itself does not suffice to draw specific conclusions with regard to the consequences of non-compliance with the order

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<sup>41</sup> *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction of 8 February 2005 ("*Plama*"), para. 198.

<sup>42</sup> Present Majority Decision, para. 12.

<sup>43</sup> *Ibid*, paras. 594-95.

established in Article 8” of the Argentina-Italy BIT.<sup>44</sup> Secondly, the Majority Decision nullifies right away the effects of that initial endorsement of Professor Abi-Saab’s statement by concluding that Claimants were nevertheless not precluded from resorting to direct arbitration, through an application to the interpretation of Article 8(1) to (3) of the Argentina-Italy BIT of a “futility threshold” included of *lege ferenda* by the International Law Commission in a set of draft articles on the topic of “diplomatic protection”!!! But, the said draft articles are still subject to consideration within Legal Committee of the General Assembly of the United Nations and have not yet been endorsed by the generality of States as reflecting the customary international law governing “diplomatic protection”. Notwithstanding these facts, the Majority Decision proceeds to apply that so-called threshold without even asking whether it was actually part and parcel of a rule of positive international law *applicable* in the relations between the Contracting Parties to the BIT, namely between Argentina and Italy, as directed by Article 31(3)(c) of the VCLT.<sup>45</sup>

57. The total identification of the Majority in the present proceedings with the *Abaclat* majority decision is expressly admitted in paragraphs 624-28 of the present Majority Decision. The passages concerned, which are unusual in an ICSID arbitral decision, would appear to have a two-fold purpose. Firstly, the Majority in the present proceedings seems eager to excuse itself before *Abaclat* for having come to the same result concerning the interpretation of Article 8(2) and (3) of the Argentina-Italy BIT but on the basis of a different reasoning. Secondly, it would seem that for the said Majority one of the tasks of the so-called “sister tribunal”, namely of the present Tribunal, would be to strengthen the findings of the *Abaclat* majority decision. The following peculiar passage deserves to be quoted as an illustration of the said two-fold purpose:

“The Tribunal cannot ignore, however, that on a more general level the “futility” reasoning which governs the present Decision and the “fair opportunity” approach endorsed by the *Abaclat* Tribunal are not mutually exclusive, but complement each other. In fact, they seem to be based on different perspectives on the same reality of competing interests. Whilst the ‘futility’ reason rather looks at the problem from *Claimants’* side, the fair opportunity approach, by asking whether *Respondent* is given a fair opportunity to address the dispute through its local courts, takes the latter’s perspective. Similarly, whereas the emphasis of the ‘futility’ approach is on the existence for Claimants of an *effective* remedy, the fair opportunity approach draws on the idea of *forfeiture* of Respondent’s right to preferential dealing with the case due to its inability or unwillingness to provide effective legal means of redress to the investor(s)”<sup>46</sup> (*emphasis in original*).

58. In sum, the majority in the present phase of this case has rejected the law developed in Professor Abi-Saab’s dissenting opinion in its entirety, endorsing from the outset to the end the conclusions of the *Abaclat* majority decision independently of its objective law merits,

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<sup>44</sup> This proposition appears also in other recent arbitral decisions or opinions concerning investor-host State arbitrations. I qualify it as nonsensical because admitting such a proposition amounts to ignoring the secondary rules of public international law codified with general approval in the ILC Articles on the International Responsibility of States for International Wrongful Acts (*see* Resolution 56/83 of the United Nations General Assembly of 12 December 2001).

<sup>45</sup> Present Majority Decision, paras. 597-623.

<sup>46</sup> *Ibid*, para. 627.



notwithstanding the fact that at the time of the conclusion of the ICSID Convention “collective action proceedings” were quasi non-existent and multiparty proceedings (which should be distinguished from “mass claims processes”) were quite exceptional cases and generally subject to specific consent.

59. Furthermore, the Majority seems also to consider that Article 8(3) of the Argentina-Italy BIT would be a kind of autonomous residual default provision allowing, under certain circumstances, to affirm jurisdiction and/or admissibility, independently of the Claimants’ fulfilment of the legal prerequisites in paragraphs (1) and (2) of the same Article 8. Thus, jurisdiction or admissibility could be declared by an ICSID arbitral tribunal even against the clear text to the contrary in the BIT and irrespective of the rules of public international law governing State’s consent to the jurisdiction of international courts and tribunals applicable in the relations between Argentina and Italy as Contracting Parties to the BIT. But, it happens that, the Majority Decision notwithstanding, *the default of jurisdiction is never a source of jurisdiction in public international law.*

60. As recent investor-host State arbitral decisions and awards have had the occasion to recall, in public international law there *does not exist a default jurisdiction.* The residual default rule is no jurisdiction. To try to fabricate a different rule through arbitral or judicial decisions by means of a free interpretation approach to compromissory clauses in BITs cannot but weaken the ICSID system whose cornerstone is the consent of the Contracting Parties, and general public international law as well, and will end in a fiasco.<sup>47</sup> *Pacta sunt servanda* and the law of treaties are among the most direct casualties, but there are others as well.

61. The majority considers likewise that the international arbitration standing offer in Article 8(3) of the Argentina-Italy BIT entails consent to all kind of arbitral proceedings and actions and, consequently, is not limited by the silence thereon of the applicable arbitral procedures and rules. Here again, I side with the views developed by Professor Abi-Saab in its dissenting opinion by the simply and elementary reason that the ICSID international arbitral tribunals are not organs empowered by the ICSID Convention and/or the BITs with legislative jurisdiction or power. Assumptions or adaptations to the contrary by individual arbitral tribunals are, in my opinion, generally speaking *ultra vires* the applicable conventional instruments and general international law.

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<sup>47</sup> As recent as 6 April 2011, the European Parliament adopted a Resolution which in its paragraph 24: “Expresses its deep concern regarding the level of discretion of international arbitrators to make a broad interpretation of investor protection clauses, thereby leading to the ruling out of legitimate public regulations; calls on the Commission to produce clear definitions of investor protection standards in order to avoid such problems in the new investments agreements”, cited in Andrea Giardina, Report on “*Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties*”, *Yearbook of the Institute of International Law*, Session of Rhodes (2011), volume 74, at p. 54 of the Report.

## 5. Selective referral by the present Majority Decision to the summary factual background of the *Abaclat* majority decision

62. Finally, I cannot but mentioning the fact that the present Majority Decision is not a “self-contained” arbitral decision because it does not contain any global analysis of the facts of the *Ambiente Ufficio and others* case. For the majority a considerable part of the information provided by the parties would only become relevant at the merits stage. Thus, instead of incorporating in its Majority Decision its own *prima facie* global analysis of the facts relevant for the present case taking account of arguments and evidence submitted by the Parties at the present phase, the Majority Decision send the reader back to the *Abaclat* majority decision in the following terms:

“[...] the Tribunal acknowledges that the *Abaclat* majority decision, in its paras. 11-64, 70-71 and 75-80, contains a summary of the general factual background of that *Abaclat* case (see para. 10 of *Abaclat*), notably containing an explanation of general concepts related to financial markets and bonds, as far as relevant for the case, a general overview on sovereign debt restructuring and of Argentina’s financial crisis and default in 2001 as well as Argentina’s activities in terms of restructuring its economy and its sovereign debt (particularly including the Exchange Offer of 2005 and the adoption of Law No. 26.017 on 9 February 2005).

*In the eyes of the Tribunal*, this succinct description of the factual background in the *Abaclat* Decision can also be usefully applied regarding the present case. The Tribunal has already stated that it will refer to the *Abaclat* case, whenever appropriate, and it considers this a valuable opportunity to do so for reason of expediency, namely not to reduplicate an effort that has already been made by *the sister Tribunal*<sup>48</sup> (*emphasis supplied*).

63. Thus, regarding the *prima facie* global assessment of the elements of fact of the present *Ambiente Ufficio* case, the Majority identified itself once more with the presentation made in the *Abaclat* majority decision. In my opinion, reasons of elementary arbitral prudence would have advised to proceed otherwise because the factual context is not the same in all respects in both cases. So the majority was obliged to proceed by selectively referring the Parties first to paragraphs 11-64, 70-71 and 75-80 of the *Abaclat* majority decision, namely to the following questions: (1) General Concepts relating to Financial Markets and Bonds; (2) General Overview on Sovereign Debt restructuring; and (3) Argentina’s Restructuring of its Economy and its Debt in relation to the Bonds.

64. However, with respect to the latter section (3) the majority left outside of the cross-reference the information contained in paragraphs 65-69 and 72-74 and 81-83 of that section of the *Abaclat* majority decision. Then, those paragraphs provide also in several respects relevant information for an assessment of the Parties’ conduct in the present case. In particular, for example, with respect to: the 2003 discussions which took place between TFA and the Respondent in order to reach a solution for the outstanding debt; the further discussions held between creditor groups, such as GCAB and TFA and the Respondent; the 2004 Form 18-K/A that Argentina filed with

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<sup>48</sup> Present Majority Decision, paras. 60-1.

the U.S. Securities and Exchange Commission; the information and terms of the supplement to the prospectus of 2004 relating to Argentina's launch of the "Exchange Offer 2005" on 14 January 2005; the information and text of Argentina Law 26,017 enacted on 9 February 2005; the period for submitting tenders pursuant to the "Exchange Offer 2005" which expired on 25 February 2005; and the alleged fact that the original claimants in the *Abaclat* case did not participate in that Exchange Offer, as well as the information provided on a number of court litigation (lawsuits) initiated by creditors unsatisfied with the terms and conditions of the Exchange Offer 2005.

65. I consider that the above information is *prima facie* quite relevant to the present phase of the *Ambiente Ufficio* case, *inter alia*, because it shows (i) that Argentina's 2005 restructuring of its sovereign debt follows the principles, steps and methods general applied at the relevant time by the international community to this kind of sovereign financial operation with international overtones. It shows also (ii) that discussions and consultations were possible and that TFA participated therein on behalf of its alleged bondholders while in the present case neither NASAM nor the alleged Claimants participate at any time in any discussion or consultation before filing their 2008 Request for Arbitration with ICSID.<sup>49</sup> And it shows likewise that the first reaction of unsatisfied creditors was "litigation" and not "international arbitration" in ICSID as was generally customary before the organization and funding of unsatisfied creditors by TAF in *Abaclat* case and NASAM in the present case.

66. The cross-reference to the summary of the facts in *Abaclat* made in the present Majority Decision does not send back either to section 4 (Evolution of the Dispute following Argentina's Exchange Offer 2005) and section 5 (New Exchange Offer 2010). However, these sections provide quite important evidence for the present phase of the proceedings. For example, Section 4 reproduces *the text of a TFA letter, dated 28 February 2006, to the Argentine Ministry of Economy and Production, providing thereby to Minister Lic. Felisa Miceli final notice* that in the light of the alleged Argentina's refusal to negotiate a solution the TFA bondholders contemplate under Article 8 of the Argentina-Italy BIT that if Argentina fails to resolve the dispute amicably and pay within sixty days the said bondholders will have no choice but to commence legal proceedings before ICSID. And the letter concludes by stating that hereby TFA on behalf of TFA bondholders "accepts the offer of consent expressed by Argentina in Article 8" of the Argentina-Italy BIT to submit the dispute to ICSID for settlement by arbitration pursuant to the ICSID Convention without entering into any reservation or caveat.<sup>50</sup>

67. This evidence is determinative concerning some aspects of the "futility approach" adopted by the Majority Decision in the instant case. The interest for the present case of the section 5 on the Exchange Offer 2010 is likewise evident because a number of the original Claimants accepted that offer and tender their security entitlements in the old bonds, discontinuing thereby their participation in the *Ambiente Ufficio* case as rightly recorded in the Majority Decision.

68. Last but not least, the present Majority Decisions fails to make a global assessment of the facts alleged by the Respondent in support of some of its preliminary objections such as, for

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<sup>49</sup> The *Abaclat* majority decision, *supra* note 4, found that the exchanges between TFA and respondent fulfilled, in the circumstances of the case, the "amicable consultation" requirement of Article 8(1) of the Argentina-Italy BIT.

<sup>50</sup> See *Abaclat* majority decision, *supra* note 4, para. 84.

example, the non-existence of a *prima facie* treaty violation of the Argentina-Italy BIT as alleged by the Claimants. The Majority Decision limits itself to refer to some of those factual elements in a rather fragmentary manner, namely under the particular heading of the various questions considered without a global analysis. This is a further shortcoming of the Majority Decision, because some legal arguments of Claimants are global in nature in the sense of going across the board of various submitted preliminary objections. For example, the argument that under the Argentina-Italy BIT a “protected investment” is a unity even when it may encompass elements which do not correspond to such a characterization. Moreover, Claimants consider that the Argentine Republic’s issuance and selling of sovereign bonds in the first market and the subsequent selling by Italian Banks in the Italian retail market to Italian nationals of “security entitlements” in the Argentine sovereign bonds held by the Banks is “a single same underlying economic transaction”. The Respondent has refuted those arguments also with overall arguments which go also across the board. All this does not come clearly out in the text of the present Majority Decision.

## Chapter II – Comments on some hinged conclusions and omissions of the Majority Decision

### 1. The distinction between “mass claims”, “class action” and “representative proceeding” and “collective claims”, “multi-party action” and “aggregate proceeding”: a distinction without a difference for the Majority Decision which ignores the rule of consent to arbitration of general international law and the general rule of interpretation of treaties codified by the VCLT

69. In chapter I, entitled “*Consent of the Respondent*”, the present Majority Decision deals exclusively with the issue of Respondent’s rejection of the kind of action exercised “*collectively*” by the Claimants. The basic jurisdictional question, *namely* the Respondent’s general consent to ICSID international arbitration, is considered mainly in chapter VI of the Majority Decision, entitled “*Compliance with Art. 8 of the Argentina-Italy BIT: the prerequisites of amicable consultations and recourse to Argentine courts*”.

70. Thus, the comments on this section of the Opinion relate only to the preliminary objections of the Respondent concerning its rejection of the kind of collective action exercised by Claimants in the present case. This is certainly an unsatisfactory way of dealing with the core of the *jurisdiction* issue because international tribunals are supposed to give priority to the latter from the very outset of the proceeding in question, but to follow this course in the present Opinion is now unavoidable in the light of the general economy of the Majority Decision. I must add however in discharge of the majority that, ultimately, the cause of the economy of its Decision is to be found in the peculiar manner in which the Parties themselves pleaded their respective cases in the present dispute and in the shadow projected by the *Abaclat* majority decision which, for reasons of its own, sidestepped the jurisdictional requirement, and introduced instead “admissibility” criteria.

71. The present Majority Decision begins its chapter I by focusing on questions of terminology and characterization raised by Claimants’ collective action. I concur generally with this methodology in the light of the need for an early clarification of those matters due to omnipresence of *Abaclat* in the present proceeding and the fact that the *Abaclat* majority decision had characterized initially the proceeding in the case as a “mass claims proceeding”<sup>51</sup> and later on as a “hybrid” in the following terms: “In summary, the present proceedings (*Abaclat*) seem to be a sort of a hybrid kind of collective proceedings, in the sense that it starts as aggregate proceedings, but then continues with features similar to representative proceedings due

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<sup>51</sup> *Abaclat* majority decision, *supra* note 4, para. 294. This majority decision begins characterizing the proceedings as “mass claims proceedings”, but none of the thousands of Claimants in *Abaclat* appears to have been acting as representing the whole of the Claimants or a part thereof. Furthermore, as it has been written: “Even accepting as the Majority would have us do, the TFA (Task Force Argentina) is acting *like* a representative Claimant does not sit well. It is not for the majority to use the way in which the Claimants have organized their representation to characterize the proceeding. The claims within the *Abaclat* proceeding have been pleaded individually and they must be dealt with as such by the majority; this is the defining characteristic of the proceeding” (Hans van Houtte, and Bridie McAsey, “*Case Comment. Abaclat and Others v. Argentine Republic, ICSID, the BIT and MASS Claims*”, ICSID Review, Vol. 27 (2012), at p. 235).

to the high number of Claimants involved”.<sup>52</sup> For obvious objective reasons (smaller number of Claimants), those characterizations are not appropriate for the instant proceeding which does not present the “mass” or “hybrid” features of *Abaclat*.

72. I concur also with the terminology conclusions of the Majority Decision to the effect that: (i) in the present proceedings the Tribunal is not confronted with a “class action” or a “mass claim” but with a kind of “collective action” which may, for convenience, be called “*multi-party action*”, and the subsequent proceeding as a “*multi-party proceeding*”<sup>53</sup>. Certainly, the instant proceeding is not a “representative proceeding” because it involves, as agreed upon by the Parties from the very beginning, individual examination and determination of individual claims in respect to *ratione personae* jurisdictional issues. The instant proceeding is therefore an “aggregate proceeding” which was instituted through the exercise of a “multi-party action” of originally 119 Claimants, reduced by now to 90.<sup>54</sup>

73. Likewise, I agree with the Majority Decision that the present proceeding is not either a “joinder of proceedings” consolidating those prior instituted on different cases, but rather the original submission of claims by a plurality of Claimants in a single ICSID proceeding.<sup>55</sup> But, surely, it is a “joinder of actions” under the form of an “aggregate proceeding”. In this respect the example of *Wintershall* referred to in the Majority Decision<sup>56</sup> is far from being out of place in the context for the international law rule of consent to international arbitration. Why? Because neither “joinders of proceedings” nor “joinders of actions” are regulated in the ICSID basic instruments and in such a silence situation, as *Wintershall* demonstrates with respect to the “joinder of proceedings”, the *consent or acquiescence* of the respondent is necessary by operation of international law, as confirmed by the Final Report on the Geneva Colloquium held on 22 April 2006.<sup>57</sup>

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74. The clarification on the different types of actions, claims or proceedings made by the Majority Decision appears however, at the end of the day, as *a distinction without a difference* because the majority in the present case reaches on the matter, *mutatis mutandis*, conclusions similar to those reached by *Abaclat* majority decision with respect to its declared “mass hybrid

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<sup>52</sup> *Abaclat* majority decision, *supra* note 4, para. 488. This prompted Professor Abi-Saab to level the conclusion of the *Abaclat* majority of “legal genetic engineering” that “risk producing a monster” (Professor Abi-Saab’s dissenting opinion in *Abaclat*, *supra* note 37, para. 130).

<sup>53</sup> Majority Decision, para. 122.

<sup>54</sup> *Ibid*, para. 350.

<sup>55</sup> *Ibid*, para. 123 and footnote no. 30.

<sup>56</sup> G. Kaufmann-Kohler *et al.*, *Consolidation of proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Effectively?*, 21 ICSID Review-Foreign Investment Law Journal, 59 (2006). The situation is different in the ICJ precisely because Article 47 of its Rules empowered the Court to direct that proceedings in two or more cases be joined, independently of the parties’ consent to the joining.

<sup>57</sup> Majority decision, paras. 81 and 94. The Parties referred also, particularly at the Hearing, to the “*litis consorcio facultativo*” (“*litisconsorzio facoltativo*”) because arguments on the existence of consent became mixed up with the question of whether multi-party proceedings in ICSID arbitration presupposes a certain commonality or relationship of legal and factual elements between the would-be co-claimants, as it is often the case in domestic law (the Majority Decision addressed this latter question in its paras. 152 and ff).

proceeding”. This means that for the instant Majority Decision whatever the characterization of the “collective action” and subsequent “proceeding” may be, the foreign private investor would be entitled to institute *directly* an international arbitration proceeding against the host State at the ICSID without further ado, in spite of the silence on the subject-matter of the basic applicable texts.

75. The explanation for that commonality in the conclusions of both majority decisions notwithstanding the different characterization of the respective “collective actions” and “proceedings” is due to the fact that both majority decisions are deficient in the treatment of the subject-matter of jurisdiction, an issue which is governed in international arbitration by the consent of the parties to the dispute. In the case of *Abaclat* the majority decision did it, as indicated, by sidestepping “jurisdictional” requirements (introducing “admissibility” criteria).<sup>58</sup> In the instant case, by the Majority Decision’s interpretation of the *silence* of the ICSID Convention and Rules in favour of the existence of jurisdiction on multi-party arbitrations using as a pretext the lack of express exclusion of these arbitrations by the pertinent provisions of ICSID law. As it will be indicated below, in this opinion, the invocation of the “*contracting out*” argument in matters concerning the consent to international arbitration of the parties to the dispute is a fallacy.

76. It is my opinion that in public international law the “silence” of the objective applicable law in no occasion may be interpreted in favour of the existence of jurisdiction. To remedy the legal effects of that “silence” in jurisdictional matters in a given case a manifestation of a specific consent of both parties to the dispute is necessary, in particular of the respondent because claimants’ consent manifests itself by the very act of instituting the proceeding. This is the situation in the instant case. Furthermore, in institutional international arbitration systems, such as ICSID, if the basic instrument, the 1965 Washington Convention in the instant case, contains requirements limiting the scope of application of the system, the consent of both parties to the dispute cannot go beyond those limits by virtue of the application of the so-called *double-barrelled test*. It is on that basis that I consider generally that representative proceedings and proceedings partaking of both aggregate and representative proceedings fall outside the ICSID arbitration system as presently established.

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77. It would seem that, through the distinctions made, the Majority Decision was looking firstly to be rid of, as from the outset, of the counter-arguments made by the Respondent in the face of what the Claimants originally described as “*azione di gruppi*”.<sup>59</sup> And secondly, to find support for the so-called “ubiquitous phenomenon” argument advanced by the Majority to counteract Respondent’s invocation of the statement in the *Abaclat* majority decision to the effect that “at the time of the conclusion of the ICSID Convention collective proceedings were quasi-inexistent”, as was actually the case at that time.<sup>60</sup>

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<sup>58</sup> Hans van Houtte and Bridie McAsey, “Case Comment. *Abaclat and Others v. Argentine Republic...*”, *supra* note 51, at p. 233 (*see also* para. 41 of this Opinion).

<sup>59</sup> Majority Decision, para. 118.

<sup>60</sup> *Ibid*, para. 134, and *Abaclat* majority decision, *supra* note 4, para. 519.

78. In any case, it is clear that for the Majority Decision the present “multi-party proceeding” (as for the *Abaclat* tribunal its “mass” or, alternatively, “hybrid” proceeding) would not require *the consent or acquiescence of the respondent* even when, as in the instant case, the arbitration agreement between the parties to the dispute (executed by the “arbitration offer” of the 1990 Argentina-Italy BIT purportedly accepted by the Claimants) is, in my opinion, as silent as the 1965 ICSID Convention with respect to “multi-party proceedings”. Concerning the latter Convention the published *travaux préparatoires* (“*travaux*”) show that a commentary to the definition of “national” in an August 1963 draft which referred expressly to “association of persons” vanished by 1964.<sup>61</sup>

79. Particularly relevant on the point is the fact that the ICSID Institution, Conciliation and Arbitration Rules are also silent on “multi-party proceedings”, as well as on “mass” or “hybrid” proceedings. The Tribunal has not been informed either of any Contracting States’ attempt or, for the matter, of the World Bank to open an amendment procedure of the ICSID Convention thereon pursuant to the provisions set forth in Chapter IX of the Convention.

80. However, the Majority Decision concludes as follows:

“In the Tribunal’s view, this interpretatory effort clearly points into one direction. Nothing has emerged from the preceding legal analysis that would militate in favour of interpreting the ‘silence’ of the ICSID Convention as standing in the way of instituting multi-party proceedings. Quite on the contrary, not only are multi-party arbitrations not excluded by the pertinent provisions of ICSID law, but they are perfectly compatible with them. The analysis of the relevant tribunal practice has not suggested any other outcome. In view of this unambiguous result, the Tribunal sees no benefit in engaging in a policy or efficiency reasoning of any kind, but concludes that the ICSID Convention, the Argentina-Italy BIT and other applicable rules in the present dispute are not opposed to a plurality of claimants jointly submitting a claim to the Centre. In particular, these provisions do not require a specific or additional consent by the Respondent beyond the prerequisite of written consent under Art. 25(1) of the ICSID Convention.”<sup>62</sup>

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81. I am in total disagreement with the above conclusion of the Majority’s “interpretatory effort” which should not be confused with a treaty interpretation made in conformity with Article 31 of the VCLT. I find the conclusion flawed for several reasons. In the first place, I am obliged to call to attention the fact that in public international law logic is never a source of jurisdiction for international arbitral tribunals. Secondly, the conclusion is based upon the false premise that the “silence” in the basic applicable international instruments (characterized by the majority of “non-opposition”) militates in favour of allowing the institution of multi-party arbitration proceedings. Thirdly, the advance written consent given by the Argentine Republic in Article 8(3) of the 1990 Argentina-Italy BIT under the form of a “standing arbitration offer” does not cover “multi-

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<sup>61</sup> ICSID, *The History of the ICSID Convention: Documents concerning the origin and the formulation of the Convention on the Settlement of Investment Disputes between states and nationals of other states*, Vol. II-1, at pgs. 170 and 610.

<sup>62</sup> Majority Decision, para. 146.



party arbitrations”. Fourthly, as a matter of positive international law, the rule of general international law, derived from systemic considerations, of *the consent of the parties to the dispute to international arbitration with its corollaries*, stands in the way of the majority’s conclusion.<sup>63</sup> Then, according to this rule, the parties’ consent to international arbitration must be a *manifest consent* with regard to both the very existence of the consent and its scope.<sup>64</sup>

82. As stated historically by the Permanent Court of International Justice (“PCIJ”), the manifestation of the needed consent may result either from an express declaration or be inferred from a number of acts *conclusively establishing it*<sup>65</sup> (prorogation of jurisdiction), and, further, the mere fact that certain events and situations, which the terms of given convention in their ordinary meaning are wide enough to cover, were not thought of, *does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with its terms*.<sup>66</sup> In other words, the existence and scope of consent to a given international arbitration cannot be said to have been established by invoking mere “silence” or “non-exclusion” provisions. It must be determined in accordance with the ordinary meaning of the terms of the text of the provision subject to interpretation in their context and in the light of the object and purpose of the treaty concerned (“general rule of interpretation of treaties” codified in Article 31 of the VCLT). An expressed declaration of consent may in turn be given either in a single instrument or in various interrelated documents,<sup>67</sup> *but it must always be manifest and unequivocal*.

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83. It is obvious that by the fact of participating in the ICSID Convention the Argentine Republic did not manifest any consent to multi-party proceedings in ICSID arbitrations. The present Majority Decision cannot but admit that the text of Article 25(1) of the ICSID Convention uses the singular “*a national of another Contracting State*”, as well as in the singular “*a Contracting State*”. But even so, the majority, invoking *inter alia* the *travaux* of the Convention, concludes that the “discussions were not conclusive as to the intention to either accept or refuse multi-party arbitrations”.<sup>68</sup> But, the term “national of a Contracting State” in the singular is likewise used in Articles 1 and 2 of the ICSID Institution Rules adopted by the Administrative Council of the Centre pursuant to Article 6(1)(b) of the ICSID Convention, namely after the adoption of the Convention.

84. The Majority Decision proceeds in a similar way, *mutatis mutandis*, in its reading of the provisions set forth in Article 8(1)(3) and (5) of the Argentina-Italy BIT, affirming without any kind of interpretative demonstration, that “[t]his provision speaks *interchangeably* of ‘an investor’ (paras. 1 and 5) and ‘investors’ (heading and para. 3)” (*emphasis supplied*). At that point and on the basis that in Article 8(3) of the BIT the term “investors” appears in the plural,

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<sup>63</sup> On the rule of State’s consent to jurisdiction see Chapter IV of this Opinion.

<sup>64</sup> See, for example, *Daimler*, *supra* note 1, para. 175.

<sup>65</sup> *Rights of Minorities in Upper Silesia* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 15 (Apr. 26), p. 24.

<sup>66</sup> *Interpretation of Convention of 1919 concerning Employment of Women during the Night*, Advisory Opinion, 1932, P.C.I.J. (ser. A) No. 50 (Nov. 15), p. 377.

<sup>67</sup> See, for example, the *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/01/2), Award of 21 June 2012 (“*Goetz II*”), paras. 1 and 139.

<sup>68</sup> Majority Decision, para. 132.

the majority - ignoring the “general rule of interpretation of treaties” of Article 31 of the VCLT - reaches the extraordinary conclusion that “the ordinary meaning of the term “national” in Article 25(1) of the ICSID Convention, *when view together* with Article 8 of the Argentina-Italy BIT, may well include the situation of a plurality of investors submitting a legal dispute to the Centre”<sup>69</sup> (*emphasis supplied*).

85. Thus, according to the Majority Decision the authentic expression of the intentions of the Contracting States manifested in the text of Article 25(1) of the multilateral 1965 ICSID Convention will be revealed in reading it together with the text of Article 8(1)(3) and (5) of a BIT concluded in 1990 by Argentina and Italy. The necessary implication of such an extraordinary assertion would be that for the Majority Decision the ordinary meaning of the terms “a national of a Contracting State” in Article 25(1) of the ICSID Convention and in Articles 1 and 2 of the ICSID Institution Rules would have no ordinary meaning at all or, alternatively, it has fluctuating meanings according to the terms of text of the BIT at issue freely selected for such a purpose by the interpreter. This first attempt by the Majority Decision for voiding of any sense the *double-barrelled test* will be followed by others as indicated below.

86. The appeal to the “interchangeable” argument is another conceited fallacy. The terms in the different provisions of a BIT are not *a priori* interchangeable for interpretation purposes. The ordinary meaning of each of them is supposed to be ascertained by the interpreter *in their respective contexts* as provided for in Article 31(1) of the VCLT. Then, the most adjoining context of the term “investors” of Article 8(3) of the BIT is the whole of Article 8 (in particular of its paragraphs (1), (2), (4), and (5)) which is the Article of the BIT containing the investment dispute resolution settlement procedures between “*Investors and Contracting Parties*”. The fact that in the title “Contracting Parties” and not only “Investors” are in the plural provides already an appropriate answer to the tentative of appealing to the title to determine the ordinary meaning of the term “investors” in the text of Article 8(3) of the BIT.

87. Having disposed also of the title argument, one should return to the text of Article 8(3). According to Article 8(3) of the BIT: “*If a dispute still exists* between investors and a Contracting Party, after a period of 18- months has elapsed since notification of the commencement of the proceedings before the national jurisdiction indicated in paragraph 2, *the dispute may be submitted to international arbitration*” (*emphasis supplied*). The context represented by the words in italics provide the answer to the question of the ordinary meaning to be given to the term “investors” (in the plural) in the said provision, and this answer is indeed the opposite to the one given by the Majority Decision, namely that the term does not include the case of a plurality of investors submitting an investment dispute to the ICSID through a “multi-party action”.

88. Why? Firstly, because, on one hand, the opening words “*If a dispute still exists*” of the said paragraph are controlled by the provisions in Article 8(1) and (2) and, on the other hand, the words “the dispute may be submitted to international arbitration” are controlled by Article 8(5)(a) and (b). “The dispute” which “still exists” when one reaches the third step (international arbitration) of the dispute resolution mechanism could not be in such a context but

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<sup>69</sup> *Ibid*, para. 131.

*the same dispute* which was not possible to be resolved previously either through the first step (amicable consultation) or by the second step (the competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment is located). Then, such a dispute is defined in Article 8(1) as being “any dispute relating to investments that arises between *an investor from one of the Contracting Parties and the other Party*”.

89. If one turns now to the term “*international arbitration*” in Article 8(3), its controlling provisions - namely Article 8(5)(a) and (b) - provide for that “in the event that international arbitration is resorted to” *the dispute shall* be submitted, at the election of the investor (in the singular) either to ICSID, as in the instant case, or to an *ad hoc* arbitral tribunal which *shall* proceed in accordance with the UNCITRAL Arbitration Rules. Then, neither the Argentina-Italy BIT, nor ICSID Convention and Rules nor the UNCITRAL Arbitration Rules contain provisions allowing the possibility of instituting, without further ado, multi-party arbitration proceedings as a means of resolving an investment dispute between a plurality of investors and a host State.

90. At this point, the principle of *mutuality* should not be forgotten in the light of the statement in paragraph 13 of the Executive Director’ Report that *the Convention permits the institution of proceedings by host States as well as by investors*. Thus, for example, if the term “a national of another Contracting State” in Article 25(1) of the ICSID Convention would incorporate the plural (nationals), then the term “a Contracting State” should also incorporate the plural (Contracting States). But, such an interpretation would well be or become manifestly absurd or unreasonable. For example, in the present case could the Argentine Republic together with the other Latin American States members of Mercosur (parties of course to the ICSID Convention) institute a “multi-party proceeding” against the 90 unrelated Italian private foreign investors purportedly claimants in the present case, or a group or a single one of them? I do not think so without the consent or acquiescence of the private foreign investors concerned who, then, would be in the position of respondents. For the Majority Decision such a respondent consent or acquiescence would be unnecessary.

91. It should also be recalled that consent to international arbitration is a rule of international law applicable in the relations between Argentina and Italy which as such shall be taken into account by the interpreter in the process of interpreting Article 8(3) of the 1990 Argentina-Italy BIT, as provided for by Article 31(3)(c) of the VCLT. The Majority Decision ignores altogether - in the present context - this element of the general rule of interpretation of the VCLT although *in casu* that general rule applies not only as a customary codified rule of public international law but also *qua* a treaty norm, both Argentina and Italy being parties to the VCLT since before the conclusion of their BIT in 1990.

92. Lastly, Article 5(1)(c) of the Argentina-Italy BIT entitled “Nationalization or Expropriation” - which is also part and parcel of “context” for the interpretation of the term “investors” in Article 8(3) - provides for that *if an agreement is not reached between the investor and the Contracting Party that adopted the measure* (once again the singular) the amount of the compensation shall be determined *pursuant to the dispute resolution procedures indicated in Article 8 of this Agreement*.

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93. The above considerations confirm that in Article 8(3) of the Argentina-Italy BIT the term “investors” (in the plural) does not qualify in any respect the term “dispute” - already defined in Article 8(1) - but it is used by the Contracting States for the generic purposes of referring to all those investors who did not succeed to settle their respective *dispute* (in the singular) with the host State through amicable consultations or by litigation in local courts. They are also other provisions of the BIT that refer to “investors” in the plural in the same generic sense (for example, Articles 2, 7 and 10).

94. The contrary interpretation given in the Majority Decision means that that the term “investors” (in the plural) of Article 8(3) of the BIT controls the interpretation of all the rest, namely of paragraphs (1), (2), (3) and (5) of Article 8 of the BIT, and that once the BIT so interpreted, would further control, in turn, Article 25(1) of the 1965 Washington Convention or, for the matter, the whole of ICSID law. This is surely an unlikely proposition which would lead to a result manifestly absurd or unreasonable and, therefore, unacceptable. In the same vein, I cannot but reject the underlying thesis - apparently based upon a subjective appreciation of a presumed intention of the authors of the BIT - that when the nature of a investment alleged to be protected by the BIT appears particularly suitable for a high number of potential claimants, it should be admitted that the Contracting Parties have consented to multi-party proceedings. This thesis disavows altogether the rule of consent to international arbitration of general international law and feigns to ignore that there is no default jurisdiction in the international legal order. The arbitration system of ICSID is not an overall general compulsory arbitration system either. It may of course be amended or modified by the Contracting States, but by nobody else. In any case, it is not the task of individual ICSID arbitral tribunals, established to adjudicate a given case, to assume general legislative tasks.

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95. Looking for support for the thesis that, notwithstanding the silence of the applicable basic instruments, the institution of “multi-party proceedings” at the ICSID does not require the consent or acquiescence of the Respondent, the Majority Decision leaves soon the ICSID law and Article 8 of the Argentina-Italy BIT and turns instead its attention to the practice of ICSID and NAFTA arbitral tribunals. It reveals, for example, that 38 out of 398 reported ICSID cases (as of 21 August 2012) are “multi-party cases” involving a varying number of claimants ranging from 3 to 14 or 137 claimants.<sup>70</sup> Out from these 38 multi-party ICSID cases the Majority Decision reviews only 6 ICSID cases (2 of which are cases under the ICSID Arbitration (Additional Facility) Rules), namely: *Klöckner* (1983); *Goetz I & II* (1999 & 2012); *LG&E Energy Corp* (2004); *Bayview* (2007); *Funnekotter* (2009); and *Alasdair* (2010); as well as one NAFTA/UNCITRAL case: *Canadian Cattlemen* (2008). It is on that meagre case-law basis that the majority sees confirmation of its conclusions on the issue of the Respondents’ consent to multi-party proceedings.

96. Thus the first question which arises is: what happens in the other 31 identified ICSID multi-party cases? I assume that all these cases do not provide support for the majority’s thesis otherwise they would have been mentioned in the Majority Decision. An additional problem for

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<sup>70</sup> *Ibid*, para. 135.

the majority is that the cases they have reviewed are of no help for them either, the issue being of course whether they are cases in which a “multi-party proceeding” was accepted by an ICSID arbitral tribunal in the face of the opposition of the respondent:

1. *Klöckner and others v. Cameroon*. The Respondent initially argued that the use of the singular in Article 25(1) of the ICSID Convention would bar multipartite arbitration, but subsequently it dropped the objection as recorded in the Majority Decision itself.<sup>71</sup> The 1983 award of the arbitral tribunal in the case was annulled in 1985 by an ICSID *ad hoc* committee.

2. *Goetz and others v. Burundi*. The case concerns joint claims submitted by 6 Belgian natural person shareholders of a Burundian company. There was therefore a link between the claimants. The respondent did not appear, failing to defend its case (*default* case). Acting pursuant to the *default* ICSID Arbitration Rules, the arbitral tribunal declared itself to be satisfied as to the existence of jurisdiction and upheld it.<sup>72</sup> An award of 10 February 1999 (“*Goetz I*”) incorporated a parties’ protocol of settlement (*acuerdo de partes*) and the case was discontinued pursuant to ICSID Arbitration Rule 43. A further dispute arose later on and a second case entitled “*Antoine Goetz & Consorts et S.A. Affinage des Métaux c. République de Burundi*” was instituted in June 2011 by the Consorts Goetz (main shareholders of some Burundi companies) and the AFFIMET company (this second case is not recorded in the Majority Decision). Thus, another ICSID arbitral tribunal was established. The Republic of Burundi appeared in this second case and filed some preliminary objections. However, the objections were abandoned in the Reply (« *la République du Burundi accepte la compétence du Tribunal pour le besoin du présent litige et dans les limites définies dans la présent Réplique* »).<sup>73</sup> This was confirmed at the hearing. No opposition of Burundi therefore to this “multi-party proceeding”. In its award of 21 June 2012, the arbitral tribunal upheld its competence on Consorts Goetz’s claims on the basis of a special convention forming an integral part of the protocol of settlement embodied in the award of 10 February 1999 (Article 53(1) of the ICSID Convention) only, excluding thereby the AFFIMET claim.<sup>74</sup>

3. In the *LG&E Energy Corp., and others v. Argentine Republic* case, the applicable Argentina-United States BIT provides that: “Each Party (i.e. the Argentine Republic and the United States of America) hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3” (Article VII (4) of the BIT). The request for arbitration was jointly made by the three *LG&E* claimant corporations. The respondent does not appear to oppose the exercise of the multi-party action as such. Furthermore, in the context it is understandable that an arbitral tribunal may find that the host State has already given its consent by accepting the said BIT formula.<sup>75</sup> But the Argentina-

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<sup>71</sup> *Ibid*, para. 136, citing to *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2).

<sup>72</sup> *Ibid*, paras. 136 and 157, citing to *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3), Decision of 2 September 1998 (“*Goetz I*”).

<sup>73</sup> *Goetz II*, *supra* note 67, para. 136.

<sup>74</sup> *Ibid*, paras. 139-145.

<sup>75</sup> *LG&E Energy Corp.*, *supra* note 26, Decision of 30 April 2004, para. 73.

Italy BIT does not have the same all-including formula. Moreover, the arbitral tribunal had rejected a respondent's objection to jurisdiction based upon the lack of *jus standi* of the Claimants by finding that: "the Claimants should be considered foreign investors, even though they did not directly operate the investment in the Argentine Republic but acted through companies constituted for that purpose in its territory".<sup>76</sup> In the present case, Claimants do not have such kind of link between themselves.

4. In *Bayview Irrigation District v. United Mexican States*, an ICSID Arbitration (Additional Facility) Rules case, the number of claimants alleged to be United States nationals was much bigger than in previous cases (46 claimants). Although unrelated with each other, they claimed to have been harmed by the same allegedly unlawful acts of Mexico.<sup>77</sup> The applicable law was NAFTA (a free trade agreement). The Respondent filed three main objections to jurisdiction and admissibility and argued that: "the claim must pertain to an investment within the scope of NAFTA Chapter Eleven (Section A), and within the scope of Respondent's consent to arbitration".<sup>78</sup> As stated in the award of 19 June 2007, NAFTA Article 1101 defines the relevant provisions on the scope and coverage of Chapter Eleven Section A as follows: "1. This Chapter applies to measures adopted or maintained by a Party relating to: (a) *investors* of another party; (b) *investments of investors* of another Party in the territory of the Party"<sup>79</sup> (*emphasis supplied*). According to the arbitral tribunal, this provision would include not only the substantive protections accorded by NAFTA to investors and investments in Section A but also "*the scope of the rights to submit disputes to arbitration under Chapter Eleven Section B*".<sup>80</sup> It is also clear that the language of NAFTA Article 1101 does not exclude the institution of multi-party proceedings by protected investors. After recalling the definition of "investor of a Party" and "investment of an investor of a Party" in NAFTA Article 1139, the arbitral tribunal analyzed the crucial question at stake in the case, namely whether the claimants were seeking to make, were making, or had made an investment *in Mexico*, or whether, as they argued, the undisputed fact that they had made an investment in Texas was sufficient.<sup>81</sup> The tribunal concluded that the ordinary meaning of the text of the relevant provisions of Chapter Eleven is that they are concerned with *foreign* investment, not with domestic investments, therefore declining jurisdiction.<sup>82</sup> This award has not been the subject of any annulment proceeding.

5. The majority seems to attach considerable weight to the *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe* instituted by 13 claimants, Dutch nationals (natural persons). The only link between the claimants seems to be the alleged violations of a Zimbabwe-Netherlands BIT by respondent's measures relating to the implementation of the 1992 Land Acquisition Programme. Jurisdictional objections and merits were considered together. In the Counter-Memorial the respondent stated that it was aware of its obligations

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<sup>76</sup> *Ibid*, para. 63

<sup>77</sup> Majority Decision, paras. 137 and 156, citing *Bayview Irrigation District and others v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award of 19 June 2007 ("*Bayview*").

<sup>78</sup> *Bayview*, *supra* note 77, para. 25.

<sup>79</sup> *Ibid*, para. 84.

<sup>80</sup> *Ibid*, para. 85.

<sup>81</sup> *Ibid*, para. 93.

<sup>82</sup> *Ibid*, para. 122.

in terms of the applicable BIT and that, despite *Claimants' misgivings*, it was willing and able to make restitution, requesting only that the claimants furnish “the strictest proof” of their Dutch nationality. In the Rejoinder the respondent declared that it “does not object to the jurisdiction of the Centre” and this position was confirmed at the hearing.<sup>83</sup> The tribunal considered however that:

“In light of the importance of jurisdiction as a foundation for arbitral decisions and the special competence granted to arbitral tribunals to determine their jurisdiction, the Tribunal considers it important *to address, albeit briefly, the question of jurisdiction despite the current agreement between the parties. It is the Tribunal's judgment that jurisdiction under the BIT and the ICSID Convention has been established: all three requisites for jurisdiction have been met*<sup>84</sup> (emphasis supplied).

What were those “three requisites” which the tribunal consider important to address notwithstanding “the current agreement between the parties”? They were, as explained in the award, the three classic aspects of the general consent to international arbitration only, namely jurisdiction *ratione personae*, jurisdiction *ratione materiae* and jurisdiction *ratione temporis*.<sup>85</sup> All other eventual issues of jurisdiction or admissibility were not addressed “briefly” because doubtless covered by “the agreement between the parties” mentioned in the quotation. In fact, this case provides a further example of a respondent’s consent or acquiescence to a “multi-party proceeding” (in this case as from the filing of the Counter-Memorial). Therefore, the conclusion of paragraph 158 of the Majority Decision is, in my opinion, quite unwarranted.

6. In the case *Alasdair Ross Anderson and others v. Republic of Costa Rica* it should be recalled that the original request included a large number of individuals and companies from several nationalities. After significant revisions, the case was registered at the ICSID, as amended and supplemented, by 137 Canadian individual nationals pursuant to the ICSID Arbitration (Additional Facility) Rules. The respondent submitted five preliminary objections to jurisdiction and admissibility, but none regarding the “multi-party” character of the proceeding. The respondent acquiesces therefore to that kind of proceeding. The tribunal declined jurisdiction by upholding a respondent’s *ratione materiae* objection to the effect that claimants did not own or control the investments *in accordance with the law of Costa Rica*, as required by the Canada-Costa Rica BIT.<sup>86</sup>

7. In the *Canadian Cattlemen for Fair Trade v. United States of America* case, the proceeding was instituted by 109 Canadian claimants pursuant to a consolidated arbitration under Chapter Eleven of NAFTA and the UNCITRAL Arbitration Rules. No preliminary objections based upon the multi-party character of the proceedings were raised. In fact, the respondent was prevented from doing so by procedural order No. 1 (point 3.6) of the tribunal

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<sup>83</sup> *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe* (ICSID Case No. ARB/05/6), Award of 22 April 2009 (“*Funnekotter*”), paras. 59, 61, 82 and 93.

<sup>84</sup> *Ibid*, para. 94.

<sup>85</sup> *Ibid*, para. 95.

<sup>86</sup> *Alasdair Ross Anderson and others v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award of 19 May 2010, paras. 59 and 65.

according to which, in a first procedural stage, the tribunal *shall only deal with a 'preliminary issue'* defined by the parties as follows:

“Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants’ investments at issue are located in the Canadian portion of the North America Free Trade Area and the Claimants do not seek to make, are not making and have not made any investment in the territory of the United States of the America?”

The Parties agree that a negative determination of this question will dispose of all Claimants’ claims in their entirety.

The Parties also agree that any other objections of a potentially jurisdictional nature shall be reserved for a single merits phase should the claims not be dismissed at the preliminary phase.”<sup>87</sup>

But the claims were indeed dismissed at the first stage by reasons similar *mutatis mutandis* to those which prevailed also in the *Bayview* case, namely that the invoked international protection covered foreign investments, not domestic investments. There was therefore no occasion for considering an eventual objection or opposition to the multi-party action as such.

97. The review of the 7 cases referred to by the Majority Decision together with the silence on the remaining 31 multi-party cases out of a total of 398 ICSID cases (see paragraph 95 above), do not allowed me to conclude, as affirmed by the majority, that in the ICSID system multi-party arbitration is a generally accepted practice and that a multi-party proceeding does not require any additional specific consent on the part of the respondent State, beyond the general consent to arbitration of Article 25(1) of the Convention.<sup>88</sup>

98. To speak of an “additional” specific consent of the respondent seems to me a more unequivocal terminology than the term “second consent”. The reason being that in none of the cases reviewed does the arbitral tribunal appear to consider the need of a respondent’s consent to multi-party arbitration as otherwise than derived from the scope of the general consent referred to in Article 25(1) of the ICSID Convention and generally in the jurisdictional title relevant in the case (BIT or NAFTA). In any case, no ICSID arbitral tribunal has admitted “multi-party proceedings” against the opposition of the respondent with one exception, and this exception is the *Abaclat* tribunal which did so not with respect to a “multi-party proceeding” proper as the present one, but with respect to a “mass” or “hybrid” proceeding according to the characterizations of the tribunal itself.

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99. The distinction between “mass claims proceedings” and “multi-party proceedings” referred to above is, within the ICSID arbitration system, not only a distinction of degree (based upon the

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<sup>87</sup> *The Canadian Cattlemen for Fair Trade v. United States of America* (NAFTA-UNCITRAL Arbitration Rules), Award on Jurisdiction of 28 January 2008 (“*Canadian Cattlemen*”), para. 14.

<sup>88</sup> See, for example, Majority Decision, para. 145.



more or less large-scale litigation) but of nature, entailing *different legal effects as a result of the rule of the consent of the parties to the dispute governing international arbitration*. In effect, in light of the silence of the ICSID basic texts, it cannot be taken for granted that “mass claims proceedings” - which are or tend to be *representative* proceedings - fit in the present framework of the ICSID system. These proceedings need special international provisions and rules like in *foro domestico* special legislation. It follows that in order for these proceedings to enter into the ICSID system, in my opinion, additional international common action would be necessary by those concerned and, in the first place, by the ICSID Contracting States.

100. However, for the rule of consent to international arbitration, “multi-party proceedings” proper do not present the same incompatibility with the present ICSID arbitration system so long as they adopt the form of an “aggregate proceeding”, namely of a proceeding allowing due process examination of each individual claim forming part of the “multi-party action”. Thus, in the case of these proceedings the silence of the ICSID law and of the relevant BIT may be remedied by an *ad hoc* additional manifestation of consent to the “multi-party proceeding” concerned on the part of the respondent. The case-law above confirms that proposition and that such a respondent’s consent may be manifested even by acquiescence or other forms of conclusive conduct, as well as that the respondents are more ready to do so when there is some kind of link between the claimants.

101. But, although flexible in the forms of its manifestation, the said respondent’s consent is needed with respect to a “multi-party proceeding” when the basic texts are silent - as in ICSID law - on the admissibility of collective forms of action. In the instant case, the silence of the ICSID basic texts has not been remedied by an additional consent of the Argentine Republic as Respondent neither in the “arbitration offer” contained in the Argentina-Italy BIT nor in any *ad hoc* manner. In fact, the Respondent manifested its opposition from the very outset to the “multi-party” action of the Claimants, namely as from the filing of Claimants’ Request for Arbitration, and has maintained that opposition throughout the present proceeding.

102. Thus, I agree with the passages of Schreuer’s *Commentary on the ICSID Convention* (first and second editions) in which the Professor states that more than one party on the investor’s side in one set of proceeding is perfectly possible,<sup>89</sup> but providing, of course, that the nature of the proceeding instituted thereby fits within the present ICSID arbitration system and the respondent’s consent to the “multi-party proceeding” instituted by the claimants is further duly established, as required by international law which - according to the Majority Decision itself - is the law applicable to decide jurisdiction and admissibility issues in the present case.

103. The Majority Decision’s assertion that no requirement of respondent’s consent can be derived from the academic literature referred to by the Parties<sup>90</sup> is indeed a daring assertion. One example would suffice to prove that such kind of affirmations never go too far. I am referring to the statement of Professor S.I. Strong - quoted by Professor Abi-Saab in his dissenting opinion in the *Abalat* decision referred to the Tribunal - which reads as follows:

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<sup>89</sup> *Ibid*, para. 143.

<sup>90</sup> *Ibid*.

“(T)he first question raised in every arbitration is whether the parties have agreed to arbitrate this particular dispute. This issue [...] can be termed ‘primary consent’... Instead, class arbitration focuses for the most part on what can be called ‘secondary consent’, meaning consent to this particular kind of procedure”.....*This concept is by no means unique to class disputes, since traditional multiparty arbitrations are also required to establish secondary consent in cases where the arbitration agreement are silent or ambiguous as to multiparty treatment*” (S.I. Strong, “Does Class Arbitration ‘Change the Nature’ of Arbitration?, *Stolt Nielsen, AT&T and Return to First Principles*”, 17 *Harvard Negotiation Law Review*).<sup>91</sup>

104. I agree with the above statement in so far as to multi-party arbitrations in the ICSID system are concerned but not, for the reasons already mentioned, with respect to mass claim representative proceedings. I consider the features of the latter proceedings incompatible with the present ICSID arbitration system and, consequently, beyond the possibility for the consent of a given respondent State to remedy the situation. In the ICSID system the characterization of the instituted proceeding as “a mass dispute” or a “multi-party dispute” *stricto sensu*, is therefore quite determinative for the continuance of a proceeding instituted by a collective action; a characterization which should be done bearing in mind not only the number of claimants but also the kind and nature of claims submitted to the arbitral tribunal for adjudication.

105. As already indicated, I have no doubt that the instant case is an ICSID multi-party aggregate proceeding. Furthermore, with 90 Claimants it is not unmanageable for the Tribunal. However, the proceeding is defective because being instituted unilaterally by a “multi-party action” it is in need of the respondent’s consent or acquiescence which was not delivered and continues to be missing. Without prejudice to the terminological caveat above (paragraph 98), I will conclude this section of my Opinion quoting the following passage of Professor Abi-Saab on “multi-party arbitrations” which confirms my own conclusion on the item considered:

“Concerning multi-party arbitrations, as the majority award states, the issue was raised during the drafting of the ICSID Convention, but the question was left open. It was debated during the latest revision of the Rules, but again was not expressly addressed in the revised Rules of 2006. But the absence of written regulation does not mean absence of rules. Indeed, the few cases of multi-party arbitrations which took place within the ICSID framework (and also NAFTA), were always either with the clear agreement of the parties or *with no objection from the Respondent*, which amounts to an implied consent. Thus, the rule of “secondary consent” was consistently upheld in multi-party arbitration<sup>92</sup> (*emphasis supplied*).

## **2. The agreement to arbitrate between the parties to the dispute under the BIT system: the disregard by the Majority Decision of paramount aspects of the formation of that agreement and its execution**

106. International arbitration is an international law means of settlement of disputes in which the consent of the parties to the dispute plays a paramount role. As indicated in the preamble of the

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<sup>91</sup> Professor Abi-Saab’s dissenting opinion, *supra* note 37, in *Abaclat*, para. 173.

<sup>92</sup> *Ibid*, para. 175.

*Model Rules on Arbitral Procedure* adopted in 1958 by the ILC, the *undertaking to arbitrate* is based on the following fundamental rules: (i) the undertaking constitutes a legal obligation which must be carried out in good faith, (ii) the undertaking results from agreement between the parties and may relate to existing disputes or to dispute arising subsequently; (iii) the undertaking must be embodied in a written instrument, whatever the form of the instrument may be; (iv) the procedures suggested to States parties in a dispute by the *Model Rules* shall not be compulsory unless the States concerned have agreed, either in the *compromise* or in some other undertaking, to have recourse thereto, and (v) the parties shall be equal in all proceedings before the arbitral tribunal.

107. The jurisprudence of the ICJ and the decisions of arbitral tribunals in inter-state arbitrations have frequently recalled that arbitration is a consensual means of dispute settlement and that the competence of international arbitral tribunals derives from a clear and unqualified consent thereto by both parties to the dispute. For example, in its Judgment of 19 May 1953 in the *Ambatielos* case (merits: obligation to arbitrate) the ICJ stated that:

“The Court is not departing from the principle, which is well established in international law and accepted by its own jurisdiction as well as that of 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”.<sup>93</sup>

108. The same applies *mutatis mutandis* to international arbitral procedures applicable nowadays to investment disputes between the host State of the investment and a private foreign investor in the territory of that State. As explained in the Report of the Executive Directors on the 1965 ICSID Convention, consent in writing of the parties to submit to ICSID arbitration is the “cornerstone of the jurisdiction of the Centre”<sup>94</sup> Moreover, Article 25 of the ICSID Convention provides that the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State and a national of another Contracting State, *which the parties to the dispute consent in writing to submit to the Centre*. Furthermore, The Preamble of the ICSID Convention states 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 ICSID conciliation or arbitration (last paragraph of the Preamble).

109. Nowadays, the necessary *agreement to arbitrate between the parties to an investment dispute* is most often to be executed, as in the present case, under the form of an “arbitration offer” of the host State contained in a bilateral investment treaty concluded with the State of the nationality of the foreign investor (the BIT) following by the acceptance in writing by the foreign investor of the “arbitration offer” defined by the host State and the national State of the investor in the BIT concerned. It follows that the agreement to arbitrate a given legal dispute arising directly out of the investment is formed, under the BIT system, by the matching of the consent of

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<sup>93</sup> *Ambatielos Case* (Merits: Obligation to Arbitrate), Greece v. United Kingdom, (“*Ambatielos*”) I.C.J. Reports 1953, p. 19.

<sup>94</sup> Report of the Executive Directors, paras. 22-3. The term “jurisdiction of the Centre” is used in the 1965 ICSID Convention as a convenient expression to mean *the limits within which the provisions of the Convention will apply* and the facilities of the Centre will be available for conciliation and arbitration proceedings.

the host State and the consent of the foreign investor parties to the dispute, each of them manifested in the form indicated respectively.

110. Thus, the main jurisdictional issue posed by the consent of the foreign investor for an arbitral tribunal seized of an investment dispute is the determination of whether the scope of the foreign private investor's consent embodied in *acceptance in writing* of the "arbitration offer" of the host State matches the scope of the latter's consent as embodied in *the dispute-resolution provision of the BIT concluded by that host State and the national State of the investor concerned*, because only when both consents match each other may the necessary agreement or undertaking to arbitrate between the parties to the investment dispute be considered to have been executed. A second main related issue is the need to determine whether at the time of instituting the arbitral proceeding, by filing for example a request for arbitration with ICSID, it may be said that a *legal dispute arising directly out of an investment* already existed between the foreign private investor and the host State, as provided for in Article 25(1) of the ICSID Convention.

111. The Decision on Jurisdiction and Admissibility adopted by the Majority Decision considers the question of the "*Consent of the Claimants*" in its chapter II.<sup>95</sup> In this chapter, the Decision analyses a series of issues on the consent of the Claimants pleaded by the Parties, such as: (i) the fact of the lack of Claimants' signature on the Request for Arbitration filed with ICSID on 23 June, 2008, in plain contradiction with what is stated in paragraph 84 of the Request; (ii) the question of defects (purported invalidity and defects in the scope) of the Power of Attorney given by the Claimants to Avv. Parodi and the eventual bearing on the matter of the NASAM mandate; (iii) the fact of the lack of Avv. Parodi's signature from the Request for Arbitration notwithstanding the Request's statement (paragraph 6) about the joint representation of the Claimants by Parodi, di Brozolo and Barra; (iv) the question of the evidentiary value of Avv. Parodi's letter of 3 June 2008 (submitted to the Tribunal on the third day of the Hearing) on Avv. Radicati di Brozolo and Professor Barra's powers to represent the Claimants and to defend them jointly or severally; and finally (v) the question of the role of NASAM and its eventual control of the Claimants in the present proceedings.

112. I disagree with most of the conclusions of the Majority Decision on these various questions and, in particular, with the way in which the contradictions, errors and omissions of the Request for Arbitration are treated. In the Majority Decision the resulting vices and shortcomings seem to be considered as if all of them were deficiencies of low intensity as to the legal effects. I disagree. In fact some of them, in particular those relating to the Request for Arbitration filed by the Claimants are not of low intensity at all because they concern the instrument containing, as admitted by practice, their written acceptance of the "arbitration offer" of the Respondent. Then, the Request is a document *vitiated by incongruity* in many essential respects.<sup>96</sup>

113. In such kind of situation, it is not acceptable the position of some commentators referred to in the present Majority Decision, to the effect that once a request for arbitration is registered by ICSID deficiencies in the request can no longer be raised and cannot operate as a bar to the jurisdiction of the Centre and the competence of the arbitral tribunal.<sup>97</sup> The acceptance of such a

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<sup>95</sup> Paras. 173-278.

<sup>96</sup> See Chapter IV of the present Opinion.

<sup>97</sup> Majority Decision, para. 266.

nonsensical proposition would amount in practice to leave out of any objective legal control the *foreign private investor's written consent to arbitration* required by Article 25 of the ICSID Convention when (as in the instant case) the consent of the investor is given through the filing of a request for arbitration with the Centre.

114. It would be so, because in the light of recent practice, it appears that the control by the ICSID Secretary-General of the registration of a request for arbitration is not understood as entailing the verification of the essential validity of the request concerned. In such circumstances, to bar arbitral tribunals from carrying out such a control - because the registration is already accomplished when they have the opportunity to intervene - would amount to leaving foreign private investors' purported consent to arbitration the dispute with the host State (when expressed under the form indicated) out of any objective control as to its legal validity, and this is unacceptable as a proposition.

115. Lastly, the main failure of the Majority Decision's consideration of the "consent of the claimants" item is the absence of a thoughtful verification of the determinative issue of whether or not in the light of the text and the incongruities of its contents the Request for Arbitration filed with ICSID, it may still be said that by its filing the Claimants have accepted the "standing arbitration offer" of the Respondent embodied in Article 8 of the 1990 Argentina-Italy BIT, so as to be able to conclude that the agreement to arbitrate between the Parties to the present dispute, needed for establishing the jurisdiction of the Centre and the competence of the Tribunal, has been duly executed.

116. That omission is not a minor question. In the circumstances of the present case, the issue has a direct bearing on the determination of the existence between the Claimants and the Respondent of an agreement to arbitrate the investment dispute referred to the present Tribunal, as well as on the determination of whether it may be said that a legal dispute thereon existed between the Parties to the present proceeding at the time of the Claimants' filing of the Request for Arbitration, namely on 23 June 2008. I will turn my attention to those questions in Chapter IV of the present Opinion guided by the legal and logical considerations which inspired the 2002 *Mihaly* Tribunal.<sup>98</sup>

### **3. The definition of the "protected investors" (jurisdiction *ratione personae*): the prejudging and errors of the Majority Decision in the interpretation and application of the relevant provisions of the ICSID Convention and the Argentina-Italy BIT**

117. Regarding jurisdiction *ratione personae*, the mandate given by the Parties to the Tribunal in the present phase of the case was to deal with objections of a general character only, not with any jurisdictional issue that may arise in relation to individual claimants.<sup>99</sup> Notwithstanding this

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<sup>98</sup> See quotation above in paragraph 30 of this Opinion, *supra* note 27. Other ICSID arbitral tribunals have also acted inspired by the same considerations; for instance, the *Funnekotter* tribunal, *supra* note 83, and the 2012 *Goetz II* tribunal, *supra* note 67, notwithstanding the parties being in agreement as to the existence of jurisdiction.

<sup>99</sup> Minutes of the First Session of the Tribunal, point 14.

limited mandate, the Majority Decision “concludes that no doubts regarding the jurisdiction *ratione personae* of the Centre in relation to the present case have become manifest”.<sup>100</sup>

118. This conclusion of the majority prejudices, unnecessarily in my opinion, the issue of the jurisdiction *ratione personae* because it is not legally admissibly to conclude in the abstract that such a jurisdiction exists prior to a detailed verification, accompanying if necessary by an expertise, whether or not each individual Claimant meets the *ratione personae* jurisdictional requirements of the ICSID Convention and the 1990 Argentina-Italy BIT. All aspects of the jurisdiction of an international tribunal are supposed to be ascertained *in concreto*, not by more or less founded conjectures. It should not be forgotten that in the present case - as admitted by the Majority Decision - each Claimant is exercising an action of its own, although collectively, namely all together a “multi-party action”.

119. Furthermore, the evidence submitted by the Parties concerning the *ratione personae* jurisdiction issues is not in the present case so persuasive or conclusive as to dispose of the matter in the way that the Majority Decision does. On the contrary, all concur, in my opinion, to reach the *prima facie* conclusion that the *ratione personae* jurisdiction issue does not have in the circumstances of the present “multi-party proceeding” an exclusively preliminary character and, consequently, should have been joined to the merits in order to be considered at that phase jointly with the always pending individual Claimants *ratione personae* jurisdiction issues, as I suggested during the proceedings to my co-arbitrators.

120. Probably, the shadow of the characterization of *Abaclat* proceeding as a “hybrid” (see above) has obfuscated the minds. In a proceeding with 60,000 Claimants as *Abaclat* where there was a question of applying particular methods, including sampling techniques of verification, the distinction between “general” and “individual” *ratione personae* jurisdiction issues may make sense, but in the present proceeding the Tribunal is not dealing with a “mass” of Claimants. This distinction is unjustified in a proceeding with 90 Claimants as the present one where a detailed examination and verification of the *ratione personae* requirements of each individual Claimant is doubtlessly manageable for the Tribunal.

121. As already indicated, the present multi-party proceeding is of a workable magnitude. NASAM is not acting in the instant case like a representative Claimant and Counsel for Claimants is not exercising expansive powers of attorney as TFA and Counsel in *Abaclat*, respectively. In any case, if after the individual examination and verification at the merits phase of the submitted evidence concerning the remaining 90 Claimants none of them fulfils the relevant *ratione personae* requirements the Tribunal would not have *ratione personae* jurisdiction, notwithstanding the present declared general conclusion of the Majority Decision which then would become an empty shell.

122. As to the requirements of the *ratione personae* jurisdiction of the Claimants, “nationality” and “domicile” are not, in the instant case, the only ones requiring verification. There are other elements like “consent” and “being a holder of a protected investment in the territory of the Argentine Republic at the relevant dates”, which are also in need of detailed verification before

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<sup>100</sup> Majority Decision, chapter III, para. 322.

being in a position allowing the Tribunal to declare the existence of *ratione personae* jurisdiction, either in general or with respect to each individual Claimant.

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123. To justify its prejudging conclusion on *ratione personae* jurisdiction, the Majority Decision, following closely Claimants' argument, invokes a passage in the reasoning of the *Bayview* award to the effect that "(i)t is clear that there are at least some Claimants who meet the requirement that they be nationals or enterprises of a Party."<sup>101</sup> It is on this base that the Majority Decision concludes as follows:

"Also in the dispute at hand, there can be no doubt that at least some of the Claimants qualify as 'nationals of another Contracting State' in the meaning of Art. 25(2) of the ICSID Convention and as 'investors' in the meaning of Art. 1(2) of the Argentina-Italy BIT. This suffices to establish the jurisdiction *ratione personae* in the present dispute and to allow the case to move forward to the merits stage".<sup>102</sup>

124. This extraordinary conclusion becomes still more surprising when one reads the quoted sentences in the context of the *Bayview* award's relevant paragraph which is drafted as follows:

"Doubts have been raised as to whether all of the Claimants are qualified investors, in terms of their nationality. For the present, however, the Tribunal sets those doubts to one side, because it is clear that there are at least some Claimants who meet the requirement that they be nationals or enterprises of a Party, in this case the United States. That takes us to the question whether there is a Claimant who 'seeks to make, is making or has made an investment'".<sup>103</sup>

125. It is crystal clear that in the above paragraph the *Bayview* tribunal was not making any conclusion or decision on *ratione personae* jurisdiction even *prima facie*, or making an *obiter dictum* statement on the issue of the nationality of claimants in general within NAFTA. The paragraph contains a mere logical explanation of the choice made by the *Bayview* arbitral to consider certain relevant aspects concerning the territoriality requirement of the "investments" protected under NAFTA (a *ratione materiae* issue) *prior* to the consideration of the *ratione personae* nationality requirement of the "investors". In the exercise of competence on its own competence (*Kompetenz-Kompetenz*), an international tribunal enjoys discretionary authority to choose the order of consideration of jurisdictional requirements, or of preliminary objections, concerning its jurisdiction. The confusion cultivated by the Majority Decision on the referred sentence of the *Bayview* tribunal must be exposed and dispelled because we are not confronted here by a "arbitral decision or award" and still less, obviously, by a "judicial decision" in the sense of Article 38(1)(d) of the Statute of the ICJ.

126. The *Bayview* award went on to consider whether the farms and facilities in Texas of the *purported* claimants qualify them not simply as holders of an "investment" in the general sense

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<sup>101</sup> *Ibid*, para. 324 (first sentence), citing *Bayview*, *supra* note 77, para. 89.

<sup>102</sup> *Ibid*, para. 324 (second and third sentences).

<sup>103</sup> *Bayview*, *supra* note 77, para. 89.

but as holders of an “investment” in the sense of the definition of Article 1139 of NAFTA, entitling as such an investor to initiate under NAFTA the specific claims of the case against Mexico.<sup>104</sup> On the basis of the text of that definition, the *Bayview* tribunal concludes that the claimants were investors in Texas, but not “foreign investors” in Mexico, because “the economic dependence of an enterprise upon supplies of goods – in this case, water – from another State is not sufficient to make dependent enterprise an ‘investor’ in that other State”.<sup>105</sup> NAFTA Article 1101(a) and (b) on the scope and coverage of the Treaty excludes “domestic investors” and, consequently, NAFTA protection covers “foreign investments” of another NAFTA Contracting Party only.

127. Thus, for the *Bayview* tribunal the crucial question to be answered was: “whether the claimants have an investment ‘in the territory of (Mexico)’”<sup>106</sup> - namely in the territory of a NAFTA Party other than the Party of whom the investors were *purportedly* nationals<sup>107</sup> – finding ultimately that the tribunal lacks jurisdiction over all of the claims of the claimants because:

[...] it has not been demonstrated that any of the Claimants seeks to make, is making or has made an investment *in Mexico*. That being the case, the Tribunal does not have the jurisdiction to hear any of these claims against Mexico because the Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven, as defined by NAFTA Article 1101”<sup>108</sup> (emphasis in original).

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128. The definition of the term “investor” in NAFTA (Article 1139) does not explicitly requires the investor to make the investment in the territory of another NAFTA State, but it requires indeed that the investor makes an “investment” and the investments covered by NAFTA Chapter Eleven are investments of investors of a Party in the territory of another Party to NAFTA (Article 1101(1)(b)). In the instant case, *the definitions of both “investment” and “investor” of Article 1(1) and (2) of the Argentina-Italy BIT incorporates expressly the territorial requirement to text of the respective definitions of those terms*. The one concerning “investor” reads as follows:

“The term ‘investor’ means any physical or juridical person of one Contracting Party that has made, is making or has assumed an obligation to make investments in the territory of the other Contracting Party.”

One cannot but wonder about what international law rules of treaty interpretation have been applied by the Majority Decision to uphold general *ratione materiae* jurisdiction in the face of the text of the definition of the term “investor” in Article 1(2) of the BIT.

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<sup>104</sup> *Ibid*, para. 91

<sup>105</sup> *Ibid*, para. 104.

<sup>106</sup> *Ibid*, para. 112.

<sup>107</sup> *Ibid*, para. 105.

<sup>108</sup> *Ibid* para. 122.



129. The Majority Decision does not explain in the section of chapter III concerning the nationality requirement how it is possible to declare the existence of *ratione personae* jurisdiction in the case (general or otherwise) while bypassing the territoriality requirement of *the text* of Article 1(2) of the 1990 Argentina-Italy BIT where the term “investor” is defined. The territoriality requirement is considered by the Majority Decision in its chapter IV (“Existence of a Legal Dispute Directly Arising Out Of An Investment”) (paragraphs 496 and ff) but the conclusions on the nationality issue of chapter III (paragraphs 322-326) do not refer at all to the territorial requirement of the definition of “investor” and make no cross-reference to the relevant paragraphs of chapter IV.

130. However, it did not prevent the Majority Decision from doing what amounts to a prejudging, namely declaring the existence of jurisdiction *ratione personae*, with the sole caveat of whether a more detailed analysis “regarding the nationality and domicile requirements” would raise doubts “as to whether certain individual Claimants qualify” *providing the Respondent, in the further course of the proceedings, submit relevant information to the Tribunal*.<sup>109</sup>

131. Having made *disappear* by a sleight of hand the territoriality requirement of the definition of the term “investor” of the BIT within the consideration of the nationality issue, the Majority Decision does *refer* to that requirement in the context of its consideration of the Respondent’s claims regarding the lack of standing of the Claimants together with other heteroclitic arguments such as: the remoteness of the Claimants as holders of security entitlements, the decisions of Italian domestic courts regarding claims brought by the Claimants against banks and financial intermediaries, and NASAM’s role in present proceedings. It is in this context that the Majority Decision sends the reader back to the consideration of the territoriality requirement made with respect to the term “investment” within chapter IV of the Majority Decision, in the following terms:

“[...] the Respondent’s related argument that the Claimants are not investors within the meaning of Art. 1 para. 2 of the Argentina-Italy BIT because they did not make an investment in the territory of the Respondent, as expressly provided for in that rule [...], will be dealt with in further detail, and disposed of, in the context of discussing the analogous territoriality requirement contained in Art. 1 para. 1 of the Argentina-Italy BIT regarding the concept of ‘investment’. Respondent itself concedes in that regard that ‘investors do not exist in isolation from investments’ so that, in relation of the question at hand, the Tribunal would refer *mutatis mutandis* to the pertinent Chapter in the present Decision”.<sup>110</sup>

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132. In any case, the territoriality requirement of the definition of “investor” in the Argentina-Italy BIT raises, unquestionably and mainly, an issue of jurisdiction *ratione personae* (not of Claimants’ standing) as confirmed by the fact that in chapter IV(2)(c)(2) of the Majority Decision the territoriality requirement is treated as a jurisdictional requirement, and rightly so. To avoid doing it in the present context is but one example of the Majority Decision tendency to

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<sup>109</sup> Majority Decision, para. 325.

<sup>110</sup> *Ibid*, para. 328.

sidestep jurisdictional requirements as much as possible or to keep them in the dark. The case-law confirms however that the territoriality requirement, whatever its field of application, including in relation to the definition of the term “investor”, raises a jurisdictional requirement. Reference has already been made above to the *Bayview* award in this regard. In the same vein, the 2008 *Canadian Cattlemen* award is relevant, whose operative part reads as following:

“This Tribunal does not have *jurisdiction* to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants’ investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investment in the territory of the United States of America”<sup>111</sup> (*emphasis supplied*).

133. All this cannot but lead to the conclusion that the Majority Decision has entered into prejudging when in paragraph 322 of chapter III the Tribunal concludes “no doubts regarding the jurisdiction *ratione personae* of the Centre in relation to the present case have become manifest”. The Majority Decision declares also that “photocopies of passports or identity documents or certificates of incorporation will suffice to adequately substantiate the Italian nationality requirement for natural and juridical persons, [...] as long as there are no relevant counter-indications and as long as the Tribunal is satisfied that the documents are in order.”<sup>112</sup>

134. But, it is a fact that the Tribunal has not yet proceeded to a detailed assessing of the probative value of the said documents, or of any other piece of evidence submitted in this respect, and nevertheless the majority proclaims itself *in the abstract* already satisfied to the point of concluding that *ratione personae* jurisdiction has been established at the least in a general sense.

135. Certainly, it was not within the present phase for the Tribunal to make the needed detailed examination and verification of that documentation in so far as it relates to individual Claimants. But then, the whole of the *ratione personae* jurisdictional issue (general and individual) should have been joined to the following merits phase, so as to avoid any kind of unwanted prejudging.

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136. When the Majority Decision affirms, as indicated, that at least some of the Claimants qualify as “nationals of another Contracting State” in the meaning of Article 25(2) of the ICSID Convention and of Article 1(2) of the Argentina-Italy BIT, it is making an assumption, no more,<sup>113</sup> in order to be in the position of declaring as a general finding that: “[...] the Claimants have, as a matter of principle, successfully substantiated that they have Italian nationality”.<sup>114</sup> Such a finding when the examination and verification of the relevant submitted documental evidence is still pending cannot be characterized but as a prejudgment. Why to do such an obvious prejudging? There must be some urgent purpose for the majority to do so. Looking to the economy of chapter III of the Majority Decision, it appears that the answer to the question is

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<sup>111</sup> *Canadian Cattlemen*, *supra* note 87, Decision 1 on page 124.

<sup>112</sup> Majority Decision, para. 319.

<sup>113</sup> *Ibid.*, para. 324.

<sup>114</sup> *Ibid.*, para. 326.

that the majority intended to make easier the burden of proof for the Claimants at the expense of burdening the Respondent with a heavier lot.

137. Thus, the prejudging is far from being neutral from the standpoint of the equality of the Parties in the proceeding. Through the said so-called general finding, the majority does make a partial reversal of the burden of proof in favour of the Claimants, as expressly reflected in paragraphs 312 and 325 of the Majority Decision. It tries to justify its behave by stating that it was taking as “guidance” the finding of the *ad hoc* committee for annulment the 2007 *Soufraki v. United Arab Emirates* award, one of the exceptional cases in which ICSID tribunals have reviewed nationality documentation issue by State officials.<sup>115</sup>

138. Here again the case-law invoked cannot be more negative for the Majority Decision, because the application for annulment of the 2002 award filed by the claimant, Mr. Soufraki, was dismissed by a majority of the *ad hoc* committee. Furthermore, the 2007 *Soufraki* Decision as a whole provides relevant information on case-law and legal authorities<sup>116</sup> to the effect that an international tribunal is fully empowered to make its own nationality determinations, even if its decision contradicts official government documents, including:

1. The 1904 *Flutie* case (United States-Venezuela Claims Commission): “Whatever may be the conclusive force of judgments of nationalizations under the municipal laws of the country in which there are granted, international tribunals, such as this Commission, have claimed and exercised the right to determine for themselves the citizenship of claimants from all the facts present” (*Soufraki*, para. 68).
2. The 1958 *Flegenheimer* Commission: “It is thus not sufficient that a certificate of nationality be plausible for it to be recognised by international jurisdictions; the latter have the power of investigating the probative value thereof even if its ‘prima facie’ content does not appear to be incorrect” (*Soufraki*, para. 71).
3. The *Champion Trading v. Egypt* (ICSID Case No. ARB/02/9): “Although the tribunal was presented with conflict and contradictory documents regarding the claimants’ nationalities, it did not investigate the accuracy of any of them. Nonetheless, it did make its own independent determination as to the nationality of the claimants by considering the relevant facts and evidence in the light of the applicable law, which was Egyptian law” (*Soufraki*, para. 72).
4. Aron Broches’ statement during the drafting of the ICSID Convention: “There seemed to be a consensus at all four meetings that the certificate of nationality should be regarded merely as *prima facie* evidence rather than ‘conclusive proof’ and that it should be left to a tribunal, ultimately to decide questions of nationality” (*Soufraki*, para. 73).
5. R. Jennings and A. Watts, *Oppenheim’s International Law*, 9th ed., Harlow, Longman, 1992, pp. 854-55: “An international tribunal called upon to apply rules of international law

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<sup>115</sup> *Ibid*, para. 318.

<sup>116</sup> *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on the Application for Annulment of 5 June 2007 (“*Soufraki*”).

based upon the concept of nationality has the power to investigate that state's claim that a person has its nationality" (*Soufraki*, para. 74).

6. Nathan, K.V.S.K., *The ICSID Convention. The Law of the International Centre for the Settlement of Investment Disputes*, (Juris Publishing, 2000), pp. 86-7: "[...] if there is a real challenge from a contracting State as to the nationality of a foreign investor, an ICSID Arbitral Tribunal will be bound to investigate the circumstances of the investor's acquisition of the nationality of a contracting State in order to satisfy itself that the investor is a genuine national of a contracting State and that it has jurisdiction over him" (*Ibid*).

7. Christoph Schreuer, *The ICSID Convention: A Commentary* (2001): "A certificate of nationality will be treated as part of the 'documents and other evidence' to be examine by the tribunal in accordance with art. 43. Such a certificate will be given its appropriate weight but does not preclude a decision at variance with its contents" (*Ibid*).

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139. The prejudgment entered by the Majority Decision by declaring as a general finding the existence of *ratione personae* jurisdiction in the present case was a *motu proprio* conclusion. It was adopted at the present phase without a procedural need to do so, as well as without due verification of the submitted relevant evidence. Furthermore, as already explained, it is not procedurally a neutral conclusion. By establishing a kind of presumption in favour of Claimants in matters of nationality and domicile it alters the normal allocation of the burden of proof as between the Parties in those matters.

140. This is reflecting in the Majority Decision as follows: "The Tribunal concludes that the burden of proof that the Claimants are Italian nationals falls on the Claimants themselves, while the burden to prove the negative elements – i.e. of not being Argentine (or for the matter, dual) nationals and of not having been domiciled in Argentina for more than two years would fall on the Respondent's side".<sup>117</sup> As formulated, this conclusion, in my opinion, makes a departure from a well-settled principle of international law which the ICJ has declared in the following terms, namely:

"Ultimately, however, it is the litigant seeking to establish the existence of a fact who bears the burden of proving it; and in cases where evidence may not be forthcoming, a submission may in the judgment be rejected as unproved, but it is not to be ruled out as inadmissible *in limine* on the basis of an anticipated lack of proof".<sup>118</sup>

141. In the present case, the Claimants are the Party which seeks to establish the fact of being "protected investors" and, therefore, by the operation of international law, the burden of proof of all positive and negative relevant elements confirming in the case the nationality and domicile requirements set forth by the applicable law, as well as of the validity of their consent to ICSID

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<sup>117</sup> Majority Decision, para. 312.

<sup>118</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment of 26 November 1986, I.C.J. Reports 1984, p. 437, para. 101. See also, *Avena and Other Mexican Nationals (Mexico v. USA)*, Judgment of 31 March 2004 ("Avena"), I.C.J. Reports 2004 (I), para. 55.

arbitration and of being a “protected investor” at the time of the filing of the Request for Arbitration at ICSID corresponds to them *in the first place*.

142. The non-existence of a “documentation obligation” concerning nationality in Rule 2 of the ICSID Institution Rules is irrelevant for the determination of the burden of proof which is a matter regulated by international law. Now, when does the burden of proof correspond to the Respondent? When in the process of rebutting evidence submitted by Claimants, the Respondent asserts affirmatively a fact or facts in defence, as the United States did in the *Avena* case when it contended that particular arrested persons of Mexican nationality were, at the relevant time, also United States nationals.

143. In that case, Mexico was not supposed to submit evidence on the fact that the Mexican arrested persons were not United States nationals because the applicable law (Article 36(1) of the 1963 Vienna Convention on Consular Relations) did not impose such an obligation to the “sending State” of a consular post, namely to Mexico in the case. The ICJ took, therefore, the right decision when deciding that it was for the United States to demonstrate the United States nationality of the persons concerned and to furnish to the Court with all information on the matter.<sup>119</sup>

144. In the instant case, however, the applicable ICSID Convention imposes on a natural person private investor the burden to prove that s/he is a national of a Contracting State on the given dates *and in addition, that on these dates s/he does not have the nationality of the Contracting State party to the dispute* (Article 25(2)(a)); and point 1 of the Additional Protocol to the Argentina-Italy BIT, *inter alia* that *at the time of making the investment s/he has not maintained domicile for more than two years in the territory of the Contracting Party where the investment was made*.

145. Thus, the Majority Decision erred when in its paragraph 312 it allocated to the Respondent’s side the burden of proof: “of (the Claimants) not being Argentine (or, for the matter, dual) nationals and of not having been domiciled in Argentina for more than two years”. I consider further that Rule 34(1) of the ICSID Arbitration Rules does not allow ICSID arbitrators to disregard fundamental rules of procedure of international law when weighing evidence in a given case.

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<sup>119</sup> *Avena*, paras. 55-7.

### **Chapter III - The “investment” requirement of Article 25(1) of the 1965 ICSID Convention and the definition of “investment” of Article 1(1) of the 1990 Argentina-Italy BIT: an analysis of the “protected investments” (jurisdiction *ratione materiae*)**

146. The Majority Decision devoted its Chapter IV to the jurisdiction *ratione materiae*, an outstanding issue in the present case in the light of the novelty of the subject-matter of the Claimants’ claims, namely “security entitlements” related to sovereigns bonds issued by the Argentine Republic before its sovereign default in December 2001 and the restructuring process of the sovereign debt relating thereto.<sup>120</sup> The overall conclusion of the Majority Decision on the issue is formulated in the following terms:

“Having rejected all preliminary objections of the Respondent as to the purported lack of jurisdiction *ratione materiae* and having assured itself that all requirements of the jurisdiction *ratione materiae* are satisfied with regard to the pertinent bonds and security entitlements, both under Art. 25 of the ICSID Convention and Art. 1(1), of the Argentina-Italy BIT, the Tribunal concludes that there exists jurisdiction [*ratione materiae*] of the Centre and, for that matter, competence of the present Tribunal to decide the case at hand.”<sup>121</sup>

147. I am in full disagreement with the above overall conclusion which is, in turn, based upon a series of particular conclusions all along Chapter IV of the Decision in which the majority takes quite a lot of liberties with respect (i) to the identification and grouping of the underlying economic operations at stake in the present case and (ii) to the interaction and implications of the use of the term “investment” in the two conventional instruments referred to in the quotation (the so-called *double-barrelled* test). The first aspect entails essentially the weighing for characterization purposes of a chain of factual transactions, while the second is an operation that is legal in nature involving the interpretation and application of treaty provisions in accordance with the VCLT.

148. The Majority Decision - which admits expressly in the instant context to be guided by the 2011 *Abaclat* decision - bases its conclusions on the jurisdiction *ratione materiae* on the three following flawed main propositions: (i) that the economic transactions at stake would constitute a single economic operation which as a whole would qualify as an investment; (ii) that the notion of “investment” in Article 25(1) of the ICSID Convention would be essentially subjective, being subsumed for all practical purposes under the concept of “consent” as defined in the BIT

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<sup>120</sup> The restructuring process was completely voluntary in nature. There is no bankruptcy legislation for sovereign States and, therefore, there is no way to require creditors to accept a proposal for the restructuring of a State’s debt, regardless of the percentage of such creditors that are willing to do so. Contrary to the typical “cram down” provisions contained in local laws on insolvency, in the Argentine Republic’s restructuring each creditor has the right to reject the proposal for the restructuring of sovereign debt and demand the fulfilment of the legal obligations arising under the terms of his debt instrument. It is precisely in order to preserve these unaffected “contractual rights” of the holdouts that the underwriters of sovereign debt instruments issued abroad insist that the debt must be governed by the legislation of a jurisdiction other than that of the issuer and that legal remedies before courts other than those of the issuer must be provided for (Argentina’s Memorial, para. 46).

<sup>121</sup> Majority Decision, para. 520. The 2011 *Abaclat* decision on jurisdiction and admissibility, *supra* note 4, is the only ICSID arbitral tribunals on sovereign bonds and related security entitlements prior to the present one.

concerned; and (iii) that the examples in (a) to (f) of Article 1(1) of the Argentina-Italy BIT are autonomous provisions susceptible of being interpreted and applied independently of the controlling general definition of “investment for the purpose of the Agreement” set forth in the *chapeau* of Article 1(1) of the BIT.

149. It suffices that one of these propositions be wrong for the building so construed by the Majority Decision to fall apart.

### **1. The alleged general economic unity of the transactions concerned**

150. According to the Majority Decision, “the Tribunal is convinced that the process of issuing bonds and their circulation on the retail, i.e. financial, markets in the form of security entitlements are to be considered an economic unity and must be dealt with as such a unity for the purpose of deciding whether disputes relating to financial instruments of this kind ‘aris[e] directly out of an investment’ and are therefore covered by Art. 25 of the ICSID Convention and Art. 1 of the Argentina-Italy BIT”.<sup>122</sup>

151. By the dogmatic characterization of these two kinds of unconnected factual economic transactions (i.e. Argentina’s selling of the bonds in the international primary market and Claimants’ purchase of the security entitlements in the in the Italian retail market from Italian banks having acquired the bonds apparently in the international secondary market) taken together as a “single economic operation” and the artificial extrapolation to the whole of some ICSID case-law constructions for other situations based upon the concept of the “general unity of an investment operation” (essentially, decisions on jurisdiction of *Fedax*, *CSOB*, and *Enron Creditors Recovery*). In this way, the Majority Decision denies altogether the distinctions to be made in the real world, on one hand, between “bonds” and “security entitlements” and, on another hand, between “primary market” and “Italian retail market”, as different economic and financial realities which in the present case are, further, unconnected with each other.

152. The Majority Decision rejects as well the Respondent’s submission to the effect that the Claimants lack standing in the present case because *inter alia* their purchases from the Italian banks of the security entitlements concerned were alien and too remote transactions with respect to the Argentine Republic’s selling of the bonds in the international primary market. In my opinion, the alien and remoteness arguments, as factual circumstances of the case, are *prima facie* quite convincing and, furthermore, the Claimants failed to prove to my satisfaction that their purchasing of the security entitlements were conceived or perceived at that time by them to conform a “single economic operation” or, still less, an “indivisible whole” with the selling of the pertinent bonds by Argentina in the primary market or vice versa.

153. Those kinds of transactions, as well as the social actors, purposes, subject-matters, timing and place of the transactions at stake differ from each other in every respect. Moreover, for reasons explained below, I consider that neither of the two individual components of the so-

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<sup>122</sup> Majority Decision, para. 429.

called “whole” could on their own be economic transactions susceptible of being characterized as an “investment operation” in the sense of the ICSID Convention and the Argentina-Italy BIT.

154. The so-called “single economic operation” is in fact affirmed by the Majority Decision without any reference to or assessment of the evidence adduced by the Respondent concerning the process of issuing and circulation of the bonds and without taking into consideration the legal framework and structures of the different sequential transactions at issue. For example, the Tribunal had at its disposal several experts’ reports and statements on the mechanism for the issuance and placement, as well as for the circulation and holding of the bonds, submitted by Argentina.<sup>123</sup> This information was generally uncontested by the Claimants.<sup>124</sup> However, there is not apparently a single reference to that evidence in the Majority Decision. The same happens with the Respondent’s adduced legal authorities’ pronouncements relating to the distinction between “bonds” and “security entitlements”. In this respect, for example, the Majority Decision provides not answer to the question of whether when a “security entitlement” is acquired by a holder does the latter “not take it over from some predecessor in interest, (as purchasers in the direct holding system do), [or] instead, (the) security entitlement is a new item of property, minted just for (the said holder). By the same token, when an entitlement holder liquidates a position with the securities intermediary, the security entitlement is simple extinguished, rather than being transferred to some successor in interest.”<sup>125</sup>

155. The distinction between “bonds” and “security entitlements” is presented by the Majority Decision as mere “technical nuances” because in its view “they make only sense together”. I do not see why this circular argument would make sense either. In fact, the pertinent “bonds” and “security entitlements” are materially and legally different “financial products” issued at different moments of time, in different markets and by two different juridical persons, namely the Argentine Republic for the bonds and the Italian banks for the security entitlements respectively. What happens is that the Majority was in need to invoke something in order to be in the position to reject the Respondent’s submission to the effect that the dispute was not “directly” related to an investment, otherwise Claimants’ case would fall altogether, the latter having admitted that their purchases of the security entitlements from the Italian banks standing alone would not qualified as an “investment” under the ICSID Convention and the Argentina-Italy BIT.

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156. This general description of the circumstances of the present case shows already that they are not similar to the factual and legal environment where the ICSID case-law arbitrators referred to above elaborate the invoked doctrine of the “general unity of an investment operation”. To begin with, for the proclamation of the “general unity” of a given series of transactions, it is a must that, at the least, one or some of those involved be undisputable an “investment operation”. Then,

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<sup>123</sup> For example, Argentina submitted with its Memorial: a Witness Statement of William Burke-White; an Expert Report of Barry J. Eichengreen; a Testimonio de Federico Molina, a Testimonio de Noemi C. La Greca; and a Witness Statement by Ambassador Mr. Guillermo Nielsen.

<sup>124</sup> Claimants’ Rejoinder on Jurisdiction, para. 96.

<sup>125</sup> C. Bjerre and S. Rocks, *The ABCs of the UCC: Article 8. Investment Securities*, 2nd ed., Chicago, Ill. : Section of Business Law, American Bar Association (2004), at p. 36.



in the instant case, none of the economic transactions at stake qualified as a protected investment under the ICSID Convention and/or the Argentina-Italy BIT. The proclaimed economic unity of the transactions at stake in the present case affirmed by the Majority Decision has in fact no other basis than the conclusions of the 2011 *Abaclat* decision, namely:

- The bonds at stake were always meant to be divided into smaller negotiable economic values, i.e. securities.
- The underwriters would not have subscribed to any of the bonds, without previously ensured that the bonds were re-sellable to the intermediaries and their end customers.
- The security entitlements are the result of the distribution process of the bonds through their division into a multitude of smaller securities representing each a part of the value of the relevant bond.
- The security entitlements have no value per se, i.e. independently of the bond.
- The fact that the distribution process happens electronically, without the physical transfer of any title, does not change anything to the fact that rights effectively passed on to acquirers of security entitlements in the bonds.<sup>126</sup>

157. It is against this background that, according to the Majority Decision, to split bonds and security entitlements “into different, only loosely and indirectly connected operations would ignore the economic realities and the very function of the bond issuing process”. The bond issuing State would have assumed, and counted on the fact, that “persons will purchase shares of the bonds in the secondary market, in the form of security entitlements, since otherwise the bond could not have been successfully issued in the first place”.<sup>127</sup> It may be, but there is no evidence adduced in the present case supporting the existence of the alleged connection between the issuance of the bonds by Argentina and the issuance of the security entitlements by the Italian Banks or, for the matter, of the alleged Respondent’s assumption at the relevant time. No factual and/or legal causality connection between the issuance of the bonds and the issuance of the security entitlements has been proven by Claimants in the instant proceeding.

158. I do not see how the Majority can attribute to the Respondent such an assumption in the light of the evidence submitted by the Parties in the present case. In the first place, the proof that the purchase of the pertinent bonds by the placement banks (or underwriters) in the primary market would constitute an investment under the ICSID Convention has not been administered. Then, as indicated, if such an assumption fails the unity of the purported “investment operation” plunges headlong. Moreover, mere *portfolio investments* made by the Claimants in the Italian retail market do not amount, as it will be shown below, to the kind of transactions falling under the jurisdiction of the ICSID Convention either.

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<sup>126</sup> Majority Decision, para. 424, citing *Abaclat*, *supra* note 4, para. 364).

<sup>127</sup> *Ibid*, para. 425.

159. Furthermore, the logical possibility of maintaining that *contribution, duration* and *risk* requirements (referred to by *Fedax v. Venezuela* as the basic features of an investment)<sup>128</sup> were satisfied is excluded by a fact recognized by Claimants, namely that the underwriters or placement agents would only hold those securities for seconds in the current mechanism for the issuance and circulation of financial instruments. They only acquired or agreed to acquire such bonds when they were certain that they could be sold immediately after the issuance.<sup>129</sup> In other words, Claimants cannot argue, on one hand, the unity of a purported “investment operation” and, on the other hand, the speeded placement and circulation of the bonds in the markets since *duration* is one of the basic distinguishing features of an “investment” under the ICSID Convention.

160. There are precisely those and others capital market realities which makes me to side with Professor Abi-Saab when in the *Abaclat* case he rejects as “simplistic” the affirmation of the majority in that case that the bonds and security entitlements are part of one and the same economic operation when, in fact, everything indicates that one is here in the presence of at least two different markets with different actors and different financial products, as explained masterly in the following crystal-clear paragraphs of Professor Abi-Saab’s dissenting opinion:

“70. The award fails clearly to distinguish between purchases on the primary market, involving the issuer (Argentina) and the first buyers of the issue (the underwriters), and the secondary market, where previously issued securities are trade, without any involvement of the sovereign debtor. An ICSID tribunal cannot look only at the economics of a transaction, without taking into consideration its legal framework and structure, in order to determine whether it qualifies as a protected ‘investment’ or not.

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

72. The Tribunal is thus bound to look at the circumstances of the individual purchases of the security entitlements, and their traceability to - i.e. the strength or tenuousness of their legal *nexus* with - Argentina, before it can decide whether the dispute over each of them ‘aris[es] directly out of an investment’; in other words whether they satisfy the requirements of a covered or protected ‘investment’ under the Convention and the BIT, on which hinges its jurisdiction *ratione materiae*.”

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<sup>128</sup> *Fedax N.V. v. Republic of Venezuela* (ICSID Case No. ARB/96/3), Decision on Objections to Jurisdiction of 11 July 1997 (“*Fedax*”), para. 43.

<sup>129</sup> Respondent’s Post-Hearing-Brief, para. 127.

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161. Regarding the alleged pertinent case-law other than *Abaclat* (2011), the Majority Decision invokes in support of the application of the criterion of the general unity of the purported “investment operation” the decisions on jurisdiction of *Fedax* (1997), as well as of *CSOB* (1999) and *Enron Creditors Recovery* (2004), described as the “jurisprudence” applicable to the facts of the present case.<sup>130</sup> However, in none of these decisions such a criterion was invoked or applied in circumstances similar *mutatis mutandis* to those prevailing in the present case. *Fedax* refers to the criterion as emphasized by the *Holiday Inns v. Morocco* tribunal with respect to “loan contracts that had their origin in agreements separate from the investment”.<sup>131</sup> Moreover, the issue of the relationship between the original Venezuelan holder of the promissory notes and *Fedax* is discussed in the decision with reference to the eventual effects of the “endorsement” of the notes and not with respect to the applicability of the investment unity doctrine.<sup>132</sup> Lastly, as rightly underlines by other case-law and doctrine, the *Fedax* decision confused the traditional criterion of “*risk*” of the concept of “investment” of the ICSID Convention with a different risk, namely the risk for non-performance of the agreement or contract in question by the other partner.

162. In *CSOB*, a case related to the partition of Czechoslovakia and the return to market economy, the Slovak Republic’s undertaking and the CSOB loan concerned were considered to form an integrated whole within the process defined in a Consolidation Agreement concluded between the Minister of Finance of the Slovak Republic, the Minister of Finance of the Czech Republic and the commercial bank CSOB, the basic feature of that Agreement being the development of the role and activities of CSOB in both new Republics.<sup>133</sup> Moreover, the *CSOB* decision misapplied the traditional criterion of “*contribution*” by extending it to the sharing of non-performing receivables. Finally, in *Enron Creditors Recovery* the investment concerned was constituted by an original license on gas transport which evolved over the time and was followed by subsequent agreements on tariffs adjustments concluded between government officials and industry representatives, namely between the parties to the dispute.<sup>134</sup> Nothing of that kind occurred in the present case.

163. The above case-law does not provide therefore any basis for the extrapolation to the present case of the criterion of the unity of the “investment operation”. In fact, there is no room to do so in the instant case because it is not possible to qualify the issuing and circulation of the pertinent bonds as an investment under the ICSID law, unless basic elements of an international investment relationship such as the existence of a “host State of the investment” and a “private foreign investor of the other Contracting Party to the BIT” are misrepresented, as does the Majority Decision.

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<sup>130</sup> Majority Decision, paras. 426, 427 and 429. I do not consider that the guidance provided by the ICSID arbitral case-law is “a subsidiary means for the determination of rules of law” in the sense of the “judicial decisions” referred to in Article 38(1)(d) of the Statute of the International Court of Justice.

<sup>131</sup> *Fedax*, *supra* note 128, para. 26.

<sup>132</sup> *Ibid.*, paras. 39 and 40.

<sup>133</sup> *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Objections to Jurisdiction of 24 May 1999 (“*CSOB*”), paras. 82-91.

<sup>134</sup> *Enron Creditors Recovery*, *supra* note 26, Decision of 30 July 2010 on the Application for Annulment, paras. 37-46.

## 2. The characterization of the affirmed general economic unity of the transactions concerned as an “investment operation”

164. While invoking “economic realities” the Majority Decision tries in fact to replace reality by its own “virtual constructions”, so as to provide some support for its conclusions. For the Majority, if the issuing and circulation of sovereign bonds in international capital markets do not fit well into one or another aspect of the ICSID investment law, the solution would consist in reformulating the latter so as to present the issuing and circulation of the bonds to be in conformity with its subjective representation of the law.

165. Concerning, for example, the *nature of the transactions* at stake, the Majority Decision considers without further ado that the Claimants have correctly characterized them as “*overall loans*” which made funds available to finance the Respondent’s budgetary needs, with each Claimant holding a proportional share of that investment,<sup>135</sup> although the Decision admits also that “the specific question of the Centre’s jurisdiction over loans seems to have been left open”<sup>136</sup> at the time of the conclusion of the ICSID Convention. In any case, the characterization by the majority of the pertinent “sovereign bonds” as “loans” and, in turn, “these loans together” as an “investment” under Article 25(1) of the said Convention finds no support in the most conspicuous authors and arbitral decisions.

166. Even those inclined to subsume the question of the *nature* of the transaction or transactions (regarding the meaning and scope of the term “investment” in Article 25(1) of the ICSID Convention) under the requirement of the *consent* of the parties (questioning thereby the existence of an objective definition of the term “investment”) admit that not all “loans” qualify as an “investment”. Delaume, for example, stated that: “[...] it has been assumed from the origin of the Convention that loans, *or more precisely those of a certain duration as opposed to rapidly concluded commercial financial facilities*, were included in the concept of ‘investment’”<sup>137</sup> (*emphasis supplied*). Likewise, the *Fedax* decision underlines that: “[...] loans qualify as an investment within ICSID jurisdiction, as does, *in given circumstances*, the purchase of bonds. Since promissory notes are evidence of a loan and a rather a typical financial and credit instrument, there is nothing to prevent their purchase from qualifying as an investment under the Convention *in the circumstances of a particular case such as this*”<sup>138</sup> (*emphasis supplied*).

167. Thus, for *Fedax* the pertinent promissory notes were a form of “loan” or “credit” qualified as an investment, but, not every loan or credit would fall for *Fedax* under the category of a protected “investment” pursuant to the ICSID Convention. In other words, they may well be loans or credits excluded from that category and being, therefore, mere ordinary commercial

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<sup>135</sup> Majority Decision, para. 425. In their Post Hearing Brief of 29 March 2011, Claimants recalled: “that the investment at issue is the overall loans whereby Argentina financed its budgetary needs and which are represented by the bonds issue in respect thereof. The bonds are an indebtedness of Argentina. Each Claimant holds a proportionate share of the initial investment corresponding to the face value of the bonds held by it, plus interests” (para. 91). In some occasions, Counsel for the Claimants argued that a holder of a security entitlement was in a position *mutatis mutandis* similar to the shareholders with respect to the corporation concerned. I do not share those Claimants’ views.

<sup>136</sup> Majority Decision, para. 454.

<sup>137</sup> Quoted in *Fedax*, *supra* note 128, para. 23.

<sup>138</sup> *Fedax*, para. 29.

transaction(s) even if they could involve a public interest as it would be, for example, the general financing of given State, purpose which should not be confused with loans or credits linked to investments undertakings in the territory of a host State and relating to the economic development of the latter.

168. In practice, it appears that ICSID arbitral tribunals have no problem to admit loans within the concept of “investment” of the ICSID Convention when the pertinent credit transaction is linked to or has, at the least, some relationship with a present or future economic activity or venture undertaking unfolding in the host State in question. For example, in the *Oko Pankki Oyj and others v. Estonia* case, the tribunal considered that a loan for the funding of a new fish-processing factory in Tallin (on Estonian territory), by itself, might even arguably be an investment for ICSID Convention purposes, but taken together with the Loan Agreement and (if necessary) the Guarantees, the Loan, as principal part of an overall operation, qualified as an investment under Article 25(1) of the ICSID Convention.<sup>139</sup>

169. Even in the case of the arbitral decisions more akin to admit certain “loans” under the concept of “investment” of the ICSID Convention - as the *Fedax* and *CSOB* decisions - the tribunals take care to underline somehow that the overall operation entailed ultimately some kind of economic activity, works or services in the host State. No economic activity or venture is present at all in the instant case in any territory of any host State *in none of the two components (selling of bonds and purchases of security entitlements) of the so-called “investment operation”*.

170. In contrast, the *Fedax* decision takes care in underlining that the “promissory notes” concerned were issued under the Law on Public Credit of Venezuela whose terms specifically governed public credit operations aiming at raising funds and resources to undertake, *inter alia*, “productive works” and “contracting for works and services”,<sup>140</sup> concluding that, “given the particular facts of the case the transaction meets the basic features of an investment”, because “the type of investment involved is not merely a short-term, occasional financial arrangements, such as could happen with investments that come in for quick gains and leave immediately thereafter - i.e. “volatile capital”.<sup>141</sup> In the present case, the Majority Decision by its conclusions on the topic considered allows that volatile capital transactions could be characterized or invoked as “investments” under Article 25(1) of the ICSID Convention, a retrograde involution indeed in my opinion.

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171. The statements of some authors (for example, Mortenson) to the effect that all efforts to eliminate the ICSID Convention’s application to bonds, loans and capital flow were rejected are, in my opinion, subject to caution because they frequently ignore the time element in the process of negotiating and drafting the Convention. It is true that some textual suggestions of Philippines, Burundi and Austria aiming at excluding bonds, loans or capital flow (particularly public loans

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<sup>139</sup> *OKO Pankki Oyj and others v. Republic of Estonia* (ICSID Case No. ARB/04/6), Award of 19 November 2007, para. 208.

<sup>140</sup> *Fedax*, *supra* note 129, para. 42.

<sup>141</sup> *Ibid*, para. 43.

or bonds) from the future convention were not incorporated therein, but the same happened with a statement of Australian aiming at considering them as covered by the future convention.<sup>142</sup> The fact is that that numerous attempts to define investments were made during the negotiations, but none was adopted with respect to any transaction and, therefore, the qualification of given loan or bond as an “investment operation” pursuant to the ICSID Convention must be subject to the same traditional criteria test that any other form of underlying economic transaction.

172. Likewise, statements on the matter or related thereto of Broches and Delaume are frequently quoted without reference to the timing and context in which they were made. For example, when quoted as stating that the *current draft* covered loans, information should be provided enabling the reader ascertaining to what draft are they referring to. It appears that the *first draft* of the Convention contained a definition, quoted in *Fedax*, to the effect that: “(i) ‘investment’ means any contribution of money or other asset of economic value for an indefinite period or, if the period is defined, for not less than five years”,<sup>143</sup> but this definition was not included in the 1965 ICSID Convention.

173. The above considerations advise to distinguish “loans” falling either within the “investment” Article 25(1) of the ICSID Convention and “loans” falling outside the outer limits of that conventional provision. Silence on this distinction is but one of the shortcomings in legal analysis of the Majority Decision taken as a whole. I do not consider right to subsume without further ado the “selling of sovereign bonds” in international capital markets or mere “portfolio investments” in security entitlements as an “ICSID investments” in the sense of the 1965 Washington Convention, unless convinced by a legal demonstration which is missing in the Majority Decision.

174. In any case, the pertinent sovereign bonds and the security entitlements of this case are financial products distinct from each other as well as, in nature and purpose, from “promissory notes” or “loans” in the sense that these terms have appeared in *Fedax* or *CSOB* decisions, respectively. The selling or purchasing of these mere financial products being, in the instant case without any relation whatsoever to a genuine ICSID investment aimed at promoting an economic activity or venture in a given host State, they cannot be qualified but as *ordinary commercial transactions* simply because, as rightly stated by Michael Waibel, those bonds and security entitlements “do not display the typical features of an investment”.<sup>144</sup>

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175. The need for the Majority Decision to endorse Claimants’ arguments as to the qualification of the pertinent sovereign bonds and related security entitlements as “loans” and to consider the transactions at stake “as a whole” a protected ICSID investment explains itself by the very fact that, as admitted by the Claimants, their purchase in Italy of security entitlements from Italian banks are transactions which being transactions between Italian nationals in Italian territory obviously do not qualify as an “investment” under Article 25(1) of the ICSID Convention. They

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<sup>142</sup> Majority Decision, p. 149, footnote 190.

<sup>143</sup> Quoted in *Fedax*, *supra* note 128, para. 23.

<sup>144</sup> Michael Waibel, “*Opening Pandora’s Box: Sovereign Bonds in International Arbitration*”, 101 *AJIL* (2007, No. 4), pg. 722.

fall indeed by that sole feature outside the jurisdiction of the Centre, without prejudice that the transactions in question do not display on their own any of the typical *ratione materiae* features characterising traditionally an investment under the ICSID Convention.

176. In such a situation the only possibility for the Claimants to pass the *ratione materiae* jurisdictional test was to link somewhat the Italian transactions on the acquisition of “security entitlements” in the Italian retail market to the initial purchase by the banks (underwriters) in the primary capital market of the “sovereign bonds” sold by the Argentine Republic, and maintain at the same time, as they did, that such an initial purchase was *indisputably* an investment because “loans” would be transactions falling necessarily and without any reservation or caveat under the scope of the term “investment” in Article 25(1) of the ICSID Convention. The Claimants’ Rejoinder did so in the following terms:

“Simply put, the situation is as follows. The initial purchase by the banks and underwriters of the bonds issued by Argentina is indisputably an investment which satisfies *all requirements* of the definition of investment, in terms of duration, risk, substantial commitment and contribution to the development of Argentina, profits and returns. As permitted by the terms (and as in practically all bond issues), the initial purchaser of the bonds sold them to a vast number of investors on the secondary market, who later may have resold them. The subsequent circulation of the bonds on the secondary market evidently did not deprive the initial ‘investment’ of its quality, nor did it modify its nature”<sup>145</sup> (*emphasis supplied*).

177. This statement calls for some observations. The first is the Claimants’ admission thereby that in the ICSID system the term “investment” has an objective meaning defined by reference to a certain number of requirements generally recognized as constitutive of the notion of “investment” within the system which, as such, operate independently of the parties’ consent requirement. In other words, as stated in the Report of the Executive Directors: “[...] consent alone will not suffice to bring a dispute within (the jurisdiction of the Centre). In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the *nature of the dispute and the parties thereto*”<sup>146</sup> (*emphasis supplied*).

178. Thus, it should be noted that while Claimants and Respondent argued in the present case on the basis of the existence of an objective definition of “investment” in ICSID law, the Majority Decision espouses an extremely subjective approach on the meaning of that term in the ICSID Convention by, first, subsuming it for all practical purposes under the paramount requirement of “consent” and, thereafter, interpreting freely (and in my opinion wrongly) the provisions of Article 1(1) of the Argentina-Italy BIT defining, for the purpose of the latter Agreement, the term “investment”.

179. The second observation is that the Claimants’ argument hinges upon the assertion that the purchase of the pertinent Argentine bonds by placement banks (or underwriters) in the primary market does qualify as an investment under the ICSID Convention. Then, this proposition is legally untenable because *that purchase of the Argentine bonds does not satisfy either the hard*

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<sup>145</sup> Claimants’ Rejoinder, para. 97.

<sup>146</sup> Executive Directors’ Report, para. 25.

core of the objective requirements defining traditionally an “investment” under the ICSID Convention, described succinctly as contribution/duration/risk.

180. So far as “contribution”, it is not controversial as between the Parties that the placement banks or underwriters put the money collected by the selling of the sovereign bonds in the primary market at the disposal of Argentina, but not necessarily *in* Argentina’s economic activities or ventures and/or *for* the particular purpose of the economic development of Argentina.<sup>147</sup> Concerning “duration”, as it was already said above, the placement banks (or underwriters) operating in the primary market held only the sovereign bonds for seconds. With respect to “risk”, the Majority Decision confuses (as *Fedax* did before) the operational risk of an investment with the risk of non-performance of the treaty or contract by the other contractual partner. As the UNCITRAL tribunal *Romak v. Uzbekistan* stated:

“All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing an investment and a commercial transaction.

An ‘investment risk’ entails a different kind of *alea*, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is a ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.”<sup>148</sup>

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181. For the Majority Decision, the fact that Argentina received a given sum of money by selling the pertinent sovereign bonds in international capital markets for budgetary State’s reasons (a general public interest or purpose) appears as having had an unduly determinative role in the qualification of the transactions concerned as ICSID investments. Originating in *Fedax*’s erroneous *public interest* test, that criterion is unwarranted.<sup>149</sup> Otherwise, every ordinary commercial transaction by a government - by the very fact of being “governmental” - would be an “ICSID investment”, a conclusion manifestly absurd or unreasonable.

182. In any case, one does not find in the Majority Decision any legal or economic analysis on the nature of the initial transaction between the Argentine Republic and the placement banks (or underwriters) allowing the majority to conclude as it does. Even the *Fedax* tribunal noted, as already indicated, that “bonds” would qualify as investment in “given circumstances”<sup>150</sup> only and said nothing about “sovereign bonds”. As to the latter it should be recalled that “sovereign

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<sup>147</sup> The Claimants holders of the security entitlements did not transfer money into Argentina or put money at the disposal of Argentina in any form at any place.

<sup>148</sup> *Romak S.A. v. The Republic of Uzbekistan* (PCA-UNCITRAL Arbitration Rules), Award of 26 November 2009 (“*Romak*”), paras. 229-30.

<sup>149</sup> Waibel, *supra* note 144, p. 721.

<sup>150</sup> *Fedax*, *supra* note 128, para. 29.



bonds” are public bonds indeed, but not all “public bonds” are sovereign bonds a confusion which is not always noted as it should be.

183. By issuing and selling in accordance with contemporary international practice, the Argentine Republic created and made circulate in effect “*financial products*” of her own as a means of getting in the primary market liquidity for funding the State’s general budgetary needs. Once issued, Argentina received the money looked for by selling the said “product” to placement banks (or underwriters) who, in turn, resell generally the bonds to other banks or institutions (although the underwriters may keep the bonds or some of them in their own portfolio). The instrument embodying that product called “sovereign bond” or “bond” has a given nominal value to be reimbursed on maturity, earning interests in the interval.

184. The sovereign bonds are certainly documents acknowledging indebtedness by the amount of its nominal value and promising repayment of principal at maturity and interests on an earlier advanced of money by the purchasers, but they are not “promissory notes”, “debentures” or “certificates of indebtedness” containing an admission of a debt *to a given lender or lenders*. They are therefore financial products of another kind issued by Governments of sovereign States pursuant to given prospectus which contain detailed information for interested purchasers on various matters, including on risk issues, applicable law and jurisdictional matters.

185. Thus, the documents embodying the sovereign bonds adopt the form of unnamed titles containing the promise to pay to the buyers the agreed interests at intervals and the principal at maturity, and providing for the specific manner of amortizing the issue. These unnamed bonds are susceptible to circulation and appropriation, are negotiable in markets at any moment, and have a variable market value in addition to their fixed nominal value.

186. Argentina participated in the transactions concerning the selling of its sovereign bonds to the placement banks (or underwriters) as a commercial actor. One of the characteristics of the pertinent sovereign bonds being that although issued by a sovereign State, the Argentine Republic in the instant case, the sovereign bonds are governed by the municipal law of a given foreign country and are subject to the jurisdiction of foreign domestic courts of the major financial centres.<sup>151</sup>

187. It follows from the considerations above, that the initial purchase of the pertinent Argentine sovereign bonds by the placement banks (or underwriters) in international capital markets was a mere commercial transaction and not, as concluded by the Majority, a transaction qualifying as an “investment” in Argentina pursuant to the ICSID Convention, because to begin with a “host State” entity is absent from such a transaction. Neither the Argentine Republic acted as the host State of an investment when selling the sovereign bonds nor, for the matter, the placement banks (underwriters) were acting as foreign private investors in the territory of Argentine when purchasing the sovereign bonds in the primary market.

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<sup>151</sup> See, for example, *Payment of Various Serbian Loans Issued in France* (Fr. v. Yugo.), 1929, P.C.I.J. (ser. A) No. 20 (July 12), p. 41.

188. The Republic of Argentina was “hosting” nothing as a result of the transactions considered, but making a commercial dealing of a financial product of its own outside the Republic in international markets as could be the selling of any other eventual kind of Argentine governmental goods, getting a price in return. Then, the security entitlements holding by the Claimants cannot have acquired as concluded by the majority a non-existent “investment” quality of those sovereign bonds, because no one could transfer a better title than what he really has (*nemo dat quod non habet*) as declared by the *Mihaly v. Sri Lanka* tribunal<sup>152</sup> and advised by common sense. In the secondary market sovereign bonds are likewise exchanged between buyers and sellers (in wholesale or retail markets) as commercial transactions as well, often at substantial discounts from their face value.<sup>153</sup>

189. In the instant case, the initial selling and purchase in the primary market of the bonds being a pure commercial transaction concluded between partners acting as commercial actors: (i) the sovereign bonds acquired by and deposited in the Italian banks concerned do not partake of quality of an “investment” under the ICSID Convention and, consequently, (ii) the security entitlements in those sovereign bonds they sold in the Italian retail market to the Claimants in the present case are not an “investment” pursuant to Article 25(1) of the ICSID Convention either.

### **3. The concept of “investment” in Article 25(1) of the 1965 ICSID Convention and its relevancy for establishing the competence of ICSID arbitral tribunals (the “double-barrelled” test)**

190. The Majority Decision begins by acknowledging that the existence of an “investment” within the meaning of Article 25(1) of the ICSID Convention “is a mandatory requirement for the jurisdiction of the Centre, with a request for arbitration transcending these limits leading to the dismissal of the case”.<sup>154</sup> Article 25(1) set out therefore some *outer limits* to the jurisdiction of ICSID. It would follow that any objection to the jurisdiction of the Centre and the competence of the arbitral tribunal concerned must obviously be considered in the light of both Article 25(1) of the Convention and the definition of the term “investment” in the pertinent BIT, contract or legislation, Article 1(1) of the Argentina-Italy BIT in the present case (“*double-barrelled*” test).

191. Notwithstanding this initial presentation, the thrust of the relevant reasoning of the Majority Decision is aimed at excluding altogether any normative effect to the expression “any legal dispute arising directly out of an investment” of Article 25(1) of the ICSID Convention in the interpretative process of determining whether or not the sovereign bonds and security entitlements at stake constitute protected “investments” for in the instant case. For the author of the present Opinion, the term “investment” in Article 25(1) has an objective ordinary meaning. The Majority Decision however would leave to the parties to a BIT wide discretion for defining

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<sup>152</sup> *Mihaly*, *supra* note 27, para. 24.

<sup>153</sup> Michael Waibel pointed out, with respect to the secondary market for sovereign debts, that the said discounts: “reflect the likelihood of eventual repayment” and that “the rise of secondary markets since 1980 has provided incentives to buy (bonds) below par and pursue litigation for full principal and interests” (“*Opening the Pandora’s Box...*”, *supra* note 144, p.722, footnote 71)

<sup>154</sup> Majority Decision, para. 439.

therein the term “investment” and that definition of the BIT would prevail in their mutual relations over the ordinary meaning of that term in Article 25(1) of the ICSID Convention.

192. As stated in one of the conclusions of the Majority Decision: “There is no need here for the Tribunal to decide the question whether one should go as far as including any ‘plausibly economic activity or asset’ under the umbrella of Art. 25 of the Convention as long as States are prepared to subject it to ICSID jurisdiction. In fact, there are good reasons to leave a single commercial transaction such as the delivery of a single load of cars outside the concept of investment and thus outside the subject-matter jurisdiction of the Centre”.<sup>155</sup> The “delivery of a single load of cars” (and so long as it would be “a single commercial transaction”) is the only example given in the Majority Decision of a economic activity which would qualify as a mere commercial transaction falling as such outside the “outer limits” of Article 25 of the ICSID Convention.

193. As to the “good reasons” for the exclusion of the selling of material products as “cars” from the scope of the said Article 25 and, in contrast, for the inclusion therein the selling of financial products as “sovereign bonds”, the circular reasoning of the Majority Decision reads as follows:

“Sovereign bonds and security entitlements based thereupon are, however, in no way comparable to single commercial transactions. Notwithstanding the peculiarities of the financial instruments [citation omitted], in the light of the broad understanding to be given to Art. 25 of the ICSID Convention, the Tribunal has no doubt that bonds/security entitlements such as those at stake in the present proceedings fall under the term ‘investment’ as used in Art. 25 of the Convention.

Accordingly, the Tribunal can see no reason why sovereign bonds/security entitlements should be excluded from the jurisdiction of the Centre and, for that matter, from the competence of this Tribunal, *if and to the extent* that there is evidence that the States parties, i.e. Argentina and Italy, considered those to be investments to be protected, in view of which they both gave their ‘advance and irrevocable consent that any dispute (on this basis) may be submitted to arbitration’ (Art. 8(3) of the Argentina-Italy BIT. Hence, sovereign bonds/security entitlements are covered by the term ‘investment’ in Art. 25(1) of the ICSID Convention”<sup>156</sup> (*emphasis supplied*).

194. The Majority Decision adopts therefore in the determination of the scope of the term “investment” in Article 25(1) of the ICSID Convention the subjectivist theory which, as stated by Emmanuel Gaillard: “merely merges the requisite of investment with the condition of consent”.<sup>157</sup> As applied by the Majority Decision, such a method reveals itself in one of its most extreme manifestation, namely as purely subjective and as such impossible to be reconciled with the *effet utile* to be given to the rule in Article 25(1) which commands (“*shall*”) the existence of

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<sup>155</sup> *Ibid*, para. 470

<sup>156</sup> *Ibid*, paras. 471-72.

<sup>157</sup> Emmanuel Gaillard, *Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice*, in *International Investment Law for the 21st Century: Essays in the Honour of Christoph Schreuer*, (Oxford University Press, 2009), p.410.

a legal dispute “arising directly out of an investment”.<sup>158</sup> As stated in the *Saba Fakes v. Republic of Turkey* award of 14 July 2010:

“First, the Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties’ consent, which is a distinct condition for the Centre’s jurisdiction. The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning”.<sup>159</sup>

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195. The words “arising directly out of an investment” in Article 25(1) bear indeed some meaning. These words cannot be meaningless and a good faith interpretation shall take it into account. Being the subject of an amendment, those words reflect objectively the “outer limits” beyond which parties’ consent would be ineffective to create an ICSID protected investment. Parties are free to agree on what constitutes an investment in their mutual relations but providing that their definitions fall within “outer limits” defined by the ordinary meaning of the term “investment” of Article 25(1) in the context of the 1965 ICSID Convention and in the light of its object and purpose.

196. As Judge Shahabuddeen has recently recalled that position was accurately defined by the Chairman of the Regional Consultative Meeting of Legal Settlement of Investment Disputes when he reported during the negotiation of the future ICSID Convention, on 9 July 1964, as follows:

“The purpose of Section 1 is not to define the circumstances in which recourse to the facilities of the Centre would in fact occur, but rather to indicate the outer limits within which the Centre would have jurisdiction provided the parties’ consent had been attained. Beyond these outer limits no use could be made of the facilities on the Centre even with such consent”.<sup>160</sup>

197. Early commentators have also confirmed the existence of objective outer limits embodied in the ICSID Convention derived from the functions of the terms “arising directly out of an investment” in any *bona fide* interpretation of the rule set forth in Article 25(1) of the Convention. For example, Aron Broches in his 1972 lecture at The Hague Academy of

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<sup>158</sup> *Ibid*, at p. 441. Concerning the adoption of this formula, see Professor Abi-Saab’s dissenting opinion in *Abaclat*, *supra* note 37, para. 44

<sup>159</sup> *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award of 14 July 2010 (“*Saba Fakes*”), para. 108.

<sup>160</sup> Judge Shahabuddeen’s dissenting opinion to the *ad hoc* Committee Decision of 16 April 2009 on the Application for Annulment of the *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10), Award of 17 May 2007 (“*Malaysian Historical Salvors*”), para.12 of the Opinion (quotation taken from: ICSID, *History of the ICSID Convention*, *supra* note 61, vol. II-1, p.566, 1958). The majority of the *ad hoc* committee who adopted the subjectivist approach as to the meaning of the term “investment” in Article 25(1) of the ICSID Convention resorted also to the preparatory work of the Convention, as the present Majority Decision does (para. 57 and ff. of the decision).

International Law after referring to the essential requirement of parties' consent adds the following: "It goes without saying, however - and I have made this remark before in another connection - that this discretion is not unlimited and cannot be exercised to the point of being *clearly inconsistent with the purpose of the Convention*"<sup>161</sup> (*emphasis supplied*). In the same sense, Christoph Schreuer:

"There is no doubt that the Centre's services would not be available for just any dispute that the 'parties may wish to submit. (I)t was always clear that ordinary commercial transactions would not be covered by the Centre's jurisdiction [...] The conclusion that the term 'investment' has an objective meaning independent of the parties' disposition is confirmed by Rule 2 of the Institution Rules".<sup>162</sup>

198. This is also generally the position of the ICSID arbitral tribunals' decisions and commentators relying on an objective concept of the term "investment" when the ICSID Convention was adopted in 1965. As explained by Emmanuel Gaillard:

« Traditionnellement, la controverse sur la notion d'investissement au sens de l'article 25 (1) de la Convention de Washington se présente de la façon suivante. Même lorsqu'elle se préoccupe des nouvelles formes d'investissement, la doctrine classique définit l'investissement comme 'un apport dont la rémunération est différée dans le temps et fonction des résultats entrepris' [...] Trois éléments sont donc requis : l'apport, la durée et le fait que l'investisseur supporte, au moins en partie, les aléas de l'entreprise [...] Dans une telle conception, un simple prêt dont la rémunération ne dépend en rien du succès de l'entreprise ne peut être qualifié d'investissement. Certains auteurs ont proposé des définitions moins exigeantes de la notion d'investissement ».<sup>163</sup>

199. Michael Waibel is quite right when in a lapidary manner he stated that: "Article 25's definition of investment is not infinitively elastic",<sup>164</sup> and more recently: "The inclusion of the term investment in Article 25 implies that ICSID subject matter jurisdiction is limited. The term investment has a distinct meaning, which can be derived from the ordinary meaning of investment, preparatory works, subsequent practice, arbitral awards and doctrine. The tribunal's jurisdiction cannot be engaged whenever the parties so desire. ICSID jurisdiction has 'outer limits'".<sup>165</sup> I share the views above, as well as the following from Zachary Douglas:

"(t)he term 'investment'...is a term of art: its ordinary meaning cannot be extended to bring any rights having an economic value within its scope, for otherwise violence would be done

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<sup>161</sup> Recueil des Cours, 1972 (II), tome 136, p. 362.

<sup>162</sup> Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nations of Other States* (Cambridge University Press, 2nd ed., 2009), p. 117.

<sup>163</sup> Emmanuel Gaillard, *La jurisprudence du CIRDI (ICSID Case Law)*, Pedone Paris 2004, p. 479.

<sup>164</sup> Waibel, "Opening Pandora's Box: Sovereign Bonds in International Arbitration", *supra* note 144, p. 711 at p. 722.

<sup>165</sup> Michael Waibel, *Sovereign Defaults before International Courts and Tribunals*, (Cambridge University Press, 2011), p. 212.

to that ordinary meaning in contradiction to Article 31 of the Vienna Convention on the Law of Treaties ”.<sup>166</sup>

200. Those statements find general support in the ICSID case-law. For instance, the *Joy Mining* tribunal (presided by the same person as *Fedax*) declared in 2004 that the freedom of the parties to define an investment is not unlimited and that: “The parties to a dispute cannot by contract or treaty define as investment, for the purpose of the ICSID jurisdiction, something which *does not satisfy the objective requirement of Article 25 of the Convention*. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned in a meaningless provision”<sup>167</sup> (*emphasis supplied*). The unanimously adopted 2009 award in *Phoenix Action v. Czech Republic* summarizes the legal situation with precision:

“There is nothing like a total discretion, even if the definition developed by the ICSID case law is quite broad and encompassing. There are indeed some basic criteria and parties are not free to decide in BITs that anything [...] is an investment”.<sup>168</sup>

201. The objective limits introduced in Article 25(1) by the insertion of the term “investment” have also been declared in clear terms by ICSID *ad hoc* committees on applications for annulment. For example, in the following passage of the decision of the *ad hoc* committee in the *Patrick Mitchell v. Democratic Republic of Congo* annulment proceedings:

“[...] the parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an investment. It is thus repeated that before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT”.<sup>169</sup>

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202. It is true that during the elaboration of the ICSID Convention several definitions of “investment” were considered and rejected, but it does not allow to consider such a definitional silence of the Convention as if the term “investment” would be meaningless in Article 25(1) or the notion be so elastic as to deprive it of any legal effect, as does in fact the Majority Decision. As rightly put by Michael Waibel “*the failure to reach consensus cannot be used to adopt a broad notion by default*” (*emphasis in original*) and, further: “Putting exclusive weight on BIT consent deprives Article 25 of its core purpose”.<sup>170</sup>

203. It is evident that reading away Article 25’s investment requirement is at odds with the treaty interpretation rules of the VCLT which are based on the principle that the text must be presumed

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<sup>166</sup> Zachary Douglas, *The International Law of Investment Claims*, (Graduate Institute of International Studies, Geneva, 2009), para. 342.

<sup>167</sup> *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award of 6 August 2004 (“*Joy Mining*”), para. 50.

<sup>168</sup> *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009 (“*Phoenix Action*”), para. 82.

<sup>169</sup> *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the application for annulment of 1 November 2006, para. 31.

<sup>170</sup> Waibel, “Opening the Pandora’s Box...”, *supra* note 144, p. 730.

to be the authentic expression of the intention of the parties and which incorporate also the principle of “effective interpretation” (*effet utile*) under the control of good faith and the object and purpose of the treaty subject to the interpretation. As explained by Professor Abi-Saab in his dissenting opinion in 2011 *Abaclat* decision, the term “investment” in Article 25(1) “whilst flexible enough is not infinitely elastic” it has a “hard-core” which should be identified looking into the general context of the ICSID Convention and the circumstances surrounding its elaboration as well as to its object and purpose” (paras. 46 and 47 of the Opinion), and further:

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

204. The considerations and comments above need to be recalled because the Majority Decision’s initial reference to the “double-barrelled” test vanishes soon. It admits that Article 25(1) “opens the general scope of the term ‘investment’ up to the possibility of restriction”.<sup>171</sup> But, for the Majority Decision such restriction refers essentially back to the scope of the consent of the parties as expressed in the BIT, not to a sensible objective hard-core of the investment requirement of Article 25(1). The label by the parties to the BIT of the transaction concerned as “investment” would be for the Majority Decision the determinative factor.

205. This pure subjective approach of the Majority Decision is difficult to reconcile with the specific language of Article 25(1) (“any legal dispute arising directly out of an investment”) because as mentioned, for instance, in a no suspected decision for the subjectivists as the 1999 *CSOB v. Slovak Republic*:

“The Slovak Republic *is correct in pointing out*, however, that an agreement of the parties describing their transaction is not, as such conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention. The concept of an investment as spelled out in that provision is *objective in nature* in that the parties may agree on more precise or restrictive definition of their acceptance of the Centre’s jurisdiction, but they may not choose to submit disputes to the Centre that are not related to an investment. A two-fold test must therefore be applied in determining whether this Tribunal has the competence to consider the merits of the claim: whether the dispute arises out of an investment within the meaning of the Convention and, if so, whether the dispute relates to an investment as defined in the Parties’ consent to ICSID arbitration, in their reference to the BIT and the pertinent definitions contained in Article 1 of the BIT”<sup>172</sup> (*emphasis supplied*).

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206. I reject the limitless subjectivist Majority Decision’s approach regarding the meaning and scope of the investment requirement of Article 25(1) of the ICSID Convention as contrary to the

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<sup>171</sup> Majority Decision, para. 454.

<sup>172</sup> *CSOB*, *supra* note 133, para. 68.

text of the provision and a good faith interpretation and application of that conventional rule. Likewise, I reject the particular conclusion of the Majority Decision to the effect that the selling of the sovereign bonds by the Argentine Republic and the purchasing of the security entitlements by the Claimants are transactions which, either individually or together, pass the investment requirement of Article 25(1) of the ICSID Convention and, as such, the first component of the “double-barrelled” test.

207. Those transactions are not by its very nature ICSID protected investments because they do not meet the objective basic criteria for identifying an investment appurtenant to Article 25(1), as interpreted generally by most of ICSID arbitral decisions and academic commentators.<sup>173</sup> The objective elements of “investmentness” that an activity must have to qualify as an ICSID investment are missed in the transactions at stake in the present case.

208. Moreover, contrary to the relevant conclusion of the Majority Decision, Argentina and Italy did not decide in their 1990 BIT that the sovereign bonds and security entitlements in question were “investments”, as the term is defined in Article 1(1) of the BIT (see below). The text of this definition does not provide either support for the Majority Decision’s upholding of the present Tribunal’s competence to know and adjudicate the instant case, as instituted by the Claimants, because as stated in the 2004 *Joy Mining* award:

“The parties to a dispute cannot by contract or treaty define as investment, for the purpose of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention. Otherwise Article 25 and its reliance on the concept of investment, even if not specifically defined, would be turned into a meaningless provision”<sup>174</sup> (*emphasis supplied*).

209. I will add to conclude on the “double-barrelled” test by recalling that such a test is not an exceptional feature of the ICSID law. In international law is rather the general rule in institutionalized arbitration and judicial settlement. For example, in the ICJ the determination of the jurisdiction of the Court in a given case entails to pass the test of both the provisions of its Statute on the competence of the Court (Articles 34-38) as well as of the relevant provisions of the title or titles of jurisdiction invoked.

#### **4. The determination of the ordinary meaning of the term “investment” in Article 25(1) of the ICSID Convention by application of the rules of international law on interpretation of treaties codified by the VCLT**

##### **(a) The recourse by the Majority Decision to the supplementary means of interpretation of treaties of Article 32 of the VCLT**

210. The Majority Decision begins the interpretation of Article 25(1) of the ICSID Convention by considering the “background of the adoption” of that provision, namely by the *travaux*

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<sup>173</sup> See, for example, R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2<sup>nd</sup> ed., 2012), at pp. 68 and 69.

<sup>174</sup> *Joy Mining*, *supra* note 167, para. 50.



*préparatoires*. The aim of this rather heterodox application of the treaty interpretation system of the Vienna Convention seems: (i) to provide from the outset of the interpretation process support to wide as much as possible the *concept of “investment”* of the ICSID Convention (practically without any objective normative limitation); and (ii) to avoid entering into the troublesome *temporal element* question of the prevailing *economic development* sense of the ordinary meaning of the term “investment” in the decade of the sixties (over the current meaning in a *financial* sense).

211. The Majority Decision’s early recourse to the *travaux* comes nevertheless as a surprise because neither the issuance of sovereign bonds nor the sovereign default problems was a subject-matter of consideration within the framework of the negotiations leading to the elaboration of the ICSID Convention. Moreover, *practice* confirms that since the entering into force of the ICSID Convention on 14 October 1966 until the *Abaclat* case instituted on 14 September 2006, namely during forty years, no “sovereign bonds” subject to a sovereign debt restructuring consequential from a State’s declaration of sovereign default in a situation of economy emergency (or, for the matter, of “security entitlements”) have been the subject-matter of any instituted ICSID case. Thus, the general messages sent by the *travaux*, as well as by *general ICSID practice*, excludes from the purview of the ICSID Convention of both “sovereign bonds” and “security entitlements” in sovereign bonds.

212. In any case, the Majority Decision’s early recourse to a “supplementary means” of interpretation as the *travaux* of the ICSID Convention cannot go unnoticed. It obliges to recall in the first place that the term “supplementary” emphasizes that Article 32 of the VCLT does not provide, as stated in the commentary of the International Law Commission, “for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in Article 31” of the VCLT.<sup>175</sup> And secondly that as explained in the same commentary:

“The elements of interpretation in Article 31 all relate to the agreement between the parties *at the time when or after it received authentic expression in the text*. *Ex hypothesi* this is not the case with preparatory work which does not, in consequence, have the same authentic character as an element of interpretation, however valuable it may sometimes be in throwing light on the expression of the agreement in the text. Moreover, it is beyond question that the records of the treaty negotiations are in many cases incomplete or misleading, so that considerable discretion has to be exercised in determining their value as an element of interpretation”.<sup>176</sup>

213. Furthermore, as presented by the Majority Decision, namely without any precise referential context or sequence, the *travaux* referred to often appear contradictory with each other or with commentaries thereon. For instance, to mention in isolation that an Australian delegate highlighted in 1964 that at that time a “draft ” seemed to include “borrowing of cash by the host country from foreign private investor” is, without further ado, of no help to interpret Article 25

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<sup>175</sup> Report of the United Nations Conference on the Law of Treaties, First and Second Sessions, Vienna, 26 March-24 May 1968 and 9 April-22 May 1969, Documents of the Conference (United Nations publication, Sales No. E.70.V.5) (“*UN Publication on the Law of Treaties*”), p. 43, para. 19.

<sup>176</sup> *Ibid*, p. 40, at para. 10.

of the 1965 ICSID Convention. The same may be said of Austria's submission that "public loans and bonds should not be included" in the Convention or that Burundi statement that money lent by a foreign company to a State could not be regarded as an investment.<sup>177</sup>

214. Regarding commentaries on the *travaux*, the Majority Decision quotes two statements by Broches that, out of context, appear contradictory with each other. According to the first statement "the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction".<sup>178</sup> By contrast, in another quoted statement, Broches said that: "Presumably, the parties' agreement that a dispute is an 'investment dispute' will be given great weight in any determination of the Centre's jurisdiction, *although it would not be controlling*"<sup>179</sup> (*emphasis supplied*).

215. The Majority Decision concludes that "the *consent of the parties* as to the scope of the term 'investment' is to be deemed "of great relevance when establishing the meaning of Art. 25 of the ICSID Convention *without the concept thus becoming subject to the parties' unfettered discretion*"<sup>180</sup> (*emphasis supplied*). However, no objective legal content is given to the cosmetic caveat of the "unfettered discretion" (expression taken from other ICSID arbitral decisions) which would be powerless in face of the parties' mutual consent. In any case, the said "unfettered discretion" does not appear to operate as a normative legal limit of any kind on what is for the Majority Decision an all-encompassing meaning of the term "investment" in Article 25(1) of the Convention, leading it to conclude that the pertinent sovereign bonds and security entitlements fall within the concept of "investment" of the ICSID Convention.

216. The author of the present Opinion is of a different view. For him the term "investment" in the Article 25(1) had at the time of elaboration of the ICSID Convention an objective hard-core or intrinsic ordinary meaning intended by the negotiating States whose component elements have been identified by ICSID decisions and commentators, meaning which cannot be waived even by the agreement of given by parties to a BIT or in another form. Then, that hard-core or intrinsic ordinary meaning (as will be seen below) excludes that the pertinent sovereign bonds and security entitlements at stake in the present case may be characterized as an "investment" in the sense the Article 25(1) of the ICSID Convention.

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217. The early consideration by the Majority Decision of the *travaux* also has the additional purpose of eroding further any objective concept of the term "investment" by insisting that in the course of elaboration of the ICSID Convention the main compromise would have been constituted, on one hand, by a bare use of the term "investment" in Article 25(1) with no, or only very weak, limits as to the jurisdiction *ratione materiae* of the Centre (to satisfy the capital-exporting States' position) and, on the other hand, the establishment of a mechanism in

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<sup>177</sup> See, Majority Decision, footnote 190; and Waibel, "Opening the Pandora's Box...", *supra* note 144, at p. 720, footnote 61.

<sup>178</sup> Majority Decision, p. 148, footnote 185 citing A. Broches, The Convention on the Settlement of Investment Disputes: Some Observations on Jurisdiction, 5 Columbia Journal of Transnational Law (1966), 261, at 268.

<sup>179</sup> *Ibid*, p. 148, footnote 187.

<sup>180</sup> *Ibid*, para. 452.

Article 25<sup>181</sup> by which States could withhold matters from the jurisdiction of the ICSID which they considered inappropriate to be dealt with by this institution (to satisfy capital-importing State' position).<sup>182</sup> In other words, the general view of the majority is that the ICSID as an institution would enjoy an all-encompassing *ratione materiae* jurisdiction, unless States contracted-out by notifying the Centre the class or classes of disputes which it would or would not consider submitted to the jurisdiction of the Centre.

218. As evidence of the so-called “trade-off” above, the majority quotes paragraph 27 of the Report of the Executive Directors of the ICSID Convention which expressly links the lack of a definition of “investment”, first, to the “essential requirement of consent by the parties” and, second, to the mechanism of Article 25(4) of the Convention.<sup>183</sup> Without denying that passage of the Executive Director’s Report or the right to invoke it, I must say that for the general rule of interpretation of treaties of Article 31 of the VCLT the *intention* behind the “trade-off” invoked by the Majority Decision would be relevant only to the extent it finds expression in the text of the ICSID Convention, but not beyond or otherwise. Moreover, the published history of the ICSID Convention provides conclusive evidence that contrary to what it is stated in the said paragraph of the Executive Director’s Report there were several attempts during the negotiations to define the term “investment” in Article 25(1).

219. Then, I have to confess that I do not see such expression reflected, by cross-references or otherwise, in the text of any of the paragraphs of Article 25 or in any other provision of the ICSID Convention, preamble included. Furthermore, they are surely several other trade-offs or understandings reached likewise during the negotiation and drafting process of the ICSID Convention which are not referred to at all in the Majority Decision which once more is quite selective in its references to *travaux*, arguments and evidence. For example, in paragraph 25 of the same Executive Directors’ Report one may read the following:

“While consent of the parties is an essential prerequisite of the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. *In keeping with the purpose of the Convention*, the jurisdiction of the Centre is further limited by reference to *the nature of the dispute* and the parties thereto” (*emphasis supplied*).

220. Thus, Article 25(4) notwithstanding, the *nature of the dispute* remains quite essential for the interpretation of the expression “any legal dispute arising directly out of an investment” in Article 25(1) of the ICSID Convention. Second, the text of Article 25 as a whole does not provide a contextual basis allowing the interpreter to reason as if the addition to Article 25(4) would deprive of its meaning and normative role the term “investment” of paragraph 1. Third, the need to interpret the latter term - in the context of the ICSID Convention as a whole and in the light of its object and purpose - cannot be avoided by invoking the possibility for States of making notifications excluding a given “class or classes of disputes”, because non-excluded class or classes of legal disputes must likewise arise “directly out of an investment” to be in conformity with Article 25(1). Fourth, in the present case neither Argentina nor Italy made declarations pursuant to Article 25(4) excluding any class or classes of legal disputes otherwise

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<sup>181</sup> *Ibid*, paras. 449-51.

<sup>182</sup> *Ibid*, para. 451.

<sup>183</sup> *Ibid*.

admitted by the ICSID Convention. In conclusion, Article 25(1) includes some legal disputes and excludes other disputes and Article 25(4) allows Contracting States to exclude a class or classes from the legal disputes included.

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221. For an interpretation of the term “investment” in Article 25(1) of the ICSID Convention, the more relevant *travaux* are, in my opinion, those relating specifically to the successive formulations proposed for paragraph 1 of that Article and the discussion relating thereto, as recorded in the publication entitled *History of the ICSID Convention*. Then, those *travaux* curiously enough, are missing from the Majority Decision. However, there is some information thereon in the documentation referred to the Tribunal by the Parties revealing a certain interest of those *travaux* for some aspects of the interpretation of Article 25(1) for confirmation purposes.

222. For instance, in paragraph 23 of the 1997 *Fedax* decision it is said that in a first draft of the future convention it was provided for the purpose of the chapter concerned that: “(i) ‘investment’ means any contribution of money or other asset of economic value for an indefinite period or, if the period be defined, for not less than five years”. A definition of this kind would have included “loans” but not every form of loans, only those having a given duration. This provision disappeared in the course of the negotiations, but it is a good example of the eventual interest of the *travaux* for an interpretation of Article 25(1) of the ICSID Convention as a supplementary means.

223. Professor Abi-Saab’s dissenting opinion, referred to the Tribunal, does provide for a number of the most relevant information on the *travaux* leading to the very adoption of the text of Article 25(1). Then, this information reveals “*the limiting or restricting intent behind the introduction and further qualification of the term ‘investment’ in the provision*”.<sup>184</sup> As explained by Professor Abi-Saab, this was done in response to concerns about the over-broad jurisdiction *ratione materiae* of certain drafts. Initially one working paper simply referred to “disputes”. Then, a preliminary draft introduced the term “investment” as a qualifier before “disputes” in defining the ambit of jurisdiction (any existing or future *investment* dispute of a legal nature). This was further narrowed in another draft as follows: “all legal disputes [...] arising out of or in connection with any investment”. But, this latter formula was still strongly attacked as too wide, particularly the clause “in connection with” (which was struck out by a vote of 26 to 8), while adding the qualifier “directly” into the second (revised) draft that became the actual formula: “any legal dispute arising *directly* out of an investment”.<sup>185</sup>

224. Thus, as concluded by Professor Abi-Saab: (i) *the purpose of using the term investment in Article 25(1) of the ICSID Convention was to set objective outer-limits to the types of disputes that can be treated within ICSID*; (ii) the said outer-limits bound a vast ambit; and (iii) but they exist all the same.<sup>186</sup> This is frequently reiterated in ICSID case-law and by commentators. For example the 2003 *SGS v. Pakistan* decision acknowledges that the ICSID Convention leaves to the Contracting Parties “a large measure of freedom to define (the) term (“investment”) as their

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<sup>184</sup> Professor Abi-Saab’s dissenting opinion in *Abaclat*, *supra* note 37, para. 43.

<sup>185</sup> *Ibid.*, para. 44.

<sup>186</sup> *Ibid.*, para. 45.

specific objectives and circumstances may lead them to do so”, but this is qualified by the following statement:

“That freedom does not, however, appear to be unlimited, considering that ‘investment’ may well be regarded as embodying certain core meaning which distinguishes it from an ‘ordinary commercial transaction’ such as a simple, stand alone, sale of goods or services”.<sup>187</sup>

225. In sum, the early appeal by the Majority Decision to supplementary means of interpretation as the *travaux* of the ICSID Convention ends finally in the confirmation that the insertion of the term “investment” in Article 25(1) of the Convention was intended to distinguish the transactions to be protected by the ICSID system established by the 1965 Convention from other transactions, named “ordinary commercial transactions”, which will remain under the protection granted by customary international law exclusively. The term “investment” was considered flexible enough so as to providing a wide margin for further specification by States, but not as infinitely elastic to the point of confusing an “investment” with an “ordinary commercial transaction”.

226. This conclusion is enough to refute the opinion that there is no need for the present claims to be submitted to a “double-barrelled” test, namely to the ICSID and the BIT test. For the author of the present Opinion that double test entails in the present case - as it is common ground between the Parties - that the competence of the present Tribunal is contingent upon the fulfilment of the objective jurisdictional requirements of both the ICSID Convention and the Argentina-Italy BIT, the jurisdiction *ratione materiae* of the Tribunal resting - to use the language of the 2009 *Phoenix Action Award* - in the *intersection* of the two definitions.<sup>188</sup>

**(b) The ordinary meaning of the term “investment” in Article 25(1) of the ICSID Convention ascertained by the application of the general rule of interpretation of treaties of Article 31 of the VCLT and the so-called “Salini” test**

227. After having opening the game with the *travaux*, the Majority Decision in its hesitating reasoning on the meaning of “investment” in Article 25(1) of the ICSID Convention admits that its previous remarks on the *travaux* and the alleged intentions of the parties “must not lead to an outcome deviating from the interpretation” of Article 25 in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Article 31 of the VCLT), even if indicated otherwise by the historical background.<sup>189</sup>

228. So far so good. I cannot but be in agreement with that statement. But then why so much noise on the “trade-off” and underlying alleged intentions of the drafters of the 1965 ICSID Convention? In any case, according to the rules of international law codified in Article 31- 33 of the VCLT, a treaty interpretation must proceed from the *ordinary meaning* of the terms, even if the interpreter does not like that meaning, and parties’ intention are relevant to the extent that it

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<sup>187</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on Objections to Jurisdiction of 6 August 2003 (“*SGS v. Pakistan*”), para. 133 and footnote 153.

<sup>188</sup> *Phoenix Action*, *supra* note 168, para. 74.

<sup>189</sup> Majority Decision, para. 455.

finds expression in the text of the treaty or necessarily implied therein, but not beyond or otherwise. These rules of international law are duty-bound for international courts and tribunals, including ICSID tribunals, which are not supposed to deviate from them in the course of their application to the cases submitted to their consideration. *Pacta sunt servanda* is here at stake.

229. As a consequence of the overall subjectivist view adopted by the Majority Decision, the latter is unable to conclude at any given *ordinary meaning* of the term “investment” in Article 25(1) of the ICSID Convention, beyond the quite general and flawed affirmation - advanced on the basis of alleged dictionary definitions - that the term “does certainly not restrict the scope of the notion so as to exclude bonds and security entitlements such as the ones pertinent to this case from its purview, but is rather susceptible to include those financial instruments”.<sup>190</sup> And, further, that even endorsing the Professor Amerasinghe’s caveat that dictionary definitions may be irrelevant for the purpose of defining “investment” in Article 25(1), this argument would not result for the Majority Decision in the opposite conclusion, namely that bonds and security entitlements are *not* covered by the ordinary meaning, but would rather suggest that the term is “ambiguous” in the sense of Article 32 of the VCLT or that it has been given “a special meaning [...] if it is established that the parties so intended” (Article 31(4) of VCLT).<sup>191</sup>

230. No more effort is made by the Majority Decision with a view to ascertaining the “ordinary meaning” of the term “investment” in Article 25(1) ICSID Convention through the application as relevant of all component interpretative elements of the general rule of interpretation of treaties of Article 31 of the VCLT which - it should be recalled - “form a single, closely integrated rule” to be applied in a process of interpretation conceived as “a unity”.<sup>192</sup>

231. The relevant passages of the Majority Decision are indeed very poor. For example - after paying lip services to the method of systematic interpretation - the only role given in the interpretation to the *context* consists in sending the reader back to the majority’s assessment of the *travaux* of the Convention, namely to the alleged “trade-off” referred to above.<sup>193</sup> But, the *travaux* have no role to play in an application of the general rule of interpretation of treaties. “Context” is indeed an element of that general rule, but it relates - as all the other elements constituting the general rule of Article 31 - to the agreement between the parties *at the time when or after it received authentic expression in the text* (not to one or more “trade-off” or dealings during the negotiation or drafting phases of the treaty).<sup>194</sup> In contrast, several elements of the VCLT “context” (Article 31(2)) play no role at all in the reasoning of the Majority Decision.

232. On the basis of the textual “context” defined by Article 31(2) of the VCLT and other elements of Article 31 there is no ground for concluding, as the Majority Decision does, that the very existence of the notification mechanism of Article 25(4) of the ICSID Convention would militate for a “broad” interpretation of the concept of investment in Article 25(1) subject to the

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<sup>190</sup> *Ibid.*, para. 456.

<sup>191</sup> *Ibid.*, p. 151, footnote 194.

<sup>192</sup> UN Publication on the Law of Treaties, *supra* note 175, p. 39, para. 8.

<sup>193</sup> Majority Decision, para. 457.

<sup>194</sup> UN Publication on the Law of Treaties, *supra* note 175, p. 40, para. 10.

possibility of subsequent restriction by the parties”.<sup>195</sup> Article 25(4) is certainly “context” for the interpretation of terms in Article 25(1), but the actual wording of the former does not convey a broad or narrow intent as to the use of the term “investment” in the latter. There is no cross-reference or any other textual or necessary implied indication to that effect in none of these two paragraphs of Article 25 or, for the matter, in any other provision of that Article or of the ICSID Convention. Paragraphs 1 and 4 of Article 25 of the Convention deal with a different subject-matters and each is formulated in a self-contained way.

233. As to the *object and purpose* of the ICSID Convention, the Majority Decision begins indicating that “the situation is less clear” than in the case of the context because the first preamble paragraph of the ICSID Convention “*may well be understood in different ways*”.<sup>196</sup> Why? In fact, the first paragraph of the Preamble is quite clear underlining the “need for *international cooperation for economic development*, and the role of private international investment therein”; the second one reminds “the possibility that from time to time *disputes may arise in connection with such investments* between Contracting States and nationals of other Contracting States; and the third recognizes “that while *such disputes* would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases” (*emphasis supplied*).

234. In the light of the clearness of the Preamble, the explanations of the Executive Directors’ Report (paragraphs 9, 11, 12 and 13) and the aggregate of the relevant ICSID case-law and related doctrinal commentaries, there are no objective grounds for the Majority Decision’s inconclusive finding on the object and purpose of the ICSID Convention. Once more, the only explanation for the alleged inconclusiveness is the subjectivist unilateral vision of the Majority Decision, and the shadow projected thereon by *Abaclat* majority decision criticised on the point by Professor Abi-Saab in his dissenting opinion as follows:

“157. [...] the reasoning is also premised on and proceeds from a purely subjective, truncated and partial representation of the object and purpose of the ICSID Convention and the BIT, [...] the object and purpose of these two treaties are described as being exclusively to afford maximum protection to foreign investment and foreign investors; as if these treaties were ‘unilateral contracts’ creating rights for the benefit of one party only. In consequence, according to this vision, all the provisions of these treaties have to be interpreted exclusively with this aim in mind.

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

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<sup>195</sup> Majority Decision, para. 457.

<sup>196</sup> *Ibid*, para. 458.

235. The unilateral vision of the Majority Decision is indeed in stark contrast to the object and purpose of the ICSID Convention, *as clearly explained in the above mentioned paragraphs of the Report of the Executive Directors* as, for example, in the following one:

“While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention *maintain a careful balance between the interest of investors and those of host States*. Moreover, the Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly in mind that the provisions of the Convention should be equally adapted to the requirements of both cases”<sup>197</sup> (*emphasis supplied*).

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236. Notwithstanding the above consideration, the Majority Decision finds soon *a way* to clear out the object and purpose of the ICSID Convention under the form of the following amazing “tentative conclusion”:

“[...] the Tribunal would [...] resist to endorse an overly narrow reading of the term ‘investment’ in Art. 25(1) of the Convention. In particular, the Tribunal would like to caution against a restrictive reading of the jurisdictional provisions of the ICSID Convention which does not find its base in the Convention itself, but rather draws on concerns regarding the ability, and appropriateness, of arbitral tribunals to tackle difficulties relating to the substantive side of the case. This is a question to be dealt with on the level of the merits, but should not lead tribunals to decline to hear cases in ‘anticipatory obedience’ to real or imagine constituencies”.<sup>198</sup>

237. This “tentative conclusion”, inserted in the middle of the Majority Decision’s consideration on the role of the *object and purpose* element in the interpretation of the term “investment” in Article 25(1) of the Convention does not make sense and cannot be allowed either to get lost without a commentary. First, nobody asked in the present case for an “overly narrow” reading of the term “investment” in Article 25(1), but for the intrinsic ordinary meaning of that term at the time of the conclusion of the ICSID Convention ascertaining through the application of the general rule of interpretation of treaties of Article 31 of the VCLT.

238. Second, my refute of the main conclusions of the Majority Decision in the present context have nothing to do with the alleged difficulties of the substantive aspects of the case, but with *pacta sunt servanda* and the customary international law rule of State’s consent to the jurisdiction of international courts and tribunals (ICSID arbitral tribunals included), as well as with the correct application of the rules of international law codified by the VCLT governing the interpretation of treaties.

239. Lastly, it makes little sense, to say the least, to extrapolate into considerations relating to the object and purpose of the ICSID Convention duly fixed by the Contracting States in 1965,

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<sup>197</sup> Report of Executive Directors, para. 13.

<sup>198</sup> Majority Decision, para. 460.



personal doctrinal comments or views (sometimes of *lege ferenda*) in contemporary publications regarding the understanding and/or performance by ICSID arbitral tribunals of their respective tasks.<sup>199</sup>

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240. Following the above incisory “tentative conclusion”, the Majority Decision goes on to indicate that the Tribunal “would concede that a restrictive reading is required *if the consent given by a State* indicates that certain types of investment should be excluded from the protection of the ICSID arbitration mechanism. The key role of the requirement of (specific) consent to arbitration on the part of States is already articulated in the last preambular paragraph and becomes particularly and repeatedly manifest in Art. 25 of the ICSID Convention, notably in the last sentence of its para. 4”.<sup>200</sup>

241. Again consent as the controlling factor of the meaning of the term “investment” in Article 25(1) of the ICSID Convention that the Majority Decision stresses through the aggregation of different elements, namely: Preamble (last paragraph); Article 25(4) (the “trade-off” reached during negotiations); Executive Directors’ Report (reference to consent as the “cornerstone” of the jurisdiction of the Centre) and Article 1(1) of the BIT (alleged to include in the definition of “investment” the transactions at stake). And again the Majority Decision rejects any objective ordinary meaning of the term “investment in Article 25(1) of the ICSID Convention.

242. The paramount aim of the 1965 ICSID Convention of promoting international cooperation for *economic development* disappears altogether from the picture overwhelmed by the above avalanche of unilateral or bilateral consents. It is indeed a peculiar way of applying the VCLT rules to the interpretation of Article 25(1) of the Convention to replace the object and purpose of the latter (a component of the general rule of interpretation of treaties) by the majority’s own wrong conclusions on the definition of the term “investment” in Article 1(1) of the Argentina-Italy BIT (see below).

243. For the Majority Decision leaving the pertinent sovereign bonds and security entitlements outside of the scope of Article 25 of the ICSID Convention would “make no sense in view of Argentina’s and Italy’s express agreement to protect the value generated by these kinds of contributions”.<sup>201</sup> This statement makes sense if one rejects the *double-barrelled* test only. Thus at the end of the day, the Majority Decision ended by a denial of the normative value to the “*two barrelled*” test, in line with the 2011 *Abaclat* majority decision. In fact, what makes no sense for the Majority Decision is but one of the always plausible outcomes resulting naturally from the interpretation of the text of an international conventional instrument by an international arbitral tribunal applying the VCLT rules. As explained by Professor Abi-Saab in paragraph 40 of his dissenting opinion in *Abaclat*: “Without limits, words would be meaningless, because undistinguishable from one another. The intrinsic meaning of a word, *which is its ‘ordinary’ meaning, is further specified by the way it is used and the context in which it is used, and if it figures in a treaty, by the object and purpose of the treaty*” (*emphasis supplied*).

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<sup>199</sup> *Ibid.*, p. 153, footnote 203.

<sup>200</sup> *Ibid.*, para. 461.

<sup>201</sup> *Ibid.*, para. 463.

244. The Majority Decision’s reasoning on the interpretation of the concept of “investment” in Article 25(1) of the ICSID Convention has also a grave and unacceptable lacuna. It omits any reference to the first constituting element of the general rule of the interpretation of treaties, namely to *good faith*. As declared by the opening words of Article 31(1) of the VCLT: “*A treaty shall be interpreted in good faith*”. Moreover, good faith is a general principle of law applicable, on this account also, by international courts and tribunals to *inter alia* the interpretation and application of treaties and States cannot contract out of the system of international law.

245. This is to say that international courts and tribunals are expected to bear constantly in mind, as noted by the International Law Commission, that “the interpretation of treaties in good faith and according to the law is essential if the *pacta sunt servanda* rule is to have any real meaning”.<sup>202</sup> In effect, as stated by the Commission’s commentary of Article 31(1) of the VCLT contains three separate principles:

“The first - interpretation in good faith - flows directly from the rule *pacta sunt servanda*. The second principle is the very essence of the textual approach: the parties are to be presumed to have that intention which appears from the ordinary meaning of the terms used by them. The third principle is one of both common sense and good faith; the ordinary meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose. These principles have repeatedly been affirmed by the Court.”<sup>203</sup>

246. Thus, an interpretation of the term “investment” in Article 25(1) that would oversight that the *primary purpose* of the ICSID Convention is to provide additional inducement and stimulate a larger flow of private international investment into the territories of the host States as a means of strengthening the economy development of these States cannot be considered a good faith interpretation of the provision, because the probative available material (the text of the first three paragraphs of the Preamble of the Convention; paragraph 12 of the Report of the Executive Directors) support the view that such a primary purpose was clearly present in 1965 at the time of the adoption of the ICSID Convention in the minds of the representatives of the negotiating States and their intentions manifested themselves clearly in the very text of the preamble of the Convention. Moreover, the *travaux* confirm that the term “investment” was inserted in Article 25(1) precisely to distinguish between those protected by the ICSID system from other operations or activities called, generically, “ordinary commercial transactions”.

247. Another element that a good faith interpretation must ponder is the fact that the term “investment” or the expression “investment dispute” has not been the subject of any definition in the treaty itself. However, the title confirms that the treaty is a “Convention on *the settlement of investment disputes* between States and Nationals of other States”, not a general international system of settlement of any kind of disputes. Further, from the wording of the Convention cannot be inferred an intention of the Contracting States to accord to the term “investment” of the title and text an unusual, extraordinary or counterintuitive meaning. The “special meaning” rule of

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<sup>202</sup> UN Publication on the Law of Treaties, *supra* note 175, p.38, at para. 5.

<sup>203</sup> *Ibid*, p. 40, at para. 12.

Article 31(4) of the VCLT appears therefore as no applicable to the interpretation of the term “investment” in Article 25(1) of the ICSID Convention.

248. The provision in Article 25(1) should therefore be interpreted in good faith *in accordance with the ordinary meaning to be given to its terms*, including of course to the term “investment”, in their context and in the light of the object and purpose of the Convention. The subject-matter of the interpretative process in the present instance consists, consequently, in ascertaining the ordinary meaning of the term “investment” in that Article of the ICSID Convention with the help, as relevant, of the interpretative elements constituting the general rule of interpretation of treaties set out in paragraphs (1) to (3) of Article 31 of the VCLT.

249. In this connection, it should be recalled that within the VCLT interpretation system a correct application of the temporal element to the interpretation of a given term or expression in the text is controlled by the principle of good faith specifically incorporated into the “general rule” of interpretation of treaties of Article 31 of the VCLT.<sup>204</sup> Then, a good faith interpretation of the term “investment” in Article 25(1) of the ICSID Convention does not allow the interpreter to ignore the eventual incidence in the interpretation of the temporal element. One must therefore ask first: what was the prevailing ordinary meaning of the term “investment” when in 1965 it was inserted in Article 25(1)?

250. It is necessary to clear up this question because, at present, the term is sometimes used either generically or in some specific context (for example, in a financial context) with meanings which might not coincide with the ordinary meaning of the term “investment” at the time of the negotiation and adoption of the ICSID Convention, without prejudice of course of the penumbra around its exact outer-limits which provides a margin for interpretation. Good faith requires indeed to take duly into account, as appropriate, the temporal element in the interpretation of Article 25(1) of the Convention by distinguishing between any eventual meaning of the term “investment” in current financial or other contexts unconnected with any economic activity in the host State, on one hand, and the international “investment” that the ICSID Convention seeks in 1965 to protect in order to encourage *economic development*, by providing a neutral international forum for the settlement of investment disputes that counter-balance the host State’s regulatory authority over investments in its territory, on the other hand.

251. In the light of the probative available materials and publications, the type of “investment” of the ICSID Convention presupposes not only a financial contribution, but also a contribution in terms of economic activity, duration and risk in the host State, with the expectation of profits and/or revenue in return.<sup>205</sup> The Majority Decision admits expressly that the paramount argument militating against its own extremely wider understanding of the term “investment” in Article 25 of the Convention “would be that this might come as a surprise for States having subscribed to international arbitration”.<sup>206</sup>

252. The good faith interpretation of the VCLT is just the tool at the disposal of the interpreter to avoid conclusions which might well be contrary to the *pacta sunt servanda* rule binding States

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<sup>204</sup> *Ibid.*, p. 42, at para. 16.

<sup>205</sup> Professor Abi-Saab’s dissenting opinion in *Abaclat*, *supra* note 37, para.50.

<sup>206</sup> Majority Decision, para. 462.

by contracting in the ICSID Convention. Given the interpretative methods applied by the Majority Decision, I consider in order to seize this opportunity to reproduce below the following passage of *Oppenheim's International Law* edited in 1992 by Sir Robert Jennings, former President of the ICJ, and Sir Arthur Watts:

“The general rule of interpretation laid down in Article 31 of the Vienna Convention adopts the textual approach ...That such a textual approach - on which the International Law Commission was unanimous - is an accepted part of customary international law is suggested by many pronouncements of the International Court of Justice, which has also emphasised that interpretation is not a matter of revising treaties or reading into them what they do not expressly or by necessary implication contain, or of applying a rule of interpretation so as to produce a result contrary to the letter or spirit of the treaty's text”.<sup>207</sup>

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253. No evidence has been provided to the Tribunal about any amendment or modification by practice or otherwise of the original *primary purpose* of the ICSID Convention of strengthening the economic development of host States by stimulating a larger flow of private international investment into their territories. Furthermore, neither the Majority Decision nor the Parties have argued, and still less proved, that the Contracting States of the ICSID Convention intended that the meaning of the term “investment” inserted in Article 25(1) should be understood as being, for interpretation purpose, an “evolutionary” term incorporating as such future eventual developments in the use of the term in law or relations in contexts other than a ICSID context. As explained in the Executive Directors’ Report, the opening words of Article 25(1) of the Convention, namely the expression “*The jurisdiction of the Centre*” is used in the Convention “as a convenient expression to mean *the limits* within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings”<sup>208</sup> (*emphasis supplied*).

254. Certainly, the Parties to the present case differ as to the interpretation of the facts and the applicable law but they did not controvert the kind or type of “investment” to which Article 25(1) of the Convention refers. It is quite significant in this respect that the Claimants themselves describe the purported basis to qualify their holdings as ICSID investments as follows:

“[...] The initial purchase by the banks and the underwriters of the bonds issued by Argentina is indisputable an investment which satisfies all the requirements of the definition of investment, in terms of duration, risk, substantial commitment and contribution to the development of Argentina, profits and returns. As permitted by the terms of the relevant bond issues (and as in practically all bond issues), the initial purchasers of the bonds sold them to a vast number of investors in the secondary market who later may have resold them. *The subsequent circulation of the bonds on the secondary market evidently did not deprive the initial ‘investment’ of its quality, nor did it modify its nature*”<sup>209</sup> (*emphasis supplied*).

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<sup>207</sup> Oppenheim’s International Law, vol.1 (parts 2 to 4), 9th edition, pp. 1271-72. It is to be noted that in the quoted passage the reference “to the spirit” is not to a floating spirit but to the “spirit of the treaty’s text”.

<sup>208</sup> Report of the Executive Directors, para. 22.

<sup>209</sup> Claimants’ Rejoinder, para. 97.

255. In its search for the ordinary meaning of the term “investment” in Article 25(1) of the ICSID Convention, a good faith interpretation of the provision cannot brush aside the criterion that an activity or operation must be present to characterize a given transaction as an “investment” as deduced from ICSID decisions and commentators thereon. The criteria generally followed single out some *contribution* in cash or other assets of economic value (i.e. contribution in kind, labor, etc.), a *certain duration* (a minimum of years), an element of *risk in the enterprise* (operational risk) and a contribution to the host State *economic development*, presented sometimes in terms of the magnitude of the investment (a positive and significant contribution to the economic development of the host State). Reference is also made (sometimes under the heading of “contribution”) to the regularity of the deferred compensation for the investment (profits and return).

256. The *Salini v. Morocco* ICSID arbitral tribunal - one of the first to attempt an objective definition of “investment” - provides in its decision of jurisdiction of 23 July 2001 the following list of distinctive marks of “investment” which must be satisfied cumulatively:

“The doctrine generally considers that investment infers: contributions, certain duration of performance of the contract and a participation in the risks of the transaction (citations omitted). In reading the Convention’s Preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of the performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually”;<sup>210</sup>

“Although the total duration for the performance of the contract, in accordance CCAP, was fixed at 32 months, this was extended to 36 months. The transaction therefore, complies with minimal length of time upheld by the doctrine, which is from 2 to 5 years” (citations omitted).<sup>211</sup>

257. With minor variations, the attempts to ascertain the ordinary meaning of the term “investment” in the Article 25 of the ICSID Convention turn generally around those criteria or conditions. As stated, among several others, by the *Jan de Nul* arbitral tribunal in its 2006 decision on jurisdiction:

“The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called ‘*Salini* test’. Such test identifies the following elements as indicative of an ‘investment’ for the purpose of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and (iv) a contribution to the host State’s development, being understood that these elements may be closely interrelated, should be examined in their totality and will normally depend on the circumstances of the case” (*Jan de Nul* decision of 16 June 2006, para. 91).

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<sup>210</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction of 23 July 2001 (“*Salini v. Morocco*”), para. 52.

<sup>211</sup> *Ibid.*, para. 54.

258. The fourth additional condition of the *Salini* test, namely the contribution to the host State's economic development of the investment referred to in the Preamble of the ICSID Convention, had been suggested in the eighties by George Delaume as a single condition test *alternative* to the traditional contribution/ duration/ risk test, with a view to enlarging the scope of application of Article 25(1) of the Convention.<sup>212</sup> The *Salini* test merges therefore these three constitutive elements of the traditional definition of "investment" *plus* the element of the contribution of the international investment to the economic development of the host State of the ICSID Convention Preamble.

259. Most of the ICSID arbitral tribunals espoused the objective conceptualist approach of *Salini* (with its "deductive method") but, as explained in the quotations below, some of them considered *the fourth Salini condition to be a consequence of the investment rather than a constitutive condition of the notion and that, in any case, the fourth condition is covered by the first three*:

"[...] it seems that, in conformity with the objectives of the Convention, for a contract to be deemed an investment it must fulfil the following three conditions: a) the contracting party has made a contribution in the country in question, b) this contribution must extend over a certain period of time, and c) it must entail some risk for the contracting party.

However, it does not seem necessary to establish that the contract addresses the economic development of the country, *a condition that is in any case difficult to establish and is implicitly covered by the three conditions adopted therein*" (*LESI-Dipenta v. Algeria* (ICSID Case No. ARB/03/8) award of 10 January 2005, para. 13(iv)) (*emphasis supplied*);

"This Tribunal considers that a definition of investment does exist within the meaning of the ICSID Convention and that it does not suffice to note the existence of certain 'characteristics' which are typical of an investment to satisfy this objective requirement of the Centre's jurisdiction. Such an interpretation would result in depriving certain terms of Article 25 of the ICSID Convention of any meaning, something which would be incompatible with the obligation to interpret the terms of the Convention in accordance with the *effet utile* principle, as rightly stated by the award rendered in the *Joy Mining Machinery Limited v. Arab Republic of Egypt* case on August 6, 2004. According to the Tribunal, this definition, by contrast, only includes three elements. The requirement of a contribution to the development of the host State, which is difficult to establish, appears to allude to the merits of the dispute rather than to the Centre's jurisdiction. An investment may or may not prove to be useful to the host State without losing its status as such. It is true that the preamble of the ICSID convention makes references to the contribution to the economic development of the host State. *This is nevertheless presented as a consequence, and not a condition, of the investment: by protecting investments, the convention foments the development of the host State. That does not mean that the development of the host State is a constitutive element of the notion of investment.* This is why, as has been pointed out by certain arbitral tribunals,

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<sup>212</sup> George Delaume refers to "the expected if not always actual, contribution of the investment to the economic development of the country in question" (Le centre international pour le règlement des différends (CIRDI)", *Journal de droit international* (1982), at page 801).

this fourth condition is in reality covered by the first three” (*Pey Casado v. Chile* (ICSID Case No. ARB/98/2), Award of 8 May 2008, para. 232) (*emphasis supplied*); and

“[...] the present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal opinion, this approach reflects an objective definition of ‘investment’ that embodies specific criteria corresponding to the ordinary meaning of the term ‘investment’, without doing violence either to the text or the object and purpose of the ICSID Convention. *These three criteria derive from the ordinary meaning of the word ‘investment’, [...]*” (*Saba Fakes v. Turkey* award of 14 July 2010, para. 110) (*emphasis supplied*).

260. The decisions above and others following the same classical objective approach<sup>213</sup> diverge therefore sometimes in respect to the number of the constitutive elements to define “investment” but all are seeking to define the term by fixed criteria which must be fulfilled for the transaction may be qualified as “investment”. Moreover, all those decisions listed the three elements of contributions, durability and operational risk which appear as a minimum common denominator, namely as the hard-core or intrinsic *ordinary meaning* of the concept of investment of Article 25(1) of the Convention, as rightly stated by the above *Saba Fakes* decision.<sup>214</sup>

261. Nevertheless, the “contribution to the economic development of the host State” being part and parcel of the object and purpose of the ICSID Convention (independently of being considered implied in the said hard-core, additional condition or a consequence of the investment) has also - by virtue of Article 31(1) of VCLT - a important role to play in ascertaining the ordinary meaning of “investment” within the specific context of Article 25(1) of the ICSID Convention. In the light of that object and purpose it is obvious that, as rightly stated by the *Phoenix Action* arbitral tribunal, if “the investor carries out no economic activity, which is the goal of the encouragement of the flow of international investment, the operation, although possibly involving a contribution, a duration and some taking of risk will not qualify as a *protected investment*, as it does not satisfy the purpose of the ICSID Convention” (award of 15 April 2009, para. 86) (*emphasis supplied*).

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<sup>213</sup> As explained by D. Carreau, T. Flory and P. Juillard in a section concerning the search for criteria relating to “the concept of investment”: “The criteria are based in three ideas. First, there can be no investment without a contribution -whatever the form of contribution. Second, there can be no investment within a short period of time: an investment transaction is characterized by a ‘durability’ that can only be satisfied by a mid to long term contribution. Third, there can be no investment without risk, which means that the deferred compensation of the investor must be dependent upon the loss and profit of the venture. These three criteria are to be applied cumulatively”. (*Droit International Economique*, 3rd edition, 1990, para.935) (quoted in Emmanuel Gaillard, *Identify or Define?*, *supra* note 157, at p. 405)

<sup>214</sup> In addition to decisions already mentioned, see for example: *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction of 14 November 2005 (“*Bayindir Insaat*”); *LESI, S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3), Decision on Jurisdiction of 12 July 2006 (“*LESI-Astaldi*”); *Saipem S.p.A. v. People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007; *Ioannis Kardassopoulos v. Georgia* (ICSID Case No. ARB/05/18), Decision on Jurisdiction of 6 July 2007; and *Romak v. Uzbekistan*, *supra* note 148.

262. The ordinary meaning of the term “investment” in Article 25(1) of the ICSID Convention deduced from the above considerations raises indeed the question of whether it may be affirmed that “portfolio investments” and other financial negotiable products (traded with high velocity of circulation in capital markets and at places far remote from the State in whose territory the investment is supposed to take place) between persons alien to any economic activity in the host State and which, generally speaking, cover a wide spectrum of financial products ranging from standardized instruments (i.e. shares, bonds, loans) to structured and derivatives products (i.e. hedges of currencies, oil, etc., credit default swaps) may be qualified as “investment” in the sense of the ICSID Convention in the light of their intrinsic characteristics and the novelty of several of those products.

263. It is the conviction of the author of the present Opinion that the answer of a good faith international law interpretation to that question cannot be but negative because those financial products do not meet the investment requirements derived from the inherent *ordinary meaning* of term “investment” of Article 25(1) in its context and in the light of the object and purpose of the 1965 ICSID Convention. Thus, they cannot as a general rule qualify as “protected investment” under that Convention.<sup>215</sup>

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264. The Majority Decision’s conclusion on the matter, contrary to my own, derives from its assumption of the proposition of *the non-jurisdictional nature of the Salini test* shared generally by the subjectivists (i.e. Delaume, Schreuer, Fadlallah, Mortenson, Manciaux, etc.) who although admit the existence of common features of most “investments” (quite similar by the way to those mentioned in the paragraphs above) consider, however, those features should not be understood as “jurisdictional requirements”, but merely as “typical characteristics” of investments under the ICSID Convention.<sup>216</sup> The Majority Decision is perfectly clear in this respect: “The preceding analysis has also made clear that the present Tribunal endorses the view that the term ‘investment’ in Art. 25(1) of the ICSID Convention should not be subject to an unduly restrictive interpretation. Hence, the *Salini* criteria, if useful at all, must not be conceived of as expressing jurisdictional requirements *stricto sensu*”.<sup>217</sup>

265. However, the Majority Decision feels the need to indicate some limits to an otherwise *unduly liberal interpretation* of Article 25(1), so it adds that: “(the *Salini* test criteria) [...] may still prove useful provided that they are treated as guidelines and that they are applied in conjunction and in a flexible manner. In particular, they may help to identify, and exclude,

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<sup>215</sup> See Professor Abi-Saab’s dissenting opinion in *Abaclat*, *supra* note 37, paras. 55-8.

<sup>216</sup> Some of those authors evolved with the passage of time to more radical subjectivist positions. For example, *Delaume* wrote in 1986 that it “is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID” (“*ICSID and the Transnational Financial Community*”, 1 ICSID Review (1986), at p.242). This statement is not without ambiguity. It may be read *prima facie* as an attempt to interpret the 1965 ordinary meaning of the term “investment” in Article 25(1) by reference to Article 25(4), as the Majority Decision tried in the present case. But, it may be also viewed as an attempt to redefine, since 1986 onwards (without amendment of the Convention), the original ordinary meaning of the term “investment” in Article 25(1), coinciding with the expanding flow at that time of private capital in the financing of emergent market countries.

<sup>217</sup> Majority Decision, para. 479.



*extreme phenomena* that must remain outside of even a broad reading of the term ‘investment’ in Art. 25 of the ICSID Convention”<sup>218</sup> (*emphasis supplied*). However, one cannot but wonder what “extreme phenomena” means for the Majority Decision in the light of its specific conclusion that the pertinent “security entitlements” held by the Claimants in Argentine “sovereign bonds” deposited in Italian banks in Italy “fulfilled the criteria generally ascribed to the *Salini* test”<sup>219</sup>, when in fact they fulfil none of those criteria.

266. If the majority is unable or unwilling to distinguish between an “investment” of Article 25(1) of the ICSID convention and the issuance and selling of sovereign bonds by a State in international capital markets as a means of financing themselves its general needs in cash in accordance with the corresponding contemporary accepted practices and procedures of those markets, the self-proclaimed “guidelines” of the *Salini* test are meaningless, mere lip service to objectivity.

267. In fact, the Majority Decision not only puts aside the *Salini* test but refuses altogether with obstinacy, and this is the real legal issue on the point with the present Opinion, to attribute to the term “investment” in Article 25(1) the ordinary meaning it has in its context and in the light of the object and purpose of the 1965 ICSID Convention. Another casualty is the role of the “temporal element” in the interpretation of treaty terms. The total disregarding by the Majority Decision of this element is contrary to the principle of good faith governing the interpretation of treaties. In 1965 the time of the tradable Brady sovereign bonds of the 1990s and later markets was still far away.<sup>220</sup>

268. In any case, the proof that the selling and purchase of sovereign bonds and security entitlements like those at stake in the present case were intended in 1965 by the negotiating States to be covered by the term “investment” in Article 25(1) of the ICSID Convention has not been administered by the Claimants and it is not explained in the Majority Decision either. What it is obvious is the existence of a broad parallelism in time between the expanding flow of private capital and the increase in the number of doctrinal publications in favour, as a matter of policy, of opening the doors of ICSID international arbitration to eventual disputes arising out of mere

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<sup>218</sup> *Ibid*, para. 481.

<sup>219</sup> *Ibid*, para. 482.

<sup>220</sup> In the late 1980s and early 1990s the nature of sovereign borrowing changed dramatically in ways that limited the effectiveness of the Paris Club (lending to sovereigns from other States or their Agencies). The flows of official capital to emerging markets countries stagnated and flows of private capital surged most of which “came from large banks in developed, high-income countries, which sought to take advantage of the higher interest rate available through loans to sovereign in the developing world. “Emerging market debt’ became its own market.” (*Written Witness Statement of William Burke-White*, para. 15, annexed to Argentina’s Memorial). In 1985, under the Baker Plan commercial bank lending became a prerequisite to multilateral lending from the IMF and other international organizations (*Ibid*, para. 17). A process for the renegotiation of sovereign debt to private bank was established within the London Club (*Ibid*, para. 18). A major shift in the ownership of sovereign debt came in 1989 with the Brady Plan thereby bank debts were converted into *tradable* Brady Bonds. The market for developing country bonds expanded: “For issuing governments, these new bonds provided a relatively easy source of new capital. For capital exporters, these new sovereign bonds promised a high return in capital” (*Ibid*, para. 22). As a result, the creditors of the 1990 and later “were largely bondholders -small banks, funds and individual (instead of large commercial banks). These private creditors “have become increasingly numerous, anonymous and difficult to coordinate” (*Ibid*, para. 23).

financial transaction even if the latter are unconnected with any genuine “investment”.<sup>221</sup> But, as already indicated, the 1965 ICSID Convention remains as concluded, namely without being amended.

269. The Majority Decision has been quite timid in alleging case-law in support of its conclusions, showing thereby that the latter yield mainly to doctrinal constructions quite posterior to the ICSID Convention. Moreover, some of the invoked ICSID arbitral decisions boomerang against the Majority Decision’s conclusions. It is for example the case of the *Mihaly* award (2002) which provides that “without proof of an ‘investment’ under Article 25(1), neither Party need to argue further, for without such an ‘investment’, there cannot be no dispute, legal or otherwise, arising directly or indirectly out of it, which could be submitted to the jurisdiction of the Centre and the Tribunal”.<sup>222</sup> This is exactly the position of the author of the present Opinion. In the same vein, the 2004 *Joy Mining* award which after noting the absence in the case of the elements of risk, duration, regularity of profit and contribution to development concludes that “it lacks jurisdiction to consider the dispute because the claim falls outside both the Treaty and the Convention”.<sup>223</sup>

270. The Majority Decision’s conclusions rest heavily on the *Fedax* decision (1997). Then, it should be recalled that while giving certainly a broad reach to the concept, the decision does not reject the proposition that by inserting the term “investment” in Article 25(1) of the ICSID Convention the Contracting States set out an objective legal requirement which must be complied with for establishing the jurisdiction of the Centre.<sup>224</sup> Thus, without engaging in a vast debate on the notion of “investment”, *Fedax* nevertheless took into account some basic constitutive elements of that objective notion (certain duration, regularity of profit and return, assumption of risk, substantial commitment, significant for the host State’s development) when deciding that the purchase of the pertinent promissory notes (an evidence of a “loan”) qualified in the *particular facts of the case* as an investment under the ICSID Convention.<sup>225</sup>

271. Certainly, *Fedax* admits that a loan *could* constitute an investment, but that this is not necessarily so in all factual circumstances or for every form of loan or credit. It would seem that for *Fedax* the loans which would fall ultimately under the scope of the Convention will generally be those intended to finance somehow a project, work or services (reference to the Venezuelan Public Credit Law is significant in that respect) in the host State having the character of, or be related to, a “genuine” investment under Article 25(1) of the Convention.<sup>226</sup> The decision in *Joy Mining* (2004) and the award in *Sempre v. Argentine* (2007), tribunals presided by the same person, throw some additional light thereon.<sup>227</sup>

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<sup>221</sup> For instance, in 2004 Manciaux suggested taking into account only the “growth of the host State’s estate” reminiscent of Delaume’s former proposition of the “contribution to the host State’s economic development” (see, Emmanuel Gaillard, *Identify or Define?*, *supra* note 157, at p. 405, footnote 15).

<sup>222</sup> *Mihaly*, *supra* note 27, para. 32.

<sup>223</sup> *Joy Mining*, *supra* note 167, paras. 62 and 63.

<sup>224</sup> *Fedax*, *supra* note 128, para. 28.

<sup>225</sup> *Ibid*, para. 43.

<sup>226</sup> *Ibid*, para. 42.

<sup>227</sup> *Joy Mining*, *supra* note 168, para. 60; *Sempre Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Award of 28 September 2007, paras. 211-16 (this award has been annulled by an ICSID *ad hoc* Committee Decision on Application for Annulment of 29 June 2010).

272. In contrast with *Fedax*, the *CSOB v. Slovakia* decision did not consider that the basic elements of the objective concept of “investment” were jurisdictional prerequisites for the finding that a given transaction constitute an investment, but that the underlying transaction should be designed to promote the economic development of the host State.<sup>228</sup> This latter decision is therefore closer to the present Majority Decision than *Fedax*. The *CSOB v. Slovakia* arbitral tribunal underlined that the “CSOB’s claim and the related loan facility made available to the Slovak Collection Company are closely connected to the development of CSOB’s banking activity in the Slovak Republic and that they qualify as investments within the meaning of the Convention and the BIT”.<sup>229</sup> However, contrary to the general approach of the present Majority Decision to the territoriality aspect of an “investment” (see below), *CSOB v. Slovakia* tribunal underlines that the Consolidation Agreement provides basically for the development of CSOB’s activities in both the Czech and Slovak Republics, as well as that there were spending or outlays of resources in the Slovak Republic, that the CSOB qualifies as the holder of an “asset invested or obtained” in the territory of the Slovak Republic, and that the said activities were designed to produce a benefit and to offer a return in the future, subject to the element of risk that is implicit in most economic activities.<sup>230</sup>

273. In the present case, the Majority Decision does not follow in fact the reasoning of either *Fedax* or *CSOB* to reach the conclusion that the sovereign bonds and security entitlements at stake fulfil the criteria general ascribed to the *Salini* test, but a different path based essentially upon the presumption that the Contracting States of the ICSID Convention left largely to the BITs, or other jurisdictional instruments, the definition of the term “investment” of Article 25(1) of the ICSID Convention as did before, for example, the *MCI v. Ecuador* decision of 31 July 2007,<sup>231</sup> the *CMS Gas v. Argentina* decision of the *ad hoc* committee on application for annulment of 25 September 2007<sup>232</sup> and the *Biwater v. Tanzania* award of 24 July 2008 which declares, *inter alia*, that “even if the Republic could demonstrate that any, or all, of the *Salini* criteria are not satisfied in this case, this not necessarily be sufficient - in and of itself - to deny jurisdiction”.<sup>233</sup> In the subject-matter considered, the *Abaclat* majority decision was not of much help for the present Majority Decision in view of the sidestepping by the former of jurisdictional requirements.

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274. In sum, the Majority Decision raises the issue of the non-jurisdictional nature of the *Salini* test to avoid the unavoidable conclusion that the purchase by the Claimants of the sovereign bonds and security entitlements at stake in the present case is not a genuine “investment” in the sense of Article 25(1) of the ICSID Convention. But such issue is rather a fallacy. What counts for a good faith interpretation is not at all *Salini* as such, but the determination of the *ordinary*

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<sup>228</sup> *CSOB*, *supra* note 133, para. 64.

<sup>229</sup> *Ibid*, para. 91.

<sup>230</sup> *Ibid*, paras. 87-90.

<sup>231</sup> *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on the Application for Annulment of 19 October 2009 (“*MCI v. Ecuador*”), para. 165.

<sup>232</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic of 25 September 2007 (“*CMS Gas v. Argentina*”), para. 71.

<sup>233</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Award of 24 July 2008, para. 318.

*meaning* of the term “investment” in Article 25(1) in the context of the 1965 ICSID Convention and in the light of the object and purpose of that Convention which is the first point of reference for the interpretation of treaty provisions, as provided for by the rules on interpretation of treaties codified by the VCLT. Then, it is such an ordinary meaning that the majority tries to conceal again and again behind the screen of the reiterative and dogmatic affirmation of the broad meaning to be given to term “investment” in Article 25 (in fact a limitless meaning) or, alternatively, that the said term should not be subjected to an unduly restrict interpretation which nobody proposed or is proposing.

275. A good faith interpretation of Article 25(1) of the ICSID Convention has also to ponder the fact that the Centre was not established to become just another institution for the settlement of any kind of disputes through conciliation and arbitration, but only for the settlement of disputes arising directly out of an “investment” between a Contracting State (the host State) and a national of other Contracting States (the private foreign investor). To proceed otherwise would be in full contradiction with the plain text of Article 25(1), the purpose of the ICSID Convention as recorded in the Preamble and the Executive Directors’ Report, and the very logic and justification of the ICSID special international protection system.<sup>234</sup> Further, in the present case, the Claimants are alien to any kind of economic activity in the host State (or related thereto in some significant relevant way) and, therefore, they do not satisfy either the requirement of the cooperation for economic development of host State requirement enounce in the opening paragraph of the Preamble of the ICSID Convention which is, indeed, the *raison d’être* of the protection granted thereby to a genuine “investment”.<sup>235</sup>

276. For the author of the present Opinion, the term “investment” in Article 25(1) of the ICSID Convention has an intended inherent *ordinary meaning* rightly described, with reference to the 1993 Switzerland- Uzbekistan BIT, by the award of 26 November 2009 of the *Romak and Uzbekistan* arbitral tribunal (a PCA tribunal) as follows:

“The Arbitral Tribunal [...] considers that the term ‘investment’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals [...] which consistently incorporates contribution, duration and risk as hallmarks of an “investment”. By their nature, asset types enumerated in the BIT’s non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of ‘investment,’ the fact that it falls within one of the categories listed in Article 1 does not transform it into an ‘investment’. In the general formulation of the tribunal in *Azinian* “labelling [...] is no substitute for analysis”.<sup>236</sup>

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<sup>234</sup> See Judge Mohamed Shahabuddeen’s dissenting opinion in the *Malaysian Historical Salvors* Decision on annulment, *supra* note 160, paras. 62-5.

<sup>235</sup> *Phoenix Action*, *supra* note 168, para. 86.

<sup>236</sup> *Romak*, *supra* note 148, para. 207.

## 5. The definition of “investment” of Article 1(1) of the 1990 Argentina-Italy BIT

### (a) Authentic texts and general economy of the definition

277. The provision defining the term “investment” in the Argentina-Italy BIT, namely Article 1(1), is construed by a *chapeau* containing a *general definition* of the term, followed - *within that general context* - by a non-exhaustive list (a) to (f) of examples of different types of specific investments. Among them, the example in lit. (c) deals with financial instruments. As mentioned in footnote 23 of the Introduction to the present Opinion, the term used in the authentic Spanish (“*obligaciones*”) and Italian (“*obbligazioni*”) texts of Article 1(1)(c) were translated in some English versions as “*bonds*” creating initially considerable misunderstandings between the Parties, as well as within the Tribunal.

278. The Majority Decision reproduces the authentic Spanish and Italian texts and an unofficial English translation of Article 1(1)(c) in its paragraphs 417 and 418. The reproduced unofficial English translation is composed by a translation provided by the Respondent and an alternative translation offered by the Claimants, but that translation has not been authenticated by the Parties (Article 33(2) of the VCLT). It follows that the question of the use or non-use of the term “*bonds*” in some unofficial English translation is legally irrelevant for the interpretation of lit. (c) of Article 1(1) of the BIT. Thus, I will reproduce below in the order the text of lit. (c) in the equally authentic Spanish and Italian texts only:

“c. obligaciones, títulos públicos o privados o cualquier otro derecho a prestaciones o servicios que tengan un valor económico, como también las ganancias capitalizadas;”

“c. obbligazioni, titoli pubblici o private o qualsiasi altro diritto per prestazioni o servizi che abbiamo un valore economico, come altresì redditi capitalizzati”.

279. As can be seen, the terms “*bonds*” and/or “*security entitlements*” do not appear in the authentic Spanish or Italian texts of Article 1(1)(c) of the 1990 Argentina-Italy BIT; still less expressions such as “*sovereign bonds*” or “*security entitlements in sovereign bonds*”. This clarification should be the starting point of any interpretative process aimed at determining the ordinary meaning of the term “*investment*” in Article 1(1) of the BIT through the application of the interpretation rules of the VCLT. However, and from the very beginning of its interpretative process, the Majority Decision proclaims dogmatically that “there can be no doubt that *Art. 1(1) of the Argentina-Italy BIT* covers the bonds/security entitlements at stake in the present proceedings”.<sup>237</sup> I must say that such a proclamation does not stand scrutiny, unless the immediate *context* of lit. (c), namely the *chapeau* in Article 1(1), is done away with one fell stroke, as does the Majority Decision’s reasoning.

280. But, the Majority Decision cannot ignore, and in fact it admits, that very text of Article 1(1) of the BIT does *subject* the meaning of the non-exhaustive list of specific types of investments therein, and therefore of lit. (c), to *the general definition of the chapeau of Article 1(1)*. Then, as already indicated in this Opinion, Article 31(1) of the VCLT provides that a treaty shall be

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<sup>237</sup> Majority Decision, para. 490.

interpreted in good faith in accordance with *the ordinary meaning to be given to the terms of the treaty in their context* and in the light of its object and purpose. Thus, it follows that the “*obligaciones/ obbligazioni*” of lit. (c) cannot be but those which are in conformity with the definition of the *chapeau* and not further or otherwise. However, notwithstanding this obvious textual and contextual conclusion as to the meaning and scope of the term “*obligaciones/obbligazioni*” in lit. (c), the Majority Decision insists that:

“At most, it might be argued that the Parties opted to use a generic term covering all types of obligations, thus including bonds/security entitlements. Had the Parties sought to actually exclude those instruments from the scope of the application of the BIT, they would have had to say so explicitly”.<sup>238</sup>

281. But, this is what has been precisely done by Argentina and Italy through the method of placing all the specific examples of the non-exhaustive list within the context of the definition of “investment” of the *chapeau* of Article 1(1) (*en este marco general/intale contesto di carattere generale*). Thus, those “*obligaciones/obbligazioni*” in lit. (c) which do not fulfil the requirements set out in the general definition of the *chapeau*, or because of its very nature or characteristics are in plain contradiction with such a definition, are to be deemed explicitly excluded by the investment definition of Article 1(1) when that definition is read, as it should, as a whole. This is of course without prejudice that States are not obliged in international law to have recourse to any particular technical method, such as the “contracting out” procedure, to avoid assuming any kind of conventional obligations, in particular jurisdictional obligations.

282. The conclusion is therefore obvious. Even if a given asset falls within one of the types enumerated in the non-exhaustive list of examples (which is not the case with the pertinent “sovereign bonds” and “security entitlements”) this fact does not transform it into an “investment” protected by the BIT, unless the asset in question do correspond to the definition of that term in the *chapeau* of Article 1(1) of the Argentina-Italy BIT. In other words, a given asset, even when falling within one of the types enumerated in lit. (a) to (f), is considered to be an “investment” protected by the BIT *provided that the asset concerned falls likewise within the definition of the chapeau*.

**(b) The text of the definition of “investment” in the *chapeau* of Article 1(1) of the BIT and its interpretation**

283. The purchasing transactions of the present case are not a contribution or asset invested or reinvested by the Claimants *in the territory* of the Argentine Republic, *in accordance with the laws and regulations of the latter* and, consequently, are not susceptible of falling within the definition of the term “investment” provided for in the *chapeau* of Article 1(1) of the BIT which reads as follows:

“1. The term ‘investment’ shall mean, in conformity with the legal system of the host State and independently from the legal form adopted or from any other connected legal system,

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<sup>238</sup> *Ibid*, para. 491.

any contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party in the territory of the other, in accordance with the laws and regulations of the latter.”

284. The ordinary meaning of the terms of definition of the *chapeau* do not allow concluding that the selling of sovereign bonds and the purchase of related security entitlements at stake in the present case qualify as “investments”, either individually or jointly, in the sense of the definition of Article 1(1) of the Argentina-Italy BIT. This explains in turn why the Majority Decision *avoids conducting a true contextual analysis on the existence in the present case of an investment falling under the BIT’s definition taking as a whole*, as well as its silence on the facts that Argentina-Italy BIT defines in Article 1(2) the term “investor” by reference likewise to “investments in the territory of the other Contracting Party” and that in Article 1(4) defines the term “territory” for the purpose of the Agreement as follows:

“The term ‘territory’ means, in addition to areas within land and maritime boundaries, maritime zones, meaning marine and submarine zones over which the Contracting Parties have sovereignty, sovereign rights or exercise jurisdiction, in conformity with their respective laws and international law”.

285. The Majority Decision errs when it approaches the determination of the meaning and scope of the term “*obligaciones/obbligazioni*” of lit. (c) as if this subparagraph would be a self-contained or autonomous provision for interpretation purpose. Subparagraph lit. (c) is part and parcel of a wider provision which states explicitly and unequivocally that the subparagraph is to be understood *within the general context* of the definition of the term “investment” giving in the *chapeau* of Article 1(1). An interpretative undertaking ignoring the immediate context of subparagraph lit. (c) represented by the *chapeau* of Article 1(1) of the BIT and the definitions of the terms “investor” and “territory” in Article 1(2) and (4) of the BIT respectively- as commanded by Article 31 of the VCLT - cannot yield a correct good faith interpretation of the ordinary meaning of the term “*obligaciones/obbligazioni*” in Article 1(1) (c).

286. It goes without saying that these considerations apply to all and each of the terms and expressions in every specific asset type listed either in Article 1(1) (c) of the BIT or in its subparagraphs lit. (a), (b), (d), (e), and (f). Consequently, the efforts deployed by the Majority Decision to find some support for its misreading of Article 1(1) by invoking the expressions “any other right to benefits or services with a economic value” or “any right of an economic nature granted by law or contract” (in lit. (c) and (f) respectively) likewise lead nowhere. The ordinary meaning of these expressions must be also determined taking duly into account the same immediate *context*, namely the *chapeau*, as in the case of the term “*obligaciones*”/“*obbligazioni*” of lit. (c).

287. Furthermore, an interpreter who applies Article 31 of the VCLT is not supposed either to declare to be “fully convinced that the bonds/security entitlements pertinent to the present case fall into the scope of application laid down in Art. 1(1)(a)-(f) of the Argentine-Italy BIT” as the

Majority Decision does<sup>239</sup> *before* ascertaining the ordinary meaning of the terms in the *chapeau* of Article 1(1) not only in their *context* but also *in the light of the object and purpose of the BIT*.

288. Then, the Preamble of the 1990 Argentina-Italy BIT states expressly that by concluding the BIT the Contracting Parties: (i) desire “to create favourable conditions for greater *economic cooperation* between the two States and, in particular, *for the making of investments by investors of one Contracting Party in the territory of the other*; (ii) consider that the only way of establishing and maintaining an adequate flow of capital is to ensure a climate that is conducive *to investments respecting the law of the host State*”; and (iii) recognize that they were entering into the BIT, because “the encouragement and reciprocal protection of investments will help *to stimulate entrepreneurial initiatives* which will contribute to the prosperity of the two Contracting Parties” (*emphasis supplied*).

289. Thus, the object and purpose intended by Argentina and Italy when concluding their 1990 BIT was essentially the development of economic cooperation *through the stimulation of entrepreneurial initiatives* under the form of investments made by investors of one of the Contracting Party in the territory of the other and in accordance with the laws and regulations of the latter. The object and purpose of the BIT, as well as the context of lit (c), confirm beyond any doubt that the aim of the BIT is the development of investments entailing economic activities of an entrepreneurial character in the territory of the other Contracting Party and not portfolio investments or the acquisition of mere financial products without any rapport whatsoever with a project, enterprise or activity of the private investor national of one Contracting Party in the territory of the host Party of the investment.

290. The reasoning leading the Majority Decision to conclude otherwise results apparently from assuming that each of the specific types of investments listed in Article 1(1) of the BIT would have an ordinary meaning of its own independent of the context represented by the definition of the term “investment” in the *chapeau* of Article 1(1) and the definitions of the terms “investor” and “territory” in Article 1(2) and (4), as well as of the object and purpose of the BIT deduced from its Preamble. It is indeed on the basis of that false assumption that the Majority Decision concludes that the sovereign bonds and the security entitlement at stake are investments protected by the Argentina-Italy BIT. But, it cannot be so because that conclusion does not result from an interpretation conducted in conformity with Article 31 the VCLT, good faith principle included. The *very text* of Article 1(1) excludes that the Contracting Parties could have intended that for interpretation purpose the asset type of subparagraph (c) be insulated from its immediate context and the object and purpose of the BIT.

291. By making an autonomous and free interpretation on lit. (c), the Majority Decision necessarily errs in its conclusion because proceeding in that manner amounts to disregarding altogether the following paramount comment of the International Law Commission concerning the third basic principle built within Article 31(1) of the VCLT (former 27(1) in the ILC draft articles): “The third principle is one of both of common sense and good faith; the ordinary

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<sup>239</sup> *Ibid*, para. 495.



meaning of a term is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose”.<sup>240</sup>

**(c) Requirements qualifying the expression “contribution or asset invested or reinvested by physical or juridical persons of one Contracting Party” of the *chapeau* of Article 1(1) of the BIT**

**(i) General considerations**

292. The erroneous interpretative approach of the Majority Decision to the determination of the scope of the term of “investment” in Article 1(1) of the 1990 Argentina-Italy BIT finds confirmation when, in a second move, the majority deals with the core issue of the interpretation of the *requirements* qualifying in the *chapeau* the “*contribution or assets invested or reinvested*” (*aporte o bien invertido o reinvertido; conferimento o bene investito o reinvestito*) by providing for the investment be made by the foreign private investor (i) in the territory of the other State Party to the BIT and (ii) in accordance with the laws and regulations of the latter State.

293. None of these two requirements is met by the “investments” allegedly made by the Claimants in the present case. However, by means of a coarse reasoning the majority reaches the opposite conclusion on both accounts.<sup>241</sup> I am of course of a different opinion. But the point of interest at the moment is not my views, but to inquire how the majority could have reached its conclusions by means of an interpretation supposedly done in conformity with the VCLT rules on interpretation of treaties. The mystery however does not last much, because the present Majority Decision proceeded without concealment, once more, to follow the interpretative methodology of the 2011 *Abaclat* majority decision which places itself in a universe other than the law of treaties of public international law.

294. To find in the present Majority Decision’s reasoning some traces of the principles and rules adopted by the VCLT to the effect that the text must be presumed to be the authentic expression of the intention of the parties or that the starting point of the interpretation of a treaty is the elucidation of the meaning of the text (not an investigation of any eventual original or posterior floating intentions) would be a vain undertaking. And it is so in spite of the fact that the text of the definition in the *chapeau* of Article 1(1) of the BIT does not have any major ambiguity or obscurity to the point that it seems one of those treaty texts which gives a sense to the maxim *in claris non fit interpretatio*.

295. In fact, the Majority Decision decided to rewrite in the present case the requirements qualifying the expression “contribution or asset invested or reinvested” in Article 1(1) of the BIT by means of a construction based upon two wrong propositions: (i) the invocation out of context of the term “*obligaciones/obbligazioni*” in lit. (c); and (ii) the recourse to elements extrinsic to the general rule of interpretation of treaties of Article 31 of the VCLT. It is indeed difficult to understand otherwise the number of departures from the law of treaties of the Majority Decision in the present context. However, the paramount goal of the majority - namely that “all

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<sup>240</sup> UN Publication on the Law of Treaties, *supra* note 175, p. 40, para. 12.

<sup>241</sup> Majority Decision, paras. 510 and 519.

requirements of the jurisdiction *ratione materiae* are satisfied with regard to the pertinent bonds and security entitlements”<sup>242</sup> cannot be reached in an ICSID arbitration but through the application of the relevant law, public international law in the instant environment.

296. In this respect, the present Majority Decision is but one example - among others in the field of investment disputes between foreign private investors and host States, of purportedly interpretative decisions of treaty provisions declared to be done in conformity with the VCLT interpretation rules, which in fact are due to policy oriented conclusions adopted with the subjective value aim in mind of extending the maximum protection to foreign private investments, as well as to the greatest number of purported investors, even beyond the texts of the applicable instruments and irrespective of the scope of the host State’s consent to jurisdiction as recorded in the standing arbitration offer set out in the corresponding BIT. A good illustration of the described approach is the reasoning underlying the following passage of the present Majority Decision:

“In regard to the bonds/security entitlements at stake, the only alternative conclusion (to an investment’s *situs* in Argentina) to be drawn would be to state that those have their *situs* nowhere, as the Respondent could not point out any other jurisdiction that would have closer links to the investments at issue. This would, however, imply that those investments fall out of the protection of investment law completely. However, as far as the present Tribunal is concerned, such position cannot be reconciled with the obvious intent of the Parties, when concluding the Argentina-Italy BIT, to make Art. 1(1) of the BIT cover various types of obligations, including financial instruments such as bonds/security entitlements, in view of which they must have been aware that those would often have a *situs* not as clearly identifiable as that of a mine or industrial plant”.<sup>243</sup>

297. I must confess that I encounter considerable difficulties to understand the above reasoning in a public international law context. It reflects a tendency observable in some ICSID case-law in which when confronted with a subject-matter of a claim falling outside of the applicable law instead of dismissing the case, arbitrators make all kind of efforts to avoid doing so by creating meaning in the application of the law rather than to discover it through an interpretation of the BIT done in accordance with the general rule of interpretation of treaties of Article 31 of the VCLT.<sup>244</sup> The best legal answer to that kind of so-called interpretative conclusions is to quote again from the following self-explanatory commentary of the ILC to its draft articles on the law of treaties:

“[...] the jurisprudence of the International Court contains many pronouncements from which it is permissible to conclude that the textual approach to treaty interpretation is regarded by it as established law. In particular, the Court has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contained”.<sup>245</sup>

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<sup>242</sup> *Ibid.*, para. 520.

<sup>243</sup> *Ibid.*, para. 509.

<sup>244</sup> M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (University of Helsinki, 1989), p. 415; See also *Wintershall*, *supra* note 9, para. 185.

<sup>245</sup> UN Publication on the Law of Treaties, *supra* note 175, at para. 11.

**(ii) The investment shall be made “in the territory” of the other Contracting Party**

298. Following a reasoning similar to the *Abaclat* tribunal, the Majority Decision in the present case begins its consideration of the territoriality requirement by affirming, dogmatically, that given the character of the investments at stake (namely, its own erroneous conclusion that the pertinent bonds and security entitlements are “investments” under Article 1(1) of the Argentina-Italy BIT ), the decisive criterion to determine the fulfilment of the territoriality requirement cannot be the *physical location in Argentina* of the purportedly contributions concerned.

299. Thus, instead of declaring the obvious - namely that the pertinent sovereign bonds and security entitlements do not fulfil the territorial requirement of the “investment” protected by the BIT - the Majority Decision simply decided to look for an alternative criterion susceptible of bypassing the territoriality requirement of the BIT so as to make fitting therein the financial products concerned, notwithstanding the fact that *the term “territory” of each Contracting Party for the purpose of the BIT is defined in Article 1(4) in physical/ legal land and maritime terms which excludes virtual construction of the concept of “territory” as the one made by the Majority Decision.* For the 1990 Argentina-Italy BIT “territory” for the purpose of the Agreement means: (i) areas within land and maritime boundaries of one of the Contracting Parties; and (ii) maritime zones, namely marine and submarine zones, over which one of the Contracting Parties has sovereignty, sovereign rights or exercise jurisdiction, in conformity with their respective laws and international law.

300. Looking for one alternative to the territoriality requirement as defined in Article 1(1) and (4) of the Argentina-Italy BIT, the Majority Decision finds that *in the case of* the pertinent sovereign bonds and security entitlements it suffices that “funds were made available to the Respondent that were at its disposal to foster its economic development, and this notably suffices to qualify the investment at stake as one made ‘in the territory’ of Argentina”, rejecting that the funds in question can be traced to a specific project, enterprise or activity in the host State territory.<sup>246</sup> In support of this conclusion, the majority invokes the first paragraph of the Preamble of the ICSID Convention, although in fact it seems to follow *Abaclat’s* reasoning that *the relevant question* “is where the invested funds ultimately made available to the host State and did they support the latter’s economic development”.<sup>247</sup> All this is reminiscent of the most extremist subjectivist views mentioned in connection with the interpretation of the concept of “investment” in Article 25(1) of the ICSID Convention, in particular of Delaume and Manciaux. As to the substance of the argument, one may find in the case-law pronouncements to the effect that the contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes “development” (see *Phoenix Action* award, para. 85).

301. In whatever hypothesis, this alternative criterion or criteria are imported by the Majority Decision from the general discussion on the concept of “investment” in Article 25(1) of the ICSID Convention, a discussion alien to the text of the definitions in Article 1(1) and (4) of the Argentina-Italy BIT. As such, it has no role to play in an interpretation of the wording of these

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<sup>246</sup> Majority Decision, paras. 496 and 503-05.

<sup>247</sup> *Abaclat*, *supra* note 4, para. 374. See Majority Decision, paras. 499, 502 and 505.

definitions. Furthermore, that wording of Article 1(1) is crystal clear (contribution or asset invested or reinvested “in the territory” of the other Contracting Party) and, further, it is not in need of an interpretation because as indicated the term “territory” is in turn defined also in Article 1(4) of the same BIT. In such a situation, the task of an international arbitrator is to give effect, to applied, the two said definitions of the BIT as formulated in the text of this conventional bilateral instrument and not to do otherwise, namely to revising or amending *motu proprio* the text of Article 1(1) and (4) of the Argentina-Italy BIT. I regret indeed to put on record that the Majority Decision has invoked the Argentina-Italy BIT against an objective concept of “investment” in Article 25(1) of the ICSID Convention and, in the present context, a given subjective concept that Convention’s term against the ordinary meaning of the terms “investment” and “territory” as respectively defined by the text of the Argentina-Italy BIT. A further shortcoming of the position of the Majority Decision in the matter is that it follows that the terms “in the territory” would have different meanings depending on the nature of the case or claim. Then, there is nothing in the text of the 1990 Argentina-Italy BIT manifesting such a common intention of the Contracting Parties when concluding the BIT.

302. It is a matter of fact that all along the Argentina-Italy BIT the term “investment” appears systematically qualified by the words “in the territory” of the other Contracting Party understood in the *physical/legal sense* of the definition of “territory” in Article 1(4) of the BIT, as illustrated by the following sentences: “for the making of investments by investors of one Contracting Party in the territory of the other” (first para. of the Preamble of the BIT); “make investments in the territory of the other Contracting Party” (Article 1(2)); “each Contracting Party shall encourage the making of investment in its territory” (Article 2); “each Contracting Party, within the ambit of its territory, shall accord to the investments made by investors of the other Contracting Party” (Article 3); “the Contracting Party in whose territory the investment was made” (Article 4); “risks for investment made by (the) investors (of one Contracting Party’s ) in the territory of the other Party (Article 7); “the Contracting Party in whose territory the investment is located” (Article 8); and “in whose territory the investment was made” (Additional Protocol (1)).

303. There cannot be any doubt that the protection given by the Argentina-Italy BIT to the “investment” of private investors nationals of the other Contracting Party concerns those made “*in the territory*” (*as defined in the BIT itself*) of the host State Party exclusively, and not further or otherwise. The territoriality requirement is indeed one of the most outstanding features of the Argentina-Italy BIT taking as a whole (as in NAFTA and other BITs). Being expressly and clearly manifested in the text of the BIT, the territoriality requirement as defined therein cannot be put aside in an interpretation of the common intention of Argentina and Italy on the issue of the “protected investments” when they concluded the BIT.<sup>248</sup>

304. In this respect, it should be recalled that in the relations between Argentina and Italy the rules on interpretation of treaties of Articles 31 to 33 of the 1969 VCLT apply not only as codified customary rules of international law but also *qua* conventional rules because both countries are Parties to the VCLT and the BIT was concluded in 1990, namely after the entry into force in 1980 of the VCLT. Thus, even if someone would consider that in customary international law the term “territory” might have according to the circumstances of the case

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<sup>248</sup> In this respect the 1990 Argentina-Italy BIT is quite similar to the relevant NAFTA provisions.

various meanings, the definition of Article 1(4) of the BIT would prevail in the relations between Argentina and Italy by virtue of the “special meaning” rule of Article 31(4) of the VCLT.

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305. To the above, the Majority Decision adds a further element extrinsic to the text in its interpretation of the territoriality requirement embodied in the text of Article 1(1) of the Argentina-Italy BIT, namely the alleged “unified economic operation of the bonds issuing process” considered at the beginning of Chapter III of this Opinion.<sup>249</sup> According to the Majority Decision, the Respondent would have devised the circulation of security entitlements on the secondary market as a means to raise money for the budgetary needs of Argentina when it undertook to issue the bonds in question in the primary market in agreement with the underwriters. Confronted with this kind of explanation, the reader is entitled again to ask himself whether the Majority Decision is actually engaged in an interpretation of the BIT or in something else without rapport with a treaty interpretative operation undertaken in accordance with the VCLT interpretation rules.

306. In support of the above unified economic operation argument, the Majority Decision rejects the need to prove that the funds or contributions in question can be traced to a “specific project, enterprise or activity” in the host State’s territory frequently referred to in ICSID case-law in connection with the concept of “investment” in Article 25(1) of the ICSID Convention. For the Majority Decision “nowhere in the Argentina- Italy BIT” can such a “specificity requirement” be found as complementing the requirement of territoriality.<sup>250</sup> This is correct, but it is quite irrelevant because the subject-matter in the present context is the Argentina-Italy BIT, not the ICSID Convention. This shows once more the Majority Decision’s difficulties in a sincere admission of the “double-barrelled” test. The present Tribunal is supposed to interpret and apply two conventional instruments with different parties, not a single one.

307. Following the Claimants, the Majority Decision refers in relation with the present issue to the 1997 *Fedax* decision. This reference calls also for some clarifications. In the first place, *Fedax* did not mix up the interpretation of the ICSID Convention and the interpretation of the applicable BIT. On the scope of Article 25(1) of the Convention, the *Fedax* tribunal considered that since promissory notes were evidence of a loan and a rather typical financial and credit instrument, there was nothing to prevent their purchase from qualifying as an investment under the Convention *in the particular circumstances of the case* and, further, that this conclusion *had to be examined next in the contest of the specific consent of the parties and other provisions which are controlling in the matter*. Later on, the tribunal considered the relevant terms and provisions of the Netherlands-Venezuela BIT which, as stated, was the specific bilateral investment treaty governing the consent to arbitration by the latter Contracting Party. It is at this point, and in reply to Venezuela’s argument to the contrary, that the *Fedax* tribunal did declare that “while it is true that *in some kinds of investments listed under Article 1(a) of the Agreement*, such as the acquisition of interests in immovable property, companies and the like, a transfer of

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<sup>249</sup> Majority Decision, paras. 500-02.

<sup>250</sup> *Ibid*, para. 503.

funds or value will be made into the territory of the host State, *this does not necessarily happen in a number of other types of investments, particularly those of a financial nature*”<sup>251</sup> (*emphasis supplied*).

308. But, this declaration of the *Fedax* tribunal related to a BIT, the Netherlands-Venezuela BIT, whose definition of the term “investment” in its Article 1(a) did not incorporate the territoriality requirement (“in the territory of” the other Contracting Party), as does Article 1(1) of the Argentina-Italy BIT. However, notwithstanding this fact, the *Fedax* tribunal felt the need of concluding the reasoning on the point underlining that the promissory notes in question were issued in Venezuela and were expressly governed by the Venezuelan Law on Public Credit aimed at obtaining domestic and foreign credit for work and services in the Republic of Venezuela and that the type of investment at stake was not volatile capital. It should also be added that Article 1(a) of the Netherlands-Venezuela BIT included between the listed types of investments covered “titles to money”. None of those circumstances are present in the instant case.

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309. The Respondent has repeatedly explained in its written pleading and at the hearing the mechanism followed by the pertinent bond issuances of the Argentine Republic and submitted also quite a number of expert reports. Claimants, on the other hand, did not reject Argentina’s description of the mechanism for the issuance, ownership and circulation of security entitlements. But, the Majority Decision avoids entering into a legal analysis of this valuable information and related documentary evidence on the essential inherent features of typical transactions in contemporary capital or security markets.<sup>252</sup>

310. Without an appropriate analysis of the legal and factual features underlying the economic operations involved in the present case, the conclusion of the Majority Decision that the very fact of the issuance and circulation process of bonds by Argentina would imply that funds were made available to or at the disposal of the Respondent “to foster its economic development” and that this “notably suffices to qualified the investment at stake as one made ‘in the territory’ of Argentina”<sup>253</sup> appears as a mere rhetoric declaration without evidentiary support. At no moment, Claimants were able to prove through submitted evidence that the money paid out to Italian banks for the pertinent “security entitlements” were destined to “contribute to Argentina’s economic development and *were actually made available to it for that purpose*” (*emphasis supplied*), as stated by the Majority Decision,<sup>254</sup> which would seem to rely in the matter on *Abaclat* majority decision and some commentators’ general views.

311. In any case, the relevant facts are: (i) that a territorial link of the pertinent “security entitlements” transactions in the Italian retail market between Italians with Argentina is inexistent; (ii) that the contributions of the Italian Claimant purchasers of those entitlements from Italian banks in Italy is too remote of a transaction to satisfy the element of a positive effect on the economic development of the Argentine Republic; (iii) that it has not been proven that the

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<sup>251</sup> *Fedax*, *supra* note 128, paras. 29 and 41.

<sup>252</sup> See Argentine’s Reply Memorial, paras. 203 to 209 and its Post-Hearing brief, paras. 125-133.

<sup>253</sup> Majority Decision, para. 504.

<sup>254</sup> *Ibid*, para. 508.

Claimants made available to the Argentine Republic in its territory or in any other place any kind funds as a result of their purchase of the said “security entitlements”, (iv) that there was no proof either that the Claimants intended or actually did support the economic development of the Argentine Republic through the purchase of the “security entitlements” in Italy; (v) that the selling by the Respondent of “sovereign bonds” in the international primary market to underwriter banks as a means of borrowing liquidity for the financing of the general budgetary needs of the Argentine Republic is a financial transaction alien to the Claimants; (vi) that the Argentine Republic got from the buyer underwriter banks an agreed price for the “sovereign bonds” issued by it; and (vii) that it has not been proven either by the Claimants that the amounts that they pay out to the Italian banks in Italy when purchasing the “security entitlements” were done in any whatsoever connection with an investment undertaking or project in the territory of the Argentine Republic or in the framework of such an undertaking or project. Thus, the statement below of the *LESI-Dipenta v. Algeria* tribunal is not applicable either to the Claimants in the present case:

“[...] investments are often effected *in the country* concerned, but this is also not an absolute condition, nothing prevents investments from being undertaken at least in part from the country where the investors resides, as long as this is done in the framework of a project to be implemented abroad”.<sup>255</sup>

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312. In the process of interpretation of a BIT, international law does not allow interpreters to replace a mutually agreed definition in the text of the BIT reflecting the Contracting Parties’ agreement of the activities constituting a “protected investment” by something else, namely by definitions *à la carte* by the interpreters. In the choice by the Majority Decision of elements to conclude, as it does, that the pertinent transactions were not “ordinary commercial transactions”, it would seem that the very nature of the “financial products” at stake has played a primary role. Matters being so, it is in order to underline again that the circumstances of the present case do not provide grounds for concluding the presence of facts allowing the application of the “overall operation standard” elaborated by the relevant ICSID case-law. The examples of the application of the notion of an “integrated economic operation” reveal two or more components in which the financial one does not qualify alone as an investment under the applicable BIT or contract, but the overall operation does. In the present case there are unconnected financial transactions all of them made outside the territory of the Argentine Republic. The present facts do not pose either an issue of “indirect investments” as in the *Fedax* case.

313. Under the Argentina-Italy BIT it would seem possible that a mere financial contribution or asset could qualify as a “protected investment” if either it is directly invested or reinvested in the territory of the other Contracting Party or when it has a “legal/material connection” with a related project, enterprise or entrepreneurial activity unfolding in territory of that Contracting Party. However, in the present case, the Claimants did not invest or reinvest their contributions in the territory of Argentina or outside its territory but in connection with a project, enterprise or

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<sup>255</sup> *LESI-Dipenta v. Algeria*, para. 14 (original in French; unofficial translation into English); *see also* para. 259 of this Opinion.

entrepreneurial activity in the territory of Argentina. In those circumstances the applicability of the notion of “integrated economic operation” to the case is not only arguable, it is inapplicable.

314. It should also be noted that when the *Abaclat* majority decision declares (in paragraph 374 of the decision) that the relevant question on the territoriality requirement is whether the invested funds were ultimately made available to the host State and whether they did support the latter’s economic development, it was referring to the meaning of the notion of “investment” in Article 25(1) of the ICSID Convention. But, the present Majority Decision, taking liberties with the Vienna interpretation rules, quoted that *Abaclat* conclusion on the point out of context, namely in connection with the interpretation of the words “in the territory of the other Contracting Party” of the definition of the term “investment” in Article 1(1) of the Argentina-Italy BIT.<sup>256</sup> Context must be respected because, *inter alia*, a change of the “context” may modify the ordinary meaning to be attributed to a given term of a conventional instrument.

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315. No ICSID arbitral tribunal, with the exception of *Abaclat*, has so far made its own definition of the territoriality requirement prevail over the ordinary meaning of the terms “in the territory” in the definition of “investment” and “territory” of a given BIT. In any case, the conclusions to be drawn from the four case-law examples referred to in footnote 247 of the Majority Decision<sup>257</sup> do not buttress at all its conclusion on the territorial requirement, but rather the other way around. Regarding *Fedax*, as already indicated, the definition of the applicable BIT did not incorporate the territoriality requirement. The other three cases mentioned by the Majority Decision do not support either its conclusions on the question considered:

- So far as to the 1999 *CSOB v. the Slovak Republic* case, the CSOB invoked as the basis of jurisdiction the 1992 Slovak Republic - Czech Republic BIT and the 1993 Agreement on the Basic Principles of a Financial Consolidation of CSOB A.S. (Consolidation Agreement) that Claimant contends to incorporate by reference in the BIT. Article 1(1) of the BIT sets out that the “investment” as defined herein was to be “in the territory of the other Party”. The Consolidated Agreement establishes Collection Companies in two Republics. The Slovak Collection Company and CSOB concluded a Loan Agreement on 31 December 1993. Claimant alleged that the Slovak Republic had breached the obligation of repayment of a CSOB loan assumed by virtue of that Loan Agreement. The Slovak Republic argued that the CSOB loan did not meet any of the elements of the definition of an investment, including the said territorial requirement. But, the tribunal considers that the basic and ultimate goal of the Consolidate Agreement was *to ensure a continuing and expanding activity of CSOB in both Republics. This undertaking taken as a whole involved a significant contribution by CSOB to the economic development of the Slovak Republic including the spending or out-lays of resources in the Slovak Republic in response to the need for the development of the Republic’s banking infrastructure* (para. 88 of the decision). On that basis, the tribunal concluded that *CSOB’s activity in the Slovak Republic and its undertaking to ensure a sound banking structure in that country* compel the conclusion that CSOB qualifies as the holder of

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<sup>256</sup> *Ibid*, paras. 502 and 505.

<sup>257</sup> *Ibid*, para. 502, footnote 259.



an asset invested or obtained in the territory of the Slovak Republic within the meaning of Article 1(1) of the applicable BIT (para. 89 of the decision).

- In the 2003 *SGS v. Pakistan* decision, Pakistan objected to jurisdiction *inter alia* because the SGS's activities pursuant to the "Pre-Shipment Inspection Agreement" (PSI) did not constitute an investment "in the territory" of Pakistan within the meaning of Article 2(1) of the BIT between the Swiss Confederation and the Republic of Pakistan. The tribunal found that the PSI defined the commitments of SGS in such a way as to ensure that SGS, if it was to comply with them, had to make certain expenditures in the territory of Pakistan. While the expenditures may be relative small they did involve the "injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement" (para. 136 of the decision). The claimant adduced evidence of expenditures it had incurred in Pakistan to establish and operate liaison offices in Pakistan necessary to enable it to perform its obligations under the PSI Agreement. Accordingly, the tribunal concluded that these expenditures made by SGS pursuant to the PSI Agreement constituted an investment within the meaning of the BIT.

- Concerning the 2004 *SGS v. Philippines* decision, Article II of the BIT between the Swiss Confederation and the Republic of Philippines provided that the present Agreement shall apply to investments "in the territory" of the other Contracting Party. The territorial requirement was also referred to in other provisions of the BIT. The arbitral tribunal declared that "*in accordance with normal principles of treaty interpretation, investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT*" (para. 99 of the decision). The tribunal agreed with the relevant reasoning of the *SGS v. Pakistan* decision, considering that in its own case such reasoning was ever more justified given the scale and duration of SGS's activities in Philippines and the significance of the Manila Liaison Office. The tribunal concluded on the point that "there was no distinct or separate investment made elsewhere than in the territory of Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionable an investment 'in the territory of' the Philippines" (para. 112 of the decision).

316. The selling of the sovereign bonds issued by Argentina to the placing banks or underwriters in the international primary market and the buying in the Italian retail market by the Claimants of security entitlements in Argentina sovereign bonds holding by the Italian banks are transactions perfectly distinguished from each other on both economic and legal accounts and none of them complied with the territoriality requirement of Article 1(1) of the Argentina-Italy BIT. Sovereign bonds are intangible capital flows without physical implantation in a given host country's territory. Their transactions are in fact alien to the very notion of "host State" (notion which should not be confused with the determination for other purposes of the *situs* of a sovereign debt).

317. The regime of the Argentina-Italy BIT was designed to counterbalance the host State's regulatory authority over investments in its territory.<sup>258</sup> But such a counterbalance does not make sense when the transactions concerned are made outside the territory of the Respondent State as

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<sup>258</sup> Michael Waibel, *Sovereign Defaults before the International Courts and Tribunals*, *supra* note 165, pp. 238-242.

is the case with both Argentina's selling of the sovereign bonds to the placing banks or underwriters and the Claimants' purchase of the security entitlements in Italy from the Italian banks holders and depository of the pertinent "sovereign bonds". This explains why none of these two kinds of transactions qualifies as a "protected investment" under the Argentina-Italy BIT.

**(iii) The investment shall be made "in accordance with the laws and regulations" of the other Contracting Party**

318. A further requirement contained in the *chapeau* of Article 1(1) of the Argentina-Italy BIT provides that a contribution or asset to qualify as an "investment" must be made "in accordance with the laws and regulations" of the other Contracting Party. The Majority Decision dismissed *in casu* the possibility of non-fulfilment by the Claimants of that requirement because "no argument has been brought before the Tribunal that the bonds/security entitlements would have violated any provision of Argentine law".<sup>259</sup>

319. However, the Respondent had made some arguments to the contrary. First, that the Tribunal shall make its decision based *inter alia* on the laws of the Contracting Party involved in the dispute - including its rules on conflict of laws -, the provisions of the BIT, and the terms of any particular agreement entered into regarding the investment, as well as applicable principles of international law (Article 8(7) of the BIT). Secondly, the Respondent contends that Argentine law provides that the validity and nature of contracts executed outside Argentina shall be governed by the laws of the place where the contract was executed, i.e. Italy in the instant case. Thus, the non-compliance with Italian law governing the validity and nature of the transactions concerning the purchases in Italy by the Claimants of the "security entitlements" at hand would amount to non-compliance with Argentine laws.<sup>260</sup>

320. Concerning the first of those two arguments, the Majority Decision following *Abaclat* concludes: (i) that Article 8(7) of the Argentina-Italy BIT deals *exclusively* with the law applicable to the merits of the dispute, but does not serve as a basis to extend the definition of investment as provided in Article 1(1) of the BIT; and (ii) that the question of jurisdiction is to be dealt *solely* on the basis of Article 25(1) of the ICSID Convention, as opposed to Article 42 of the Convention which would be supposed to address the law applicable to the merits of the dispute.<sup>261</sup> I admit that there is case-law and doctrine which support this conclusion, although I personally have some doubts. First, in the present context we are interpreting Article 8(7) of the Argentina-Italy BIT, not Articles 25 and/or 42 of the Convention. Secondly, I doubt as to the "exclusively" and the "solely". In any case, it cannot be questioned that, for example, for assessing the jurisdiction *ratione personae* (i.e. requirements of nationality and domicile), and perhaps in other specific issues, domestic laws play a determinative role in a preliminary jurisdictional phase and in a merits phase as well.

321. By its above conclusion, the Majority Decision tried to give an answer to the second argument of the Respondent by taking out of the picture the purported illegalities committed by

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<sup>259</sup> Majority Decision, para. 512.

<sup>260</sup> *Ibid*, para. 513.

<sup>261</sup> *Ibid*, paras. 514-15.

some Italian banks and financial intermediaries when they sold *in Italy* the pertinent security entitlements to the Claimants in disregard of the protection provided by the Italian laws and regulations to the buyers of sensible financial products. The Tribunal got from the parties some evidence of Italian courts' decisions terminating or annulling contracts concerning the purchase of "security entitlements" like to those of the present case. All this poses in international law as well as in domestic law a *bona fide* issue common to all law systems in relation to the Claimants' purchases of the "security entitlements" in Italy.

322. The Majority Decision declares however that it cannot see how such eventual violations of the Italian law could negatively affect a qualification of the security entitlements at stake as being purchased in accordance with the laws and regulations of Argentina. I am not so sure because the Italian banks and financial intermediaries might have refrained likewise from duly informing the Italian purchasers of the security entitlements of the information contained in the Argentine "sovereign bonds", and "prospectus" relating thereto, advising of the high risks involved in the acquisition of that kind of financial products and this could well constitute a sellers *bona fide* breach incompatible with the *ordre public* of the Argentine Republic. In such a hypothesis, the purchases in Italy of the "security entitlements" could not have been made in accordance with Argentine laws and regulations.<sup>262</sup> Matters might well be so because the Claimants are not holders of the "sovereign bonds" with the corresponding information on the risks involved (which remained deposited in the banks) but of the so-called "security entitlements" which apparently do not contain therein information on the said risks.

323. In the light of the considerations above, the conclusion of the Majority Decision is, in my opinion, premature because the issues at stake were not fully pleaded, so as to be in a position to reach an informed conclusion. It is also unconvincing as to the reasoning. In the first place because, in accordance with Argentine Law No. 21382, an "investment of foreign capital" is defined as "any capital contribution made by foreign investors *and allocated to activities of an economic nature conducted in the country*"<sup>263</sup> (*emphasis supplied*). Then, Claimants' funds cannot be considered a foreign investment under that Argentina law because Claimants did not demonstrate that such funds were allocated to or use for activities of an economic nature conducted in Argentina, as confirmed by the conclusion of this Opinion on non-compliance with the territorial requirement of Article 1(1) of the Argentina-Italy BIT. Consequently, it cannot be declared as the Majority Decision does that the pertinent "security entitlements" (a financial product) have been made "in accordance with the laws and regulations of Argentina" as host State. In fact in the present case, the Respondent has not hosted anybody or anything.

324. Furthermore, the Majority Decision does not actually answer the good faith and legality arguments of the Respondent.<sup>264</sup> The principles of good faith and legality are general principles of law common to international law and to Argentine law and Italian law. It is therefore unacceptable to affirm that eventual violations of those legal principles in the course of transactions on security entitlements in Argentine sovereign bonds which took place in Italy between Italians are irrelevant for Argentine law and/or for an international legal instrument like

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<sup>262</sup> *Ibid*, paras. 516-18.

<sup>263</sup> Argentine law No. 21382 (A RA 326) (quoted in the Argentine Republic's Reply Memorial, p. 149, footnote 473).

<sup>264</sup> Argentine Republic's Post-Hearing Brief, paras. 141-44.

the Argentina-Italy BIT, both in jurisdictional and merits issues. Particularly so when, as in the present case, Argentine rules on conflicts of laws refer to the provisions of the Italian law and the “sovereign bonds” issued by Argentina advise potential buyers of the risks involved in its acquisition.

325. The Argentina-Italy BIT, like all BITs, is supposed to protect *bona fide* investments only, incorporating the legality requirement in the very definition of the term “investment”. As declared by the 2008 *Plama* award with reference to the Energy Charter Treaty: “The Arbitral Tribunal concludes that the substantive protections of the ECT cannot apply to investments that are made contrary to the law”.<sup>265</sup> Likewise, I agree with the statement in the 2009 *Phoenix Action* award to the effect that: “The Tribunal has to prevent an abuse of the system of international investment protection under the ICSID Convention, in ensuring that only investments that are made in compliance with the international principle of good faith and do not attempt to misuse the system are protected”.<sup>266</sup>

326. If in a given jurisdictional/admissibility phase the *bona fide* and legality principles (as well as *ordre public*) are at issue but the tribunal has not enough arguments and evidence at its disposal to decide the question, the objection should be joined to the merits but not be dismissed *in limine*, as done by the Majority Decision in relation with the laws and regulations of the other Contracting Party requirement of Article 1(1) of the Argentina-Italy BIT.

## 6. Conclusion

327. As all requirements concerning the jurisdiction *ratione materiae* under both the 1965 ICSID Convention and the 1990 Argentina-Italy BIT are not satisfied by the Claimants with respect to the sovereign bonds and security entitlements constituting the subject-matter of their claims, I would uphold the preliminary objections of the Respondent as to the lack of jurisdiction *ratione materiae*, and conclude that there is no jurisdiction of the Centre and, for that matter, competence of the present Tribunal to decide the legal dispute at hand.

328. The opposite conclusion of the Majority Decision is, generally speaking, the result of the erratic way of approaching the interpretation of the relevant provisions of the two conventional instruments involved. In addition, the methods followed by the Majority Decision for applying the VCLT rules on interpretation of treaties to Article 25(1) of the Convention and to Article 1(1) of the BIT differ from each other. In the case of Article 25(1) of the ICSID Convention, the majority privileges elements extrinsic to the text (*travaux*; alleged floating intentions) in detriment to the ordinary meaning of the term “investment” of the text within its context and in the light of the object and purpose of the Convention (*subjective method*). But in so far as Article 1(1) of the BIT is concerned, the majority gives in the interpretation the greatest possible weight to one of the possible literal meanings of a single term in a given subparagraph of the Article (namely “*obligaciones/obbligazioni*”) disregarding the ordinary meaning of that term within the

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<sup>265</sup> *Plama*, *supra* note 41, para. 139.

<sup>266</sup> *Phoenix Action*, *supra* note 168, para. 113. For other relevant decisions see *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award of 2 August 2006.

context of the Article as a whole and in the light of the object and purpose of the BIT (*grammatical method*).

329. These two methods are alien to the rules of interpretation of treaties of customary international law codified by the 1969 VCLT which in the case of the BIT applies likewise between Argentina and Italy, as explained, *qua* conventional law. It is therefore in order to end the above considerations on the jurisdiction *ratione materiae* by quoting from a recent Case Comment that:

“[...] it is not to the Majority to adapt the ICSID framework out of concern for access to justice; that is for States to undertake if injustice is perceived.”<sup>267</sup>

330. In this latter respect the progressive development of international law is going on. In the present case, the Tribunal’s attention was called to the “Principles for Stable Capital Flows and Fair Debt Restructuring in Emerging Markets” noted in 2005 by the Monetary and Financial Committee of the Board of Governors of the IMF.<sup>268</sup> Since then, as it is in the public domain, UNCTAD launched in 2009 the initiative to formulate a set of global principles to promote responsible sovereign lending and borrowing practices, an initiative endorsed by the United Nations General Assembly, and in 2012 a consolidated version of the UNCTAD “Principles on Promoting Responsible Sovereign Lending and Borrowing” was achieved in Doha on the occasion of UNCTAD XIII, inaugurating the phase of endorsement and implementation of the Principles, whose principle 15 deals with unavoidable “Restructuring” of sovereign debts obligations in a state of economic necessity.<sup>269</sup>

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<sup>267</sup> Hans van Houtte and Bridie McAsey, “Case Comment. *Abaclat and others v. Argentine Republic...*”, *supra* note 51, at p. 233, footnote 19.

<sup>268</sup> The text of the Principles is attached to the “Report on Implementation by the Principles Consultative Group” (October 2007) (Argentina’s Reply, Annex 351). *See also* (i) The Observations regarding the principles from the Argentine Minister of Economy (*Ibid*, Annex 352) and (ii) Anne O. Kueger and Sean Hagan, “*Sovereign Workouts: An IMF perspective*” (6 *Chi.J.Int’L*. 2005, p.203-218) (Argentina’s Memorial, Annex 67).

<sup>269</sup> *See*: Carlos Espósito and Juan Pablo Bohoslavsky, *Principles Matter: Legal Status of UNCTAD’s Principles on Responsible Sovereign Lending and Borrowing* in *Sovereign Financing and International Law. The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*, Edited by Carlos Espósito, Yuefen Li and Juan Pablo Bohoslavsky (Oxford University Press, Forthcoming 2013). The text of the UNCTAD’s Principles is annexed to the publication.

## **Chapter IV- The consent to arbitration of the Parties to the dispute**

331. Chapter VI of the Majority Decision entitled “Compliance with Article 8 of the Argentina-Italy BIT- The prerequisites of amicable consultations and recourse to Argentine courts”, deals with preliminary objection (f) whereby the Respondent requested: “in the alternative, determining that the Claimants have not satisfied the necessary requirements for bringing a claim under the Argentina -Italy BIT”. Under that Chapter the Majority considers together the question of the extent of the Respondent’s consent (Article 8 of the BIT) and the extent of the Claimants’ consent (Request for Arbitration) with respect to the various topics dealt with therein. In order to better ascertain whether or not both consents match each other to the point that it may be concluded that the “agreement to arbitrate” between the Parties to the dispute has been duly executed (see Chapter II (2) of the present Opinion), this Opinion deals separately in the present Chapter IV with each of the two consents in question as done sometimes by the ICJ (see, for example, the 2008 Judgment in the *Mutual Assistance in Criminal Matters (Djibouti v. France)* case). Section 1 will be devoted to the extent of the Respondent’s consent and Section 2 to the extent of Claimants’ consent. The admissibility issues raised by Claimants’ Request for Arbitration will be likewise considered in that Section 2 of the Opinion.

### **1. The consent of the Respondent State**

#### **(a) Some questions of public international law**

##### **(i) The international law rule of State’s consent to jurisdiction**

332. In public international law, jurisprudence and doctrine are unanimous in considering that the rule of State’s consent to jurisdiction applies to the determination of the existence of jurisdiction of any international court or tribunal, as well as to the scope of any jurisdiction accepted by a given State. Already in 1923, the Permanent Court of International Justice declared that: “It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement”.<sup>270</sup>

333. The Permanent Court underlined likewise: that its own contentious jurisdiction only exists in so far as the respondent has given its consent;<sup>271</sup> that the Court has a limited jurisdiction existing only in so far as States have accepted it;<sup>272</sup> and that the contentious jurisdiction of the Court exists only within the limits which it has been accepted.<sup>273</sup> The rule is described by this jurisprudence as a corollary of the sovereignty and independence of the States.<sup>274</sup>

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<sup>270</sup> *Status of Eastern Carelia*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5 (July 23), p.27.

<sup>271</sup> *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30), p.16.

<sup>272</sup> *Factory at Chorzów* (Germany v. Poland), 1927 P.C.I.J. (ser. A) No. 9 (July 26), p.32.

<sup>273</sup> *Phosphates in Morocco* (Italy v. France), 1938 P.C.I.J. (ser. A/B) No. 74 (June 14), p.23.

<sup>274</sup> *S.S. Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), p.18.

334. On every relevant occasion, the International Court of Justice has recalled that the rule of State's consent to jurisdiction is well established in international law, as well as that the Court can only exercise jurisdiction over a State with its consent;<sup>275</sup> that the Court may not compel a State to appear before it, even by way of intervention;<sup>276</sup> and that one of the fundamental principles of its Statute is that the Court cannot decide disputes between States without the consent of those States to its jurisdiction.<sup>277</sup>

335. For legal doctrine there exists an uncontroverted principle according to which no State is obliged by general public international law to submit any dispute, or to give an account of its own conduct thereon, to any international court or tribunal. It follows that as stated generally by authors like, for example, Rosenne: "The agreement of the parties to the dispute is the prerequisite to adjudication on the merits".<sup>278</sup>

336. The rule of State's consent to jurisdiction cannot be treated lightly by international judges or arbitrators when interpreting or applying instruments or compromissory clauses providing for dispute-resolution means because the rule has its roots in the very structure of the international legal order. It is a systemic rule forming part of the international legal environment of treaty instruments and clauses. As explained by Mani: "Contemporary international law is essentially characterized by its decentralized, horizontal process of authoritative decision-making. A large part of its body juridic [sic] has emerged from the consent of States. Consent of States plays a vital role, particularly in the realm of dispute settlement. It remains the main-spring of all dispute settlement devices and even of the body of norms to be applied by them".<sup>279</sup>

337. The customary international law principle of State's consent to jurisdiction requires from States that their respective consents be given by a positive and external manifestation of the acceptance of the jurisdiction of the international court or tribunal concerned, namely by a "contracting in" act or conduct. This important corollary of the State's consent to jurisdiction rule has to be underlined in the present case because arbitral tribunals on investment disputes, including ICSID arbitral tribunals, have argued, quite often, the other way around. They have considered, for example, that a respondent State gives its consent to the jurisdiction of the arbitral tribunal concerned through a MFN clause of a given BIT unless dispute-resolution has been "contracted out" of the MFN clause in question. Such kind of assumption is nonsensical in public international law because this legal order does not impose *per se* on sovereign independent States any "international jurisdictional obligation". The reversal of that natural order of things prevailing in the international legal order is doubtless the main legal shortcoming with respect to MFN clauses of *Maffezini* and like arbitral decisions in the investment disputes field.

338. The source of every jurisdictional obligation assumed by a State is always in customary or general international law the result of a *pacta* (undertaking, agreement, convention), without

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<sup>275</sup> *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question)*, (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America), I.C.J. Reports, 1954, p.32.

<sup>276</sup> *Certain Phosphate Lands in Nauru* (Nauru v. Australia), I.C.J. Reports 1992, p.260, para.53.

<sup>277</sup> *East Timor (Portugal v. Australia), Judgment*, I.C.J. Reports 1995 ("East Timor"), p.101, para.26.

<sup>278</sup> Shabtai Rosenne, *Law and Practice of the International Court of Justice (1920-1996)*. Vol. II (Jurisdiction), Martinus Nijhoff, 1997, p. 565.

<sup>279</sup> V.S. Mani, *International Adjudication. Procedural Aspects*, (Martinus Nijhoff, 1980), p.xiii.

*pacta*, or beyond the scope of the *pacta*, there are no international jurisdictional obligations for the States. This is precisely why BITs contain generally provisions on dispute-resolution whereby the States Parties to the BIT consented by an explicit agreement in writing to the international jurisdiction of the ICSID and the competence of the arbitral tribunals established pursuant to the ICSID Convention ( and/or to another agreed alternative arbitration system) with a view to the resolution of investment disputes between the host State of the investment and an investor national of the other State Party to the BIT. The jurisdiction or competence so accepted may be limited in scope and/or be subjected to prerequisites or conditions as well. As the ICJ has declared:

“[...] the Court has jurisdiction in respect of States only to the extent that they have consented thereto [...] When a compromissory clause in a treaty provides for the Court’s jurisdiction, that jurisdiction exist only in respect to the parties to the treaty who are bound by that clause *and within the limits set out therein*”<sup>280</sup> (*emphasis supplied*).

339. In the aftermath of the reversal by *Maffezini* of the principle that the jurisdiction of any international court or tribunal does not exist in the international legal order unless so provided by an undertaking, agreement or convention to the contrary executed between the parties to the dispute, a number of arbitral decisions on investment disputes went still further than *Maffezini* through arguments such as, for example, the so-called “forum consented” argument or the invocation of the maxim *expressio unius est exclusio alterius* in connection with the interpretation of exceptions to MFN clauses in BITs, etc., so as to conclude at the existence of jurisdiction and competence in cases of obvious, or even admitted, non-compliance with the prerequisites defining the scope of the consent to international arbitration manifested by the Contracting Parties to the BIT in dispute-resolution provisions of the latter, as actually happened with the Majority Decision in the present case with its acceptance of the Claimants’ *futility* argument (a *première* in the field), under the form, apparently, of an *implied* condition in Article 8 of the Argentina-Italy BIT (defined with reference to the ILC draft articles on diplomatic protection). That argument prevails for the Majority over the *explicit* prerequisites to international arbitration set out by the Contracting States in that article of the BIT.

340. But, it is not the only novelty. Recently, the silence of dispute-resolution provisions in BITs on the effects of non-compliance with the prerequisites circumscribing the scope of the host State’s consent to international arbitration set forth in the dispute-resolution provisions of a BIT has also been invoked by arbitral ICSID tribunals to uphold jurisdiction or admissibility where it was none of the two. The answer to such an extraordinary argument, within a public international law environment, has been given by Professor Abi-Saab in the following passage of his dissenting opinion in *Abaclat*: “According to the general rules of law and rules of general international law non-compliance begets the inevitably legal sanction of dismissing the case, as falling outside the jurisdiction of the tribunal or as inadmissibly. Only if the parties want to waive or vary this sanction do they address the effect of non-compliance in the instrument. Otherwise, in case of silence, it is the rules of general international law that apply”.<sup>281</sup>

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<sup>280</sup> *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002)*, (*Democratic Republic of Congo v. Uganda*), *Judgment*, I.C.J. Reports 2006, p. 32, para. 65.

<sup>281</sup> Professor Abi-Saab’s dissenting opinion, *supra* note 37, para.28.



341. Thus, “futility” and “silence of the dispute-resolution provisions on the effects of non-compliance” have been added recently to the arsenal of arguments employed in ICSID arbitral proceedings to sidestep the international law rule of State’s consent to jurisdiction. One may understand the recourse of claimants’ counsel to such kind of arguments, but the extraordinary phenomenon to be noted is the fact that a number of ICSID arbitrators accept them, declaring jurisdiction irrespective of the existence or scope of State’s consent to jurisdiction. The 2011 *Abaclat* majority decision went even further through a double exercise. First, it avoided altogether determinations on jurisdictional requirements and introduced instead admissibility criteria, by alleging (against the established jurisprudence of the ICJ) the existence of a difference between “conditioning consent” and “conditioning the effective implementation of consent”. Secondly, by dismissing the alleged inadmissibility objections by the subjective means of weighting the specific interests at the stake of the host State and the private foreign investors as in the law on contracts of some domestic systems. These kinds of decisions take “the liberty of striking out a clear conventional requirement, on the basis of purely subjective judgment” as stated by Professor Abi-Saab’s Dissenting Opinion in *Abaclat*.<sup>282</sup>

342. The light handling, by some ICSID arbitral tribunals, of the rule of State’s consent to jurisdiction and its corollaries is a matter of surprise indeed because those tribunals affirm that the law they apply to dispose of objections on jurisdiction and/or admissibility falling under Article 41 of the ICSID Convention is international law exclusively, and not the provision of Article 42(1) of the Convention. Further, the rule of State’s consent is part and parcel of the “context” that an interpreter of a given treaty “shall take into account” (mandatory language) in the interpretative process (Article 31(3)(c) of the VCLT) because it is a rule of general international law. Furthermore, in the instant phase of the present case it’s obviously a “relevant rule of international law”, as well as a rule “applicable in the relations between Argentina and Italy” on both accounts general international law and the VCLT itself applicable also in the relations between both countries *qua* conventional law with respect to their 1990 BIT.

343. It is also in order to recall that Article 31(3)(c) of the VCLT is sometimes invoked as providing support for “evolving interpretations” of treaty terms or expressions, after verifying the original intention of the parties to the instrument. However, in so far as “jurisdictional conventional obligations” evolving interpretation methods are unjustified unless expressly permitted or necessarily implied by the terms used by the text of the treaty or by general practice in its application, the reason being that the State’s consent to jurisdiction rule is unfriendly to the validation of alleged “implied consents”. Furthermore, in the present case it has not been plead, and still less proven, that the rule of State’s consent to jurisdiction has evolved since the conclusion of the 1990 Argentina-Italy BIT. On the contrary, the rule has been confirmed in the most recent jurisprudence of the ICJ.<sup>283</sup>

344. In sum, as concluded by the *ICS Inspection and Control Services* award of 10 February 2012 - within its consideration of a MFN clause invoked as a purportedly alternative base of

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<sup>282</sup> *Ibid*, para. 30 and ff.

<sup>283</sup> See, for example, ICJ Judgment of 1 April 2011 in the *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, I.C.J. Reports 2011 (“*Application of the CERD*”).

jurisdiction - when, in the international legal order, the respondent State's consent to international arbitration is not sufficiently certain, jurisdiction cannot but be declined:

“This principle follows from the lack of a default forum for the presentation of claims under international law. Whereas the inherent jurisdiction or hermetic division of competence over claims before general courts is a common feature of municipal judicial systems, *the default position under public international law is the absence of forum before which to present claims*. The absence of a forum before which to present valid substantive claims is thus a normal state of affairs in the international sphere. A finding of no jurisdiction should not therefore be treated as a defect in a treaty scheme that runs counter to its object and purpose in providing for substantive investment protection”<sup>284</sup> (*emphasis supplied*).

345. Lastly, the public international law rule of State's consent to jurisdiction applies *ne varietur* in ICSID international arbitral proceedings on investment disputes with private foreign investors concerning the determination of the existence and scope of the consent of the States participating in those proceedings. As recalled by the *Plama* decision: “Nowadays, arbitration is the generally accepted avenue for resolving disputes between investors and states. Yet, that phenomenon does not take away the basic prerequisite for arbitration: an agreement of the parties to arbitrate. It is a well-established principle, both in domestic and international law, that such an agreement should be clear and unambiguous.”<sup>285</sup>

**(ii) State's consent to jurisdiction must be voluntary, certain and unequivocal whatever the form of its manifestation or the title or basis of jurisdiction invoked**

346. It is established jurisprudence of the ICJ and best doctrine that the State's consent to jurisdiction must be voluntary, certain and unequivocal. It is therefore difficult to understand the surprise of some commentators of ICSID arbitral decisions and awards when confronted with this uncontroversial corollary of the rule of State's consent to jurisdiction. To entertain doubts by defective drafting or other means is of no help for upholding jurisdiction in public international law but rather the other way around.

347. Thus, the existence of doubts about the reality or scope of a given State's consent favour generally defeating, not upholding, jurisdiction. Contemporaneous decisions of the ICJ have enriched its jurisprudence on the matter, as in the following passage of the 2006 Judgment of the Court in the *Armed Activities in the Territory of Congo (New Application 2002)* case:

“The Court recalls its jurisprudence, as well as that of its predecessor, the Permanent Court of International Justice, regarding the forms which the parties' expression of their consent to its jurisdiction may take. According to that jurisprudence, ‘neither the Statute nor the Rules require that this consent should be expressed in a particular form’ and ‘there is nothing to prevent the acceptance of jurisdiction from being effected by two separate and successive acts, instead jointly and beforehand by a special agreement’[...] The attitude of the respondent State must, however, be capable of being regarded as ‘an unequivocal indication’

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<sup>284</sup> *ICS Inspection and Control Services*, *supra* note 12, para.281.

<sup>285</sup> *Plama*, *supra* note 41, para.198.

of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner".<sup>286</sup>

348. The requirement that a State's consent to the jurisdiction must be voluntary, certain and unequivocal applies consequently whatever the particular form adopted by the expression of the State's consent, the timing of its expression, the simultaneous or successive acceptance of the jurisdiction by the parties to the dispute, or the written or unwritten basis of the jurisdiction invoked. For example, in its 2008 Judgment on *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, a *forum prorogatum* case, the ICJ - after recalling once more that its jurisdiction is based on the consent of States under the conditions expressed therein - declared the following:

"The consent allowing the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*. As the Court has recently explained, *whatever the basis of consent*, the attitude of the respondent State must "be capable of being regarded as 'an unequivocal indication' of the desire of that State to accept the Court's jurisdiction in a 'voluntary and indisputable' manner [...] For the Court to exercise jurisdiction on the basis of *forum prorogatum*, the element of consent must be either explicit or clearly to be deduced from the general conduct of a State" (emphasis supplied).<sup>287</sup>

349. The requirement that the State's consent to jurisdiction must be voluntary, certain and unequivocal applies likewise in international arbitration whatever the basis of the jurisdiction invoked or the various written forms of expression of a State's consent to jurisdiction in international arbitration. But, as a general proposition the "undertaking to arbitrate" in international law must be embodied in a written instrument excluding thereby the possibility of invoking *forum prorogatum* as a basis of jurisdiction in international arbitration.<sup>288</sup>

350. In the particular ICSID system, Article 25(1) of the ICSID Convention provides that *consent of the Parties to the dispute (host State as well as private foreign investor) must be submitted in writing to the Centre*, but without prescribing any particular written title or form of doing so. In all cases therefore the State's consent to jurisdiction in writing is needed for the jurisdiction of the Centre and the competence of the ICSID arbitral tribunals to be established and that consent must be voluntary, certain and unequivocal whatever the form or ways of its manifestation. Thus, the voluntary, certain and unequivocal requirement applies whatever may be the title or basis of jurisdiction alleged by a foreign private investor claimant, including of course to the "*arbitration offers*" of the Contracting States contained in most of the dispute-resolution clauses of BITs. Similarly, the said requirement is to be applied to determine the existence and extent of the host State's consent to jurisdiction when the "*arbitration offer*" would allegedly be embodied in the MFN clause of a BIT in *lieu* of the dispute-resolution provision of the BIT concerned.

351. Generally, MFN clauses do not operate as a jurisdictional alternative to dispute-resolution provision of the BIT. But, it may be that the Contracting Parties to a BIT intend by "contracting

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<sup>286</sup> *Supra* note 280, p. 18, para. 21.

<sup>287</sup> *Judgment*, I.C.J. Reports 2008, p. 204, para. 62.

<sup>288</sup> See Preamble of the *Model Rules on Arbitral Procedure* codified in 1958 by the ILC.

in” that the MFN clause would apply to jurisdictional issues. In such a hypothesis, the text of the MFN clause or of the dispute-resolution provision or some other provision of the BIT concerned should provide so explicitly, and in a clear and unambiguous manner.

352. In other words, it is not admissible to invoke a MFN clause as an alternative basis of jurisdiction to the one provided for in the dispute-resolution clause of the same BIT as a sort of get-away from the requirement that State’s consent to jurisdiction must be certain, unequivocal and voluntary. Thus, in line with the *Salini v. Jordan* award,<sup>289</sup> the *Plama* Tribunal made a correct application of the requirement considered when it declared that “an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, *unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them*”<sup>290</sup> (*emphasis supplied*).

353. Several subsequent arbitral decisions confirm that conclusion. For example, the following passage of the *Wintershall* award:

“Ordinarily, an MFN clause would not operate so as to replace one means of dispute settlement with another. This is (presumably) why the drafters of the UK Model BIT had provided (in Article 3(1)) that ‘for avoidance of doubt MFN shall apply to certain specified provisions of the BIT including the dispute settlement provision’. Because, ordinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – *unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted: which is not so in the present case*”<sup>291</sup> (*emphasis supplied*).

**(iii) The distinction between substantive or material provisions, dispute-resolution provisions and final clauses in treaties**

354. A distinction should be made between the substantive provisions of a treaty, its dispute-resolution provisions (if any) and the final clauses. The substantive provisions enounce the material rights and obligations of the States parties with respect to the subject-matter of the treaty. The dispute-resolution provisions concern the means or procedures agreed upon by the States parties to settle eventual future disputes concerning those material rights and obligations. The final clauses relate to the treaty *qua* instrument (authentic texts, signature, ratification, acceptance or approval, entry into force, scope of application, amendments or modifications, denunciation, suspension or termination, registration, depositary, date and place of conclusion).

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<sup>289</sup> As explained by *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 (“*Salini v. Jordan*”), the question of the applicability of the MFN clause at issue in the case to “the administration of justice in so far as concerns the protection by the Courts of the rights of persons engaged in trade and navigation” in the decision of the International Arbitration Commission in the *Ambatielos* case, *supra* note 93, related to the application by British Courts of substantive provisions in treaties between the United Kingdom and several other countries, not to the application of a dispute-resolution clause (paras. 106-12 of the decision).

<sup>290</sup> *Plama*, *supra* note 41, para.223.

<sup>291</sup> *Wintershall*, *supra* note 9, para. 167. In the same sense: Campbell McLachlan, Laurence Shore and Matthew Weiniger, “*International Investment Arbitration: Substantive Principles*”, (Oxford University Press 2007), p. 256.

The rules of these three categories of treaty provisions are of a different legal nature and it is within the second and third categories that the rule of State's consent to jurisdiction plays a paramount role in international arbitration.

355. The above distinction is enhanced by the established jurisprudence of the ICJ. For example, in its Judgment in the *East Timor* case, the Court declared that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things and that the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain the dispute.<sup>292</sup> The Court's Judgment on jurisdiction and admissibility concerning the case entitled *Armed Activities on the territory of the Congo (New Application: 2002)* underlines, with respect to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court's jurisdiction, that: "the fact that a dispute relates to compliance with a norm having such character (*jus cogens*), which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court's Statute that jurisdiction is always based on the consent of the parties."<sup>293</sup> If this is so for *erga omnes* obligations and *jus cogens* norms, the same cannot but be likewise true with respect to dispositive rules of the kind of those contained in BITs.

356. It follows that when a dispute-resolution provision in a treaty provides for the jurisdiction of a given international court or tribunal as a means of settlement of disputes, that jurisdiction exists only in respect of the parties to the treaty and within the limits of their consent as embodied in the dispute-resolution provision concerned. The importance or relevance of the values intended to be protected by the treaty in question and the nature, character and/or scope of the substantive rules therein are irrelevant for establishing jurisdiction. This is also confirmed by the jurisprudence of the ICJ. For example, in its Judgment in the case concerning the *Interpretation and Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)* the Court states:

"The jurisdiction of the Court in this case is based solely on Article IX of the (Genocide) Convention [...] (the Court) *has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed erga omnes*"<sup>294</sup> (*emphasis supplied*).

357. Surely, the values protected by the BITs are important, but they are certainly not higher in importance than those protected by the rules enumerated by the Court in the quotation above.

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358. The first general relevant conclusion to be drawn from the referred international jurisprudence of the ICJ is the need for the arbitrators to distinguish substantive rights and

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<sup>292</sup> *Supra* note 277, p. 102, para. 29.

<sup>293</sup> *Supra* note 280, p. 32, para. 64.

<sup>294</sup> I.C.J. Reports 2007, p. 104, para. 147.

obligations granted to investors of the other Contracting Party by the 1990 Argentina-Italy BIT (material provisions), on one hand, and the investment dispute-resolution provisions of the BIT concerning disputes between the host State of the investment and the private investor national of the other Contracting State, on the other hand. The importance of substantive provisions setting forth *material standards* of protection of foreign private investments and investors, or the value attached by an arbitrator to such a protection by means of international arbitration, are elements that in public international law are not called in to play any role in the legal operation of determining (through interpretation of the dispute-resolution provision) either the existence or inexistence of jurisdiction or, in the first hypothesis, the wideness of the scope of the arbitral jurisdiction accepted by Argentina and Italy in the “*standing international arbitration offer*” made to private investor nationals of the other Contracting Party embodied by them in the dispute-resolution provision of the BIT.

359. The necessity to underline in the present context the distinction between the *material protection* provisions and *dispute-resolution* provisions derives from the fact that confusion between these two categories of treaty provisions are at the root of the misleading jurisdictional conclusions which one may find in several ICSID and other arbitral decisions on jurisdiction and admissibility in investment dispute cases, particularly in decisions dealing with the issue of the establishment of jurisdiction and competence through the operation of the MFN clause in the BIT concerned.

360. Some excesses in this respect have prompted pronouncements as the following of the 2009 *Quasar de Valores* award on preliminary objections (Arbitration Institute of the Stockholm Chamber of Commerce):

“Article 31 (of the VCLT) must be considered with caution and discipline lest it become a palimpsest constantly altered by the projection of subjective suppositions. It does not for example compel the result that all textual doubts be resolved in favour of the investors. The long-term promotion of investments is likely to be better ensured by a well-balanced regime rather than by one which goes so far that it provokes a swing of the pendulum in the other direction”.<sup>295</sup> (emphasis supplied).

361. In line with the Report of the Executive Directors,<sup>296</sup> Aron Broches in his 1972 lecture at the Hague Academy of International Law of The Hague after recalling that a characterization of the 1965 ICSID Convention as an instrument for only the protection of private foreign investments is one-sided and too narrow continued as follows:

“Like the Statute of the International Court of Justice, the (ICSID) Convention imposes no obligation on Contracting States to submit any specific dispute to the jurisdiction of the Centre in the absence of consent, and this fact is expressly noted in the Preamble. The Preamble also makes clear that it is not the purpose of the Convention, or *the expectations of the Contracting States*, that all matters affecting foreign investments should be removed from national jurisdiction. The Preamble recognizes that such

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<sup>295</sup> *Quasar de Valores*, *supra* note 11, para.55.

<sup>296</sup> Para.13 of the Executive Directors’ Report.

disputes would usually be subject to national legal processes but that international methods of settlement may be appropriate in certain cases. I may add in that connection that while Article 26 of the Convention provides that consent to arbitration under the Convention shall unless otherwise stated be deemed consent to such arbitration to the exclusion of any other remedy, that Article expressly recognizes *the right of a Contracting State to required the exhaustion of local remedies as a condition of its consent*<sup>297</sup> (emphasis supplied).

362. Thus, the lofty goal of the protection of foreign investors is not the only “object and purpose” of the ICSID Convention and of the BITs. These instruments are treaties, namely international instruments, governed by public international law and, as such, the intention of the contracting States Parties thereto as manifested in the text, or necessarily implied thereof, must be respected by all concerned, arbitrators included (*pacta sunt servanda*). The protection of foreign investments and investors is certainly one of the purposes of the ICSID system, but it does not authorize arbitrators to interpret the provisions of the ICSID Convention or of a given BIT in a way that would disregard the intentions of the States Parties as manifested in the text, or necessarily implied thereof, and/or interpreting the text by ignoring the outstanding interpretative elements enounced in Article 31(1) of the VCLT, namely: good faith, the ordinary meaning of the terms used in the text, the context of those terms and the object and purpose of the treaty in question.

363. The invocation of the protection of foreign private investments or investors is not a justification in law for making interpretations of the jurisdictional provisions of the ICSID Convention or of a BIT more liberal or strict than in the case of any other kind of treaty provision. All treaty provisions (the jurisdictional ones and MFN clauses included) in need of interpretation must be interpreted through the application of the interpretation rules codified in Articles 31, 32 and 33 of the VCLT which are mandatory rules of international law of general application for the interpretation of any treaty or treaty provision (not mere axioms, directives or guides) and, as such, binding for the parties to the dispute and the arbitrators alike. I fully agree therefore with the prevailing view that dispute-resolution provisions, as well as MFN clauses, in BITs must be construed and applied neither broadly nor restrictively but in conformity with those rules of the VCLT.

364. Furthermore, the interpretation should also take into account the commitments that the parties may be considered as having reasonably and legitimately envisaged when concluding the treaty, like the principle of contemporaneousness and the principle of effectiveness (*effect utile*). These principles are controlled within the general rule of interpreting treaties (Article 31 of the VCLT) by the principle of good faith and the object and purpose of the treaty. I share, consequently, the following observations made by the 1983 *Amco Asia v. Indonesia* arbitral tribunal in its decision on jurisdiction:

“[...] (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

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<sup>297</sup> Aron Broches, “The Convention on the Settlement of Investment Disputes between States and nationals of other States”, *Recueil des Cours*, 1972, II, tome 136, p.349.

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 that 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 of the parties may be considered as having reasonably and legitimately envisaged*<sup>298</sup> (emphasis supplied in second paragraph).

365. I do not believe therefore that the basic distinction in the matter under consideration between *Maffezini*, *Siemens* and the like; and *Plama*, *Wintershall* and the like case-law’s lines of interpretation (concerning, for example, the interpretation of MFN clauses in BITs) turns on the existence or not of any purported rule of restrictive or liberal interpretation. For the author of the present Opinion, any *a priori* affirmation of the existence of a general rule of either restrictive or liberal interpretation of treaties would conflict with the VCLT and contemporary customary international law. As stated above, any treaty provision in need of interpretation has to be interpreted by applying duly the interpretation rules codified in Articles 31-33 of the Vienna Convention in every circumstance and, therefore, independently that the outcome of the interpretation yielded by the application of the said VCLT rules be considered *a posteriori* wide or narrow with respect to the claims, expectations or positions of any of the parties to the dispute or to the subjective values or legal schools of the arbitrators.

**(iv) The scope of application of generally drafted MFN clauses and the *ejusdem generis* principle**

366. Regarding the operation of MFN clauses in the jurisdictional field, the extension of the scope of application of “generally drafted MFN clauses” to dispute settlement issues on the basis of an alleged presumed consent or contracting out presupposition, or of other allegations disregarding the above distinction between substantive provisions and dispute-resolution provisions, would amount to bypassing the paramount international law rule of States’ consent to jurisdiction, as defined by international jurisprudence and best doctrine. Matters being so, those promoting the extension of the scope of application of “generally drafted MFN clauses” in BITs to dispute-resolution should provide a reasonable legal explanation of how this phenomenon may take place in practice without disregarding the said principle. Such explanation is needed because as Professor Zachary Douglas rightly explains:

“The fundamental point is that the more favourable treatment granted in a third treaty must be claimed *through* the MFN clause in the basic treaty. That is how the MFN clause works. It does not operate to amend or supplement the text of the basic treaty”.<sup>299</sup>

367. Until *Maffezini* (2000), it was admitted in investment arbitral decisions that rights and means of protecting rights are two different “legal animals” to use the image of Professor

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<sup>298</sup> *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Jurisdiction of September 25, 1983 (“*Amco Asia*”), para. 14(i).

<sup>299</sup> Zachary Douglas, “The MFN clause in Investment Arbitration: Treaty Interpretation Off the Rails”, *Journal of International Law Dispute Settlement*, Vol.2, No.1 (2011), at p. 106.



Brigitte Stern in her concurring and dissenting opinion in the *Impregilo* award.<sup>300</sup> This continues to be the case as reflected in the jurisprudence of the ICJ and public international law doctrine, as well in a number of arbitral decisions in investment dispute, because the distinction is inherent to basic systemic principles of the international legal order in force. Subjective convictions to the contrary deserve respect, but by definition they are unable to modify that legal order and might even be an obstacle for its progressive development.

368. It is for that reason that I do not share, in its literalness, propositions such as: dispute-settlement arrangements and substantive or material protection are inextricably related (*Maffezini*), part of the treatment of foreign investments and investors (*Siemens*), integral part of the investment protection regime (*Suez*), or a significant substantive incentive and protection for foreign investors (*Gas Natural*), etc. In this way, the error of *Maffezini* in the interpretation of a well-known passage in *Ambatielos II* was extended for a while beyond *Maffezini* itself by subsequent decisions which disregarded altogether the “public policy considerations” and other caveats of *Maffezini*, as well as its conclusion that the requisite in the BIT concerned of the submission of the disputes to local courts within the specified period of eighteen months prior to taking it to international arbitration was indeed a jurisdictional requirement, limiting as such the scope of the consent to arbitration of the State hosting the investment. But, ICSID investment arbitration is not a system of binding precedents and, by now, quite a number of arbitral decisions and opinions have restored the scope of application of generally drafted MFN clauses in investment disputes as commanded by public international law.

369. Ultimately, as explained by Professor Brigitte Stern: “[...] the core reason why an MFN clause cannot apply to dispute settlement is intimately linked with the essence of international law”.<sup>301</sup> A conclusion at the root of the findings of other arbitral tribunal awards and decisions on investment disputes as, for example, *Salini v. Jordan* (2004), *Plama* (2005), *Telenor* (2006), *Berchader* (2006), *Wintershall* (2008), *Tza Yap Shum* (2009) and, more recently, *ICS Inspection and Control Services* (2012) and *Daimler Financial Services* (2012). There is not a need however to dwell in detail on this case-law in the light of the circumstances of the present case (see below). Moreover, the issue of the extension of the application of the MFN clauses to dispute settlement provisions has been recently thoroughly and masterly examined in the decisions on jurisdiction of the *Inspection and Control Service* tribunal (paras. 274-325) and the *Daimler* tribunal (paras. 160-278) with respect to the United Kingdom-Argentine BIT and the German-Argentine BIT respectively, as well as by Brigitte Stern in her concurring and dissenting opinion in *Impregilo v. Argentina* (with reference to the Argentina-Italy BIT) and by J. Christopher Thomas in his separate and dissenting opinion in *Hochtief v. Argentina* (with reference to the German-Argentine BIT). I share generally the lofty reasoning and conclusions of those recent judicial contributions on the subject-matter of the application of MFN clauses to dispute-resolution in investment disputes.

370. Because of the rule of State’s consent to the jurisdiction of international tribunals in public international there is a dichotomy evident between substantive rights and the settlement procedural rights aiming at protecting those substantive rights, and such a dichotomy prevents,

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<sup>300</sup> Brigitte Stern concurring and dissenting opinion in *Impregilo v. Argentina*, *supra* note 40, para.31.

<sup>301</sup> *Ibid*, para.16 of the concurring and dissenting opinion.

without more, an *ejusdem generis* relationship between those two sets of rights by lacking the required “*substantial identity*” between both. The *ejusdem generis* rule which governs the operation of MFN clauses in international relations takes duly into account that dichotomy in the definition of the scope of application of generally drafted MFN clauses, as well as with respect to the distinction between the substantive provisions of a treaty and the final clauses of the treaty. Then, concerning the latter relationship, there are not, apparently, arbitral decisions extending the application of a generally drafted MFN clause to the field of the final clauses of other BITs, although in certain situations it might be said that such an extension would improve the protection of the substantive rights of an investor.

371. The situation was similar with respect to extending the application of that type of MFN clause to dispute-resolution provisions until *Maffezini* interpreted the expression “administration of justice” of the *Ambatielos* International Arbitration Commission as referring to the application of an international dispute-resolution provision instead of the application to substantive protection provisions in treaties between the United Kingdom and several other countries, substantive protection which included, in the case, the right of access to national courts of the United Kingdom.<sup>302</sup> It should be added that when, in a MFN clause context, the expression “administration of justice” is used without further ado, that expression is sent generally back to the administration of *national* justice. For example: access to national courts; recognition and execution of foreign judgments; security for costs; *cautio judicatum solvi*; judicial assistance between States; etc. This appears to be the ordinary meaning of the expression when used in the indicated context.<sup>303</sup>

372. As stated most effectively by the ILC in paragraphs 10 and 11 of its commentary to Articles 9 and 10 of the Draft Articles on the Most-Favoured-Nation Clause:

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

(11) The effect of the most-favoured-nation process is, by means of the provision of one treaty, to attract those of another. Unless this process is strictly confined to cases where there is a substantial identity between the subject-matter of the two sets of clauses concerned, the result in a number of cases may be to impose upon the granting State obligations it never contemplated. Thus the rule follows clearly from the general principles of treaty interpretation. States cannot be regarded as being bound beyond the obligations they have undertaken.”<sup>304</sup>

373. Thus a “generally drafted MFN clause” cannot operate where there is a lack of “*substantial identity*” between the subject-matter of the rules at issue. One thing is to accord the investor

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<sup>302</sup> *Salini v. Jordan* decision on jurisdiction, *supra* note 289, paras.107-112.

<sup>303</sup> Andre Ustor, “Most-Favoured-Nation Clause”, in *Encyclopedia of Public International Law*, Max Planck Institute, Vol.8 (1985), at p.411.

<sup>304</sup> *Yearbook of the International Law Commission*, 1978, vol.II, Part Two, p.30.

most-favoured-nation treatment in material rights, and another thing to use the MFN clause to avoid a condition or limitation contained in the dispute-resolution provisions of the same BIT. To proceed otherwise would amount to deny not only the “*effet utile*” of the dispute-resolution in the interpretation, but also and most fundamental the international law rule of a State’s consent to jurisdiction. The reason being that “jurisdictional rights” as, for example, access to international arbitration to settle a given investment dispute, require private investors’ prior compliance - as commanded by the rule of State’s consent to jurisdiction - with the conditions or requirements qualifying the right of access set out by the Contracting States in the dispute-resolution provision of the BIT in question. It is so because indeed, as stated in the ICJ jurisprudence, those conditions or requirements *delimit the scope of the host State’s consent to international arbitration* given in advance, under the form of an “offer” in the dispute-resolution provision of the BIT.

374. Between “substantive rights” and “substantive treatment”, on one hand, and “jurisdictional rights” and “jurisdictional treatment”, on the other hand, there are legal differences not only of degree but also of nature. This difference in nature manifests itself in the fact that “jurisdictional rights” and “jurisdictional treatment” require prior compliance - by virtue of the systemic rule of State’s consent of jurisdiction - with the *ratione voluntatis* conditions or requirements attached by the Contracting Parties to their *standing international arbitration offer*. The qualifying conditions of access to substantive rights of BITs and the qualifying conditions of access to international arbitration or other international means of dispute-resolution of BITs lack, therefore, between them the necessary *substantial identity* for the operation *inter se* of a generally drafted MFN clause.<sup>305</sup>

375. The existence of an obligation of international law to comply with the jurisdictional conditions or requirements as defined by the Contracting States in BITs before the private investor having even the possibility of access to the international arbitration of the offer (consequential to the interposition in the matter of the rule of State’s consent to jurisdiction), explains that it is unjustified in international law to insist on the proposition of the existence of an *ejusdem generis* relationship between “substantive protection” and “the means of enforcing such protection”, as rightly underlined by J. Christopher Thomas.<sup>306</sup> The beneficiary of a MFN clause can only claim rights falling within the scope of the clause as defined by the Contracting States in the BIT. As written by Andre Ustor, former ILC Special Rapporteur on the topic:

“The beneficiary State (the investor in the instant case) can only claim rights which belong to the subject-matter of the clause, which are within the time-limits and other conditions or restrictions set by the agreement, and which are in respect of persons or things specified in the clause or implied from its subject-matter.”<sup>307</sup>

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<sup>305</sup> Brigitte Stern’s concurring and dissenting opinion in *Impregilo*, *supra* note 300, para.44 and ff.

<sup>306</sup> J. Christopher Thomas’ separate and dissenting opinion in *Hochtief Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Jurisdiction of October 24, 2011 (“*Hochtief*”), para. 81 and footnote 52 of the opinion.

<sup>307</sup> Andre Ustor, “Most -Favoured-Nation Clause”, *supra* note 303, p. 415.

376. The above considerations apply, as indicated, to “generally drafted MFN clauses” whose interpretation cannot be done in isolation, namely without considering the *context* represented by the text of the dispute-resolution provision and of the BIT concerned as a whole as provided by the VCLT. The situation would of course be different if the MFN clause (or for that matter the dispute-resolution provision or some other provision of the BIT) provides expressly in a certain and unequivocal manner that the MFN treatment of the clause in the basic BIT is intended to import a more favourable arbitration dispute-resolution provision from another treaty.

377. In this latter hypothesis, the interpreter cannot but give effect to that common intention of the Contracting Parties manifested in the BIT because “the text must be presumed to be the authentic expression of the intention of the parties”<sup>308</sup> and, in particular, because the requirements of the rule of State’s consent to jurisdiction would have been fulfilled in such a case by the special way of incorporating expressly in the BIT the mutual consent of the Contracting States to extend the scope of operation of the MFN clause in the BIT concerned to dispute-resolution matters in their mutual relations. As stated in the *Plama* decision:

“[...] an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, *unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them*”<sup>309</sup> (*emphasis supplied*).

**(v) As secondary right holders, foreign private investors have access to international arbitration only by accepting the “standing arbitration offer” in the terms and with the general preconditions and prior requirements formulated by the Contracting States in the BIT**

378. As explained above, each Contracting State gives *in advance* in the BIT its consent to the effect that investment disputes with a protected private investor national of the other Contracting State be submitted to international arbitration under the form of a standing offer expressed in *written* form, as required by Article 25(1) of the ICSID Convention. Thus, the terms, conditions and wideness of the consent of the host State party to the investment dispute are to be found in the dispute-resolution provision of the BIT concerned. The protected private foreign investors are entitled therefore to invoke that consent to international arbitration of the host State as defined and confined by the said dispute-resolution provision, but not to allege a different host State’s consent or a wider one.

379. The private investor cannot modify by his/its act of acceptance of the standing offer, or otherwise, the terms or scope of the “international arbitration” consented by the Contracting States in the offer contained in the dispute-resolution provision of the BIT. The written acceptance of the foreign private investor cannot therefore be accompanied by reservations or caveats of any kind with respect to the existence of the consent to arbitration embodied in the “standing offer” of the host State or to its extent. On the contrary, to be legally effective the investor’s acceptance shall be deemed to correspond to the terms and scope of the international

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<sup>308</sup> UN Publication on the Law of Treaties, *supra* note 175, p.40, para. 11.

<sup>309</sup> *Plama*, *supra* note 41, para.223.

arbitration standing offer as defined by the Contracting States in the BIT. To do otherwise would be self-defeating for the investor because it would prevent that *the respective consents of the parties to the dispute match each other so that the undertaking to arbitrate (convención de arbitraje) between them be formed and the undertaking duly executed*. As has already been mentioned in Chapter II (2) of this Opinion, the jurisdiction of an arbitral tribunal depends upon the existence of an agreement to arbitrate between the parties to the dispute. This need is a *sine qua non* prior condition for any international arbitration, as explained by J. Christopher Thomas in his separate and dissenting opinion in *Hochtief v. Argentina*.<sup>310</sup> He pointed out *inter alia* that: “In the pre-*Maffezini* days, it was clear that the offer and the acceptance must match”.<sup>311</sup>

380. Without a mutually-consented-binding-arbitral-undertaking duly executed, the investor as a secondary holder of rights under the BIT in question would have deprived him/it by its own conduct of the right of access to the ICSID Centre and, consequently, of the possibility that the investment dispute be adjudicated by an ICSID arbitral tribunal. It is, therefore, in the investor’s interest to meet the terms and scope of the “standing offer” for international arbitration made by the host State in the BIT concerned by complying with the preconditions or prior requirements attached thereto by the Contracting States. Unilateral attempts to circumvent, to modify or to alter in any respect the terms and scope of the host State’s consent to international arbitration, as defined and delimited in the said offer, are in public international law beyond the reach of *third parties* who, like the investors, are holding under the BIT secondary-treaty rights only.

381. These general conclusions are based not only upon the paramount international law principle of the consensual jurisdiction of international courts and tribunals, but also in the law of treaties. As recalled by the *Wintershall* tribunal, according to the law of treaties, when exercising a right provided for in a given treaty, a “third beneficiary of a right” under the treaty, like the investors, “must comply with the conditions for the exercise of the right provided for in the treaty concerned or established in conformity with the treaty”<sup>312</sup>, namely in the instant case with the conditions and requirements set forth in Article 8 of the 1990 Argentina-Italy BIT.

382. As has been underlined by case-law and doctrine the “standing arbitration offers” of the Contracting States of BITs are in the nature of “take it or leave it offers” vis-à-vis foreign private investors. For example, the award on jurisdiction in the *ICS Inspection and Control Services* case states that:

“At the time of commencing dispute resolution under the treaty, the investor can only accept or decline the offer to arbitrate, but cannot vary its terms. The investor, regardless of the particular circumstances affecting the investor or its belief in the utility or fairness of the conditions attached to the offer of the host State, must nonetheless contemporaneously consent to the application of the terms and conditions of the offer made by the host State, *or else no agreement to arbitrate may be formed*. As opposed to a dispute resolution provision in a concession contract between an investor and a host State where subsequent events or

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<sup>310</sup> *Supra* note 306, paras. 14-27 of the dissenting opinion.

<sup>311</sup> *Ibid*, para. 20 of the dissenting opinion.

<sup>312</sup> *Wintershall*, *supra* note 9, para. 114. See, in the analogous context of treaties providing for rights for third States, Article 36(2) of the VCLT: “A State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with a treaty”.

circumstances arising may be taken into account to determine the effect to be given to earlier negotiated terms, the investment treaty presents a ‘take it or leave it’ situation at the time the dispute and the investor’s circumstances are already known. This point is equally poignant in the context of jurisdiction grounded on an MFN clause [...]”<sup>313</sup> (*emphasis supplied*).

383. Thus, to enjoy the right of access to international arbitration, provided for in a given BIT, a foreign private investor as a *third party* shall comply with the conditions for the exercise of that right set forth in the dispute-resolution provision of the BIT as commanded by the law of treaties, as well as by the rule of State’s consent to jurisdiction of general international law for which rule those conditions *limit further the scope of the consent itself*. This is established jurisdiction at the ICJ. For example, in its Judgment in the *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda)* case, the Court declared that:

“(The Court’s) jurisdiction is based on the consent of the parties and is confined to the extent accepted by them ...When that consent is expressed in a compromissory clause in an international agreement, *any conditions to which such consent is subject must be regarded as constituting limits thereon*”<sup>314</sup> (*emphasis supplied*).

**(vi) Non-applicability of the customary international law rules on prior exhaustion of local remedies and diplomatic protection to the present case**

384. Argentina and Italy did not require when joining the ICSID Convention or thereafter the exhaustion of local administrative or judicial remedies as a condition of their respective consents to arbitration under that Convention, as allowed by its Article 26.<sup>315</sup> In 1990, they did not incorporate either in their BIT a conventional *inter se* version of that rule of customary international law. But, Argentina and Italy did not *contract into* the “standing offer” in the BIT for international arbitration with investors unreservedly.

385. Both countries do confine their respective consents to international arbitration within some jurisdictional preconditions that protected investors shall comply with before having access to international arbitration. However, none of them (prior consultation as far as possible, followed by 18 months litigation in local courts) amount to an exhaustion of administrative or judicial local remedies precondition. They are *conventional preconditions* agreed upon willingly and freely by Argentina and Italy which delimit the maximum extent of the consent to international arbitration accepted by these countries in the “offer” of their BIT. Diplomatic protection customary rules of international law are also alien to the present phase devoted to the preliminary objections submitted by the Respondent and exclude at present, expressly, by Article 27(1) of the ICSID Convention because no award has yet been rendered by the Tribunal in the case.

386. The above reminder is, however, necessary because the Majority Decision based its conclusion upon the prerequisite of the 18 months litigation in local courts in a *de lege ferenda* threshold for the futility exception contained in Article 15(a) of the 2006 draft articles of the ILC

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<sup>313</sup> *ICS Inspection and Control Services*, *supra* note 12, para. 272.

<sup>314</sup> *Supra* note 280, p. 39, para. 88.

<sup>315</sup> No information to the contrary was called to the attention of the ICSID Secretariat or the Tribunal by the Parties.

on diplomatic protection,<sup>316</sup> draft articles which remain since then within the UN General Assembly waiting for a decision in the light of comments and observations from Governments. In such circumstances, I am of the opinion that the recourse by the Majority Decision to the said threshold as it would be positive international law applicable in the relations between Argentina and Italy is not only misplaced, but an unwarranted *ultra vires* exercise by the Majority of the *Kompetenz-Kompetenz* of the Tribunal vested upon it by Article 41 of the ICSID Convention. An opinion of mine which is, furthermore, confirmed by the very fact that Article 17 of the said 2006 draft articles reads as follows:

“The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments”.<sup>317</sup>

**(b) The extent of the Respondent’s consent to international arbitration manifested in the “standing arbitration offer” of Article 8 of the 1990 Argentina-Italy BIT**

**(i) The Respondent’s consent to international arbitration as confined within the dispute-resolution system of the BIT**

387. Argentina’s international arbitration “offer” to Italian private investors in its territory is contained in Article 8(3) of the 1990 Argentina-Italy BIT. In this “offer” Argentina gives its advance and irrevocable consent that the investment disputes with the protected Italian private investors may be submitted to international arbitration. But, the “offer” is far from being an unrestricted international arbitration offer. It is subject to some prior conditions and requirements. The Italian private investors have to comply with those conditions and requirements in order to have access to international arbitration. They do not have an unrestricted unilateral right of access to international arbitration vis-à-vis the Respondent.

388. As to the prior general conditions two appear as outstanding, namely: (i) that the consent to international arbitration is given by Argentina “for the purpose, and in conformity with the terms” of the BIT (Article 8(3), second paragraph); and (ii) that the said consent is given by Argentina for “any dispute relating to investments that arises” between it and protected Italian private investors “with respect to matters regulated” by the BIT (Article 8(1), but not further or otherwise.

389. Concerning the requirements circumscribing the extent of Respondent’s given consent, Article 8 of the BIT provides for a multi-layered, sequential dispute-resolution system leading, eventually, as a last step, to international arbitration. The prior settlement means provided for by

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<sup>316</sup> Majority Decision, paras. 608-11.

<sup>317</sup> The 2006 ILC draft articles on diplomatic protection, with commentaries, appears in *Official Records of the General Assembly, Sixty-first Session, Supplement No.10 (A/61/10)*. In 2010, the General Assembly decided to include in the provisional agenda of its sixty-eight session (2013) an item entitled “Diplomatic Protection” and, within the framework of a working group of the Sixth Committee, in the light of the written comments of Governments, as well as views expressed in the debates held at the 62nd and 65th sessions of the General Assembly, to further examine the question of a convention on diplomatic protection, or any other appropriate action, on the basis of the articles and also identify any difference of opinion on the articles (see: International Law Commission, Analytical Guide: Diplomatic Protection, J. Final Outcome, available at: [http://untreaty.un.org/ilc/guide/9\\_8.htm](http://untreaty.un.org/ilc/guide/9_8.htm), last update:19 January 2012).

the system are “amicable consultations” (Article 8(1)) and “18-month litigation in local courts” (Article 8(2)(3)). In the first place, the dispute “shall be, in so far as possible, resolved through amicable consultations between the parties to the dispute”. If the initial “amicable consultations” attempt does not provide a solution, the dispute “may be submitted to a competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment is located”. It is only if the dispute still exists “after a period of 18 months has elapsed since the commencement of the proceeding before the national jurisdictions” that the dispute may be submitted to international arbitration.

390. The above preconditions and prerequisites are part and parcel of the “offer” that Argentina and Italy agreed upon in the BIT delimiting as much the extent of the international arbitration consented by Argentina and Italy in the BIT. These *ratione voluntatis* limitations (agreed upon by the Contracting States) of the extent of the consent to international arbitration given by them in advance and in an irrevocable manner, adopts in Article 8(3) of the BIT the form of an “offer” to the private investors nationals of the other Contracting State. Thus, the Italian private investors in Argentina protected by the BIT have no option but to comply with the closely interlinked conditions and prerequisites mentioned in Article 8 of the BIT which define the extent of the host State’s consent to international arbitration. It follows that they do not have the right to sue directly the host State by filing a request for arbitration in the Centre without previous compliance with the said preconditions and prerequisites, simply because that is the express will of the States Parties to the BIT.<sup>318</sup> It is, therefore, in the interest of the protected investors to comply with those conditions and prerequisites.

391. The text of Article 8 of the Argentina-Italy BIT is crystal clear. In the face of that clearness eventual allegations of different expectations by investors are not, in my opinion, a proposition susceptible of being sustained in public international law. Arbitrators cannot but duly take into account those preconditions and prerequisites when assessing, pursuant to the Argentina-Italy BIT, the jurisdiction of the ICSID and the competence of the present Tribunal. No doubts seem possible about the intentions of Argentina and Italy manifested in Article 8 of their BIT concerning the extent of their respective consents to international arbitration embodied in the “offer”. The Claimants themselves admitted in their Request for Arbitration of 23 June 2008 that: “In the present case, Argentina’s offer to Italian investors to refer disputes to ICSID is expressed in Article 8 of the BIT, which provides the following: (quotation of the text of paragraphs 1 to 5(a) of Article 8 of the Argentina-Italy BIT).<sup>319</sup>

## **(ii) General preconditions**

392. As indicated in paragraph 388 above, the Respondent’s consent to international arbitration in Article 8 (3) is given for investment disputes between the investor and the host State *with respect to matters regulated by the BIT* (Article 8(1)), not further or otherwise. Such consent does not extend therefore to matters falling outside the BIT as, for example, matters not covered by the definition of the terms “investment”, “investor”, “income” and “territory” in Article 1 of the BIT. In other words, the extent of the Respondent’s consent to international arbitration is

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<sup>318</sup> *Wintershall, supra* note 9, para. 117.

<sup>319</sup> Para. 83 of the Request for Arbitration.



circumscribed to investment disputes whose subject-matter falls under the *ratione materiae* and the *ratione personae* jurisdictions as defined by the Argentina-Italy BIT and the ICSID Convention.<sup>320</sup>

393. Furthermore, the Respondent's consent is given "in conformity with the terms of the Agreement" (namely the BIT) and, consequently, for *the period of time following compliance* with the dispute-resolution prerequisites of "amicable consultations" and the "18 months litigation in Argentine courts". This *ratione temporis* limitation of the extent of the Respondent's consent to international arbitration is likewise ignored by the Majority Decision. Further, additional limitations *ratione temporis* are set forth in the final clauses of the BIT with respect to investments made prior to the entry into force of the BIT, as well as to its entry into force and terms and expiration of the BIT.

394. Regarding the second general precondition, namely the existence of an investment dispute, at the date of the institution of the present arbitration proceeding (23 June 2008), between the Parties with respect to matters regulated by the BIT, namely a legal investment dispute between the Claimants and the Respondent,<sup>321</sup> no specific preliminary objection was submitted. But, Respondent moved the preliminary admissibility objection that the "Claimants lack legal standing to institute these proceedings".<sup>322</sup> This matter will be considered below in Section 2 of this Opinion devoted to the extent of Claimants' consent and the admissibility of their Request for Arbitration.

### **(iii) The prior requirement of "amicable consultations"**

395. The dispute-resolution system the Argentina-Italy BIT provides for, in the first place, that the investment dispute "shall be, insofar as possible, resolved through amicable consultations between the parties to the dispute" (Article 8(1)). Only in the case the "amicable consultations" do not provide a solution, the dispute may be submitted to the local courts of the host State of the investment (second step of the system). The use of the word "shall" is in itself indicative of an *obligation* to try to resolve the dispute through amicable consultations, not simple a choice or option. The word "shall" in treaty terminology means that what is provided for is *legally binding*.

396. The Respondent accepts that the obligation for the Parties to the dispute to enter into "amicable consultations" is a mandatory requirement which it characterizes as jurisdictional in nature.<sup>323</sup> The Claimants consider that there exists an obligation for the Parties to resort to "amicable consultations" prior to taking a dispute to international arbitration, but in their opinion the provision does not lay down a mandatory jurisdictional requirement but merely provides for a procedural prerequisite which does not need to be strictly followed. Thus, for the Claimants non-

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<sup>320</sup> So far as to the scope of *ratione materiae* jurisdiction in the instant case, see Chapters II (1) and III of the present Opinion.

<sup>321</sup> Claimants instituted the present arbitration proceeding pursuant to Rule 1 of the Institution Rules, Article 25 of the ICSID Convention limiting the jurisdiction of the Centre to "any legal dispute arising directly out of an investment".

<sup>322</sup> Point (e) of Respondent's Request for Relief in para. 185 of the Argentine Republic's Post-Hearing-Brief.

<sup>323</sup> Majority Decision, para. 552.

compliance with the “amicable consultations” requirement of Article 8(1) of the BIT would not be a bar to ICSID jurisdiction.<sup>324</sup>

397. Furthermore, Claimants argued that the requirement of “amicable consultations” was clearly inapplicable in the present case. They alleged that it was apparent from the facts because Argentina would have always displayed a hostile and uncooperative attitude towards the Claimants and, in any case, the possibility of reaching an amicable settlement was precluded by Law No. 26.017 which prohibited governmental bodies from taking any kind of action (judicial, extrajudicial or private) with the Claimants.<sup>325</sup> However, for the Respondent the prior requirement of “amicable consultations” operates as a limitation of its consent to international arbitration and, being mandatory and jurisdictional in nature, the requirement must be strictly complied with before an investor’s right to international arbitration arises, and be exercised by the investors through the institution of international arbitral proceedings on the investment dispute. Failure to comply with the requirement will entail a bar to the jurisdiction of the Centre and to the competence of the Tribunal. Furthermore, the Respondent points out that the Law No. 26.017 did not make settlement of the investment dispute with Argentina impossible or futile. It only required legislative consent to any settlement as corroborated by the reopening of the Exchange Offer in 2010.<sup>326</sup>

398. I find myself in agreement with the essence of the Respondent’s view. As admitted by the Majority Decision itself,<sup>327</sup> there is no ambiguity as to the mandatory character of the prior “amicable consultations” requirement of Article 8(1) of the Argentina-Italy BIT. The addition of the words “in so far as possible” does not eliminate the binding character of the provision,<sup>328</sup> the mandatory language of which reveals, obviously, a State Parties’ intention to the effect that the dispute “*shall be, in so far as possible, resolved through amicable consultations*” (*emphasis supplied*).

399. Furthermore, to the extent that a prerequisite in a treaty or in a given compromissory clause thereof qualified as a *legally binding condition*, it must be complied with before the seisin of the international court or tribunal concerned, even when the prerequisite is not subject by the treaty instrument or clause to a given *temporal timeframe*, as it is the case of the rule on “amicable consultations” of Article 8(1) of the Argentina-Italy BIT. This provision does not set out in effect any given period of time or time-limits for the holding of the “amicable consultations” between the parties to the dispute.

400. “Amicable consultations” or “negotiations” as preconditions to international arbitration or judicial settlement are very usual in conventional law. For example, Article 9 of the Argentina-Italy BIT concerning the “Resolution of Disputes between the Contracting Parties” over the interpretation and application of the BIT itself provides also for “amicable consultations” during

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<sup>324</sup> *Ibid.*, para.560.

<sup>325</sup> Request for Arbitration, para. 87

<sup>326</sup> Majority decision, paras.552-553.

<sup>327</sup> *Ibid.*, paras. 579-80.

<sup>328</sup> For the Majority Decision the addition of the words “so far as possible” characterized that the type of binding provision as an “obligation of means” or of “best efforts” (para. 579 of the Decision).

six months before going to an *ad hoc* Arbitral Tribunal to be established in accordance with the provisions of the said Article of the BIT.

401. Resort to “amicable consultations” or “negotiations” prior to the recourse to international arbitration or judicial settlement is indeed a generalized practice which in the field of investment disputes is very common in most if not all of the BITs.<sup>329</sup> We are not dealing here, therefore, with one of those conditions or requirements that sometimes investors’ counsels characterize *ex facie* as “unreasonable”, “meaningless”, “nonsensical”, “oppressive” or “impossible of compliance” and that, for those reasons, they ask that their clients be dispensed with or the tribunal disregard it altogether in the instituted arbitral proceeding.<sup>330</sup> In the instant case, as matter of principle, there is no reason why the Tribunal should not enforce the “amicable consultations” obligation of Article 8(1) of the BIT, when it is clearly and undisputedly so stipulated in a conventional rule of the applicable BIT.

402. As the ICJ has explained, resort to “amicable consultations” and “negotiations” fulfils three main useful distinct functions, namely: (i) it gives notice to the respondent that a dispute exists and delimits the scope of the dispute and its subject-matter; (ii) it encourages the parties to attempt to settle their dispute by mutual agreement, so avoiding recourse to binding third-party adjudication or arbitration; and (iii) it performs an important function, together with other methods of peaceful settlement, in indicating *the limit of consent given by States to the jurisdiction* of a given international court or tribunal.<sup>331</sup>

403. In the light of the conduct adopted by Claimants, the “amicable consultations” method of Article 8(1) of the Argentina-Italy BIT is clearly unable in the present case to perform the first two functions listed above. But the third function, namely *the important function of indicating the limit of the consent given by Argentina to international arbitration in Article 8 of the BIT, as Respondent in the instant case, remains entirely, because beyond the reach of being affected by any Claimants’ adopted conduct.*

404. In effect, it is unquestionable that it belongs exclusively to the Argentine Republic to define the extent of its own consent to international arbitration in investment disputes with alleged Italian investors. And the Argentine Republic did so, in agreement with Italy, in Article 8 of the 1990 Argentina-Italy BIT. The consent therein manifested being limited by an “amicable consultations” prerequisite with the Italian disputing investor(s), the concluding finding cannot be other than the submission to international arbitration of an alleged investment dispute with an Italian investor *without* the prior holding of the mandatory “amicable consultations” between the Parties to the dispute falls outside the extent of the consent to international arbitration given by the Argentine Republic in the BIT concluded with Italy. In any case, Argentina’s consent to international arbitration in the absence of compliance with “amicable consultations” of Article 8

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<sup>329</sup> For example, the Convention on the Elimination of All Forms of Racial Discrimination, Article 22.

<sup>330</sup> See, for example, *Wintershall*, *supra* note 9, para 125.

<sup>331</sup> In the *ICJ Judgment in the Application of the CERD (Georgia v. Russian Federation)* case, *supra* note 283, para. 135. The fact that Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) is not drafted in mandatory terms did not prevent the Court to dismiss the case for non-compliance by claimant of the two alternative preconditions to judicial settlement set out in the said Article 22, namely negotiations or referral to procedures expressly provided for in CERD.

of the BIT has not been proven by Claimants who all the way argued that the requirement did not apply to them in the circumstances of the case.

405. The Majority Decision admits that “no consultations between the Parties have taken place” and that “Claimants could not establish that a minimum amount of consultations between them and the Respondent were conducted”.<sup>332</sup> However, the Majority concludes that “Claimants did not violate the requirement to engage in amicable consultations incumbent upon them by virtue of Art. 8(1) of the Argentina-Italy BIT”.<sup>333</sup> How is this *ex facie* contradiction explained in the Majority Decision? By an erroneous interpretation of the role attributed to the words “*in so far as possible*” within the rule set forth in Article 8(1). To the point that it infringes upon the issue of the extent of the Respondent’s consent to international arbitration, this erroneous interpretation has to be dealt here, without prejudice to come back to the matter in Section 2 of the present Chapter from the standpoint of the definition of the extent of the manifested Claimants’ consent.

406. The Majority Decision begins by making the disclaimer that it is not reading a “futility exception” into Article 8(1), but that its conclusions are “a direct and independent consequence of the very wording of the provision in question”.<sup>334</sup> But right after, the Majority abandons the text of the provision all together *endorsing* instead, within the interpretative process, some subjective *Abaclat* tribunal’s pronouncements to the effect that consultation “is to be reasonably understood as referring not only to the technical possibility of settlement talks, but also to the possibility, i.e. the likelihood, of a positive result” and that “it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from the outset. The willingness to settle is the *sine qua non* condition for the success of any amicable settlement talk”.<sup>335</sup> Peculiar pronouncements in the light *inter alia* that in public international law, as a general rule, an obligation of “consultation” or “negotiation” does not entail reaching agreement but of trying to agree.

407. In that way, namely through an alleged interpretation of the text (supposed to be conducted in accordance with the interpretation rules of the VCLT), the “amicable consultations” conventional obligation set forth in Article 8(1) of the BIT is transformed in something else, i.e. in an obligation with a different content and purpose.<sup>336</sup> This method of interpretation of treaty law cannot be considered reasonable at all in public international law. Once more, the Majority Decision is modifying the text of the BIT under the pretext of making an interpretation of one of its provisions. The “amicable consultations” obligation of Article 8(1) is not setting forth the precondition that a “possibility of meaningful consultations to settle the dispute” with the host State existed, as argued the Majority Decision. This is *Abalat’s dixit*, not BIT’s *dixit*.

408. Within the text of Article 8(1) the words “*in so far as possible*” do not refer to the entering or engaging into the “amicable consultations” but to the duration of the obligation. The obligation *to resolve* the dispute through that process ends or terminates in law at the moment

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<sup>332</sup> Majority Decision, para. 584.

<sup>333</sup> *Ibid*, para. 588.

<sup>334</sup> *Ibid*, para. 582.

<sup>335</sup> *Ibid*.

<sup>336</sup> In other contexts as well.

when that possibility is over, but it exists and is operative until that moment. The words “*in so far as possible*” do not qualify the entering or engaging of the “amicable consultations” process. Claimants are not obliged to enter or engage in “amicable consultations” at any specified moment of time, but if they do not try even (as in the present case) to initiate the process, they cannot claim the right of submitting the investment dispute to international arbitration pursuant to Article 8 of the Argentina -Italy BIT. The Argentine Republic’s consent to international arbitration in the “offer” to Italian protected private investors in its territory does not extend so far as to cover unilateral direct access to international arbitration

409. I conclude, therefore, that the extent of consent to international arbitration contained in the Argentine Republic’s offer of the BIT does not cover the international arbitration proceeding instituted by Claimants in the instant case. This conclusion of mine is based upon the text of Article 8(1) of the BIT in the context of paragraphs (1)-(3) of the Article as a whole. It is furthermore conformed to the established jurisprudence of the ICJ on the matter, as well as to a number of arbitral decisions in ICSID case-law. As declared by the ICJ in its Judgment in the *Case concerning Application of the CERD (Georgia v. Russian Federation)*:

“Manifestly, in the absence of evidence of a genuine attempt to negotiate, the precondition of negotiation is not met. However, where negotiations are attempted or have commenced the jurisprudence of this Court and of the Permanent Court of International Justice clearly reveals that the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked”.<sup>337</sup>

410. The ICJ dismissed the above case by lack of jurisdiction because Georgia was unable to prove that in fact it sought *to commence* good faith negotiation or the other settlement method provided for in Article 22 of CERD as preconditions for the seisin of the Court. The same may occur of course in investment arbitrations proceedings. Then, as did for example the *Murphy International v. Ecuador* tribunal, the lack of jurisdiction of ICSID and of competence of the tribunal has to be declared by sustaining a preliminary objection of non-compliance with the amicable consultations or negotiation precondition prescribed by the applicable BIT.<sup>338</sup>

411. Lastly, it should be recalled that the position of the Claimants concerning compliance with the “amicable consultations obligation” of Article 8(1) of the Argentina-Italy BIT is different from the position of the claimants in the *Abaclat* case, as proved by the evidence provided for by their letter of 28 February 2006 to the Argentine Minister of Economy referred to in paragraph 66 of the present Opinion. There is not such kind of letter in the present case. I see in

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<sup>337</sup> *Supra* note 283, para. 159. The paragraph mentioned in support of the declared jurisprudence the following cases: *Mavrommatis Palestine Concessions*, *supra* note 271; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (1960–1966)*; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*; *Applicability of the Obligations to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 Advisory Opinion of 26 April 1988 – General List No. 77 (1988–1988)*; and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*. In the same sense, the Judgment in the case of *Armed Activities in the Territory of the Congo*, *supra* note 280, p. 40-41, para. 91).

<sup>338</sup> With respect to a “six months consultation and negotiation period” precondition in the applicable BIT (*Murphy Exploration & Production Company – International v. Republic of Ecuador* (PCA- UNCITRAL Arbitration Rules) Award on Jurisdiction of December 15, 2010 (“*Murphy v. Ecuador*”), para. 161).

this absence an additional reason to avoid references to the pronouncements of the *Abaclat* tribunal on the subject-matter of the “amicable consultations” of Article 8(1) of the BIT.

**(iv) The prior requirement of “18 month litigation in local courts”**

412. The considerations and conclusions above are likewise applicable *mutatis mutandis* to the second prerequisite to international arbitration of the system set forth in Article 8(2) and (3) of the Argentina-Italy BIT namely that, if the “amicable consultations” failed, “the dispute may be submitted to the competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment is located” during “a period of 18 months”. The language of Article 8(2) uses a permissive “may”, but read together with the immediate context provided for by Article 8(3) cannot be reasonably understood but as meaning that the dispute, if it still exists, may be submitted to international arbitration only “after a period of 18 months has elapsed since notification of the commencement of the proceeding before the national jurisdictions indicated in paragraph 2”. As stated by the *Impregilo* award with reference to the same provision of the Argentina-Italy BIT applicable to the present case:

“[...] the wording of Article 8(3) indicates that it contains a general condition for international arbitration, and there is no exception for the situation where there had been no domestic proceedings. If the intention had been to provide for such an exception, the wording would most probably be different. An appropriate wording would then have been, for instance: ‘If the dispute has not been submitted to the competent judicial or administrative courts in accordance with paragraph 2 above, or if the dispute, after having been submitted to these courts, has remained unresolved eighteen months after the commencement of the proceedings before them, it may be submitted to international arbitration...’”<sup>339</sup>

413. Thus, Article 8(2) of the BIT provides a mandatory time-limited “18 months litigations in local courts obligation” (Argentine courts in the instant case) before, if the investment dispute still exists, bringing it to international arbitration. So much so, that Article 8(4) of the BIT provides that “from the moment an (international) arbitral proceeding is commenced, each of the parties to the dispute will adopt all necessary measures in order to desist from the on-going judicial proceeding” in local courts. This proviso answers eventual situations in which the withdrawal of the case from local courts would be or appear impermissible under domestic laws.<sup>340</sup>

414. The Claimants denied the above. For the Claimants the prerequisite to have recourse to the domestic courts of the host State for a period of 18 months prior to resorting to international arbitration was merely an option for the investor. To this effect they rely on: the language of Article 8(2); the “entirely futility” of a legal action before Argentine courts because the impossibility to decide the case in only 18 months; the Law No. 26.017 (notably its Articles 3 and 6); the judgment of the Supreme Court of Argentina in the *Galli, Hugo Gabriel y otro c/ Poder Ejecutivo Nacional* (“*Galli*”) case; and the costs of the proceedings before the Argentine courts. Furthermore, Claimants contend that they are not required to have recourse to domestic

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<sup>339</sup> *Impregilo*, *supra* note 40, para. 89.

<sup>340</sup> The point was, for example, raised in the *Wintershall* case, *supra* note 9 (*see* paras. 130-32 of the award).

courts on the account of an alleged alternative base of jurisdiction which would be provided for by the MFN clause contained in Article 3 of the Argentina-Italy BIT.<sup>341</sup>

415. The Respondent considers that the recourse to domestic courts was mandatory and a precondition to avail oneself of international arbitration. It points out further that the Claimants do not dispute their failure to submit their claims to the Argentine courts, and contests that the Claimants can rely on the so-called “futility exception” on any of the alleged accounts, recalling in that respect that Article 8(3) of the BIT does not require the dispute to be *resolved* within the 18 months stipulated timeframe, but only that the dispute be *submitted* to domestic courts during 18 months. The Respondent contends also that Law No. 26.017 and the 2005 *Galli* judgment (a purely domestic case) in no way inhibits Claimants from *submitting* the dispute to local courts, that remedies before Argentine courts are inexpensive and, furthermore, that the MFN clause of the Argentina-Italy BIT does not apply to dispute-resolution mechanisms.<sup>342</sup>

416. As in the case of the “amicable consultation”, I find myself in agreement with the essence of the Respondent’s arguments on the time-bound-prior-recourse-to-local-courts requirement of the Argentina-Italy BIT. The requirement is mandatory and sequential in nature for any Italian claimant investor in the territory of Argentina. It limits, therefore, the scope of the Respondent’s consent to international arbitration as manifested in the “offer” contained in Article 8(3) of the Argentina-Italy BIT and, consequently, is also jurisdictional in nature. The Majority Decision begins by accepting the proposition that “the *possibility* to proceed to international arbitration is at the disposal of the investor only when not having failed to satisfy the *obligation* of having recourse to domestic courts”,<sup>343</sup> but it voids that initial admission of any practical meaning when coming down to consider the legal consequences of Claimants’ non-compliance with the prerequisite.

417. As to the question of the limiting effect of this prerequisite on the extent of the Argentine Republic’s consent to international arbitration, I do not find any answer in the Majority Decision. However, there is no reason why the Tribunal should not consider and respect the extent of the Respondent’s consent to jurisdiction resulting from the “18 months litigation in Argentine courts” precondition, as formulated together by Argentina and Italy as Contracting States of Article 8(2) and (3) of the BIT. Further, the precondition considered is not an extemporaneous prerequisite at all. About 10 of the BITs concluded by the Argentine Republic with other States contain, with some difference in language, a time-bound recourse to domestic courts obligation before going to international arbitration.<sup>344</sup>

418. The requirement is neither a mere “waiting period” nor an “exhaustion of local remedies” requirement. It falls rather between both in respect to contents as well as object and purpose.<sup>345</sup> It is further a requirement mixed in character composite by a *ratione fori* element and a *ratione*

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<sup>341</sup> Majority Decision, paras. 563-67.

<sup>342</sup> *Ibid*, paras. 554-59.

<sup>343</sup> *Ibid*, para. 591.

<sup>344</sup> The 10 State Parties to those 10 BITs are: Italy, Belgium-Luxembourg, United Kingdom, Germany, Switzerland, Spain, Canada, Austria, Netherlands, and Republic of Korea (See *ICS Inspection and Control Services*, *supra* note 12, Annex 1).

<sup>345</sup> *Ibid*, para. 248.

*temporis* element.<sup>346</sup> Beyond resolving the dispute, there are various other purposes and sensible reasons for including the “18 months litigation in local courts” precondition requirement. As has been observed by some arbitral tribunals in investment disputes:

“(1) the submission to domestic courts might serve to familiarize them with the State’s international obligations towards foreign investors and promote their capacity to handle and resolve international investment disputes; (2) the submission to domestic courts may help to highlight areas of inconsistency between local law and State’ international obligations for potential reform, (3) the State may prefer to avoid the publicity of an international claim if the dispute is able to be resolved locally; and (4) the delay and process involved may better allow the State to assess the claim, gather evidence, and prepare a defence to a possible international arbitration claim”.<sup>347</sup>

419. In any case, being in Article 8 of the BIT, this treaty-based-pre-condition is also, like the previous amicable consultations one, a *ratione voluntatis* requirement that Italian private investors have no choice but to comply with in order to be entitled to institute an international arbitration proceeding at ICSID against the Argentine Republic. In the absence of even a  *cursory* attempt to comply with the “18 months litigation in Argentine courts” it’s obvious, without the need of further evidence that Claimants failed to abide by that precondition to international arbitration.

420. This conduct of the Claimants is, however, powerless *per se*, as stated above, to alter, in any respect, the extent of the Respondent’s consent to international arbitration *as manifested in the offer of Article 8 of the BIT*. Therefore, the conventional obligation of “18 months litigation in Argentine courts” cannot be considered fulfilled (like in the case of the “amicable consultations” precondition) by anything less than by what is explicitly prescribed in Article 8 of the BIT. The consent to international arbitration given by the Respondent in the said offer does not extend to investment disputes instituted by Italian private investors prior to their compliance with the 18 months of litigation in Argentine courts.

421. As we are going to see next, the 18 months litigation in local courts is a requirement that must be respected because it is jurisdictional in nature, the reason being as declared unanimously by the *Impregilo v. Argentina* tribunal:

“In sum, Article 8(3) contains a jurisdictional requirement that has to be fulfilled before an ICSID tribunal can assert jurisdiction. This decision is in accordance with the decision in *Wintershall*, where it was found for a very similar clause in the Argentina-Germany BIT, 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’ *before the right to ICSID can even materialize*. *Impregilo* not having fulfilled this requirement, the Tribunal cannot find jurisdiction on the basis of Article 8(3) of the Argentina-Italy BIT”<sup>348</sup> (*emphasis supplied*).

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<sup>346</sup> *Wintershall*, *supra* note 9, para. 145

<sup>347</sup> *ICS Inspection and Control Services*, *supra* note 12, p.89, footnote 98, and *Daimler v. Argentina*, *supra* note 1, paras. 197-98.

<sup>348</sup> *Impregilo*, *supra* note 40, para. 118.



422. The quotation above describes clearly the reasons and grounds why I cannot but dissent *in toto* of the construction made by the Majority Decision on the requirement of the prior recourse to domestic courts as established in Article 8 of the Argentina-Italy BIT. This Article sets forth the conditions under which the present Tribunal may exercise jurisdiction in the case with the consent of those two States by their sovereign agreement embodied in the Argentina-Italy BIT, but not further or otherwise. As stated by the *Wintershall* tribunal with reference to the similar provision in the Argentina-Germany BIT:

“That an investor could choose at will to omit the second step (the 18-months domestic courts requirement) is simply not provided for nor even envisaged by the Argentina-Germany BIT - because (Argentina’s) the Host State’s ‘consent’ (standing offer) is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in local courts”.<sup>349</sup>

423. I am therefore in agreement with the concluding words of the *Daimler v. Argentina* award on the requirement that “since the 18-months domestic courts provision constitutes a treaty-based pre-condition to the *Host States consent to arbitrate*, it cannot be bypassed or otherwise waived by the Tribunal”<sup>350</sup> by extrapolating on the consideration of the present requirement a “futility threshold” proposition to governments contained in the ILC draft articles on diplomatic protection, still within consideration in the UN General Assembly, in detriment of the integrity of the Argentina-Italy BIT and of the public international law rule of State’s consent to jurisdiction (see above para. 386 of this Opinion).

**(v) The jurisdictional nature of the obligations enshrined in Article 8(1)-(3) of the Argentina-Italy BIT.**

424. The question of the legal nature of the obligations enshrined in Article 8(1)-(3) of the Argentina-Italy BIT is very much in dispute between the Parties to the present case. While the Respondent insists that these provisions of the BIT create a “multi-layered, sequential dispute resolution system” constituting “mandatory jurisdictional requirements”, Claimants’ view is that these requirements only give rise to “procedural prerequisites”<sup>351</sup> which may be eventually disregarded or waived. The Majority Decision avoids deciding this inter-Parties issue in the following terms:

“[...] irrespective of whether others may identify a different degree of “bindingness” with regard to the two notions, in this Tribunal’s view and at least with regard to the requirements set forth by Art. 8(1)-(3) of the Argentina-Italy BIT, if any of these requirements *in their interpretation by the Tribunal and applied to the facts of the case*, has not been met by Claimants, the Tribunal would have to dismiss the case irrespective of whether the requirement would qualify as one of jurisdiction or admissibility”<sup>352</sup> (*emphasis supplied*).

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<sup>349</sup> *Wintershall*, *supra* note 9, para. 160(2).

<sup>350</sup> *Daimler*, *supra* note 1, para. 194.

<sup>351</sup> Majority Decision, para. 570.

<sup>352</sup> *Ibid*, para. 575.

425. I belong to the “others” who identify a different degree of “bindingness” between the two notions and that consider further that, being the BITs bilateral treaties, ICSID arbitral tribunals have to respect and enforce *pacta sunt servanda* in the interpretation and application the dispute-resolution provisions contained in those conventional instruments as agreed upon by the Contracting States concerned, Argentina and Italy in the instant case. To do otherwise would go against the legal security in investment relations between host States and private foreign investors and goes against the public international law rule of State’s consent to jurisdiction governing the jurisdictional field at the international level.

426. Generally speaking, the so-called “procedural requirements”, even in the form of mere prior “waiting periods” or “cooling off periods” for consultations or negotiations, or for any other purpose like litigation in domestic courts, are formulated in BITs in terms of mandatory jurisdictional requirements, its non-compliance justifying a finding of lack of jurisdiction. For example, Article 10(4) of the Argentina-Germany BIT provides that if no agreement were reached concerning the choice between ICSID or UNCITRAL arbitrations the dispute will be submitted to ICSID *following a three-month term* counted from a given date. And Article VII, paragraph 3(a), of the Argentina-United States BIT, a BIT invoked by Claimants in the present case (see below), provides that if the dispute has not been submitted for resolution under paragraph 2 (a) or (b) of the Article and *that six months have elapsed* from the date on which the dispute arose, the dispute may be submitted for settlement by binding arbitration, but not before. I am, therefore, generally in agreement with the following conclusion of the *Murphy v. Ecuador* tribunal:

“The Tribunal also does not accept the consequences Claimant seeks to derive between ‘procedural’ and ‘jurisdictional’ requirements. According to *Murphy International*, ‘procedural requirements’ are of an inferior category than the ‘jurisdictional requirements’ and, consequently, its non-compliance has no legal consequences. It is evident that in legal practice this does not occur, and non-compliance with a purely procedural requirement, such as, for example, the time to appeal a judgment can have serious consequences for the defaulting party.”<sup>353</sup>

427. Thus, even purely “waiting periods” or “procedural requirements” may be rendered “jurisdictional” (namely the so-called “obstacles” or “hurdlers” for a certain doctrine) by the wording, context or role attributed to it by the Contracting States within the dispute-resolution provision of the BIT concerned. It is obvious that it is not beyond the States’ autonomy to contract in thereon through a BIT. Thus, it is likewise obvious that although there is an objective core-notion of what is “jurisdictional”, Contracting States may also by agreement attribute to a given requirement a “jurisdictional” role (*ratione voluntatis* preconditions). In the instant case, the obligations enshrining in Article 8(1)-(3) of the Argentina-Italy BIT are, in my opinion, “jurisdictional” in nature by sharing the objective core-notion of the concept, as well as by the subjective will of Argentina and Italy as sovereign State Parties to the BIT.

428. Of course, it may happen that in a given particular case the host State might acquiesce to forgive the foreign investor’s compliance with one or more preconditions to international

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<sup>353</sup> *Murphy v. Ecuador*, *supra* note 338, para. 142.

arbitration set forth in the BIT, even those jurisdictional in nature There are some examples of this kind in the field of investor-host State dispute settlement, for instance, in the *Wena Hotel* case (a waiting period requirement) and in the *Bayindir Insaat* case (a notice requirement). But, in the instant case none of the Parties to the dispute have pleaded the existence between them of such a kind of understanding. The Respondent insists on compliance with all the requirements in Article 8(1)-(3) of the BIT as “jurisdictional” and the Claimants in its “procedural” nature and, under the circumstances, dispensable.

429. The preconditions to international arbitration in the dispute-resolution provisions of BITs are, as a general rule, “jurisdictional” in nature by the simple fact that they relate and limit the power of the international arbitral tribunals to decide on the merits of the dispute. *This is the established jurisprudence of the ICJ on the matter*, summarized in the following passage of its 2006 Judgment on “Jurisdiction of the Court and Admissibility of the Application” in the *Armed Activities on the Territory of the Congo (New Application: 2002)*:

“The Court recalls in this regard that its jurisdiction is based on the consent of the parties and *is confined to the extent accepted by them...* when that consent is expressed in a compromissory clause in an international agreement (for example in a BIT), *any conditions to which such consent is subject must be regarded as constituting the limits thereon. The court accordingly considers that the examination of such conditions relates to its jurisdiction and not to the admissibility of the application*”.<sup>354</sup>

430. The same criterion continues to be applied by the ICJ as, for example, in the 2011 Judgment in the *Georgia v. Russian Federation (preliminary objections)* case relating to the application of the CERD Convention. In its Judgment concerning the *Armed Activities in the Territory of Congo (New Application 2002)* case, the ICJ applied that jurisdictional criterion to all the titles invoked by the Applicant and irrespective of the kind of precondition at issue as follows:

Convention on Discrimination against Women (Article 29) - The Court was not satisfied that the Applicant in fact sought to commence “negotiations” and noted also that the Applicant failed to prove attempts on its part to initiate an “arbitration” precondition in the following terms:

“The Court cannot in this regard accept the DRC’s argument that the impossibility of opening or advancing in negotiations with Rwanda prevented it from contemplating having recourse to arbitration; *since this is a condition formally set out in Article 29 of the Convention on Discrimination against Women, the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept. In the present case, the Court has found nothing in the file which would enable it*

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<sup>354</sup> *Supra* note 280, p. 39, para. 88. The Court mentioned eight previous Judgments in support of its finding (*ibid.*) and applied it to all compromissory clauses invoked by the Applicant in the case (*ibid.*, p. 40, para. 88). This jurisprudence continuous to be applied by the Court, as illustrated by the 2011 Judgment on preliminary objections in the *Case Concerning the Application of the CERD (Georgia v. Russian Federation)*, *supra* note 283, see para. 131.

to conclude that the DRC made a proposal to Rwanda that arbitration proceedings should be organized, and that the latter failed to respond thereto”<sup>355</sup> (emphasis supplied).

WHO Constitution (Article 75) - The Court noted that, even if the DRC had proved the existence of a question or dispute falling within the scope of the said Article:

“it has in any event not proved that the other preconditions for seisin the Court established by the provision have been satisfied, namely that it attempted to settle the question or dispute by negotiation with Rwanda or that the World Health Assembly had been unable to settle it”<sup>356</sup> (emphasis supplied).

UNESCO Constitution (Article XIV(2)) and Montreal Convention (Article 14(1)) - The Court reached *mutatis mutandis* similar conclusions because the applicant failed to show that the prior procedures to seisin the Court pursuant to those treaty provisions were followed, concluding that it had no jurisdiction to entertain the application as in the case of the previous titles of jurisdiction invoked by the applicant.

431. This jurisprudence of the Court has inspired a number of decisions and awards of ICSID and other arbitral tribunals dealing with investor-host State investment disputes, as well as domestic court decisions rejecting investor’s arguments to the contrary. A perusal of the decisions of the said arbitral tribunals does bear out very much the proposition that preconditions to international arbitration as the requirements in Article 8 of the Argentina-Italy BIT, namely amicable consultations and 18 months litigation in local courts, are requirements in the nature of “jurisdictional requirements” whose omission or failure to comply would result in a determination of lack of jurisdiction. See, for example, among others: *Maffezini* (2000) (paras. 35-6); *Enron Creditors Recovery* (2006) (para. 88); *Wintershall* (2008) (paras. 155-56); *Murphy v. Ecuador* (2010) (paras. 156-57); *Impregilo* (2011) (para. 94); *ICS Inspection and Control Services* (2012) (para. 262); *Daimler* (2012) (paras. 193-94). Faced with the aggregate of the ICJ’s jurisprudence and investor-State case-law in investment disputes, the Majority Decision justifies its declared non-definition of the legal nature of the requirements of Article 8 of the Argentina-Italy BIT by referring to the 2011 *Abaclat* majority decision,<sup>357</sup> namely to a decision that has been commented by doctrine as “*sidestepping jurisdictional requirements, and instead introducing ‘admissibility’ criteria*”.<sup>358</sup>

432. Some arbitral decisions (i.e. *Ethyl Corporation v. Canada*; *Lauder v. Czech Republic*; *SGS v. Pakistan*) have found that the failing to comply with periods designed to encourage means of settlement by consultations or negotiations would not deprive the arbitral tribunal of jurisdiction. These three cases are referred to in footnote 298 of the Majority Decision together with others less pertinent.<sup>359</sup> They reflect the practice on admissibility objections in domestic

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<sup>355</sup> *Supra* note 280, p. 41, para. 92.

<sup>356</sup> *Ibid*, p. 43, para. 100.

<sup>357</sup> Majority Decision, para. 570.

<sup>358</sup> Hans van Houte and Bridie McAsey, *Cases Comment, Abaclat and others v. Argentina Republic. ICSID, the BIT and Mass Claims*, *supra* note 52, p. 233.

<sup>359</sup> For example, in *Bayindir Insaat*, *supra* note 214, Pakistan as the respondent State in the case admitted that the notice requirement did not constitute a prerequisite for jurisdiction (see *Wintershall*, *supra* note 9, p. 89, para. 152.)

courts. But this cannot hold up in public international law as a proposition susceptible of generalisation when the requirements considered *constitute treaty-based preconditions to the host State's consent to arbitrate the dispute, as in the case of Article 8 of the Argentina-Italy BIT*, and that furthermore, in the instant case, are formulated in mandatory language. As is stated in the *Daimler v. Argentina* award:

“However, admissibility analyses patterned on domestic court practice have no relevance for BIT-based jurisdictional decisions in the context of investor-State disputes. In the domestic courts, admissibility requirements are judicially constructed rules designed to preserve the efficiency and integrity of court proceedings. *They do not expand the jurisdiction of domestic courts*. Rather, they serve to streamline courts’ dockets by striking out matters which the jurisdiction of the courts, are for one reason or another not appropriate for adjudication at the particular time or in the particular manner in question”<sup>360</sup> (*emphasis supplied*).

433. It should be added that in the Argentina-Italy BIT, the period of time reserved for amicable consultations is governed by terms such as “insofar as possible” (Article 8(1)) and Article 8(3) for litigation in domestic courts a fixed period of “18 months” (Article 8(3)). Both terms are treaty-based sharing and have, consequently, the same “jurisdictional” nature of their respective requirement because conditioning or limiting the extent of the Argentine Republic’s consent to international arbitration and, in turn, the Tribunal’s power to adjudicate the merits of the present dispute. They do not raise an admissibility issue in public international law, but a jurisdictional one.

434. In sum, the “preconditions” to international arbitration set forth in Article 8 of the Argentina-Italy BT are both treaty-based “jurisdictional requirements” which as such should have been enforced by the Tribunal in accordance with international law as reflected in the established jurisprudence of the ICJ and in investor-State dispute arbitration case-law; the reason being that those preconditions limit the extent of the Argentine Republic’s consent to international arbitration and, consequently, the Tribunal’s power to decide the merits of the dispute.

435. Even investment arbitral decisions upholding that a given MFN clause in a BIT provides for, *in toto* or in part, an alternative title of jurisdiction have treated the issue, as they should, namely as a jurisdictional question (i.e. *RostInvest, Quasar de Valors, Hochtief*).<sup>361</sup> The treatment of the “requirement” of exhaustion of local remedies as an “admissibility issue” as referred to in footnote 288 of the Majority Decision is consequential to the content and operation of that “material rule” of customary international law linked to the exercise by States of the “diplomatic protection” of its nationals.

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<sup>360</sup> *Daimler, supra* note 1, para. 192.

<sup>361</sup> *Hochtief v. Argentine* decision on jurisdiction, *supra* note 306, refers to the distinction between “jurisdiction” and “admissibility” in its reasoning concerning the topic entitled “*MNF and jurisdictional limits*” (paras. 90, 91 and 94 of the decision).

## 2. Consent of the Claimants

### (a) The international arbitration consented by Claimants in their Request for Arbitration

436. The Claimants filed a Request for Arbitration at ICSID on 23 June 2008. In the Introduction of the Request, Claimants limit themselves to indicate: “This is a Request for Arbitration pursuant to Article 36 of the Washington Convention of 18 March 1965 and Article 8, para. 5(a), of the Agreement between the Argentine Republic and the Italian Republic on the Reciprocal Promotion and Protection of Investments (the “BIT”) signed in Buenos Aires on 22 May 1990 and in force from 14 October 1993.”<sup>362</sup> According to Article 36(2) of the ICSID Convention, a request for arbitration shall contain information concerning (i) the issues in dispute, (ii) the identity of the parties, and (iii) the *consent to arbitration of the parties to the dispute*, in accordance with the ICSID Institution Rules. Article 8(5)(a), of the Argentina-Italy BIT regulates the election by the investor of the international arbitration body, ICSID arbitration in the instant case.

437. The information of the Request concerning the *consent to arbitration of the Parties to the present dispute* does not appear until rather the end of the Request in Section XII of the document entitled “The Parties have consented in writing to ICSID Jurisdiction”. Section XII begins recalling that Article 25(1) of the ICSID Convention does not require a specific form for the manifestation of the parties’ written consent, but merely required that the consent be given prior to the filing of the Request for Arbitration.<sup>363</sup> In this respect, it should be pointed out that in the present case the Claimants did not provide any evidence, and did not argue, of having given any written consent to the present arbitration before filing their Request of 23 June 2008.

438. Thereafter, Section XII of the Request goes on explaining the formation of the necessary *undertaking to arbitrate* between the Parties to the present dispute as follows:

“82. It is commonly admitted by case-law and the most authoritative doctrine that a Contracting State’s consent to submit a dispute or category of disputes to ICSID arbitration may result from a unilateral undertaking or a public offer by that State to submit such disputes to ICSID, as expressed in national law or in an international treaty on the protection of foreign investments. Foreign investors have *the right to accept such an offer once a dispute has arisen* between them and the offering State.

83. In the present case, Argentina’s offer to Italian investors to refer investment disputes to ICSID is expressed in Article 8 of the BIT, which provides the following: (quotation of the text of paragraphs (1) to (5)(a) of the Argentina-Italy BIT)”.

84. As to the Claimants’ acceptance of the Argentina’s offer of ICSID arbitration it is commonly admitted that the investor’s acceptance of the host State’s offer can be manifested, *inter alia*, by filing a request for arbitration to ICSID. For these purposes, *the Claimants*

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<sup>362</sup> Request for Arbitration, para.1

<sup>363</sup> *Ibid.*, para.81.

*hereby accept to submit the dispute to ICSID arbitration by signing and filing this Request for Arbitration.”*

85. Pursuant to Article 2(3) of the ICSID Institution Rules, the *date of consent* is considered to be ‘the date on which the second party (i.e. the investor) acted’. In the present case such date is the date of submission of this request” (*emphasis supplied*).

439. So far so good. But, immediately after, the Claimants’ Request for Arbitration contradicts itself by stating that: “The *conditions* set out in Article 8 of the BIT *are clearly inapplicable* in the present case”<sup>364</sup> (*emphasis supplied*). This statement, and related Claimants’ argument all along this phase of the proceeding, raises an issue of paramount importance for the continuation of the proceeding in the case, namely the jurisdictional question of whether or not the undertaking to arbitrate (*convención de arbitraje*) as between the Parties to the present dispute was actually executed by the Claimants when filing at ICSID on 23 June 2008 their Request for Arbitration, as affirmed by Claimants in the above quoted paragraph 84 of the Request.

440. In the light of the above statement of the Request, can it be affirmed that the consent of the Claimants as given in the filed Request and the consent of the Respondent manifested in the “offer” were at idem on 23 June 2008 so that the necessary undertaking to arbitrate between the Parties for submission of the alleged dispute to ICSID arbitration was duly executed on that day? It is clear to me, in the light of the concurring facts that, on that date, each of the Parties to the dispute accepted as a principle ICSID arbitration as a means of settlement of investor-State investment disputes, but not on the submission of the Claimants’ alleged multiparty investment dispute to ICSID arbitration. The legal cause for that evident conclusion is that on 23 June 2008 the Claimants’ Request by no means accepted the terms of the “offer” of the Argentine Republic to Italian private investors in its territory embodied in the dispute-resolution sequential system of Article 8, paras. (1) to (3), of the Argentina-Italy BIT, whose preconditions to international arbitration constitute, as already explained, the limits of the Respondent’s consent to international arbitration as it is well established by a steady international jurisprudence.

441. As explained in Section 1 of the present Chapter of this Opinion, the Claimants have indeed “*the right to accept such an offer*”,<sup>365</sup> but surely “*not the right to alter or modify that offer*” as they did by giving in substance their consent to an unilateral direct access to ICSID international arbitration which is not part and parcel of the “offer” of the Respondent State, while declaring playing with words, in the above quoted paragraph 84 of the Request, their “*acceptance of the Argentina’s offer of ICSID arbitration*”. The Claimants’ reporting information on the motives of their own conduct set out in the three last paragraphs of Section XII of their Request for Arbitration does not allow any doubt in that respect. Claimants did not accept Respondent’s “offer” but something else.

442. As secondary treaty rights holders, the Claimants are not in the possession of any bargaining right aiming at amending the terms and conditions of the “offer” made by the two States Parties to the BIT. They may or may not accept the “offer” with its terms and conditions,

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<sup>364</sup> *Ibid.*, para. 86

<sup>365</sup> See paras.106-116 of the present Opinion.

but they lack *locus standing* to try in fact to a redefinition of the standing offer in terms of a right of unilateral direct access to international arbitration non-existent in the BIT, or to appeal to the present Tribunal to apply to the case, under pretext of interpretation, a version of the dispute-resolution mechanism of article 8 of the BIT different to the one manifestly agreed by Argentina and Italy when the two States concluded the BIT in 1990.<sup>366</sup>

443. In effect, concerning for example the first mandatory prior requirement to international arbitration, namely the entering or engaging “amicable consultations” with the host State with a view to resolve, in so far as possible, the investment dispute (Article 8(1) of the BIT), Claimants admit not having complied with this prerequisite of the Respondent’s “offer”, invoking in that respects three general considerations: (i) that it is apparent from the description of the facts underlying the dispute, as presented in the Request for Arbitration, that Argentina has always displayed a hostile and uncooperative attitude towards the Claimants; (ii) that the possibility of reaching an amicable settlement was precluded by Law No. 26.017 of 9 February 2005; and (iii) that Argentina’s behaviour in the present case is similar to the ones held by it since the beginning of 2001, for which Argentina has already been held liable.<sup>367</sup>

444. None of these three general considerations are, in public international law, susceptible of derogating, reforming or suspending the jurisdictional conventional obligation of means bestowed upon any purported Claimants by Article 8(1) of the BIT, a precondition limiting as such the scope of the Respondent’s consent to the international arbitration of the “offer”. Moreover, even if, for the sake of argument, one would admit that any or all the above considerations would have the effect of liberating the Claimants from the prior amicable consultations obligation, the total absence of evidence of a genuine attempt by them to enter or engage in “amicable consultations” means not only that they failed altogether to comply with that precondition but also that their consent to ICSID arbitration did not match the consent to arbitration embodied in the Respondent’s “offer”.

445. This complete absence of *any attempt* to engage with the Respondent in amicable consultations prescribed by the BIT, together with the kind of excuses advanced, shows also that when filing their Request for Arbitration the Claimants did not intend to match the Argentina’s consent to international arbitration as in the “offer” in order to execute the corresponding arbitral undertaking between the Parties to dispute, but to get from the present Tribunal an unilateral, unconditional and unreserved access to ICSID arbitration going far beyond the extent of the consent to international arbitration given by the Argentine Republic in its “offer” of Article 8 of the Argentina-Italy BIT.

446. That intention is confirmed by the fact that none of the alleged excuses prevent obviously Claimants addressing a communication to the Respondent asking for the opening of amicable consultations or giving notice that in case of rejection by the Respondent of such an opening, they will institute arbitral proceedings at ICSID, as did the Italian claimants in the *Abaclat and others* case without difficulties with their letter to the Argentine Ministry of Economy and Production.<sup>368</sup> Law No. 26.017, for example, does not preclude Claimants from sending such

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<sup>366</sup> See paras.378-383 of the present Opinion.

<sup>367</sup> Request for Arbitration, para. 87.

<sup>368</sup> TAF letter of 28 February 2006 (see para. 66 of the present Opinion).



kind of communications to the Respondent and, in any case, the former are not arguing having suffered any material impossibility (original or supervening) of performing such kind of acts before filing the Request for Arbitration or being in some other way prevented from complying with the prerequisite of the “amicable consultations” of Article 8(1) of the BIT.

447. This conduct is indeed revealing that the actual intention of the Claimants was to pursue ICSID arbitration but not the ICSID arbitration consented by the Respondent in Article 8 the Argentina-Italy BIT given therein by the Contracting States expressly “for the purpose, and in conformity with the terms of this Agreement” and not further or otherwise. The Claimants themselves admit, as indicated, that they have not complied with the prerequisite of amicable consultations arguing that it would be clearly inapplicable to them in the circumstances of the present case. But the Majority Decision disregarding altogether that admission concludes that the Claimants “*did not violate the requirement incumbent upon them by virtue of Article 8(1)*” of the BIT.<sup>369</sup>

448. I reject that conclusion of the Majority Decision because it is the result of a devious and unlikely interpretation of the ordinary meaning of the words “in so far as possible” within Article 8(1) of the BIT, off of track with the VCLT interpretation rules and on the basis of merely *speculating grounds* because no evidence has being submitted to the effect that the Respondent replied to a Claimants’ demarche showing no interest in entering into “amicable consultations”. Then, as established by the jurisprudence of the ICJ and of the PCIJ, the invocation of failure, deadlock or futility of a given consultation or negotiation precondition is in order *only where consultations or negotiations are attempted or have commenced, not before that attempt or commencement as in the instant case.*<sup>370</sup> Further, as has been recently declared by the Court, “the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from (the) substantives rules, nor...would require their modification or would displace their application” (2012 ICJ Judgment in the *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening*, para. 95) and – I would add - the same is true the other way around, namely that the substantive rules of international law, independently of its nature and protected values, do not derogate, modify or displace the rules determining the scope, extent or exercise of international jurisdiction governed by the consent of the parties to the dispute.

449. The non-compliance either by Claimants with the second mandatory precondition to arbitration of Article 8 of the BIT, namely with the submission of the dispute to Argentine courts for a period of 18 months before resorting to international arbitration, corroborates that when filing the Request for Arbitration at ICSID the consent given by the Claimants was actually a consent to an international arbitration bypassing the sequential dispute-resolution system of the BIT, trying to put in its place an unconditional ICSID arbitration in total disregard of the “offer” made by Argentina and Italy in the BIT. As in the case of the amicable consultation precondition there is also total absence of evidence of any genuine attempt by the Claimants to institute litigation in Argentine courts for an 18 months period as prescribed by Article 8(2) and (3) of the BIT

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<sup>369</sup> Majority Decision, para.588.

<sup>370</sup> See the ICJ judgment of 1 April 2011 in the *Case concerning the Application of the CERD (Georgia v. Russian Federation)*, *supra* note 283, para.159.

450. This time, the Claimants invoked in the Request, in an effort to justify their conduct, the following three general considerations: (i) that the consistent jurisprudence of international arbitral tribunals demonstrates that the provision does not constitute an obstacle to the offer of arbitration contained in the BIT; (ii) that in the present case the Claimants were effectively inhibited from challenging Argentina's preposterous Public Offer of Exchange (the 2005 POE) in light of Article 6 of Law No. 26.017; and (iii) that the resort to Argentine courts would have been an *entirely futile exercise*, since it would be clearly impossible for the local courts to decide the case in only 18 months.<sup>371</sup>

451. The "consistent jurisprudence" argument is inaccurate and did not correspond when the Request for Arbitration was filed on 23 June 2008 to the actual ICSID case-law situation. The "effectively inhibition" argument because of Law 26.017 is untenable in the absence of evidence that Argentine courts rejected any attempt by Claimants of instituting litigation because of the said Law, lack of a cause of action or some other way preventing them from complying with the rule in Article 8(2) and (3). As to the "impossibility" or "futility" to resolve the dispute in 18 months it is an argument based upon an incorrect reading of the core-meaning of that rule of the BIT,<sup>372</sup> as well as on speculative grounds on the Argentine domestic courts capabilities in the light of the *Galli* and other decisions of the Argentine Supreme Court concerning *domestic bondholders*.<sup>373</sup> For me, in the present instance the Claimants' plea of the *entirely futility exercise of litigation in Argentine domestic courts* is indeed merely speculative as the Argentine courts were never presented with Claimants' claims. Thus, futility has not been established in the first place by the facts of the case relating to the conduct of Claimants. It is not therefore a case of obvious futility. Speculative arguments are not supposed to derogate *pacta sunt servanda* nor the international law rule of State's consent to jurisdiction with its corollaries.

452. But, the Majority Decision does just that. On one hand, it admits the binding character of the recourse to domestic court of Article 8 of the BIT and that the Claimants, secondary treaty-right holders, failed to satisfy that conventional obligation. But, on the other hand, the Majority Decision - as it did with respect to the amicable consultation - states that "it cannot be concluded that the requirement of having recourse to Respondent's domestic courts, as set forth

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<sup>371</sup> Request for Arbitration, paras. 88 and 89. Subsequently to the filing of the Request, in the Counter Memorial (paras. 412-15), the Claimants invoked also to justify their non-compliance with the local courts prior requirement the decision of Argentine Supreme Court of 5 April 2005 in the *Galli* case (Annex CLA-37). Contrary to the Majority Decision, I cannot but reject also the *Galli* argument because that case concerned Argentine nationals subject to Argentine laws, not foreigners allegedly protected by an international treaty like the Argentina-Italy BIT. No evidence was submitted concerning Argentine judicial decisions relating to foreigners under special treaty protection.

<sup>372</sup> The conventional rule at stake is not premised on the proposition that the dispute is to be solved in 18 months in domestic courts, but on the different assumption that the dispute be submitted to domestic courts of the host State, Argentina in the present case, for a period of 18 months for trying to resolve the dispute before submitting it to international arbitration, by a sovereign common decision of Argentina and Italy (Article 8(2) and (3) of the BIT).

<sup>373</sup> There is not evidence of any attempt by the Claimants to seize Argentine domestic courts of the dispute. It is, therefore, without evidence in support that the Majority Decision concludes that the arguments referred in the said decisions of the Supreme Court apply "with equal force to non-domestic bondholders", engaging thereafter in highly speculative, unnecessary and out of place considerations on Argentine Constitution and judicial domestic proceedings, including on costs when Claimants have instituted international proceedings which are not precisely gratuitous (paras. 618-623 of the Majority Decision).

in Art. 8(2) and (3) of the Argentina-Italy BIT, was violated by Claimants”<sup>374</sup>. This conclusion of the Majority Decision up-holds therefore the “futility exception” invoked by the Claimants in the following terms:

“[...] an interpretation strictly faithful to the requirements of Art. 31 of VCLT, notably Art. 31(3)(c) of the Vienna Convention, leads to identify a futility exception in the pertinent *lex lata*, i.e. Art. 8(2) and (3) of the Argentina-Italy BIT”.<sup>375</sup>

453. This finding is based, in my opinion, upon a reasoning carrying with it serious departures from the international law applicable to the jurisdictional and admissibility issues at stake as well as from fundamental rules of international arbitral procedure applicable to the Tribunal’s exercise of the power to determine its own competence (Article 41 of the ICSID Convention). On the applicable international law, the reasoning of the Majority Decision tries to move by all means from the consent to jurisdiction *pacta* between the Parties to the dispute to the field of international responsibility for wrongful acts. In other words, it tries to switch off the rules of the game from “consent” and relevant “treaty law” and move to the field of “responsibility law”.

454. This explains why the Majority Decision in its paragraphs 588 and 628 frames its respective findings on the amicable consultations precondition and on the recourse to domestic courts precondition in terms of *no violation by the Claimants of the corresponding provisions of Article 8 of the BIT*. But, the “violation” or “no violation” by any one of the Parties of the provisions of the BIT is not an issue in the present phase of the case. What is the subject-matter of the present phase is the determination by the Tribunal of the existence and scope of each of the Parties to consent to ICSID arbitration and whether both consents match each other executing thereby the necessary *undertaking to arbitrate (convención de arbitraje)*. In other words, the determination of whether or not “the parties to the dispute consent in writing to submit (the dispute) to the Centre” (Article 25(1) of the ICSID Convention).

455. This unwarranted departure from the rules governing consent to jurisdiction at the international law level, and related treaty law, finds further confirmation in the fact that the Majority Decision picks on a “futility exception” - *as an implied condition in the conventional obligation set forth in Article 8(2) and (3) of the Argentina-Italy BIT* - of the exhaustion of local remedies rule of customary international law allegedly applied in the diplomatic protection field. But, neither Argentina nor Italy have required to applied that rule when joining the ICSID Convention or, thereafter, when they consented to ICSID arbitration as embodied in their 1990 BIT (Articles 25 and 26 of the ICSID Convention). Furthermore, the special rules of the ICSID system exclude diplomatic protection altogether unless the Contracting State concerned failed to abide by and comply with the award rendered in the dispute (Article 27). The Majority Decision is therefore premised on the assumption that foreign protected investors may claim simultaneously in an ICSID arbitration proceeding what they considered unilaterally as advantageous for them in both the special conventional ICSID system with its BITs and in customary international law relating to diplomatic protection.

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<sup>374</sup> Majority Decisión, para. 628.

<sup>375</sup> *Ibid.*, para. 626.

456. Last but not least, the Majority Decision identifies *ex officio* the threshold of the applied “futility exception” in one of the exceptions to the customary exhaustion of local remedies rule set out in Article 15(a) of the 2006 ILC draft articles on diplomatic protection, a draft under consideration since then by Governments within the General Assembly of the United Nations. But, on one hand, “futility” has not been demonstrated in the instant case, nor that the relief sought was patently unavailable within the Argentine legal system or completely ineffective at resolving the dispute. On the other hand, the threshold in question goes further than the exception to the local remedies exhaustion rule codified in Article 44(b) of the ILC Articles on Responsibility for Internationally Wrongful Acts, Articles called to the attention of States by General Assembly Resolution 56/83 of 12 December 2001. Furthermore, the Majority Decision relies on the said threshold notwithstanding the reservation of Article 17 of the 2006 ILC draft articles on Diplomatic Protection to the effect that those draft articles “do not apply to the extent that they are inconsistent with special rules of international law, *such as treaty provisions for the protection of investments*” (*emphasis supplied*). In those circumstances to apply such a threshold, whatever its existence or scope may be, as a supposed “futility-exception-implied-condition” in Article 8(2) and (3) of the 1990 Argentina-Italy BIT forming part of the positive international law applicable in the relations between the two countries cannot be qualified but as an incomprehensible and *ultra vires* decision of the Majority. The Majority Decision is creating out of the blue an exception to the treaty dispute-resolution provisions of Article 8 of the Argentina-Italy BIT (*pacta sunt servanda*) unknown to the Contracting Parties and invoking Article 31(3)(c) of the VCLT in support of that pretending exception, while disregarding that this Article of the Vienna Convention sends back the interpreter to the positive international law applicable in the relations between Argentina and Italy such as the rules governing the jurisdiction of international tribunals, the consent of the parties to the dispute in the first place, and the very system of interpretation of treaties of the Convention based essentially in the textual approach which, in the present case, applied as both conventional and customary international law rules.

457. The provisions in Article 8(2) and (3) of the BIT are not obviously a conventional version of the exhaustion of local remedies customary rule of international law which has no role to play at the least in the instant phase of the case. But, the above perusal of the reasoning and conclusions of the Majority Decision on the matter is quite relevant to confirm once more that the Claimants’ given consent to ICSID arbitration is not a consent *ad idem* with the Respondent’s consent to international arbitration embodied in the “offer” of Article 8 of the BIT. They filed the Request for Arbitration with the reservation or caveat that the preconditions to international arbitration of that Article were inapplicable to them (paragraph 86 of the Request), pleaded so, and adopted all along a conduct showing that they never departed from an attitude of non-compliance as a matter of right.

458. In the light of the considerations above, I concluded that the consent to arbitration manifested by the Claimants by filing at ICSID the Request for Arbitration of 23 June 2008 did not match the Respondent’s consent to ICSID arbitration embodied in the “offer” contained in Article 8 of the Argentina-Italy BIT and that, as a result, the necessary undertaking to arbitrate between the Parties to the dispute (*convención de arbitraje*) has not being duly executed. In consequence, the present Arbitral Tribunal is also, on the basis of that finding, without competence to entertain and adjudicate the merits of the case.

**(b) The invocation of the MFN clause in Article 3(1) of the Argentina-Italy BIT as an alternative base of jurisdiction**

459. The MFN clause of Article 3 of the Argentina-Italy BIT was mentioned in the Request for Arbitration in connection with alleged violations by Argentina of a “substantive standard” of protection only, namely the full protection and security standard.<sup>376</sup> But, in the Counter-Memorial the Claimants declared that Article 3 of the BIT “rules out any obligation of recourse to domestic courts”, alleging that both the “MFN clause argument” and the “futility argument” allow non-compliance by Claimants with the prior recourse to Argentine courts, as required by Article 8(2) and (3) of the BIT.<sup>377</sup> In the Reply, the Respondent asserted that the Claimants were procedurally precluded from relying on the MFN clause for that additional purpose because they had failed to do so in the Request for Arbitration.<sup>378</sup>

460. The Claimants rejected that assertion of the Respondent in their Rejoinder<sup>379</sup> but, at the hearing, they remained silent on the plea that the MFN clause of Article 3 of the BIT rules out any obligation for them to have prior recourse to Argentine courts for a period of 18 months as required by the BIT. This prompted the Respondent to propose that the Claimants’ plea of the MFN clause as ruling out their obligation of recourse to domestic courts should be dismissed *in limine* by the Tribunal.<sup>380</sup> But, Claimants made again a reference to the MFN clause of Article 3(1) of the BIT in connection with their non-compliance with the domestic courts requirement.<sup>381</sup>

461. As explained in its paragraph 629, the Majority Decision did not need to enter into the question whether the MFN clause in Article 3(1) may have entitled Claimants to rely on the allegedly more favourable dispute-resolution clause contained in Article VII(3) of the Argentina-United States BIT. Thus, the Majority Decision did not decide the procedural inadmissibility objection raised thereon by the Respondent. For my part, I esteem that given my findings in the present preliminary objection phase, I have to answer in this Opinion the Claimants’ jurisdictional claim concerning the applicability of the MFN clause in Article 3(1) to dispute-resolution. I will therefore supplement below the general consideration of public international law in Section 1 (iv) of the present Chapter on the scope of application of general drafted MFN clauses and the *ejusdem generis* principle with some additional more specific considerations as to the interpretation of Article 3(1) of the Argentine-Italy BIT.

462. I will refer to as briefly as possible to some interpretative elements and factors which make the Claimants’ argument on the MFN clause in Article 3(1) of the BIT unpersuasive for me. In the first place to follow the Claimants’ argument would mean to adopt an extensive interpretation of Article 3(1) in contradiction to the VCLT approach to treaty interpretation which rules out restrictive as well as extensive interpretations, adopting instead expansive doctrinal positions

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<sup>376</sup> Request for Arbitration, paras. 61-69.

<sup>377</sup> Claimants’ Counter Memorial, paras. 400-423.

<sup>378</sup> Respondent’s Reply, para. 476.

<sup>379</sup> Claimants’ Rejoinder, paras. 190-191.

<sup>380</sup> Respondent’s Post-Hearing-Brief, paras. 98-102.

<sup>381</sup> Claimant’s Post-Hearing-Brief, para. 117.

aiming at *multilateralization* dispute-resolution provisions in BITs through MFN clauses,<sup>382</sup> in total contradiction with the systemic international law rule of the State's consent to jurisdiction (with its corollaries) and to the *ejusdem generic* principle governing the operation of the MFN clause. I will also bear in mind that as stated in the 2012 award in *Inspection and Control Services and Argentina* case: "In the mass of different answers to this question and the many articulations of each answer, it should not be forgotten that, at its root, what is being engaged in is an exercise in treaty interpretation, *the results of which are inherently particular to the treaty being interpreted*".<sup>383</sup>

463. In effect, the BITs are treaties belonging to the international legal order and deriving its force from the *pacta sunt servanda* rule of that order. Consequently, its terms and provisions must be interpreted "according to the normal rules of interpretation of treaties and without losing sight of the principles and rules of international law applicable in the relations between the Contracting Parties to the BIT"<sup>384</sup> (Article 31(3)(c) of the VCLT), including the rule of State's consent to jurisdiction and the *ejusdem generis* principle. One must approach the interpretative process by recalling the text of Article 3(1) of the Argentina-Italy BIT which reads as follows:

"Each Contracting Party, within the ambit of its own territory, shall accord to the investments made by investors from the other Contracting Party, to the income and activities related to such investments, and to all other matters regulated by this Agreement, a treatment that is no less favourable than that accorded to its own investors or investors from third party States".

464. The text of Article 3(1) *is not therefore explicit* as to its application to dispute-resolution matters *and international law does not construe a State's silence as consent to the jurisdiction of a given international court or tribunal*.<sup>385</sup> Other general considerations which should likewise be born in mind in an interpretation of Article 3(1) of the BIT are: (i) that it combines in a single provision "national treatment" and "most-favoured-nation treatment"; (ii) that Article 3 is placed second among the "substantive or material protection clauses" (Article 2 to 7 of the BIT) and is therefore clearly differentiated in the overall scheme of the treaty from the definitions (Article 1), dispute-resolution provisions (Articles 8 and 9) and final clauses of the instrument (Articles 10 to 13), (iii) that all treatments excluded by Article 3(2) from the treatment accorded to in Article 3(1) are also substantive or material in character; (iv) that the MFN treatment is granted by Article 3(1) to the "investments", the "investors" have not been expressly granted "MFN treatment" in Article 3(1);<sup>386</sup> (v) Article 3(1) is formulated in terms of "treatment" of the investment of investors while Article 8 of the Argentina-Italy BIT concerns dispute-settlement "rights" and "duties" of investors and Contracting States.

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<sup>382</sup> See, for example, Stephan Schill, *Most-Favored-Nation Clauses as a Basis of Jurisdiction in Investment Treaty Arbitration – Arbitral Jurisprudence at a Crossroad*, *The Journal of World Investment & Trade*, April 2009, p.203. Quoted by Claimants, see Rejoinder, p. 56, para.194.

<sup>383</sup> *Inspection and Control Services* award on jurisdiction of 10 February 2012, *supra* note 12, p. 91, para.275.

<sup>384</sup> *Ibid.*, p.92/93, para.279.

<sup>385</sup> *Daimler*, *supra* note 1, para. 277.

<sup>386</sup> The terms "investment" and "investor" are defined separately in Article 1 of the Argentina-Italy BIT. The distinction has been relevant in some investment arbitration case-law, for example in *RostInvest*. However, the *RostInvest* quotation in paragraph 193 of the Claimants' Rejoinder relates to a MNF clause provision relating to "investors", not to "investments" (paras. 131-132 of the Decision).

465. It is also relevant to bear in mind what the text of Article 3(1) does not say expressly or by implication. For example, that Article 3(1) does not have any cross-reference to Article 8 of the BIT or, for the matter, to dispute-resolution “matters” or “activities” relating thereto. At the same time, it is equally true that the Article 3(2) does not carve out expressly the said matters and/or activities from Article 3(1). However, being “dispute-resolution” excluded from a general drafted MFN clause by the operation of the *ejusdem generis* principle of international law, it is entirely possible that it did not occur to the Contracting Parties that the MFN clause in Article 3(1) of the BIT could one day be invoked by an investor to bypass stipulations on dispute-resolution expressly contracting in by them in Article 8 of the BIT.<sup>387</sup>

466. The principle of contemporaneousness is another element to be born in mind in the interpretative process. After all, the Argentina-Italy BIT was concluded 10 years before *Maffezini*, namely at a time when the general accepted prevailing view was, as stated by the ICJ in the *Anglo-Iranian Oil Company (United Kingdom v. Iran)* case, that “the most-favoured-nation clause [...] has no relation whatsoever to jurisdictional matters between the two Governments”.<sup>388</sup> A tribunal has to take account of the consequences of the parties’ commitments but in so far as these commitments appear as having being reasonably and legitimately envisaged by the parties to the agreement (*Amco Asia*) which cannot be the case with the present instance.

467. Terms in Article 3(1) of the Argentina-Italy BIT such as “treatment”, “activities” or “all other matters” are certainly capable of a broad meaning, but an interpretation undertaken in conformity with the VCLT does not end with the consideration of those terms in isolation. It is not, therefore, possible to affirm, without further ado, that the provision of a MFN clause as the one embodied in Article 3(1) reaches the dispute-resolution provisions in Article 8 of the BIT. In effect, to be in a position allowing the application of Article 3(1) in any given matter or field an arbitral tribunal has in the first place to have been properly seised with jurisdiction thereon by the parties to the dispute. Thus, to reach Article 3(1) of the BIT the present Tribunal must have jurisdiction under its Article 8. This means in the instant case that for Claimants reaching Article VII of the comparator United States-Argentina BIT, the present Tribunal must have been in a position enabling it to establish jurisdiction pursuant to Article 8 of the basic Argentina-Italy BIT.<sup>389</sup>

468. Moreover, if it would be possible for establishing jurisdiction under Article 3(1) of the BIT without passing through Article 8, Claimants should still have to prove that the text of the MFN clause, as worded in Article 3(1), reflects a certain, clear and unambiguous Contracting States’ consent to international arbitral jurisdiction, as they did in Article 8 in a manifest and unequivocal manner. In other words, it must be proven that Article 3(1) is actually an alternative

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<sup>387</sup> As it is the declared purpose of the Claimants in the present case with respect to the prior requirement of the 18 months litigation in Argentine courts provided for in Article 8(2) and (3) of the BIT.

<sup>388</sup> *Judgment*, I.C.J. Reports 1952, p.110. For an analysis of the jurisprudence of the ICJ and other precedents see: Zachary Douglas, *International Law of Investment Claims*, *supra* note 166, pp.345-356.

<sup>389</sup> As stated by the *Daimler* Tribunal: “since the Claimant has not yet satisfied the necessary condition precedent to Argentina consent to international arbitration, its MFN arguments are not yet properly before the Tribunal. The Tribunal is therefore without jurisdiction to rule on any MFN-based claims unless the MNF clauses themselves supply the tribunal with the necessary jurisdiction” (*supra* note 1, para. 200).

base or title of international arbitral jurisdiction within the BIT. To affirm jurisdiction under Article 3(1) without such a proof (which is missing in the instant case) would amount to bypassing the international law rule of State's consent to jurisdiction *and to regard as sufficient consent to the jurisdiction of an international tribunal that would be merely presumed*.<sup>390</sup>

469. One of the first textual questions to elucidate is whether the term “*treatment*” as used in Article 3(1) of their BIT *encompasses jurisdictional as well substantive treatment*.<sup>391</sup> The very text of Article 3(1) casts doubts upon whether the broadest meaning of the term “treatment” is the ordinary meaning intended by the Contracting Parties in the provision. The MFN clause in Article 3(1) is, in effect, silent about extending its application to dispute-resolution provisions, while Article 8 of the same BIT provides a detailed sequential system for dispute-resolution of investment disputes between an investor and the host State. Article 8 is consequently a context which is called to playing a paramount role in the determination of the ordinary meaning of the term “investment” within Article 3(1),<sup>392</sup> as well as in confirming the absence of an *ejusdem generis* relationship between the subject-matter of Article 3(1) and the subject-matter of Article 8.

470. Article 3(1) regulates a Contracting State's substantive grant, namely the grant of MFN and national treatments that it “shall accord to the investments made by investors from the other Contracting Party within the ambit of its own territory”. It follows that the term “treatment” is limited by the text *to activities developed in the territory of the host State*, as in the case of others substantive standards provisions and definitions of the BIT. In contrast, the text does not enounce any kind of territorial limitation in the dispute resolution provisions (Articles 8 and 9) or in the final clauses (Articles 10-13) of the BIT. The logical inference of this textual difference is that “treatment” in Article 3(1) does not encompass activities taking place outside the territory of the host State as, for the matter, those relating to the present ICSID arbitration proceeding.

471. According to the text of Article 3 (1) the MFN “treatment” to be accorded by the host State within the ambit of its territory applies to the “income and activities related to (the) investments”, as well as to “all other matters regulated by (the BIT)”. “Income” is a term defined in Article 1(3) which is not susceptible of attracting as such dispute-resolution provisions of any comparator BIT. As to the “activities”, the text qualifies the term by the words “related to (the) investments”. Thus, the “activities” concerned appears focused on the day-to-day normal conduct, management and operation of the investment, namely to activities in the territory of the host States and, therefore, far removed from those relating to *the resolution of investment disputes by international arbitration* in contentious situations between the investor and the host State.<sup>393</sup>

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<sup>390</sup> See, *Case Concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, I.C.J. Reports 1959, p.142, for the same proposition.

<sup>391</sup> The *Wintershall* tribunal, *supra* note 9, for example, rejected the application of the MNF clause of the Germany-Argentina BIT in the case because the 18 months litigation in domestic courts prerequisite was part and parcel of the integrated jurisdictional “offer” for ICSID arbitration of Germany and Argentina in their BIT, not because the term “treatment” *per se* could not include arbitration or other means of international dispute settlement when so provided for in the applicable BIT in a certain, clear and unambiguous manner.

<sup>392</sup> See, for example, *Austrian Air Lines v. Slovak Republic* (UNCITRAL Arbitration Rules), Final Award of 9 October 2009, para.138, and *ICS Inspection and Control Services*, *supra* note 12, para.296.

<sup>393</sup> *Wintershall*, *supra* note 9, para. 171.



472. It remains the meaning of the expression “*all other matters regulated by (the) BIT*” of Article 3(1). Claimants seem to rely upon that expression, following *Maffezini, Siemens, Gas Natural, Suez* and the like decisions which they characterized as “constant ICSID case-law”<sup>394</sup> but disregarding *Salini v. Jordan, Plama, Telenor, Wintershall* and the like trend of opinion.<sup>395</sup> In ascertaining the ordinary meaning of that expression in Article 3(1) one must recall: (i) that the scope of the expression is limited to matters within the “territorial ambit” of the host State as defined in Article 1(4); (ii) that the scope of the expression is limited to matters regulated by the BIT relating to “investments” ; and (iii) that the scope of the expression is limited to the matters in the BIT concerning the “treatment” to be accorded by the host States to the investments.

473. What are those “all other matters regulated by the BIT”? They are the provisions of the BIT “regulating” the substantive protection of the investments *other* than the national treatment and MFN treatment of Article 3(1) itself, namely: the encouragement and protection of the investments (Article 2), the compensation for damages and losses of investments (Article 4), the nationalization or expropriation of investments (Article 5), transfer and repatriation of capital, emoluments and compensation relating to an investment (Article 6) and subrogation in credits resulting from a guarantee to ensure investments against non-commercial risks (Article 7). The expression in question, drafted as a residual rule, sends therefore back the interpreter to “all” material provisions of the BIT on substantive protection of investments

474. This conclusion is confirmed by the text of Article 8(1) and Article 5(1)(c) of the Argentina-Italy BIT which according to Article 31(2) of the VCLT are *context* for the determination of the ordinary meaning of the expression “matters regulated by this Agreement” in Article 3(1) of the BIT. Then, the same expression appears for a second time precisely in Article 8(1) where the Argentina-Italy BIT defines the “*investor-Host State investment disputes*” covered by dispute-resolution provision. In effect, Article 8 defines those disputes between investor-host State as relating to investments “*with respect to matters regulated by this Agreement*”, namely to the substantive protection *matters which are the ones regulated by the BIT* in its Articles 2 to 7 and which are distinguished from those between the Contracting States on the interpretation and application of the BIT dealt within Article 9.

475. Article 5(1)(c) of the Argentina-Italy BIT corroborates that the investor-host State investment disputes concerning substantive protection matters when - in connection with the determination of the amount of compensation in case of nationalization and expropriations- provides for, in mandatory terms, that “if an agreement is not reached between the investor and the Contracting Party that adopted the measure, the amount of compensation shall be determined pursuant to *the dispute resolution procedure indicated in Article 8 of the Agreement*” (*emphasis supplied*). No reference either to Article 3(1) of the BIT as a base of jurisdiction alternative to the dispute resolution system of Article 8 of the BIT

476. It is therefore clear that the Argentina-Italy BIT distinguishes “matters regulated by the Agreement” and “disputes resolution procedures of the Agreement”, the first expression

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<sup>394</sup> Claimants’ Counter-Memorial of 26 November 2009, para. 404.

<sup>395</sup> As recorded in para. 268 of the *Daimler* award of 2 August 2012, *supra* note 1: “To-date, at least nine investor-State arbitral panels have found that a particular BIT’s MFN clause could be used to modify its international dispute resolution provisions while another ten have reached the opposite result”.

concerning substantive protection matters exclusively. Moreover, as shown briefly below, there are further a number of elements concurring in the interpretation that the scope of the MFN clause in Article 3(1) of the said BIT does not cover the subject-matter of dispute-resolution of investment disputes.<sup>396</sup>

477. Concerning the *expression unius est exclusion alterius* argument, invoked also by the Claimants,<sup>397</sup> the answer of principle is quite clear. Argentina and Italy did not need to *contract-out* of international arbitral jurisdiction in Article 3(2) because it has not been proved that they did *contracting-in* international arbitral jurisdiction, explicitly or implicitly, in Article 3(1) of the BIT in the first place. The exceptions to MFN clause treatment listed in Article 3(1) (also in Additional Protocol, para. 2(b)) with its references to “advantages” and/or “privileges” send back to the substantive treatments granted by the host State within its territory. It is not the case of ICSID arbitration proceedings.

478. Another reason why I do not consider that a MFN clause drafted as Article 3(1) of the Argentina-Italy BIT could be interpreted as argued by the Claimants is the fact that it would deprive of its *effect utile* the dispute-resolution provision specifically agreed upon in the BIT by the Contracting Parties, without explicitly clear evidence of a Contracting States’ intention to the contrary (principle of effectiveness controlled in Article 31(1) of the VCLT by good faith and the object purpose of the treaty).

479. Lastly, the Claimants have not met the burden of proof that Article VII of the United States-Argentina BIT invoked by them through the MFN clause of Article 3(1) of the Argentina-Italy BIT effectively provides for, necessarily, that the former treaty grants a “*more favourable treatment*” than the latter. The United States-Argentina BIT fixes a six-month mandatory consultation and negotiation period and gives *fork-in-the road* effects to the investor’s choice of alternative dispute-resolution means. In fact, each of those BITs set forth two different systems of settlement which as such could well fall under the *Maffezini* exceptions.<sup>398</sup>

480. Furthermore, in the instant case there is also additional circumstances that (to be explained below) result from the non-compliance by Claimants of the prerequisite of “amicable consultations” of the Argentina-Italy BIT and from the fact that they filed their Request for Arbitration without having previously established in law the existence of the dispute. Then, according to Article VII of the United States-Argentina BIT the fixed six months fixed for consultation and negotiation period has to be counted *as from the date that the dispute arose*. But the Tribunal has no information about that date.

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<sup>396</sup> My conclusion on the matter is similar to the one reached by Brigitte Stern on the interpretation of Article 3 (1) of the Argentina-Italy BIT in her opinion in the *Impregilo* case, *supra* note 300, and, *mutatis mutandis*, by Christopher Thomas on his interpretation of the corresponding MFN clause of the Germany-Argentina BIT in his opinion in the *Hochtief* case, *supra* note 306. It is also inspired by the detailed explanations on the issue of MNF clauses and dispute-resolution which I generally share developed in *Wintershall*, *supra* note 9 (2008), *ICS Inspection and Control services*, *supra* note 12 (2012) and *Daimler*, *supra* note 1 (2012) awards.

<sup>397</sup> Claimants’ Counter-Memorial, para.407.

<sup>398</sup> See on the matter *Wintershall*, *supra* note 9, paras.175-176.

481. In the light of the considerations above, I reject the Claimants' argument that the MFN clause of Article 3(1) of the Argentina-Italy BIT does extend to the dispute-resolution matters of Article 8 and that, consequently, it would have the effect of ruling out any obligation for them of recourse during 18 months to Argentine domestic courts, as provided for in Article 8(2) and (3) of the BIT.<sup>399</sup>

**(c) The inadmissibility of the Request for Arbitration: untimely filing and internal incongruity**

482. In their eagerness for reaching direct access to international arbitration, the Claimants filed a premature and internal incongruent Request for Arbitration that they try thereafter to make good alleging, as considered above, "futility" and the MFN clause of Article 3 of the Argentina-Italy BIT. But that untimely finding of the Request and its internal incongruity pose additional questions concerning, this time, the admissibility of the Request itself.

**(i) The question of the existence of a dispute between the Parties prior to the date of filing of the Request**

483. The first admissibility issue relates to the question of whether on 23 June 2008 - date of the filing at ICSID of the Request for Arbitration and of the Claimants' consent in writing to submit it to the Centre, there existed between the Parties "a dispute" which should be legal and arising directly out of an investment, as provided for generally in Article 25(1) of the ICSID Convention and with respect to matters regulated by the Argentina-Italy BIT in Article 8(1) of the latter.

484. The Respondent did not move for a preliminary objection referring specifically to the question of the *existence of a dispute* between the Parties with respect to the subject-matter of the claim made by Claimants in their Request for Arbitration.<sup>400</sup> However, in point (f) of its request for relief the Respondent asked the Tribunal to determine, in the alternative, *inter alia* that "Claimants lack legal standing to institute the proceedings".<sup>401</sup> Then, one of the first general conditions to have legal standing to institute arbitral or judicial proceedings is *the existence of the alleged dispute at the critical date*, a preliminary question which by its very nature is susceptible of *motu proprio* examination by an international tribunal. Although the Majority did not do so in its Decision, I consider that, in the circumstances of the case, I have to answer that question in this Opinion, taking into account the facts as alleged in the documents submitted by the Parties and, in the first place, by the Request for Arbitration filed by the Claimants on 23 June 2008.

485. In public international law it is established case law that the general meaning of the word "dispute" when used in relation to the jurisdiction of an international court or tribunal is "a

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<sup>399</sup> For indications on State practice and international jurisprudence in relation with the issue of excesses in the application of the MFN clauses to dispute-resolution which followed the *Maffezini* decision (2000), see *Plama* decision on jurisdiction, *supra* note 41, (2005) paras. 200-27, and *Daimler* award, *supra* note 1 (2012), paras.261-78.

<sup>400</sup> Request for Arbitration, paras. 11-12.

<sup>401</sup> Respondent Post-Hearing-Brief, para. 185.

disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”.<sup>402</sup> In other words, it must be shown that the claim of a party is positively opposed by the other, the existence of the dispute being determined objectively as a matter of substance on an examination of the facts. The existence of a dispute may sometimes be inferred from the failure to respond to a claim in circumstances where a response is called for.<sup>403</sup> But, in any case the dispute must exist at the date the application or request instituting the proceeding is filed, the latter day being the critical date for determining the admissibility of the application or request concerned.<sup>404</sup>

486. The Request for Arbitration filed at the ICSID by the Claimants on 23 June 2008 devotes its Chapter II to “The Facts Underlying the Dispute” (38 paragraphs). The Chapter begins by stating that “the present claims are to be viewed against the historic background and specially of the Argentine Government’s policy with respect to the country’s economic crises of the late 1980s and 1990s which sought to render the investment environment more appealing to foreign investors”;<sup>405</sup> and ends with the historic background by stating, with reference to the 2007 positive trend of Argentina’s economic growth, that “despite its recovery, Argentina still steadfastly and without any justification – in a totally arbitrary and discriminatory manner – refuses to reimburse the holders of the non-exchanged securities, including the Claimants, of the entire value of their investment”,<sup>406</sup> concluding as follows:

“Since this behaviour amounts to a clear violation of Argentina’s international obligations, the Claimants have decided to seek satisfaction against Argentina by bringing their claims to ICSID, as permitted by the BIT”.<sup>407</sup>

487. But, there is not a single word in Chapter II on exchanges between the Parties establishing, or allowing to be established, that by 23 June 2008, the date of the filing of the Request for Arbitration, there was a dispute between the Parties about the Respondent’s compliance with its obligations under the Argentina-Italy BIT and/or under international law. Chapter III of the Request for Arbitration, entitled “Argentina has violated its obligations under the BIT and under international law”, begins by recalling the object of the dispute as defined in paragraph 11 of the Request. Nothing either on evidence relevant to determine the existence of a dispute between the Parties as to the violations described by the Claimants as constituting the object of the dispute.

488. Still more significant is the fact that Chapter IV of the Request entitled “ICSID Jurisdiction over the Present Dispute” remains silent on the existence in law of a dispute between the Parties as a result of the Respondent’s proclaimed violations. In paragraph 71, the Request states that the prerequisites for the jurisdiction of ICSID are the following: (i) the dispute is of a legal nature; (ii) the dispute arises directly out of an investment; (iii) the parties to the dispute are a

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<sup>402</sup> *Mavrommatis Palestine Concessions*, *supra* note 271, p. 11.

<sup>403</sup> For the jurisprudence of the ICJ on the matter see: *Case concerning the Application of CERD (Georgia v. Russian Federation)*, *supra* note 283, para. 30.

<sup>404</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, *Jurisdiction and Admissibility*, I.C.J. Reports 1988, p. 95, para. 66.

<sup>405</sup> Request for Arbitration, para. 13.

<sup>406</sup> *Ibid*, para. 37.

<sup>407</sup> *Ibid*, para. 38.

Contracting State and a national or nationals of another Contracting State; and (iv) the parties have expressed in writing their consent to submit the dispute to ICSID. Immediately after, paragraph 72 affirms that “all these conditions are satisfied in the case”. However, *the list omits from the first of all of conditions, namely the existence of the dispute prior to the filing of the Request for Arbitration.*

489. This is confirmed by the additional fact that under the section relating to the first of the listed conditions, namely “the dispute is of a legal nature”, nothing is said with respect to the *existence of the dispute invoked*. In effect, paragraph 73 of the Request limits itself to state: “The terms of the dispute are summarised in Chapter II above (The Facts Underlying the Dispute). The dispute is to be settled under international law, in particular the BIT (Articles 2(2) and 5)”.

490. This perusal of the Claimants’ Request for Arbitration points out that by the date on which the Request was filed (23 June 2008) there was not in law a dispute between the Parties to the present case about the Respondent’s compliance with its obligations under the Argentina-Italy BIT and/or under international law. The Request does not record any element of information on the existence by that date of a disagreement between the Parties on the subject-matter of the Claimants’ claim. There is a complete absence of the factual evidence needed to determine whether the Claimants made such claims and the Respondent positively opposed it with the result that by the critical date it may be affirmed there was a dispute between them in the sense of Article 25 of the ICSID Convention and Article 8 of the Argentina-Italy BIT.

491. It is not possible either to infer the existence of the dispute from a failure of the Respondent to respond to the Claimants’ claim because the peculiarity of the instant case lies precisely in the fact of the total absence of evidence of whether the Claimants made such a claim to the Respondent before filing the Request for Arbitration. I did not find in the dossier of the case documents, statements or exchanges of the Parties issued before 23 June 2008 about the existence of a dispute. Moreover, the circumstance of the lack of any undertaking of amicable consultations between the Parties does not provide for any assistance either to determining the existence of the dispute.<sup>408</sup>

492. In the absence of any evidence to the contrary, I conclude that *the Claimants fail to prove the existence of a dispute between the Parties on the subject-matter of their claim before the critical date*. The Request for Arbitration is therefore inadmissible.

## **(ii) The internal incongruity of the Request**

493. The filed Request for Arbitration is a document with contradictions, errors and omissions as referred to in paragraph 112 of this Opinion. Then, this has a bearing on various jurisdictional and admissibility issues, such as the actual Claimants’ written consent to *commence* the present ICSID arbitral proceedings against the Argentine Republic on 22 June 2008 and their legal representation at the filing of the Request and during the instant phase of the proceeding, as well as on the validity of the Request in the light of its internal incongruity as to the signing and filing

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<sup>408</sup> As a matter of principle the existence of a dispute is an issue distinct from the undertaking of consultations or negotiations, but the latter are sometimes of help to determining the former.

of the document. I consider therefore that the Request is a document *vitiata* in many aspects, some essential.<sup>409</sup> I disagree, therefore, with what appears to be the general underlying proposition of the Majority Decision's conclusions thereon,<sup>410</sup> namely that the vices and defects of the Request are after all deficiencies of low intensity. I am of a different opinion, sharing in general the developments and conclusions on the matter of the Argentine Republic as summarized in its Post-Hearing-Brief.<sup>411</sup>

494. As explained by the Majority Decision, there is an inter-play between the requirement of the ICSID Convention on the "written consent to submit the dispute pursuant to Article 26" and the requirement on the "submission of the request in writing pursuant to Article 36".<sup>412</sup> Having already dealt with the essential issue of the Claimants' written consent within the context of the topic of the jurisdiction of the Centre and the competence of the Tribunal, I will review below briefly the matter from the standpoint of the admissibility question of the submission of the request in writing provided for in Article 36 of the Convention.

495. For that purposes the most significant question is, in my opinion, the issue of the signing and filing of the Request, together with some ancillary issues relating to the so-called NASAM Mandate Package, the NASAM Mandate and the Power of Attorney elements of the NASAM Mandate Package.<sup>413</sup> The text of the Request for Arbitration cannot be clearest as to the signing and filing of the Request by the Claimants themselves. The relevant paragraph reads as follows:

"84. As to the Claimants' acceptance of Argentina's offer of ICSID Arbitration, it is commonly admitted that the investor's acceptance of the host State's offer can be manifested, *inter alia*, by filing a request for arbitration to ICSID. For these purpose, the Claimants hereby accept to submit the dispute to ICSID arbitration **by signing and filing this Request for Arbitration**" (*emphasis supplied*).

496. Thus, according to the Request for Arbitration the Claimants (i) accept Argentina's offer of ICSID arbitration through the form of filing the Request at the Centre and (ii) accept for these purposes the submission of the dispute to ICSID arbitration, by signing and filing the Request with the Centre on 23 June 2008. It follows that the signing of the Request for Arbitration by the Claimants is a decisive indicative element, according to the text of the Request itself, of the consent of the Claimants to arbitrate the dispute and to institute the present proceeding in the Centre on the said date. But, the signatures of the Claimants are missed in the signature page of the Request for Arbitration.<sup>414</sup>

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<sup>409</sup> Paras. 111-12 of this Opinión.

<sup>410</sup> Chapter II of the Majority Decision.

<sup>411</sup> Argentine Republic's Post-Hearing-Brief, paras. 40-80.

<sup>412</sup> Majority Decision, para. 206 and ff.

<sup>413</sup> The NASAM Mandate Package as submitted to the Tribunal included the following documents: (i) NASAM Instruction Letter to the holders of security entitlements in Argentine bonds; (ii) the NASAM **Mandate** (the *Incarico*); (iii) a form to be completed with details of the Claimants; (iv) a form to be completed by the Claimants banks; (v) **Special Power of Attorney** (*Procura Speciale*), in Italian and in English, purporting to establish a counsel representative relationship of each individual Claimant with Avv. Piero G. Parodi, the only designated counsel in the attorneys' powers (see, para 6(a) of the Request).

<sup>414</sup> Request for Arbitration, p. 42 (in English version).

497. None of the Claimants signed the Request for arbitration. Consequently, Paragraph 84 of the Request was never executed. There is, therefore, an evident internal incongruity in the Request (a marked logical contradiction, incoherence or discordance within the document) never corrected on a subject-matter (the Claimants' consent to commence ICSID arbitration against Argentina) of paramount importance for the institution of the present proceeding which vitiates, in my opinion, the validity of the Request giving rise to a cause of inadmissibility of the document. The Respondent is right when it affirms that "no action against Argentina could be brought without Claimants' signature on the Request for Arbitration (given that this is what the parties had agreed upon)"<sup>415</sup> through the form of acceptance of Argentina's offer chosen by the Claimants themselves in paragraph 84 of the Request.

498. That form of expressing Claimants' consent to institute the present ICSID arbitral proceeding finds confirmation beyond any reasonable doubt in the indications contained in the NASAM Mandate and Instruction Letter, according to which the prospective Claimants were expected to sign the Power of Attorney (and mailed to NASAM or handed over to the so-called *Multi Family Office*) so that it would be effective by the time of the execution of the Request for Arbitration when signing it at the office of Mr. Parodi (only designated counsel in the Power of Attorney). As stated in the NASAM Instruction Letter: "You will subsequently have to sign the request for arbitration when so requested by attorney Parodi at his office".<sup>416</sup> Thus, the NASAM Scheme provided for: (i) that the prospective Claimants sign the Request for Arbitration and (ii) that the prospective Claimants do so at the office of Mr. Parodi, in all probability for verifying the actual identity of the numerous Claimants and authenticate their signatures.

499. None of those two requirements were satisfied. The only person having actually signed *manu propria* the Request for Arbitration filed at ICSID on 23 June 2008 is Mr. Radicati di Brozolo who, according to the Request, was designated as co-counsel by Mr. Parodi in accordance with the power conferred upon him by the Claimants in the Power of Attorney.<sup>417</sup> And it seems also that the filing of the Request at ICSID was effected by Mr. Radicati di Brozolo without any document or letter of Mr. Parodi accrediting him as co-counsel. The only evidence before the Tribunal of the link between Mr. Parodi and Mr. Radicati di Brozolo was provided much later, at the Hearing, through a letter, date 3 June 2008, signed by Mr. Parodi and addressed to Mr. Radicati di Brozolo and Mr. Barra, but submitted to the Tribunal on January 2011, of a more than questionable, in my opinion, probative value. The Majority Decision makes all kinds of contortionist efforts to "heal" the lack of authorization of Mr. Radicati di Brozolo to sign and file the Request for Arbitration on 23 June 2008.<sup>418</sup>

500. However, the legal relevant point for my inadmissibility finding concerning the Request for Arbitration is not whether before the critical date Mr. Parodi authorized or not Mr. Radicati di Brozolo to sign and file the Request, but the internal incongruity of the Request as filed by him. In other words, the issue is not for me the signing and filing by Mr. Radicati di Brozolo, *but the not signing and filing of the Request by the Claimants which is an incontestable proven fact in the present proceeding*. As to Mr. Radicati di Brozolo's authorization for signing and filing I will

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<sup>415</sup> Argentine Republic's Post-Hearing-Brief, para. 69.

<sup>416</sup> Exhibit of the Argentine Republic No. 107. Quoted in para. 43 of the Argentina's Post-Hearing-Brief.

<sup>417</sup> Request for Arbitration, para. 6 (b).

<sup>418</sup> Majority Decision, paras. 259-272.

point out that according to paragraph 6 of the Request the three persons listed therein (Parodi, Radicati di Brozolo and Parra) represented *jointly* the Claimants while Mr. Parodi's letter of 3 June 2008 to his co-counsels confer upon them all the powers to represent the Claimants and to defend them *jointly and severally*. This contradiction between Mr. Parodi's letter and the Request for Arbitration filed by Mr. Radicati di Brozolo adds a new internal incongruity to the latter.

501. It follows from the above, that the Claimants' Request for Arbitration is also inadmissible on a second account, namely by the vice of internal incongruities on the essential question of the manifestation of the Claimants' consent to arbitration.



## **V. CONCLUDING FINDINGS**

502. In consequence of the forgoing considerations and conclusions, I find with respect to the arguments and evidence submitted by the Parties on the Respondent's preliminary objections constituting the subject-matter of this phase of the case the following:

1. That this Tribunal has no jurisdiction *ratione materiae* over the sovereign debt instruments (security entitlements in Argentina sovereign bonds) because they do not constitute a covered protected investment under the ICSID Convention and the Argentina-Italy BIT, in the light of their very nature and in absence of a territorial link with Argentina;
2. That this Tribunal has no jurisdiction under the ICSID Convention and the BIT over the kind of multiparty claims action instituted by the Claimants, in the absence of Argentina's consent or acquiescence thereto;
3. That the *ratione personae* jurisdiction objection does not possess in the circumstances of the case an exclusively preliminary character and, consequently, is not susceptible of adjudication in the present preliminary phase on jurisdiction and admissibility;
4. That the *prima facie* treaty claims test objection does not possess either in the circumstances of the case an exclusively preliminary character and, therefore, is not susceptible either of adjudication in the present phase;
5. That the Tribunal has no jurisdiction because of the lack of Respondent's consent to international arbitration in absence of compliance by the Claimants with the prerequisites of prior amicable consultations and 18-month litigation in Argentine courts prescribed by Article 8 of the BIT;
6. That this Tribunal has no jurisdiction because the Claimants' consent to the arbitration as manifested in their Request for Arbitration does not match the Respondent's consent to international arbitration offered in Article 8 of the BIT and, consequently, the undertaking between the Parties to the dispute to have recourse to ICSID arbitration (*convención de arbitraje*) has not been duly executed by the filing of the said Request;
7. That the MFN clause in Article 3(1) of the Argentina-Italy BIT does not extend to international dispute resolution matters; and
8. That the Claimants' Request for Arbitration is inadmissible on two accounts, namely for having being filed before a legal dispute between the Claimants and the Respondent was duly established in international law and because the instrument is vitiated by internal incongruity.

For these reasons, I cannot concur in the Majority Decision and enter this dissenting Opinion.

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[Signed and dated]

Santiago Torres Bernárdez