School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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WINTERSHALL AKTIENGESELLSCHAFT V. ARGENTINE REPUBLIC (ICSID CASE NO. ARB/04/14)

AWARD

Reported by Fabricio Fortese**
Edited by Carmen Nuñez-Lagos ***

An award rendered on December 8, 2008 by an Arbitral Tribunal constituted in accordance with the Bilateral Investment Treaty (BIT) Concerning the Reciprocal Encouragement and Protection of Investments between Argentina and the Federal Republic of Germany, the ICISD Convention and its Arbitration Rules.

Tribunal:	Mr. Fali S. Nariman (President), Dr. Santiago Torres Bernández, Professor Piero Bernardini.
Claimant's counsel:	Mr. Frank H. Dienemann, Mr. Andrés O. Wertheimer, WINTERSHALL AKTIENGESELLSCHAFT. and Mr José A. Martínez de Hoz (Jr.) and Mrs. Valeria Macchia, PEREZ ALATI, GRONDONA, BENITES ARNTSEN & MARTINEZ HOZ (Jr.)
Defendant's Counsel:	Dr. Osvaldo César Guglielmino, Procurador del Tesoro de la Nación Argentina, PROCURADOR DEL TESORO DE LA NACION ARGENTINA.

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INDEX OF MATTERS DISCUSSED

Digest

1. Facts of the Case

Wintershall Energía S.A. ("WIAR") is a wholly-owned Argentinean subsidiary of Wintershall Aktiengesellshaft ("Wintershall"), a company incorporated in the Federal Republic of Germany.

WIAR, an oil and natural gas producer in Argentina was performing activities pursuant to hydrocarbon-production concessions, exploration-permits and production-contracts in different provinces (Neuquén, Mendoza and Tierra del Fuego), all of them according to the Argentine hydrocarbons-regulatory framework, laws, decrees and licences enacted between the years 1989 and 1992 to that effect. All the rights and guarantees granted by the Argentine Republic were expressly incorporated in the terms of each production-concession, exploration-permit and production-contract to which the WIAR was a party.

In a letter dated April 2, 2003 addressed to the President of Argentina, Wintershall and WAIR described how in breach of all their undertakings, guarantees and protections established in the Bilateral Investment Treaty Concerning the Reciprocal Encouragement and Protection of Investments between Argentina and the Federal Republic of Germany[1] (Argentina–Germany BIT), Argentina had unilaterally taken measures in the years 2001 and 2002, which impinged on the right of hydrocarbon producers (including WIAR) to freely dispose of their authorized percentage of export proceeds; had an adverse impact on the revenues of the Argentinean Company and, consequently on the value of Wintershall's equity ownership in WIAR.

It was asserted that such measures had (i) prevented Wintershall from timely receipt of dividend payments from WIAR; (ii) impaired vested legal and contractual rights of WIAR which enjoyed the constitutional protection of property rights, and; (iii) violated Article 4(2) of the Argentina–Germany BIT which, prohibited Argentina from taking directly or indirectly, expropriation measures or any other measure with equivalent effect, except for public purpose, without prompt compensation.

According to Claimant, the Argentine Government's measures also constituted a violation of Articles 2(1), 2(2), 2(3), 4(1), 5 and 7(2) of the BIT which required that (i) protected investments receive a fair and equitable treatment, full protection and legal security, and that neither of the Parties would impair by arbitrary or

[1] Signed on April 09, 1991 and in force as from November 08, 1993.

discriminatory measures the management, operation, use or enjoyment of investments, (ii) that each Party shall guarantee the free transfer of payments related to an investment, freely and without delay and (iii) and that each of the Parties shall comply with the agreed commitments with respect to the investment.

By the same letter the Argentine Government was notified of the commencement of the period of amicable negotiations provided for in the BIT and the existence of its right, in the event that the Disputes were not amicably resolved through negotiation, to commence one or more judicial or arbitral cases against the Republic of Argentina (inter alia) before the International Centre for Settlement of Investment Disputes (ICSID).

In a new letter to the President of the Argentine Republic (dated December 19, 2003), Wintershall and WIAR pointed out that having more than six months elapsed since the investment dispute was raised without any response from the Argentine Government, they were submitting their claim directly to the International Centre for the Settlement of Investment Disputes (ICSID), pursuant to Article VII of the *Argentine-US BIT*.

This was in lieu of the dispute settlement mechanism of Article 10 of Argentina-Germany BIT, in exercise of the agreed right to a more favourable treatment.

On December 23, 2003, Wintershall and WIAR submitted their Request for Arbitration against the Argentine Republic before the ICSID.

In such a Request Claimants stated that Argentina: a) effectively expropriated key legal and contractual rights and associated revenues of Claimant; b) failed to treat Claimant's investments fairly and equitably; c) failed to comply with obligations undertaken towards investment; d) impaired by arbitrary or discriminatory measures the management, operation, use or enjoyment of Claimant's investments; and e) failed to provide full protection and legal security to Claimant's investment.

As a consequence, Claimant sought for an award for all damages incurred, and that may be incurred, due to the failure of Argentina to comply with the BIT, international law and/or Argentine law, including interest; and of all costs of the proceeding, including their attorneys' fees.

On July 15, 2004, the Secretary-General of the Centre notified Wintershall that the Centre had registered its Request for Arbitration dated December 23, 2003. Pursuant to Rule 8 of the Institution Rules of the Convention, WIAR had exercised its right of withdrawal on May 5, 2004. Wintershall continued the proceedings as Sole Claimant.

The Tribunal was thereafter duly constituted on September 7, 2005 by: (i) the appointment by Wintershall (the Claimant) of Prof. Piero Bernardini (Italian); (ii) the appointment by the Republic of Argentina (the Respondent) of Dr. Santiago Torres Bernardez (Spanish) and (iii) the appointment by the Secretary-General of ICSID of Mr. Fali S. Nariman (Indian) as President.

2. Legal issues discussed in the decision

Preliminary Objections

General Approach of the Tribunal.

Relying on the provisions contained in Article 41 of the ICSID Convention and Rule 41 of the Arbitration Rules, Argentina filed Objections to Jurisdiction and requested that the Tribunal declare (i) that the dispute falls outside the jurisdiction of the Centre and (ii) that it has no jurisdiction over the dispute.

It was affirmed in the award that the Centre and ICSID tribunals appointed by the Centre, do not have general jurisdiction over States. The powers of such tribunals are limited and no presumption in favour of their jurisdiction can be made. The acceptance by a State of the jurisdiction of an international court or tribunal always requires to be expressed by means of a positive act or conduct. The Tribunal bore in mind that it is a general principle of international law that international courts and tribunals can exercise jurisdiction over States only with its express consent, which is a corollary to the sovereignty and independence of the State.

Accordingly, the Tribunal understood that it was inevitably called to examine first whether it had the jurisdiction to proceed with the merits of the Claimants' Request for Arbitration.

It was held that the registration of the case by the Secretary-General, which is an administrative act in exercise of powers conferred by Article 36(3)41 of the Convention, does not preclude the Tribunal from considering and ruling on the Objections to Jurisdiction filed by the Respondent[2]. The registration of the Request gives formal validity to the procedure but its essential validity is left to be determined by the Tribunal.[3]

Six preliminary objections to jurisdiction were raised Argentina and, based on the written pleadings of the parties, the Tribunal decided to bifurcate the question of jurisdiction and the merits, suspending the later.

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[2] Article 41 of the Convention and Rule 41 of the Arbitration Rules.

[3] According to ¶ 69 – 71 of the Award.

Claimant's Spin Off – Joinder.

In May 2007 the Claimant and Wintershall Holding Aktiengesellshaft, a new legal entity registered in Germany, requested the Tribunal to acknowledge that:

(i) Wintershall had spun-off and transferred to Wintershall Holding assets and liabilities as a whole, including its indirect interest in WIAR; (ii) in accordance with the provisions of German law, Wintershall Holding was the partial universal successor in interest of Wintershall in relation to the ICSID Claim; and (iii) as the partial universal successor of the Original Claimant, Wintershall Holding would continue the ICSID claim as claimant. In the event the Tribunal considered that the Original Claimant, either solely or jointly with Wintershall Holding, should maintain its capacity as claimant in the proceedings, they requested that the Tribunal take due consideration of Wintershall's willingness to act in such capacity.

It was the first time in the history of International law where a claim had been assigned from one company to another while the original claimant still existed. All the cases recalled involved situations where the original company had merged with the successor or where the transfer of the claim had taken place before filing the claim.

It was argued in the case that in international arbitral proceedings, third parties may not become parties unless specific legislation otherwise provides. It can also happen with the consent of the parties to the original arbitration agreement.

In line with the Respondent's request[4] -*(a) reject Claimant's request to transfer its decision to Wintershall Holding or, in the alternative, order that both Wintershall AG and Wintershall Holding be claimants in this arbitration*"-, the Tribunal decided that having Argentina itself agreed to the two companies being joined as Claimants, the Tribunal had jurisdiction and power to direct that Wintershall Holding Aktiengesellschaft be joined as Claimant along with Wintershall.

Other matters arisen during the proceedings.

The Respondent pleaded that it had not been established that the dispute resolution provision in the Argentina-US BIT was more favourable than the dispute resolution mechanism provided in the Argentina-Germany BIT. On this point the Tribunal held that at that preliminary stage of the proceedings, such a plea was premature because it requires proof of factual data from each party and it really pertained to the merits of the case, which were suspended.

[4] Post-Hearing Brief, October 30, 2007 paragraph 35.

In the same line of thought, the Tribunal dismissed any other contention that did not form part of the jurisdictional objections considered as *preliminary*.

Objections to Jurisdiction raised by Argentina

1. The Six Objections to Jurisdiction.

In its first objection to jurisdiction Argentina argued:

(1) that before resorting to an arbitral Tribunal Wintershall should have submitted the dispute to Courts of competent jurisdiction in Argentina under Article 10(2) of the BIT;

(2) that Wintershall cannot not rely on the Most-Favoured-Nation Clause in Article 3 in order to avoid compliance with the requirements set forth in Article 10(2) of the BIT because:

The other five objections to jurisdiction were (1) that ICSID had no jurisdiction over the revision of the measures adopted as a result of a national emergency, given that these matters were subject exclusively to the Argentine Republic's internal jurisdiction; (2) that the claim referred to contractual matters over which the ICSID had no jurisdiction; (3) that the Tribunal had no jurisdiction because all disputes relating to the instruments relied upon by Wintershall had to be referred to Argentine Courts; (4) that Wintershall had no legal standing to claim on legal rights that appertain to another person; and finally, (5) that Wintershall cannot claim on the areas it acquired after the measures under challenge were adopted.

Regarding these five objections, the Tribunal understood that any discussion on them would be unnecessary and superfluous for two reasons: first, because in the Tribunal's view these further objections were not exclusively preliminary in character, and secondly because it was Argentina's first preliminary objection to jurisdiction that was being upheld.

2. International Law applicable to the First Objection to Jurisdiction.

Since the first Preliminary Objection to Jurisdiction involved (i) an interpretation of the text of the Argentina-Germany BIT in accordance with the Vienna Convention on the Law of Treaties 1969 (VCLT) and (ii) an application of "principles of MFN treatment" in Bilateral Investment Treaties; the Tribunal understood that it was necessary to address these aspects first. In this sense, it was reasoned that in interpreting treaties (including BITs) the Tribunal must apply the VCLT not only because both States are parties to the VCLT, but also because as declared by the International Court of Justice (ICJ), the rules of interpretation set out in the VCLT reflect customary international law in this matter.

Recalling different decisions of the ICJ, the Tribunal stressed the rule of international law on interpretation of treaties according to which the must be based above all upon the text of the treaty and, as a supplementary measure, tribunals may recourse to preparatory works of the treaty and the circumstances of its conclusion. The duty of the Tribunal is to interpret the Treaties, not to revise them.

It was held then that "there is no room for any presumed intention of the Contracting Parties to a bilateral treaty as an independent basis of interpretation, because this opens up the possibility of an interpreter altering the text of the treaty in order to make it conform better with what he (or she) considers to be the treaty's 'true purpose'."[5]

3. Part (1) of the First of Objection to Jurisdiction.

3.1. Article 10(2) of the Argentina-Germany BIT.

Because of the manner in which Article 10 of the BIT was worded it was apparent for the Tribunal that reference to ICSID arbitration was expressly conditioned upon to a Court of competent jurisdiction in Argentina, during an 18–month period (and a three month further waiting period) and then proceeding to ICSID arbitration.

Since the Claimant (a German national) can only make a claim under the Argentina-Germany BIT, and under no other document, when Wintershall made a claim, it had no option but to comply with the conditions mentioned in Article 10 before exercising its right to ICSID arbitration, simply because that was the expressed will of the Contracting States.

In the Tribunal's viewpoint, Article 10(2) of the BIT contains a time-bound prior-recourse-to-local-courts-clause, which *mandates* (not merely permits) litigation by the investor (for a definitive period) in the domestic forum which both Contracting Parties of the BIT had considered to be an appropriate judicial body.

The use of the word "shall" in Article 10(2) *("[i]f any dispute in terms of the paragraph 1 above could not be settled within the term of six months ……it shall be submitted to the Courts of competent jurisdiction of the Contracting Party in whose territory the investment was made"*), is itself indicative of an "obligation" and not simply a choice or option. "*Therefore, the use of the word « shall » renders the obligation a jurisdictional requirement and cannot be overriden or ignored.*

[5] ¶ 88 of the Award.

A further reason why there was an obligation on Wintershall to comply with all the paragraphs of Article 10, was because of the way in which text of the entire Article was structured. Each of the paragraphs was interdependent and interlinked. Under the Argentina–Germany BIT therefore recourse to ICSID arbitration was an event that could not be insisted upon by an investor until the "event" previously prescribed had occurred.

The Tribunal also observed that the stipulation of Article 10(2) was that the claim had to be "submitted" to local courts and, if after eighteen months no decision has been reached, the investor has a right to submit the dispute to ICSID arbitration. There was no requirement in the BIT that the claim initiated in local courts must first be withdrawn on the expiration of the eighteen-month period, or that it had to be decided within the prescribed time.

The non-fulfilment of the "obligation" imposed in Article 10(2) of the BIT could not be described as a "mere defect of form", especially since it was not (and could not be) alleged that Argentina had in any way prevented the Claimant from submitting its claim to local courts.

Procedural obstacles may constitute or not jurisdictional requirements depending on their wording. The Tribunal said that: "". the obligation under Article 10(2) is twofold: being constituted both by a *ratione fori* element and a *ratione temporis* element. The circumstance that "waiting periods" are held in some decisions to be "procedural" rather than imposing a jurisdictional requirement has no bearing in the present case on the characterization of the eighteen-month requirement before the local Courts as a jurisdictional requirement. The wording used in the Argentina-Germany – BIT prescribed the two requirements differently, Article 10(1) mentions that "Disputes… shall as far as possible be settled amicably between the parties in dispute", while the imperative word "shall" (standing alone) is used in Article 10(2), without further qualification. A waiting period for amicable settlement (or for "negotiation") is definitely not the same as a requirement to invoke the jurisdiction of domestic Courts for a given period of time; – the former is dealt with in the Argentina-Germany BIT in paragraph (1) of Article 10. The latter forms the subject matter of paragraph (2) of Article 10."[6]

Provision made in a BIT for "consultation" (or a "waiting period") is different and distinct from a requirement that a claimant invokes the jurisdiction of domestic courts for a given period of time before proceeding to arbitration. For these reasons, the Tribunal concluded that pursuant to the manner in which Article 10 of the BIT was worded, consent to ICSID Arbitration was expressly conditioned upon a claimant-investor inter alia first submitting its dispute to a

[6] ¶ 145 of the Award.

court in Argentina, during an eighteen-month period (and a three month further waiting period) before proceeding to submit the dispute to ICSID arbitration. "The relevant words used by the Contracting States in Article 10 of the Argentine-Germany BIT do make sense in their context and as stated by the ICJ in Guinea – Bissau v. Senegal, Judgement of November 12, 1991: If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter."[7]

Not having Claimant complied with Article 10(2) of the Argentina-Germany BIT, the Tribunal decided it had no competence to entertain the claim and to proceed with it on merits.

4. Part (2) of the First of Objection to Jurisdiction.

4.1. Article 10 of the Argentina-Germany BIT and the MFN clause (Art. 3).

The Claimant applied the MFN provision in Article 3 of the Argentina-Germany BIT in order to reach the dispute-settlement provision in the Argentina-US BIT, and thereby contended that it was Article VII of the latter treaty that governed dispute-settlement between Argentina and a German investor in Argentina. As expressed by the Tribunal, such invocation involves "issues of jurisdiction or consent to arbitration".

In the ICSID system, "consent" of the Host State to international arbitration is given not generally, but inter alia under a particular investment treaty. The Host-State's consent is given when a bilateral investment treaty is concluded with another State.

The Tribunal held that Claimant's contention that since Argentina had already consented to ICSID arbitration in Article 10 of the Argentina-Germany BIT, the invocation of the MFN provisions of Article 3 would not involve any issue of jurisdiction, or of consent to arbitration of the Host State, is plainly erroneous.

The reason behind this is that because as from the very moment the MFN clause is invoked by the Claimant on a jurisdictional ground (i.e. to enable Claimant to invoke a different dispute resolution mechanism in lieu of Article 10 of the Argentina-Germany BIT) the question of the Host State's *consent* to an alternate jurisdiction clause arises.[8]

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[7] ¶ 127 of the Award.
[8] ¶ 160 of the Award.

4.2. Construction of Article 10 of the Argentina-Germany BIT in the context of Article 3 – MFN clause.

The most-favoured-nation clause is contained in Article 3 of the Argentina-Germany BIT, but that article does not mention that the most-favoured-nation treatment as to investments, and investment related activities, is to be in respect of "all relations" or that it extends to "all aspects" or covers "all matters in the treaty".

In the Tribunal's opinion, it is well-settled that a most-favoured-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates. The category of subject (the genus) to which the treatment mentioned in Article 3 relates to can only be ascertained upon reading Article 3 along with Article 4. In the case, full protection and security of investments, including expropriation or nationalisation of investment comprising measures tantamount to nationalisation and expropriation are matters expressly dealt with in Article 4.

The complaint of the Claimant and WAIR in the letter to the President of the Republic of Argentina (April 2003) and in the Request for Arbitration was chiefly in respect of Argentina not providing full protection and security to their investments and investment related activities and in respect of measures taken by the Government of Argentina which were tantamount to expropriation/nationalisation.

"In the context of the dispute raised in the Request for Arbitration specific items of 'treatment' accorded to investments and investment related activities covered by Article 3 would stand excluded by the express provisions of Article 4; since Article 4(4) provides that in respect of "matters governed by this Article the nationals or companies of either Contracting Party shall be accorded in the territory of the other Contracting Party the treatment accorded to the most favoured country." Hence, "treatment" covered by Article 4 (full protection and security to investments and investments not being subjected to expropriation or nationalisation or measures tantamount to expropriation or nationalisation) – being the whole range of claims made in the Request for Arbitration stand excluded from the "treatment" mentioned in Article 3; and since the MFN Clause for all forms of "treatment" described in Article 4 is expressly restricted to the provisions of that Article, they would not and could not be said to extend to Article 10."[9]

[9] ¶ 164 of the Award.

4.3. The definition of "investment related activity"

The Tribunal held that one thing is to stipulate that the investor is to have the benefit of MFN treatment but quite another to use a MFN clause to bypass a limitation in the settlement resolution clause of the very same BIT, especially when the Parties have not chosen language showing an intention to do this. In the opinion of the Tribunal the above principle applies mutatis mutandis, to "investments" as well as to "activities related to investments".

The ordinary meaning of expressions such as "investment related activities" or "associated activities" used in BITs refer generally to activities of the investor for the conduct of its business in the territory of the host State rather than to activities related to or associated with the settlement of disputes between the investors and the Host State.

4.4. The dispense of jurisdictional requirements.

The requirement of recourse to local courts for an eighteen-month period in Article 10(2) was understood by the Tribunal fundamentally as a jurisdictional clause and not a mere procedural provision. Thus, the requirement of such recourse can only be dispensed by a legitimate extension of rights and benefits by means of the operation of the MFN Clause. That would be when the text of the MFN clause itself permits the interpreter of the treaty to conclude that this was the clear and unambiguous intention of the Contracting Parties. However, such words were absent in Article 3 of the Argentina-German BIT.

4.5. Article 10 of the Argentina-Germany BIT vs. Article VII of the Argentina-US BIT.

Reasoning the provisions of the two BITs the Tribunal concluded that the dispute resolution clause in Article 10 of the Argentina-Germany BIT provides for ICSID as the ultimate and only arbitration forum. Instead, Article VII of the Argentina-US BIT gives a claimant (for example, a US investor in Argentina) a choice of *fora* viz. either ICSID or UNCITRAL.

Under the Argentina-Germany BIT, if there is no submission of the dispute to courts in Argentina, then there can be no ICSID arbitration. Conversely, under the Argentina-US BIT, if there is a submission of the dispute to courts in Argentina there can be no international arbitration; and even where there is no submission of such dispute to courts in Argentina, the arbitral forum is not necessarily ICSID; the Claimant can choose at his/its discretion either ICSID Arbitration or UNCITRAL Arbitration.

Bearing this in mind, the Tribunal opined that the MFN clause in Article 3 of the Argentina-Germany BIT could not avail the Claimant, since what it sought to invoke in its Request for Arbitration was a different system of arbitration under a different BIT.

4.6. "Stare Decisis" in International Arbitration.

Under the ICSID system, there is no mechanism for promoting certainty and predictability, a *jurisprudence constant.* But this does not mean that decisions of tribunals (ICSID or other) are not cited by parties before an arbitration tribunal in a particular case. Nonetheless, none of them are binding on the Tribunals.

The different decisions (of ICSID and other tribunals) on the application (non-application) of MFN clauses to dispute resolution provisions (in bilateral investments treaties) reveal two separate lines of approach:

(i) The first line of decisions -being the first one the Maffezini case-[10] proceed on the presumption that dispute-resolution provisions do invariably fall within the scope of an MFN agreed in a BIT, unless the contrary is plainly demonstrated. In the opinion of the Tribunal the contracting out presumption underlying this line of decisions was not warranted in the case, neither by the provisions in the text of the Argentina-Germany BIT nor in its preamble.

(ii) A second line of decisions[11] of tribunals mark a decisive step away from the expansive approach adopted by the tribunal in Maffezini. Contracting States cannot be presumed to have agreed that dispute resolution provisions in a specific treaty, negotiated with a view to resolving disputes under that very treaty, could be enlarged (or displaced) by incorporating dispute resolution provisions from other treaties negotiated by the Host State with a different party in an entirely different context.

This trend follows the principle of general international law that international courts (and tribunals) can only exercise jurisdiction over a

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[10] Maffezini v. Spain (25.01.00); Gas Natural v. Argentina (17.06.05), para. 29; National Grid v. Argentina (29.06.06); Suez-AWG v. Argentina, (3.08.06), para. 46 et seq.; Siemens A.G. v. Argentina Republic (ICSID Case No. ARB/02/8) (3.08.04), para. 103 ("Siemens v. Argentina"); among others.

[11] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13), Plama Consortium Limited v. Republic of Bulgaria (ICSID Case No. ARB/03/24), Telenor v. Hungary, Award of September 13, 2006.

State with its express consent. Thus, it does not regard as sufficient a consent of the Host State to international arbitration which would be a merely presumed consent.

4.7. The "ex major cautela" and the Siemes case.

Claimant argued that, as stated in the Siemens[12] award, Article 4(4) of the Argentina-Germany BIT was inserted for the removal of doubts. In such decision the Tribunal assumed that Article 3 applied to all Articles of the BIT and then proceeds with the surmise that what is mentioned in Article 4(4) is ex *abundante cautela*. Nonetheless the Tribunal in this case understood that the assumption that Article 3 applies to all other provisions of the BIT is not borne out by the text of the treaty. The Tribunal asserted that reading into the BIT words which are not there is an impermissible exercise in treaty interpretation.

The Tribunal also referred to the opinion of the International Court of Justice in the case East Timor (Portugal) v. Australia[13], in which it was said that "*the scope of application of a substantive obligation is an entirely separate question to the conferral of jurisdiction upon an international tribunal, Jurisdiction in International law depends solely upon consent. This is a difficult concept in any event in investment arbitration. Given the absence of a meeting of minds between investor and host State, consent has to be constructed from the standing consent given by the State by treaty, and the subsequent consent given by the investor at the time the claim is submitted to arbitration. In those circumstances, it is particularly important to construe the ambit of the State's consent strictly"* and *…"the various dispute settlement options [in Dispute Resolution Provisions] is often the subject of careful negotiation between the State Parties, selecting from a range of different techniques. It is not to be presumed that this can be disrupted by an investor selecting at will from an assorted menu of other options provided in other treaties, negotiated with other State Parties and in other circumstances. Moreover, it is in any event not possible to imply a hierarchy of favour to dispute settlement provisions. The clauses themselves do not do this, and it would be invidious for international tribunals to be finding (in the absence of specific evidence) that host State adjudication of treaty rights was necessarily inferior to international arbitration. The same point could be made with even more force in the case of a comparison between ICSID and other forms of arbitration which the State Parties may have specified in particular investment treaties.*

[12] Siemens v. Argentina, para. 90, p. 35. Interprets the Argentina-Germany BIT.

[13] ICJ Reports, 1995, para. 29, p. 102. As referenced by the Tribunal in ¶ 188 of the Award.

The result, will be that the Most Favoured Nation clause will not apply to investment treaties' dispute settlement provisions, save where the States expressly so provide."

4.8. The application of the MFN provision to the Dispute Resolution clause.

Claimant's assertion that since Article 10 of the Argentina–Germany BIT relates to investor-State dispute settlement and Article VII of the Argentina-US BIT also relates to investor-State dispute settlement, therefore it is *ejusdem generis* of the same kind, was a specious plea. The Tribunal held instead that this was not the true principle of *ejusdem generis* as applicable to an MFN clause.

In the Draft Articles of the International Law Commission on Most-Favoured-Nation Clauses it was stated "under the most-favoured-nation clause the beneficiary state acquires, for itself and for the benefits of persons or things in a determined relationship with it only those rights which fall within the limits of the subject matter of the clause." The commentary (1978) to Articles 9 and 10 reads[14]:

> *The scope of the Most-Favoured-Nations Clause regarding its subject matter: (1) The rule which is sometimes referred to as the ejusdem generis rule is generally recognized and affirmed by the jurisprudence of international tribunals and national courts and by diplomatic practice…. the clause can only operate in regard to the subject matter which the two States had in mind when they inserted the clause in their treaty.*

If, therefore, measures tantamount to expropriation or nationalization and measures not granting full protection and security to investments of nationals or companies of either Contracting Party in the territory of the other Contracting Party cannot apply to or be extended to the dispute resolution clause (Article 10), it is difficult to say that when the Contracting Parties used the word "treatment" in Article 3 they "had in mind" the dispute resolution clause in Article 10.

3. Decisions of the Tribunal

The Arbitral Tribunal unanimously:

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[14] See ¶ 191 of the Award.

(1) Found (a) that the Claimant was not entitled to directly refer the dispute raised by it to ICSID arbitration, since it had not complied with the provisions contained in Article 10(2) of the Argentina-Germany BIT; and (b) that the most-favoured-nation clause in Article 3 of the Argentina-Germany BIT did not entitle the Claimant to avoid compliance with the requirements set forth in Article 10(2) of the said BIT.

(2) Decided that the dispute was not within the jurisdiction of the Centre nor within the competence of the Tribunal.

(3) Declared that the remaining Preliminary Objections to Jurisdiction raised by Respondent were not exclusively preliminary in character; and therefore any discussion or findings in its respect were unnecessary.

(4) Decided that, since there was no want of bona fides on the part of the Claimant in instituting the arbitration proceedings, and taking into consideration the complexity and unsettled status of the questions involved in the First Preliminary Objection to Jurisdiction:

(a) the costs and expenses of the Centre had to be borne by the parties in equal shares;

(b) the costs incurred by each of the parties in the arbitration proceedings would have to be borne by the respective parties themselves.