

CASINOS AUSTRIA INTERNATIONAL GMBH AND CASINOS AUSTRIA  
AKTIENGESELLSCHAFT

Claimants

-v-

ARGENTINE REPUBLIC

Respondent

ICSID CASE No. ARB/14/32

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**Dissenting Opinion on Respondent’s Second Preliminary Objection and  
Declaration of Dissent concerning its First and Third Preliminary  
Objections of Arbitrator Santiago Torres Bernárdez**

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**TABLE OF CONTENTS**

**INTRODUCTION**.....3

**PART ONE**

Dissenting Opinion on Respondent’s Second Preliminary Objection to  
Jurisdiction: *There is not mutual consent of the Parties to the dispute to submit it  
to international arbitration.* .....5

**A. The Law Applicable to the Case**.....7

(a) The respective general position of the Parties.....7

(b) The relevant provisions of the BIT.....8

(c) The relevant provisions of the ICSID Convention.....11

(d) The rules of public international law governing the interpretation and  
application of treaties .....13

(e)	The question of the characterization of the requirements in Article 8(1) to (3) of the Argentina-Austria BIT as preconditions to international arbitration.....	17
(f)	The jurisprudence of the ICJ on the rule of State’s consent to international jurisdictions and on preconditions in treaty dispute resolution clauses.....	19
(g)	The scope of the “consent” given in advance by the Contracting States’ “standing arbitration offer” in Article 8 of the Argentina-Austria BIT.....	24
(h)	The formation of a binding “arbitration agreement” between the host State and the protected investor national of the other Contracting State .....	25
<b>B.</b>	<b>The Evaluation of Parties’ Arguments and Established Facts in the Light of the Applicable Law.....</b>	<b>31</b>
(a)	The sequential system of settlement of investment disputes of Article 8 of the Argentina-Austria BIT .....	35
(b)	The prior condition of “amicable consultations” for a term of six months .....	39
(c)	The prior condition of “submission of the dispute to the competent administrative or judicial jurisdiction” of the host State for a term of eighteen months.....	54
(d)	The withdrawal of “pending local judicial proceedings”.....	74
(e)	Claimants’ invocation of the MFN clause in Article 3 of the BIT as an alternative base of jurisdiction in the case.....	77
<b>C.</b>	<b>General conclusion.....</b>	<b>82</b>

**PART TWO**

Declaration of dissent concerning Respondent’s First and Third Preliminary Objections .....	88
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(a)	First Preliminary Objection: <i>There is no claim for a prima facie violation of the BIT</i> .....	95
(b)	Third Preliminary Objection: <i>There is no jurisdiction ratione materiae</i> .....	100

## INTRODUCTION

1. The present ICSID case was instituted by CAI and CASAG, Claimants, against the Argentine Republic, Respondent, by a Request for Arbitration dated 4 December 2014. Following the filing by Claimants of the Memorial on the merits, Respondent on 15 March 2016 filed a Memorial on Objections to Jurisdictions and Counter-Memorial on the Merits containing a request for bifurcation. Having considered the Parties' submissions on that request, the Tribunal decided by Procedural Order N° 3 of 25 April 2016 to "deal with Respondent's objections to the jurisdiction of the Centre and/or the competence of the Tribunal as a preliminary question, in accordance with Article 41(2) of the ICSID Convention and Rule 41(4) of the ICSID Arbitration Rules" and to "bifurcate the proceedings into separate jurisdiction and merits phases, such that the jurisdiction phase will deal with all objections to the jurisdiction of the Centre and/or the competence of the Tribunal". The present Decision on Jurisdiction puts an end to the jurisdictional phase of the case.

2. During this jurisdictional phase, the Tribunal considered the three preliminary objections on the jurisdiction of the Centre and the competence of the Arbitral Tribunal filed by Respondent, namely:

First Objection: There is no claim for a *prima facie* violation of the BIT;

Second objection: There is no consent to arbitrate because Claimants failed to accept Argentina's offer to arbitrate in the BIT; and

Third Objection: There is not jurisdiction *ratione materiae*.

3. The present majority Decision on Jurisdiction rejects apparently Respondent's three preliminary objections, deciding: A) that the Tribunal has jurisdiction over the present dispute concerning Claimants' claims for breach of Articles 2(1) and 4(1)-(3) of the Argentina-Austria BIT; and B) that it has no jurisdiction over the present dispute concerning claims for breach of Article 3(1) of that BIT. I reject this decision adopted by the majority of the Tribunal, and enter into the present Dissenting Opinion concerning Respondent's Second Preliminary Objection (PART ONE) and into a Declaration of dissent explaining my vote on Respondent's First and Second Preliminary Objections. (PART TWO)

4. My choice for casting under the form of an opinion my views on Respondent's Second Preliminary Objection is due to the fact that *consent* is the cornerstone of the jurisdiction of Centre and, generally, of arbitration

in public international law and that the majority analysis and conclusions thereon are, in my opinion, particularly unfortunate in the light of the law applicable to the case, as well as contrary to considerations of legal security with respect to the formation under the BIT system of the needed binding arbitration agreement between the Parties to the dispute referred to in paragraph 6 of the Preamble of the ICSID Convention.

## PART ONE

### **Dissenting Opinion on Respondent's Second Preliminary Objection to Jurisdiction: *There is not mutual consent of the Parties to the dispute to submit it to international arbitration***

5. Argentina's second objection is that the Tribunal lacks jurisdiction *ratione voluntatis*, Claimants having failed to comply with the jurisdictional requirements set out in Article 8 of the 1992 Argentina/Austria BIT (in force since 1 January 1995) invoked by them, as the basis for jurisdiction in the instant case, in their Request for Arbitration of 4 December 2014 registered by the Secretary-General of ICSID on 18 December 2014. As indicated in paragraph 134 of the present Decision, Claimants contend that they "validly accepted Respondent's offer to arbitrate under Article 8 of the BIT". And, to this effect, they argue that *strict compliance* with the various *procedural* requirements of Article 8 "*is not a condition for the validity of the Parties' consent to arbitration*". Instead, for Claimants "compliance with Article 8 of the BIT raises *merely questions of admissibility*". (Emphasis added)
6. These contentions of Claimants basically accepted by the present majority Decision, are in full contradiction with the *jurisprudence* of the International Court of Justice (ICJ) with respect to the principle qualified by the Court as the "fundamental principle of consent". For example, in the *Armed Activities in the Territory of Congo (New Application 2002)*, the Court stated that:

“(The Court) 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 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 ...” (*Case Concerning Armed Activities in the Territory of Congo (New Application 2002)*, (*DR of Congo v. Rwanda*), *ICJ Reports 2006*, p. 39, para. 88) (AL RA 39).

As the above statement of the ICJ appears quoted in paragraph 141 of the Decision on Jurisdiction of the *Philip Morris v. Uruguay* Tribunal of 2 July 2013 (CL-134), a decision referred to in various contexts by Claimants, the present arbitrator presumes that they are aware of that Court's statement but reject it, notwithstanding that the Court's jurisprudence thereon is declaratory of the fundamental principle of State's consent to jurisdiction

of public international law. The same applies *mutatis mutandis* to my co-arbitrators because otherwise their conclusions in paragraphs 263 to 328 of the present Decision would be incomprehensible.

7. For my part, I consider that the above contentions of principle of Claimants are untenable propositions because *inter alia* they are in full contradiction with: (i) the established jurisprudence of the ICJ on the matter; (ii) the systemic principle of public international law of State's consent to the jurisdictions of international courts and tribunals; (iii) the rules governing international arbitration in general as well as in the ICSID Convention; (iv) the text and context of Article 8 of the Argentina/Austria BIT; (v) the rules of international law on interpretation and application of treaties codified by the Vienna Convention on the Law of Treaties (VCLT) applicable in the relations between Argentina and Austria; (vi) the lengthy line of case-law in international investment arbitration which during the last decades has acknowledged and explained that requirements as those set forth in Article 8 of the BIT are indeed *jurisdictional requirements*; (vii) the admission by Claimants in the letter of 30 April 2014 addressed to the President of the Argentine Republic notifying that a dispute arose under Article 8 (1) of the BIT as a result of the revocation of the licence of ENJASA by ENREJA and that "the requirements to submit the dispute to arbitration under Articles 8(2) and Article 8(3) b) are fulfilled"; and (viii) Claimants' statements to the effect that "irrespective of the legal qualification of the procedure set forth in Article 8 BIT, Claimants have complied with it and were entitled to refer the dispute to arbitration" confirming thereby that what they characterize as "*procedural requirements*" have nonetheless to be complied with by investors in order to meet the "offer" of international arbitration made by Argentina and Austria in Article 8 (4) of the BIT (see, for example, Claimants' PHB, para. 195). It should be noted however with respect to the letter of 30 April 2014 that in that letter CAI states that it "accepts the offer in Article 8(5) BIT to submit the dispute to arbitration" concerning the selection of ICSID arbitration, but kept silent concerning the core consent to arbitration offer made in Article 8(4) by the Contracting States of the BIT.
8. For the above and other considerations to be developed further below, I uphold, as already indicated, the *ratione voluntatis* preliminary objection filed by Respondent which I consider rightly founded upon the elements of fact and law concurring in the instant case and in conformity with the admissions of and proofs administered by the Parties. The present opinion is aimed at developing in detail the motives for my rejection of the conclusion of my colleagues on Respondent's Second Preliminary Objection. I will begin by recalling in the first place the main principles

and rules of international law (conventional and customary) applicable to this phase of the case, an essential element diminished, when not absent, in the reasoning of the present majority Decision.

## **A. The Law Applicable to the Case**

### **(a) The respective general position of the Parties**

9. The general positions of the Parties on the law applicable to the case differ from each other. One of the first issues concerns their disagreement as to the meaning of “*compliance*” in connection with the application of the conditions and requirements set out in Article 8 of the Argentina-Austria BIT. Should the term mean compliance *tout court* (position of Respondent) or would an alleged *non-strict* compliance suffice (position of Claimants)? And further, does it make sense, legally, to refer to a “*non-strict compliance*” in the face of the clear mandatory provisions of Article 8(1) to (4) of the BIT or is the expression simply a sagacious manner to disguise eventual non-compliances as compliances? Furthermore, Claimants contended expressly that “[c]ompliance with Article 8 of the BIT *is not a question of consent*”, without excluding altogether that it could be binding on other grounds (see Claimants’ Opening Statement, Hearing Transcript, Day 1, 168:24-25, English version). (Emphasis added)
10. Thus, Claimants’ non-strict compliance argument goes hand in hand with an attempt to side-pass the *cornerstone issue* of the existence *in casu* of the required “arbitral agreement” which cannot be reached but by the mutual consent of the Parties to the dispute to submit it to ICSID arbitration. A similar path has already been followed before in ICSID arbitrations by claimants in difficulties to prove the existence of the mutual consent of the Parties to the dispute required for jurisdiction to be established. I understand fully that claimants in such a situation try to avoid facing the issue of the mutual consent and of its proof, but it is more difficult for me to understand that arbitrators might be seduced by pleas which are in full contradiction with the law applicable to the present ICSID arbitration. Everybody knows that unilateral offers by host States to arbitrate investment disputes contained in BITs are unable without further ado to establish jurisdiction to adjudicate a given investor-host State investment dispute. The offers have to be accepted by the protected private investor in the terms formulated in the offer concerned in order for that mutual consent to give birth to a binding arbitration agreement between the host State and the protected private investor. Under the ICSID Convention there is no arbitral jurisdiction by the unilateral consent of one of the parties to the

dispute, and private protected investors lack standing to modify in any respect the terms of the offer enounced in a BIT, which is a treaty between two States in written form and governed by international law.

11. For Respondent, the non-strict compliance argument of Claimants is simply a contention which tries to make good their failure to accept the conditions and requirements under which the Argentine Republic had consented to international arbitration as manifested in the very text of Article 8 of the Argentina-Austria BIT, in particular (i) the failure to accept the offer to arbitrate as a whole, by disrupting the *sequential system of settlement* provided for in Article 8; (ii) the failure to enter into *amicable consultations* for a term of six months; (iii) the failure to submit the dispute to the *local courts* for a term of 18 months; alternatively, (iv) the failure to withdraw the *pending domestic courts proceedings*; and (v) the *invocation of the MFN clause* of the BIT in order to import an alleged alternative means of dispute resolution in terms other than those expressly agreed upon between Argentina and Austria in Article 8 of their BIT (see, for example, Respondent's PHB, para. 35)
12. For the determination of whether or not Claimants have complied with the law applicable to the determination of the jurisdiction of the Centre and the competence of the Tribunal it is indispensable to be acquainted with various components of the applicable law, beginning with the wording of the relevant provisions of the Argentina-Austria BIT and of the ICSID Convention. Where there is not an English translation agreed between the Parties of a given provision of the BIT I will quote the text of the authentic Spanish version.

**(b) The relevant provisions of the BIT**

13. The relevant provisions of the Argentina/Austria BIT are enounced in Article 8 and Article 1, which in the authentic Spanish text read as quoted below:

“Artículo 8

Solución de controversias relativas a las inversiones

(1) Toda controversia relativa a las inversiones entre un inversor de una de las Partes Contratantes y la otra Parte Contratante sobre las materias regidas por el presente Convenio será, en la medida de lo



posible, solucionada por consultas amistosas entre las partes en la controversia.

(2) Si estas consultas no aportaran una solución en un plazo de seis meses, la controversia podrá ser sometida a la jurisdicción administrativa o judicial competente de la Parte Contratante en cuyo territorio se realizó la inversión.

(3) La controversia podrá ser sometida a un tribunal arbitral en los casos siguientes:

a) cuando no haya una decisión sobre el fondo, luego de la expiración de un plazo de dieciocho meses contados a partir de la notificación de la iniciación del procedimiento ante la jurisdicción arriba citada;

b) cuando tal decisión haya sido emitida pero la controversia subsista. En tal caso el recurso al tribunal de arbitraje privará de efectos a las decisiones correspondientes adoptadas con anterioridad en el ámbito nacional;

c) cuando las dos partes en la controversia lo hayan así convenido.

(4) Con este fin, cada Parte Contratante otorga, en las condiciones del presente Convenio, su consentimiento anticipado e irrevocable para que toda controversia sea sometida a este arbitraje. A partir del comienzo de un procedimiento de arbitraje, cada parte en la controversia tomará todas las medidas requeridas para su desistimiento de la instancia judicial en curso.

...

(6) El órgano arbitral decidirá en base al derecho de la Parte Contratante que sea parte en la controversia – incluidas las normas de derecho internacional privado –, en base a las disposiciones del presente Convenio y a los términos de eventuales acuerdos específicos concluidos con relación a la inversión, como así también según los principios de derecho internacional en la materia.

...”

14. For this arbitrator all the requirements defined in Article 8(1), (2) and (3) of the BIT are, in conformity with the established jurisprudence of the ICJ,

jurisdictional preconditions to which the consent to arbitration given in Article 8(4) is subject. Consequently, those preconditions which are interdependent and interlinked with each other constitute limits to the scope of the said consent. But this is not the case for the requirement in the second sentence of Article 8(4) because it is not setting a precondition to the institution of the arbitral proceeding. In my opinion, this particular requirement is a requirement concerning indeed the admissibility of Claimants' Request for Arbitration. Secondly, the definition of investment disputes of Article 8(1) of the BIT as worded in the Argentina-Austria BITs excludes "*contract claims*". And thirdly, the definition of the applicable law in Article 8(6) of the BIT encompasses the law of the host State of the investment, the Argentina/Austria BIT, specific agreements on the investment concerned if any, and the principles of international law on the matter.

15. Concerning Article 1 of the BIT, the relevant provisions are in the definition of the term "investment", as follows:

"Artículo 1  
Definiciones

A los fines del presente Convenio:

(1) El término "inversión" designa todo activo invertido o reinvertido en cualquier sector de la actividad económica, siempre que la inversión haya sido realizada conforme con las leyes y reglamentaciones de la Parte Contratante en cuyo territorio ha sido efectuada y, en particular, aunque no exclusivamente:

...

b) los derechos de participación y otras formas de participación en las empresas;

...

e) las concesiones de derecho público para la prospección y la explotación de los recursos naturales.

El contenido y el alcance de los derechos correspondientes a las diversas categorías de los activos, serán determinados por las leyes y reglamentaciones de la Parte Contratante en cuyo territorio la inversión está situada."

16. Claimants have initially referred with respect to its “investment” in the Argentine Province of Salta to Article 1(1)(b) and (e) of the BIT, notwithstanding that the latter provision relates to “natural resources” exclusively as pointed out by Respondent. But Respondent admitted that Claimants’ shareholding in ENJASA qualified as an “investment” under Article 1(b) of the BIT. The last quoted provision of Article 1(1) of the BIT whereby “*los derechos correspondientes a las diversas categorías de los activos*” are determined by the law of the host State are particularly relevant in connection with some specific questions at issue between the Parties as, for example, the distinction which has to be born in mind between the “company’s rights” and “shareholder’ rights”.
17. Finally, Article 3(1) of the Argentina-Austria BIT enounces the MFN treatment clause invoked by Claimants as an alternative base of jurisdiction, which reads as follows:

“Artículo 3  
Tratamiento de las inversiones

(1) Cada Parte contratante otorgará a los inversores de la otra Parte Contratante y a sus inversiones, un tratamiento no menos favorable que el otorgado a sus propios inversores y a sus inversiones o a los inversores de terceros Estados y a sus inversiones.”

**(c) The relevant provisions of the ICSID Convention**

18. The main relevant provisions of the ICSID Convention in the instant phase of the case are formulated in the Preamble (paragraph 6) and Articles 25(1), 26 (first sentence), 41 and 42. These provisions are worded as quoted below:

“Preamble

... Recognizing that mutual consent by the parties to submit such disputes [investment disputes] to conciliation or to arbitration through such facilities [Centre facilities] constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; ...

#### Article 25 (1)

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

...

#### Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...

#### Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

#### Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) ... shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.”

19. The above quoted provisions confirm in the first place that the mutual consent of the parties to the dispute is the base of the binding agreement to

arbitrate investments disputes in the ICSID arbitration system. No ICSID arbitration may go on the mere basis of the unilateral consent of a one of the parties only. Both parties to the dispute must consent mutually. Secondly, those provisions confirm likewise (i) that only when *the parties* in the plural have given their consent, namely when a mutual consent to arbitrate the disputes is there, no party may withdraw its consent unilaterally and (ii) that the consent of the parties to arbitrate the dispute under the ICSID Convention excludes the recourse to any other remedy, unless otherwise stated. There is not such a statement in the instant case. On the contrary there is an explicit reaffirmation of the said general rule in the second sentence of Article 8(4) of the Argentina-Austria BIT. Thirdly there is not any agreement of the parties empowering the Tribunal to decide the dispute *ex aequo et bono* either. The Tribunal must therefore decide the dispute in accordance with the rules of law defined in Article 42(1) of the ICSID Convention and Article 8(6) of the Argentina/Austria BIT which refer respectively, *inter alia*, to the “rules of international law as may be applicable” and to the “principles of international law” on the matter.

**(d) The rules of public international law governing the interpretation and application of treaties**

20. The rules of customary international law on the interpretation and application of treaties have been codified by the Vienna Convention of the Law of Treaties (VCLT) and Argentina and Austria are parties to that Convention. As to “interpretation” of the BIT both Parties agree that the rules set out in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (VCLT) apply, in particular the “General rule of interpretation” of Article 31 of the Convention which, as stated by the International Law Commission (ILC) in its commentary, is a single integrated rule. So far so good, but these rules of the VCLT are not the only ones that needed to be born in mind in the circumstances of the present case. There are others particularly on the application of treaties which are likewise relevant in the case.
21. The essence of the system of interpretation of treaties set out in Articles 31 to 33 of the VCLT has recently been recalled - in connection also with a given *ratione voluntatis* objection to jurisdiction - by the Award of 30 April 2015 in the case *Ping an Life Insurance Company of China, Limited et al v. Kingdom of Belgium*, ICSID Case N° ARB/12/29 (AL RA 250) in the following terms:

“164. ... The general principle is that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context (including the preamble and annexes) and in the light of its object and purpose (Vienna Convention, Article 31(1), (2)) and also the circumstances of its conclusion (Article 32).

165. Article 31 of the Vienna Convention reflects the primacy of the text as the basis for the interpretation of a treaty, while also giving a role to extrinsic evidence of the circumstances of its conclusion and to the objects and purposes of a treaty as a means of interpretation. It is based on the view that the text is presumed to be the authentic expression of the intentions of the parties, and that in consequence the starting point of interpretation is the elucidation of the meaning of the text by reference to the intention of the drafters: International Law Commission, Yb ILC, 1966, vol II, pp 218, 220.

166. The ordinary meaning approach has been adopted in many investor-State arbitrations to confirm that the presumed intentions of the parties should not be used to override the explicit language of a BIT (*Fraport v. Philippines* at [340]) or to override the agreed-upon framework (*Daimler Financial Services v. Argentina* at [164]), or be used as an independent basis of interpretation (*Wintershall v. Argentina* at [88]).”

22. The principles and considerations quoted above apply *mutatis mutandis* to the interpretation of Article 8 of the Argentina-Austria BIT. Thus, Article 8 shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the Article in their context and in the light of the object and purpose of the BIT (Article 31(1) of the VCLT), except of course for terms like “investment” to which a *special meaning* for the purpose of the BIT has been given by Argentina and Austria in Article 1 of the BIT, as provided for in Article 31(4) of the VCLT. As to the *context* the only elements of the definition in Article 31(2) of the VCLT present in the instant case are the text of the BIT itself, its preamble included. The Parties to the case did not provide the Tribunal either with annexes to the BIT or with any agreement and/or instrument of the kind listed by the VCLT in its definition of context. Concerning the interpretative elements that the interpreter shall take into account together with the context (Article 31(3) of the VCLT) the only one present in the instant case is the *relevant rules of international law applicable in the relations between Argentina and Austria*, because the Parties to the case

are not invoking any subsequent agreement or practice on the interpretation and/or the application of the BIT.

23. In the present case, Claimants did not invoke directly a “floating or presume intention” of the Contracting Parties as an independent basis for the interpretation of Article 8 Argentine-Austria BIT overriding the primacy of the text and the ordinary meaning of its terms as provided for in of Article 31 of the VCLT. They tried however to achieve a somewhat similar result by other means like, for instance, their “*non-strict compliance argument*”, a notion alien to the VCLT. In any case, for this arbitrator the text of Article 8 of the BIT is the primary element for ascertaining the common intention of Argentina and Austria when they chose to conclude a BIT for the protection and promotion of investments of their respective nationals and the settlement of eventual investment disputes related thereto with the host State of the investment. There is nothing in the wording of Article 8 which could be considered to be in a good faith interpretation inconsistent with the object and purpose of the BIT as defined in its Preamble. There is not therefore room for less than compliance with the sequential system of settlement and the individual conditions and requirements fixed by Argentina and Austria in the dispute-settlement-system adopted by the two States for Article 8(1) to (4) of the BIT.
24. As it has been concluded by the best doctrine, an interpreter is supposed to read the BIT and not to read into the BIT, to paraphrase the heading of an article published in 2006 by Weiniger on the topic of jurisdiction challenges in BIT arbitration, and the purpose of interpretation as a legal operation is to discover rather than to create meaning as stated by Koskenniemi in an article published in 1989 on the structure of international legal argument. I cannot therefore accept arguments construed for the case on the basis essentially of an alleged “non-strict compliance” with Article 8 of the BIT or the like. This kind of reasoning gives rise to serious questions concerning *pacta sunt servanda* and other systemic principles of the international legal order which cannot be put aside lightly, as underlined by a number of decisions and awards of ICSID arbitration tribunals, such as the following passage of the Award of 22 August 2012 in the *Daimler v. Argentina* case:

“... as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution

clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so” (para. 164) (AL RA 96).

25. So far as the supplementary means of interpretation of Article 32 of the VCLT are concerned, the *circumstances of conclusion* of the BIT are also relevant in the instant case in the sense that they proved beyond any reasonable doubt that Claimants are “thirds” with regard to the BIT, as confirmed by the first paragraph of the Preamble of the BIT, as well as by the fact that Claimants lack standing in public international law to conclude treaties. Being “thirds” with respect to the Argentina-Austria BIT, Claimants have no standing to circumvent, to modify or to alter the terms and scope of Argentina’s consent to international arbitration, as defined and delimited in the “standing offer to arbitrate” in Article 8(4) of Argentina-Austria BIT. And the same apply to arbitrators.
26. Under the Argentina/Austria BIT, Claimants hold secondary-treaty-rights only and in the exercise of those held secondary rights they have to act in accordance with the BIT, by complying with the conditions and requirements for their exercise as provided for in the BIT or established in conformity with the BIT (see Article 36(2) of the VCLT (CL-001)). This has been recalled by the *Wintershall* tribunal as follows:

“It is a general principle of the law of treaties that a third beneficiary of a right under it must comply with the conditions for the exercise of the right provided for in the treaty or established in conformity with the treaty. On the analogy of Article 36(2) of the Vienna Convention on the Law of Treaties of 1969 (the “Vienna Convention”) the ‘secondary right-holder’ under a bilateral treaty (the investor) who is conferred certain rights, being in no different position from “the third State” (mentioned in Article 36) – must comply with the conditions stipulated for the exercise of the rights provided for in the treaty concerned, which in the instant case is the ‘basic’ treaty” (Award of 8 December 2008, para. 114) (AL RA 38).



**(e) The question of the characterization of the requirements in Article 8(1) to (3) of the Argentina-Austria BIT as preconditions to international arbitration**

27. As indicated at the beginning of the present Opinion, the Parties disagree as to the legal characterization of the requirements of international arbitration of the system of settlement of investment disputes of Article 8 of the Argentina-Austria BIT. On the one hand, Respondent considers that those requirements are preconditions jurisdictional in nature, which explains that its alleged failure of compliance by Claimants prompted the filing of the present Preliminary Objection to Jurisdiction. On the other hand, Claimants consider that those requirements are of a procedural character and its eventual non-compliance does not pertain to the realm of “jurisdiction” but to the “admissibility” of a claim, while affirming nonetheless that they have complied with the said requirements and, consequently, they were entitled to refer the instant dispute to arbitration under the Argentina-Austria BIT.
28. However, notwithstanding the above disagreement (*jurisdictional requirements v. procedural or admissibility requirements*) none of the Parties appear to question that to reach arbitration in Article 8(3) of the BIT the investor has to comply with the preconditions in Article 8(1), (2) and (3), namely to engage in amicable consultations with the host State for six months and to submit the dispute to the competent administrative or judicial jurisdiction of the host State for at least eighteen months. It is indeed crystal clear in the light of the ordinary meaning of the terms used in those paragraphs of Article 8 that if the investor wishes (“may”) to reach the third step (international arbitration) it must comply with the first (amicable consultations) and second (local administrative or judicial jurisdiction) steps. Furthermore, it is not questionable in the light of the wording, sequence and interrelation of these steps of the dispute resolution system of Article 8 of the BIT that they are indeed premised on the binding character of each of said steps in order for the investor be in the position to resort to ICSID or UNCITRAL international arbitration. It follows therefore that the requirements of Article 8(1), (2) and (3) and its sequence are *preconditions* to international arbitration and that, whatever its legal characterization, binding in character for protected investors.
29. It should also be recalled that this characterization issue poses an interpretative question of public international law and that the rules on interpretation of treaties codified by the VCLT listed also “any relevant rules of international law applicable in the relations between the parties” as one of the interpretative elements to be taken into account by the

interpreter together with the context (Article 31(3)(c) of the VCLT) (CL-001). It is certainly true that States parties to a given BIT are free to formulate the requirements commented as preconditions delimiting the scope of consent given in advance of “an offer to arbitrate” (jurisdiction) or as a condition relating to the application or request for arbitration (admissibility) or as a procedural requirement. However, the latter are much less frequent because in most cases the arbitration forum designated by the BITs has its own arbitration rules like ICSID and *ad hoc* tribunals have at their disposal the UNCITRAL Rules. Furthermore, in investment arbitration the procedural rules to be applied by the arbitral tribunals are supposed to be agreed upon not by the States parties to the applicable BIT, as is the case of jurisdictional or admissibility preconditions, but by the investor and the host State (see, for example, Article 44 of the ICSID Convention). And, in any case even the requirements in BITs characterised as “procedural” are binding for the investors as recalled, for example, by *Murphy v. Ecuador* tribunal (Decision on Jurisdiction of 15 December 2010, para. 142) (AL RA 204).

30. What is more frequent is that in dispute resolution systems of BITs the Contracting States formulate the requirements under consideration as in the present case, namely in term of preconditions to international arbitration, the reason for that being the paramount importance for the States to circumscribe with some degree of precision the scope of the “standing arbitration offers” in BITs willingly given by them in advance without knowing either the individual protected private investors who will accept the offers nor the particular factual circumstances of a future investment dispute with them. The BIT system entails certainly exceptional assurances for foreign protected investors but it was not intended to derogate the systemic principle of the State’s consent to international jurisdiction of public international law and should not be understood and applied by ICSID arbitral tribunals otherwise.
31. For example, as stated by the *Philip Morris v. Uruguay* Tribunal with reference to the local jurisdiction precondition in BITs:

“137. The Tribunal disagrees with the position expressed by some tribunals, and echoed by the Claimants, which would disregard the domestic litigation requirement [as] ‘nonsensical’, since, allegedly, the domestic court would not be in a position to render a decision within the time-limit prescribed by the applicable treaty. The Tribunal also considers that a finding that domestic litigation would be ‘futile’ must be approached with care and circumspection. Except where this conclusion is justified in the factual circumstances of the particular

case, the domestic litigation requirement may not be ignored or dispensed with as futile in view of its paramount importance for the host State. Its purpose is to offer the State an opportunity to redress alleged violations of the investor's rights under the relevant treaty before the latter may pursue claims in international arbitration.” (Decision on Jurisdiction of 2 July 2013) (CL-134).

32. I share the above statement of the *Philip Morris* tribunal as well as its general conclusion that whether the domestic litigation requirement (like the amicable consultations requirement) relate to jurisdiction or, rather, to admissibility or procedure depends on the interpretation of the dispute resolution article of the BIT, based on the interpretation rules of the VCLT (*Ibid*, para. 138). It is indeed on such a basis that this arbitrator considers that the requirements in Article 8(1) to (3) of the Argentina-Austria BIT relate to jurisdiction and not to admissibility or procedure.

**(f) The jurisprudence of the ICJ on the rule of State's consent to international jurisdictions and on preconditions in treaty dispute resolution clauses**

33. The established jurisprudence (*jurisprudence constante*) of the ICJ on the characterization of preconditions in a compromissory clause of a given treaty as relating to its jurisdiction and not to the admissibility of the application - as declared for example by the Court in the *Armed Activities in the Territory of Congo (New application 2002)* (see above paragraph 6 of this Opinion) - is for me determinative of that question in public international law. And that is so not only due to the authority of the ICJ but also because, as stated in Article 38(1) of its Statute, the function of the Court is “to decide in accordance with international law such disputes as are submitted to it”. This explains the frequent invocation by parties to arbitration proceeding of investment disputes the relevant jurisprudence of the ICJ, as well as the references to it in decisions and awards of ICSID arbitration tribunals. The present case is not an exception in that respect. Respondent has invoked in several contexts law statements of the ICJ and sometimes also Claimants (for example, the *ELSI* case), but the majority supporting the present Decision has been, in my opinion, particularly wrong and shy on the relevant jurisprudence of the Court for issues raised in the present phase of the case, notwithstanding that the Arbitral Tribunal has to decide in accordance, *inter alia*, with principles and rules of international law as may be applicable.

34. I am of a different opinion. I believe that several core issues at the present phase of the case have already received in the said jurisprudence of the ICJ the correct international law answers, particularly in connection with the forms of manifestation of *State's consent* admitted and on the question of the *characterization of preconditions* in treaty dispute resolution clauses, as those formulated in Article 8(1), (2) to (3) of the Argentina/Austria BIT. For example, it is obvious that the overall conclusions in paragraphs 336 and 337 of the present majority Decision are untenable propositions in the face of the established jurisprudence of the ICJ on the systemic role of a State's consent to the jurisdiction of international courts and tribunals which provides that such a consent must be voluntary, certain, clear and unequivocal whatever the form of its manifestation or the title or base of jurisdiction invoked and/or the nature and values of the substantive legal obligations at issue. It is obvious that Claimants have not proven that Respondent gave in the said BIT, and neither did Austria, a voluntary, certain, clear and unequivocal consent for free access to international arbitration of protected investors nationals of the other country, nor have voluntarily, certainly, clearly and unequivocally consented to international arbitration without the investors' prior compliance with the conditions set forth in the BIT or dispensed that Claimants alleged consent may be of a different meaning or scope than Respondent's consent in the offer to arbitrate defined in the BIT *au lieu* of the "meeting of consents" commanded by Article 25 of the ICSID Convention. Furthermore, the character of a material norm and the rule of State's consent to jurisdiction are two different things (see *Case Concerning East Timor (Portugal v. Australia)*, *ICJ Reports 1995*, p. 102, para. 29) (CL-107 / AL RA 200) and, consequently, they should not be confused with each other through references, for example, to the object and purpose of the BIT concerned or other parties' frequent contentions in ICSID arbitrations aimed at avoiding compliance with the preconditions and requirements of BITs.

35. The following collection of some samples of relevant ICJ statements, there are many others, records its established jurisprudence in the matter under consideration:

"... The Court could not act in that way in the present case. It has simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.

Such manifest breach might result from, for example, the failure of the Tribunal properly to apply the relevant rules of interpretation to the provisions of the Arbitration Agreement which govern its

competence. An arbitration agreement (*compromis d'arbitrage*) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties.” (*Case concerning Arbitral Award of 31 July 1989, ICJ Reports 1991*, p. 69, paras.47-48);

“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 any particular form’ and ‘there is nothing to prevent the acceptance of jurisdiction ... from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement’ ... The attitude of the respondent State must, however, 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’ ...” (*Case Concerning Armed Activities in the Territory of Congo (New Application 2002)*, (*DR of Congo v. Rwanda*), *ICJ Reports 2006*, p. 18, para. 21) (AL RA 39).

“... 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 exists only in respect to the parties to the treaty who are bound by the clause and within the limits set out therein” (*Ibid.*, p. 32, para. 65)

“... Article 29 of this Convention [on Discrimination against Women] gives the Court jurisdiction in respect of any dispute between States parties concerning its interpretation or application, on condition that: it has not been possible to settle the dispute by negotiation; that, following the failure of negotiations, the dispute has, at the request of one such State, been submitted to arbitration; and that, if the parties have been unable to agree on the organization of the arbitration, a period of six months has elapsed from the date of the request for arbitration.

“In the view of the Court, it is apparent from the language of Article 29 of the Convention that these conditions are cumulative. The Court must therefore consider whether the preconditions on its seisin set out in the said Article 29 have been satisfied in this case” (*Ibid.*, p. 39, para. 87)

“When that consent [of the parties] is expressed in a compromissory clause in an international agreement, 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 ... It follows that in the present case the conditions for seisin of the Court set out in Article 29 of the Convention on Discrimination against Women must be examined in the context of the issue of the Court’s jurisdiction. This conclusion applies *mutatis mutandis* to all of the other compromissory clauses invoked by the DRC” (*Ibid.*, pp. 39-40, para. 88)

“The Court further notes that, even if the DRC had demonstrated the existence of a question or dispute falling within the scope of Article 75 of the WHO Constitution, it has in any event not proved that the other preconditions for seisin of the Court established by that 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” (*Ibid.*, p. 43, para. 100)

“...the Court is called upon to determine whether a State must resort to certain procedures before seising the Court. In this context it notes that the terms ‘condition’, ‘precondition’, ‘prior condition’, ‘condition precedent’ are sometimes used as synonyms and sometimes as different from each other. There is in essence no difference between those expressions save for the fact that, when unqualified, the term ‘condition’ may encompass, in addition to prior conditions, other conditions to be fulfilled concurrently with or subsequent to an event. To the extent that the procedural requirements of [a dispute settlement clause] may be conditions, they must be conditions precedent to the seisin of the court even when the term is not qualified by a temporal element” (*Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)*, *ICJ Reports 2011 (I)*, p. 124, para. 130).

“The consent allowing for 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 relevant conduct of a State” (*Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, ICJ Reports 2008, p. 204, para. 62) (AL RA 35).

“... the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*” (*Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports 1995, p. 102, para. 29) (CL-107 / AL RA 200).

“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 of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*” (*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, p. 104, para. 147).

36. The above statements of the ICJ, confirmed by several others, qualify the State’s consent to the jurisdiction of international courts or tribunals rule, as a *fundamental principle* of the international legal order (see, for example, *ICJ Reports 1995*, p. 101, para. 26) (CL-107 / AL RA 200). It follows that the present ICSID Arbitral Tribunal can only exercise jurisdiction over the Argentine Republic with its consent. That consent must be proved to be voluntary, certain and unequivocal and be manifested, as it has been so done in the “*standing offer to arbitrate*” made to the investors of the other Contracting State in Article 8(4) of the Argentina-Austria BIT. However, the consent embodied in that offer of Argentina, as well as of Austria, exists only within the parameters enounced in the text of Article 8 of the BIT which delimits with considerable precision the scope of the consent given by each of these States in their offer. There is no consent of Argentina or of Austria beyond that scope or otherwise.
37. These considerations relate however to a fundamental principle of the applicable international law which is dwarfed in Claimants’ plea, as well

as diminished and misunderstood in the reasoning of the present majority Decision.

**(g) The scope of the “consent” given in advance by the Contracting States’ “standing arbitration offer” in Article 8 of the Argentina-Austria BIT**

38. As clearly established in the BIT, the respective consents to ICSID arbitration given in advance by Argentina and Austria in the “standing arbitration offer” of Article 8 of the BIT is not all-embracing. Its scope is limited by the definitions in Article 1 of the BIT and the conditions in paragraphs (1) to (3) of Article 8 that must be complied with step by step by protected investors so as to be in the position of reaching the final step of international arbitration. In effect, in the first place, the provision in Article 8(1) confines the scope of application of the whole Article 8 to “treaty claims investor-host State disputes”. Secondly, the consent manifested in the “standing arbitration offer” of Article 8(4) (first sentence) is subject to successive compliance with each of the conditions set out in the preceding Article 8(1) to (3) of the BIT which are, because of its sequential order and drafting, *preconditions* to international arbitration.
39. Thus, it follows that Respondent’s advanced consent in the “standing arbitration-offer” of Article 8(4) of the BIT is neither a “mutual consent” of the parties to the dispute allowing protected investors direct access to international arbitration from the entry into force of the BIT nor a unilateral “arbitration consent offer” which could be considered as a perfected consent without the protected investor concerned accepted that offer following compliance with all the preconditions of Article 8(1) to (3) in its sequential order. The time-limits being part and parcel of the preconditions concerned must also be observed by the protected investor in order for “Argentina arbitration consent offer” made in the BIT to become a “mutual consent” of Respondent and Claimants giving birth as such to a binding “arbitration agreement” (*convención de arbitraje*) between the parties to the investment dispute, as referred to in the Preamble (paragraph 6) and Article 25 of the ICSID Convention.
40. For this arbitrator the ordinary meaning of the words “*sobre las materias regidas por el presente Convenio*” in Article 8(1) is certainly broad when contrasted with the scope of the dispute resolution clause of Article 9 of the BIT as underlined by Claimants in line with some ICSID arbitral tribunals. This is quite normal because the subject-matter of these Articles differs from each other. But with respect to investment disputes resolutions



clauses in BITs, Article 8(1) of the Argentina-Austria BIT is not particularly broad because, contrary to other BITs (for example, the corresponding provision in the Switzerland/Uruguay BIT applied in the *Philip Morris case*), the words quoted from the Argentina-Austria BIT exclude “contract claims disputes. It follows that it is not sufficient under the Argentina-Austria BIT that the dispute at issue be merely an investment dispute without further ado. It must be a “treaty claims investment dispute”.

41. Furthermore, the sentence “Con este fin, cada Parte Contratante otorga en las condiciones del presente Convenio, su consentimiento anticipado e irrevocable” (emphasis added) in Article 8(4) of the BIT settles the issue of the mandatory jurisdictional nature and sequential character of the preconditions in Article 8(1) to and (3) of the BIT, which are binding for the protected investors as confirmed further by the accompanying temporal element of six month in the case of “amicable consultations precondition” and of the eighteen months in the case of “local jurisdictions precondition”.
42. These conclusions are based on the ordinary meaning of the terms used in the text of Article 8(1) to (4) of the BIT in its respective context as provided for in Article 31 of the VCLT and the sequence of the successive steps of the settlement dispute resolution system of Article 8 of the BIT, as confirmed also by case-law.

**(h) The formation of a binding “arbitration agreement” between the host State and the protected investor national of the other Contracting State**

43. In international law “arbitration” is a means of settlement of disputes in which the consent of the parties thereto plays a paramount role. The same applies to international arbitral procedures applicable nowadays to investment disputes between the host State of the investment and a protected private investor national of the other Contracting State of the BIT. As explained in the Report of the Executive Directors on the 1965 ICSID Convention the consent of the parties to the dispute to submit themselves to ICSID arbitration is the cornerstone of the jurisdiction of the Centre. It follows that, under the current BIT system, the execution of a binding “agreement to arbitrate” a legal dispute arising directly out of an investment cannot be achieved but by the matching of the consent of the host State as manifested in the offer of the applicable BIT and the consent given by the protected investor when accepting that offer in writing and/or by filing a request for arbitration with the Centre. As explained above, the

BITs are bilateral treaties which provide “rights” for potential third protected investors, but the latter are not obliged at all by these BITs to accept the “standing arbitration offers” made by the Contracting States of the BIT in question, but they cannot modify or alter the meaning or scope of the standing offer of the BIT.

44. The present case is a BIT case and, therefore, the main jurisdictional issue posed by the formation of the needed “arbitration agreement” *of the parties to the dispute* to submit it to international arbitration consists in ascertaining whether Argentina’s consent to arbitrate as given in advance to protected Austrian investors in the offer made in Article 8 of the Argentina/Austria BIT and CAI and CASAG’ consent as given when accepting that Respondent’s arbitration offer match each other, because only if the consents of both parties to the dispute match, a “mutual consent” comes into existence and, consequently, the agreement or undertaking to arbitrate of the Parties to the present dispute can be considered as having been executed. The need of such arbitration agreement or undertaking between the parties to the dispute remains today, as in the past, unquestionable under the BIT system, as well as under contemporary public international law as explained, for example, by *Plama Consortium v. Bulgaria* Decision on Jurisdiction in the following passage:

“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. In the framework of a BIT the agreement to arbitrate is arrived at by the consent to arbitration that a state gives in advance in respect of investment disputes falling under the BIT, and the acceptance thereof by an investor if the latter so desires.” (para. 98 of the Decision) (AL RA 36).

45. At the doctrinal level, Dolzer and Schreuer have explained referring to consent through a BIT that: “The basic mechanism is the same as in the case of national legislation ... the arbitration agreement is perfected through the acceptance of that offer by an eligible investor” (*Principles of International Investment Law*, Oxford University Press, 2008, p. 242) (AL RA 37). In the same vein, Zachary Douglas, *International Law of Investments Claims*, Cambridge University Press, 2009, p. 74 and seq. and 360 (AL RA 23).

46. The Parties do not dispute some historical facts such as: (i) that in Salta (Argentina) a contract claims dispute at the domestic level between the Province of SALTA and ENJASA on the subject-matter of the revocation of a license of ENJASA by ENREJA (the *ente regulador* in the Province) was going on since 2013; and (ii) that Respondent had been informed by CAI's letter of 30 April 2014, joined later by CASAG (letter of 7 August 2014), that Claimants considered that a second legal dispute had arisen, this time between CAI and CASAG and the Argentine Republic, under the Argentina-Austria BIT, "as a result of the revocation of the license of ENJASA". The filing of Claimants' Request for Arbitration on 4 December 2014 formalized procedurally this second ICSID treaty claims dispute. Only the second legal investment dispute is before the present Arbitral Tribunal.
47. What is in dispute between the Parties is whether - notwithstanding the declaration by Claimants of their acceptance of Respondent's offer to arbitrate in CAI's letter of 30 April 2013 and the filing by CAI and CASAG of the Request for Arbitration of 4 December 2014 - Claimants' conduct reveals a consent to arbitrate the present dispute which actually matches Respondent's consent to arbitrate as defined in the offer of Article 8 of the Argentina-Austria BIT or, on the contrary, reveals a Claimants' consent which differs or falls out of the scope of Respondent's consent as given in the offer of the said BIT. In the first of these two hypotheses the Second Preliminary Objection of Respondent has to be rejected, but in the second one the Second Preliminary Objection must be upheld because the lack of mutual consent of the Parties to the dispute to submit it to ICSID arbitration entails the absence of a binding agreement between the Parties to arbitrate the dispute.
48. The easy way to be followed for the execution of an "arbitration agreement" between the parties to the dispute under the prevailing practice of the BIT system has facilitated enormously the exercise by protected investors of the right provided for them in the corresponding BIT to institute international arbitration proceedings against host States, but in contrast the system reserves exclusively to the host States the definition of the "standing arbitration offers" of BITs. There are not examples of BITs leaving to individual protected investors (or to all together) nationals of any one of the two Contracting States of the BIT the possibility of modifying or altering in any respect the kind and scope of the host State's "standing arbitration offer" as defined in the corresponding BIT, but I regret to say that this is what actually does the present majority Decision and explains this Dissenting Opinion of mine.

49. For me, the “standing arbitration offer” of Article 8 of the Argentina-Austria BIT with all its preconditions, terms and requirements cannot be, under the applicable international law, questioned, altered or modified by Claimants as apparently admitted by my co-arbitrators. CAI and CASAG are “third persons” with respect to the BIT and as such they hold only secondary rights under the BIT, in addition to being private legal persons lacking standing in international law to conclude, amend or to modify the BIT or the offer to investors made therein. As stated in the following passage of the Award on Jurisdiction of the *ICS Inspection and Control Service v. Argentina* Tribunal:

“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 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 ...” (Award of 10 February 2012, para. 272) (AL RA 40).

50. After decades of application of the ICSID Convention and the BIT system it could appear redundant to recall the obvious. But the conclusions in paragraphs 336 and 337 of the present majority Decision show that it is not yet the case for my co-arbitrators. To declare the wild conclusion that the Arbitral Tribunal “*comes to the conclusion that Respondent has validly consented to the jurisdiction of the Centre and the present arbitration under Article 8 of the BIT at the time the BIT entered into force... This consent thus has existed since the entry into force of the BIT. Claimants, in turn, have consented to the jurisdiction of the Centre and the present arbitration when they initiated the present claim against Respondent*” proves that the question of formation of the “arbitration agreement” (*acuerdo de arbitraje*) between the Parties to “the present treaty claims investment dispute”, namely between CAI and CASAG (Claimants) and the Argentine Republic (Respondent), as required by the ICSID Convention, is not yet clear in all minds. This, however, is not all because the said conclusion is supplemented by a second one as mistaken as the

first, namely: “...the pre-arbitral requirements equally laid down in Article 8 of the BIT ... do not constitute conditions precedent to Respondent’s consent, which would need to be fulfilled at the time of initiating ICSID arbitration. They merely concern criteria for the validity of the seisin of the Tribunal. The Tribunal found that it suffices that these criteria are fulfilled at the time a decision on jurisdiction is taken”.

51. With those two conclusions my co-arbitrators dynamite the BIT system as it has been functioning until the present. Moreover, this appears to have been indeed the intent, namely to create a new case-law and doctrine or, for the matter, to give birth to a system altogether different from the present BIT system. In any case, this majority Decision unbalances the conditions governing the BIT system since its beginnings. It is, therefore, in my opinion, a Decision that goes against the legal security which should preside over the relations between host States and protected investors under the ICSID Conventions and the BIT system. All this is done by the majority Decision without invoking any instrument, rules and principle of public international law applicable to this phase of the case, not even the rules on the interpretation and application of treaties of the VCLT. This explain why I begin this Dissenting Opinion recalling the instruments, rules and principles, some systemic in nature, of public international law applicable to the present phase of the case.
  
52. In the second part of this Opinion I will consider in detail the various issues of law and fact that, in my opinion, have to be taken into account to make arbitral determinations relating to the Second Preliminary Objection of Respondent. However, without prejudice of those determinations, I will advance here a few general considerations of law and fact thereon to be born in mind. In the first place, that as it is obvious, Article 8 (4) is but one of the provisions of the Article on settlement of investment dispute system of the BIT, and that dispute settlement provisions contain several other provisions setting out preconditions and/or requirements which according to the interpretation rules of the VCLT must be taken into account as “context” in the interpretation Article 8(4). Secondly, Claimants are “thirds” *vis-à-vis* the BIT concluded between Argentina and Austria where the two States included the “standing consent offer” of Article 8 as a right (not an obligation) for protected private investors accepting that offer not further or otherwise. Thirdly, the present “international arbitration” as such is not an arbitration under domestic legislation, it was instituted by Claimants as an arbitration under an international instrument, the ICSID Convention, and under this Convention as generally in public international law there is no arbitration without an “arbitration agreement” executed

between the parties to the dispute, as enounced the Preamble and Article 25 of ICSID Convention.

53. As to the facts, I will recall here first that there was not an “arbitration agreement” between Claimants and Respondent when the BIT entered into force in the relation between Argentina and Austria on 1 January 1995; and, secondly, that Claimants were not investors in the Province of Salta (Argentina) concerning the subject-matter of the present dispute before the year 2000 when they acquired 5% of L&E’s shares. How therefore the majority concludes that the Respondent “*has validly consented to the present arbitration under Article 8 of the BIT*” with Claimants on 1 January 1995, date of entry into force of the BIT in the relations between Argentina and Austria? Where is the needed second consent of the Preamble and Article 25(1) of ICSID, namely Claimants’ consent on that date? The explanation for this *totum revolutum*, there are many others, is not easy to find, unless the majority is trying here to suggest, *inter alia*, that the ICSID Convention has already been revised in the sense that ICSID arbitration could go on with the sole consent of the host State party to dispute. It would be a nonsensical proposition in public international law. Last but not least, the majority Decision all along, not only in its conclusions, reverses the logical order to be followed when considering the Second Preliminary Objection of Respondent according to which there is no jurisdiction because Claimants did not comply with the “standing arbitration offer” of the BIT. Respondent has never questioned its own consent *as determined* in writing in Article 8 of the BIT. What is at issue is whether or not that consent has been matched by Claimants’ alleged consent, not the Respondent’s consent.
54. The determination of jurisdiction and competence by an ICSID arbitral tribunal as the present one is, like in the case of any international court or tribunal, an *objective question* which must be decided by the tribunal concerned as judge of its own competence (Article 41 of the ICSID Convention) in accordance with the elements of law and fact concurring in the particular case. In the present phase of the case the elements of law are provided in the first place by Article 8 of the Argentina-Austria BIT with its conditions and requirements and Article 25 of the ICSID Convention, interpreted and applied in accordance with the corresponding rules of the VCLT and other principles and rules of public international law referred in this Opinion. As to the elements of fact by the proofs and admissions that reveal that Claimants have not complied either with any of those conditions and requirements or with the sequential system of means of settlement enounced in Article 8 of the BIT.

55. In such a situation, trying as the majority does in paragraph 337 of the present Decision to excuse one of the Parties, Claimants, for its non-compliance with the applicable law by references to “overly formalistic” approaches (echoing Claimants’ non-strict application fallacy) and to invoke “a fair administration of international justice” to condone not compliance with the applicable law by Claimants in detriment of Respondent’s rights is an abuse of language unacceptable for this arbitrator. The issue is not, and it has never been, “when” Claimants may have instituted their case with the Centre but that whenever such moment maybe they have prior to comply with the preconditions of Article 8 and its sequential order.
56. In any case, the present ICSID arbitration is an arbitration *under the applicable law* as defined in Article 8(6) of the BIT and Article 42(1) of the ICSID Convention and not in any respect an *ex aequo et bono arbitration* pursuant to a given agreement between the Parties to the dispute as provided in Article 42(3) of the ICSID Convention. None of the Parties has informed the Arbitral Tribunal of the existence of such an agreement or has claimed that the Tribunal proceeds as if such agreement would exist between the Parties. Once more the present majority Decision is confusing apples with oranges by a topical *totum revolutum* approach. What this Tribunal must do in the present proceedings is to be guided and enforce the law applicable to the present phase of the case in accordance with the principle of a “proper administration of (arbitral) justice” so as to avoid miscarriages or unwarranted *denials of justice*.

#### **B. The Evaluation of Parties’ Arguments and Established Facts in the Light of the Applicable Law**

57. Generally, it may be said that Respondent considers that the Argentine Republic’s consent embodied in the “standing arbitration offer” addressed to protected investor of the other Contracting State of Article 8(4) of the Argentina-Austria BIT is subject to the conditions, terms and requirements expressly stated in the relevant paragraphs (1) to (4) of Article 8 and that the only way for that consent to be perfected, namely to become a “mutual consent” to arbitrate the present dispute, is that Claimants accept the offer as formulated in the BIT by complying with all its conditions, terms and requirements as the case may be.
58. The general position of Claimants is based upon the twofold affirmation already referred above, namely (i) that the requirements of Article 8 do not constitute preconditions to Respondent’s consent to international

arbitration but procedural conditions relating to admissibility of Claimants' claims and (ii) that although in principle Claimants have to comply with those procedural requirements in order for the Arbitral Tribunal to be able to decide the merits of the case, they do not need to be fully applied or followed by them for the existence of jurisdiction (the so-called "non-strict compliance argument" of Claimants).

59. In paragraphs 271 to 282 of the present Decision on Jurisdiction, entitled "Source and existence of Respondent's consent and nature of the pre-arbitral requirements in Article 8 of the BIT", the majority adopted the general position of Claimants. I reject that choice of my colleagues as contrary to the law applicable to the present case as already explained in detail all along paragraphs 9 to 56 of the present Opinion. I will therefore add here only a few observations on specific points made by the majority in the said paragraphs of the majority Decision.
60. Nobody questions that the irrevocable consent given in advance by Argentina and Austria in the BIT, as an offer to protected investors of the other Contracting State, came into existence from the entry into force of the BIT between the two Contracting States *in the relations between themselves*. And it is indeed as from that date that there is an offer by Respondent to arbitrate "investment disputes" with Austrian protected investors as defined in article 8 of the BIT and, consequently, it is as from then that the offer became capable of being accepted by an Austrian protected investor. But Respondent's consent given in advance in Article 8(4) (first sentence) of the BIT cannot be interpreted and applied in isolation from other provisions of the Article (including Article 8(6)) and the BIT as a whole as "context", if the interpreter is of course applying the rules on interpretation and application of treaties codified in the VCLT - including "any relevant rules of international law applicable in the relations between [Argentina and Austria]" (Article 31(3)(c) of the VCLT) (CL-001) - and not proceeding in the abstract or in a legal vacuum.
61. In paragraph 271 of the Decision, the majority refers indeed to the rules on treaty interpretation of the VCLT, but the ensuing reasoning fails to explain how in the light of the clear text of Article 8(1) to (3) a good faith interpretation and application made as commanded by the VCLT may lead to the conclusion in paragraph 281 that "the BIT did not establish the pre-arbitral requirements in Article 8 of the BIT as conditions precedent to the existence of the host State's consent to investor-State arbitration, but rather as mandatory procedural steps investors have to take before a claim can be decided by an international arbitral tribunal on the merits". As to the determination from when Respondent's advance consent as embodied in



the “standing arbitration offer” of the Argentina-Austria BIT is in existence, it goes with the BIT system that it must be prior to the consent of the protected investor, but without the latter’s consent there a “mutual consent” between the parties to the dispute indispensable for the “arbitration agreement” cannot be considered executed.

62. Respondent’s consent offer to protected Austrian investors as manifested in the Argentina-Austria BIT, the fact that the offer is in force since 1 January 1995 and the further fact that that “offer” was in existence before CAI and CASAG accepted the “offer” do not alter in any respect neither the legal nature of the preconditions to international arbitration formulated in Article 8(1), (2) and (3) the BIT nor the normal operation, under the BIT and ICSID mechanisms, of the dispute settlement system established by the Argentine-Austria BIT, which is binding for Claimants since CAI’s letter of 30 April 2014 accepting thereby the ICSID arbitration offer in Article 8(5) of the BIT (joined on 7 August 2014 by the same acceptance of CASAG) and confirmed for both companies by the Request for Arbitration dated 4 December 2014.
63. This arbitrator has noted that the majority Decision appears to be rather in silence (or deny) the condition of “offer” to protected investor of the other Contracting State of the “standing consent” of Article 8 of the BIT. This is quite wrong. The best proof for this conclusion of mine is the very Claimants’ Request for Arbitration of 4 December 2014 whose section 2 entitled “*Consent to Arbitrate*” reads as follows.

“(12) Article 8 of the BIT contains an *offer* by Argentina to submit to arbitration within the scope of the treaty. CAI and CASAG initiated amicable consultation in accordance with Article 8(1) and (2) of the BIT with letter dated 30 April 2014. With the same letter, CAI accepted Argentina’s *offer* to submit the dispute to arbitration. CASAG accepted Argentina’s *offer* to submit the dispute to arbitration with letter dated 7 August 2014. CAI and CASAG submit this Request for Arbitration to ICSID in accordance with *Article 8(5) of the BIT as the applicable dispute resolution mechanism and thereby repeat and ratify their consent to arbitration.*

“(13) *The acceptance of Argentina’s jurisdictional offer forms the parties’ consent in writing to submit to ICSID.*

“(14) Pursuant to Rule 2(3) of the Institution Rules, the date of consent to ICSID arbitration is 30 April 2014 for CAI and 7 August 2014 for CASAG.” (Emphasis added)

64. In the present phase of the case, Respondent's consent as such poses no problem for the core determinations to be made by the Arbitral Tribunal. In fact, the problem only exists with respect to Claimants' consent because they are "thirds" to the BIT and as such CAI and CASAG do not have standing to modify Respondent's arbitration offer of the BIT with all its preconditions, terms and requirements and, as it will be explained below, they failed to do so. The question of the correspondence between the Spanish word "*condiciones*" and the German word "*Bestimmungen*" raised in paragraph 281 of the majority Decision is, in my opinion, irrelevant for the core determinations to be made by the Arbitral Tribunal.

65. What is essential is to know whether or not Claimants' alleged consent matches the scope of Respondent's consent of the offer or whether because the non-fulfilment of the preconditions to arbitration in Article 8(1), (2) and (3) and the by-passing of the sequential system of settlement of the Article, Claimants' consent falls outside of the scope of the offered Respondent's consent with the result that the indispensable "arbitration agreement" (*acuerdo de arbitraje*) between the Parties to the dispute has not been formed or executed between them. But, before examining in detail these failures a few general comments on the "applicable law" and the "burden of proof" seem in order.

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66. Contrary to current practice followed generally in investment international arbitration decision and awards, the present majority Decision is silent on the law applicable to this phase of the case and on the allocation of the burden of proof to the Parties. Regarding the law governing the determination of jurisdiction the predominant opinion is that such determination is rather to be decided in accordance with Article 25 of the ICSID Convention, the applicable rules of the relevant treaty, the Argentina/ Austria in the BIT instant case, and the applicable rules and principles of international law, Article 42(1) of the ICSID Convention would govern the merits of the case only (see, for example, Decision on Jurisdiction of 2 July 2013 in the *Philip Morris v. Uruguay* case, p. 11, para. 30). I have followed this predominant opinion but without excluding altogether Article 42(1) because in the present case the Argentina-Austria BIT makes at the end of the definition of the term "investment" a very important *renvoi* to the laws and regulations of the Contracting Party in whose territory the investment is placed.

67. As to the allocation of the burden of proof, I have been guided by recent relevant jurisdictional decisions or awards which have distinguished

rightly between different sets of facts with regard to the burden of proof at a jurisdictional phase (Decisions on Jurisdiction in the case *Société Générale de Surveillance and Republic of Paraguay* (2010), and *Philip Morris v. Uruguay* (2013); and Award on *Blue Bank International v. Venezuela* (2017)). As stated, for example, by the *Philip Morris v. Uruguay* Tribunal:

“Regarding burden of proof, it is commonly accepted that at the jurisdictional stage the facts as alleged by the claimant have to be accepted when, if proven they would constitute a breach of the relevant treaty. However, if jurisdiction rests on the satisfaction of certain conditions, such as the existence of an ‘investment’ and of the parties’ consent, the Tribunal must apply the standard rule of onus of proof *actori incumbit probatio*, except that any party asserting a fact shall have to prove it.” (Decision on Jurisdiction of 2 July 2013, para. 29) (CL-134).

**(a) The sequential system of settlement of investment disputes of Article 8 of the Argentina-Austria BIT**

68. The first issue raised by Respondent’s Second Preliminary Objection concerns the failure of Claimants to comply with the sequential system of settlement of investment disputes set forth in Article 8 of the Argentina-Austria BIT. For Respondent the path followed by Claimants disrupted that “sequential multi-stage dispute settlement system” of the BIT made up of successive and interdependent steps, namely amicable consultations, local or domestic jurisdictions, international arbitration and withdrawal of local proceedings *before* ICSID arbitration would be ultimately available for protected investors. More precisely the sequential system would command for the Respondent the following steps: (i) amicable consultations at least six months, except in case of an earlier solution; (ii) submission of the dispute to domestic jurisdiction at least 18 months except in case of a decision on the merits before or agreement between the parties; (iii) possibility of submitting the dispute to an international arbitral tribunal; (iv) withdrawal of any pending local judicial proceedings in case of submitting the dispute to ICSID arbitration.
69. In support of its main argument Respondent invokes mainly the text of Article 8 and other provisions of the Argentina-Austria BIT, the ICSID Convention, the rules on interpretation of treaties codified by the VCLT and the jurisprudence of the ICJ (for example, the case *Georgia v. Russian Federation* (2011)), as well as decisions or awards on jurisdiction of

investment arbitral tribunals relating to the interpretation of similar dispute resolution clauses of other BITs (for example, in *Wintershall* (2008), *Murphy* (2010), *Impregilo v. Argentina* (2011), *Inspection and Control Service v. Argentina* (2012) and *Daimler* (2012)).

70. In this kind of dispute resolution systems, the Contracting States' intention reflected in the very wording of the relevant provisions of the applicable BIT makes clear that each step of the sequential settlement process is contingent upon the fulfilment by the investor of the prior step of the system, the various paragraphs of the dispute resolution clause being thereby interdependent and interlinked. Thus, if a given protected investor desires to benefit itself from the access to international arbitration offered by that kind of system in BITs it must first comply with the prior steps as announced by the system – and following the order of steps established by it, amicable consultation and local jurisdictions in the Argentina-Austria BIT. Otherwise, the investor's access to international arbitration cannot be materialized in law. Why not? Because the wording of that kind of dispute resolution systems shows that the Contracting States of the BIT did not intend that protected investors would have a free choice between the prior means of settlement listed in the system on the one hand and direct access to international arbitration on the other hand, and the starting point of the interpretation of any treaty is the elucidation of the meaning of *the text* of the provision or provisions subject to the interpretation presumed in public international law to be the authentic expression of the intentions of the parties to the treaty (VCLT *dixit*).
71. In the present case, it is obvious that the text adopted by Argentina and Austria for Article 8 of the BIT makes its various relevant paragraphs interdependent and interlinked, becoming mutually near “context” to each other in one interpretation conducted in accordance with the interpretation and application rules codified by the VCLT. In public international law there are no admissible propositions to the effect that when a treaty provides for rights for “thirds” (as happened with BITs in respect of protected investors) these very “thirds” when accepting those rights may free themselves from complying with conditions or requirements provided for by the treaty concerned for the exercise of the rights in question. In accordance with rules codified in article 36(2) of the VCLT the protected investors exercising BIT rights are duty bound (*shall*) to comply with the conditions for the exercise of those rights as formulated in the BIT in question. In the present case, they must comply with the conditions (order of the successive steps included) of the sequential systems of Article 8 of the Argentina-Austria BIT. To do otherwise would render the system meaningless, an unacceptable result for a good faith interpretation done in

accordance with the VCLT. Furthermore, the words used by the contracting States in the text of the treaty provision subject to interpretation should have to be given appropriate effect by the interpreter, as commended by the *effect utile* principle in public international law.

72. No facts making it actually *impossible* or *futile* (notions which should not be confused with *reasons of convenience*) for Claimants to comply with all aspects of the sequential system of the BIT have been invoked or satisfactorily proven to me and Claimants have not established that Argentina and Austria intended to give any special meaning to the words used in the relevant paragraphs of Article 8 either, except with respect to the term “investment” and “investors” defined by the Contracting States in Article 1(1) and (2) of the BIT. It follows that for all other terms of Article 8 the ordinary meaning rule of Article 31 of the VCLT applies. Thus, the listed individual preconditions as well as the sequential order of the system itself as formulated in the text of Article 8 of the BIT are part and parcel of the “offer to arbitrate” made by Argentina and Austria in the BIT. This means in turn that when a given protected investor affirms having accepted or complied with the conditions and requirements of Article 8 that statement cannot be taken but as referring to Article 8 *in toto*, including the very sequential system as such and not only its individual interrelated steps.
73. Claimants have been rather silent on the issue of the duty to comply with the sequential system itself of Article 8 of the BIT, beyond contending that they did not breach the “procedural steps” of Article 8 of the BIT. They have considered preferable to approach the subject-matter of the system as such in an oblique manner when addressing the individual preconditions at issue without elaborating much on the system of settlement of the BIT as a whole. But their basic submission has been all along that they have complied with the “procedural conditions” of Article 8, although they admit not necessarily in the order listed in Article 8 of the BIT.
74. For example, the “Notification for the commencement of amicable consultations” addressed by CAI to the President of the Republic of Argentina of 30 April 2014 states that “the requirements to submit the dispute to arbitration under Articles 8(2) and 8(3) b) are fulfilled” because as contended it had seised Salta provincial administrative and judicial jurisdictions before requesting the host State for the commencement of amicable consultations. In their Hearing Opening Statement, they restated the argument of having “complied with the requirements of Article 8” but they invoked cautiously, as an alternative to Article 8, that in any case the MFN clause of Article 3(1) of the BIT would grant Claimants jurisdiction

if the Tribunal were to follow Respondent's *strict reading* of Article 8 (see, for example, para. 136 of the Tribunal Decision) (*emphasis added*)

75. To be more precise, Claimants are invoking - as a demonstration of compliance with Article 8 - the alleged following facts: (i) that on 28 August 2013 a *dispute arose* from the treatment accorded to CAI's investment in ENJASA as a result of the revocation by Resolution 240/13 of 13 August 2013 by the *ente regulador* ENREJA of the exclusive licence of ENJASA for the management, commercialization and exploitation of all the games of chance in the province of Salta and (ii) that following the rejection by ENJASA Resolution 315 /13 of 19 November 2013 of the request for revocation of that measure, ENJASA on 5 February 2014 filed in a local court of Salta judicial action aiming this time at the annulment of that ENREJA's decisions on the revocation of the measure. In other words, Claimants admitted in the present ICSID international proceedings that the local jurisdictions (administrative as well as judicial remedies) have been seised by ENJASA in Salta prior, not subsequent, to Claimants' notification of 30 April 2014 to the Argentine Republic asking for the commencement of amicable consultations, admitting therefore to having inverted the order of sequence of remedies of the BIT.
76. These admissions are indeed evidence that for Claimants the order of the steps of the sequential system of the BIT could be altered by them (the menu *à la carte* of the *Daimler* tribunal) without breaching Article 8 of the BI, *otherwise the provision would be applied strictly by the Arbitral Tribunal*. This together with Claimants' general position on the characterization of the individual preconditions to arbitration of Article 8, allows this arbitrator to conclude *ad majori* that Claimants consider themselves entitled to alter without negative jurisdictional consequences for them the sequence or steps of the system of settlement agreed upon by Argentina and Austria when concluding the BIT and, by so doing, ignoring one of the conditions which are part and parcel of the "standing arbitration offer" made by the two States in the BIT. This misbehaviour is dispensed of by the majority Decision without major explanation in detriment to the common intention of the Contracting States of the BIT and the principle of legal security which should prevail in the relations between host States and protected private investors under the BITs.
77. The above proposition and decision cannot be upheld by this arbitrator in the light of the applicable law and the considerations made *supra* on the matter. The fact that the sequential system of settlement of Article 8 of the Argentina-Austria is sided-step by the present majority Decision is indeed the first of the reasons for my dissent concerning the present Decision on

the Respondent's Second Preliminary Objection. Arbitrators are not Contracting Parties to BITs. They are duty-bound to make its decisions on the basis of the law applicable to the case, without disregarding the provisions of bilateral treaties adopted by States to protect and promote investments as they commonly wish.

78. As it has been declared by the ICJ when the dispute resolution system of a treaty provides for, as the bilateral Argentina/Austria BIT does, an express choice of two or more modes of dispute settlement (in the instant BIT amicable negotiation followed by resort to local administrative or judicial jurisdiction before international arbitration) the text suggests *an affirmative duty* to resort to these means, in this order, prior to the institution of international arbitration (see *ICJ Reports 2011 (I)*, p. 126, para. 134 and ff.) and this affirmative duty must, in my opinion, be enforced by the arbitrators.
79. The conclusions above are advanced without prejudice to the question to be considered below of whether or not there exists between the Parties a single or two distinct disputes, namely a "contract dispute" and a "treaty dispute" allegedly born from the same original event, the revocation of the exclusive licence of ENJASA, a privatized enterprise national of Argentina where the Claimant alleged to have a protected investment under the Argentina-Austria BIT amounting mainly at the time of the occurrence of the event to the holding of 60% shares of Leisure & Entertainment S.A. (L&E)'s (another Argentina stock corporation) shareholding of ENJASA.

**(b) The prior condition of "amicable consultations" for a term of six months**

80. Respondent contends that Claimants failed to meet the requirement of prior "amicable consultations" for a six months period of Article 8(1) and (2) of the Argentina-Austria BIT and this failure to comply with this first individual precondition of the dispute resolution system of the BIT demonstrates that CAI and CASAG did not accept the "offer to arbitrate" advanced by Argentina in Article 8, with the result that Respondent's consent to arbitrate the present investment dispute with Claimants was never perfected through Claimants' acceptance of that offer. In consequence, the "arbitration agreement" between the Parties to the present dispute needed for establishing the jurisdiction of ICSID and the competence of this Arbitral Tribunal has never been executed between these Parties.

81. For Respondent, the precondition of “amicable consultations” is not a mere dispensable procedural requirement and its temporal element of six months period is not a dispensable cooling-off period either. They are binding *jurisdictional requirements* whereby the Parties to the dispute must attempt to settle it amicably during a maximum period of six months. The text would suggest that it sets forth an obligation (*shall*, in the text) which operates between the Parties within the dispute resolution system of the BIT during a defined time-limit as a *prior condition* to the submission of the dispute to the second step of the system, namely *before* (not *after*) the submission of the dispute to the local jurisdictions and thereafter, eventually, to international arbitration.
82. Respondent rejects Claimants’ contentions that the obligation to negotiate is a “soft obligation” which must only be attempted when one of the Parties unilaterally considers that it is possible (*en la medida de lo posible*, in the Spanish text) to solve thereby the dispute. For Respondent, the Claimants’ contention was aimed at retroactively justifying their failure to meet the “amicable consultations” precondition of Article 8 of the BIT, invoking against such a contention: (i) the very text of the provisions in Article 8(1) and (2) of the Argentina/Austria BIT; (ii) the Wolf Theiss firm’s letter of 30 April 2014 on behalf of CAI entitled “Notification for the commencement of amicable consultations” addressed to the President of the Argentine Republic; (iii) the affirmation in the said Notification that the dispute was already submitted to the competent domestic authorities of Salta since 2013 as described in paragraphs 119 and 120 of Claimants’ Rejoinder of Jurisdiction; and (iv) Claimants’ admission in said Notification that CAI had already fulfilled the requirement of Article 8(2) and (3) of the BIT, while asking for the *commencement* of “amicable consultations” and noting that a decision on the merits of the dispute was already rendered by the *ente regulador* ENREJA on 19 November 2013. All this would prove beyond any reasonable doubt Claimants’ breach of the precondition of “amicable consultations” defined by the BIT as the first means of settlement to be tried by the parties to the dispute.
83. Starting from their basic position the so-called “no strict compliance” and the characterization of the “amicable consultations” as a mere *procedural* requirement and not as a precondition for the validity of the consent of the Parties to the dispute, Claimants argued that Article 8(1) does not provide for an unconditional consultation obligation, but only an obligation to the extent that the amicable consultations are possible (*en la medida de lo posible*). However, Claimants contend that they have met the BIT procedural requirement of entering into amicable consultations aimed at settling the dispute with Respondent.



84. To reconcile both propositions, Claimants develop a series of profuse arguments on (i) when did the dispute arise and (ii) how have Claimants complied with the requirement to settle the dispute, while possible, through amicable consultations (see Claimants' PHB, pp. 69-85). Under (i), Claimants considered the definition of dispute, the emergence of the dispute and whether or not Claimants have to initiate amicable consultations with an "official" trigger letter. And under (ii), Claimants considered the definition of amicable consultations and the conduct of the amicable consultations, concluding that they had fulfilled the requirement of Article 8(1) even if CAI letter of 30 April 2014 is considered to be determinative of the beginning date of the amicable consultations.
85. These arguments Claimants' take in their Post-Hearing Brief about sixteen pages, however neither in the text nor in the corresponding sixty footnotes of those pages appears, if I am not mistaken, any reference to the rules codified by the VCLT on the interpretation and application of treaties.
86. Doubtless some passages of Claimants' arguments on the present precondition are or could be relevant for the jurisdictional determinations to be made by the Arbitral Tribunal, but most of these arguments appear to me to be rather alien or falling outside the realm of the VCLT *rules of the law of treaties* concerning the interpretation and application of "conventional obligations" as the obligation to engage in "amicable consultations" of Article 8(1) and (2) of the BIT, namely as an invitation to the Arbitral Tribunal to follow a kind of free interpretation and application approach to BIT obligations as promoted by certain circles but that this arbitrator does not share because it ignores relevant principles and rules of the applicable conventional and customary international law.
87. Besides, several of Claimants' arguments do not appear to have taken account, as they should, of the full text of the BIT obligation of trying first to settle the dispute through "amicable consultations". Thus, it has to be underlined that the text does begin in Article 8(1) but ends with the first words of Article 8(2) where it is stated that "*Si estas consultas no aportaran una solución en un plazo de seis meses, ...*" the dispute may be submitted to second step, namely the competent local administrative or judicial jurisdiction of the host State. Given the admitted or proven facts, it seems that Claimants have not complied with this temporal aspect of the "amicable consultations" obligation of the Argentina-Austria BIT either.

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88. To ascertain the meaning and scope of the obligation of engaging in “amicable consultations” with the other party to the dispute, as the first precondition to international arbitration, an interpreter has to proceed to look at the *text* of the obligation *in toto*, the mutual *context* provided *inter se* by the first four paragraphs of Article 8 and the definition of the word “investment” in Article 1(1) of the BIT, as well as together with the context the relevant *rules of international law* applicable in the relations between Argentina and Austria as Contracting States of the BIT (Article 31(3)(c) of the VCLT). If that is done through a good faith interpretation process the meaning and scope of the “amicable consultations” obligation of the BIT appears perfectly clear.
89. In Article 8(1) of the Argentina-Austria BIT, the word “dispute” must be of course understood as defined in Article 1(1) of the BIT and be a “legal investment dispute” (as provided for in article 25(1) of the ICSID Convention). The dispute must be between a protected investor of the other Contracting State and the host State of the investment and concern “*las materias regidas por el presente Convenio*”, but not further. This last very important reference in Article 8(1) excludes “*contract claims disputes*” from the scope of application of Article 8. The subject-matter of the legal investment dispute falling within the scope of Article 8 must be therefore a “*treaty claims dispute*” and the Parties are obliged to engage between themselves in the “amicable consultations” thereon, not otherwise, and try thereby *en la medida de lo posible* to settle the “*treaty claims dispute*” concerned through those consultations within a term of six months, except of course in case of an earlier settlement of the dispute between the parties. Only, as provided expressly at the beginning of Article 8(2), “*Si estas consultas no aportaran una solución en un plazo de seis meses*” may the dispute be submitted to the second step of the dispute settlement system of the BIT.
90. Thus, except in the hypothesis of “an earlier solution”, the obligation of engaging in “amicable consultations” lasts until the six months period is over. Thereafter, the parties are entitled to move the dispute to the competent administrative or judicial jurisdiction of the host State. As rightly stated by the *Teinver v. Argentina* Tribunal, it is fair to interpret the “amicable consultations obligation” as “a general ‘best efforts’ obligation for the parties” and, further, that the natural reading of the obligation together with its temporal element is “that the Parties are obligated to make their best efforts to amicably settle their dispute, and that they are required to do so for six months before proceeding to the next step.” (Decision on Jurisdiction of 21 December 2012, p. 19, para. 108).

91. This is how Argentina and Austria have defined in the BIT the precondition of “amicable consultation” obligation and it is as such, no otherwise, which is binding for Claimants to accept Respondent’s offer to arbitrate the investment dispute in question. For this arbitrator, it is a clear obligation of conduct binding the Parties to the dispute all along of the prescribed six months unless an earlier settlement is reached. “Amicable consultations or negotiations” were in the past, and are at present, the most frequent precondition to international arbitration or judicial settlement in the international practice because it is a manifestation of a systemic rule of public international law, namely the rule of State’s consent to the jurisdiction of international courts and tribunals as reflected in the jurisprudence of the ICJ, and its arbitral or judicial application should be approached with most care. For my part, I do not admit the characterization of “soft obligation” as do the majority Decision with reference to the “amicable consultations” obligation in Article 8 of the present BIT or in any other international conventional instrument.

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92. The established jurisprudence of the ICJ rejects in resolute terms the majority Decision arguments developed in its motives concerning the characterization, nature and function of preconditions in disputes resolution clauses of treaties, as evidenced by some passages of its jurisprudence already quoted in the above paragraphs 6 and 35 of this Opinion. For example, in the following one: “... any conditions to which [the] 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” (*Case Concerning Armed Activities in the Territory of Congo (New Application)*), (*DR of Congo v. Rwanda*), *ICJ Reports 2006*, p. 39, para. 88) (AL RA 39).

93. Among more recent examples, the Judgment on Preliminary Objections in the case concerning the *Application of the International Convention on the Elimination of all Forms Racial Discrimination (Georgia v. Russian Federation)* is of particular interest for the jurisdictional phase of the present ICSID arbitration case because (i) the applicant failed its case for not complying with a treaty precondition of prior resort to negotiations and (ii) the summing up made by the Court in that Judgment of its own and of the Permanent Court’s jurisprudence on the subject-matter. I quote below some passages of this Judgment which provide additional light on specific issues of law which are also present in this ICSID arbitration case in

connection with the “amicable consultations” obligation of Article 8 of the BIT:

(i) On prior negotiations qualified by a temporal element:

“To the extent that the procedural requirements [of a dispute settlement clause] may be conditions, they must be conditions precedent to the seisin of the Court even when the term is not qualified by a temporal element” (see whole quotation of the passage in paragraph 35 of the present Opinion).

(ii) On the absence of a genuine attempt to negotiate:

“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” (*Case concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russian Federation)*, ICJ Reports 2011, p. 133, para. 159).

(iii) On the distinction between negotiations or mere protest or disputations:

“Furthermore, ascertainment of whether negotiations, as distinct from mere protests or disputations, have taken place, and whether they have failed or become futile or deadlocked, are essentially questions of fact ‘for consideration in each case’” (*Ibid.*, p. 133, para. 160).

(iv) On the relationship between the precondition of negotiations and the subject-matter of the treaty containing the resolution clause:

“However, to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must

concern the substantive obligations contained in the treaty in question” (*Ibid.*, p. 133, para. 161).

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94. As already explained above, the Austrian protected investors under the Argentina-Austria BIT as Claimants are a “third person” with respect to that BIT and, consequently, they lack standing for altering or modifying, in any respect, the “offer to arbitrate” given in advance by Argentina to Austrian nationals as per the BIT. Claimants are not in a procedural position allowing them to question, redraft or dispense themselves compliance with that “offer” through free interpretations or unilateral statements alleging impossibility, futility or the like when as in the instant case the “amicable consultations” of Article 8(1) and (2) of the BIT had not even commenced. This seems to be the position of Respondent and also in April 2014 the understanding of Claimants themselves as reflected in CAI’s letter of 30 April 2014 to the President of the Argentine Republic, except with respect to the specific question whether or not “amicable consultations” could be the *second* step in the dispute resolution system of the BIT.
95. What the Parties definitely disagree on all along is with respect to the date as from which the six months period of Article 8(2) has to be counted: As from the date of the invitation to the other party to engaging in the amicable consultation *simpliciter*? As from the date of actual commencement of the amicable consultations? or as from any other date or dates? The answer is a question of fact and the burden of proof of that fact corresponds to Claimants (*onus probandi incumbit actori*). Claimants suggest to the Arbitral Tribunal two alternative dates for that purpose, namely as from 27 August 2013 or as from 30 April 2014, but none of these dates have been proven to my satisfaction as correct. The reasons will be unfolded below.

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96. This arbitrator is unable to admit the first date proposed by Claimants, namely as from 27 August 2013, the date of the first meeting of Mr. Tucek with representatives of the Government of the Province of Salta (Claimants’ PHB, para. 214). Neither their second alternative date, namely as from the letter dated 30 April 2014 to the President of the Argentine Republic entitled “Notification for the commencement of amicable consultations” (*Ibid.*, para. 252). Both contentions appear to ignore elements of fact and law of the case which cannot be put aside by this arbitrator in the light of the applicable law and admitted facts.

97. As to the first contention, it must be recalled that the subject-matter of the meeting of Mr. Tucek (acting in behalf of ENJASA) on 27 August 2013 with representatives of the Province of Salta concerned *exclusively* the issue of the reinstatement of ENJASA's licence which had been revoked on 13 August 2013 by ENREJA Resolution N° 240/13. At that time, the subject-matter of these contacts, meetings or exchanges between representatives of Claimants (acting either on their own or on behalf of ENJASA) and representatives of the Province of Salta concerned the issue of the revocation of the license, as confirmed by ENJASA's submission on 28 August 2013 before ENREJA of a petition for reconsideration of Resolution N° 240/13. At some point of those exchanges, on the one hand, the Salta authorities made certain settlement proposals to Claimants which were rejected by them and, on the other hand, Claimants increased their control of ENJASA by purchasing the remaining 40% of the shares in L&E (for the Claimants' version on those events, see the written witness statements of Mr. Tucek and Mr. Schreiner and their oral statements at the Hearing).

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98. However, neither of those initial events nor the fact that thereafter ENJASA filed under the administrative domestic laws of Salta a request or petition for reconsideration of Resolution N° 240/13 or the further fact of the rejection of that petition by ENREJA Resolution N° 315/13 of 19 November 2013 relate to the subject-matter of the present ICSID arbitration which is an international arbitration which subject-matter is compensation for alleged damages resulting from alleged breaches of the Argentina-Austria BIT (not the reconsideration of the revocation of ENREJA's Resolutions concerning the license, which is an administrative "contract claims dispute" pursued by ENJASA under the domestic law of the Province of Salta and which since 5 February 2014 is the object of a request by ENJASA for annulment of ENREJA's Resolutions concerned before the First Instance Court of Salta).

99. The mere description of the events above suffices to answer in the negative the first Claimants' suggested date as from which the six months period of Article 8(2) of the BIT should be counted. Claimants' notification of 30 April 2014 provides additional determinative written proof of Claimants' admission that by April 2014 they had not yet fulfilled the obligation of engaging in "amicable consultations" with the Argentine Republic as

Respondent in the present case, as prescribed by this precondition of Article 8(1) and (2) of the BIT.

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100. Regarding the second alternative date (30 April 2014) suggested by Claimants explaining that “at the latest on 1 November 2014 (i.e. six months after the letter dated 30 April 2014), Claimants had complied with the six-month period pursuant to Article 8(1) [of the] BIT”. However, 30 April 2014 is not acceptable for this arbitrator either because CAI took months to provide Respondent with the usual written evidence concerning capacity, legal representation and powers of attorney. Furthermore, CASAG did not join CAI as Claimants in the present case and provide for the corresponding representation and powers of attorney until Claimants’ letter of 7 August 2014, at no time before that date, as admitted by Claimants.
101. The above facts have not been challenged by Claimants. The documental evidence submitted to the Arbitral Tribunal shows that by letter of 16 May 2014 the head, Dr. Abbona, of the competent federal administration (*Procuraduría del Tesoro de la Nación*) requested the Claimants’ side to provide documentation showing the capacity of Wolf Theiss to act on behalf of CAI. A copy of a power of attorney of CAI to Wolf Theiss was provided to Respondent as an attachment to a further letter of 10 June 2014 where it is also recalled the readiness of CAI to participate in amicable consultations as per the notification of 30 April 2014.
102. Following a further letter of Dr. Abbona of 2 July 2014, the executive director (Mr. Tucek) and the financial director (Mr. Zuruker-Burda) of CAI confirmed the readiness of CAI to participate in amicable consultations as per letters of 30 April 2014 and 10 June 2014. In another letter of 14 July 2014 which refers also to Dr. Abbona’s letter of 2 July 2014, Wolf Theiss informed further (i) that the letter of 10 June 2014 was validly issued because it had been signed by the executive directors in accordance with the statutes of the company; (ii) that an attached certified copy of CAI’s entry in the Austrian commercial register confirms that the signatories of the power of attorney are the executive directors of CAI; (iii) that attaching copies of the applicable provisions of Austrian law provide for the executive directors’ representations in all matters concerning limited liability companies and third parties’ reliance on the validity of all entries in the commercial register; (iv) that CAI would confirm in a separate letter that Wolf Theiss had been duly appointed as legal representative of CAI in relation to the dispute; and finally (v) recalling the notification of 30 April

2014 and the readiness of CAI to participate in amicable consultations with the Government of Argentina, as well as asking when Dr. Abonna would be available for a meeting to conduct amicable consultations.

103. Furthermore, in a letter dated 7 August 2014 from Wolf Theiss, Respondent was informed of the following: (i) that the notification for the commencement of amicable consultations made by CAI also *included claims* of its parent company CASAG; (ii) that CASAG was ready to participate in amicable consultations with Argentina in accordance with Article 8(1) of the BIT; and (iii) that Wolf Theiss had assured likewise the legal representation of CASAG, attaching therewith the corresponding power of attorney from CASAG.
104. Thus, Claimants' preparation and submission of documentation showing the capacity, representation and powers of attorney for CAI and for the joined CASAG company *extended from 30 April 2014 until 7 August 2014*, namely more than six months. All along this period ENJASA' judicial action instituted as indicated on 5 February 2014 in the local courts of Salta requesting the annulment of ENREJA's resolutions 240 and 331 was, and continued to be, going on in 2014.
105. It follows that it was only on 7 August 2014 that the preliminary procedural issues of proving capacity, representation and powers of both Claimants were settled. Consequently, the possibility of commencing the substantive "amicable consultations" of Article 8(1) and (2) of the BIT was certainly there as from that day, but not before that date. Thus, as stated by Respondent: "Claimants' counsel provided evidence of their power to represent both Claimants on 7 August 2014, as a result of which 'only on 7<sup>th</sup> August 2014 the parties are in a position to start sitting down around the table to negotiate'" (Respondent's PHB, para 55). On the basis of the relevant written documentation in the record of the case this arbitrator concludes that 7 August 2014 is the date as from which the six months temporal element of the "amicable consultations" obligation of Article 8(1) and (2) of the BIT must, in the circumstances of the present case, begin to be counted.

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106. Notwithstanding the above, from 7 August 2014 on Claimants did not show major interest in engaging in "amicable consultations" and on 4 December 2014 they filed the Request for Arbitration with ICSID. The last of Claimants' relevant communications between these two dates, the letters of CAI and CASAG of 9 September and 21 October 2014 to the Argentine



Republic (Exhibits C-8 and C-14) limit themselves to reiterating the previous position by recalling once more that Claimants were “looking forward” to Respondent’s comments to the first letter of 30 April 2014 and asking Respondent to inform them of its availability for a meeting “to conduct amicable consultations”. But they did not advance any concrete proposal to Respondent concerning where and when to call the suggested meeting or any other alternative meeting or how to organize the consultation or propose a draft agenda.

107. After 7 August 2014 Claimants did not move a jota from beyond reiterating in most general terms their readiness as per the letter of 30 April 2014. They never confronted Respondent with any kind of concrete proposal concerning the consultations or gave a warning or a hint to Respondent’s side. There are practical means to move along consultations or negotiations in international practice if there exists the will to do so. For example, the making of a soft intimation or *mise en demeure* through a proper communication or announcement or still more simply by sending a letter with fixed time-limits to get a positive answer from the other side as did, for example, Claimants in the *Abaclat* case (see, Decision on Jurisdiction and Admissibility of 4 August 2011, p. 43) (CL-131). Nothing of the kind occurred in the present case.
108. Claimants’ conduct did not show any eagerness to meet the other side or to organize somewhere the amicable consultations of Article 8(1) and (2) of the BIT. They did not come to Argentina or propose a third country as host for the amicable consultations. In fact, it was Mr. Wajntraub – appointed representative of Salta by a provincial decree – the one who tried and finally got in touch not without difficulties with the legal representative of the Claimants on 22 October 2014 and arranged with them through e-mail exchanges and the assistance of the Austrian Embassy in Buenos Aires a meeting that finally took place on 13 March 2015 in Vienna, namely more than three months after Claimants’ filing on 4 December 2014 of the Request for Arbitration with the Centre. (see paragraph 75 of the present Decision)
109. The factual evidence provided by Mr. Wajntraub in a written witness statement and oral testimony at the Hearing of his e-mail exchanges with the legal representatives of the Claimants and of what happened during the one-day Vienna meeting confirms my own perception that whatever might have been the Claimants’ initial intention on 30 April 2014 about holding with Respondent the “amicable consultations” prescribed by the BIT (although *as a second step*) it was over by October 2014. In the formation of that perception I took also account of the time needed by Claimants for

the preparation of the detailed Request for Arbitration they filed on 4 December 2014. In any case, a detailed analysis of the testimony of Mr. Wajjntraub is given in paragraphs 58 to 66 of Respondent's PHB.

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110. In the light of the considerations and conclusion above on the applicable law and factual evidence, I dissent from all the conclusions of the majority in paragraphs 284 to 292 of the present Decision, namely:
- (i) To define the “amicable consultation obligation” under consideration by reference to Article 8(1) of the Argentina-Austria BIT only, namely without major attention to the temporal element of the obligation;
  - (ii) To characterize the “amicable consultations” obligation of Article 8(1) and (2) of the Argentina-Austria BIT as a “soft obligation”;
  - (iii) To interpret of the words “as far as possible” in Article 8(1) as encompassing mere unilateral party's allegation of unwillingness of the other party or compliance with time-limits under a given domestic law and without taking account in the matter of the six months temporal element of the amicable consultations obligation as provided by Article 8(2);
  - (iv) To affirm that in no case the requirement of “amicable consultations” of Article 8 (1) and (2) of the BIT may be read as limiting the scope of Respondent's consent offer to arbitrate in paragraph Article 8(4) notwithstanding the jurisprudence on the matter of the ICJ and paragraphs 12 to 14 of Claimants' Request for Arbitration;
  - (v) To affirm that Claimants have fulfilled their obligation to comply with the requirement of “amicable consultations” of Article 8(1) and (2) of the BIT since 27 August 2013 when Mr. Tucek, the CEO of CASAG, met with representatives of the Province of Salta and of NREJA in order discuss how to reinstate ENJASA's exclusive license, namely at a time when there is no hint at all for any of the interested participants of any eventual “treaty claims dispute” between Claimants and Respondent;
  - (vi) To affirm without evidence in support Claimants' hypothetical argument that the reinstatement of ENJASA's license by the Province of Salta a “contract claim dispute” would have settled the present

“treaty claim dispute” between Claimants and Argentina Republic before this ICSID Arbitral Tribunal when in fact since 4 December 2014 Claimants by their own initiative are participating simultaneously in the Salta proceedings and the ICSID proceedings;

- (vii) To affirm without further ado that the acts, all the acts, of the Province of Salta are attributable under public international law to the Argentine Republic mixing up thereby the situation under international responsibility for international wrongful acts of international law with the attribution of contractual rights and obligations under the domestic laws of a given country;
- (viii) To affirm that the “amicable consultations” obligation of Article 8(1) contains a broad understanding to the effect that the “dispute” subject to amicable consultations could be any dispute with regard to investment, including negotiations concerning the reinstatement of ENJASA’s license, disregarding the text of the provision, the definition of “investment” in Article 1(1) of the Argentina-Austria BIT, the exclusive “treaty claims dispute” competence of the Arbitral Tribunal and without providing in support of such affirmation any preparatory work or any other kind of evidence;
- (ix) To affirm that the meetings which took place on 27 August 2013 between representatives of Claimants and the Province of Salta fulfil the need for Claimants to attempt the settlement of the present “treaty claims dispute” with the Argentine Republic through consultations, in full contradiction with CAI’s “Notification for the commencement of amicable consultations” to the President of the Argentine Republic dated 30 April 2014 and the six subsequent letters (the last one of 21 October 2014) inviting Respondent for such a commencement;
- (x) To affirm that the consultations Claimants attempted to initiate through these letters, which remained without response in substance because of their own lack of preparation, equally fulfil the requirement under Article 8(1) of the BIT, again without reference to the temporal element of the “amicable consultation obligation” in Article 8(2).

111. All the conclusions of the majority Decision affirming Claimants’ compliance with the precondition of “amicable consultations” are presented therein: (i) without answering directly any one of the arguments and evidence presented by the Respondent; (ii) without any indication of the VCLT applied by the majority Decision to the interpretation and

application of the conventional provisions in Article 8(1) and (2) of the Argentina-Austria BIT to reach the conclusions concerned; and (iii) without any hint as to how the majority proceeded for weighing, in the light of the applicable international law, the factual evidence submitted by each Party with their respective contentions, arguments, admissions or contradictions.

112. One obvious example of those general shortcomings in the motives of the majority Decision would be sufficient as an illustration of the above. CAI's letter of 30 April 2014 which subject-matter is, as indicated, the formal notification to the President of the Argentine Republic *for the commencement of amicable consultations under the Argentina-Austria BIT* and the series of subsequent letters which went on until 21 October 2014 referring to *the commencement of the said consultations* (all of which are in the records of the case) belied fully, in my opinion, the present majority Decision's conclusion on the core question of whether or not the meeting between Mr. Tucek and representatives of the Province of Salta and of ENREJA on 27 August 2013 had already fulfilled the amicable consultations precondition provided for in Article 8(1) and (2) of the Argentina-Austria BIT *without providing any evidence that the participants in the meeting were conscious of such an anticipated effect* or any other kind of evidence in support of that extravagant conclusion. In any case, this basic contradiction would deserve a complete demonstration in the motives of the Decision, which is missed.
113. I will recall further, because it is important to bear it in mind in the present phase of the case that the affirmation in paragraph 286 of the majority Decision to the effect that - for the purpose of compliance with the "amicable consultations" precondition of Article 8(1) and (2) of the BIT – the meeting of Mr. Tucek with the representatives of the Province of Salta "shows that the 'dispute', at the time, was not limited to claims for breach of domestic law between ENJASA and ENREJA, or the Province of Salta, but already concerned the rights of Claimants as foreign investor under the Argentina-Austria BIT" is a fallacy not only out of line with established facts and considerations of coherence and logic, but also by the reading of the text and context of the said provisions of the BIT and the jurisprudence of the ICJ (see above paragraph 93 of this Opinion). The subject-matter of the "amicable consultations" of the precondition must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations of the treaty in question. Nothing of that kind took place at the said Mr. Tucek's meeting on 27 August 2013 according to the written and oral evidence submitted by the Parties to the Arbitral Tribunal. It is also the appropriate moment to recall that according to the said jurisprudence

the absence of a *genuine* attempt to negotiate, the precondition of negotiation is not met.

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114. In sum, I reject the majority Decision’s conclusion on the precondition of “amicable consultations” obligation of Article 8(1) and (2) of the Argentina-Austria BIT and conclude that the Claimants failed to comply with its duty of trying first to solve the instant ICSID dispute between CAI and CASAG and the Argentine Republic for the following summarized core reasons:

- (i) Because Claimants as admitted did not try first to solve that “treaty claims dispute” before the Arbitral Tribunal through “amicable consultations”, as provided for in the sequential dispute settlement system of Article 8 of the BIT;
- (ii) Because Claimants’ affirmation to have complied with the “amicable consultations “of Article 8(1) and (2) has not been proven or the affirmation relate to facts concerning a dispute other than a “treaty claims dispute” before this ICSID Arbitral Tribunal;
- (iii) Because Claimants did not comply with the six months term established by Article 8 of the BIT for the “amicable consultations” considering that the earliest available date, in the circumstances of the case, to begin to count the said temporal term is 7 August 2014 and that Claimants filed with the Centre their Request for Arbitration on 4 December 2014, namely before completion of that term;
- (iv) Because Claimants invoke the exchanges held at the meeting between Mr. Tucek and representatives of the Province of Salta on 27 August 2013 when such invocation is not admissible under international law as declared by ICJ jurisprudence according to which to meet the precondition of negotiations prescribed in a dispute settlement clause of a given treaty the later must relate to the subject-matter of the treaty containing the dispute resolution clause so that the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question;
- (v) Because Claimants’ invocation of Mr. Tucet’s meeting of 27 August 2013 as complying with the “amicable consultations” requirement of Article 8(1) and (2) of the BIT is absolutely incompatible with CAI’ Notification to the President of the Argentine Republic of 30 April

2014 (joined in August 2014 by CASAG) of Claimants' readiness to commence "amicable consultations" pursuant to the Argentina-Austria BIT and the six subsequent Claimants' letters (the last one of 21 October 2014) insisting on the commencement of the said consultations; and

- (vi) Because CAI and CASAG never actually engaged in "amicable consultations" with the Argentine Republic and, therefore, according to international law as declared by ICJ jurisprudence Claimants are not entitled now to allege impossibility of compliance or a failure of consultations which never took place or that consultations would have become futile or deadlocked.

**(c) The prior condition of "submission of the dispute to the competent administrative or judicial jurisdiction" of the host State for a term of eighteen months**

- 115. Respondent contends that following the "amicable consultations" precondition, the next step of the system of investments disputes settlement of the Argentina-Austria BIT is the submission of the investment dispute to the competent administrative or judicial jurisdiction of the host State for 18 months, as provided for in Article 8(2) and (3) (a) of the BIT. As in the case of any other jurisdictional precondition the submission of the dispute to the host State competent domestic jurisdiction is mandatory for the protected investor and Claimants' reliance in the word "may be" (*podrá ser*) in Article 8(2) of the BIT is taken out of context and does not mean that recourse to domestic courts is discretionary. To the contrary, a contextual reading of Article 8(2) of the BIT indicates that it does not contain options but a mandatory precondition requiring recourse to local courts of the host States, as second step, prior to the submission to international arbitration.
- 116. For the Respondent, the only circumstance in which submission to local courts would not be necessary is that the Parties have agreed to disregard this step, which is not the case with the instant dispute. Failing that agreement recourse to local courts constitutes a jurisdictional precondition as already explained in this Opinion. International tribunals would have found that the absence of imperative language does not equal to the absence of a mandatory requirement, or mean that the treaty language can be ignored. Furthermore, Respondent affirms that the dispute filed with domestic courts cannot be different from the one submitted to international arbitration and that the term "dispute" in Article 8 is not broad enough to

permit unrestricted access to ICSID jurisdiction, while rejecting Claimants' arguments that there were not competent courts and administrative authorities in Argentina to address their grievance and that submission to Argentine courts would have been futile within the limited span of 18 months established in Article 8(3)(a) of the BIT.

117. Claimants contend that they fulfilled their obligation under Article 8(2) of the BIT to submit the dispute to the competent administrative or judicial jurisdiction of the Province of Salta (Argentina). They assert that ENJASA's recourse for reconsideration of ENREJA Resolution N° 240/13 was a recourse to the competent administrative jurisdiction, underlining in that context that unlike most other BITs of Argentina and Austria the BIT applicable to the present case specifically refers not only to "competent judicial jurisdiction" but also to the "competent administrative jurisdiction". Claimants assert likewise that they were not required to wait for six months before submitting the dispute to domestic authorities, as provided for under Article 8(2) of the BIT, because the recourse for reconsideration under domestic law had to be introduced within 15 days and, in such circumstances, the consultation waiting period cannot be a mandatory waiting period of six months.
118. A further assertion of Claimants was that the domestic administrative issues are the same as those raised in the present ICSID arbitration and, consequently, it would follow that the dispute in domestic administrative proceedings would be the same dispute as the one pending before the present ICSID Arbitral Tribunal. In their view it would be contrary to the text, context and object and purpose of Article 8 of the BIT that the scope of the term "dispute" in the Article be construed as narrowly as proposed by the Respondent. According to the Claimants Article 8 would not require that the dispute submitted to the domestic administrative or judicial authorities be *identical* as the one before this ICSID Arbitral Tribunal. All that Article 8 of the BIT would require is, for Claimants, that "the pleaded facts are substantially similar and concern the same protected investment" (Claimants' PHB, para. 258).
119. Finally, Claimants argue further that they have also complied with Article 8(3) of the BIT which provides that the investor may proceed to international arbitration either if no decision on the merits has been reached by domestic courts within 18 months as stipulated Article 8(3)(a), or once a decision on the merits was rendered but the dispute persists as stipulated in Article 3(b).

120. This latter alternative, in Claimants' view, happened with ENREJA Resolution N°. 315/13 which would be a decision on the merits on ENJASA's recourse for reconsideration of Resolution N° 240/13 even if it could still be appealed before a higher administrative authority (recourse of "*alzada*"). The notion of a "decision on merits" and a "final decision" should not be equated, the latter being a decision without appeal. Claimants contend also that "the dispute" arose with the passing of ENREJA's Resolution N° 240/13, not with the adoption of its Resolution N° 315/13.

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121. In the face of Claimants' *totum revolutom* approach on the interpretation and application of the precondition of Article 8(2) and (3)(a) of the Argentina-Austria BIT, this arbitrator considers it a necessity - since the outset of the consideration of this prior-recourse to competent administrative or judicial jurisdiction of the host State for 18 months - to recall first the well-established distinction in international investment law between "*contract claims*" and "*treaty claims*" and secondly that if - as admitted by the majority Decision - the present ICSID case is a "*treaty claims dispute*", *it must be so all along and in all respects* and not only with regard to the Respondent's First Preliminary Objection in order to overcome the forum selection clause of the Bidding Terms of the license.

122. It is necessary to deal with the said distinction for objective as well subjective reasons. Concerning the objective ones, Article 8(1) of the Argentina-Austria BIT states explicitly that it applies with regard to investment disputes between an investor of one of the Contracting States and the other Contracting State concerning any subject- matter governed by this Agreement (*Toda controversia relativa a las inversiones entre un inversor de una de las Partes Contratantes y la otra Parte Contratante sobre las materias regidas por el presente Convenio*), not further or otherwise.

123. As to the subjective reasons, paragraph (1) of Claimants' Request for Arbitration against the Republic of Argentina of 4 December 2014 cannot be clearer. The Request is made in accordance with Article 36(1) and (2) of the ICSID Convention, Article 2 of ICSID Institution Rules and Article 8 of Argentina-Austria BIT of 7 August 1992. No doubt therefore that the Claimants' Request for Arbitration itself excludes altogether domestic contract disputes or claims - as the ones between ENJASA and ENREJA or between ENJASA and the Province of Salta - from the subject-matter of the present ICSID arbitration case as defined by Claimants themselves.



124. Having clarified that the subject-matter of the instant ICSID arbitration dispute between CAI and CASAG and the Republic of Argentina is “*treaty claims dispute*” - and no “umbrella clause” having been alleged or otherwise invoked in this jurisdictional phase by Claimants - this arbitrator in his consideration of the second jurisdictional precondition of Article 8(2) and (3) of the BIT will apply the interpretation and application rules of the VCLT and other relevant principles and rules of international law applicable in the relations between Austria and Argentina without losing sight of the differentiation between a “*treaty claims dispute*” and a “*contract claims dispute*” object of particular doctrinal attention (see, for example, James Crawford, *Treaty and Contract in Investment Arbitration*, Arbitration International, (Kluwer Law International 2008, Volume 24, issue 3 pp. 351-374).
125. Investment arbitration case-law has also taken the above distinction duly into account, as in the following passages of the *Abaclat and others v. Argentina* Decision on Jurisdiction and Admissibility:

“It is in principle admitted that with respect to a BIT claim an arbitral tribunal has no jurisdiction where the claim at stake is a pure contract claim. This is because a BIT is not meant to correct or replace contractual remedies, and in particular it is not meant to serve as a substitute to judicial or arbitral proceedings arising from contract claims. Within the context of claims arising from a contractual relationship, the tribunal’s jurisdiction in relation to BIT claims is in principle only given where, in addition to the alleged breach of contract, the Host State further breaches obligations it undertook under a relevant treaty. Pure contract claims must be brought before the competent organ, which derives its jurisdiction from the contract, and such organ – be it a court or an arbitral tribunal – can and must hear the claim in its entirety and decide thereon based on the contract only” (Decision of 4 August 2011, para. 316) (CL-131).

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126. In the present case, the Parties, as shown above in paragraphs 116 to 118 of this Opinion, are in disagreement on the question of whether or not under of the Argentina-Austria BIT the “dispute” submitted to the international arbitral body must be rather the same or covered substantially the same dispute as the one submitted beforehand to the local courts pursuant to Article 8(2) and (3) of the present BIT (obligation constituted by both *ratione fori* and *ratione temporis* elements). Respondent relies mainly on the conclusion of the *Wintershall* Tribunal to the effect that in the

corresponding Article 10 of the Argentina-Germany BIT the 18 months rule was premised on the submission of the entire dispute for resolution to the local courts and also in statements of other investment arbitration tribunals (for example, by the Tribunal in *Omer Dede and Serdar Elhuseyni v. Romania*).

127. The *Urbaser v. Argentina* tribunal observed rightly that in *Wintershall the Arbitral Tribunal's* emphasis was placed on the notion of a “same *dispute*” or on “*dispute* coextensive” with the dispute under the BIT:

“The key concept in Article X of the BIT [Argentina/Germany BIT] is the ‘dispute’, not the relief requested. There is no indication whatsoever that the investor should not be entitled to present its dispute ‘in full’ before a domestic court. The *Wintershall* Tribunal therefore correctly noted that the 18 month[s] rule is premised on the submission of ‘the entire dispute for resolution in local courts’.

...

“The claim before the local courts must be ‘coextensive’ with a dispute relating to investments made under the BIT. The nature of the “dispute” brought before domestic courts may be broad. The objective of the judicial filing is indeed to provide the domestic court with an opportunity to fashion a suitable remedy that may obviate international arbitration. For such a result to be reached, it is not necessary for the domestic court to adjudicate the claim within the framework of the BIT. What is required, however, is that the cause of action to be adjudicated at the domestic level be of such a nature as to allow for the resolution of the dispute to the same extent as if the claim had been brought before an international arbitration under the BIT. As the *Wintershall* tribunal stated, it must be possible to bring the ‘entire dispute’ before the competent local court” (*Urbaser v. Argentina*, Decision on Jurisdiction of 19 December 2012, paras. 180-181) (AL RA 41).

128. Claimants are of a different view. They contend that Respondent’s position on the scope of the term “dispute” in Article 8 of the Argentina-Austria BIT was too narrow and argue in favour of what they define as a “broad” meaning or understanding of the term in question in the context of Article 8, invoking in that regard the decisions of *Teinver v. Argentina* Tribunal (2012) and *Philip Morris v. Uruguay* Tribunal (2013). Furthermore, Claimants submitted that contention as if the proposition would be one of general application. However, they reached the said conclusion without

applying either the VCLT rules on interpretation of treaties or any other rules or principles of law in support of the contention. In my opinion, this Claimants' contention is erroneous and, consequently, not acceptable for this arbitrator, in addition to being a misrepresentation of *Teinver* and *Philip Morris* to affirm that its conclusions are susceptible of application to the legal and factual circumstances of the present case.

129. The conclusions of *Teinver* and *Philip Morris* differ from those of *Wintershall* by the simple reason that the dispute resolution clauses of the Argentina-Spain BIT and of the Switzerland-Uruguay BIT have quite different wordings than the wording of the corresponding clause in Argentina-Germany BIT, but the three tribunals applied the same principle, namely that the dispute resolution clause of the BIT applicable to the case concerned must be interpreted and applied in accordance with the relevant rules of the VCLT. The three tribunals respected therefore the intention of the Contracting States as reflected in the respective texts of each of those three BITs. A conclusion that is far from being true as regards the present majority Decision which in approaching the question of the meaning “dispute” (“*controversia*”) – term which appears in the first fives and in the last paragraphs of Article 8 of the Argentina-Austria BIT – disregards the “context” represented by the wording of Article 8 as a whole in the interpretation of said term.
130. The verification of the above conclusions may be done very easily by a comparison between the text of the relevant paragraphs of Article 8 of the Argentina-Austria BIT (quoted in paragraph 13 of the present Opinion) and the texts of the corresponding paragraphs of the dispute settlement clauses of the BITs applicable in the *Teinver* (Argentina-Spain BIT) and *Philip Morris* (Switzerland-Uruguay BIT) cases:

Argentina-Spain BIT (Requirements in Article 10(1) and (2))

“1. Disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute.

2. If a dispute within the meaning of section 1 cannot be settled within six months as from the date on which one of the parties to the dispute raised it, it shall be submitted, at the request of either party, to the competent tribunals of the Party in whose territory the investment was made.” (*Teinver v. Argentina*, Decision on Jurisdiction of 21 December 2012, para. 74) (CL-137).

## Switzerland-Uruguay BIT (Requirements in Article 10(1) and (2))

“1. Disputes with respect to investments within the meaning of this Agreement between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties concerned.

2. If a dispute within the meaning of paragraph (1) cannot be settled within a period of six months after it was raised, the dispute shall, upon request of either party to the dispute, be submitted to the competent courts of the Contracting Party in the territory of which the investment has been made. If within a period of 18 months after the proceedings have been instituted no judgment has been passed, the investor concerned may appeal to an arbitral tribunal which decides on the dispute in all its aspects.” (*Philip Morris v. Uruguay*, Decision on Jurisdiction of 2 July 2013, para. 25) (CL-134).

131. It is quite clear that the scope of the term “disputes” (in the plural) *with respect to investments within the meaning of the BIT* in the settlement resolution clauses of the BITs applied in *Teinver* and *Philip Morris* is broader than term “dispute” (in the singular) *on any subject matter governed by the BIT* of Article 8 of the Argentina-Austria BIT. In *Teinver* and *Philip Morris* the term “disputes” may encompass, for example, more than one dispute and left open the door to different degrees of similarity or resemblance between them. The problem for arbitral tribunals in the case of these BITs is to determine the test for determining the relationship which must exist between the two or more of the disputes concerned.
132. Thus, the *Teinver* Tribunal referred to a domestic litigation suit and an international arbitration suit as *having in casu the same subject-matter* and that *the goal* of both suits was to make the Claimants’ “whole for the economic loss suffered as a result of the nationalization” (Decision on Jurisdiction of 21 December 2012, para. 132) (CL-137) and further that the BIT “permits either party to initiate local court proceedings for purposes of Article X.” (*Ibid.*, para. 134) In the *Philip Morris* case, Article 10(1) of the BIT referred to “disputes with respect to investments” and other provisions of the same article referred also to “disputes” in the plural. The Tribunal expressly stated that account must be taken of the plural of dispute (Decision on Jurisdiction of 2 July 2013, para. 100) (CL-134).
133. The *Philip Morris* Tribunal had to decide whether Claimants had failed to satisfy the 18 months domestic litigation requirement of Article 10(2) of the Switzerland - Uruguay BIT on the following grounds: (i) Claimants

failed to litigate their treaty dispute in Uruguayan courts and (ii) Even if they had submitted the dispute to Uruguayan courts, Claimants were required to have litigated for 18 months before initiating arbitration. The tribunal rejected both preliminary objections on the following grounds:

*First ground*

“... by submitting their domestic law claim through the Requests for Annulment filed with the TCA to the Uruguayan Courts the Claimants satisfied the domestic litigation requirement under Article 10(2) of the BIT. The term ‘disputes’, as used in Article 10(2), is to be interpreted broadly as concerning the subject matter and facts at issue and not as limited to particular legal claims, including specifically BIT claims. The dispute before domestic courts under Article 10(2) does not need to have the same legal basis or cause of action as the dispute brought in the subsequent arbitration, provided that both disputes involve substantially similar facts and relate to investments as this term is defined by the BIT.” (Decision on Jurisdiction of 2 July 2013, para. 113) (CL-134);

*Second ground*

“The domestic litigation requirement had not been satisfied at the time this arbitration was instituted. The present case differs from the other cases where jurisdiction has been denied due to the absence either of a dispute expressed in legal terms or of any actions by the investor to address its claims to the domestic court before resorting to arbitration. Nonetheless, even if the requirement were regarded as jurisdictional, the Tribunal concludes that it could be, and was, satisfied by actions occurring after the date the arbitration was instituted. The Tribunal notes that the ICJ’s decisions show that the rule that events subsequent to the institution of legal proceedings are to be disregarded for jurisdictional purposes has not prevented that Court from accepting jurisdiction where requirements for jurisdiction that were not met at the time of instituting the proceedings were met subsequently (at least where they occurred before the date on which a decision on jurisdiction is to be taken).” (*Ibid.*, para 144).

134. The considerations and quotations above show beyond any doubt that the legal and factual circumstances of *Teinver* and *Philip Morris* are quite different from those of the present case. But, in those two cases, like in *Wintershall*, the determinative factor to define the meaning and scope of the term “dispute” or “disputes”, as the case may, be in the dispute-

settlement-clause has been the intention of the Contracting States of the BIT as reflected in the wording given by them to the corresponding dispute-settlement-clause of the applicable BIT interpreted and applied in accordance with relevant rules of the VCLT and, eventually, with other relevant rules of public international law as well.

135. The dispute-settlement-clauses in *Teinver* and *Philip Morris* were broad enough to include more than one kind of dispute on investments extending, for example, the meaning and scope of the term “disputes” beyond treaty-based disputes, or including contract disputes not involving treaty breaches, or disputes regarding domestic law claims in addition to treaty claims, etc. In all those situations, two or more different disputes *may fall within the scope of the clause* and the problem becomes the question of the relationship between the disputes concerned, solved in the case law most frequently by reference to notions such as the “subject-matter” or “object and purpose” of both disputes or its respective “cause of action”, or a much less frequent case, by reference to the notion of “substantially similar facts” or to a combination of these criteria.
136. But, the above situation is alien to the present case because the meaning and scope of the term “dispute” in Article 8 of the Argentina-Austria BIT refers exclusively to a “single dispute” and to a “treaty (BIT) claims dispute” all along the successive paragraphs of Article 8 and, furthermore, in the present case the conditions and requirements of Article 8 were not been satisfied by Claimants not only on 4 December 2014 when they instituted the case but also on the date of issuance of the present Decision on Jurisdiction.

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137. It follows from the above that in the present ICSID arbitration the formula adopted by Argentina and Austria in the text of Article 8 of their BIT is determinative for ascertaining the meaning and scope of the term “dispute” in that provision. Then, that formula follows *mutatis mutandis* the corresponding clause of the Argentina-Germany BIT (*Wintershall*) and some other like BITs concluded by Argentina (for example, with the United Kingdom) and by no means the broader formulas of the term “disputes” used in the Argentina-Spain BIT (*Teinver*) or in the Switzerland-Uruguay BIT (*Philip Morris*).
138. It is for that reason that the *Wintershall* Tribunal’s conclusions on the meaning and scope of the term “dispute” in the dispute-settlement-clause of the Argentina-Germany BIT are essentially similar to the conclusions of

this arbitrator regarding the meaning and scope of that term “dispute” in Article 8 of the Argentina-Austria BIT, namely that the term refers all along the paragraphs of the Article to *one and the same treaty claims dispute* and not further or otherwise. The text of Article 8 of the applicable BIT does not allow, if interpreted in accordance with the rules on interpretation of treaties of the VCLT, to reach a different conclusion with respect of the intentions of Argentina and Austria when in 1992 they formulated and adopted the text of Article 8 of their BIT.

139. The same applies regarding the mandatory nature of the precondition to international arbitration of Article 8(2) of the Argentina-Austria BIT, explained in the *Wintershall* award with reference to Article 10(2) of the Argentina-Germany BIT, as follows:

“Article 10(2) [Article 8(2) in the present case] 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 have considered to be an appropriate judicial body. It does not mention what relief should be sought in the domestic courts, nor does it require that it should be the same or similar relief to that sought in international arbitration. Whatever may have been the object in contemplation of the Contracting States when the Argentina-Germany BIT [Argentina-Austria in the present case] was agreed to and adopted, (and there is no evidence of this in the present case apart from the text of the treaty – i.e. the BIT) it does definitely indicate a compulsion to comply – (not, as erroneously stated in paragraph 95 of Claimant’s Counter-Memorial on Preliminary Objection of Jurisdiction a mere ‘option’ to comply).” (*Wintershall v. Argentina*, Award of 8 December 2008, para. 118) (AL RA 38).

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140. In the light of the above conclusions, in the present case the question raised by Claimants’ contention of the broadness of term “dispute” in Article 8 of the Argentina-Austria BIT has to be answered with the framework of a single “treaty claims dispute” as prescribed in the very text of Article 8. There is not room in the Article either for more than one “treaty claims dispute” or for any kind of “contract claims disputes”.
141. Placed within that appropriate frame, this second aspect of the Claimants’ “broad scope argument” appears to be a proposition without limitations. Everything fitting Claimants’ propositions will fall within the scope of the

present “treaty claims dispute”. It is indeed a contention which, as presented, appears out of control by the applicable law to the point of making a caricature of the very *notion of “dispute”* defined in public international law by reference to the three classic elements of *parties, petitum* and *causa petendi*, the two last ones (*petitum* and *causa petendi*) defining the *subject-matter* of the dispute.

142. I feel the need to recall the criteria which define in law the term “dispute” - *which is the term subject to interpretation* in Article 8 of the BIT and not any other gratuitously extrapolating therein like, for instance, “claims” “relief” or “facts” (see *Urbaser* in paragraph 127 of this Opinion) - because of the following contradictory and amazing conclusion of the majority:

“In light of the above, the Tribunal concludes that ENJASA’s Action for Annulment of Resolutions Nos. 240/13 and 315/13 complied with the need to have recourse to domestic remedies under Article 8(3) of the BIT. This recourse has also been submitted after amicable consultations had been initiated with the meeting of Mr. Tucek with representatives of the Province of Salta of 27 August 2013 and pursued in subsequent meetings. Since this recourse has now been pending for more than 18 months without a decision on the merits, the Tribunal finds that it can exercise its jurisdiction in the present case and proceed to the merits.” (present Decision, para. 328).

143. I do not find any kind of support in the elements of law and fact of the case before this ICSID Arbitral Tribunal for such a rigmorole conclusion of the majority in which on the basis of alleged “substantially similar facts” between selected proceedings of the “contract claims dispute” case going on in Salta since 2013, and being since 5 February 2014 before the First Instance Court of Salta because an ENJASA’s request for annulment of ENREJA’s Resolutions 240 and 315 and Decrees of the Province thereto (*ENJASA v. Province of Salta* dispute), and the present international “treaty claims dispute” before this Arbitral Tribunal on compensation for damages for alleged breaches by the Argentine Republic of certain standards of the Argentina – Austria BIT pursuant to CAI and CASAG’ Request for Arbitration of 4 December 2014 filed with ICSID on 4 December 2014. By so doing the majority admits the fact that the “treaty claims dispute” before the Arbitral Tribunal has never been submitted to an administrative or judicial jurisdiction of the Argentine Republic. Then, the provision in Article 8(2) and (3)(a) of the Argentina-Austria BIT is premised on the prior submission of the dispute before the Arbitral Tribunal to the competent domestic jurisdiction of the host State of the investment. What counts under the Argentina-Austria BIT is not the



“similarity of facts”, as could be under other BITs, but the identity of the dispute, the present “treaty claims dispute” in the instant case.

144. The quoted paragraph of the Decision is contradictory with itself because in order to reject Respondent’s First Preliminary Objection the present case is a “treaty claims dispute” while now to reject Respondent’ Second Preliminary Objection it extrapolates to the proceeding of present treaty claims dispute the domestic judicial proceeding going on in the First Instance Court of Salta, and this Arbitral Tribunal is without competence for any dispute on “contract claims”. And it is an amazing conclusion that does not find justification in the law and facts of the case, it is in breach of the VCLT rules on interpretation of treaties and it is a backward decision with respect to the clarification of the distinction which must be made between compliance with international law and compliance with domestic law as explained in the *Vivendi Annulment* decision and, before, as advised by the ICJ in the following passage of the *Elettronica Sicula* case:

“Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.” (*Case Concerning Elettronica Sicula S.p.A., ICJ Reports 1989*, p. 51, para. 73) (AL RA 193).

145. Moreover, for the determinations to be made by this Arbitral Tribunal at the present phase of the case the facts relevant are those concerning Claimants’ conduct with respect to their compliance or not with Article 8(1) to (4) of the BIT and not the behaviour, whatever it may be, of ENJASA in local judicial proceedings relating to the contract claims of its dispute with the Salta Province concerning certain Resolution adopted by ENREJA as *ente regulador* of the market concerned. The dispute with the Province of Salta is not subject in any respect to the conditions and requirements of the BIT and/or the systemic rule of public international law of State’s consent to the jurisdiction of international courts and tribunals.
146. ENJASA is litigating under the domestic legislation of the Salta Province, while in the present phase of this ICSID arbitral proceedings the existence of jurisdiction and competence requires the concurrence of (i) a treaty as the Argentina-Austria BIT and (ii) an “arbitral agreement” executed by the mutual consent of the parties to the dispute, namely CAI and CASAG as Claimants and the Argentine Republic as Respondent. Then, in none of these legal instruments there is a place for ENJASA and its domestic

proceedings in the Salta Province in this phase of the case. The criteria of “substantially similar facts” is also irrelevant in the present “treaty claims dispute” in which the core issue is the interpretation of the term “dispute” in Article 8 of the Argentina-Austria BIT with reference to a single treaty claim dispute as per Claimants’ Request for Arbitration. Even in the hypothesis of being in need of determining the relationship between two disputes, as in *Philip Morris*, the criteria of “substantially similar facts” was not alone. It was preceded by a reference to the “subject-matter” of both disputes and followed by the words applicable also to both disputes that the facts concerned be “related to investments as the term is defined in the BIT” applicable (see paragraphs 133 of the present Opinion).

147. The subject-matter of the present ICSID arbitration proceeding is not similar in any respect to the subject-matter of Salta domestic proceeding, and extrapolation of events from the latter to the former in matters of jurisdiction and competence appears a wavering move without grounds either in international law or in the logic of international judicial proceedings and questioning the *integrity* of both judicial proceedings. The subject-matter of the present ICSID international arbitration is compensation for alleged breaches by the Argentine Republic of three material treaty standards (expropriation, fair and equitable treatment and discrimination) of its BIT with Austria, while the subject-matter of the dispute going on in the domestic court of Salta Province is the annulment of certain Resolutions adopted by *ENREJA* by alleging breaches of the domestic provincial applicable law adopted in the exercise of its regulatory functions and related decrees of the Government of the Province. In any case, these subject-matters of each of these judicial proceedings are quite different from each other to the point as appearing as being mutually incompatibly, underlying thereby the premature filing of the Request for Arbitration on 4 December 2014.
148. Last but not least, the conclusion of the majority based upon what I consider to be an oxymoron denies in fact the Arbitral Tribunal’s limited competence as established by the text of Article 8(1) to (5) of the BIT (see paragraphs 121-125 of the present Opinion). It is clear according to these texts of those provisions that the present Arbitral Tribunal has no competence over pure contract claims and ENJASA’s domestic proceedings going on in the Salta Province relate to pure contract claims. A good reason indeed to avoid interfering as done by the majority Decision *to avoid concluding with the proven fact* of Claimants’ non-compliance with the precondition of submission of the instant “treaty claims dispute” to the competent administrative or judicial jurisdiction of the host State for a term of eighteen months, as provided for in Article 8(2) and (3) (a) of the

Argentina/Austria BIT, and *replacing* it without any support in the applicable law and the facts of the case by the proceedings on ENJASA's request for annulment of the said ENREJA's Resolutions going on since 5 February 2014 in the First Instance Court of Salta. An *ultra vires* approach indeed.

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149. For the this arbitrator, Claimants have obviously not complied with the prior condition of international arbitration of submitting the *present treaty claims dispute* (the only one before this Arbitral Tribunal) to the competent administrative or judicial jurisdiction of the Argentine Republic, in its condition of host State, for a term of eighteen months simply by reasons of convenience and, in any case whatever the reason or reasons, it is a proven matter of fact that *such an event never took place* as commanded by Article 8 (2) and (3) (a) of the BIT. In the case of this precondition of Article 8 (as in the case of the others considered before) Claimants failed to conduct themselves as provided for in Article 8 of the Argentina –Austria BIT in order to be entitled *thereafter* to have access to ICSID international arbitration.
150. However, Claimants have been authorized by the majority Decision “to proceed to the merits” and that happened in spite that Claimants as third parties to the BIT are holding under it secondary rights only. Thus, the fundamental *pacta sunt servanda* rule prompted me to ask myself the question: how is it possible? I guess that by a series of subjective or free interpretations which put aside altogether not only the texts of the prescriptions provided for in the dispute- settlement-system of Article 8 of the BIT and the relevant rules of the ICSID Convention, but also the Vienna Convention on the Law of Treaties (VCLT) itself, notwithstanding that, in addition to enouncing codified international law on the subject, it is a Convention to which both Argentina and Austria are Parties. The outcome of this lacuna is a kind of hodgepodge which does not fit in with Article 8 of the BIT, the VCLT and other rules of the public international law applicable in this phase of the case.
151. Furthermore, the majority Decision following the way of pleading of Claimants qualified Respondent's contentions on the duty of protected investors to comply with Article 8 of the BIT as adopted by Argentina and Austria with names such as “strict reading”, “overly formalistic”, “slavishly compliance”, “unfairly”, “stall or cause delay”, “increase the costs”, etc. to such an extent that sometimes the motives of the Decision look like the plea of a party. Another way that the Decision excuses

Claimants' non-compliances used and abused in the motives is by self-defining the object and purpose of the BIT provision concerned by presuming that States adopt BITs for the sole benefit of the protected investors and that investors' interest or convenience should be the prevailing guidance, if not the only one, for the interpreter, without regard for *pacta sunt servanda* and the law of treaties and/or other rules of international law such as the rule of State's consent to the jurisdiction of international courts and tribunals.

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152. In the light of the considerations and conclusion above on the applicable law and evidence submitted by the Parties, I dissent from all the core conclusions of the majority in paragraphs 296 to 328 of the present Decision. Here, the *totum revolutum* approach of Claimants, assumed by the majority Decision, with its mix-up of everything - including the proceedings of the "*contract claims dispute*" between ENJASA and the Province of Salta and the proceedings on the instant "*treaty claims dispute*" between CAI and CASAG as Claimants and the Argentine Republic as Respondent - reaches indeed in the case of the present precondition its climax, in detriment of the integrity of the Argentina – Austria BIT, the rules of public international law applicable and the preservation of legal security in the relation between protected investors and host States.
153. The annulment proceeding of ENREJA's Resolutions instituted by ENJASA before the First Instance Court of Salta would retroactively mean for the majority Decision compliance by CAI and CASAG with their obligation under Article 8(2) and (3) of the BIT (prior submission of the present treaty dispute to the domestic competent administrative or judicial jurisdiction for a term of 18 months), in the same way that the exchanges at the meeting held on 27 August 2013 of Mr. Tucek with representatives of the Government of the Province and of ENREJA would retroactively mean compliance of CAI and CASAG with their obligation under Article 8(1) and (2) of the BIT (prior amicable consultations on the present treaty dispute for a term of six months).
154. The motives of my rejection of the individual conclusions of the majority Decision in the said paragraphs 296-328 are given below selectively and in summary form:

1. *The notion of dispute in Article 8 of the Argentina/Austria BIT*

- (i) That for determining Claimants' compliance with the precondition of having recourse to the competent administrative or judicial jurisdiction of the host State provided for in Article 8(2) and (3) of the BIT it would be necessary for the Tribunal in the instant case to address first the nature of one or the other of domestic recourses instituted under the law of the Salta Province by ENJASA against the revocation of its license by ENREJA. *Irrelevant.*
- (ii) To affirm as a general proposition that the recourse to the domestic jurisdictions of Article 8(3) of the BIT cannot be understood narrowly in the sense that the domestic dispute or disputes and the dispute submitted to ICSID arbitration be identical (in parties and cause of action), because it would hardly be in line with the object and purpose of BITs. *Wrong under the present Argentina -Austria BIT.*
- (iii) To affirm as a general proposition that investment treaty tribunals have generally adopted a broader notion of dispute for the purpose of determining whether domestic-remedies-first in investment treaties have been complied with. *Wrong, depending on the text of the dispute-settlement-clause of the applicable BIT.*
- (iv) To suggest that the quoted passages of the *Teinver* and *Philip Morris* decisions on jurisdiction would endorse a broad notion of dispute in the matter as a kind of rule or guidance of general application by investments tribunal. And that the fact that Article 8 (2) provides that the dispute in question may be "submitted to the competent administrative or judicial jurisdiction" would support a broad notion of the term dispute. *Wrong because the text of the dispute-settlement-clauses of the Argentina-Spain BIT and Switzerland-Uruguay BIT differ from the text of Article 8 of the Argentina-Austria BIT and, because the alternative "administrative" or "judicial" jurisdiction is irrelevant to the interpretation of the term 'dispute' in Article 8 of the BIT.*
- (v) To affirm, on the basis of the *Teinver* and *Philip Morris* conclusions, that the domestic recourses by ENJASA under Salta law against the revocation of the license or the annulment of ENREJA's decisions are able to fulfill the domestic-remedy-recourse of Article 8 of the Argentina/Austria BIT. And that the so-called narrow reading of the notion of dispute would be incompatible with a good faith reading

of Article 8(2) and 8(3) of the BIT under the interpretation rules of the VCLT. *Wrong inter alia because Article 8 of the present BIT limits the competence of this Arbitral Tribunal to “treaty claims disputes” exclusively and because a good faith reading of Article 8(2) and (3) commands to respect the text of the applicable treaty provision concerned*

## 2. Compliance with Article 8(2) of the BIT

- (vi) The affirmation that for the determinations to be made by the Arbitral Tribunal in the present phase of the case the question arises as to which one, if any, of ENJASA’s recourses pursuant to the laws of the Salta Province complied with Article 8(2) of the BIT. *Irrelevant.*
- (vii) That the different conclusions reached by the majority to the effect that the “recourse for reconsideration ENJASA submitted against Resolution N°. 240/13 to ENREJA” which would not meet the requirement that the dispute must have been submitted to an ‘administrative jurisdiction’ in the sense of Article 8(2) of the BIT (which I accept), while ‘the recourse for annulment initiated by ENJASA on 5 February 2014 of ENREJA Resolutions N° 240/13 and 315/13 with the First Instance Court of Salta qualifies as a recourse to domestic courts as required by Article 8(2) of the BIT are relevant in the case for the determination by the Arbitral Tribunal of its jurisdiction. *Both hypotheses irrelevant*
- (viii) The qualification of the temporal element of six months period of the “amicable consultations obligation” in Article 8(2) as a “waiting period” which cannot be complied with “slavishly” before going to the second prior condition of “competent administrative or judicial jurisdiction” of the host State. *Wrong, as it is contrary to the text of the provision.*
- (ix) The affirmation that the recourse to the “amicable consultations obligation” being qualified by the words “as far as possible” means that the parties can only be expected to exhaust the negotiations period of six months to the extent this is feasible *Wrong as it is contrary to the text of the provision.*
- (x) That any other construction would create contradictions between Article 8(1) and Article 8(2) of the BIT and, at the same time, suggest replacing in the process of interpretation the notion of

“dispute” by the notion of the “investment” and making wider the object of the required negotiations. *Wrong, the alleged contradiction is self-induced, the object of the interpretation is the term “dispute” and the object of the required negotiations is the dispute before the Arbitral Tribunal.*

- (xi) That in the light of the time-limits and other requirements of ENJASA’s local proceedings challenging the revocation of the license, no breach of the negotiation period in article 8(2) of the BIT has occurred. *Wrong because time-limits and requirements of the Salta local proceeding are irrelevant for the interpretation and application of Article 8 of the BIT.*

### 3. Compliance with the 18 months requirement in Article 8(3)(a) of the BIT

- (xii) That whether the non-compliance with the 18 months requirement at the time of initiating the ICSID arbitration may make Claimants’ claims inadmissible under Article 8(3) of the BIT. *Irrelevant because the 18 months requirement is part and parcel of a jurisdictional precondition and not a cause of inadmissibility.*
- (xiii) That Claimants have complied with the temporal element of the prior obligation of submitting the dispute to the competent administrative or judicial jurisdiction of the host State because by now (May 2018) 18 months have passed since 5 February 2014 when ENJASA submitted its claim for annulment to the courts of Salta. *Wrong because ENJASA’s domestic courts proceeding is irrelevant for the interpretation and application of the 18 months term of Article 8(3)(a) of the BIT.*
- (xiv) That requiring that 18 months must have passed before international arbitration is initiated is overly formalistic and not in line with the object and purpose of the domestic-remedies-first requirement as contained in Article 8(3) of the BIT and, furthermore, the allegation that because the dispute may be submitted to international arbitration “whenever” they have agree to do so (Article 8 (3) (c) ) it must also, *mutatis mutandis*, be irrelevant for purposes of timing of seisin under Article 8 (3) *Wrong because it is contrary to the text of Article 8(3)(a) of the BIT and because under that provision of the BIT the parties are not acting pursuant to a particular agreement directly concluded by the parties to the dispute concerned.*

- (xv) That the purpose of a domestic-remedies-first requirement is not to stall or to cause delay, nor to increase the costs for the investors by requiring them to pursue domestic remedies first. *Quite irrelevant for the interpretation and application of Article 8 of the BIT.*
- (xvi) That to insist on strict compliance would be an exaggerated formalism that is incompatible with the fair administration of international justice and the principle of good faith in aiming to settle international disputes. *Quite irrelevant for the interpretation and application of Article 8 of the BIT.*
- (xvii) That strict insistence on the 18 months term would no longer at present prevent Claimants from reinitiating an identical arbitration without facing jurisdictional obstructions because of the 18 months requirement from Article 8(3)(a) of the BIT. *Irrelevant. Claimants did not comply with that term before or after instituting the present case because they never complied with the precondition to which the term refers.*
- (xviii) That the quoted conclusions of *Teinver v. Argentina* and *Philip Morris v. Uruguay* are applicable in the circumstances of the present case and with the same effect. *Wrong, because those conclusions do not correspond to the prescriptions of the BIT applicable in the present case.*
- (xix) That ENJASA's recourse to annul Resolutions N° 240/13 and N° 315/13 submitted to the domestic courts of Salta concerned "substantially similar facts" as the dispute instituted by Claimants before the Arbitral Tribunal and fulfils the temporal element of domestic-remedies-first requirement in Article 8 (3) of the BIT and, therefore, the Tribunal has jurisdiction in the case to proceed to the merits. *Quite wrong because Article 8 of Argentina-Austria BIT refers in all its paragraphs to a "single treaty dispute", not to two or more disputes eventually of different kinds, as does the majority Decision.*

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155. In sum, I reject the majority Decision's conclusions on this precondition to international arbitration - set forth in Article 8(2) and (3) of the Argentina-Austria BIT - and conclude that the Claimants failed to comply with that jurisdictional obligation for the following seven resumed core reasons:



- (i) Because Claimants did not try to solve the present “treaty dispute” after trying “amicable consultation” as provided for in the sequential dispute settlement system of Article 8 of the BIT;
- (ii) Because Claimants has never submitted the present “treaty dispute” to the competent administrative or judicial jurisdiction of the Argentine Republic as prescribed by Article 8(2) and (3) (a) of the BIT;
- (iii) Because Claimants’ contention that they have complied with the present precondition because of the filing by ENJASA on 5 February 2014 before the First Instance Court of Salta of a request for annulment of ENREJA’s Resolutions N° 240/13 and N°315/13 and related Decrees is rejected by this arbitrator on the ground that these domestic judicial proceedings relate to “contract claims” alien to the subject-matter of the “treaty dispute” before this Arbitral Tribunal (Article 8(1) of the BIT) and, furthermore, the scope of the Tribunal’s competence defined by the BIT does not encompass “contract disputes” and, still further, the competence over these contract dispute belongs, according to the forum-selection-clause applicable, to the local courts of Salta;
- (iv) Because Claimants’ invocation of the conclusions in *Teinver* and *Philip Morris* in the present case is out of place in the light of the wording of the dispute-settlement-clauses of the BITs applicable to these cases that refer to “disputes” in the plural, while Article 8 of the Argentina-Austria BIT, like the Argentina – Germany BIT of *Wintershall*, is premised on a single “treaty dispute” to be submitted for resolution in local courts, as well as on the submission that the claims before the local courts should be coextensive with the “treaty dispute” for breaches of the Argentina – Austria BIT. Consequently, the issue of the relationship between two disputes posed to the *Teinver* and *Philip Morris* Tribunals by the wording of their respective BITs is alien to the present ICSID case;
- (v) Because Claimants having never submitted the present “treaty dispute” to the competent administrative or judicial jurisdiction of the Republic of Argentina did not comply either with the eighteen months temporal term of the present precondition established in Article 8(3)(a) of the BIT. It is because of that that some references in the Decision to certain jurisprudence of the ICJ is not opposable in the present case;

- (vi) Because Claimants have not proven that the competent administrative or judicial jurisdiction of the Argentine Republic to entertain the present “treaty dispute” between CAI and CASAG versus Argentine Republic is the First Instance Court of Salta;
- (vii) Because Claimants never complied with the treaty obligations set forth in Article 8(2) and (3)(a) of the BIT they are not entitled now to allege that compliance would have been futile because of the impossibility for Argentine courts to solve the present “treaty dispute” in 18 months, ignoring the context provided for by Article 8(3)(b), according to which even if the domestic courts rendered the decision within the 18 months, but the dispute persists, it may be submitted by the investor to international arbitration, and the arbitral tribunal’s decision could render ineffective the previously adopted decision at the domestic level, notwithstanding the encompassing delays and costs incurred.

**(d) The withdrawal of “pending local judicial proceedings”**

- 156. The requirement in Article 8(4) (second sentence) of the Argentina-Austria BIT is not for this arbitrator a prior jurisdictional condition to arbitration as claimed by Respondent. The reason for this conclusion is the very wording and location of the sentence within the dispute-settlement-system of the BIT. The relevant text of the provision - which echoes the “exclusive remedy rule” of Article 26 (first sentence) of the ICSID Convention – reads, as per the English translation agreed between the Parties, as follows: *“As from the commencement of an arbitration proceeding, each party to the dispute shall take all the required measures to withdraw the pending judicial proceedings”*.
- 157. In the light of the words *“shall take all the required measures”*, it is crystal clear that this provision enounces a requirement as binding as the preconditions set forth in Article 8(1), (2) and (3) of the BIT, but it is not a jurisdictional precondition because the obligation is not *precedent to the seisin* of the Arbitral Tribunal (see *ICJ Reports 2011(I)*, p. 124, para. 130) (the full quotation of the passage concerned is given in paragraph 35 of the present Opinion). The Parties’ obligation to comply with the requirement begins only, as so stated in the text, “as from the commencement of an arbitration proceeding” and not before that moment. It is for this reason that the requirement does not qualified as a jurisdictional precondition. Furthermore, the Parties’ discontinuance obligation established by Article 8 (4) (second sentence) concerns only *“pending judicial proceedings”*.

Thus, the obligation applies doubtless to the pending judicial proceeding instituted on 5 February 2014 by ENJASA on the annulment of ENREJA' Resolutions on the revocation of the license which is going on since then before the First Instance Court of Salta, notwithstanding Claimants' Request for Arbitration filed on 4 December 2014 with ICSID.

158. I agree therefore with the majority Decision (paragraph 331) that this requirement although binding does not relate to consent to jurisdiction but rather to the conduct of the arbitral proceeding following the institution of the case. The requirement is rather a *procedural admissibility condition* relating in the present case to Claimants' application, namely their Request for Arbitration of 4 December 2014). As of this moment (March 2018), Claimants did not take any initiative aiming at complying with this admissibility condition and the judicial proceeding instituted by ENJASA on 5 February 2014 in the said Court of Salta continues to go on in breach of this admissibility requirement of the BIT and Article 26 (first sentence) of the ICSID Convention.
159. For the rest, I disagree with the manner in which the majority has handled this question. Once more, the reasoning of the Decision takes only into account alleged difficulties for the Claimants for an earlier compliance with the obligation enounced in Article 8(4) (second sentence) of the BIT, as well as in Article 26 (first sentence) of the ICSID Convention, forgetting the proven fact that the existing situation has been caused by Claimants' premature filing of their Request for Arbitration. The difficulties created for Respondent up to now (including incurred means and costs) by that premature Claimants' conduct do not appear to have been weighed by the majority on this occasion. The emphasis in the majority Decision's reasoning is clearly on the obligation of cooperation of both Parties to put an end to a situation contrary to the applicable law of the BIT and the ICSID Convention, but this should not mean in my opinion that the burden to put an end to the ongoing situation be the same for both Parties.
160. For this arbitrator, the initiative in the matter corresponds to the claimant party in this and any other similar cases, but Claimants have done nothing in this respect since the filing of their Request for Arbitration on 4 December 2014. The so-called "risk" for Claimants referred to in paragraph 332 of the majority Decision is not an admissible argument because ICSID arbitration is not supposed to be used as a kind of appeal chamber for domestic contract disputes and, on the other hand, the institution of ICSID arbitral proceedings is not subject to any kind of time-limits for a claimant party. They concern rather the judicial policy, strategy or conveniences of a given Party, namely elements that according to the

VCLT are not interpretative elements to be taken into account in deciding how Article 8(4) (second sentence) of the BIT operates.

161. More generally, this arbitrator does not see justification for a Claimants' delay of more than two years in taking any initiative for the withdrawal of Salta's judicial proceeding. The argument concerning the disposal or non-disposal of domestic remedies and the further one relating to the outcome of the present phase are not questions to be pondered in the interpretation of the requirements enounced by the applicable objective law, namely by the dispute-settlement-cause in Article 8 of the BIT and by Article 26 (first sentence) of the ICID Convention.
162. The reference in paragraph 332 of the majority Decision to the notion of "denial of justice" seems to me an excess of language because nobody has prevented or prevents Claimants from their access to both the First Instance Court of Salta and to the present ICSID arbitration as they have done. If they prevailed or lost in anyone, both or none of these proceedings, is of course a different matter alien to the notion of "denial of justice", except in case of serious departures from a fundamental rule of procedure or a decision on the merits manifestly unjust which none of the Parties has alleged with respect to any one of the two proceedings in question.
163. I reject, therefore, the astonishing conclusion in the said paragraph 332 of the majority Decision that "the obligation in Article 8(4) of the BIT to withdraw any pending domestic proceeding only arises once the present decision comes into effect". My conclusion is just the opposite. For me, the Arbitral Tribunal should have simply suspended the present proceeding until being informed by the Parties of their compliance with the obligations in Article 8(4) (second sentence). It would have been a decision more akin to the text and spirit of the obligations concerned and have the additional advantage of avoiding gossip on "denial of justice".
164. As a consequence of my conclusion above, I am unable either to accept at this stage of the case the implementation measures ordered in paragraphs 333 and 335 of the majority Decision. I will only recall that the two months' time-limit given in paragraph 335 for the withdrawal of the dispute pending in the Salta courts concerns the same ENJASA's "contractual dispute" that the majority in paragraph 328 of the Decision takes as having been the remedy for Claimants' non-compliance with the precondition of Article 8(3) of the BIT.

**(e) Claimants’ invocation of the MFN clause in Article 3 of the BIT as an alternative base of jurisdiction in the case**

165. Having determined the existence in the instant case of jurisdiction of the Centre and competence of the Arbitral Tribunal on the basis of the dispute-settlement provision of Article 8 of the Argentina-Austria BIT, the present majority Decision did not need to enter into the question whether the MFN clause of Article 3 of the BIT may have entitled Claimants to rely on the allegedly more favourable dispute-resolution clause of Article 9(2) of the Argentina-Denmark BIT. Thus, the majority Decision did not decide the inadmissibility objection raised thereon by the Respondent.
166. For my part, I esteem that given my findings concerning the inexistence of jurisdiction and competence under Article 8 of the BIT, I have to answer in this Opinion to Claimants’ jurisdictional claim concerning the applicability of the MFN clause in Article 3 of the Argentina-Austria BIT to dispute-settlement. I will do it below through some relevant systemic principles of public international law and rules on interpretation of treaties which make Claimants’ argument on the MFN clause in Article 3 of the BIT unpersuasive for me because that clause is a mere “*generally drafted MFN clause*”, and I agree with the *Plama v. Bulgaria* Tribunal that an MFN provision so drafted “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*” (Decision on Jurisdiction of 8 February 2005, para. 223) (emphasis added).
167. That incorporation is, as a matter of fact, alien to the text of Article 3 (Treatment of Investments) of the Argentina-Austria BIT which paragraph 1 is thus reading:

“Each Contracting Party shall grant to investors of the other Contracting Party and to their investments treatment no less favorable than that which it grants to its own investors and their investments or to investors of any third State and their investments.”

The expression “generally drafted MFN clause” is used in this Opinion for reasons of convenience, namely to distinguishing an MFN clause drafted generally speaking along the lines of the above quoted Article 3(1) of the Argentina-Austria BIT from broad “all matters” or “any matter” language MFN clauses in some other BITs and MFN clauses which provide expressly, clearly and unambiguously, that the Contracting States intended

that the scope of the clause encompasses dispute-settlement (as, for example, in some UK Model BIT and practice).

168. Furthermore, there are not traces in the whole Argentina-Austria BIT showing that the Contracting States intended to incorporate dispute settlement provisions of another treaty when they negotiated and drafted the BIT, Articles 3 and 8 included, and the Parties have not provided the Arbitral Tribunal with evidence or information to the contrary. Then, as declared by the ICJ on several occasions, a State's consent to jurisdiction must be voluntary, certain and unequivocal *whatever the form of its manifestation or the title or base of jurisdiction invoked* (see, for example, *Certain Question of Mutual Assistance in Criminal Matters*, ICJ Reports 2008, p. 204, para. 2) (AL RA 35). Under no circumstances may a State's consent to an international jurisdiction be presumed because international law does not construe a State's silence, or uncertain consent, as consent to the jurisdiction of a given international court or tribunal. The question is intimately linked with basic systemic principles and rules of *public* international law, as declared likewise by both the PCIJ and the ICJ in the following terms:

“It is well established in international law that no State can, without its consent, be compelled to submit its disputes ... either to mediation or to arbitration, or to any other kind of peaceful settlement” (*Status of Eastern Carelia*, 1923, PCIJ, Series B, N° 5, p. 27);

“The Court is not departing from the principle, which is well established in international law and accepted by its own jurisprudence as well as that of 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” (*Ambatielos Case (Greece v. United Kingdom)*, ICJ Reports 1953, p. 19) (AL RA 235).

169. The extension of the scope of application of “*generally drafted MFN clauses*” to dispute-settlement on the basis of an alleged presumed consent or contracting out proposition, or of other allegations disregarding the distinction between “substantive provisions” and “dispute-settlement provisions”, would amount to bypassing the paramount international law rule of States' consent to jurisdiction, as declared by international jurisprudence and the best doctrine. Matters being so, those invoking the extension of the scope of application of generally drafted MFN clauses in BITs to dispute-settlement should provide a reasonable legal explanation of how this phenomenon may take place in practice without disregarding the said principle because in public international law “substantial

treatment” and “jurisdictional treatment” have to be distinguished from each other, the latter requiring a supplementary condition to be granted to the investor: the consent of the host State.

170. Claimants did not provide that explanation. But the question remains because in international law “substantive rights” and “means of dispute-settlement for protecting those rights” are different things and confusion with each other is inadmissible in the light of a distinction which is inherent to a basic systemic principle of the international legal order in force. This dichotomy prevents indeed an *ejusdem generis* relationship between these two sets of rights absent the required *substantial identity* between both. Even if access to international arbitration can broadly be considered part of “treatment”, the investor is not entitled to have access to the two aspects of that treatment under the same conditions (see, for example, Brigitte Stern, Concurring and Dissenting Opinion in *Impregilo v. Argentina*, p. 13, para. 45).
171. Between “substantive rights” and “substantive treatment”, on the 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 international law systemic rule of a State’s consent to jurisdiction – with the *ratione voluntatis* conditions and requirements attached by the Contracting States to the standing international arbitration offer of the dispute-settlement-clause of the BIT, or likely in its MFN clause or in any clause of the BIT invoked as a dispute-resolution clause by a party to a given case. The existence of such an obligation of international law consequential to the interposition in the matter of the rule of State’s consent to jurisdiction explains that it is unjustified in public international law to insist in the proposition of the existence of an *ejusdem generis* relationship between “substantive protection” and the “means of enforcing such protection”.
172. One thing is to accord the investor 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-settlement-clause of the BIT. To proceed otherwise would amount to deny not only the *effect utile* of that clause but also of the international law systemic rule of State’s consent to jurisdiction. It follows that “jurisdictional rights” as, for example, access to ICSID arbitration to settle a given investment dispute, require the 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 normally in the dispute-settlement-clause of the BIT.

173. The situation would of course be different if the MFN clause at issue (or for that matter some other provision of the BIT, including the dispute-settlement-clause) would provide expressly in a clear and unequivocal manner that the MFN treatment of the clause in the basic treaty is intended to import a more favourable arbitration dispute-resolution from another treaty, as stated in the *Plama* decision. In this hypothesis, the interpreter cannot but give effect to that common intention of the Contracting States manifested in the BIT (or eventually in conformity with the BIT) because for the VCLT the text must be presumed to be the authentic expression of the intention of the Parties to the BIT and further because, in such a hypothesis, the commands of the rule of State's consent to jurisdiction would have been in general terms satisfied.
174. But this hypothesis is alien to the present case, as well as the case-law concerning cases where the MFN clause refers to "all matters" or "any matter", as for example in *Maffezini* (2000) and *Teinver* (2012) decided both under the 1991 Argentina-Spain BIT. *Teinver* differs also from the present case because Claimants rely on the MFN clause of Article 3 of the Argentina-Austria BIT as a second basis of jurisdiction alternative to Article 8 of the BIT, while *Teinver* did not request that the tribunal apply the MFN clause to replace the dispute-settlement provision of the BIT, but only to apply the clause "in order to broaden the scope of the legal issues that may be adjudicated through arbitration" (*Teinver*, Decision on Jurisdiction of 21 December 2012, para. 182) (CL-137).
175. In the present case, Article 3(1) of the BIT does not manifest in any manner whatsoever that dispute-settlement falls under its scope of application and there are not traces of it in other provisions of the BIT or in protocols or annexes to the BIT. Concerning the non-listing of dispute-settlement among the exceptions of Article 3(2) the legal answer is quite simple, because it is not necessary to do so. Establishing jurisdiction in public international law requires *always*, as it has been explained on several occasions, a manifest positive act of acceptance, a *contracting-in* conduct. *Contracting-out* contentions do not have a role to play in the field as mistakenly used and abused in some earlier case-law.
176. As pointed out by the ICJ in the *East Timor* case, the scope of application of a substantive obligation is an entirely separate question to the conferral of jurisdiction to an international tribunal, the latter depending solely upon consent (*ICJ Reports 1995*, p. 102, para. 29). I will add that the principle



of contemporaneousness which is controlled in the interpretation process by the interpretative elements of good faith and the object and purpose of the instrument subject to interpretation does not help Claimants' invocation of Article 3 of that BIT either. At the time of conclusion of the Argentina-Austria BIT the generally accepted prevailing view was, as declared by the ICJ in the *Anglo-Iranian Oil Company (United Kingdom v. Iran)* that "the most-favoured-nation clause ... has no relation whatsoever to jurisdictional matters between the two Governments" (*ICJ Reports 1952*, p. 110) and the rejection of the "incorporation by reference" concerning most favoured nation treatment in *Rights of Nationals of the United States of America in Morocco (ICJ Reports 1952*, p. 191/192)

177. In fact, this view remained unchallenged until the year 2000 when *Maffezini* erred in the interpretation of a well-known passage in *Ambatielos II*. Then, the Argentina-Austria BIT had been concluded 8 years before *Maffezini* in 1992. It is true that after *Maffezini* several arbitral decisions on investment disputes without major legal analysis (for example, *Siemens, Suez, Gas Natural, etc.*) followed for a while the proposition of the so-called "inextricable link between dispute-settlement and substantive protection" and went even further, disregarding altogether the "public policy considerations" reservation and other caveats of *Maffezini*, as well as the acknowledgement of *Maffezini* that the precondition of submitting the investment dispute to local courts for a term of 18 months prior to international arbitration is indeed a jurisdictional requirement, limiting as such the scope of the consent to arbitration of the State hosting the investment.
178. However, the above argument is not prevailing any more to the point that nowadays it appears rather as an old-fashioned argument in investment arbitration proceedings. Since about fourteen years ago, arbitral tribunals in investment disputes have progressively found and explained the core reason why a "generally drafted MFN clause" cannot be extended in its application, without further ado, to dispute-settlement because the distinction in public international law between "dispute-settlement protection" and "substantive protection" is an inherent tenet of the international legal order in force.
179. This perception is at the root of the findings that with respect to invocations of MFN clauses as a base of jurisdiction have been reached by arbitral tribunals on investment disputes in a series of arbitral awards and decisions, such as: *Salini v. Jordan* (2004), *Plama* (2005), *Telenor* (2006), *Berchader* (2006), *Wintershall* (2008), *Tza Yap Shum* (2009), *ICS Inspection and Control Services* (2012) and *Daimler Financial Services*

(2012). There are also opinions of individual arbitrators inspired by the systemic distinction referred to above, like: Brigitte Stern in *Impregilo v. Argentina* (2011), J. Christopher Thomas in *Hochtief v. Argentina* (2011) and myself in *Ambiente Ufficio v. Argentina* (2013). The basic view prevailing before *Manffezini* has been restored also at the doctrinal level by a number of qualified publicists of international law. One of them, Zachary Douglas, has rightly pointed out that:

“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. ... One can appreciate the wisdom of the International Law Commission’s decision to avoid the language of ‘incorporation of [by] reference’ in its Draft Articles on MFN clauses and of the International Court’s rejection of that approach. It is a domestic contract law analogy that is probably the root cause of the mistaken approach taken by investment treaty tribunals to the MFN clause. Reliance upon an MFN clause is not the same as reliance upon an express term in a commercial contract making reference to the standard terms of a trade organization, for instance” (*The MFN clause in Investment Arbitration: Treaty Interpretation Off the Rails*, Journal of International Law Dispute Settlement, Vol. 2, N° 1 (2011), p. 106).

180. For the reasons set forth above, I reject Claimants’ invocation of the MFN clause of Article 3(1) of the Argentina-Austria as an alternative base of jurisdiction in the present case. Moreover, differential treatment in relation to dispute-resolution may not necessarily equal less or more favourable treatment as the case may be and, therefore, if “more favourable treatment” is invoked it needs to be so proven. Then, Claimants failed to prove to my satisfaction that the invoked Argentina-Denmark BIT (the comparator treaty) with its *fork-in-the-road* dispute settlement provision offers, as alleged, “more favourable treatment” in dispute settlement matters to Danish investors in Argentina as compared with the treatment offered to Austrian investors in Argentina under Article 8 the Argentina-Austria BIT (the basic treaty).

### **C. General conclusion**

181. In the light of the considerations and conclusions above on the applicable law and its interpretation and application to the case, as well as the proven or admitted relevant facts, it is quite clear that Claimants have not complied

with any of the relevant conditions and requirements set forth in Article 8 (Settlement of Disputes regarding Investments) of the Argentina- Austria BIT either before or after the filing on 4 December 2014 of their Request for Arbitration with ICSID.

182. The Contracting States of the applicable BIT, namely Argentina and Austria, gave, in advance in Article 8(4) (first sentence) within the framework of that dispute-settlement system, their respective irrevocable consents to submit investment disputes with investors nationals of the other Contracting State to arbitration, under the form topical under the BIT mechanism, of an “arbitration offer” as expressly admitted by Claimants in their Request for Arbitration of 4 December 2014, “offer” subject as it is also usual to certain preconditions and requirements enounced in Article 8(1) to (4) of the BIT.
183. Thus, the “advanced and irrevocable consent” referred above has not been given by Argentina and Austria under the form of an “unconditional consent” to direct access of the investors protected by the BIT to international arbitration against the host State. Such an access is indeed subject to fulfilment by the protected investor concerned of the said preconditions and requirements spelled out in the first four paragraphs of Article 8 which wording is formulated in a sequential and interrelated manner so that the text of each paragraph is the immediate context for the preceding or following one for any given interpretative operation aimed at determining the scope of the “offer” made by Argentina and Austria in Article 8(4) of the BIT.
184. The very text of Article 8(4) cannot be more explicit and clear in that respect: “Con este fin, cada Parte Contratante otorga, *en las condiciones del presente Convenio (nach den Bestimmungen dieses Abkommens)* su consentimiento anticipado e irrevocable para que toda controversia *sea sometida a este arbitraje (diesem Schiedsverfahren unterbreitet wird)*. The offered consent of the BIT has therefore not been given for any kind of arbitration, but to the conditional international arbitration of the BIT itself as set forth therein exclusively, and with respect to “investments” as defined in Article 1(1) of the Argentina –Austria BIT but not further or otherwise.
185. In the present case, Claimants did not accept the “arbitration offer” made by the Contracting States in the BIT, neither in their communication of 30 April 2014 nor when filing their Request for Arbitration on 4 December 2014. The admitted facts of the case prove in an irrefutable manner that Claimants disregarded each and every one of the preconditions and

requirements of Article 8 which go together with the “arbitration offer” made by Argentina and Austria in the BIT. Thus, Claimants failed to comply with: (i) the sequential and subsequent system of settlement of investment disputes as enounced in the Article 8; (ii) entering into amicable consultations with Respondent for a term 6 months for trying to settle the present dispute; (iii) failed to submit the present dispute to local courts for a term of 18 months; and (iv) did not withdraw ENJASA’s pending proceeding in the First Instance Court of Salta they instituted on 5 February 2014 following the institution of the present ICSID arbitration on 4 December 2014.

186. The first three Claimants’ failures to comply concern requirements jurisdictional in nature because they are preconditions to the Respondent’s consent advanced in the arbitration offer as *per* the Argentina-Austria BIT and “arbitral jurisdiction” in public international law is based upon the mutual consent of the parties to the dispute and confined to the extent accepted by both of them. As has been declared by the ICJ: “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 the limits thereon*” (*Case Concerning Armed Activities in the Territory of Congo (New Application), (DR of Congo v. Rwanda)*, *ICJ Reports 2006*, p. 39, para. 88) (AL RA 39) (*emphasis added*). Compliance with these three preconditions is therefore a question of consent and Claimants failed to comply with the three.
187. The fourth condition or requirement is of a different nature. It is not a “precondition” because the obligation concerned exists only as “from the commencement of an arbitration proceeding”, not before. It relates rather to the admissibility of the request for arbitration but - as illustrated by the text of second sentence of Article 8(4) - is as binding for the protected investors as the first three because it is likewise condition or requirement of the “offer” made by Argentina and Austria in the BIT, in the language of the BIT one of the “*condiciones del presente Convenio*” (*Bestimmungen dieses Abkommens*).
188. Thus, independently of their characterization as jurisdictional, procedural, or otherwise the four conditions or requirements are mandatory for protected investors as underlined by *Murphy v. Ecuador, Philip Morris v. Uruguay* and several other ICSID arbitral tribunals in like circumstances. But, contrary to their submission, Claimants have not complied with any one of these conditions or requirements. The question is not as was contended by them whether they have validly given their consent or whether or not such a consent may be given in advance by a protected

investor, but if one may conclude that Claimants' alleged consent is in agreement with (*match*) the scope of Respondent's consent as offered in advance in Article 8 of the BIT so as to allow to determine the existence of the "mutual consent" source of the needed "arbitration agreement" between the Parties to the present investment dispute to submit it to ICSID arbitration.

189. In other words, the core question is whether a binding "agreement to arbitrate" the present investment dispute exists in the relations between the two Parties thereto. The finding of this arbitrator is that no "agreement to arbitrate" the dispute has been executed because CAI and CASAG, as Claimants, have not accepted the arbitration offer consented to by the Argentine Republic, as Respondent, in the terms provided for in Article 8(1), (2) and (3) of the Argentina-Austria BIT. And with respect to the admissibility requirement of Article 8(4) (second sentence) my finding is that its non-compliance when more than two years have lapsed since the commencement of the present ICSID arbitral proceeding is a cause for suspension of the present proceeding until the Arbitral Tribunal is informed by the Parties of the termination or withdrawal of the domestic judicial proceeding going on in Salta.
190. With respect to the alternative basis of jurisdiction invoked by Claimants, namely the MFN clause in Article 3(1) of the Argentina-Austria BIT, the finding of this arbitrator is that such provision as drafted does not provide a base of jurisdiction alternative to Article 8(1) to (4) of the Argentina-Austria BIT or entitling Claimants to rely in the present case on dispute settlement provisions contained in the Argentina-Denmark BIT, because consent to the jurisdiction of an international arbitral tribunal, as are ICSID tribunals, has to be in all occasions voluntary in nature, cannot be presumed, and should be manifested in a clear and unambiguous manner, as recalled by *Plama*, *Wintershall*, *ICS Inspection and Control Service*, *Daimler* and other treaty based arbitral tribunals in investment disputes.
191. It follows from the above that this arbitrator upholds the Second Preliminary Objection of the Respondent and, consequently, there is no jurisdiction of the Centre and competence of the Arbitral Tribunal to consider and adjudicate the merits of the present "treaty dispute". The majority Decision is mistaken for manifest reckless misinterpretations and erroneous application of the relevant provisions of the BIT and for ignoring several rules of public international law applicable in the case of the present Preliminary Objection such, among others:

1. The non-application of Articles 31 and 32 on interpretation of treaties of the VCLT;
  2. The non-application Article 36(2) on application of treaties providing for rights for third parties of the VCLT;
  3. The non-application of the systemic rule of international law on State's consent to the jurisdiction of international courts and tribunals, as manifested and defined by the ICJ in its established jurisprudence; and
  4. The non-application of the general principle of international law that international arbitration required an agreement to arbitrate between the parties to the dispute, as provided for in the Preamble and Articles 25(1) and 26 (first sentence) of the ICSID Convention.
192. The non-application of the VCLT is particularly regrettable because it is, in my opinion, one of main reasons of the otherwise inexplicable broad interpretations and application by the majority Decision of the provisions of the Argentina-Austria BIT, broadness which appear aimed at avoiding any limitation on the right of investors to sue host States whatever the wording and prescriptions of the applicable BIT, and notwithstanding the fact that such a right did not exist but as *per* the BIT itself. The conviction of this arbitrator is that to avoid unbalanced interpretation and application, the BITs, like any other kind of treaties, have to be interpreted and applied in good faith in accordance with the rules of international law codified by the VCLT. It is not admissible that uncertainties or ambiguities be decided systematically in favour of State sovereignty or in favour of the protected investor without regard for the applicable law and the rules governing the interpretation and application of treaties. Concerning the protected investors, as rightly stated by the *El Paso* Arbitral Tribunal, what is not acceptable is the contention that: “as a BIT’s purpose is to protect [investors], the interpretation of treaties for the promotion and the protection of investments, viewed in their context and according to their object and purpose, leads to an interpretation in favour of the investors” (Decision on Jurisdiction of 27 April 2006, paras. 68 and 69) (CL-106).
193. Last but not least, the majority Decision erred likewise:
1. By following all along an unfit *totum revolutum* approach - which, *inter alia*, tends to confuse “claims” and “disputes” in detriment of the meaning of the term “dispute” in Article 8 of the Argentina-Austria BIT as defined in Article 1(1) the BIT itself;

2. By extrapolating into the present ICSID arbitral proceedings on a “treaty dispute” ENJASA’s actions concerning a “contract dispute” instituting first administrative proceedings before ENREJA and then in a judicial proceeding before the First Instance Court of Salta as a remedy for Claimants’ failure to comply with the preconditions of “amicable consultations” and “referral to local jurisdictions” of Article 8 of the BIT.
3. By blurring, for so doing, the established legal distinction that a breach of a treaty like the BIT and a breach of contract are quite different legal questions as has been declared by the ICJ in the *Siccula* case and with respect to ICSID arbitration as, for example, in the following statement by the *Ad hoc* committee in *Vivendi Universal v. Argentina Annulment* decision:

“For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.” (Decision on Annulment of 3 July 2002, para. 96) (AL RA 22).

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194. To conclude with this general conclusion on Respondent’s Second Preliminary Objection I confirm all and every one of the considerations and conclusions I made in this Dissenting Opinion. It follows that I consider that the conclusions reached by the majority concerning Respondent’s Second Preliminary Objection are not based upon what I consider to be the “applicable law” and I do not know what “applicable law”, if any, has been applied in the matter by my co-arbitrators.
195. The considerations in paragraphs 272 to 276 of the majority Decision continue to keep undefined the “legal rules” applied by the majority for reaching its conclusions. I say “legal rules” because it is so commanded by Article 42 of the ICSID Convention and Article 8 (6) of the Argentina-Austria BIT. Furthermore, Article 8 of the Argentina-Austria BIT is a bilateral treaty provision whose interpretation and application is governed by the law of treaties codified by the Vienna Convention which is an instrument of public international law, and because ICSID arbitral tribunals are considered to be “international tribunals” by the fact of being “treaty-

based” institutions entitled to applied public international law for the solution of investment disputes.

196. In paragraph 171 and footnote 135 the majority Decision claims that it applies the rules on treaty interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT) but this rhetoric statement is not confirmed neither by the interpretative operation undertaken by the majority concerning Article 8 of the BIT as recorded in the Decision, nor by the conclusions of the latter. Then, as recalled in paragraph 24 of the present Dissenting Opinion, I have to conclude that the interpretation of the majority “is not reading the BIT but reading into the BIT” and, consequently, it is not an interpretation of Article 8 of the BIT done in accordance with the relevant rules of the Vienna Convention. The paragraph 171 and footnote 185 made also a reference to “interpretative canons” which may be understood by some as diminishing the normative nature of the rules set forth in Articles 31 to 33 of the CVLT which the ICJ considers declaratory of general customary international law.
197. In this respect, it should be born in mind that, as explained by the ILC in its Draft Articles on the Law of Treaties, the Commission decided “to trying to isolate and codify the comparatively few general principles which appear to constitute general rules for the interpretation of treaties” and that there were cogent reasons why the codification of these general rules should be attempted and, in the first place, that “the interpretation of treaties in good faith *and according to law* is essential if the *pacta sunt servanda* rule is to have any real meaning” (United Nations Publication, Sales Number:E.70. V.5, p. 38, para. 5) (*italics supplied*).
198. Moreover, I cannot accept the invocation in footnote 185 of the so-called difficulties of a “hermeneutic enterprise, such as the interpretation of international treaties” as an excuse for the construction of Article 8 of the BIT arrived at by the majority. Article 8 of the BIT is drafted in very clear terms and does not pose any major interpretative issue for a good faith interpreter acting in conformity with the said Vienna interpretation rules. On the other hand, the reference to the capacity of “appreciation of nuances” is certainly misplaced, the reason being that the interpretation reached by the majority of Article 8 of the BIT does not pose to any reasonable arbitrator an issue of “nuance”. It is an unwarrantable interpretation in the light of the wording of Article 8 and the factual circumstances of the case and, therefore, in quite contradiction with the affirmation in paragraph 171 that the majority Decision applies the rules on treaty interpretation laid down in the VCLT. Having participated in all meetings concerning the elaboration of the VCLT (ILC, Sixth Committee



of the GA and United Nation Conference on the Law of Treaties, drafting committees included) I am fully equipped to distinguish in the field “a nuance” from “a non-compliance”.

199. The majority has also difficulties in handling the fact that the Claimants are “third” with respect to the BIT concluded between Argentina and Austria and this carries with it some legal consequences for the interpretation, as well as the application of that BIT. At the interpretation level the Claimants’ conduct is irrelevant for an interpretation of Article 8 of the BIT done in conformity with the Vienna interpretation rules. However, in the interpretative operation undertaken by the majority it is obvious that Claimants’ conduct, behaviour or mere convenience is the leading factor in the interpretation of the provisions of Article 8 arrived at by the majority Decision.
200. At the application level, Claimants as a third to the BIT are subject to the provision of Article 36(2) concerning the application of treaties providing for rights for third parties as indicated *supra*. The answer given by the majority to their non-application of the said provision is given in footnote 238 of the Decision in the form of the following denial: “As investors are not States, the rules for beneficiary third States under Article 36(2) of the Vienna Convention are not applicable to the relations between host States and investors covered under the BIT”. But, this slavish textualist argument cannot prevail because the provision is but a mere manifestation of a general principle of law known as “*estipulaciones en favor de terceros (stipulation pour autrui)*” according to which “any third” when exercising a right provided for it in a given instrument must comply with the conditions for the exercise of such a right provided for in the instrument in question and, *in casu*, Argentina and Austria made an stipulation in favour of the Claimants as protected investors in Article 8 of the BIT and have recognized the said general principle of law by the act of becoming parties to the VCLT.
201. The radical antagonism existing since the outset between the applicable law and the majority’s views continues. Thus, the final product, namely the majority Decision, remains as alien to public international law as before concerning, for example, the principle of State’s consent to the jurisdiction of international courts and tribunals. The majority does not accept that the requirements in paragraphs (1) (2) and (3) of Article 8 of the BIT are preconditions to international arbitration of a jurisdictional nature, limiting thereby the scope of the consented jurisdiction by the host State.

202. Furthermore, with regard to the general principle of international law that international arbitration requires an agreement between the parties to the dispute (principle making by the 1965 ICSID Convention the cornerstone of the jurisdiction of the Centre), the majority continue to questioning my position in that respect and tries to confuse a clear fundamental matter of principle by introducing, in paragraphs 272 and 273 of the Decision, irrelevant distinctions concerning the different forms of casting consent by the parties to a dispute. I said irrelevant because nobody is making analogies between “contract-based arbitration” and “inter-state arbitration” because, in the first place, protected foreign investors lack standing to conclude treaties. The “binding agreement” referred to in paragraph 6 of the Preamble of the ICSID Convention cannot be by definition a treaty and nobody is saying the contrary. The real issue in the present context is not the possible forms of casting parties’ consent, but the substantive issue of the need that the consent given by the parties to the dispute be a “*mutual consent*” otherwise a “binding agreement to arbitrate” (*acuerdo de arbitraje*) cannot be considered as executed. This is what happened in the present case and, consequently, the conclusion cannot be a finding of in favour of the existence of jurisdiction.
203. Notwithstanding the general accepted mechanism as how to reach the above “*mutual consent*” of the parties to the dispute under the BIT system, the majority Decision continue to side-step the consequences on consent of that system, namely that the protected investor must accept the offer of the applicable BIT as formulated by the Contracting States thereto. As stated by Schreuer: “The (ICSID) Convention requires consent in writing *by both parties to the dispute*. Just as in the case of legislative provisions for the settlement of dispute by ICSID, a provision on consent in a BIT can be no more than an offer that needs to be accepted in order to amount to a consent agreement. The treaty provision cannot replace the need for consent by the foreign investors. The observations made in the context of national legislation concerning the timing, form and scope by the investors (paras. 416- 420 *supra*) apply equally to BITs. An additional requirement is that the BIT must be between the host State and the State of investor’s nationality” (“*The ICSID Convention. A commentary*”, Second Edition, p. 211/212, para. 447) (*italics supplied*).
204. As it is mentioned in the paragraphs referred to in the middle of the quotation above where consent is based on the host State’s legislation, “it can only come into existence through an agreement between the parties. The provision in the host State’s legislation can amount to no more than an offer that may be accepted by the investor” (*Ibid*, p. 202, para. 416) as in the case of BITs. Further, also as in the case of BITs, the investor’s

acceptance of the consent given in the host State's legislation "can be given only to the extent of the offer made in the legislation. But it is entirely possible for the investor's acceptance to be narrower than the offer and to extend only to certain matter or only to a particular investment operation" (*Ibid*, p. 203, para. 420). In the present case, Claimants' alleged consent went far beyond of the extent or scope of the offer made by the Argentina in its BIT with Austria and, consequently the offer has not been perfected by lack of the needed mutual or reciprocal consent of the parties to settle the present dispute through ICSID arbitration as provided for in the BIT.

205. As I stated above in this Dissenting Opinion, the offer/ acceptance mechanism for reaching under the BIT system the "mutual consent" between the parties to the dispute necessary for the execution of the "binding agreement" to arbitrate at ICSID the dispute has been correctly explained in the Claimants' Request for Arbitration (paragraphs 12 and 13). But the majority Decision does not take account neither of such fact nor of the additional fact of the subsequent change position in Claimants' pleadings in order to avoid or overcome the problem posed to them by the non-compliance with the "preconditions" in paragraphs (1) (2) and (3) of Article 8 of the BIT. This is but an example of the cavalier manner in which the Decision handles certain relevant admitted facts when it may put into question majority findings.
206. Another example of the same is the treatment given in the majority Decision to Claimants' notification of 30 April 2014 and subsequent related letters (the last dated 21 October 2014). The fact that in all these letter Claimants were asking "*for the commencement of amicable consultations pursuant to Article 8 (1)*" of the BIT was not a sufficient documental proof for the majority of the fact that before the period 30 April 2014- 21 October 2014 no "amicable consultations" pursuant to the Article 8 (1) of BIT took place. All this clear relevant documental proof provided by the Claimants themselves and recorded by the Tribunal did not prevent the majority to conclude that the "amicable consultations" required by Article 8 (1) of the BIT took place on 27 August 2013! This contrast indeed with the alleviations or dispensations by the majority of Claimants' burden of proof like, for example, in paragraph 289 of the Decision: "The Tribunal also has no indication of fact to conclude that Claimants engaged in these negotiations, which they initiated, without the genuine intention of trying to settle the dispute arising out of the revocation of ENJASA's license amicably. In the Tribunal's view, it cannot be required that Claimants furnish positive evidence of the existence of such genuine intentions in the absence of clear indications suggesting their absence".

207. The majority Decision continues to interpret the term “*controversia*” (dispute) in Article 8 of the Argentina-Austria BIT as if the wording of that provision would be similar to dispute-resolution-provisions of other BITs, in particular of the Argentina-Spain BIT and Switzerland- Uruguay BIT. Furthermore, the unfit *totum revolutum* approach is maintained all along the Decision by the majority mixing up the present ICSID arbitration proceedings with the proceedings of the “contract dispute” going on in Salta Province, notwithstanding the fact that according to Article 8 (1) of the BIT the Arbitral Tribunal is without competence in contractual investment disputes. Then, the annulment of ENJASA’s resolutions revocation ENJASA’s licence is a contractual “subject-matter” governed by the laws and regulations of Salta Province as provided for in the applicable forum selection clauses of the contractual instruments concerned, and not a “subject-matter” governed by the Argentina-Austria BIT and, consequently, it is a “subject-matter” which falls outside the competence of the present ICSID Arbitral Tribunal.
208. Finally, the majority Decision continues to ignore the point of international law that the State of Argentina, namely the Republic Argentina, is not liable for the performance of contracts entered into by the Province of Salta, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts. It is only when a claim is based on a treaty that international law rules of attribution apply, with the result that the State of Argentina is internationally responsible for the acts of its provincial authorities. This distinction of the *Vivendi Annulment* Decision underlined the unfitness of mixing up apples and oranges in these matters as does the majority with its *totum revolutum* approach.
209. In sum, the Decision concerning Respondent’s Second Preliminary Objection continues to be alien to the applicable public international law rules (conventional and customary). It appears as if for the majority the process of interpretation and application of the applicable law would be conditioned by considerations of another nature such as, for example, elements of the *lex mercatoria*, or policy guidances for the governance of investments or undefined principles of soft law or the non-strict compliance argument of Claimants, in contradiction with the provisions of Article 8 (6) of the Argentina-Austria BIT and Article 42 (1) of the ICSID Convention that command both that the solution of jurisdictional disputed issues in investment arbitral cases be done by the application of the relevant provisions of the BIT concerned and of the rules of international law as may be applicable in the case, and bearing in mind that in the international legal order the systemic rule of State’s consent to jurisdiction must be

respected in the interest of international legal security of all concerned and, ultimately, of the preservation of the ICSID arbitration as a means of settlement of investment disputes between States and national of other States.

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210. It follows that consequential to the attitude of lawgivers adopted by the majority, the present Decision does not make sense in public international law. For public international law it appears, in my opinion, as a lawless decision, although my co-arbitrators do not challenge directly the law applicable to the present phase of the case, as defined in Part A of this Opinion. They proceed rather indirectly voiding the applicable rules of public international law of its core meaning and functions by construing an artificial background and proceeding, thereafter, to an alleged process of interpretation and application against the said self-made background. (See paragraphs 271 to 276 of the majority Decision)
211. The first step in the construction of the said artificial background was to make of the so-called “investment treaty arbitration” a separate category of arbitration with its own specifications (jurisdictional basis included) different from other forms of international arbitration like, for example, the so-called “contract arbitration”. This first step is aiming at excluding the need of an “arbitration agreement between the parties to the dispute” in investment treaty arbitration cases, a condition sine qua non in all forms of international arbitration under public international law. The second consideration of the majority in its construction of the said background concerns the jurisdictional preconditions or requirements of the compromissory clauses and it is aiming at denying the strict compliance obligation with these conditions and requirements contrary the established jurisprudence of the ICJ in the matter which is, in turn, a corollary of the rule of State’s consent to jurisdiction. For the majority, “absent a clear and unmistakable formulation to the contrary, investors should not be held to the formalities of public international law dispute settlement with the same strictness as States”. A proposition that *inter alia* aims at transforming the “contracting in” position of States in jurisdictional matters under public international law in a “contracting out” obligation.
212. Finally, the third consideration of the majority in the process of construction of said artificial self-made background consists in extending the second consideration above to the very interpretation of Article 8 of the Argentina-Austria BIT because they said the object and purpose of the BIT is “to promote and protect foreign investments”. On this basis - and in full

contradiction with El Paso and other investment case-law, the majority states in the Decision:

“It cannot be seen in a pure inter-State context but is in fact addressed to investors, entitled to protection, and consequently has to be interpreted in that light. This does not mean that pre-arbitration requirements are optional. On the contrary, they remain, in principle, mandatory requirements. But – again, unless the pre-arbitration requirements are formulated clearly and unmistakably to require the same formalistic approach in assessing compliance with them – an investment treaty tribunal should accord greater flexibility to the disputing parties than the ICJ accords to conditions of seisin under compromissory clauses. It is against this background that the Tribunal proceeds to analyzing Article 8 of the Argentina-Austria BIT” (majority Decision, para. 276).

213. The above quotation confirms in the first place what has been said *supra* in this Opinion, namely that the majority failed to apply to the interpretation of Article 8 of the Argentina-Austria BIT the codified interpretation rules of the VCLT. Moreover, the majority consider that the international law rules applicable in a given ICSID arbitration case may be put aside by arbitrators on the basis of subjective doctrinal, ideological or convenience considerations alien to the objective law applicable to the case at issue. And furthermore, that the said subjective considerations may be applied for the solution of the case in question without any kind of prior demonstration that the considerations concerned are part and parcel of the applicable law. Without such a demonstration the decision cannot claim to be based upon public international law. Then, it should be recalled, Article 8(6) of the Argentina-Austria BIT and 42(1) of the ICSID Convention provide that the Tribunal shall decide the dispute in accordance with rules of law as indicated in these provisions.

## PART TWO

### Declaration of Dissent concerning Respondent's First and Third Preliminary Objections

214. Having dissented also from the findings of the present majority Decision concerning the Respondent's First and Third Preliminary Objections, I explain my vote thereon through this Declaration.

**(a) First Preliminary Objection: There is no claim for a prima facie violation of the BIT**

215. The finding of the majority on Respondent's First Preliminary Objection in paragraph 262 of the Decision provides: (i) that Claimants have met the threshold of presenting *prima facie* claims for breach of Article 4 of the BIT relating to expropriation, and for breach of Article 2(1) of the BIT relating to fair and equitable treatment; (ii) that their claims as presented qualified as treaty claims, not contract claims; (iii) that they have also presented *prima facie* claims that these treaty provisions were breached in relation to Claimants as shareholders-investors in L&E and ENJASA; (iv) that, in particular, the Tribunal found that Article 4(3) of the Argentina-Austria BIT cannot be interpreted as limiting claims by shareholders-investors to breaches of Article 4 of the BIT for expropriation; (v) that the forum selection clauses in the Bidding Terms and Conditions as well as the Transfer Agreement, have a limit scope, which do not cover claims for breach of the Argentina-Austria BIT arising out of the revocation of the license and subsequent events; (vi) that Claimants have not been able to present a *prima facie* claim for breach of Article 3(1) of the BIT relating to national treatment; and (vii) that the Tribunal therefore rejects Respondent's objection relating to a lack of a *prima facie* claim insofar it relates to claims for breach of Articles 2(1) and 4 of the BIT, but upholds it with respect to breach of Article 3(1) of the BIT.

216. I dissent from most of the above findings for several reasons. In the first place because concerning findings (i) (ii) (iii) (iv) and (vii), Claimants have not met at all the threshold of presenting *prima facie* claims for breach of Article 4 of the BIT relating to expropriation. This majority finding is absolutely baseless. None, I say none, of the facts alleged in that respect by Claimants, if duly proved or established as true, would amount to an expropriation or to a measure having an equivalent effect. Here, the majority is betraying its own test defined in paragraph 207 of the Decision as follows: "The task of the Tribunal under this test is therefore to

determine whether the facts pleaded by Claimants, if established to be true, could possibly result in a breach of the Argentina-Austria BIT”. It is by applying that very text that I reject the finding of the majority relating to Article 4 of the BIT concerning expropriation. In contrast, I share finding (vi) of the Decision to the effect that Claimants failed to present a *prima facie* for breach of Article 3(1) but for both treatments, namely “national treatment” and “MFN treatment”.

217. Thus, regarding majority’s findings (i) (ii) (iii) (iv) and (vii) I consider that only the claims as presented by Claimants concerning the fair and equitable treatment (Article 2(1) of the BIT) could meet the *prima facie* threshold provided that there is jurisdiction and only, of course, if they are genuine “treaty claims”, because this Arbitral Tribunal is without jurisdiction over “contract claims” (Article 8(1) of the BIT). This last remark is prompted because of the majority’s *totum revolutum* reasoning which avoids making in core issues clear factual and legal distinctions between “contract claims” and “treaty claims”. My guidance on the matter has been the leading case on contract/treaty distinction, namely the *Vivendi Annulment* decision where it is stated, *inter alia*, that:

“As to the relation between breach of contract and breach of treaty ... (a) State may breach a treaty without breaching a contract, and vice versa ... In accordance with this general principle (which is undoubtedly declaratory of general international law) whether there has been a breach of the BIT and whether has been a breach of contract are different questions. Each of these claims will be determined by reference to its proper or applicable law – in the case of the BIT by international law; and in the case of the (contract), by the proper law of the contract, in other words, the (municipal law) (decision of the *ad hoc* Committee of 3 July 2002, paras. 95-96).

218. I cannot accept either finding (iv) because it is not an issue concerning the “*prima facie* breaches of the BIT” and clearly prejudices the decision to be taken by the Tribunal on the Respondent’s Third Preliminary Objection. Furthermore, I reject finding (v) of the majority according to which the forum selection clauses concerned would have such a limited scope that they do not cover the revocation of the licence of ENJASA, an essential contractual matter in domestic administrative license regimes. This finding is aimed at excluding the “revocation” concerned from the administrative contract, the License, as well as from its natural legal framework under Salta law, essentially: the Bidding Terms and Conditions, the Stock Purchase Agreement and the Law N° 7020. In so doing, the majority tries to make of the “revocation” a part and parcel of an “artificially construed



treaty claim” under the Argentina-Austria BIT (Decision, para. 218), so as to allow itself to characterize *at least one of the claims* brought before the Arbitral Tribunal by Claimants as a “treaty claim” and conclude, on that fragile basis, that there is *prima facie* jurisdiction. It goes without saying that such a characterization finds no support in the distinction between “contract claims” and “treaty claims” as defined in the *Vivendi Annulment* decision. I disagree with the interpretation of the referred “well established jurisprudence”. The termination of a contract by the *ente regulador* in the normal exercise of its regulatory powers does not give rise to a treaty claim because in the first place it is not an international wrongful act (see below). It must be added that under public international law even the breach of a contract without further ado is not an international wrongful act.

219. In any case, the majority has not given effect to the valid choice of forum selection clauses applicable to the license by virtue of the relevant administrative contractual interrelated and closely coordinated legal instruments and Salta’s provincial legislation, notwithstanding the following facts: (i) that the license was as from its granting subject to the supervision by ENREJA, *ente regulador* provincial of the market concerned, and accepted as such first by ENJASA and then by Claimants themselves when becoming through L&E indirect shareholders of ENJASA; (ii) that the revocation was decided by ENREJA’s Resolution N° 240/13 in the exercise of its regulatory functions and powers as a sanction for alleged breaches by ENJASA of certain obligation set out in ENJASA’s licence and related contractual instruments and legislation; and (iii) that ENJASA itself has resorted to the said forum selection clauses by: (a) submitting before ENREJA an administrative recourse for reconsideration of Resolution N° 240/13; (b) requesting Salta’s courts for interim relief to stay the application of Resolution N° 240/13 and Decree N° 2348/13, a request which was granted; and (c) submitting before the First Instance Court of Salta a request still going on for annulment of ENREJA’s Resolutions N° 240/13 (revocation) and N° 315/13 (confirmation of the revocation), as well as Decrees N° 2348 and 3330.
220. But this is not all. The majority is also ignoring the incidence that the material conventional or customary international law rules applicable to the situation at stake may have for the characterization of a given claim as a “contract claim” or as a “treaty claim”. This would mean, in the instant case, the need to take into account not only the BIT standards but also other provision of the BIT and the principles and rules of international law concerning the exercise by States of its regulatory powers, the latter being formulated by the Arbitral Tribunal in *Saluka Investments v. Czech Republic* in the following terms:

“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” (Partial Award of 17 March 2006, para. 255) (CL-018).

221. The revoked ENJASA’s license granted in 1999 by the provincial authorities of Salta - which had created the company a few months before - was an exclusive license for a duration of 30 years. The resulting market was therefore a monopolistic market. Following the confirmation of the revocation of that license by the *ente regulador*, ENREJA, that market became a rather competitive market because the provincial authorities opened the market to about ten new operators holding each of them licenses for much shorter durations. This is also an element to ponder for ascertaining *prima facie* whether the exercise by the *ente regulador* of the mentioned regulatory powers was (as normal as it was) valid also under international law or whether it falls under one of the few generally admitted exceptions to the principle quoted above. The conclusions of the *Saluka Tribunal* are based upon: the *Harvard Draft Convention of the Responsibilities of States for Injuries to Aliens*; the *1967 OECD Draft Convention on the Protection of Foreign Property*; and the *1987 United States Third Restatement of the Law of Foreign Relations*.
222. Regarding the provisions of the BIT (other than the standards invoked by Claimants), the following should be recalled: (i) that the definition of the term “investment” in Article 1(1) provides that the investment has to be “made in accordance with the laws and *regulations* of the Contracting Party in whose territory the investment is made”; (ii) that regarding all the different categories of assets listed in Article 1, including therefore the category in (b) (shareholding and other forms of participation in companies) the last paragraph of that Article provides that: “The contents and scope of the rights for the different categories of assets shall be determined by the laws and *regulations* of the Contracting Party in whose territory the investment is made”; and (iii) that Article 8(6) provides that “The arbitral tribunal shall decide the dispute with reference to the laws of the Contracting Party involved in the dispute, including private international law rules, the provisions of this Agreement and the terms of any specific agreements concluded in relation to such an investment, if any, as well as the applicable principles of international law.”
223. The majority fails to explain how in the light of these provisions of the BIT it may be concluded that the “revocation” of the ENJASA’s license by the competent provincial *ente regulador* ENREJA qualifies as part of a “treaty

claim” of Claimants against the Argentine Republic, because the applicable law to the said “revocation” it is not international law but the domestic law of the Province of Salta and also because the latter law does not attribute to the Argentine Republic the contractual acts or measures adopted by the Province. On both accounts international law was absent when ENREJA adopted its Resolutions on the revocation of ENJASA’s license in accordance with the applicable law which was provincial domestic law as established by the Argentina-Austria BIT itself.

224. That absence cannot be made good by a mere *posteriori* characterization, without sufficient *prima facie* demonstration, that a claim concerning the legality of the “revocation” of ENJASA’s license could be analysed as “part of a treaty claim”. Neither Claimants nor the arbitrators are transformers able as such to convert a “contract claim” into a “treaty claim” or, for that matter, into a “mixed claim”. No doubt that ENREJA in the exercise of public authority as *ente regulador* (accepted by Claimants without reservation when they became indirect shareholders of ENJASA) revoked the licence as a sanction for alleged breaches by ENJASA of its obligations under that license and its related contractual and legislative provisions, but this does not change an iota the non-treaty nature of such a revocation Resolution.
225. Moreover, Respondent contends that Resolution n° 240/13 was issued in compliance with the applicable domestic law in a procedure where the right of defence was respected and all of ENJASA’s defence arguments were heard and, therefore, that the resolution revoking the license was adopted following considering by the competent *ente regulador* of the factual and legal background of the case in the light of the applicable law. As an illustration of its position, Respondent provided some selected passages of investment arbitration case-law as the following one:

“What is relevant is rather that the Province, with some justification, considered that AGBA had grossly failed in fulfilling its contractual obligations and terminated the Concession Contract on this basis. This is sufficient, in the Arbitral Tribunal’s opinion, to exclude that the termination could be regarded as an act of – direct or indirect – expropriation or other appropriation of AGBA’s property or Impregilo’s investment. It has also in no way been proven that the termination of the Concession Contract was the last step in a successive series of measures taken by the Province with a view to depriving AGBA of the concession, or, in other words, that AGBA was exposed to ‘creeping expropriation’.” (*Impregilo v. Argentina*, Award of 21 June 2011, para. 283) (AL RA 46).

226. The majority's device of making the "revocation of ENJASA's licence" part of Claimants' treaty claim is - for this Arbitrator - the best evidence of Claimants' failure to prove what they must prove at the present jurisdictional phase of the case, namely whether the actual behavior (conduct or measures) adopted by the Provincial Authorities and/or ENJASA *on the occasion* of the revocation of the license (no the revocation measure as such) could *prima facie*, if subsequently established as true, amount to a breach of the invoked standards of the Argentina-Austria BIT or, for that matter, of the rules of international law governing the exercise by sovereign States of their regulatory powers. In view of that failure, this arbitrator concludes that, as contended by Respondent, the existence in the case of a "treaty claim or claims" as contended by Claimants has not been proven *prima facie*.
227. Consequently, I uphold the First Preliminary Objection of Respondent on the basis of Claimants' failure to prove *prima facie*, as they should have done, that the relevant facts and conducts they alleged, if proven as true, could constitute an internationally wrongful act or acts by the Argentine Republic by breach of the standards of the Argentina-Austria BIT.

**(b) Third Preliminary Objection: There is no jurisdiction *ratione materiae***

228. The present Decision recorded the Parties' respective pleas and arguments concerning the Third Preliminary Objection, for the Respondent in paragraphs 106 to 116 of the Decision and for Claimants in its paragraphs 156 to 168. However, under Section VI of the Decision entitled "The Tribunal's Analysis" the Respondent's Third Preliminary Objection is not the object of any sub-section and consequently does not appear in the "table of contents" of that Section and has vanished from the Decision as an autonomous preliminary objection, although the Third Preliminary Objection has not been withdrawn by Respondent.
229. Why it is so? The only reason for this disappearance is the majority's decision to avoid giving a judicial answer, at the present phase of the case, to Respondent's Third Preliminary Objection notwithstanding both the fact of it being an autonomous objection and the fact that the Parties' contentions and arguments concerning this Preliminary Objection were quite complete allowing the Arbitral Tribunal to adjudicate it at present, without waiting until the end of the merits phase. The majority's arguments in support of an economy of proceedings and costs made in other contexts do not seem to have played any role on this occasion.

230. It is in order to recall likewise that Tribunal's Procedural Order N° 3 decided to bifurcate the proceedings into separate jurisdiction and merits phases so that "the jurisdiction phase will deal with all objections to the jurisdiction of the Centre and/or the competence of the Tribunal". It is true that the said Procedural Order dated 25 April 2016 reserved the possibility for the Tribunal of joining any objections to the merits phase once it had received the Claimants' counter-arguments on jurisdiction. But since then, Claimants' counter-arguments came fully in their Counter-Memorial and Rejoinder on Jurisdiction as well as at the Hearing, without any of the Parties questioning the autonomous nature of this Preliminary Objection or requesting or suggesting to join it to the merits phase, doubtless because Respondent's Third Preliminary Objection is an autonomous objection which possesses indeed an exclusive *ratione materiae* preliminary character.
231. Thus, the present Decision neither upheld nor rejected Respondent's Third Preliminary Objection nor even decided formally to join it to the merits, thereby raising a first procedural issue on the question of whether or not this treatment of a Party's Preliminary Objection constitutes a serious departure of a fundamental rule of the procedure applicable to the present ICSID arbitration. I cannot therefore accept the majority's attempt to justify such a treatment of the Respondent's Third Preliminary Objection as recorded in paragraph 172 of the Decision. The issue here has nothing to do neither with the maxim *iura novit curia* nor with the alleged Tribunal's power for treating Respondent's Objections in a different order. The matter does not need esoteric explanations at all. It is much more simple and clear than that. It is regulated by Article 41(2) of the ICSID Convention and by Rule 41(4) of the ICSID Arbitration Rules which provides *inter alia* that the Tribunal "may deal with the objection as a preliminary question (either upholding or rejecting it) or join it to the merits of the dispute". There is not a third alternative under ICSID Arbitrations. The Tribunal which is an "ICSID arbitral tribunal" is not empowered, in my view, to reformulate a party's objection as it pleases and neither the Convention nor the Arbitration Rules limit the kind of preliminary objections that a given party may decide to make.
232. How does the majority Decision proceeded to create such a procedural situation regarding Respondent's Third Preliminary Objection? First, as indicated, by denying its autonomous preliminary character and then by dividing in the Tribunal's analysis the consideration of the Third Objection into two separate sections, namely the section on the "Existence of a Protected Investment" (paragraphs 173 to 196 of the Decision) and the section on the "*Prima facie* breaches of the BIT" (paragraphs 223 to 253).

Under the first of these two sections, the Decision considers what it calls “One aspect of Respondent’s objection that the Tribunal lacks jurisdiction *ratione materiae* concerns the question whether Claimants have made an investment in Argentina that is protected under both the ICSID Convention and the Argentina-Austria BIT” (paragraph 173) and, under the second section, the so-called “other aspect of Respondent’s third objection that the Tribunal lacks jurisdiction *ratione materiae*” which is described, in footnote 187 of the majority Decision, as follows:

“The other aspect of Respondent’s third objection that the Tribunal lacks jurisdiction *ratione materiae* because of limits the BIT imposes for the protection of shareholder-investors, in the Tribunal’s view, does not, properly understood, concern a question of jurisdiction *ratione materiae*, but concerns the scope of the substantive protections the BIT grants to shareholder-investors. This is a question pertaining to the merits of the claim. At the present stage of the proceedings, any limitation on the substantive scope of protection is only relevant to the extent it results in the lack of a *prima facie* claim. See *infra* Section VI.2.”

233. The purpose of the above division of the Respondent’s Third Preliminary Objection between the so-called *two aspects* - considered separately from each other - becomes obvious when reading the first aspect supposed to be considered in paragraphs 173 to 196 of the Decision and finds that a reference to that first aspect of the Third Objection of the Respondent appears in single paragraph, namely in paragraph 185 in which,, following the Tribunal’ conclusion in the preceding one that ENJASA’s operating license does not qualify as a protected “investment” itself in the sense of Article 1 of the Argentina- Austria BIT, the Decision stated the following:

“This does not mean, however, that interferences with ENJASA’s assets are irrelevant for Claimants’ rights as shareholder-investors protected under the BIT. Yet, the question to which extent Claimants enjoy protection as (indirect) shareholders against interferences with ENJASA’s assets, such as the revocation of its operating license and subsequent events, is, in principle, an issue for the merits of the case. At the present jurisdictional stage, and despite Respondent’s formulation as part of its objection that the Tribunal lacks jurisdiction *ratione materiae*, the issue (i.e., the scope of protection of Claimants as shareholder-investors) is only relevant in order to assess whether Claimants have successfully presented a *prima facie* claim. This issue is discussed in connection with Respondent’s objection that Claimants

have failed to present a *prima facie* claim.” (majority Decision, para. 185)

234. In the light of the above quotation it is crystal clear that the purpose concerned was to deprive the Respondent’s Third Preliminary Objection of its autonomy and to begin to make it part and parcel of Respondent’s First Preliminary Objection. This is fully confirmed by paragraphs 223 to 253 of the Decision in which Article 4(3) of the BIT is reviewed, together with Article 4(1) and (2) of the BIT, in the perspective of a *prima facie* plausible breach of Article 4 of the BIT, namely as an issue falling under the Respondent’s First Preliminary Objection. Paragraphs 224 and 225 of the Decision are quite clear in that respect:

“224. In making this determination, the Tribunal therefore addresses not only aspects that are part of Respondent’s first objection that Claimants have failed to show the existence of a *prima facie* claim proper, but also those aspects of Respondent’s third objection that the Tribunal lacks jurisdiction *ratione materiae* which concern Respondent’s claim that, in light of Respondent’s construction of Article 4(3) of the BIT, Claimants, as indirect shareholders in ENJASA, are unable to bring claims relating to assets held by ENJASA, in particular claims arising out of the revocation of ENJASA’s operating license unless the revocation of the license resulted in an expropriation of “assets”/“financial assets” of ENJASA.

“225. The Tribunal will first turn to the question whether Claimants have been able to show a *prima facie* breach of Article 4 of the BIT. In this context, the Tribunal will also address Respondent’s argument on the impact of Article 4(3) of the BIT on claims by shareholder-investors, both in respect of expropriation and other causes of action under the Argentina-Austria BIT.”

235. In paragraphs 232 to 241 of the Decision, the majority made certain tentative constructions of Article 4(3) of the BIT as, for example, of the term *activos financieros* (*Vermögenwerte*) which I reject on the basis of Article 33 of the VCLT and international jurisprudence concerning the interpretation of treaties authenticated in two or more languages. Those tentative constructions of Article 4(3) of the BIT are presented by the majority under the cover of an exercise aiming at determining whether Claimants have presented a *prima facie* plausible construction of Article 4(3) of the BIT but, in my opinion, they go beyond that declared purpose. To avoid eventual misunderstandings, I declare to disagree and to reserve my position with respect to what is said concerning Article 4(3) in

paragraphs 236 to 241 of the majority Decision, taking note as from now of the statement in paragraph 235 of the Decision to the effect that:

“It is not necessary that the Tribunal comes to an ultimate conclusion on the interpretation of Article 4(3) of the BIT at the present stage of the proceedings. Instead, it is sufficient that Claimants have presented a *prima facie* plausible construction of Article 4(3) of the BIT. Paraphrasing *Ambatielos*, ‘[i]f the interpretation [...] relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one, then the [...] claim must’ proceed to the merits”

236. But, what is more important to underline here is the fact that the majority instead of dealing with Respondent’s Third Preliminary Objection took advantage of the occasion for determining that Claimants have made a *prima facie* claim that the revocation of ENJASA’s license constituted an expropriation of ENJASA that could entitle Claimants to compensation by breach, *inter alia* of Article 4(3) of the BIT. To complete the picture of how the Respondent’s Third Preliminary Objection was handled by the majority, the following statement in paragraph 239 of the Decision is quite representative:

“All in all, with respect to Article 4 of the BIT, in the Tribunal’s view, Claimants have made a *prima facie* claim that the revocation of ENJASA’s license and subsequent events constituted an indirect expropriation of Claimants’ shareholding in L&E and ENJASA contrary to Article 4(1) and (2) of the BIT. Furthermore, Claimants have presented a *prima facie* claim that the revocation of ENJASA’s license and subsequent events constituted an expropriation of certain of ENJASA’s assets or of ENJASA as a whole which could entitle Claimants to compensation pursuant to Article 4(3) of the BIT”.

237. I am obliged to dissent from the above deceptive passage, as well as of the statements in paragraphs 240 and 241 of the majority Decision, for several reasons. As I have already mentioned in paragraph 216 of this Declaration, none of the relevant facts alleged by Claimants, if duly proven or established as true, would amount to an expropriation or to a measure having an equivalent effect. But what is really amazing is to verify how the majority has transformed beyond recognition the contents and purpose of Respondent’s Third Preliminary Objection. I do not consider that to do so is a task for arbitrators. To put the matter in its correct perspective, I quoted below the meaning of that *ratione materiae* preliminary objection as described by Respondent in its Post Hearing Brief:



“In conclusion, in light of Article 4(3) of the BIT, this Tribunal has no jurisdiction (a) over the claim put forward by Claimants since it is not related to a financial asset owned by ENJASA and, in any case, (b) in relation to the alleged violation of the fair and equitable treatment and national treatment standards, since the Tribunal may only exercise jurisdiction in case of expropriation of assets of the company in which the investor owns shares.” (Respondent’s PHB, para. 132)

238. It is quite a gratuitous assertion of the majority that at the present jurisdictional stage, the issue (i.e., the scope of protection of Claimants as shareholder-investors) *is only relevant in order to assess whether Claimants have successfully presented a prima facie claim*. The *prima facie* claim criterion is relevant in the present phase of the case for the adjudication of the First Preliminary Objection. But, it is quite alien for the adjudication of the Third Preliminary Objection presented by the Respondent as an autonomous objection, as well as to the Second one. The First and Third Preliminary Objections are autonomous from each other and as such must be adjudicated separately. And this has not been done by the majority Decision which avoided Tribunal’s adjudication of Respondent’s Third Preliminary Objection at the present jurisdictional phase and even, in the alternative, to joint it to the merits phase of the dispute as provided for in Article 41(2) of the ICSID Convention and Rule 41 (4) of the ICSID Arbitration Rules.
239. Why, against the obvious, did the majority decide otherwise? Because it considered that the adjudication of Respondent’s Third Preliminary Objection at the present jurisdictional phase as one autonomous objection risked putting an end to the case while by making that Objection part and parcel of the First Objection that danger disappears *in the light of the test applicable for determining the existence of a prima facie claim*. Thus, that *test* has been used by the majority as a kind of black whole with respect to an early adjudication of the Respondent’s Third Preliminary Objection. But, the Contracting States have in effect expressly limited as *per* Article 4(3) of the BIT the possibility for a shareholder-investor to make claims under the BIT for assets of the company or companies concerned, ENJASA in the instant case.
240. Likewise, by doing as indicated above the majority alleviated in the present jurisdictional phase the standard burden of proof *actori incumbit probatio* of Claimants applicable – as declared by the *Philip Morris v. Uruguay* Tribunal (see paragraph 67 of the present Opinion) - to preliminary objections of the kind of Respondent’s Second and Third Preliminary

Objections, a standard confirmed by other investment arbitration decisions and awards on jurisdiction like the ones below:

“...Thus, so long as the objection goes only to the authority of the Tribunal to hear claims for the breach of the legal right identified by the Claimant, the Tribunal’s review of the sufficiency of the legal allegations, like its review of the factual allegations, is limited.

“A fundamentally different approach is required, however, for issues that are directly determinative of the Tribunal’s jurisdiction – such as, for example, issues of consent, nationality, covered investment, territoriality, or the temporal scope of treaty protection. If the Tribunal is to make jurisdictional determinations on such issues in a threshold jurisdictional stage (rather than joining them to the merits), the Tribunal must reach definitive findings of fact and conclusions of law. Without such determinations, the Tribunal cannot satisfy itself that it has jurisdiction to hear the merits of the dispute”. (*Société Générale de Surveillance and Republic of Paraguay*, Decision on Jurisdiction of 12 February 2010, paras. 52 and 53),

“It follows that matters that are decisive for purposes of establishing jurisdiction, such as whether a particular claimant qualifies as an investor or whether an investment falls under the protection of the relevant treaty, must be proven and decided at the jurisdictional stage. In the present instance, the burden of proof that all the jurisdictional requirements of the case are met, insofar as they are contested by the Respondent, lies with the Claimant” (*Blue Bank International v. Venezuela*, Award of 26 April 2017, para.73).

241. It follows, as pointed out by Respondent, that Article 4(3) of the BIT “establishes two requirements: (a) that the affected asset of the company constitutes a ‘financial asset’ [*activo financiero*], and (b) that the challenged measure qualifies as an expropriation”. And further, regarding the second requirement, that “even if one considered that actions may be brought by shareholders in respect of company assets under Article 4(3) of the BIT, this provision would limit those actions to claims for expropriation, and exclude claims concerning the standards of fair and equitable treatment and national treatment from the jurisdiction of the Tribunal” (quoted from paragraph 114 and 116 of the Decision). This subject-matter of Respondent’s Third Preliminary Objection not being adjudicated at the present jurisdictional phase must, unless withdrawn by Respondent, be adjudicated in the following merits phase, the burden of proof that Respondent is wrong corresponding to Claimants.

242. Finally, it appears to be generally accepted that Claimants' alleged protected investment falls *prima facie* under Article 1(1)(b) of the Argentine-Austria BIT, namely under the category defined as any shareholding and any form of participation in companies. Then, it should be recalled that such a category, like for that matter any other of the different ones listed, is subject to the provision set forth in the last paragraph of Article 1 of said BIT which reads as follows:

*“El contenido y el alcance de los derechos correspondientes a las diversas categorías de los activos, serán determinados por las leyes y reglamentaciones de la Parte Contratante en cuyo territorio la inversión está situada”.*

243. In light of the considerations above, I dissent from the *prima facie* conclusion on the Third Preliminary Objection as recorded in paragraph 239 to 241 of the present Decision concerning Article 4(3) of the BIT and from the over-all handling by the majority of Respondent's Third Preliminary Objection which has failed to be adjudicated by the Arbitral Tribunal or join it to the merits at the present jurisdictional phase in full contradiction with Article 41(2) of the ICSID Convention and Rule 41 (4) of ICSID Arbitration Rules.

244. It follows that I reject the overall conclusion of the majority to the effect that by the finding that Claimants have presented plausible *prima facie* claims that the rights of foreign investors under Article 4(3) could have been breached, as well as all the premature conclusions by the majority on the interpretation of that provision of the Argentina-Austria BIT, like in paragraphs 240 and 241 and others of the Decision, which in some cases may have incurred in procedural prejudgments. In my opinion, the majority Decision did not respond to Respondent's Third Preliminary Objection either in *toto* or in part because it has nothing in common with the demonstration of the existence or non-existence of a given *prima facie* claim.

245. Finally, I reject as from now the *prima facie* prejudgments incurred by the majority in paragraphs 240 and 262 of the Decision where it is stated that the Tribunal found respectively: (a) that Article 4(3) of the BIT was intended to grant shareholders investors an “additional cause of action; and (b) that Article 4(3) of the BIT cannot be interpreted as limiting claims by shareholder-investors to breaches of Article 4 of the BIT for expropriation.

[ *Signed* ]

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Dr. Santiago Torres Bernárdez  
Arbitrator

Date: 20 June 2018