

**ARBITRATION UNDER THE
RULES OF THE INTERNATIONAL CENTRE
FOR SETTLEMENT OF INVESTMENT DISPUTES**

**PHILIP MORRIS BRANDS SÀRL
PHILIP MORRIS PRODUCTS S.A.
and
ABAL HERMANOS S.A.**

Claimants

v.

ORIENTAL REPUBLIC OF URUGUAY,

Respondent

ICSID Case No. ARB/10/7

URUGUAY'S REPLY ON JURISDICTION

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INTRODUCTION

1. Pursuant to paragraph 13 of the Agreement of the Parties on Procedural Matters, Respondent Uruguay respectfully submits this Reply to the 23 January 2012 Counter-Memorial on Jurisdiction presented by Claimants Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A..

2. Nothing Claimants argue in their Counter-Memorial can or does change any of the conclusions presented in Uruguay's Memorial. The Tribunal lacks jurisdiction for all the reasons previously stated, namely:

- Claimants did not satisfy Article 10's requirement that they litigate this BIT dispute in Uruguayan courts for at least 18 months before instituting arbitration;
- The most-favoured nation ("MFN") clause of the Uruguay-Switzerland BIT does not apply to dispute resolution, and therefore does not excuse Claimants' failure to comply with Article 10;
- Article 2 removes public health measures from the scope of the substantive protections the BIT otherwise accords investors; and
- Because they impede Uruguay's economic development, Claimants' activities do not constitute an "investment" within the meaning of the ICSID Convention.

Rather than undermining these conclusions, Claimants' Counter-Memorial in many respects only serves to highlight the reasons Uruguay is correct.

3. Concerning the Article 10 domestic litigation requirement, for example, Claimants contend that they did in fact satisfy it by submitting various municipal law claims to the Uruguayan courts. Yet, by devoting so much attention to what they did, they indirectly shine a spotlight on what they did *not* do. In particular, they did not follow the special statutory

mechanism Uruguayan law creates for the litigation of disputes arising under any bilateral investment treaty. In choosing instead to submit only domestic law claims through the usual channels, Claimants specifically declined to litigate this treaty dispute in Uruguay as Article 10 requires. They cannot avoid the consequences of that failure now.

4. With respect to the MFN issue, despite some 30 pages of argument, Claimants tellingly do not identify even a single case in which an MFN clause as narrow as that contained in the Uruguay-Switzerland BIT was interpreted to embrace dispute resolution. This is no oversight. Claimants identify no such case because there is none. To the contrary, the authority Claimants try to enlist to their support involved far broader clauses using materially different language. The fact remains: even if MFN clauses could cover matters of dispute resolution in the abstract (itself a dubious proposition absent compelling evidence of a contrary intent), this MFN clause does not. The Uruguay-Switzerland BIT's MFN clause, therefore, does not rescue Claimants from their failure to litigate this dispute domestically, as Article 10 requires.

5. On the issue of Uruguay's rights under Article 2 to prohibit economic activity for reasons of public health, Claimants largely limit themselves to arguing that it does not apply because the provision's temporal scope is limited to the pre-investment phase. In making this argument, however, the Counter-Memorial studiously eschews the actual wording of Article 2, which makes clear that it applies throughout the life-cycle of an investment. It therefore applies fully to Claimants' investments. Uruguay's actions to promote and protect public health, challenged in this arbitration, plainly fall within its rights under Article 2.

6. Finally, concerning the question of whether or not their activities constitute an "investment" within the meaning of the ICSID Convention, Claimants make no effort to contest

the enormous economic and social costs of smoking, and the burdens imposed on Uruguay. Nor do they contest that their meager economic “contributions” to the Uruguayan economy are substantially outweighed by those costs and burdens. They argue instead that the Tribunal can ignore those facts because the ICSID Convention protects even investors who earn their profits at the expense of the host State’s economic development, and the health and well-being of its population. That cannot be, and is not, right.

7. Each of these points is elaborated fully in the pages that follow. For each of them, and for all of them, Claimants’ Request for Arbitration must be dismissed.

I. CLAIMANTS HAVE NOT COMPLIED WITH ARTICLE 10'S 18-MONTH DOMESTIC LITIGATION REQUIREMENT

8. In its Memorial, Uruguay showed that Article 10, paragraph 2, of the BIT requires investors to pursue domestic litigation for 18 months before they may initiate international arbitration.¹ Uruguay also showed that Claimants' February 2010 Request for Arbitration ("RFA") made no effort even to suggest that Claimants satisfied this requirement. Instead, the RFA sought shelter exclusively in the BIT's MFN clause, claiming it entitled Claimants to bypass the domestic litigation requirement altogether.

9. Claimants' Counter-Memorial makes an abrupt *volte-face*. Without explanation, it abandons the position staked out in the RFA and argues that Claimants did, in fact, pursue domestic litigation before the Uruguayan courts. And although they admit the 18-month period had not yet run when they filed the RFA, they claim it has now. On these bases, Claimants contend that the Tribunal has jurisdiction.

10. The RFA made no effort to claim compliance with the domestic litigation requirement because Claimants made no effort to comply. This truth is evident from a single fact: Uruguayan law creates a special statutory mechanism designed exclusively for the

¹ Uruguay-Switzerland BIT, Art. 10(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.

(RL-21).

resolution of BIT disputes. Claimants did not pursue this mechanism. Indeed, their Counter-Memorial does not even advert to its existence.

11. Rather than pursue their BIT claims through the appropriate domestic mechanism, the disputes Claimants chose to bring before the Uruguayan courts related only to matters of Uruguayan municipal law. Indeed, Claimants specifically *declined* to raise any claims under the BIT in those proceedings. They have therefore failed to litigate this dispute domestically for any period of time, let alone for 18 months. That failure deprives this Tribunal of jurisdiction.

12. Further, even if Claimants had litigated this BIT dispute before Uruguayan courts (*quod non*), the plain terms of Article 10 required them to do so for 18 months *before* pursuing arbitration. Since even on Claimants' theory, the 18 months had not run before this arbitration began, jurisdiction is lacking for this reason too.

A. Claimants Did Not Litigate This Dispute Before Uruguayan Courts

1. Claimants Did Not Follow the Special Procedure under Uruguayan Law for the Litigation of BIT Disputes

13. As stated, Uruguayan law creates a distinct procedure for the litigation of BIT disputes in domestic courts. That special procedure is set forth in Law 16,110,² enacted on 25 April 1990 – approximately a year before the entry into force of the Uruguay-Switzerland BIT.³ The origins and content of Law 16,110 are described in detail in the Expert Opinion of Dr.

² Uruguayan Law No. 16,110 (7 May 1990), Arts. 4-9 (RL-83).

³ See Uruguayan Law No. 16,176 (25 Apr. 1991) (RL-84).

Daniel Hugo Martins, Uruguay's leading scholar of domestic administrative law, submitted herewith.⁴

14. As Dr. Martins explains, the first article of Law 16,110 ratifies Uruguay's bilateral investment treaty with Germany.⁵ That was Uruguay's first BIT. The remainder of Law 16,110 creates a specific mechanism for the resolution of investor-State disputes arising under *any* bilateral investment treaty. Article 3 of Law 16,110 provides:

The disputes, not resolved amicably, that arise between foreign investors and the State under Bilateral Treaties for the Promotion and Protection of Investments, ratified by the Republic, shall be subject to the procedure established in the following articles.⁶

⁴ Dr. Daniel Hugo Martins, *Expert Report on the Application of Law No. 16,110 to the Bilateral Investment Treaty with Switzerland and the Arbitration Claim Filed by Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. the Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7 (16 Apr. 2012) (hereafter "Expert Opinion of Dr. Martins").

⁵ The second article of the Law also ratifies a tax treaty with Germany. Law No. 16,110, Art. 2 (RL-83).

⁶ See also Expert Opinion of Dr. Martins, pp. 3-4 & 8-10. The 17 August 1987 letter from the Executive Branch to the General Assembly requesting adoption of the Uruguay-Germany BIT made plain that the "procedural rules" established in Law 16,110 "will be of general character and shall apply to all Treaties with similar characteristics" – *i.e.*, all of Uruguay's future BITs requiring domestic litigation. Letter from Uruguayan President Julio María Sanguinetti and his Ministries of Foreign Affairs, Economy and Finance, and Education and Culture to the President of the General Assembly (17 Aug. 1987) (hereafter "1987 Executive Letter to General Assembly"), in Minutes of Uruguayan Senate Sessions, No. 7, Vol. 327 (13 Mar. 1990), p. 15 (R-75).

The same understanding was reiterated by various legislators leading up to the ratification of Law 16,110, including when Senator Blanco, a member of the Senate Committee on International Matters, noted that the Senate was being asked to approve, *inter alia*, "certain procedural rules establishing a special system or specific procedure to handle any type of dispute that may arise, not only for the purpose of [the Uruguay-Germany BIT], but also others of a similar nature which may arise in the future." Speech of Sen. Juan Carlos Blanco, in Minutes of Uruguayan Senate Sessions, No. 7, Vol. 327 (13 Mar. 1990), p. 98 (R-75). See also the speech of Senator Gargano:

The bill that we are considering also includes the establishment of a special jurisdiction for the general resolution, not only for the case of the Treaty with the Federal Republic of Germany, but rather to establish procedural rules relating to problems that arise for investors benefitting from the Treaties on the Reciprocal Promotion and Protection of Capital Investments and the Convention for the avoidance of double taxation of income and wealth, and in general, not only to these [agreements], but rather to all those that are signed in the future.

Speech of Sen. Reinaldo Gargano, in Minutes of Uruguayan Senate Sessions, No. 7, Vol. 327 (13 Mar. 1990), pp. 74-75 (R-75).

15. Articles 4(A) and 9 of Law 16,110 designate the *Tribunal de lo Contencioso Administrativo* (“TCA”) and the *Tribunales de Apelaciones en lo Civil* as the competent courts for investor-State BIT disputes.⁷ In either forum, special pleading laws apply. In order to initiate litigation under Law 16,110, a claimant must “express with precision” in its complaint that the claims are based on the norms established under a BIT. The complaint must also “individualize” the BIT claims with particularity.⁸ Still other procedural requirements include:

- A complaint must be accompanied by any documentary evidence that the investor intends to present; and
- It must also identify the name and address of any witnesses the investor plans to call.⁹

16. Among its more notable aspects, Article 4(I) of Law 16,110 provides that once an Uruguayan court has rendered its decision, no domestic appeal is available.¹⁰ Any secondary recourse must be to international arbitration.¹¹

17. Dr. Martins explains that the purpose of Law 16,110 was to create a streamlined process to expedite the litigation of BIT disputes so as to facilitate the rendering of a judgment

⁷ See also Expert Opinion of Dr. Martins, pp. 10-11.

⁸ “In the complaint, the plaintiff shall express with precision that they are filing the action under the standards of a Bilateral Treaty for the Promotion and Protection of Investments, which they shall individualize, and pursuant to the provisions of this law.” Law 16,110 (1990), Art. 4(C) (RL-83).

⁹ *Ibid.*, Art. 4(C).

¹⁰ *Ibid.*, Art. 4(I) (“The final judgment shall not be subject to any ordinary or extraordinary remedy of any kind.”).

¹¹ See the Protocol to the Uruguay-Switzerland BIT which establishes that “[j]udgment of the competent court ... means for the Oriental Republic of Uruguay a judicial decision in ... one and only [one] instance.” *Ad Arts. 9 & 10* (RL-21). See also Uruguay-Germany BIT, signed 4 May 1987, EIF 29 Jun. 1990, Protocol, Art. 7 (“Ad Article 11: a) As regards paragraph 2, decisions by the competent courts means, for the Oriental Republic of Uruguay, a judicial decision which cannot be appealed.”) (RL-31a).

within the 18-month window provided in the Uruguay-Germany BIT and a number of Uruguay's subsequent BITs, including the Uruguay-Switzerland BIT (which had already been signed but was not yet ratified when Law 16,110 was adopted).¹² Thus, in addition to creating special pleading rules, Law 16,110 also establishes a series of expedited deadlines that are shorter than those applicable in conventional domestic proceedings.

18. For example, under Law 16,110 the court has 90 days to issue its final decision on the case, which cannot be appealed or reviewed in any way by Uruguayan courts. In contrast, under the normal procedure, the TCA has over 245 days to issue its decision, which can be subject to further review under the *Recurso de Revisión* ("Recourse to Revision").¹³

19. Despite some 31 pages of argument on the subject of how they allegedly satisfied the Article 10 domestic litigation requirements, Claimants nowhere suggest that they invoked Law 16,110 or complied with any of its special procedural rules. They did not. To the contrary, as discussed below, Claimants specifically chose *not* to submit this BIT dispute to the Uruguayan courts. That fact confirms Claimants' wholesale failure to pursue domestic litigation for any period of time, much less for 18 months.

¹² See Expert Opinion of Dr. Martins, pp. 3, 11-13 & annexed table. See also the formal letter to the Uruguayan General Assembly requesting adoption of the Uruguay-Germany BIT and attaching a proposed draft of Law 16,110, in which the Executive Branch discussed "the establishment, within the domestic jurisdiction, of a rapid procedure for resolving any disputes that may arise, which will achieve a reduction in their duration and the consolidation of defenses, incidents and evidence, in order to also facilitate judicial activity." 1987 Executive Letter to General Assembly, in Minutes of Uruguayan Senate Sessions, No. 7, Vol. 327 (13 Mar. 1990), p. 15 (R-75).

¹³ See Expert Opinion of Dr. Martins, p. 13 & table annexed thereto.

2. The Disputes Claimants Submitted to Uruguayan Courts Were Different From This BIT Dispute

20. Rather than contend that they complied with Law 16,110, Claimants choose instead to ignore it. The Counter-Memorial argues that Claimants satisfied the BIT's domestic litigation requirement by pursuing other, ordinary actions against Uruguay's tobacco regulations in the TCA. But those suits raised purely municipal law disputes in which Abal alleged breaches of Uruguayan administrative and constitutional law. To the extent it mentioned the BIT at all, it was only for the purpose of making clear that it was *not* presenting a BIT dispute in those actions.¹⁴

21. As relayed in Claimants' Counter-Memorial, Abal filed three complaints in the TCA: the first on 9 June 2009, challenging Ordinance 514's single presentation requirement;¹⁵ the second on 22 March 2010, challenging the 80% warning label requirement in Decree 287;¹⁶ and the third on 20 April 2010, challenging one of the pictograms required under Ordinance 466.¹⁷ In all three, Abal presented only violations of Uruguayan administrative and

¹⁴ See Expert Opinion of Dr. Martins, pp. 15-25.

¹⁵ Claimants' Counter-Memorial on Jurisdiction (23 Jan. 2012) (hereafter "CMJ"), ¶ 54. See also Expert Opinion of Dr. Martins, pp. 15-17.

¹⁶ CMJ, ¶ 66 & Exhibit C-049. See also Expert Opinion of Dr. Martins, pp. 18-20.

¹⁷ See CMJ, ¶ 75. CMJ Exhibit C-050 illustrates that Claimants only challenged a single pictogram required under Ordinance 466, not the Ordinance in its entirety. See, e.g., p. 1 (filing an action "seeking *partial* annulment of Ordinance 466" and reiterating that "[t]he Ordinance, *which ABAL challenges only in part*, mandates that six rotating pictograms appear on all tobacco product packaging with a corresponding textual warning. *ABAL challenges only one of them* (the 'Pictogram')...") (emphasis added). Claimants have now withdrawn their treaty claim regarding the challenged pictogram. See CMJ, ¶ 7. See also Expert Opinion of Dr. Martins, pp. 20-23.

constitutional norms, and argued that the challenged regulations should be annulled on those grounds.¹⁸

22. In its March 2010 filing challenging Decree 287, for example, Abal asserted that the 80% warning label requirement violated its rights to freedom of commerce and property under the Uruguayan Constitution.¹⁹ That dispute has nothing to do with the treaty dispute Claimants seek to bring before this Tribunal.

23. Claimants themselves admit precisely this point elsewhere in the Counter-Memorial. Arguing that the Uruguayan Government's constitutional duty to protect public health is irrelevant in this case, they state: "[T]he requirements of Uruguay's Constitution have no bearing on whether Respondent has breached its obligations under the BIT."²⁰ Uruguay agrees. Disputes arising under Uruguayan domestic law and under the BIT are different; they cannot be conflated.

24. It is precisely for this reason that the Legal Opinion from Professor Christoph Schreuer that Claimants submit with their Counter-Memorial is, with the greatest respect, largely irrelevant. Professor Schreuer states that, in his opinion, "[i]t appears from the information" given to him, "that Claimants have complied with the requirements contained in Article 10, paragraphs (1) and (2) of the BIT."²¹ The information Professor Schreuer was given, however,

¹⁸ CMJ Exhibits C-041, C-049 & C-050. *See also* Expert Opinion of Dr. Martins, pp. 15-25.

¹⁹ CMJ Exhibit C-049, pp. 2 & 14-17.

²⁰ CMJ, ¶ 179.

²¹ C. Schreuer, *Issues of Jurisdiction in the Case Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, Legal Opinion (16 Jan. 2012) (hereafter "Legal Opinion of C. Schreuer (2012)"), ¶ 7 (Claimants' Exhibit CWS-001).

appears *not* to include Abal's complaints to the TCA.²² Nor does he appear to have been made aware of Law 16,110. Professor Schreuer seems instead simply to have taken Claimants' word for it that "litigation before the competent court was initiated..."²³ Yet, that is not the case. The predicate to Professor Schreuer's opinion is therefore incorrect.

25. To be sure, each of Abal's TCA filings did mention *en passant* that alleged violations of the BIT (and other treaties) had also occurred. But they did so only to make clear that Claimants were *not* submitting a treaty dispute to the TCA. Abal merely reserved the right to present that dispute in a different forum at a later date. Its 9 June 2009 complaint challenging Ordinance 514, for example, states:

The parent companies of Abal and other companies belonging to the Philip Morris group of companies *reserve their right to bring claims* under the [BIT and other treaties] before the forum specified under such treaties, and that they confirm that *the present action by Abal does not constitute a waiver of any of their rights under such treaties, including without limitation, their right to bring claims under these treaties*²⁴

This same reservation appears virtually verbatim in Abal's other two complaints.²⁵

26. Claimants therefore knew that they had a "right to bring claims under [the BIT]" but for whatever reason chose not to present any such dispute to the domestic courts. Claimants' Counter-Memorial admits: Abal "asserted, on its own behalf and on behalf of the other Philip Morris companies, Claimants' rights under the Switzerland-Uruguay BIT and other relevant

²² See *ibid.*, p. 1 (listing materials reviewed).

²³ *Ibid.*, ¶¶ 6(a) & 6(b).

²⁴ CMJ, ¶ 54, quoting CMJ Exhibit C-041, p. 31-32 (emphasis added).

²⁵ See Expert Opinion of Dr. Martins, pp. 19-22. See also CMJ, ¶ 77, quoting CMJ Exhibit C-050, pp. 29-30; CMJ Exhibit C-049, p. 39.

international treaties, and *expressly reserved their right to bring claims under the BIT.*²⁶ At least in this respect, the Counter-Memorial and Claimants’ RFA agree. The RFA states that Abal “asserted ... its rights under the Switzerland-Uruguay BIT and other relevant international treaties, expressly *reserving its right to bring claims under the BIT.*”²⁷

27. The plain language of the Uruguay-Switzerland BIT confirms that it is not sufficient to present a dispute concerning violations of Uruguayan constitutional or domestic law in order to satisfy the Article 10 domestic litigation requirement. What must be submitted to the Uruguayan courts is the actual dispute arising under the BIT.

28. In its Memorial, Uruguay showed that Article 10 establishes a sequence of steps through which a dispute must proceed before arriving at international arbitration.²⁸ First, it must be raised and negotiated for a period of at least six months. Then it must be litigated domestically for 18 months. Only then may it be brought before an international arbitral tribunal.

29. In particular, Article 10(1) first provides that only “disputes with respect to investments within the meaning of this Agreement [*i.e.*, the BIT]” are eligible for the special

²⁶ CMJ, ¶ 54 (emphasis added).

²⁷ Claimants’ Request for Arbitration (19 Feb. 2010) (hereafter “RFA”), ¶ 32 (emphasis added). This statement refers only to Abal’s TCA complaint challenging Ordinance 514. This is because, by the time Claimants filed the RFA on 19 February 2010, it had not yet initiated any action whatsoever in the TCA regarding either Decree 287 or Ordinance 466. See CMJ, ¶¶ 68 & 75 (indicating that Abal’s TCA complaints challenging Decree 287 and Ordinance 466 were filed on 22 March 2010 and 20 April 2010, respectively). See also, *cf.* *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 Jan. 2004) (El-Kosheri, Crawford, Crivellaro) (hereafter “*SGS v. Philippines*”), ¶ 150, quoting the United States-Venezuela Mixed Commission in the *Woodruff* case as follows: “as the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed....” (CLA-058).

²⁸ Uruguay’s Memorial on Jurisdiction (24 Sep. 2011) (hereafter “UMJ”), ¶¶ 42-48.

dispute resolution provisions established by the remainder of the Article. Article 10(2) then proceeds to state that if “a dispute within the meaning of paragraph (1) cannot be settled within a period of six months after it was raised,” then “the dispute shall be submitted” to the domestic courts. If no judgment has been reached within 18 months, “the investor concerned may appeal to an arbitral tribunal which decides the dispute in all its aspects.”

30. These provisions only retain their logic when read to mean that the same dispute, raising the same issues, must be presented both to Uruguayan courts and to international arbitration. It would be nonsensical to suggest that an investor could negotiate and litigate one dispute internally and then present a different dispute involving different issues for the first time in international arbitration.

31. The use of the term “appeal” in Article 10(2) is particularly telling. It plainly contemplates that international arbitration will be the forum of second resort (a fact confirmed by Law 16,110’s prohibition on domestic appeals). At the same time, it necessarily implies that the same BIT dispute, involving the same BIT issues, will be presented before both the internal courts and the arbitral tribunal. “Appeal” means nothing if not that one and the same dispute will be heard in the fora of first and then second instance.²⁹

32. This reading is confirmed also by Article 9(8) – yet another critical element of the legal context that the Counter-Memorial chooses to ignore. It provides:

²⁹ *Black's Law Dictionary* defines “appeal” as “[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.” *Black's Law Dictionary* (9th ed. 2009), p. 112: “Appeal” (RL-34).

With respect to disputes that have been submitted, in accordance with Article 10 of this Agreement, to the competent courts of the Contracting Party in the territory of which the investment has been made, the arbitral tribunal according to this Article may only render an arbitral award to decide on the matter in all its aspects if it has determined that the national judgment infringes a rule of international law, including the provisions of this Agreement, or is obviously unfair or there is a denial of justice.

Here again, the arbitral tribunal is envisioned as a review panel that may rule on a dispute if and only if the domestic court has erred. The provision would be nonsensical if the arbitral tribunal could be called upon to rule on a different matter from the one initially submitted to the domestic court.³⁰

33. The Protocol to Articles 10(2) and 9(8) of the BIT confirms the same point one more time. The Protocol states that the “Judgment of the competent courts in the sense of Article 9, paragraph (8), and Article 10, paragraph (2) means for the Oriental Republic of Uruguay a judicial decision in one and only instance.” Consistent with Law 16,110, this means that once a competent court in Uruguay has spoken, no further domestic recourse is permitted. As such, the only option for review is to proceed to international arbitration. The logic of this provision plainly contemplates that one and the same BIT dispute will be submitted both before the internal courts and international arbitration.

34. The difference between internal and international law claims is significant. According to Article 3 of the ILC’s Draft Articles on State Responsibility (which Claimants

³⁰ For this reason, the TCA’s judgment regarding Abal’s administrative challenge of Ordinance 514 is irrelevant here. The dispute at issue in the TCA action is not the matter before this Tribunal. *See also* Expert Opinion of Dr. Martins, pp. 15-17 (describing claims in Abal’s challenge to Ordinance 514).

themselves helpfully cite³¹): “The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”³²

35. The critical distinction between treaty and non-treaty claims is well established in investor-State jurisprudence. Indeed, other investors have frequently exploited this difference to their advantage. In cases involving underlying contracts with forum selection clauses requiring contract disputes to be brought in domestic court, for instance, tribunals have consistently found in favor of investors seeking access to international arbitration for BIT claims. The decision of the *Ad hoc* Annulment Committee in *Vivendi v. Argentina* contains a leading statement of principle: “A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard.”³³

36. Likewise, in *Telefónica v. Argentina*, the investor sought to avoid the forum selection clause of the underlying contract and stay in arbitration by arguing that “its claims ‘are founded in the Treaty’ (*i.e.*, the BIT) and that ‘it is for violations of the Treaty’ and not for ‘a

³¹ See CMJ, ¶ 179, n. 203.

³² *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2001), Art. 3 (CLA-061).

³³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 Jul. 2002) (Fortier, Crawford, Fernández Rozas), ¶ 113 (RL-109). Cited with approval by: *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction (3 Aug. 2004) (Sureda, Brower, Janeiro) (hereafter “*Siemens v. Argentina*”), ¶ 180 (RL-76); *Camuzzi International S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction (11 May 2005) (Orrego Vicuña, Lalonde, Morelli Rico), ¶¶ 109-111 (relying on *Vivendi* in discussing and “admitting the distinction between a contract-based and a treaty-based claim”) (RL-50); *Suez, Sociedad General de Aguas de Barcelona & InterAguas v. Argentina*, ICSID Case No. ARB/03/77, Decision on Jurisdiction (16 May 2006) (Salacuse, Kaufmann-Köhler, Nikken) (hereafter “*Suez v. Argentina*”), ¶ 43 (relying on *Vivendi* in holding that “BIT claims and contractual claims are two different things.”) (CLA-060).

mere breach of contract’ that Telefónica brought its case before this Tribunal.”³⁴ The tribunal agreed, stressing that “the subject matter of the claims of *Telefónica* to be decided here, and as to which Argentina challenges our jurisdiction, is not the breach of a contract containing a choice of domestic forum clause,”³⁵ but rather claims for violations of the Spain-Argentina BIT.

37. The object and purpose of the domestic litigation requirement further shows that domestic and international law disputes cannot be confused. That object and purpose can only be effectuated if the host State’s domestic courts are given a first opportunity to review the same BIT dispute that investors might later seek to submit to international arbitration.

38. In *Maffezini v. Spain*, for instance (a case Claimants are otherwise happy to embrace), the tribunal observed that an analogous 18-month domestic litigation requirement provided in the 1991 Argentina-Spain BIT gives the courts of the Contracting Parties “an opportunity to vindicate the international obligations guaranteed in the BIT”³⁶ before disputes concerning the scope of those obligations are submitted to arbitration. It goes without saying, of course, that there can be no such opportunity if the domestic courts are never presented with the international claims in the first place.

39. Similarly, in *Siemens v. Argentina*, Argentina argued that the 18-month domestic litigation requirement in its BIT with Germany was intended to give its courts “an opportunity to

³⁴ *Telefónica S.A. v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Jurisdiction (25 May 2006) (Sacerdoti, Brower, Siqueiros) (hereafter “*Telefónica v. Argentina*”), ¶ 30 (RL-77).

³⁵ *Ibid.*, ¶ 87.

³⁶ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction (25 Jan. 2000) (Orrego Vicuña, Buergenthal, Wolf) (hereafter “*Maffezini v. Spain*”), ¶ 36 (RL-54).

vindicate the international obligations guaranteed in the BIT”³⁷ by requiring “a previous, effective and diligent use of national jurisdiction.”³⁸ Here too, the tribunal agreed, stating that it “concur[red] with [Argentina] in that the Contracting Parties had intended through 10(2) to give the local tribunals an opportunity to decide a dispute first before it would be submitted to international arbitration.”³⁹

40. It would thus betray both the plain language and the object and purpose of the BIT for an investor to be able to present one dispute before domestic courts, and then to pursue an entirely different dispute before an international arbitral tribunal. The administrative and constitutional disputes Claimants chose to submit to the TCA in lieu of their treaty dispute therefore did not satisfy the BIT’s domestic litigation requirement. Because Claimants have denied Uruguayan courts the right of first review that the BIT guarantees them, this Tribunal is without jurisdiction.

3. The *Travaux Préparatoires* Confirm That International Arbitration Was Intended as a Forum of Second Resort for a Dispute Already Raised

41. The BIT’s *travaux préparatoires* provide unmistakable additional confirmation of the fact that the Article 10 domestic litigation requirement was crafted at Uruguay’s insistence to give its internal courts an initial opportunity to vindicate its international legal obligations before any recourse to arbitration could be had.

³⁷ *Siemens v. Argentina*, ¶ 59 (quoting *Maffezini v. Spain*) (RL-76).

³⁸ *Ibid.*, ¶ 56.

³⁹ *Ibid.*, ¶ 104.

42. Switzerland's original proposed BIT contained no mention of domestic litigation.⁴⁰ To the contrary, it contemplated direct recourse to arbitration following 12 months of consultations.⁴¹ After reviewing this initial proposal, the Uruguayan negotiating team prepared an internal memorandum outlining Uruguay's response and stating: "The issue of dispute resolution proposed by the Swiss Confederation poses some fundamental problems."⁴² It noted further that "the solution put forward in the proposal should be reconsidered, since in the view of the Uruguayan Party, *disputes of this type should be handled through a contentious-administrative or judicial process, before the competent judicial body.*"⁴³

43. One year later, the draft had been revised to take account of Uruguay's insistence on domestic courts being the forum of first review for disputes arising under the BIT. In the revised draft, the domestic litigation requirements that ultimately became Articles 9(8) and 10 of the BIT were added, thus granting the host State's domestic courts a first opportunity to review an investor's treaty claims.⁴⁴

44. The same contest was playing out – with the same result – in Uruguay's simultaneous, though slightly more advanced, BIT negotiations with Germany. Given the

⁴⁰ Swiss Standard Draft BIT (1 Jan. 1986) (R-70).

⁴¹ *Ibid.*, p. 11, Art. 9 (proposing for the resolution of "Disputes between a Contracting Party and an investor of the other Contracting Party" that "[i]f ... consultations do not result in a solution within 12 months and if the national or company concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for the Settlement of Investment Disputes").

⁴² Memorandum of Claudio Billig and Julián Moreno of the Uruguayan Ministry of Economy and Finance providing preliminary comments on Swiss draft of Uruguay-Switzerland BIT (26 Aug. 1986), p. 2 (R-71).

⁴³ *Ibid.*, p. 2 (emphasis added).

⁴⁴ See Negotiating Version of Uruguay-Switzerland BIT (28 Aug. 1987), pp. 12-13 (R-74).

temporal and thematic overlap,⁴⁵ as well as the Uruguayan Legislature's reliance on the debate over the ratification of the German BIT when deciding to ratify the Swiss BIT,⁴⁶ the negotiation and ratification history of the German BIT sheds important light on the Swiss BIT.⁴⁷

45. Even as Uruguay was revising the Swiss BIT, the lead Uruguayan delegate in the negotiations with Germany reported that during a meeting with his German counterpart, "issues in [the Uruguay-Germany BIT] which have not yet been resolved were discussed,"⁴⁸ including

⁴⁵ The German BIT was signed by the two countries on 4 May 1987 and submitted to the Congress by Uruguay's Executive Branch for ratification on 17 August 1987. The Swiss BIT was negotiated during the same time, and signed one year later.

⁴⁶ For instance, the report of the House of Representatives' Committee on International Matters recommending the adoption of the bill ratifying the Swiss BIT noted that "[t]he bill is similar to the Treaty which our country signed with the Federal Republic of Germany, which was ratified this year by the Legislative Branch," and highlighted the importance of what had been said previously about dispute resolution, which was "the aspect which gave rise to an extensive debate when the aforementioned Agreement with the Federal Republic of Germany was considered..." Report of the House Committee on International Affairs (3 Dec. 1990), in Minutes of Uruguayan House of Representatives Sessions (4 Feb. 1991), p. 456 (R-77).

See also Speech of Representative A. Francisco Rodriguez Camusso, in Minutes of Uruguayan House of Representatives Sessions (19 Mar. 1991), p. 155 ("This Agreement ... is similar to the one with the Federal Republic of Germany that was approved by the House ... [a]fter a debate that lasted several years...") (R-78); Speech of Representative Juan Raúl Ferreira, Reporting Member of the House Committee on International Matters, in Minutes of Uruguayan House of Representatives Sessions (19 Mar. 1991), p. 162 (stating in the debates regarding the adoption of the equivalent Dutch BIT: "I wish to refer to all the remarks that ... I made approximately a year ago" regarding the German BIT. "This is a treaty with similar characteristics. ... It seems unnecessary to us ... to enter into a more detailed analysis; we may save the country that debate, because we have already had it, and at a very high level on the part of those who argued one or the other position, when the first treaty of this kind was studied.") (R-78).

⁴⁷ *See* Vienna Convention on the Law of Treaties (with annex) (23 May 1969), 1155 U.N.T.S. 331, Art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty *and the circumstances of its conclusion*, in order to confirm the meaning resulting from the application of article 31.") (emphasis added) (RL-19). The ILC's Special Rapporteur on the Convention confirmed that "circumstances of its conclusion" is a "broad phrase [that] is intended to cover both the contemporary circumstances and the historical context in which the treaty was concluded." H. Waldock, *Third Report on the Law of Treaties*, YEARBOOK OF THE ILC, Vol. II (1964), p. 59, ¶ 22 (RL-97). *See also* *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 Sep. 2010) (von Wobeser, Stern, Rowley) ¶ 7.6.5 (affirming historical interpretation as a complementary method of treaty interpretation under Vienna Convention, Article 32) (RL-100).

⁴⁸ Uruguayan Telex regarding a meeting between personnel from the Uruguayan Ministry of Economy and Mr. Volker Hahn of Germany regarding draft of Uruguay-Germany BIT (13 Nov. 1986), p. 1, ¶ 3 (R-73).

issues regarding the resolution of disputes.⁴⁹ As with the Swiss BIT, the issue of investor-State dispute resolution was “presenting the greatest differences in order to reach an agreement.”⁵⁰ The lead Uruguayan delegate indicated that, for Uruguay, “it is a matter of principle to resort to Uruguayan courts (as a step prior to an arbitral tribunal).”⁵¹ Uruguay was simply unwilling to accept that a German investor could “deliberately dispense with resorting to Uruguayan courts.”⁵² It therefore insisted on “solutions that assure the jurisdictional authority in the first instance of the State where the investment is being made, and in the second instance arbitration under certain conditions....”⁵³

46. During the discussions regarding the ratification of the BIT with Germany, the Uruguayan Government turned to the famed Uruguayan jurist and former President of the International Court of Justice, Professor Eduardo Jiménez de Aréchaga, for his expert opinion on whether Uruguay should agree to the BIT’s dispute resolution mechanisms. In his response, Professor Jiménez de Aréchaga explained that, although the exhaustion of local remedies stems from a “well-established customary rule of international law ensuring that the State where the breach occurred has the opportunity to remedy it through its own means, within the framework of its own internal legal system,”⁵⁴ many developed countries had sought to “propos[e] the

⁴⁹ See *ibid.*, p. 2, ¶ 3(C).

⁵⁰ *Ibid.*

⁵¹ *Ibid.* (emphasis added).

⁵² *Ibid.*, ¶ 3(C).

⁵³ Speech of Dr. Julián Moreno of the Ministry of Economy & Finance to the Senate, in Minutes of Uruguayan Senate Sessions, No. 329, Vol. 324 (9 Aug. 1989), p. 52 (R-4).

⁵⁴ Report of Eduardo Jiménez de Aréchaga to the President of the Senate Committee on International Affairs (20 Oct. 1988) (hereafter “Report of E. Jiménez de Aréchaga (1988)”), in Minutes of Uruguayan Senate Sessions, No. 7, Vol. 327 (13 Mar. 1990), p. 41, ¶ 3 (quoting the ICJ) (R-75).

insertion of arbitration clauses in bilateral agreements, totally excluding the resolution of these possible disputes by the national courts.”⁵⁵ While other developing countries had relented, Uruguay held out, maintaining the “Latin American tradition of considering as inalienable the requirement that foreigners must exhaust local remedies before being able to file an international claim or go to arbitration.”⁵⁶

47. In adhering to this tradition, the Uruguay-Germany BIT provided a compromise between capital exporting countries’ desire for direct access to arbitration and Uruguay’s preference for local remedies: the dispute would go first to domestic court and only then to arbitration:

The Treaty with Germany ... departs from the generalized formulas on which capital-exporting countries insist, insofar as it contemplates and respects the requirement of the prior exhaustion of internal judicial remedies by investors.... In this sense, this treaty is a valuable precedent, which may be imitated by other countries, as it allows for the achievement of the objective of promoting the capital investments necessary for our economic development, without diminishing the fundamental principle of our country on the subject of financial claims.⁵⁷

Professor Jiménez de Aréchaga further noted that Uruguay had also compromised by agreeing to “establish a single non-appealable and accelerated procedure, allowing for the resolution of a

⁵⁵ *Ibid.*, ¶ 2.

⁵⁶ *Ibid.*, ¶¶ 4-5.

⁵⁷ *Ibid.*, pp. 41-42, ¶ 7. Professor Jiménez de Aréchaga also noted that the ICSID Convention, which is mentioned in the German BIT in multiple places, also contemplates – at Article 26 – “the requirement of the prior exhaustion of local administrative and judicial remedies as a condition of the consent to arbitration....” *Ibid.*, p. 42, ¶ 11; *see also* Uruguay-German BIT, Art. 10(5) & Protocol *Ad* Art. 11(b) (RL-31a); ICSID Convention (1966), Art. 26 (“A Contracting State may require the exhaustion of local remedies as a condition of its consent to arbitration under this Convention.”) (RL-11).

dispute within eighteen months of the filing of a legal action”⁵⁸ – *i.e.*, the procedure laid out in Law 16,110.

48. In light of the foregoing, it is clear that Article 10’s domestic litigation requirement was intended to give the host State’s internal courts an opportunity to rule on its international legal obligations in the first instance. Unless an investor presents its treaty claims to it, the domestic forum cannot serve that function. Quite apart from the failure to follow the mechanisms Law 16,110 creates, the submission of purely domestic claims, like those Claimants submitted to the TCA, therefore cannot satisfy the jurisdictional precondition Article 10(2) lays down.

49. For this and the other reasons articulated above, this Tribunal is without jurisdiction over this case.

B. Claimants’ Failure To Pursue Domestic Litigation of This Dispute Necessitates Dismissal of the Case

1. Whether Domestic Litigation Is a Matter of Jurisdiction or Admissibility, Claimants’ Failure To Comply with Article 10 Renders Dismissal Necessary

50. In its Memorial, Uruguay demonstrated that the Article 10 domestic litigation requirement is a jurisdictional one.⁵⁹ The Counter-Memorial disagrees. It argues that the

⁵⁸ Report of E. Jiménez de Aréchaga (1988), ¶ 7 (R-75). In a personal interview years later, Professor Jiménez de Aréchaga similarly noted that Uruguay’s BIT policy had established that “you can go to th[e domestic] court, and if you fail you can go to an international organ.” A. Cassese, *FIVE MASTERS OF INTERNATIONAL LAW: CONVERSATIONS WITH R.J. DUPUY, E. JIMÉNEZ DE ARÉCHAGA, R. JENNINGS, L. HENKIN AND O. SCHACHTER* (2011), pp. 98-99 (R-84).

⁵⁹ UMJ, pp. 21-32.

requirement goes instead to the issue of admissibility.⁶⁰ Although Uruguay stands by its position for the reasons stated below, the debate is ultimately irrelevant. Whatever the answer, this case must be dismissed.

51. Claimants notably make no effort to argue that domestic litigation is not required. Indeed, they admit it. In their Counter-Memorial, they specifically acknowledge that “Article 10 requires a potential claimant to ... initiate domestic litigation before a ‘competent court’ with respect to [the] dispute, before initiating arbitration.”⁶¹ They limit themselves instead to contending that the requirement is a matter of admissibility, which can be satisfied after arbitration has begun.⁶² Their argument proceeds in three steps:

- (1) They litigated this dispute in Uruguayan courts;
- (2) Although the 18-month period had not yet elapsed when they filed their RFA, it has now; and
- (3) Since the issue is one of admissibility, not jurisdiction, the Tribunal can overlook the prematurity of their RFA as their case is admissible now.

52. Claimants’ argument fails well before it gets to their step (3). It stumbles over step (1). As shown above, Claimants in fact made no effort to comply with Article 10. To the

⁶⁰ CMJ, pp. 39-50.

⁶¹ *Ibid.*, ¶ 40. *See also* ¶ 80 (“As demonstrated above, Claimants have met each of the requirements of Article 10.”).

⁶² *Ibid.*, ¶ 83 (“Respondent misconstrues the 18-month domestic litigation *requirement* as jurisdictional rather than what it is – a procedural *requirement* that can be rendered moot with time.”); ¶ 82 (“there is no question that Claimants are in *compliance with the requirements of Article 10 of the BIT* as of the date of this filing and have been in compliance with those requirements for some time. However, according to Uruguay, the fact that Claimants were not in compliance with the domestic litigation requirement as of the date of the registration of the RFA is fatal to this Tribunal’s jurisdiction. For the reasons explained below, Respondent’s position is untenable because (1) Respondent misconstrues the steps in Article 10 of the BIT as preclusive jurisdictional prerequisites rather than *procedural requirements that can be rendered moot*; and (2) *given that all of the procedural prerequisites have been met*, dismissal of the claims would serve no purpose, as Claimants could simply resubmit the dispute to arbitration.”) (emphasis added).

contrary, they expressly declined to submit this treaty dispute to the TCA. As a result, even if the issue were one of admissibility (which it is not), Claimants' case would still be at least 18 months short of becoming admissible. It must therefore be dismissed pending satisfaction of the domestic litigation requirement.⁶³

2. The BIT's Plain Meaning Makes Domestic Litigation a Jurisdictional Requirement

53. That said, the reality is that the BIT's domestic litigation requirement is very much a jurisdictional one. The effect of Claimants' failure to satisfy it does more than render their complaints inadmissible. It deprives the Tribunal of the power to hear them.

54. Claimants acknowledge that the Tribunal must have jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis*.⁶⁴ Yet, they ignore the first, essential basis for any arbitral tribunal's jurisdiction: *ratione voluntatis*.⁶⁵ It is beyond axiom that the Centre's

⁶³ See, e.g., *SGS v. Philippines*, ¶ 171 ("Normally a claim which is within jurisdiction but inadmissible (e.g., on grounds of failure to exhaust local remedies) will be *dismissed*, although this will usually be without prejudice to the right of the claimant to start new proceedings if the obstacle to admissibility has been removed (e.g., through exhaustion of local remedies).") (emphasis added) (CLA-058).

⁶⁴ CMJ, ¶ 84.

⁶⁵ "Consent to arbitration by the host State and by the investor, is an indispensable requirement for a tribunal's jurisdiction." C. Schreuer, *Consent to Arbitration*, TRANSNATIONAL DISPUTE MANAGEMENT (27 Feb. 2007), p. 1 (RL-94). See also *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010) (Fernández-Armesto, Paulsson, Voss), ¶ 45 (describing the four conditions for jurisdiction: *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione voluntatis*) (RL-114); *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern (21 Jun. 2011), ¶ 52:

In order to benefit from the jurisdictional protection granted by an arbitration mechanism ... there is a condition *ratione voluntatis*: the State must have given its consent to such a procedure which allows a foreign investor to sue the State directly on the international level. This consent is expressed broadly or restrictively, with conditions of exhaustion of local remedies or waiting periods, as allowing all claims or only certain claims: in other words, the consent is given under certain conditions. Just as the conditions of nationality for example must be fulfilled before an investor can have access to all the rights granted by the BIT, the conditions shaping the State's consent to arbitration must be fulfilled before a right to arbitration can arise.

jurisdiction is founded on the consent of the parties.⁶⁶ It is also defined by the scope of that consent.⁶⁷ To determine the limits of its jurisdiction, the Tribunal must therefore look first to the terms of consent.⁶⁸ Here, those terms are set out in Article 10 of the BIT.

55. An investor seeking arbitration under a BIT must abide by the terms of the offer of arbitration stated in the treaty. As rightly summarized in the very recent *ICS v. Argentina* decision concerning a similar domestic litigation requirement: “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.... [T]he investment treaty presents a ‘take it or leave it’ situation....”⁶⁹

(RL-113).

⁶⁶ See International Bank for Reconstruction and Development (IBRD), *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 Mar. 1965), ¶ 23 (“Consent of the parties is the cornerstone of the jurisdiction of the Centre”) (RL-15). See also *Wintershall Aktiengesellschaft v. Argentina*, ICSID Case No. ARB/04/14, Award (8 Dec. 2008) (Nariman, Torres Bernárdez, Bernardini) (hereafter “*Wintershall v. Argentina*”), ¶ 160(2) (RL-82); *ICS Inspection and Control Services Limited v. The Argentine Republic*, UNCITRAL, Award on Jurisdiction (10 Feb. 2012) (Dupuy, Torres Bernárdez, Lalonde) (hereafter “*ICS v. Argentina*”), ¶¶ 255 & 262 (RL-112).

⁶⁷ See *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment on Jurisdiction and Admissibility (3 Feb. 2006), I.C.J. Reports 2006, p. 6, ¶ 88 (RL-48); *Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment (4 Jun. 2008), I.C.J. Reports 2008, p. 177 (hereafter “*Djibouti v. France*”), ¶ 48 (RL-105); *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, I.C.J. Judgment (1 Apr. 2011) (hereafter “*Georgia v. Russia*”), ¶ 131 (RL-47); *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 Jan. 2004) (Orrego Vicuña, Gros Espiell, Tschanz) (hereafter “*Enron*”), ¶ 88 (RL-55); *Burlington Resources Inc. v. Republic of Ecuador and Empresa Estatas Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Decision on Jurisdiction (2 Jun. 2010) (Kaufmann-Kohler, Stern, Orrego Vicuña) (hereafter “*Burlington*”), ¶¶ 317-318 & 342 (RL-49); *Murphy Exploration and Prod. Co. Int’l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Decision on Jurisdiction (15 Dec. 2010) (Oreamuno Blanco, Naón, Vinuesa) (hereafter “*Murphy*”), ¶¶ 143-146, 149 & 156-157 (RL-68); *ICS v. Argentina*, ¶¶ 255-262 & 270-72 (“arbitral jurisdiction is based exclusively on consent.”) (RL-112).

⁶⁸ See also UMJ, ¶¶ 57-65.

⁶⁹ *ICS v. Argentina*, ¶ 272 (RL-112). See also *Wintershall v. Argentina*, ¶¶ 160-172 (the 18-month litigation requirement “constitutes an integral part of the “standing offer” (“consent”) of the Host State, which must be accepted on the same terms by every individual investor who seeks recourse (ultimately) to ICSID arbitration for resolving its dispute with the Host State under the concerned BIT.”) (RL-82); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction (24 Oct. 2011) (hereafter “*Hochtief v. Argentina*”), ¶¶ 22-27 (regarding the Argentina-Germany BIT, “Article 10 of the BIT is, in effect, an offer to submit disputes to arbitration,

This conclusion is grounded in the law of treaties, which establishes that when a third party seeks to exercise a right given to it by a particular treaty, that party must comply with the conditions for the exercise of that right provided for in the treaty.⁷⁰

56. As Uruguay discussed in its Memorial, the plain language of Article 10, together with the negotiating history, make clear that prior domestic litigation is a critical element of Uruguay's offer to arbitrate.⁷¹ It is, in other words, a non-derogable precondition to jurisdiction. Claimants' Counter-Memorial never bothers to address the BIT's plain text or to say why Uruguay's interpretation is incorrect.⁷² The issue cannot so easily be ignored.

57. Article 10(2) states that "if" a BIT dispute cannot be settled between the investor and host State within six months, it "shall" be submitted to the competent courts of that State.⁷³ And only "if" no judgment has been reached within 18 months, "may" the investor "appeal" to an international arbitral tribunal. There is nothing ambiguous about this choice of words. They plainly set up a sequence of mandatory conditions that must be satisfied before an investor's right to pursue arbitration can vest.

58. Prior tribunals have found that the use of the term "shall", in particular, confirms the obligatory, jurisdictional character of analogous domestic litigation requirements. In *Wintershall v. Argentina*, for example, the tribunal held: "The use of the word 'shall' ... is itself

which investors may accept.... The 'acceptance' is contained in the Request for Arbitration. There is no doubt as to the interpretation of 'acceptance': it purports to accept the offer to arbitrate made in the BIT.") (CLA-032).

⁷⁰ *ICS v. Argentina*, ¶ 271 (RL-112). See also *Wintershall v. Argentina*, ¶ 114 (RL-82).

⁷¹ UMJ, ¶¶ 42-56.

⁷² See CMJ, ¶¶ 82-100.

⁷³ Uruguay-Switzerland BIT, Art. 10 (RL-21).

indicative of an ‘obligation’ – not simply a choice or option. The word ‘shall’ in treaty terminology means that what is provided for is *legally binding*.”⁷⁴ Similarly, in its decision in *ICS v. Argentina*, the arbitral tribunal found “no ambiguity as to the mandatory character of the phrase ‘shall be submitted ... to the decision of the competent tribunal’” in the Argentina-Germany BIT.⁷⁵ The Uruguay-Switzerland BIT is equally without ambiguity.

59. The issue is not simply a *procedural* question of timing, as Claimants would have it.⁷⁶ To the contrary, it is a critical *substantive* requirement the satisfaction of which has important consequences for the scope of an arbitral tribunal’s jurisdiction.

60. According to the second sentence of Article 10(2), only “if” the domestic court does not reach judgment within 18 months, “may” the arbitral tribunal “decide[] on the dispute in all its aspects.” On the other hand, if the domestic court *does* reach judgment within 18 months – a result Law 16,110 was specifically designed to afford – the scope of the tribunal’s jurisdiction is fundamentally altered. In that event, under Article 9(8), the tribunal “may only” render an arbitral award “if” it determines that “the national judgment infringes a rule of international law, including the provisions of this Agreement, or is obviously unfair or there is a denial of justice.”

⁷⁴ *Wintershall v. Argentina*, ¶ 119 (emphasis in original) (RL-82). See also *Maffezini v. Spain*, ¶ 34 (stating as follows in declaring that it would have denied jurisdiction if not for the MFN clause: “Here it is to be noted that paragraph 2 provides that the dispute “shall be submitted” (*será sometida*) to the competent tribunals of the State Party where the investment was made, and that paragraph 3(a) then declares that the dispute “may be submitted” (*podrá ser sometida*) to an international arbitral tribunal at the request of a party to the dispute in the following circumstances.”) (RL-54).

⁷⁵ *ICS v. Argentina*, ¶ 247 (RL-112).

⁷⁶ CMJ, ¶¶ 82-100.

61. The requirement that investors litigate their treaty dispute for 18 months in the host State's courts is therefore a key condition that goes to the heart of an arbitral tribunal's jurisdiction. It cannot be treated as an issue of admissibility.

3. The International Jurisprudence Confirms the Jurisdictional Nature of the Domestic Litigation Requirement

62. The international jurisprudence further confirms that the Tribunal has no jurisdiction unless and until Claimants satisfy the preconditions Article 10 lays down.

63. In its Memorial, Uruguay showed that the International Court of Justice has consistently found that requirements like those stated in Article 10 are jurisdictional.⁷⁷ The point was recently affirmed by Professor Pierre-Marie Dupuy, Dr. Santiago Torres Bernárdez, and the Honorable Marc Lalonde in their unanimous decision *ICS v. Argentina*, in which they state: “[T]he trend in public international law has clearly favoured the strict application of procedural prerequisites.”⁷⁸

64. This is yet another topic on which Claimants' Counter-Memorial is conspicuously silent. Nowhere do Claimants address, still less make an effort to refute, the significance of the ICJ's decisions. They can therefore be deemed to admit their force.

65. The Counter-Memorial also does not seriously question the many investment arbitration awards cited in the Memorial that follow the ICJ's lead.⁷⁹ Claimants merely recognize those cases and do their best to distinguish them with the sweeping assertion that “the

⁷⁷ UMJ, ¶¶ 57-61.

⁷⁸ *ICS v. Argentina*, ¶ 250 (RL-112).

⁷⁹ UMJ, ¶¶ 62-64.

common feature of all of the cases Uruguay cites is that the claimants in those cases did not even attempt to comply with the procedural prerequisites, and either failed to engage in the six-month negotiation period or failed to submit the dispute to domestic courts.”⁸⁰ In contrast, Claimants argue, they did make an effort to submit this dispute to Uruguayan courts.

66. Far from distinguishing Uruguay’s cases, however, Claimants succeed only in showing why they apply with full force here. As demonstrated above, Claimants never submitted their treaty dispute to Uruguayan courts under Law 16,110. This case must therefore be dismissed.⁸¹

67. The cases decided in the months since Uruguay submitted its Memorial confirm the correctness of its analysis. In *ICS v. Argentina*, for instance, the tribunal denied jurisdiction because of the claimant’s failure to present the BIT dispute to Argentine courts for 18 months. In doing so, the tribunal made the gravity of claimant’s failure plain:

⁸⁰ CMJ, ¶ 99, citing to *Burlington*, ¶ 315 (RL-49); *Murphy*, ¶ 149 (RL-68); *Enron*, ¶ 88 (RL-55); *Impregilo S.P.A. v. Argentina Republic*, ICSID Case No. ARB/07/17, Award (21 Jun. 2011) (Danelius, Brower, Stern) (hereafter “*Impregilo v. Argentina*”), ¶¶ 79-94 (RL-61); *Maffezini v. Spain*, ¶¶ 34-36 (RL-54); *Wintershall v. Argentina*, ¶¶ 160(2), 170 & 172 (RL-82). See also UMJ, ¶¶ 62-64.

⁸¹ *Burlington*, ¶ 315 (the purpose of the negotiation pre-condition “is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.”) (RL-49); *Murphy*, ¶¶ 149-151 (the 6-month negotiation requirement “is not an inconsequential procedural requirement but rather a key component of the legal framework established in the BIT and in many other similar treaties....”) (RL-68); *Enron*, ¶ 88 (the pre-arbitration negotiation requirement was “very much a jurisdictional one. A failure to comply with that requirement would result in a determination of lack of jurisdiction.”) (RL-55); *Impregilo v. Argentina*, ¶¶ 79-94 (domestic litigation is a “jurisdictional requirement that has to be fulfilled before an ICSID tribunal can assert jurisdiction.”) (RL-61); *Maffezini v. Spain*, ¶¶ 34-36 (“Had this been the Claimant’s sole argument on the issue [that domestic litigation was not required], the Tribunal would have had to conclude that because the Claimant failed to submit the instant case to Spanish courts as required by Article X(2) of the BIT, the Centre lacked jurisdiction and the Tribunal lacked competence to hear the case.”) (RL-54); *Wintershall v. Argentina*, ¶¶ 160(2), 170 & 172 (RL-82). See also UMJ, ¶¶ 62-64.

The Tribunal finds no reason thus to deem this requirement as permissive and non-mandatory. Nor can the Tribunal concur with the interpretation that this requirement is satisfied by anything less than what it explicitly calls for: the submission of the investment dispute to the Argentine courts for a period of 18 months or until a final decision is rendered, whichever is shorter.⁸²

68. The practical wisdom of this approach was recently highlighted in a stark fashion. A different tribunal's decision to treat the 18-month litigation requirement as waivable was recently vacated by the United States Court of Appeals for the District of Columbia Circuit (generally considered the second most important court in the American system behind only the U.S. Supreme Court). In its January 2012 decision, the Court of Appeals emphasized that "where, as here, the contracting parties provided that an Argentine court would have eighteen months to resolve a dispute prior to resort to arbitration, a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties."⁸³

69. The Court of Appeals' decision fulfills the warning expressed years ago by the tribunal in the *Soufraki v. United Arab Emirate* Annulment Decision: "There is, in principle, an excess of power if a tribunal goes beyond its jurisdiction *ratione personae*, or *ratione materiae* or *ratione voluntatis*."⁸⁴ In the words of the tribunal in *ICS v. Argentina*:

⁸² *ICS v. Argentina*, ¶ 251 (RL-112).

⁸³ *Republic of Argentina v. BG Group PLC*, Appeal from the United States District Court for the District of Columbia (17 Jan. 2012) (hereafter "*BG Group*"), 665 F.3d 1363, 1373 (D.C. Cir. 2012) (RL-119).

⁸⁴ *Hussein Nauman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on the Application for Annulment (5 Jun. 2007) (Feliciano, Nabulsi, Stern), ¶ 42 (emphasis added) (RL-60).

Not only has the Respondent specifically conditioned its consent to arbitration on a requirement not yet fulfilled, but the Contracting Parties to the Treaty have expressly required the prior submission of a dispute to the Argentine courts for at least 18 months, before a recourse to international arbitration is initiated. *The Tribunal is simply not empowered to disregard these limits on its jurisdiction.*⁸⁵

70. The case law Claimants invoke in the Counter-Memorial is of no help to them. They present a select group of investment arbitration cases to support their argument that obliging them to fulfill the steps required in Article 10 prior to arbitration would “lead to absurd results.”⁸⁶ They cite, for instance, *TSA v. Argentina*, in which the claimant had submitted the treaty dispute to domestic litigation for 15 months before initiating arbitration – three months short of the required 18-month period.⁸⁷ Under the circumstances, the tribunal found that it had jurisdiction “since a rejection on such ground would in no way prevent [claimant] from immediately instituting new proceedings on the same matter.”⁸⁸ The outcome in the TSA case has no applicability here. If and when the Tribunal dismisses their case, Claimants will *not* simply be able to re-submit their claims the next day because they have yet to submit this dispute to Uruguayan courts. The 18-month period has yet to start, much less finish.

⁸⁵ *ICS v. Argentina*, ¶ 262 (emphasis added) (RL-112).

⁸⁶ CMJ, p. 44.

⁸⁷ *Ibid.*, ¶ 92.

⁸⁸ *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award (19 Dec. 2008) (Danelius, Abi-Saab, Aldonas), ¶ 112 (where the tribunal reasoned that “despite the fact that ICSID proceedings were initiated prematurely, the Arbitral Tribunal considers that it would be highly formalistic now to reject the case on the ground of failure to observe the formalities in Article 10(3) of the BIT, since a rejection on such ground would in no way prevent TSA from *immediately instituting new ICSID proceedings on the same matter.*”) (emphasis added) (CLA-064).

71. Claimants also rely on the rulings of a handful of tribunals which overlooked the negotiation requirements set forth in the pertinent BITs, because they felt that compelling the investor to meet a negotiation requirement would have no effect except to delay the arbitration.⁸⁹ The same cannot be said about the domestic litigation requirement in this case. Far from having no effect, dismissal would restore the right the BIT affords Uruguayan courts to a first opportunity to resolve this dispute internally before it is appealed to an international tribunal. As discussed above, the outcome would have critical implications for the tribunal's jurisdiction and the scope of its review.⁹⁰

72. Claimants try to tarnish the Uruguayan courts, and thus make domestic recourse look futile, by citing the fact that in its June 2011 ruling on Abal's administrative action challenging the legality of Ordinance 514, the TCA referenced British American Tobacco, not Abal.⁹¹ Uruguay notes at the outset that it takes offense at Claimants' suggestion that its courts are incapable of administering effective justice. Switzerland evidently had no such concerns when it agreed to the BIT's domestic litigation requirement in the first place. Moreover, Claimants' blithe critique misses the mark because it exalts form over substance. In fact, a number of tobacco companies, including Abal, all challenged Uruguay's actions as a matter of

⁸⁹ See CMJ, ¶¶ 93-97, citing *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision (6 Aug. 2003) (Feliciano, Faurès, Thomas), ¶ 184 (CLA-059); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 Nov. 2005) (Kaufmann-Kohler, Böckstiegel, Berman), ¶ 100 (CLA-012); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction (29 Jun. 1999) (Leigh, Fadlallah, Ahmad Haddad), p. 891 (CLA-069); *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction (24 Jun. 1998) (Bockstiegel, Brower, Lalonde), ¶¶ 75 & 85 (CLA-029); *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 Sep. 2001) (Cutler, Briner, Klein), ¶¶ 189-190 (CLA-052); *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 69 (CLA-039).

⁹⁰ See *supra* ¶¶ 59-60.

⁹¹ CMJ, ¶ 109.

domestic law on identical grounds at approximately the same time. The TCA's reasons for rejecting their challenges were equally applicable to all of them. The truth is that Uruguay's commitment to the rule of law and the protection of property rights is widely recognized, including by the Heritage Foundation, a well-known, pro-corporate think-tank in the United States. In its 2012 "Economic Freedom Score" report on Uruguay, it wrote:

With a solid record of democratic governance, Uruguay continues to protect the rule of law effectively. Scores for property rights and freedom from corruption are relatively high compared to other countries in the region. The regulatory environment for business has improved substantially, facilitating the development of a more robust private sector. Despite the challenging global situation, Uruguay has been able to restore foreign investment to levels predating the crisis.⁹²

73. The Legal Opinion Claimants offer with their Counter-Memorial⁹³ observes that one of the ostensible reasons tribunals have sometimes articulated for overlooking a BIT's domestic litigation requirement is their assessment "that as a practical matter the domestic judicial system would not be in a position to afford a remedy within the timeframe foreseen in the treaty."⁹⁴ With all due respect, this reasoning is flawed. As shown above, investors may only accept a State's offer to arbitrate in accordance with the conditions stated in the BIT. Such

⁹² The Heritage Foundation, "Uruguay: Economic Freedom Score," *2012 Index of Economic Freedom* (2012), available at <http://www.heritage.org/index/pdf/2012/countries/uruguay.pdf> (last visited on 20 Apr. 2012) and provided in (R-88).

⁹³ It bears noting that Professor Schreuer does not adopt the Counter-Memorial's position that Article 10 is not a jurisdictional requirement. Rather, he merely notes that "it is possible" to confine jurisdiction to the requirements in Article 25 of the ICSID Convention and to describe other bars, like those in a BIT, as related to admissibility. Legal Opinion of C. Schreuer (2012), ¶ 9 (CWS-001). He acknowledges, however, that the "case authority ... shows different attitudes" towards this issue. *Ibid.*, ¶ 36.

⁹⁴ *Ibid.*, ¶¶ 15-16, citing *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 Feb. 2005) (Salans, van den Berg, Veeder) (hereafter "*Plama v. Bulgaria*"), ¶ 224 (RL-70) and *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug. 2011) (Tercier, Abi-Saab, van den Berg) (hereafter "*Abaclat*"), ¶¶ 585-588 (CLA-002).

conditions are critical components of a State's consent to arbitration that claimants are not free to displace with their own sense of what is and is not practical.⁹⁵

74. Moreover, even if this were a valid excuse for overlooking a treaty's express terms, *quod non*, these concerns do not apply here. As discussed, Law 16,110 was specifically designed to streamline the litigation process in Uruguay so that BITs claim could be decided within 18 months. There would thus be nothing futile about enforcing the treaty as it was written.

* * *

75. For each of these reasons, and for all of them, Claimants' case should be dismissed. Whether the domestic litigation requirement is considered jurisdictional or a matter of admissibility, the result is the same. Claimants failed to litigate their treaty dispute in Uruguayan courts. Nothing argued in the Counter-Memorial or suggested in any of the authorities it cites can change this fact, or otherwise rescue Claimants from the consequences of their failure to comply with Article 10.

C. Even if Claimants Had Submitted the Dispute to Uruguayan Courts, They Were Required To Litigate for 18 Months Before Arbitration Commenced

76. Even if, hypothetically, Claimants' submission of purely municipal law disputes to Uruguayan courts could satisfy the BIT's domestic litigation requirement for treaty disputes, the Tribunal would still be without jurisdiction. Even on their own theory, Claimants did not

⁹⁵ Notably, it was this same logic that led the U.S. appeals court to vacate the *BG Group* decision in which the arbitral tribunal had "concluded that [because of the obstacles in litigating the dispute in Argentine courts] a literal reading of the Treaty would produce an 'absurd and unreasonable result.'" *BG Group*, 665 F.3d at 1368 (RL-119). The court's actions highlight the danger of replacing the explicit terms of the treaty with one's own policy preferences.

litigate in Uruguay for a full 18 months before they decided to pursue arbitration.⁹⁶ The requirements of Article 10 were therefore not satisfied in fact at the time Claimants initiated arbitration. Jurisdiction is therefore wanting, even in these hypothetical circumstances.

77. As shown above, Article 10 erects a series of mandatory pre-conditions to the seisen of an international arbitral tribunal. One of those preconditions is that the dispute must be litigated domestically for a full 18 months before arbitration is initiated. Not eight months (as was the case with Claimants' challenge to Ordinance 514); not zero months (as was the case with Decree 287); but 18 months.

78. This meaning is so plain that, before having a change of heart in their Counter-Memorial, Claimants themselves admitted the point in their RFA, wherein they recognized that the BIT required them "to wait eighteen months for a judgment *before instituting* arbitral proceedings."⁹⁷ Similarly, when describing the dispute resolution requirement, the RFA explained that "Article 10(2) of the Switzerland-Uruguay BIT allows the Claimants to *initiate* ICSID arbitration against Uruguay *after* the dispute is submitted to the competent domestic courts *and* the domestic courts have failed to render a decision *within eighteen months*."⁹⁸

79. Claimants' former position is consistent with a considerable body of jurisprudence. In *Gas Natural v. Argentina*, for instance, the tribunal labeled the 18-month domestic litigation requirement in the Argentina-Spain BIT "a condition precedent to

⁹⁶ See CMJ, ¶¶ 59 & 69.

⁹⁷ RFA, ¶ 53 (emphasis added).

⁹⁸ *Ibid.*, ¶ 74 (emphasis added).

commencing international arbitration.”⁹⁹ Likewise, in *National Grid v. Argentina*, the tribunal indicated that, under the comparable requirement in the Argentina-UK BIT, an investor can “institute arbitration proceedings *only if* the Respondent’s courts have not given a final decision within eighteen months after the dispute was submitted to them.”¹⁰⁰ Indeed, even the claimant in *National Grid* conceded that the domestic litigation provisions of the BIT at issue require “submission of the dispute to local courts for a period of time *prior to the submission* to arbitration”¹⁰¹ (although there, as here, the claimant sought to avoid the requirement by reference to that BIT’s MFN clause).

80. Now that Claimants have decided in their Counter-Memorial to make an argument that they *did* pursue domestic litigation in Uruguay, Article 10(2) appears (at least for them) to have changed its meaning. Claimants now say it is enough to create jurisdiction that the 18-month period has since run, even if it had not done so when the arbitration began. They are mistaken.

81. It is well-settled that jurisdiction must exist at the moment of instituting legal proceedings. In his Legal Opinion, Claimants’ own expert states: “It is generally accepted that, in principle, jurisdiction will be determined by reference to the date on which judicial proceedings are instituted. This means, in particular, that events taking place after that date will

⁹⁹ *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction (17 Jun. 2005) (Lowenfeld, Álvarez, Nikken) (hereafter “*Gas Natural*”), ¶ 24 (emphasis added) (RL-57).

¹⁰⁰ *National Grid PLC v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (20 Jun. 2006) (Rigo Sureda, Debevoise, Garro), ¶ 53 (emphasis added) (CLA-044).

¹⁰¹ *Ibid.*, ¶ 72 (emphasis added).

not affect jurisdiction.”¹⁰² He notes further that “ICSID tribunals have followed the same principle.”¹⁰³

82. Professor Schreuer made virtually the same observations in his Commentary on the ICSID Convention, though with telling differences. In his Commentary, he added the critical statements that: (1) “the date of the commencement of the proceedings is decisive”; and (2) “this means that on that date all jurisdictional requirements must be met.”¹⁰⁴ These clear, unqualified statements are not accompanied by any discussion of exceptions anywhere in the rest of his ample treatise.

83. In contrast, Professor Schreuer’s legal opinion submitted here in support of Claimants cites three examples from the ICJ’s jurisprudence where the Court has allegedly “applied this rule with some flexibility.”¹⁰⁵ Exceptions do not make the rule, however. The essential fact remains that “the trend in public international law has clearly favoured the strict application of procedural prerequisites.”¹⁰⁶

84. Moreover, the exceptions cited – two decisions in the *Genocide* cases and a *dissent* in *Georgia v. Russia* – are of little consequence. The Court itself made this abundantly clear in its recent judgment on jurisdiction in the *Georgia v. Russia* case, in which it denied jurisdiction because of Georgia’s failure to meet a jurisdictional pre-condition *before* initiating

¹⁰² Legal Opinion of C. Schreuer (2012), ¶ 39 (CWS-001).

¹⁰³ *Ibid.*, ¶ 41.

¹⁰⁴ C. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* (2nd ed. 2009), p. 92 (RL-43a).

¹⁰⁵ Legal Opinion of C. Schreuer (2012), ¶ 43 (CWS-001).

¹⁰⁶ *ICS v. Argentina*, ¶ 250 (RL-112).

litigation. It held: “To the extent that the procedural requirements of [the 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.”¹⁰⁷ The principle applies with even greater force where, as here, the conditions *are* qualified by a time element. Claimants were required to litigate for 18 months before commencing arbitration. They did not do so.

85. The tribunal in *Wintershall v. Argentina* put it best: “Article 10(2) 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.”¹⁰⁸ While the claimants in *Wintershall* never attempted domestic litigation, that fact does not change the legal conclusion. Claimants are not free to substitute their personal policy preferences for a treaty’s express language, particularly when that language imposes clear limits on the Contracting States’ consent. Claimants did not satisfy the time-bound prior-recourse-to-local-courts-clause.¹⁰⁹ That failure deprives the Tribunal of jurisdiction even if, *quod non*, the 18-month clock could now be deemed to have expired.

¹⁰⁷ *Georgia v. Russia*, ¶ 130 (RL-47).

¹⁰⁸ *Wintershall v. Argentina*, ¶ 118 (emphasis in original) (RL-82).

¹⁰⁹ The Counter-Memorial recognizes that Claimants had not completed the 18-month litigation period for any of the three suits brought before the TCA before initiating arbitration. Claimants presented their RFA on 19 February 2010. ICSID registered the case on 26 March 2010. By Claimants own count, they did not comply with the 18-month litigation requirement until 9 December 2010 for Ordinance 514 (more than 8 months later), 22 September 2011 for Decree 287 (some 18 months later), and 20 October 2011 for Ordinance 466 (some 19 months later).

II. THE MFN CLAUSE DOES NOT APPLY TO DISPUTE SETTLEMENT

86. In order to get around their failure to litigate this treaty dispute in Uruguay for 18 months, Claimants argue that the BIT's MFN clause set forth in Article 3(2) excuses them from that failure. Yet, as Uruguay demonstrated in its Memorial, Claimants reliance on Article 3(2) is misplaced. Its scope is restricted only to fair and equitable treatment – a discrete substantive standard the normative content of which does not encompass dispute settlement.

87. The Counter-Memorial responds by disputing the plain language of Article 3(2). According to Claimants, it covers all forms of “treatment”, a concept allegedly broad enough to include dispute settlement. In the alternative, the Counter-Memorial suggests that even if the MFN clause is limited to fair and equitable treatment, it would still entitle them to invoke the dispute settlement provisions of other BITs.

88. Claimants' arguments are mistaken for at least four reasons:

- *First*, Claimants do not even meet the threshold condition for invoking the MFN clause. Article 10's dispute settlement provisions are not “less favorable” than those of the other BITs Claimants cite.
- *Second*, the plain meaning of Article 3(2) is unmistakable. It cannot viably be read to cover *any* treatment. Its express terms are limited to matters of “fair and equitable treatment.”
- *Third*, it would contravene core rules of international law to use Article 3(2) to displace the jurisdictional conditions laid down in Article 10.
- *Fourth*, fair and equitable treatment does not cover dispute resolution.

A. Article 10's Dispute Settlement Provisions Are Not "Less Favorable" Than Those Contained in the Other BITs Claimants Cite

89. There is no need for the Tribunal even to reach the question of whether or not Article 3(2) *might* be read to embrace dispute resolution because Claimants cannot satisfy the threshold condition for invoking it in the first place. They cannot prove that the other dispute settlement provisions they seek to import are "more favorable" than those set forth in Article 10.¹¹⁰

90. Claimants cite two other BITs that they contend contain more favorable dispute resolution clauses: Uruguay's BITs with Canada and Australia. Neither requires prior resort to domestic courts for 18 months before instituting international arbitration. Instead, both give investors a choice as to which remedy to pursue. And since Claimants now prefer arbitration over domestic litigation, they say having a choice is better.¹¹¹ Their argument is flawed both as a matter of law and as a matter of fact.

91. It is flawed as a matter of law because the application of "an MFN clause does not depend upon the subjective perceptions of the relative value of treaty provisions that are

¹¹⁰ In *AAPL v. Sri Lanka*, the tribunal held that "it is not proven that the Sri Lanka/Switzerland Treaty contains rules more favourable than those provided for under the Sri Lanka/UK Treaty, and hence, Article 3 of the latter Treaty cannot be justifiably invoked in the present case." *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 Jun. 1990) (El-Kosheri, Goldman, Asante), ¶ 54 (RL-104).

See also A. Newcombe & L. Paradell, *Most-Favoured-Nation Treatment*, in *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* (2009), p. 196 ("in IIA claims, the issue is whether the host state (the granting state) has provided less favorable treatment to investments or investors of the home state (the beneficiary state) than it has accorded to investments or investors from a third state. This gives rise to two questions of application: whether the investments or investors in question are comparable ('in the same relationship') and whether there has been less favorable treatment.") (RL-91).

¹¹¹ CMJ, ¶¶ 106-107.

attributed to investors as a general class.”¹¹² As the tribunal in *ICS v. Argentina* recently held, the question of whether certain provisions are more or less favorable “cannot be limited to a simple consideration of what is more or less favorable for a given investor in the particular circumstances in which they find themselves when a dispute arises.”¹¹³ It is a matter for objective determination that requires that “the dispute settlement provisions in two treaties must be compared *as a whole*, and *not part-by-part*, to determine whether the treatment accorded by the comparator treaty is indeed more favourable in general.”¹¹⁴ “[D]ifferential treatment in relation to dispute resolution may not necessarily equal *less favourable* treatment.”¹¹⁵

92. Claimants’ argument is flawed as a matter of fact because comparing the other dispute settlement provisions they invoke with Article 10 “as a whole, and not part-by-part” shows that Article 10 is actually more favourable, not less favourable, than the comparable provisions of the Uruguay-Australia and Uruguay-Canada BITs.¹¹⁶

93. As regards the Uruguay-Australia BIT, Article 13 thereof does entitle investors to choose between submitting their disputes to domestic courts or to international arbitration. Critically, however, it also contains a classic fork-in-the-road provision: “[O]nce a party has invoked a form of dispute settlement ... neither party shall pursue any other form of dispute

¹¹² Z. Douglas, *The MFN Clause in Investment Treaty Arbitration: Treaty Interpretation Off the Rails*, JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT, Vol. 2, No. 1 (2011), pp. 16-17 (RL-88).

¹¹³ *ICS v. Argentina*, ¶ 319 (RL-112).

¹¹⁴ *Ibid.*, ¶ 320.

¹¹⁵ *Ibid.*

¹¹⁶ CMJ, ¶ 103.

settlement....”¹¹⁷ In other words, once an investor makes its choice, that choice becomes irreversible. In contrast, Article 10 of the Uruguay-Switzerland BIT gives investors two different opportunities to vindicate their perceived rights, one domestic and one international. As the tribunal in *ICS v. Argentina* noted concerning the analogous provision of the Argentina-UK BIT, it thus “gives [Claimants] two bites at the apple”, not just one.¹¹⁸ Having the opportunity to press a claim before two different fora is objectively preferable to having only a single recourse.

94. With respect to the Uruguay-Canada BIT, Article XII thereof also provides Claimants with a less favorable option. Under Article XII(3)(b), an investor may submit a dispute to arbitration only if it “has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals” of Uruguay. The disadvantage to the investor in comparison with Article 10 of the Uruguay-Switzerland BIT is evident. In the latter, investors can continue to press a claim in domestic courts even after 18 months without waiving their right to international arbitration.¹¹⁹ Here again, having two bites at the apple is better than one.

95. Objectively viewed, the dispute settlement provisions of Uruguay’s BITs with Canada and Australia are not more favorable to Claimants; in fact, they are less so. Since this threshold requirement for the invocation of any most-favoured nation clause is not met, the Tribunal need not even reach the question whether Article 3(2) might apply to dispute resolution

¹¹⁷ Uruguay-Australia BIT, signed 3 Sep. 2001, EIF 12 Dec. 2002, Art. 13 (Exhibit C-20 to RFA).

¹¹⁸ See *ICS v. Argentina*, ¶¶ 323-324 (holding that investors “are not necessarily accorded more favorable treatment” under a “fork-in-the-road” dispute settlement provision) (RL-112).

¹¹⁹ See *ibid.*, ¶ 324.

mechanisms in the abstract. But if it does, the result is the same: the MFN clause does not allow Claimants to avoid their obligations under Article 10 or the bar they impose to the Tribunal's jurisdiction over Claimants' treaty claims.

B. Article 3(2) Is Limited Only to Fair and Equitable Treatment

96. Claimants' efforts to use Article 3(2) to avoid the consequences of their failure to litigate this dispute in Uruguay run into a second, equally fundamental problem: the provision's plain language. The text of Article 3(2) could not be clearer in limiting its reach to matters of fair and equitable treatment ("FET"), a substantive standard that does not embrace dispute resolution.

97. Article 3(2) states:

Each contracting Party shall ensure *fair and equitable treatment* within its territory of the investments of the investors of the other Contracting Party. *This treatment* shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.

Notwithstanding this unmistakable language, Claimants contend that it covers *any* treatment and therefore encompasses dispute settlement. They are mistaken for the reasons that follow.

1. The Ordinary Meaning of the MFN Clause Limits its Scope to Fair and Equitable Treatment

98. Claimants' argument begins with the dubious assertion that the phrase "this treatment" in the second sentence of Article 3(2) is ambiguous. It is, they say, unclear whether or not it refers back to "fair and equitable treatment" in the first sentence or instead embraces all

forms of treatment.¹²⁰ From this shaky platform, they contend that “this treatment” should be understood to mean treatment generally because other tribunals have so decided about allegedly similar MFN clauses.¹²¹ Claimants misunderstand their own authorities, however.

99. Claimants’ first example is Article IV of the Argentina-Spain BIT, which provides:

1. Each Party shall guarantee in its territory *fair and equitable treatment* of investments made by investors of the other Party.
2. *In all matters governed by this Agreement*, such treatment shall be no less favorable than that accorded by each Party to investments made in its territory by investors of a third country.¹²²

They argue that because the tribunals in the *Suez*, *Gas Natural*, and *Telefónica* cases concluded that this “MFN clause applied to ‘treatment’ generally,” Article 3(2) of the Uruguay-Switzerland BIT should be interpreted in the same fashion.¹²³

100. Claimants’ reliance on the Argentina-Spain BIT is misplaced for a number of reasons. *First*, the terms of the two MFN clauses are obviously and materially different. Unlike Article 3(2) of the Uruguay-Swiss BIT, Article IV(2) of the Argentina-Spain BIT extends to “all matters governed by this Agreement.” As discussed in Uruguay’s Memorial, even the *Maffezini*

¹²⁰ CMJ, ¶ 112.

¹²¹ *Ibid.*, ¶¶ 113-115.

¹²² *Ibid.*, ¶ 113.

¹²³ *Ibid.*, ¶¶ 113-114.

tribunal specifically distinguished this broad formulation from other, narrower MFN clauses, including the one in the Uruguay-Spain BIT (which is virtually identical to Article 3(2)).¹²⁴

101. *Second*, and relatedly, the breadth of this “all matters” language was dispositive in all three cases Claimants cite. The *Suez* tribunal, for example, held that Article IV(2) “clearly states that ‘in all matters’ (*en todas las materias*) a Contracting party is to give treatment no less favorable than that which it grants to investments made in its territory by investors from any third country.”¹²⁵ On that basis, it concluded that “dispute settlement is certainly a ‘matter’ governed by the Argentina-Spain BIT.”¹²⁶ The decisions of the *Gas Natural* and *Telefónica* tribunals similarly stressed the critical importance of this reference to “all matters.”¹²⁷

102. *Third*, in none of the cases Claimants cite did respondent Argentina even argue that Article IV(2) of the Spain-Argentina BIT was limited to matters of fair and equitable treatment.¹²⁸ The issue now under discussion was thus not before the tribunals in those cases. Accordingly, their decisions have no bearing here.

¹²⁴ UMJ, ¶¶ 89-90. In order to distinguish the broad scope of the MFN clause in Article IV(2), the *Maffezini* tribunal cited Spain’s treaty with Uruguay as a counter-example: “of all the Spanish treaties it has been able to examine, the only one that speaks of ‘all matters subject to this Agreement’ in its most favored nation clause, is the one with Argentina. All other treaties, *including those with Uruguay* and Chile, omit this reference and merely provide that ‘this treatment’ shall be subject to the clause, *which is of course a narrower formulation.*” *Maffezini v. Spain*, ¶ 60 (emphasis added) (RL-54).

¹²⁵ *Suez v. Argentina*, ¶ 55 (CLA-060).

¹²⁶ *Ibid.*

¹²⁷ *Gas Natural*, ¶¶ 30-49 (stressing that “the introductory phrase in Article IV(2) of the BIT speaks of ‘all matters governed by the present Agreement.’”) (emphasis in original) (RL-57); *Telefónica v. Argentina*, ¶ 100 (stating that Argentina’s argument concerning the inapplicability of Article “appears unwarranted [because] Art. IV.2 explicitly states: ‘In all matters regulated by the present agreement this treatment shall not be less favorable’...”) (emphasis in original) (RL-77).

¹²⁸ See the arguments of the respondent in: *Suez v. Argentina*, ¶¶ 52-59 (CLA-060); *Gas Natural*, ¶ 27 (RL-57); and *Telefónica v. Argentina*, ¶¶ 40-42, 95, 100 & 104 (RL-77).

103. Claimants’ second example is Article 3(1) of the Chile-Malaysia BIT, which provides:

Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive *treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.*¹²⁹

Claimants suggest that because the *ad hoc* committee in *MTD v. Chile* interpreted this MFN clause to encompass any treatment, not just fair and equitable treatment, Article 3(2) of the Uruguay-Switzerland BIT should be read the same way.¹³⁰

104. Here again, Claimants’ argument is defeated by the evident differences between the two treaties. As the *ad hoc* committee rightly observed, the MFN clause of the Chile-Malaysia BIT contains two independent standards of protection: “fair and equitable treatment required by the first part of Article 3(1)” and “the most-favored-nation treatment ... required by the second half.”¹³¹ The “treatment” referenced in the second sentence of Article 3(2) of the Uruguay-Switzerland BIT, in contrast, is pegged firmly to the “fair and equitable treatment” mentioned in the first sentence through the use of the unambiguously simple modifier “this”.

105. Claimants’ third example is the MFN clause of the Switzerland-Ghana BIT, which provides:

¹²⁹ See CMJ, ¶ 115. This provision is cited in *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (24 May 2004) (Rigo Sureda, Lalonde, Oreamuno Blanco), ¶ 101 (CLA-042) and *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 Mar. 2007) (Rigo Sureda, Lalonde, Oreamuno Blanco) (hereafter “*MTD v. Chile (Annulment)*”), ¶ 27 (CLA-041). (Emphasis added.)

¹³⁰ CMJ, ¶ 115.

¹³¹ *Ibid.*; *MTD v. Chile (Annulment)*, ¶ 64.

Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of any third State, if this latter treatment is more favourable.¹³²

They get even less benefit out of this comparison than out of the others they make, not because of any difference in language between the two provisions but because the interpretative authority claimants cite does not say what they say it does.

106. According to Claimants, Dolzer and Stevens “understand that the reference to ‘this treatment’ is a reference to ‘treatment’ generally and not ‘fair and equitable treatment’ specifically.”¹³³ The basis for this assertion is unclear. Dolzer and Stevens nowhere state the conclusion Claimants ascribe to them. They merely list the MFN clause of the Swiss-Ghana BIT’s among what they label “Representative Clauses”, and express no views on its scope.¹³⁴ They say nothing that relates directly or indirectly to the issue presented here.

107. Claimants’ final example is Article 5 of the Spain-Russia BIT, which provides:

1. Each Party *shall guarantee fair and equitable* treatment within its territory for the investments made by investors of the other Party.
2. *The treatment referred to in paragraph 1 above* shall be no less favorable than that accorded by either Party in respect of investments made within its territory by investors of any third State.

¹³² Cited in R. Dolzer & M. Stevens, *BILATERAL INVESTMENT TREATIES* (1995), p. 67 (CLA-055).

¹³³ CMJ, ¶ 116.

¹³⁴ Dolzer & Stevens (1995), pp. 66-67 (CLA-055).

Claimants cite Judge Brower's *dissenting* opinion in *Renta 4* for the proposition that this MFN clause extends to all treatment, not merely fair and equitable treatment.

108. The soundness of Claimants' argument is thrown into immediate doubt by virtue of the fact that it relies on a dissenting opinion. In fact, the other members of the *Renta 4* tribunal (Paulsson and Landau) reached precisely the opposite conclusion in their majority opinion. They recognized that "the crux of the matter" is that "the Spanish BIT does not contain an MFN clause entitling investors to avail themselves in generic terms of more favourable conditions found 'in all matters covered' by other treaties."¹³⁵ Instead, the tribunal reasoned, the MFN clause "establishes the right to enjoy a no less favourable level of FET"¹³⁶ because "Subparagraph 1 explicitly concerns FET [and] Subparagraph 2 equally unmistakably refers back to FET."¹³⁷ Hence they concluded: "Subparagraph 2's promise of MFN therefore *does not encompass access to investor-State arbitration.*"¹³⁸ This Tribunal should reach the same conclusion.

109. In a further effort to support their argument that the reference to "this treatment" in the second sentence of Article 3(2) is not limited to FET, Claimants also suggest that "it is not

¹³⁵ *Renta 4 S.V.S.A et al. v. Russian Federation*, SCC No. 24/2007, Award on Preliminary Objections (20 Mar. 2009) (Brower, Landau, Paulsson) (hereafter "*Renta 4*"), ¶ 105 (RL-71).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, ¶ 115. A virtually identical MFN clause was also interpreted in *Paushok v. Mongolia*. There, the tribunal held: "The Treaty is *quite clear* as to the interpretation to be given to the MFN clause contained in Article 3(2): *the extension of ... rights it allows only has to do with Article 3(1) which deals with fair and equitable treatment.*" *Sergei Paushok, et al. v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 Apr. 2011) (Lalonde, Grigera Naón, Stern) (hereafter "*Paushok v. Mongolia*"), ¶ 570 (emphasis added) (RL-75). Although the MFN clause in that case was invoked only to attract more favorable substantive treatment, the logic of the tribunal's interpretation is nevertheless fully applicable in this case.

¹³⁸ *Renta 4*, ¶ 115 (emphasis added) (RL-71).

meaningful to interpret the MFN clause as guaranteeing MFN treatment only with respect to fair and equitable treatment.”¹³⁹ This is so, Claimants say, because “fair and equitable treatment” is a fixed standard the content of which “does not depend on how investors from other jurisdictions are treated by the host State under other investment treaties.”¹⁴⁰ Both international treaty practice and the existing jurisprudence disprove Claimants’ argument.

110. Other BITs confirm that fair and equitable treatment can be a variable standard accorded on an MFN basis. Article 3 of the Denmark-Russia BIT provides a clear example:

Each Contracting Party shall in its territory ensure investors, investments made by investors and returns *fair and equitable treatment which in no case shall be less favourable than that which it accords to investors*, investments or returns of its own investors or any third State (whichever of these treatments is more favourable from the point of view of the investor).¹⁴¹

This provision was cited by the majority in *Renta 4* in rejecting precisely the same argument Claimants now make before this Tribunal.¹⁴² The majority held that States can contemplate

¹³⁹ CMJ, ¶¶ 120-123.

¹⁴⁰ *Ibid.*, ¶ 123.

¹⁴¹ The provision is cited in *Renta 4*, ¶ 110 (RL-71). The 1993 Denmark-Chile BIT contains identical language:

Each Contracting Party shall in its territory ensure investors, investments made by investors and returns *fair and equitable treatment which in no case shall be less favourable than that which it accords to investors*, investments or returns of its own investors or any third State (whichever of these treatments is more favourable from the point of view of the investor).

Denmark-Chile BIT, signed 28 May 1993, EIF 3 Nov. 1995 Art. 3(2) (emphasis added) (RL-86).

¹⁴² The claimants in *Renta 4* argued that “it would be nonsense to speak of more or less favourable FET treatment” accorded on the MFN basis. *Renta 4*, ¶ 107 (RL-71).

“variable levels” of fair and equitable treatment and “[i]nvestors would therefore find it meaningful to be assured that they may invoke the most favorable level of FET.”¹⁴³

111. Article 3 of the Russia-Mongolia BIT provides another example of FET being accorded on an MFN basis:

1. Each Contracting Party shall, in its territory, accord investments of investors of the other Contracting Party and activities associated with investments *fair and equitable treatment* excluding the application of measures that might impair the operation and disposal with investments.
2. *The treatment mentioned under paragraph 1 of this Article, shall not be less favorable than treatment* accorded to investments and activities associated with investments of its own investors or investors of any third State.¹⁴⁴

112. The tribunal in *Paushok v. Mongolia* found this clause limited only to fair and equitable treatment. It then stated: “If there exists any other BIT between Mongolia and another State which provides for a *more generous provision relating to fair and equitable treatment*, an investor under the Treaty is entitled to invoke it.”¹⁴⁵ Notably, the tribunal found just such a BIT: the Denmark-Mongolia BIT in which “the definition of fair and equitable treatment [is] written in broader terms.”¹⁴⁶ The tribunal’s ruling confirms that fair and equitable treatment can indeed vary, and thus can be both granted and enjoyed on an MFN basis.

¹⁴³ *Ibid.*, ¶ 110.

¹⁴⁴ *Paushok v. Mongolia*, ¶¶ 562-563 (RL-75).

¹⁴⁵ *Ibid.*, ¶ 570. The tribunal also stated in ¶ 571 that “a clause in a BIT whereby the *definition of fair and equitable treatment would be written in broader terms* than in the case of the Treaty would clearly be covered by the MFN clause contained in it.” (Emphasis added.)

¹⁴⁶ *Ibid.*, ¶ 571.

2. The Context of Article 3(2) Confirms That It Is Limited to Fair and Equitable Treatment

113. The Counter-Memorial next argues that the context of Article 3(2) proves that it applies to all treatment, not just FET. Claimants cite the two exceptions from MFN treatment stated in Articles 3(3)-(4),¹⁴⁷ and argue that because “free trade agreements and double taxation agreements are standard exceptions to general MFN clauses,” it “makes no sense to except them from the reach of an MFN obligation that only applied to ‘fair and equitable treatment.’”¹⁴⁸

114. This aspect of Claimants’ argument is woven from threads painstakingly pulled from *obiter dicta* in *Renta 4*, which dealt with the analogous provisions of the Spain-Russia BIT.¹⁴⁹ Yet, it fails here for the same reason it did there: nothing that might (or might not) be implied from Articles 3(3)-(4) can override the express terms of Article 3(2).

¹⁴⁷ Article 3(3) and 3(4) of the Uruguay-Switzerland BIT provide:

- (3) The treatment of the most favored nation shall not apply to privileges which either Contracting Party accords to investors of a third State because of its membership in, or association with a free trade area, a customs union or a common market.
- (4) The treatment of the most favored nation shall neither be applicable to advantages which either Contracting Party grants to investors of a third State by virtue of a double taxation agreement or other agreements regarding matters of taxation.

(RL-21).

¹⁴⁸ CMJ, ¶ 117.

¹⁴⁹ Article 5 of the Spain-Russia BIT states:

1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.
2. The treatment referred to in paragraph 1 above shall be no less favorable than that accorded by either Party in respect of investments made within its territory by investors of any third State.
3. Such treatment shall not, however, include privileges which may be granted by either party to investors of a third State by virtue of its participation in:
 - A free trade area;

115. The *Renta 4* majority made the point clearly. It took note of the investors’ argument that because import duties and tax advantages are not ordinarily matters of fair and equitable treatment, the MFN clause might be said to cover any treatment and not just fair and equitable treatment.¹⁵⁰ In its ruling, however, the tribunal emphasized that Articles 5(1)-(2) of the Spain-Russia BIT expressly limit the scope of the MFN obligation to FET. It therefore ruled that “a revelation by grammatical deconstruction” must yield to “an explicit stipulation.”¹⁵¹ It stated: “[T]he attribution to Subparagraph 3 of sophisticated implications simply cannot dislodge the qualifying adjectives ‘fair and equitable’ in Subparagraph 1 [and] [e]ven less can it undermine the unambiguous reference in Subparagraph 2 to ‘treatment referred to in paragraph 1 above’.”¹⁵²

116. This logic applies with equal force here: the implications Claimants seek to draw from Articles 3(3)-(4) cannot displace the unambiguous terms of Article 3(2). The phrase “this

A customs union;
A common market;
An organization of mutual economic assistance...

The treatment granted under this article shall not include tax exemptions or other comparable privileges granted by either Party to investors of a third State by virtue of a double taxation agreement or any other agreement concerning matters of taxation.

This provision is cited in *Renta 4*, ¶ 68 (RL-71).

¹⁵⁰ *Renta 4*, ¶¶ 112-117 (RL-71).

¹⁵¹ *Ibid.*, ¶ 117.

¹⁵² *Ibid.*

treatment” unmistakably refers back to FET.¹⁵³ It therefore does not “encompass access to investor-State arbitration.”¹⁵⁴

117. The Counter-Memorial also tries to use the exceptions to MFN treatment stated in Articles 3(3)-(4) to argue that because it was not specifically *excluded*, dispute settlement must be deemed included within the scope of Article 3(2).¹⁵⁵ *Expressio unius est exclusio alterius*, say Claimants. Indeed, they devote more energy to this aspect of their argument than any other. Nonetheless, it is unpersuasive for at least four reasons.

118. *First*, Claimants’ attempt to rely on the *expressio unius* principle is premised on the wholly erroneous assumption that Uruguay and Switzerland intended Article 3(2) to embrace dispute resolution in the first place. But that is exactly the issue this Tribunal is being asked to address. Claimants get nowhere assuming their own conclusion.

119. *Second*, and relatedly, it can equally be argued that Uruguay and Switzerland excluded from the scope of Article 3(2) only those matters they deemed capable of falling within the MFN clause – and dispute settlement was not among them. In the words of the *ICS v. Argentina* tribunal, the Contracting Parties “have not excluded dispute settlement because they never imagined that it was included in the first place.”¹⁵⁶ Unlike Claimants’ erroneous assumptions, this conclusion is actually supported by the principle of contemporaneity (as discussed in Section II(B)(3) below).

¹⁵³ *Ibid.*, ¶ 115.

¹⁵⁴ *Ibid.*

¹⁵⁵ CMJ, ¶¶ 136-145.

¹⁵⁶ *ICS v. Argentina*, ¶ 313 (RL-112).

120. *Third*, Articles 3(3)-(4) confirm that Article 3(2) is concerned solely with issues of substantive treatment, because the exceptions in Articles 3(3)-(4) refer to customs privileges and tax advantages, which “may be viewed as indicating that MFN treatment should be understood as relating to *substantive protection*”¹⁵⁷ to the exclusion of “the procedural provisions relating to dispute settlement.”¹⁵⁸

121. *Fourth*, Claimants vastly overstate the importance of the *expressio unius* principle.¹⁵⁹ It is, at best, a supplementary means of interpretation subordinated to the general rules set out in Article 31 of the Vienna Convention.¹⁶⁰ Implications that may or may not be drawn from it cannot be used to trump the result compelled by application of the general rules of interpretation.

122. That said, the Uruguay-Switzerland BIT does contain context that is helpful in interpreting the scope of Article 3(2). Contrary to what Claimants argue, however, that context confirms that Uruguay’s interpretation is correct.

123. Article 5(2), for example, contains another reference to MFN treatment:

¹⁵⁷ *Plama v. Bulgaria*, ¶ 191 (RL-70).

¹⁵⁸ *Ibid.*

¹⁵⁹ CMJ, ¶¶ 141-145.

¹⁶⁰ Lord McNair, *THE LAW OF TREATIES* (1961), p. 393 (RL-90); R. Jennings & A. Watts (eds.), *OPPENHEIM'S INTERNATIONAL LAW* (9th ed. 1996), Vol. I, pp. 1279-1280 (RL-89).

The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or rebellion, which took place on the territory of the other Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 3, paragraph (2) of this Agreement as regards restitution, indemnification, compensation or other valuable consideration.

Uruguay and Switzerland here decided to extend MFN treatment to another discrete area of investment protection. It follows that when the Contracting Parties deemed it appropriate to grant MFN treatment, they did so explicitly. Had they wanted to extend MFN treatment to dispute resolution, they would have done it in an equally clear fashion. They did not.

124. Article 7 is similarly helpful: it underscores the fact that Uruguay and Switzerland knew how to employ more sweeping language when they wanted to. It states:

More Favorable Provisions

If provisions which have been or will be agreed upon by either of the Contracting Parties with an investor of the other Contracting Party entitles the investor to a treatment more favorable than is provided for the present Agreement, those provisions shall prevail over the terms set forth by this Agreement.

This broad reference to “a treatment more favourable” is critical. The Contracting Parties conspicuously chose *not* to use a similarly expansive formulation in Article 3(2). To the contrary, they restricted the scope of the MFN clause to the discrete, substantive standard of fair and equitable treatment. The difference between the two provisions is palpable and must be given effect.

3. The Principle of Contemporaneity Proves That Article 3(2) Does Not Apply to Dispute Settlement

125. The ILC has observed that an MFN clause “can only operate in regard to the subject matter which the two States had in mind when they inserted the clause in their treaty.”¹⁶¹ Applying that principle here compels the conclusion that Article 3(2) does not embrace dispute resolution. When Uruguay and Switzerland concluded the BIT nearly 25 years ago, they did not think – indeed, they could not have “reasonably and legitimately envisaged”¹⁶² – that Article 3(2) might apply to dispute settlement.

126. The principle of contemporaneity requires that the terms of a treaty be interpreted according to the meaning they possessed when it was concluded in the light of circumstances then prevailing.¹⁶³ The principle has frequently been applied as an “appropriate and helpful”

¹⁶¹ International Law Commission (ILC), *Draft Articles on most-favoured-nation clauses with commentaries*, Y.B.I.L.C., 1978, Vol. II, Part 2, p. 27, Art. 9(1) (RL-16). See also Lord McNair (1961), p. 287 (“The reason, which seems to rest on the common intention of the parties, is that the clause can only operate in regard to the subject-matter which the two States had in mind when they inserted the clause in their treaty.”) (RL-90).

¹⁶² In *Amoco Asia et al. v. Indonesia*, the tribunal stated: “Moreover - and this is again a general principle of law - any convention, including conventions to arbitrate, should be construed in good faith, that is to say by *taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.*” *Amco Asia Corp. et al. v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (25 Sep. 1983) (Goldman, Foighel, Rubin), ¶ 14(i) (emphasis added) (RL-103).

¹⁶³ *Case concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, Judgment (27 Aug. 1952), I.C.J. Reports 1952, p. 176 (hereafter “*Rights of United States Nationals in Morocco*”), p. 189 (RL-108). See also *Wintershall v. Argentina*, ¶¶ 128-129 (“It is the text of this treaty that has to be interpreted; and interpreted in the light of the 1969 Vienna Convention, *as well as on the principle of contemporaneity.* ... [O]n ‘the principle of contemporaneity’: *viz.* that the terms of a treaty have to be interpreted according to the meaning they possessed (and in the circumstances prevailing), at the time the treaty was concluded.”) (first emphasis in original; second emphasis added) & ¶ 174 (RL-82). In *ICS v. Argentina*, the tribunal stated at ¶ 289 that the principle of contemporaneity “requires that the meaning and scope of this term be ascertained as of the time when [the Contracting Parties] negotiated their BIT.” (RL-112).

See also *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Award (6 Mar. 1956), RIAA Vol. XII, p. 83 (hereafter “*The Ambatielos Claim*”), pp. 108-109 (RL-44); Lord McNair (1961), p. 467 (referring to “the rule that when there is a doubt as to the sense in which the parties to a treaty used words, those words should receive the meaning which they bore at the time of the conclusion of the treaty.”) (RL-90).

tool to interpret MFN clauses.¹⁶⁴ In every case where an examination of contemporaneous sources reveals that the parties could not have intended to extend MFN treatment to jurisdictional matters, the extension of such treatment has been rejected.¹⁶⁵ The same result is warranted here.

127. Uruguay and Switzerland signed the BIT in 1988, 12 years before the *Maffezini* tribunal for the very first time applied an MFN clause to establish jurisdiction where it did not otherwise exist. Until that time, every other attempt to do so had been rejected. According to Professor Douglas:

The decision in *Maffezini* was the first time that a party has been permitted to rely upon an MFN clause to modify the jurisdictional mandate of an international tribunal. Across the hundreds of years of activity of international courts and tribunals leading up to *Maffezini*, there had only been judicial pronouncements against such a device¹⁶⁶

The Contracting Parties therefore could not have envisioned that Article 3(2) might be extended to embrace the BIT's dispute resolution mechanisms.

128. In the *Anglo-Iranian Oil Company* case, for instance, the United Kingdom sought to found the ICJ's jurisdiction on the broad MFN clauses in its treaties with Iran.¹⁶⁷ It argued

¹⁶⁴ *ICS v. Argentina*, ¶¶ 289-296 (RL-112); *Rights of United States Nationals in Morocco*, p. 189 (RL-108); *The Ambatielos Claim*, pp. 108-109 (RL-44); *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award (21 Apr. 2006) (Sjövall, Lebedev, Weiler) (hereafter "*Berschader v. Russia*"), ¶¶ 200-202 (RL-81); *Wintershall v. Argentina*, ¶¶ 128-129 & 174 (RL-82).

¹⁶⁵ *Berschader v. Russia*, ¶¶ 200-202 (RL-81); *Wintershall v. Argentina*, ¶¶ 128-129 & 174 (RL-82); *ICS v. Argentina*, ¶¶ 289-296 (RL-112).

¹⁶⁶ Douglas, *The MFN Clause in Investment Treaty Arbitration* (2011), p. 5 (RL-88). See also Professor Stern's Concurring and Dissenting Opinion in *Impregilo v. Argentina*, ¶ 6 (RL-113).

¹⁶⁷ *The Anglo-Iranian Oil Co. Case (the United Kingdom v. Iran)*, Judgment on Preliminary Objection (22 Jul. 1952), I.C.J. Reports 1952, p. 93 (hereafter "*The Anglo-Iranian Oil Company Case*"), at p. 108, quoting Treaty of Peace between Great Britain and Persia, signed 4 Mar. 1957, Art. IX ("The High Contracting Parties engage that, in the establishment and recognition of Consuls-General, Consuls, Vice-Consuls, and Consular Agents, each shall be placed in the dominions of the other on the footing of the most-favoured nation; and that the treatment of their

that since other States were entitled to initiate suit against Iran in the ICJ, the United Kingdom “would not be in the position of the most-favoured-nation” if it could not similarly hale Iran into the Court.¹⁶⁸ Although the Court ultimately declined jurisdiction on different grounds, it nonetheless clearly rejected the United Kingdom’s arguments, stating that “the most-favored-nation clause ... has no relation whatever to jurisdictional matters...”¹⁶⁹

129. The *Ambatielos* arbitration has sometimes been cited as an alleged counter-example. It is not. Attempts to invoke it as such are based on a misreading of the case. In it, Greece invoked an MFN clause *not* to found jurisdiction where it did not otherwise exist but rather to widen the scope of the substantive protections accorded its nationals in relation to the administration of justice in British courts.¹⁷⁰

130. The case concerned a Greek national, Mr. Ambatielos, a ship-owner who was sued by the UK Government in UK courts. Greece complained that at trial the British Government withheld crucial evidence, prevented a key witness from testifying, and prevailed on the court to keep Ambatielos from presenting his own evidence.¹⁷¹ Greece argued that these acts

respective subjects, and their trade, shall also, *in every respect*, be placed on the footing of the treatment of the subjects and commerce of the most-favoured nation.”) (emphasis added) & Commercial Convention between the United Kingdom and Persia, signed 9 Feb. 1903, Art. II (“It is formally stipulated that British subjects and importations in Persia, as well as Persian subjects and Persian importations in the British Empire, shall continue to enjoy *in all respects*, the régime of the most-favoured nation.”) (emphasis added) (RL-45).

¹⁶⁸ *Ibid.*, p. 110.

¹⁶⁹ *Ibid.* For the affirmation of this point, see *Plama v. Bulgaria*, ¶ 214 (RL-70); *ICS v. Argentina*, ¶ 292 (RL-112); see also Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), pp. 346-348 (RL-38).

¹⁷⁰ For the affirmation of this point, see *Plama v. Bulgaria*, ¶ 215 (RL-70); *Salini Construttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction (9 Nov. 2004) (Guillaume, Cremades, Sinclair) (hereafter “*Salini v. Jordan*”), ¶ 112 (RL-74); *Berschahder v. Russia*, ¶¶ 200-202 (RL-81); *ICS v. Argentina*, ¶ 293 (RL-112); see also Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), pp. 354-356 (RL-38).

¹⁷¹ *The Ambatielos Claim*, p. 100 (RL-44).

breached the MFN clause of the 1886 Greek-UK Treaty of Commerce and Navigation, because Ambatielos had not been accorded “the benefit of other treaties into which the United Kingdom had entered.”¹⁷² Invoking no less than seven treaties, Greece submitted that by virtue of the MFN clause “it is entitled to claim for its national treatment in accordance with ‘justice,’ ‘right,’ ‘equity,’ and the ‘principles of international law.’”¹⁷³

131. The question before the Arbitration Commission was thus whether the MFN clause of a treaty of commerce and navigation could apply to the substantive administration of justice by the domestic courts of one party in regard to the nationals of the other party who were engaged in trade. It had nothing whatsoever to do with the jurisdictional predicates to international arbitration.

132. The Arbitration Commission ultimately found that the MFN clause “can be extended to the system of the administration of justice in so far as concerns the protection by the

¹⁷² *Ibid.*, p. 101. The MFN provision of the 1886 Treaty states:

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of that country shall be placed, in all respects, by the other on the footing of the most favoured nation.

This provision is cited in *The Ambatielos Claim*, p. 106 (RL-44).

¹⁷³ *The Ambatielos Claim*, p. 106 (RL-44). For example: Article 24 of the Treaty of Peace and Commerce with Denmark of 11 July 1670 providing that the Parties “shall cause justice and equity to be administered to the subjects and people of each other”; Article 8 of the Treaties of Peace and Commerce with Sweden of 11 April 1654, and of 21 October 1661, providing that “[i]n case The people and subjects on either part ... or those who are on their behalf before any Court of Judicature for the recovery of their debts, or for other lawful occasions shall stand in need of the Magistrate’s help, the same shall be readily, and according to the equity of their cause, in friendly manner granted them”; Article 10 of the Treaty of Commerce with Bolivia of 1 August 1911, reserving the right to exercise diplomatic intervention in any ease in which there may be evidence of “denial of justice” or “violation of the principles of international law.” *Ambatielos Case (Greece v. United Kingdom)*, Merits: Obligation to Arbitrate, Judgment (19 May 1953), I.C.J. Reports 1953, p. 10 (hereafter “*Ambatielos Case (Obligation to Arbitrate)*”), at p. 21 (RL-102).

courts of the rights of persons engaged in trade and navigation.”¹⁷⁴ The Commission’s interpretation was not uncontroversial at the time.¹⁷⁵ Nonetheless, one thing is clear: the debate about the scope of the MFN clause never left the field of the substantive treatment to be accorded the nationals of the two contracting parties. In that case, the substantive obligation at issue concerned the “administration of justice”; *i.e.* the substantive due process rights of parties to court proceedings. Surely that label does not provide an excuse for extending MFN treatment to the wholly distinct category of jurisdictional predicates to the seisen of an international tribunal. The Commission’s ruling therefore cannot be invoked as an example of an MFN clause being extended to dispute resolution.

133. Contemporaneous soft law instruments also provide a clear indication that “the prevailing view among the community of States” in the period before the Uruguay-Switzerland BIT did not consider MFN treatment as extending to dispute settlement.¹⁷⁶ Shortly after the

¹⁷⁴ *The Ambatielos Claim*, p. 109 (RL-44).

¹⁷⁵ The Arbitration Commission in the *Ambatielos Claim* (Alfaro, Bagge, Bourquin, Thesiger, Spiropoulos (dissenting)) arrived at an interpretation opposite to the one the judges of the ICJ had reached during Greece’s prior litigation of *Ambatielos*’ claims against the UK before the ICJ. While the majority of the Court decided the case on grounds not involving the interpretation of the MFN clause, four dissenting judges (*i.e.*, McNair, Basevant, Klaestad, Read) came to the conclusion that since the MFN clause was restricted to “commerce and navigation”, it could not possibly apply to the “administration of justice”:

Article X [the MFN Clause] promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment. *The most favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.*

Ambatielos Case (Greece v. United Kingdom), Dissenting Opinion by Sir Arnold McNair, President, and Judges Basevant, Klaestad and Read (19 May 1953), I.C.J. Reports 1953, p. 25, at p. 34 (emphasis added) (RL-101).

¹⁷⁶ *ICS v. Argentina*, ¶ 295 (RL-112).

BIT's conclusion, the World Bank adopted its "Guidelines on the Treatment of Foreign Direct Investment".¹⁷⁷ The Guidelines do not explicitly define the term "treatment." Nonetheless, as the *ICS v. Argentina* tribunal recently held, their structure and the use of "treatment" in connection only with substantive standards of investment protection "suggests that the prevailing view at the time was that treatment was meant to cover discrete principles of conduct applicable to the State hosting the foreign investment: the legal regime of the investment safeguarding it from any discriminatory or unfair and inequitable practices within the host State's territory."¹⁷⁸ In contrast, "'dispute settlement' is dealt with in Part V of those Guidelines, separately from standards of 'treatment.'"¹⁷⁹

134. There also did not "appear to be any support in the writings of publicists for the extension of the MFN clause to jurisdictional matters"¹⁸⁰ until *Maffezini* "opened the floodgates of this controversy, in taking an unprecedented decision."¹⁸¹

135. Relying in part on the principle of contemporaneity, the tribunal in *ICS v. Argentina* held in regard to the MFN clause of the 1990 UK-Argentina BIT: "in the absence of

¹⁷⁷ World Bank Development Committee, *Guidelines on the Treatment of Foreign Direct Investment* (adopted 21 Sep. 1992), 31 ILM 1363 (1992) (RL-98).

¹⁷⁸ *ISC v. Argentina*, ¶ 294 (RL-112).

¹⁷⁹ *Ibid.*

¹⁸⁰ Douglas, *The MFN Clause in Investment Treaty Arbitration* (2011), p. 5 (RL-88). See also *ICS v. Argentina*, where the tribunal found in regard to the 1990 conclusion of the UK-Argentina BIT that it was "a time when scholars and tribunals insisted on the autonomy or severability of the arbitral clause so as to protect the right of the investor to obtain reparation in case of arbitrary revocation of contracts by a State party, a general trend which also informed the negotiation of bilateral treaties aimed at [the] protection [of] foreign private investment. This was thus long before *Maffezini* brought treaty-based questions concerning the interplay between MFN clauses and international investor-State dispute resolution mechanisms into focus; indeed, these issues remained entirely unexplored." *ICS v. Argentina*, ¶ 290 (RL-112).

¹⁸¹ Professor Stern's Concurring and Dissenting Opinion in *Impregilo v. Argentina*, ¶ 6 (RL-113).

any contrary stipulation in the treaty itself,” the contracting parties did not intend the term “treatment” to encompass jurisdictional prerequisites of investment arbitration.¹⁸² The same conclusion applies to Article 3(2) of the Uruguay-Switzerland BIT. In 1988, the idea of extending MFN treatment to jurisdictional preconditions was unprecedented, unanticipated and unforeseeable.

4. Supplementary Means of Interpretation Confirm That Article 3(2) Does Not Apply To Dispute Settlement

136. Although the plain meaning of Article 3(2) is clear, the record of the BIT’s ratification provides still further confirmation that it was intended to be limited to FET.¹⁸³

137. During the ratification process, Uruguay’s Senate Committee on International Affairs explained in its Report to the Uruguayan Senate that the Treaty “provides for *fair and equitable treatment* of investments that ‘shall not be less favorable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that

¹⁸² *ICS v. Argentina*, ¶¶ 289-296 (RL-112). The tribunal stated at ¶ 296:

the term ‘treatment’, in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary...[, whereas] settlement of disputes ... remained an entirely distinct issue, covered by a separate and specific treaty provision.

¹⁸³ “Whether or not explanations given by a signatory government to its own legislature in the course of ratification or implementation of a treaty can constitute part of the *travaux préparatoires* of the treaty for the purpose of its interpretation, they can certainly shed light on the purposes and approaches taken to the treaty, and thus can evidence *opinion juris*.” *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 Oct. 2002) (Stephen, Crawford, Schwebel), ¶ 111 (RL-117).

granted by each Contracting Party to the investments made within its territory by investors of the most favored nation, if this latter treatment is more favorable’.”¹⁸⁴

138. It would therefore betray the express intent of the Contracting Parties to extend Article 3(2) to cover dispute settlement.

C. International Jurisprudence Supports Uruguay’s Interpretation of Article 3(2)

139. In addition to the plain text, Uruguay’s reading of Article 3(2) is also supported by the existing jurisprudence. Claimants’ arguments to the contrary notwithstanding, the fact is that *no* case has *ever* held that an MFN provision as limited as Article 3(2) can be used to import the dispute settlement provisions of other treaties. Those decisions that have permitted the extension of MFN clauses to dispute settlement were based on markedly broader provisions than Article 3(2).¹⁸⁵

1. Only MFN Clauses Broader than Article 3(2) Have Been Extended to Dispute Settlement

140. The Counter-Memorial argues that “Uruguay overemphasizes the importance” of broad formulations of MFN clauses.¹⁸⁶ According to Claimants, such sweeping references to “all matters governed by the treaty,” or “activity in connection with investments,” or “management, maintenance, use, enjoyment or disposal of investments” are not dispositive on

¹⁸⁴ Report of the Senate Committee on International Affairs (9 Aug. 1990), in Minutes of Uruguayan Senate Sessions, No. 48, Vol. 332 (4 Sep. 1990), p. 41 (emphasis added) (R-5a).

¹⁸⁵ UMJ, ¶¶ 75-98.

¹⁸⁶ CMJ, ¶ 140.

the issue of the scope of an MFN clause. As demonstrated in the paragraphs that follow, Claimants are mistaken.

141. In fact, the use of broad formulations like “all matters governed by the Treaty” has always been of decisive importance. This is perhaps best exemplified by *Impregilo v. Argentina*, a case involving the Italy-Argentina BIT, Article 3(1) of which provides:

Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments *and to all other matters regulated by this Agreement*, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.¹⁸⁷

142. In its decision, the *Impregilo* tribunal specifically held that it must attach “*special weight* to the wording of the MFN clause, which extends its scope to ‘all other matters regulated by this Agreement.’”¹⁸⁸ It stated: “*Given the breadth of this language*, the clause must be considered to encompass dispute settlement provisions.”¹⁸⁹ This conclusion, according to the tribunal, was supported by “a massive volume of case-law”, including *Maffezini*, *Gas Natural*, *Suez*, and *AWG Group*¹⁹⁰ – precisely the cases Claimants say stand for no such proposition.¹⁹¹

¹⁸⁷ *Impregilo v. Argentina*, ¶ 12 (RL-61).

¹⁸⁸ *Ibid.*, ¶ 103 (emphasis added).

¹⁸⁹ *Ibid.* (emphasis added). Professor Bridgette Stern issued a forceful and persuasive dissent in which she argued that even such a broad MFN clause should not be read to embrace dispute resolution because of the inherent mismatch between the substantive rights MFN clauses are intended to guarantee and the procedural mechanisms for protecting those rights. See Professor Stern’s Concurring and Dissenting Opinion in *Impregilo v. Argentina*, ¶¶ 47-56 (RL-113).

¹⁹⁰ *Impregilo v. Argentina*, ¶ 104 (RL-61).

¹⁹¹ CMJ, ¶¶ 140-141.

143. Other broad references to the scope of the MFN obligation have been equally dispositive in permitting the importation of dispute resolution provisions from other treaties. *RosInvest v. Russia*, a case Claimants attempt to use to show that it does not matter whether broad or narrow formulations are used¹⁹², provides an instructive example.

144. At issue was Article 3(2) of the UK-USSR BIT, which provides:

Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their *management, maintenance, use enjoyment or disposal of their investments*, to treatment less favorable than that which it accords to investors of any third State.¹⁹³

The tribunal was called upon to determine whether this provision could be used to expand its jurisdiction to include claims concerning the occurrence and lawfulness of expropriation, which were otherwise non-justiciable under the BIT.¹⁹⁴ The tribunal decided it could.

145. In discussing the case, the Counter-Memorial suggests that the *RosInvest* tribunal based its reasoning largely on the *expressio unius* principle, not the broad reference to the “management, maintenance, use enjoyment or disposal of their investments” in the BIT.¹⁹⁵ Claimants’ contention is contradicted by the tribunal’s actual decision. First and foremost, the tribunal began with the ordinary meaning of the terms. Seizing on the general reference to “treatment” in regard to “use” and “enjoyment” of investments, the *RosInvest* tribunal held: “[I]t

¹⁹² *Ibid.*, ¶ 144.

¹⁹³ *RosInvestCo UK Lt. v. The Russian Federation*, SCC Case No. V 079 / 2005, Award on Jurisdiction (Oct. 2007) (Böckstiegel, Steyn, Berman) (hereafter “*RosInvest v. Russia*”), ¶ 126 (emphasis added) (CLA-053).

¹⁹⁴ *Ibid.*, ¶¶ 102, 114 & 118.

¹⁹⁵ CMJ, ¶ 144.

is difficult to doubt that an expropriation interferes with the investor's use and enjoyment of the investment, and that the submission to arbitration forms a highly relevant part of the corresponding protection for the investor.”¹⁹⁶

146. Having determined that the ordinary meaning of the MFN clause rendered it applicable to dispute settlement, only then did the tribunal refer to the *expressio unius* principle to provide “further confirmation”.¹⁹⁷ The broad scope of the words used was thus dispositive; everything else was subsidiary.

147. The decision in *Hochtief v. Argentina*, which Claimants also cite, is to the same effect. Here again, Claimants contend that the tribunal's decision to bring dispute settlement within the ambit of the MFN clause was based primarily on the *expressio unius* principle not the broad language of the MFN clause.¹⁹⁸ Here again, the truth is to the contrary.

148. *Hochtief* dealt with Article 3 of the Argentina-Germany BIT, which entitles investors to claim MFN treatment “as regards their activity in connection with investments in its territory.”¹⁹⁹ The treaty's Protocol further defines “activity” in broad terms to encompass “the management, utilization, use and enjoyment of an investment.”²⁰⁰ The fundamental question for the tribunal was: “Is dispute settlement an ‘activity in connection with the investment’?”²⁰¹ The

¹⁹⁶ *RosInvest v. Russia*, ¶ 130 (CLA-053).

¹⁹⁷ *Ibid.*, ¶ 135.

¹⁹⁸ CMJ, ¶ 142.

¹⁹⁹ *Hochtief v. Argentina*, ¶¶ 61 & 103 (CLA-032).

²⁰⁰ *Ibid.*, ¶¶ 62-65.

²⁰¹ *Ibid.*, ¶ 62.

tribunal answered in the affirmative: “[T]he phrase ‘the management, utilization, use, and enjoyment of an investment’ does include recourse to dispute settlement, as an aspect of the management of the investment.”²⁰² Although the tribunal did mention the *expressio unius* principle, it did so in a single, brief sentence at the end of its analysis.²⁰³ Far from a driver of the decision, it was a mere passenger.

149. Article 3(2) stands in evident contrast to these broad MFN clauses. The cases just discussed therefore serve only to confirm that Article 3(2) cannot be extended to cover dispute resolution.

2. MFN Clauses as Limited as Article 3(2) Cannot be Extended to Dispute Settlement.

150. In its Memorial, Uruguay cited multiple decisions directly supporting its position that MFN clauses as limited as Article 3(2) do not embrace dispute resolution.²⁰⁴ The Counter-Memorial tries, but fails, to distinguish Uruguay’s cases.

²⁰² *Ibid.*, ¶ 66.

²⁰³ *Ibid.*, ¶ 74.

²⁰⁴ UMJ, ¶¶ 76-88. *E.g.*, *Plama v. Bulgaria*, ¶ 223 (“[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”) (RL-70); *Berschader v. Russia*”, ¶ 181 (“[A]n MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties.”) (RL-81); *Wintershall v. Argentina*, ¶ 167 (“[O]rdinarily and without more, the prospect of an investor selecting at will from an assorted variety of options provided in other treaties negotiated with other parties under different circumstances, dislodges the dispute resolution provision in the basic treaty itself – *unless of course the MFN Clause in the basic treaty clearly and unambiguously indicates that it should be so interpreted*”) (emphasis in original) (RL-82); *see also Salini v. Jordan*, ¶¶ 118-119 (RL-74); *Telenor Mobile Communications A.S. v. The Republic of Hungary*, ICSID Case No. ARB/04/15, Award (13 Sep. 2006) (Goode, Allard, Marriott) (hereafter “*Telenor v. Hungary*”), ¶¶ 89-95 (RL-78).

151. Claimants’ discussion of *Wintershall* is a prime example. As Uruguay noted in its Memorial, the *Wintershall* tribunal held that “an MFN Clause would not operate so as to replace one means of dispute settlement with another ..., unless of course the MFN Clause in the basic treaty *clearly and unambiguously* indicates that it should be so interpreted: which is not so in the present case.”²⁰⁵ In the face of this unambiguous statement, Claimants argue that *Wintershall* is actually irrelevant because the MFN clauses in that case “differed in significant respects from the Switzerland-Uruguay BIT.”²⁰⁶ Claimants are correct that the MFN clauses in the two cases are different. But those differences help Uruguay, not Claimants. In truth, Article 3(2) of the Uruguay-Switzerland BIT is much *narrower* than the provisions at issue in *Wintershall*.

152. According to Claimants, the material difference in *Wintershall* was “the unique interplay” between two MFN clauses, “each limiting the scope of the other.” In contrast, they say, there is only one MFN clause at issue in this case with “no limitation on its scope in the text of the treaty.”²⁰⁷ Claimants’ “unique interplay” argument is a smokescreen that is easily cleared away.

153. The Argentina-Germany BIT does in fact contain two MFN clauses: Article 3(2) grants generic MFN treatment to “activities related to investments”;²⁰⁸ and Article 4 grants MFN treatment only in respect of matters specifically provided for in that article, including full

²⁰⁵ *Wintershall v. Argentina*, ¶ 167 (RL-82).

²⁰⁶ CMJ, ¶ 146.

²⁰⁷ *Ibid.*, ¶¶ 148-149.

²⁰⁸ Argentina-Germany BIT, Art. 3(2) (“Neither of the Contracting Parties shall grant in its territory to nationals or companies of the other Contracting Party *a less favorable treatment of activities related to investments than granted to its own nationals and companies or to the nationals and companies of third States.*”) (emphasis added) (RL-22).

protection and security, expropriation, and compensation for losses owing to war.²⁰⁹ In Claimants’ view, the *Wintershall* tribunal “determined that interpreting Article 3 to require general MFN treatment (including with respect to the treatment guaranteed in Article 4) would read the MFN clause in Article 4 out of existence. Meanwhile, the MFN clause in Article 4, by its express terms ... could not be interpreted to extend to dispute settlement.”²¹⁰ Claimants mischaracterize the tribunal’s decision. What it actually ruled is this:

Article 4 applies (as it states) only to “matters governed by this Article” – not to matters governed by Article 10 (dispute resolution). ... Hence, only “treatment” of investments / investment related activities which is not of the nature of expropriation or nationalization or of measures tantamount to expropriation or nationalisation or denial of full protection and security...would remain to be comprehended by the term “treatment” in Article 3.²¹¹

In other words, although by its terms Article 4 does not apply to dispute settlement, Article 3 still encompasses any other investment-related activities not specifically regulated by Article 4.

²⁰⁹ *Ibid.*, Art. 4:

- (1) The investments of nationals or companies of one of the Contracting Parties shall enjoy full legal protection and security within the territory of the other Contracting Party.
- (2) [This paragraph deals with expropriation and compensation and is not necessary to reproduce for the present discussion.]
- (3) The nationals or companies of one of the Contracting Parties that suffer losses on their investments as a result of war or other armed conflict, revolution, a state of national emergency or insurrection within the territory of the other Contracting Party shall not be treated by the latter less favorably than the latter’s own nationals or companies as regards restitution, compensation, damages or other reimbursements. These payments must be freely transferable.
- (4) The nationals or companies of each Contracting Party shall enjoy in the territory of the other Contracting Party the treatment of the most-favoured nation *in all matters covered in this Article*.

(Emphasis added.)

²¹⁰ CMJ, ¶ 148.

²¹¹ *Wintershall v. Argentina*, ¶ 165 (RL-82).

154. Presumably, had the *Wintershall* tribunal considered it possible that dispute settlement could fall within remaining – but still broad – “activities related to investments” under Article 3, it would have so held. It did not. Instead, it determined that the reference in Article 3 to “activities related to investments” does not encompass dispute settlement and hence did not allow the investor to “bypass a limitation in the settlement resolution clause ... when the Parties have not chosen language in the MFN clause showing an intention to do this.”²¹²

155. The *Wintershall* tribunal also had three other compelling reasons for refusing to apply the MFN clauses to dispute settlement. The Counter-Memorial does not discuss any of them. *First*, the tribunal stressed the “significance that has been attached by the Contracting States to the eighteen-month [local remedies] requirement in Article 10(2),” because “it is part and parcel of [the host State’s] integrated ‘offer’ for ICSID arbitration” that “must be accepted by the investor on the same terms.”²¹³ *Second*, it expressly held that “an MFN Clause would not operate so as to replace one means of dispute settlement with another,” unless it “clearly and unambiguously indicates that it should be so interpreted.”²¹⁴ *Third*, the tribunal found that neither of two MFN clauses in the German-Argentina BIT clearly and unambiguously indicated that the 18-month local remedies requirement could be superseded.

²¹² *Ibid.*, ¶ 168.

²¹³ *Ibid.*, ¶ 162.

²¹⁴ *Ibid.*, ¶ 167 (RL-82). Scholarly commentary is in accord. *E.g.*, Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009), p. 344 (“A most-favoured-nation (MFN) clause in the basic investment treaty does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty.”) & p. 362 (“An MFN clause in the basic treaty can only be relied upon to incorporate jurisdictional provisions in a third treaty where the MFN clause clearly envisages that possibility. The most notable example is the UK Model BIT, Article 3(3) of which provides: ‘For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.’”) (RL-38).

156. In its conclusions, the tribunal underscored: “On a plain reading of the Argentina-Germany BIT it is clear that there is no general most-favoured-nation clause applicable to all articles of the treaty.”²¹⁵ In regard to Article 3(2), the tribunal stressed that it “does not mention that the most-favoured-nation ‘treatment’ as to investments, and investment related activities, is to be in respect of ‘*all relations*’ or that it extends to ‘*all aspects*’ or covers ‘*all matters in the treaty*’.”²¹⁶ And in regard to Article 4, the tribunal concluded that “since the MFN Clause for all forms of ‘treatment’ described in Article 4 is expressly restricted to the provisions of that Article, they would not and could not be said to extend to Article 10 [containing the dispute settlement provisions].”²¹⁷

157. It is clear from this discussion that Article 3(2) of the Uruguay-Switzerland BIT is actually *narrower* than the MFN clauses in the Argentina-Germany BIT. Given that the latter provisions were found not to extend to dispute resolution, *a fortiori* Article 3(2) does not either.

158. Claimants make a similarly unpersuasive effort to undermine the authority of the ICJ’s decision in the *Anglo-Iranian Oil Company* case, in which the Court specifically stated that a generally worded “most-favored-nation clause ... has no relation whatever to jurisdictional matters....”²¹⁸ Claimants contend that the case is “wholly inapt” because the Court allegedly did

²¹⁵ *Wintershall v. Argentina*, ¶ 162 (emphasis added) (RL-82).

²¹⁶ *Ibid.* Compare this to the MFN clause in *Maffezini*, which was interpreted to extend to all provisions in the treaty, including dispute resolution: “In all matters subject to this Agreement, this treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country.” Spain-Argentina BIT, Art. IV.2, quoted in *Maffezini v. Spain*, ¶ 38 (RL-54).

²¹⁷ *Wintershall v. Argentina*, ¶ 164 (RL-82).

²¹⁸ *The Anglo-Iranian Oil Company Case*, p. 110. For the affirmation of this point, see *Plama v. Bulgaria*, ¶ 214 (RL-70); *ICS v. Argentina*, ¶ 292 (RL-112); see also Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), pp. 346-348 (RL-38).

not consider the meaning of the MFN clauses on which the UK attempted to ground jurisdiction.²¹⁹ As the quotation just cited reveals, Claimants are incorrect. Although it is certainly true that the Court did ultimately find the pertinent MFN clauses inapplicable for different reasons, its direct statement that MFN clauses generally have no relation to jurisdictional matters could scarcely be any clearer. Even if it is *obiter dictum*, it is *dictum* of the most persuasive sort.

159. The Counter-Memorial also tries unsuccessfully to distinguish *Plama Consortium Ltd. v. Bulgaria*, cited in Uruguay's Memorial. Claimants argue that *Plama* is different because the negotiating history between Bulgaria and Cyprus showed that the contracting parties "themselves did not consider that the MFN provision extends to the dispute settlement provision in other BITs." This was allegedly in line with the fact that Bulgaria, at the time under a communist regime, "favored [BITs] with limited protection for foreign investors and very limited dispute settlement provisions."²²⁰ Claimants thus contend *Plama* is inapplicable because Uruguay has submitted "no evidence of any comparable intent."²²¹

160. Like the others, this attack is off-target. It is true that the *Plama* tribunal inferred that "at the time of conclusion, Bulgaria and Cyprus had no intention of extending [dispute settlement] provisions through the MFN provision."²²² But the tribunal's conclusion was based on much more than that lone inference. For the tribunal, the best evidence of the parties' intent

²¹⁹ CMJ, ¶¶ 152-153.

²²⁰ *Ibid.*, ¶ 151.

²²¹ *Ibid.*, ¶¶ 151-152.

²²² *Plama v. Bulgaria*, ¶¶ 195-197 (RL-70).

was the treaty’s text, which nowhere expressly indicated that the MFN clause was meant to embrace dispute resolution. It held: “the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed.”²²³ After analyzing the MFN clause at issue – which, it must be noted, was materially broader than Article 3(2)²²⁴ – the tribunal found no “clear and unambiguous” intention “to import the arbitration provision of the other agreement.”²²⁵ The same is true in the present case.

161. The Counter-Memorial also attempts to undermine the relevance of the tribunal’s award in *Telenor v. Hungary*, which Uruguay cited in the Memorial.²²⁶ Claimants question *Telenor*’s relevance by alleging that the tribunal “relied heavily on policy considerations, such as the supposed ‘uncertainty and instability’ generated by the application of MFN clauses, as well as its desire to deter treaty shopping,” when it rejected the application of an MFN clause to dispute settlement.²²⁷ Once again, the Counter-Memorial tells the story backwards. The policy reasons the tribunal cited constituted only a secondary line of analysis. The primary basis of the tribunal’s conclusion was, as it should have been, the plain language of the treaty.

²²³ *Ibid.*, ¶ 204.

²²⁴ The MFN provision set forth in Article 3 of the Bulgaria-Cyprus BIT reads as follows:

1. Each Contracting Party shall apply to the investments in its territory by investors of the other Contracting Party a treatment which is not less favourable than that accorded to investments by investors of third states.
2. This treatment shall not be applied to the privileges which either Contracting Party accords to investors from third countries in virtue of their participation in economic communities and unions, a customs union or a free trade area.

This provision is cited in *Plama v. Bulgaria*, ¶ 187 (RL-70).

²²⁵ *Plama v. Bulgaria*, ¶¶ 190-194 & 200 (RL-70).

²²⁶ UMJ, ¶ 83.

²²⁷ CMJ, ¶ 150.

162. The MFN clause at issue in *Telenor* was relatively narrow (though still broader than Article 3(2) of the Uruguay-Switzerland BIT), stating only that investors “shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State.”²²⁸ It did not state that it encompassed “all matters subject to this agreement” or contain any similarly expansive wording. On this basis, the tribunal held: “*In the absence of language or context to suggest the contrary*, the ordinary meaning of ‘investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State’ is that the investor’s substantive rights in respect of the investments are to be treated no less favourably ..., and *there is no warrant for construing the above phrase as importing procedural rights as well.*”²²⁹ Only after coming to this conclusion did the tribunal move on to the policy issues Claimants cite.

163. Finally, the Counter-Memorial attempts to undermine the authority of *Berschader v. Russia*, also cited in Uruguay’s Memorial.²³⁰ In that case, the tribunal refused to read an MFN clause that specifically embraced “all matters covered by the present Treaty” as importing the dispute settlement provisions of other treaties. Upon thoroughly analyzing the ordinary meaning of terms in the context of the treaty and in light of contemporaneous circumstances, the tribunal concluded that “the Treaty does not clearly and unambiguously provide” that the contracting parties intended the MFN clause to embrace dispute resolution.²³¹

²²⁸ *Telenor v. Hungary*, ¶ 84 (RL-78).

²²⁹ *Ibid.*, ¶ 92 (emphasis added).

²³⁰ UMJ, ¶ 88.

²³¹ *Berschader v. Russia*, ¶ 208 (RL-81).

164. Claimants take issue with this approach, arguing that “without a specific textual reason for limiting the scope of an MFN clause, there is no basis for imposing such a restriction.”²³² In Uruguay’s view, the *Berschader* tribunal’s reasoning is unimpeachable. It “express[ed] its firm view that the fundamental issue in determining whether ... an MFN clause encompasses the dispute resolution provisions of other treaties must always be an assessment of the intention of the contracting parties upon the conclusion of each individual treaty.”²³³ In each case, the tribunal said, the issue must be determined through “a detailed analysis of the text and, where available, the negotiating history of the relevant treaty, as well as other relevant facts.”²³⁴

165. The *Berschader* tribunal also observed that while “the ordinary meaning of words ‘all matters covered by the present Treaty’ is clear,” this expression “cannot be understood literally”²³⁵ when “seen in [the Treaty’s] context.”²³⁶ For example, the tribunal noted that “it is very difficult to see how an MFN clause” – even one relating to “all matters covered by the present Treaty” – “could possibly apply to Article 1 (Definitions)” or to provisions “concerning the period during which investments are protected under the Treaty.”²³⁷

166. After canvassing the international jurisprudence and treaty practice, the tribunal pointed to the “general uncertainty” about whether MFN clauses should be understood to extend

²³² CMJ, ¶ 150.

²³³ *Berschader v. Russia*, ¶ 175 (RL-81).

²³⁴ *Ibid.*

²³⁵ *Ibid.*, ¶ 192.

²³⁶ *Ibid.*, ¶¶ 185-190.

²³⁷ *Ibid.*, ¶¶ 188 & 191.

to dispute resolution clauses without express terms to that effect.²³⁸ It concluded that this general uncertainty “leaves little room for any general assumption that the contracting parties to a BIT intend an MFN provision to extend to the dispute resolution clause.”²³⁹ To avoid running afoul of the parties’ intent, the tribunal thus chose to adopt “the principle that an MFN provision in a BIT will only incorporate by reference an arbitration clause from another BIT where the terms of the original BIT *clearly and unambiguously* so provide *or* where it can otherwise *be clearly inferred that this was the intention* of the contracting parties.”²⁴⁰

167. In the end, however, this Tribunal need not decide whether *Berschader* reached the right result or not. Article 3(2) of the Uruguay-Switzerland BIT is dramatically narrower than the MFN clause at issue in *Berschader*. Even if Claimants were correct in their critiques of the *Berschader* decision (*quod non*), it would be without consequence to the question before the Tribunal here. The plain text of Article 3(2) and the weight of all the other jurisprudence make clear that it does not and cannot be used to import the dispute resolution provisions of other treaties, including the two treaties Claimants attempt to invoke.

168. The recent decision in *HICEE v. Slovakia* confirms this analysis. There, as here, the claimant tried to bring its claims within the tribunal’s jurisdiction by invoking the treaty’s MFN clauses to take advantage of the broader definition of “investment” contained in another treaty.²⁴¹ The tribunal rejected that effort, holding: “the clear purpose of [the MFN clauses] is to

²³⁸ *Ibid.*, ¶ 180.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*, ¶ 181 (emphasis added).

²⁴¹ The Austria-Slovakia BIT actually contains two MFN provisions. The first is limited to “full security and protection” – a substantive standard of treatment and a brethren of fair and equitable treatment. *See* Article 3(2) of

broaden the scope of *substantive protection* granted to the eligible investments of eligible investors.”²⁴² It therefore could not be used to expand the scope of the tribunal’s jurisdiction.

The same result is called for here.

* * *

169. From the foregoing review of the jurisprudence, a simple conclusion emerges: In no case has an MFN clause worded as narrowly as Article 3(2) been extended to cover dispute resolution mechanisms. The cases that have done so have all involved materially broader MFN clauses, and are thus irrelevant to the issue before this Tribunal.

D. Extending Article 3(2) to Cover Dispute Settlement Provisions Would be Contrary to the Rules Governing State Consent to Jurisdiction

170. Claimants’ interpretation of Article 3(2) is contrary to international rules of a systemic nature: the rules governing a State’s consent to jurisdiction.²⁴³

171. International courts and tribunals can exercise jurisdiction over a State only with its consent.²⁴⁴ It is an oft-stated axiom of ICSID jurisprudence that: “Consent is the cornerstone

the Slovakia-Austria BIT, cited in *HICEE B.V. v. The Slovak Republic*, UNCITRAL, Partial Award (23 May 2011) (Berman, Brower, Tomka) (hereafter “*HICEE v. Slovakia*”), ¶ 35 (RL-111). The second grants MFN treatment in regard to “obligations under international law existing at present or established thereafter between the Contracting Parties ... whether general or specific” – a conspicuously broader MFN promise compared to one under Article 3(2) of the Uruguay-Switzerland BIT. See Article 3(5) of the Slovakia-Austria BIT, cited in *HICEE v. Slovakia*, ¶ 36 (RL-111).

²⁴² *HICEE v. Slovakia*, ¶ 149 (RL-111).

²⁴³ See *ICS v. Argentina*, summarizing the proposition that the terms and provisions of international investment treaties “must ... be interpreted according to the normal rules of interpretation of treaties and without losing sight of the principles and rules of international law applicable in the relations between the Contracting Parties to the BIT (particularly those of a systemic nature such as, for example, the rules regarding the State’s consent to jurisdiction).” *ICS v. Argentina*, ¶ 279 (emphasis added) (RL-112). The *Wintershall* tribunal also stated that “it is a general principle of international law that international courts and tribunals can exercise jurisdiction over a State only with its consent. The principle is often described as a corollary to the sovereignty and independence of the State.” *Wintershall v. Argentina*, ¶ 160(3) (RL-82). See also *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment (12 Nov. 1991), I.C.J. Reports 1991, p. 53, ¶¶ 47-48 (RL-106).

of the Centre’s jurisdiction.”²⁴⁵ Claimants therefore cannot compel Uruguay into arbitration without its consent.

172. The burden of proof to show consent “falls squarely” on Claimants; a failure “to prove consent with sufficient certainty” is fatal to their case.²⁴⁶ To sustain their burden, Claimants must show “‘*an unequivocal indication*’ of the desire of that State to accept ... jurisdiction in a ‘voluntary and indisputable’ manner.”²⁴⁷ In the face of ambiguity, a State’s consent is not to be presumed.²⁴⁸

173. In order to satisfy these requirements here, Claimants would have to demonstrate that Article 3(2) is “in itself a manifestation of consent to arbitration.”²⁴⁹ They have an

²⁴⁴ The PCIJ held in *Status of Eastern Carelia*: “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*, Advisory Opinion (23 Jul. 1923), P.C.I.J. Series B, No. 5, p. 27 (RL-121).

The ICJ in *Ambatielos* stated: “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 (Obligation to Arbitrate)*, p. 19 (emphasis added) (RL-102).

²⁴⁵ *Wintershall v. Argentina*, ¶ 160(2) (RL-82); *ICS v. Argentina*, ¶¶ 255 & 262 (RL-112).

²⁴⁶ *ICS v. Argentina*, ¶ 280 (RL-112).

²⁴⁷ *Djibouti v. France*, ¶ 62 (RL-105). The ICJ’s statement is built upon and summarized the jurisprudence of the Court on the subject of consent, including its decisions in: *Armed Activities on the Territory of the Congo (New Application: 2002)*, p. 18 (RL-48); *Corfu Channel Case (United Kingdom v. Albania)*, Preliminary Objection, Judgment (25 Mar. 1948), I.C.J. Reports 1948, p. 15 (RL-110); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Judgment on Preliminary Objection (11 Jul. 1996), I.C.J. Reports 1996 (II), pp. 620-621, ¶ 40 (CLA-008); *Rights of Minorities in Upper Silesia (Minority Schools)*, Judgment No. 12 (26 Apr. 1928), P.C.I.J., Series A, No. 15, p. 24 (RL-120).

²⁴⁸ *ICS v. Argentina*, ¶ 280 (RL-112); *see also Wintershall v. Argentina*, ¶ 160(3), referring to the *Lotus* case (1927) (“A presumed consent is not regarded as sufficient, because any restriction upon the independence of a State (not agreed to) cannot be presumed by courts.”) (emphasis added by tribunal) (RL-82); *Djibouti v. France*, ¶ 62 (RL-105).

²⁴⁹ *ICS v. Argentina*, ¶ 278 (RL-112).

impossible task. On no serious reading does Article 3(2) contain “clear and unambiguous” language indicating Uruguay’s consent to arbitration.²⁵⁰

E. Fair and Equitable Treatment Does Not Include Dispute Settlement

174. In the final section of their argument concerning the scope of Article 3(2), Claimants make a perfunctory argument that even if the MFN language in Article 3(2) is limited to matters of fair and equitable treatment, it nonetheless extends to dispute resolution because “the availability of [an] additional investment arbitration option would constitute additional ‘due process’ protection and, therefore, more fair and equitable treatment.”²⁵¹ The assumption underpinning Claimants’ argument is, however, flawed.

175. Due process guarantees *during* adjudication, and jurisdictional *conditions precedent to* adjudication, are very different concepts. On several occasions, the ICJ has specifically stated: “The seising of the Court is one thing, the administration of justice is another.”²⁵² Thus, they are not *ejusdem generis* permitting the application of the MFN clause.

176. The *Ambatielos* case further demonstrates that Claimants’ argument is not sustainable. The Arbitration Commission in that case determined that MFN treatment may cover

²⁵⁰ “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.*” *Plama v. Bulgaria*, ¶ 198 (emphasis added) (RL-70). *See also ICS v. Argentina*, ¶¶ 280-282 (RL-112); *Berschader v. Russia*, ¶ 181 (RL-81); *Wintershall v. Argentina*, ¶¶ 167-168 (RL-82).

²⁵¹ CMJ, ¶¶ 162-163.

²⁵² *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objection, Judgment (18 Nov. 1953), I.C.J. Reports 1953, p. III, at p. 122 (RL-118); *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment (2 Dec. 1963), I.C.J. Reports 1963, p. 15, at p. 29 (RL-107).

the administration of justice over persons appearing before municipal courts.²⁵³ “Administration of justice” was understood as the ability of a party to avail itself of the following freedoms during litigation: (1) to appear before the courts for the protection or defense of one’s rights; (2) to bring any action authorized by law; (3) to deliver any pleading by way of defense, set-off or counterclaim; (4) to engage counsel; (5) to adduce evidence; (6) to apply for bail; and (7) to lodge appeals.²⁵⁴ These guarantees have nothing to do with *jurisdictional* conditions for accessing the courts.

177. The core differences between substantive protections of litigants’ rights to a fair hearing, and jurisdictional conditions for access to adjudication, were well summarized by the tribunal in *Plama Constortium v. Bulgaria*: “[The *Ambatielos*] ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty.”²⁵⁵

Or, in the words of the tribunal in *Salini v. Jordan*:

[I]n [*Ambatielos*], Greece invoked the most-favoured-nation clause with a view to securing, for one of its nationals, not the application of a dispute settlement clause, but the application of substantive provisions in treaties between the United Kingdom and several other countries under which their nationals were to be treated in accordance with “justice,” “right” and “equity.” The solution adopted by the Arbitration Commission cannot therefore be directly transposed in this specific instance.²⁵⁶

²⁵³ *The Ambatielos Claim*, pp. 99, 100 & 109 (RL-44).

²⁵⁴ *Ibid.*, pp. 110-111.

²⁵⁵ *Plama v. Bulgaria*, ¶ 215 (RL-70).

²⁵⁶ *Salini v. Jordan*, ¶ 112 (RL-74).

It is precisely this critical distinction that the *Maffezini* tribunal overlooked in coming to a contrary conclusion, a fact noted by a large number of tribunals and commentators.²⁵⁷

178. Notably, the arguments Claimants make here were specifically rejected in *Renta 4*, in which the majority observed that FET “as understood in international law” does not concern jurisdictional preconditions to international arbitration.²⁵⁸ The majority further held that fair and equitable treatment “relates to normative standards and *does not extend* to either (i) the availability of international as opposed to national fora or (ii) ‘more’ rather than ‘less arbitration.’”²⁵⁹

179. Uruguay submits that this Tribunal should reach the same conclusion in this case. Because it relates only to matters of “fair and equitable treatment,” Article 3(2) cannot be extended to cover dispute resolution mechanisms. As such, it cannot be used to excuse Claimants’ failure to satisfy the jurisdictional preconditions set forth in Article 10 of the BIT. Jurisdiction is therefore absent, and Claimants’ Request for Arbitration must be dismissed.

²⁵⁷ E.g., *Plama v. Bulgaria*, ¶ 215 (RL-70); *Salini v. Jordan*, ¶ 112 (RL-74); *Berschahder v. Russia*, ¶ 200 (RL-81); *ICS v. Argentina*, ¶ 293 (RL-112); Professor Stern’s Concurring and Dissenting Opinion in *Impregilo v. Argentina*, ¶ 34 (RL-113); see also Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009), pp. 354-356 (RL-38).

²⁵⁸ *Renta 4*, ¶¶ 119-120 (RL-71).

²⁵⁹ *Ibid.*, ¶ 119 (emphasis added).

III. ARTICLE 2(1) OF THE BIT EXCLUDES URUGUAY'S PUBLIC HEALTH MEASURES FROM THE TRIBUNAL'S JURISDICTION

180. In addition to lacking jurisdiction under Article 10, the Tribunal also lacks jurisdiction under Article 2, paragraph 1, the second sentence of which recognizes the “right” of each of the Parties “not to allow economic activities for reasons of public security and order, *public health* or morality, as well as activities which by law are reserved to their own investors.”²⁶⁰ As discussed in Uruguay’s Memorial, this language can only sensibly be interpreted to mean that public health measures like those at issue in this case are excluded from the protections afforded investors under the BIT. This interpretation is supported by the plain language of Article 2(1), standard canons of treaty interpretation, and a comparison between the relevant language and analogous provisions of other BITs.²⁶¹

181. The Counter-Memorial does not challenge many aspects of Uruguay’s analysis, including the fact that the measures in dispute were adopted for reasons of public health. Instead, it largely confines itself to just a single response: the “rights” language of Article 2(1) does not apply here because it relates only to sovereign conduct *prior* to the admission of an investment. According to Claimants, Article 2(1) has no application to alleged investments like theirs that have already been admitted.²⁶² For the reasons discussed below, Claimants misread Article 2(1). In fact, it does apply to Claimants’ activities and therefore bars the Tribunal’s jurisdiction in this case.

²⁶⁰ The second sentence of Art. 2(1) of the Uruguay-Switzerland BIT states: “The Contracting parties recognize each other’s right not to allow economic activities for reasons of public security and order, public health or morality, as well as activities which by law are reserved to their own investors.” (RL-21).

²⁶¹ UMJ, Section II.B.

²⁶² CMJ, ¶ 166.

A. The Obligation To Promote Investments Applies Throughout the Life-Cycle of an Investment

182. The Counter-Memorial argues in the first instance that “Article 2 is not applicable because it covers admission (*i.e.*, establishment) and does not affect investments already made, including investments made by Claimants.”²⁶³ Claimants base their argument on the first sentence of Article 2(1), which, they say, informs and limits the temporal scope of the “rights” language in the second sentence.

183. Claimants’ argument that the first sentence of Article 2(1) only “covers admission” trips at the threshold. It is obviously inconsistent with the provision’s plain text. The very title of Article 2 refers to “promotion” and “admission” as two separate and distinct concepts. The article’s text similarly reads: “Each Contracting Party shall in its territory *promote* as far as possible investments by investors of the other Contracting Party and *admit* such investments in accordance with its law.”²⁶⁴ In focusing exclusively on the obligation to “admit” investments, Claimants rather conspicuously overlook the wholly separate duty to “promote” investments stated in the same sentence. That obligation applies throughout the life-cycle of an investment.²⁶⁵ The first sentence of Article 2(1) therefore does nothing to limit the temporal scope of the second sentence. It applies fully to Claimants’ activities in Uruguay.

184. Claimants cannot so blithely ignore Article 2’s plain text. “Promote” and “admit” are not just different words; they are different concepts. Salacuse confirms: “Investment treaties

²⁶³ *Ibid.*

²⁶⁴ Uruguay-Switzerland BIT, Art. 2(1) (RL 21).

²⁶⁵ UMJ, ¶ 109.

view investment promotion and investment admission as two separate and distinct functions governed by different treaty provisions.”²⁶⁶

185. Among the critical differences between the obligations to promote and to admit investments is the fact that the obligation to promote investments applies throughout the life-cycle of an investment. It therefore covers investments already made. The broad temporal sweep of the obligation to promote is evident from the very definition of the term. According to the OXFORD ENGLISH DICTIONARY, the word “promote” means: “To further the growth, development, progress, or establishment of (anything); to help forward (a process or result); to further, advance, encourage.”²⁶⁷ Its plain meaning thus includes creating the conditions necessary for investments to flourish after they have been established.

186. International scholars also recognize that the obligation to promote investments applies not just at the pre-admission phase but also to the continuing treatment given to investments already made. According to Wells and Wint, the promotion of investments embraces the following types of activities:

advertising, direct mailing, investment seminars, investment missions, literature, one-to-one direct marketing efforts, preparation of itineraries for visits of prospective investors, matching prospective investors with local partners, acquiring permits and approvals from various government departments, preparing project proposals, conducting feasibility studies, *and providing services to the investor after projects have become operational.*²⁶⁸

²⁶⁶ J. Salacuse, *THE LAW OF INVESTMENT TREATIES* (2010), p. 195 (RL-93).

²⁶⁷ *The Compact Oxford English Dictionary* (2nd ed. 1991), p. 616: “Promote” (R-76).

²⁶⁸ L.T. Wells & A. Wint, *Marketing a Country: Promotion as a Tool for Attracting Foreign Investment* (2000), p. 8: “Definition of Promotion” (emphasis added) (R-79).

Wells and Wint note that the “[investment promotion] role can range from providing assistance to potential and *existing investors* in their daily problems to lobbying for key policy and legal reforms.”²⁶⁹ Salacuse agrees: “Investment treaties place an obligation upon host countries to promote investment from treaty partners by creating ‘favorable conditions’ within territories for making *and operating* such investments.”²⁷⁰

187. It is therefore clear that the obligation to promote investments extends beyond the pre-admission stage.

188. Uruguayan law confirms the same fact. In 1997, Uruguay enacted Law 16,906 captioned “National Interest, Promotion and Protection”.²⁷¹ Among other elements, the law contains provisions permitting the Uruguayan government to grant certain benefits to existing investment projects that the government determines to be worthy of “promotion”.²⁷² To confer these benefits, the President of Uruguay declares the investment project “promoted” under the law.²⁷³

189. Abal was itself a beneficiary of Law 16,906. Claimants admit that Uruguay declared it “promoted” and granted it a “generous package” of tax exemptions and credits,²⁷⁴ all

²⁶⁹ J. Morisset, World Bank Foreign Investment Advisory Service, Policy Research Paper 3028: *Does a Country Need a Promotion Agency to Attract Foreign Direct Investment?* (Apr. 2003), p. 3, n. 2 (citing Wells & Wint (2001)) (R-82).

²⁷⁰ Salacuse (2010), p. 194 (emphasis added) (RL-93).

²⁷¹ Uruguayan Law No. 16,906 (20 Jan. 1998) (RL-85).

²⁷² *Ibid.*, Art. 15.

²⁷³ *Ibid.*, Art. 11.

²⁷⁴ CMJ, ¶ 169.

of which applied for a period of 10 years. It goes without saying, of course, that this “promotion” occurred long after Claimants’ alleged investment in Uruguay had already been made.²⁷⁵

190. Uruguay takes its obligation to promote investments – existing and potential – seriously. In 1996, it created a governmental entity, the Institute for the Promotion of Investments and Exports of Goods and Services (also known as “Uruguay XXI”). The Institute describes itself as an agency that offers a variety of services to foreign investors, “both those who are evaluating where to make an investment *as well as those currently operating in Uruguay.*”²⁷⁶ Here again, it is clear that Uruguay regards its obligation to promote investments as extending into the period after an investment is made.

191. Because the temporal scope of the first sentence of Article 2 is not limited to the period before an investment is admitted, the temporal scope of the second sentence is also not limited. To the contrary, Uruguay’s right not to permit economic activity for reasons of public health extends throughout the life-cycle of an investment. This Tribunal therefore lacks jurisdiction over this case for all the reasons articulated in Uruguay’s Memorial.

²⁷⁵ Declaration of Promoted Activity for Investment Project of ABAL HNOS S.A. (14 Mar. 2002), ¶ 6 (“For purposes of control and follow-up, ABAL HNOS. S.A., shall submit an annual report to the Implementation Commission and simultaneously to the Ministry of Industry, Energy and Mining, with respect to the project’s implementation during the years of physical implementation of the project and during years 1 to 10, regarding the carrying out and accomplishment of the project goals, as well as regarding the use of the promotional benefits granted under this Resolutions.”) (original in Spanish, translation by Claimants) (C-029).

²⁷⁶ Uruguay XXI Website, “Our Services” (last visited on 1 Mar. 2012) (R-86).

192. In an effort to support their argument that Article 2 does not apply to the present dispute, Claimants seek support from the *Aguas del Tunari* case.²⁷⁷ They assert that the tribunal rejected “an argument similar to that which Uruguay offers here.”²⁷⁸ The alleged similarities Claimants invoke do not exist.

193. The key issue in *Aguas del Tunari* related to the scope of Bolivia’s obligations to *admit* investments, not to *promote* them. Claimants’ own discussion of the case acknowledges this limitation. The Counter-Memorial states: “The *Aguas del Tunari* tribunal interpreted the second sentence of Article 2, regarding the *admission* of investments....”²⁷⁹ Here, the question before the Tribunal has nothing to do with the admission of investments. The *Aguas del Tunari* decision is therefore irrelevant.

194. Claimants also seek support in Article 2(2) of the BIT for their argument that the obligations stated in the first sentence of Article 2(1) – and therefore also the “rights” language in the second sentence – apply only at the pre-admission phase of an investment. Article 2(2) provides: “When a Contracting Party shall have admitted, according to its law, an investment in its territory, it shall grant the necessary permits in connection with such an investment....”²⁸⁰ According to Claimants, this is relevant because, in alleged contrast to Article 2(1), Article 2(2)

²⁷⁷ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ART/02/3, Decision on Jurisdiction (21 Oct. 2003) (Caron, Alberro-Semerena, Alvarez) (CLA-006).

²⁷⁸ CMJ, ¶ 170.

²⁷⁹ *Ibid.* (emphasis added). As Claimants themselves emphasized in the Counter-Memorial, the tribunal focused on the “duty to admit”: “The tribunal concludes that the inclusion of the term ‘subject to’ indicated that the duty to admit investments is limited by ‘the right to exercise powers conferred by its laws or regulations’.” *Ibid.* (emphasis in original).

²⁸⁰ Uruguay-Switzerland BIT, Art. 2(2) (RL-21).

“changes tack and addresses the time” *after* an investment has been made.²⁸¹ Claimants appear to be suggesting that because Article 2(2) deals with the post-admission period, Article 2(1) cannot also relate to the same period. The argument is a *non sequitur*.

195. The two paragraphs address entirely different issues. Article 2(1) relates to the general obligation to promote and admit. Article 2(2) is narrower; it relates only the granting of necessary permits. The fact that Article 2(2) can, by definition, only apply post-admission does not mean that it limits, sheds light on, or otherwise implies anything about the temporal scope of Article 2(1). There is nothing inconsistent between the narrow logistical issue addressed in Article 2(2), and the broader rights and duties addressed in Article 2(1) extending throughout the life-cycle of an investment.

196. Claimant further argues that the purpose of the “rights” language in the second sentence of Article 2(1) is limited to clarifying the meaning of the obligation stated in the first sentence to “admit in accordance with its law” investments made by investors of the other State.²⁸² There is, however, nothing in the text of the second sentence of Article 2(1) that suggests it modifies only a portion of the first sentence, much less the portion Claimants would prefer. A more natural and logical interpretation is that the second sentence conditions *all* of the obligations stated in the first sentence, including the obligation to promote investments throughout their life-cycle.

197. Finally, Claimants enlist Professor Schreuer to try to provide them additional assistance on this point as well. Like Claimants, Professor Schreuer suggests that Article 2

²⁸¹ CMJ, ¶ 167.

²⁸² *Ibid.*

relates only to the “pre-investment phase.”²⁸³ Uruguay must encourage the Tribunal to reject his opinion on several grounds. *First*, it is contrary to the plain text, for the reasons already discussed. *Second*, and relatedly, it is unaccompanied by analysis or authority. It is confined instead to a cursory restatement of Claimants’ position without further explanation. *Third*, it is not admissible for Professor Schreuer (or any witness) to opine on the ultimate legal question before the Tribunal. This arbitration already has three eminently qualified legal experts whose job it is to decide the legal issues in dispute: the Members of the Tribunal. It does not need another, particularly one solicited exclusively by one of the parties.

198. Claimants are correct in one respect. The Counter-Memorial states: “None of the measures at issue in this dispute pertain to the admission of the investment.”²⁸⁴ Claimants’ observation is, however, entirely beside the point on the issue here under discussion. For the reasons discussed above, the temporal scope of the second sentence of Article 2(1) is not limited to the pre-admission phase. It therefore applies fully to the post-admission activities at issue in this arbitration and deprives the Tribunal of jurisdiction.

B. Article 2 Is an Exception to the BIT’s Substantive Protections

199. In addition to arguing that the second sentence of Article 2(1) does not apply to investments already made, Claimants also make a fall-back argument that Article 2 does not

²⁸³ Legal Opinion of C. Schreuer (2012), ¶ 62 (CWS-001).

²⁸⁴ CMJ, ¶ 171.

constitute an exemption from the substantive protections the BIT otherwise affords investors.²⁸⁵ As shown below, Claimants arguments in this respect are also unpersuasive.

200. Claimants first compare Article 2 of the Uruguay-Switzerland BIT with Annex I of Uruguay’s BIT with Canada, and argue that the latter sheds unflattering light on the former. According to Claimants, Annex I of the Uruguay-Canada BIT is broader than Article 2 of the Uruguay-Switzerland BIT and embodies an exception to the substantive provisions. In comparison, they say, Article 2 does not.²⁸⁶ Claimants misread the Uruguay-Canada BIT and misunderstand the nature of the comparison.

201. Annex I of the Uruguay-Canada BIT states in relevant part that “nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures: ... b) necessary to protect human, animal or plant life or health.”²⁸⁷ This is precisely the sort of traditional “non-precluded measures” clause Uruguay discussed in its Memorial and showed is actually narrower – not broader – than Article 2 of the BIT.²⁸⁸ In contrast to Article 2, Annex I of the Uruguay-Canada BIT, like other non-precluded measures clauses, requires a showing that the measures at issue are “necessary” to protect human life or health. That inquiry implicates complex questions relating to the doctrine of necessity under international law, and whether or not the State is entitled to judge for itself what is necessary and what is not.

²⁸⁵ *Ibid.*, ¶ 172.

²⁸⁶ *Ibid.*, ¶ 173.

²⁸⁷ *Ibid.*, ¶ 172.

²⁸⁸ UMJ, ¶ 118.

202. Article 2 of the Uruguay-Switzerland BIT requires no such inquiries. To the contrary, it requires nothing more than the questioned measures be taken “for reasons of” public health – an issue which Claimants notably do not dispute in this case.²⁸⁹ If the measures are taken for these reasons, no further examination is required. By its plain terms, the “rights” language of Article 2 operates to remove them from the substantive protections the BIT otherwise grants.

203. Claimants also invoke a response by the Swiss Federal Council to a February 2011 parliamentary inquiry allegedly rejecting “a proposal to amend the BIT to add the type of public health exception that Respondent suggests already exists in Article 2.”²⁹⁰ This argument also does nothing to advance Claimants’ cause. First, it must be noted that the proposal Claimants mention did not come from Uruguay. To the contrary, the Swiss Federal Council response states: “To date, Switzerland has received no request from Uruguay to open negotiations on amending the IPA”.²⁹¹ The reason, of course, is that in Uruguay’s view such an exception already exists.

204. Moreover, the position of the Swiss Federal Council adopted in February 2011 – that is, after the present dispute had been joined and arbitration initiated (and no doubt influenced by the lobbying of interested parties) – sheds little light on the Parties’ intent at the time they

²⁸⁹ *Ibid.*, ¶ 126. Claimants do attempt to raise questions about the *effectiveness* of the measures it challenges, suggesting, for example, that Decree 287 “is akin to arguing that if you ban the ‘Heineken’ brand family, people will stop drinking beer.” CMJ, ¶ 2. In Uruguay’s view a more apt comparison would be to a company peddling competing versions of cyanide specifically designed to foster the impression that one is less deadly than the other. In any event, the issue is not whether Claimants think the measures are effective or not, but rather whether they have been adopted for reasons of public health. That is unquestionably the case here.

²⁹⁰ CMJ, ¶ 174.

²⁹¹ Response to Inquiry No. 10.1128 Submitted by Carobbio Guscetti Marina (16 Feb. 2011) (C-052).

negotiated and signed the BIT.²⁹² It is no more controlling than the official position Uruguay has expressed in these proceedings. What matters for present purposes is the effort to give effect to the Parties' intent in 1988, based on the plain language of the BIT and the relevant rules of interpretation as expressed in the Vienna Convention on the Law of Treaties.

205. Those rules support Uruguay's position. Beyond the plain meaning of Article 2 read in the context of the BIT as a whole,²⁹³ the *travaux préparatoires* also support the conclusion that Article 2 was intended as an exception to the substantive protections of the BIT. The Swiss negotiating team first produced an initial draft of the BIT in January 1986. That draft contained no provision analogous to what became the second sentence of Article 2(1).²⁹⁴ By August 1987, the negotiating draft had been altered to take account of Uruguay's views. It was in this draft that what became the second sentence of Article 2 first appeared.²⁹⁵ It remained essentially unchanged in the final version of the BIT, signed on 7 October 1988.²⁹⁶

206. Uruguay's purpose in insisting on this "rights" language is shown in other contemporaneous documents, including a Memorandum dated 1 August 1989 from the Executive Branch (signed by the President of the Republic of Uruguay) to the President of the General Assembly regarding the ratification of both the Uruguay-Switzerland and the Uruguay-Netherlands BITs. The Memorandum states:

²⁹² Particularly, considering that the Claimant in this arbitration has been actively lobbying in the Press and elsewhere.

²⁹³ UMJ, ¶¶ 110-111 & 119.

²⁹⁴ See Swiss Standard Draft BIT (1 Jan. 1986), Art. 2(1) (R-70).

²⁹⁵ Negotiating Version of Uruguay-Switzerland BIT (28 Aug. 1987), Art. 2(1)(2) (R-74).

²⁹⁶ Uruguay-Switzerland BIT, Art. 2(1) (RL-21).

Excluded from what is provided in the Treaties presented are those activities which, for reasons of security, morality, *health* or public order, are prohibited or reserved for nationals.²⁹⁷

The intent to exclude, *inter alia*, public health measures from the protections otherwise afforded by the BIT is evident.

207. Additional proof of the intent behind Article 2 comes from a memorandum written by the Uruguayan delegation responsible for negotiating the Uruguay-United Kingdom BIT, which was negotiated by the same team immediately prior to the Uruguay-Switzerland BIT. That memorandum is dated 26 August 1986 and provides preliminary comments to the draft Uruguay-UK BIT. In it, the Uruguayan delegates note, among other things:

It is understood that, based on the wording in numeral 1 [of Article 2 of the draft], which may certainly be altered in the Spanish version, it is necessary to establish in this provision that *the promotion of investments that will be carried out by both Contracting Parties, respectively, does not extend to activities which, for reasons of security, health, public order or morality, are prohibited or reserved to nationals.*²⁹⁸

208. These observations are critical in two respects. *First*, they show a clear intent to exclude public health measures from the scope of the substantive obligations of the BIT. *Second*, and relatedly, they show that the second sentence of Article 2(1) applies not just to the obligation to admit investments but also to the much broader obligation to promote them during their life cycles.

²⁹⁷ Letter from the Executive Branch to the President of Congressional General Assembly (1 Aug. 1989) (emphasis added), quoted in subsequent Letter from the Executive Branch to the President of Congressional General Assembly (17 Jul. 1990), in Minutes of Uruguayan Senate Sessions, No. 48, Vol. 332 (4 Sep. 1990), p. 40 (R-5).

²⁹⁸ Memorandum of Claudio Billig and Julián Moreno of the Uruguayan Ministry of Economy and Finance providing preliminary comments on draft Uruguay-UK BIT (26 Aug. 1986), ¶ 4 (emphasis added) (R-72).

209. In its Memorial, Uruguay discussed the reasons it placed such importance on excluding public health measures from the scope of the BIT. The right to health is enshrined in the Uruguayan Constitution. Indeed, it is so critical that it is given priority above other sovereign powers and obligations.²⁹⁹

210. Claimants argue in response that “the requirements of Uruguay’s Constitution have no bearing on whether Respondent has breached its obligations under the BIT.”³⁰⁰ Claimants misconstrue Uruguay’s position. Uruguay invoked its Constitution to demonstrate the peremptory nature of the right to health under Uruguayan law and thus its reason for insisting on the need to exclude these matters from the scope of the BIT.³⁰¹ Uruguay did not and does not seek to enlist its Constitution as a legal basis for breaching any of its obligations. Rather, it is an important aid for interpreting the object and purpose of the second sentence of Article 2. The point is that interpreting Article 2 as an exclusion renders it entirely consistent with the fact that public health is a supreme good under the Uruguayan Constitution, something of which the Uruguayan negotiating team would have been quite mindful.

211. Finally, Claimants contend that “[i]nterpreting [Article 2] as creating a jurisdictional exception to the scope of Uruguay’s obligations with respect to investments that have already been established (such as Abal) would lead to absurd results.”³⁰² In fact, however, it is PMI’s interpretation of Article 2 that would lead to absurd results. According to Claimants’

²⁹⁹ UMJ, ¶¶ 113-116.

³⁰⁰ CMJ, ¶¶ 179-180.

³⁰¹ UMJ, ¶¶ 113-116.

³⁰² CMJ, ¶ 168.

theory, under Article 2, Uruguay could prohibit a foreign investor from selling a product that constitutes a known public health menace (*e.g.*, asbestos) from being admitted into the country. Yet, if it were to become clear only after the investment had been admitted that a foreign investor's activities damage the public health – as a result of new scientific learning, for example – the BIT would prohibit Uruguay from acting to protect its people without facing the prospect of a BIT claim. The same result would obtain, under Claimants' theory, if the initial investment were admitted, but then the investor adopted practices – whether in the area of marketing or manufacturing – that created risks to public health. With respect, such a result would be nonsensical. Uruguay must have just as much right to protect the health of its people after an investment is made as it does beforehand, especially when new scientific knowledge or research data emerge or new practices are adopted by the investor. It is that right that the second sentence of Article 2(1) affirmatively guarantees.

* * *

212. For all these reasons, Article 2(1) must be interpreted to exclude public health measures from the scope of the substantive protections the BIT otherwise accords investors. That is the result compelled by the plain text of the provision interpreted in light of its object and purpose, the context, the *travaux préparatoires*, and supported by the scholarly literature. Thus, in addition to lacking jurisdiction under Article 10, the Tribunal also lacks jurisdiction under Article 2.

IV. CLAIMANTS' ACTIVITIES IN URUGUAY ARE NOT AN "INVESTMENT" WITHIN THE MEANING OF ARTICLE 25 OF THE ICSID CONVENTION

213. In its Memorial, Uruguay showed that Claimants' activities do not constitute an "investment" within the meaning of Article 25(1) of the ICSID Convention because they do not positively contribute to Uruguay's economic development. In fact, they do the opposite: they impede Uruguay's development, and badly so. The enormous health and social costs associated with tobacco consumption far exceed the meager economic contributions Claimants' tobacco business makes to the Uruguayan economy.

214. In response, the Counter-Memorial sensibly makes no effort to deny the undeniable. Claimants do not contest the profound costs the use of Claimants' tobacco products imposes on Uruguay. Nor do they attempt to argue that their ostensible contributions to the Uruguayan economy outweigh those costs. Instead, Claimants largely limit themselves to arguing that the Tribunal can ignore these facts because the ICSID Convention does not require an "investment" to contribute to the host country's development. It is enough, they say, that their interests allegedly satisfy the definition of "investment" contained in the Uruguay-Switzerland BIT.³⁰³

215. For the reasons presented below, Claimants are wrong. The object and purpose of the Convention, the weight of the jurisprudence, and the literature all support Uruguay's position. Because Claimants' activities hamper Uruguay's development, they do not constitute an investment within the meaning of Article 25(1). The Tribunal therefore does not have jurisdiction over this dispute for this third reason as well.

³⁰³ CMJ, ¶ 192.

A. The Meaning of the Term “Investment” under Article 25 of the Convention Cannot Be Confused with the Definition Stated in the BIT

216. As explained in Uruguay’s Memorial, an investor pursuing ICSID arbitration must satisfy a two-prong test to establish the existence of an “investment”.³⁰⁴ *First*, to open the gateway to ICSID arbitration, a claimant must show that its putative investment satisfies the requirements of Article 25(1) of the Convention. *Second*, it must also show that its interest falls within the illustrative list of investments contained within the relevant BIT.³⁰⁵

217. Claimants’ response is to ask the Tribunal to conflate these two distinct inquiries. They argue that because the ICSID Convention does not specifically define the term “investment”, the Tribunal should defer to the definition in the BIT.³⁰⁶ According to the Counter-Memorial: “[I]t is in keeping with the plain meaning of Article 25 and the purpose of the ICSID Convention to defer to the State parties’ intent, as expressed in the instrument of consent (*i.e.*, the BIT), as to what constitutes an investment.”³⁰⁷ Claimants are confused. The definition of the term investment under the Convention and the definition under individual investment treaties are neither functionally equivalent nor interchangeable.

³⁰⁴ UMJ, ¶ 157. *See also* A.R. Parra, *The Institution of ICSID Arbitration Proceedings*, NEWS FROM ICSID, Vol. 20, No. 2 (Winter 2003), p. 13 (RL-92).

³⁰⁵ ICSID tribunals routinely apply this dual test. *See, e.g., Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (8 Sep. 2009) (van Houtte, Feliciani, Moghaizel), ¶ 66 (RL-80); *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 Jul. 2001) (Briner, Cremades, Fadlallah) (hereafter “*Salini v. Morocco*”), ¶ 44 (RL-73); *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 Jun. 2006) (Kaufmann-Kohler, Mayer, Stern), ¶ 90 (RL-62); *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 Dec. 2010) (Berman, Gaillard, Thomas) (hereafter “*Global Trading Resource*”), ¶ 43 (RL-58); *Kardassopoulos v. Georgia*, Decision on Jurisdiction, ICSID Case No ARB/05/18 (6 Jul. 2007) (Fortier, Orrego Vicuña, Watts), ¶ 113 (RL-64); *Helnan International Hotels A/S v Egypt*, ICSID Case No ARB/05/19, Decision on Jurisdiction (17 Oct. 2006) (Derains, Lee, Dolzer), ¶¶ 74-80 (RL-59).

³⁰⁶ CMJ, ¶¶ 186 & 189-192.

³⁰⁷ *Ibid.*, ¶ 191.

218. To begin, Article 25(1) of the ICSID Convention and Article 1(2) of the Uruguay-Switzerland BIT serve different purposes. Article 25(1) defines the scope of the Centre’s jurisdiction. Article 1(2) of the BIT, in contrast, defines the contours of the Parties’ consent within the constraints set by the Convention. By inviting the Tribunal to confuse the two, Claimants equate chalk with cheese.

219. Parties cannot consent to give the Centre jurisdiction beyond that created by the ICSID Convention. The Report of the Executive Directors on the Convention states:

While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Convention is further limited by reference to the nature of the dispute and the parties thereto.³⁰⁸

220. For this reason, other ICSID tribunals have held that the “agreement of the parties describing their transaction as an investment is not, as such, conclusive in resolving the question whether the dispute involves an investment under Article 25(1) of the Convention.”³⁰⁹ Even Claimants’ own expert, Professor Schreuer, agrees with the basic point. Elsewhere, he has written that “the term ‘investment’ has an objective meaning independent of the parties’ disposition.”³¹⁰

³⁰⁸ IBRD, *Report on the ICSID Convention* (1965), ¶ 25 (RL-15).

³⁰⁹ *Ceskoslovenska Obchodni Banka AS v Slovakia*, ICSID Case No ARB/97/4, Decision on Jurisdiction (24 May 1999) (Buergenthal, Bernardini, Bucher), ¶ 68 (RL-52). See also *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Judge Abi-Saab (28 Oct. 2011), ¶ 40 (“That the ICSID Convention does not provide an express definition of investment does not automatically imply that the definition is totally left to the BITs.”) (RL-99); *Joy Mining Machinery Limited v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 Aug. 2004) (Orrego Vicuña, Craig, Weeramantry) ¶ 49 (“The fact that the Convention has not defined the term investment does not mean, however, that anything consented to by the parties might qualify as an investment under the Convention”) (RL-63).

³¹⁰ Schreuer, *THE ICSID CONVENTION* (2009), p. 117 (RL-43a).

221. Because they serve different purposes, the ICSID Convention and individual BITs are focused on different aspects of the concept of “investment”: (i) the contributions that constitute the investment (*e.g.*, financial or in-kind); and (ii) the rights and value that derive from those contributions (*i.e.*, the asset).³¹¹ Article 25(1) of the Convention relates principally to the contribution element of an investment, while investment treaties typically provide examples of protected assets that emanate from those contributions.³¹² As the tribunal in *Malicorp v. Egypt* observed: “It can be inferred from this that assets cannot be protected unless they result from contributions....”³¹³

222. These same points can be put more simply. The meaning given to “investment” under Article 25(1) of the Convention sets the limits within which the parties’ bilateral definition must be interpreted. As the *ad hoc* Annulment Committee in the *Patrick Mitchell* case stated: “Indeed, such concept of investment [under the Convention] should prevail over any other ‘definition’ of investment in the parties’ agreement or in the BIT, as it is obvious that the *special and privileged arrangements* established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged.”³¹⁴

223. It is precisely for this reason that a number of ICSID tribunals have found that there was no investment even where the claimant’s assets or activities nominally fell within the

³¹¹ *Abaclat*, ¶ 346 (CLA-002). See also *Malicorp Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 Feb. 2011) (Tercier, Baptista, Tschanz), ¶ 110 (RL-116).

³¹² *Abaclat*, ¶ 347 (CLA-002).

³¹³ *Malicorp*, ¶ 110 (RL-116).

³¹⁴ See *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 Nov. 2006) (Dimolitsa, Dossou, Giardina), (hereafter “*Patrick Mitchell (Annulment)*”), ¶ 25 (emphasis added) (RL-69).

broad categories contained in the relevant investment treaty. The tribunal in *Joy Mining*, for example, declined jurisdiction in a dispute involving a bank guarantee despite the broad language of the relevant BIT covering “pledges, claims to money, all kinds of assets and other matters.” Finding that the bank guarantee was not an investment, the tribunal stated: “To conclude that a contingent liability is an asset under Article 1(a) of the Treaty, and hence a protected investment, would really go far beyond the concept of investment, even if broadly defined, as this and other treaties normally do.”³¹⁵

224. Similarly, the *ad hoc* Annulment Committee in *Patrick Mitchell* annulled the tribunal’s award in a case relating to the closure of a foreign law office. The *ad hoc* Committee accepted that the provision of legal services fell within certain categories in the BIT, yet nonetheless set the award aside for failure to state how the alleged investment contributed to the economic development of the State as required by the fourth factor in the *Salini* test (discussed below).³¹⁶

225. For this reason, it is not enough that Claimants may satisfy the definition of “investment” set forth in the Uruguay-Switzerland BIT. This is a necessary condition to

³¹⁵ *Joy Mining*, ¶ 45 (RL-63).

³¹⁶ *Patrick Mitchell (Annulment)*, ¶¶ 36-40 (RL-69). See also *Global Trading Resource*, in which the tribunal summarily dismissed a claim arising out of contracts for the supply of poultry. The tribunal acknowledged that the claim arguably fell within the pertinent BIT’s definition of investment, which covered “any right conferred by law or contract, and any licenses and permits pursuant to law.” Nonetheless, the tribunal held that the purchase and sale contracts at issue were pure commercial transactions that did not constitute an “investment” under Article 25. *Global Trading Resource*, ¶¶ 53 & 56-57 (RL-58).

establishing the Tribunal’s jurisdiction but it is not by itself sufficient. They must also show that they satisfy the Convention. This they cannot do.³¹⁷

B. The ICSID Convention Requires “Significant Contribution to the Host State’s Development”

226. The fact that the ICSID Convention does not expressly define the term “investment” does not change the analysis. A recent United Nations Conference on Trade and Development (“UNCTAD”) study explains that the drafters chose not to include a precise definition, in part, “to enable the Convention to accommodate both traditional types of investment, in the form of capital contributions, and new types of investment, including service contracts and transfers of technology....”³¹⁸ But that does not mean it is an empty vessel to be filled however the parties to a BIT might wish.³¹⁹

227. In its Memorial, Uruguay showed that tribunals have increasingly given content to this objective meaning in the form of the *Salini* test, which sets out the characteristics an

³¹⁷ Contrary to Claimants’ assertion, the fact that Uruguay refrained from taking a position on the issue of whether or not Claimants’ activities satisfy the BIT-based definition does not mean that Uruguay agrees “that Claimants have made an ‘investment’ in the territory of Uruguay within the meaning of Article 1(2) of the BIT.” CMJ, ¶ 183. Uruguay expresses no view because there is no need to do so. Claimants so obviously stumble over the first hurdle that they never even reach the second.

³¹⁸ See United Nations Conference on Trade and Development (UNCTAD), *Scope and Definition: A Sequel*, in UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2011), p. 48 (RL-96).

³¹⁹ See *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Shahabuddeen (19 Feb. 2009) (Schwebel, Shahabuddeen, Tomka), ¶ 11:

Inability of delegates to agree on definitions does not mean that definitions were redundant, or that they do not exist; they encapsulate fundamental, if residual, ideas. Those ideas can be violated if the parties are free to decide that any outlay whatsoever is entitled to the protection given to an ICSID investment. Where it becomes necessary to find the outer limits, as it is here, they must be found ... that the parties accepted that their admittedly wide competence to agree on the contents of an ICSID investment assumed that the competence was nevertheless not limitless....

(RL-115). See also Dissenting Opinion of Judge Abi-Saab in *Abaclat*, ¶¶ 40 & 46 (RL-99).

investment must have in order to qualify as such under the Convention.³²⁰ A key component of this test is the requirement that a claimant's activities contribute significantly and positively to the economic development of the host State.³²¹

228. Claimants' Counter-Memorial responds that even if the *Salini* test applies, the Tribunal should nonetheless reject the "contribution-to-development criterion" as somehow inconsistent with the Convention.³²² Once more, Claimants are mistaken.

229. Economic development is at the core of the foreign investment regime. UNCTAD writes: "Developing countries seek foreign direct investment (FDI) in order to promote their economic development. This is their paramount objective."³²³ The ICSID Convention shares this same paramount objective. The Report of the Executive Directors on the Convention states: "In submitting the attached Convention to governments, the Executive Directors are prompted by the desire to strengthen the partnership between countries in the cause of economic development."³²⁴

230. The ICSID Convention represents a grand compromise in which States agreed to a limited relinquishment of their sovereignty in return for an inflow of foreign investment for the

³²⁰ UMJ, ¶¶ 160-162.

³²¹ *Ibid.*, ¶¶ 164-165.

³²² CMJ, ¶ 199.

³²³ United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements: Flexibility for Development*, in UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS (2000), p. 1 (RL-95).

³²⁴ IBRD, *Report on the ICSID Convention* (1965), ¶ 9 (RL-15).

purpose of fostering economic development.³²⁵ Noah Rubins observes: “The Washington Convention and other investment protection treaties were created not for the sake of directing all private-public disputes into arbitration, but specifically in order to increase salutary economic activities and feed the engine of sustained development and prosperity around the world.”³²⁶ A recent UNCTAD study states: “[T]he ICSID Convention should not be seen merely as a means of dispute settlement. It is also ‘an instrument of international policy for the promotion of economic development.’”³²⁷

231. The ICSID Convention’s opening line highlights the centrality of economic development. The Preamble’s first paragraph expressly invokes “the need for international cooperation for economic development, and the role of private international investment therein.”³²⁸ Development and investment are tied inextricably together.³²⁹ Notably, Claimants nowhere dispute the fact that economic development is the object and purpose of the ICSID Convention. Indeed, they admit it.³³⁰

³²⁵ N. Rubins, *The Notion of "Investment" in International Arbitration* in N. Horn & S.M. Kröll (eds.), *ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS* (2004), pp. 284-285 (RL-42).

³²⁶ *Ibid.*, p. 322.

³²⁷ UNCTAD, *Scope and Definition* (2011), p. 52 (RL-96).

³²⁸ ICSID Convention (1966), Preamble (RL-11).

³²⁹ G. Delaume, *ICSID Arbitration: Practical Considerations*, *JOURNAL OF INTERNATIONAL ARBITRATION*, Vol. I (1984), p. 116 (“[T]he notion of investment today is directly related to the expected contribution that an association between a foreign party and a State make to the economy of the State concerned.”) (RL-87).

³³⁰ CMJ, ¶ 202 (acknowledging that “economic development” is “the macro-economic policy goal of the ICSID Convention”).

232. Uruguay submits merely that the term “investment” in Article 25(1) should be interpreted in light of this agreed object and purpose. Indeed, that is what the Vienna Convention on the Law of Treaties requires.

233. Claimants contend that Uruguay has misread the Preamble. They argue that Uruguay confuses the “macro-economic policy goal of the ICSID Convention” – economic development – with the “micro-economic definition of investment” – which it claims “is intended to allow individual investors to access the dispute settlement mechanism.”³³¹ By this would-be logic, Claimants seek to sever the object and purpose of the Convention from the interpretation of Article 25(1). Claimants’ attempt to disconnect the two does not work. Read together, the opening paragraphs of the Preamble unmistakably show that the sort of “investment” about which the Convention is concerned is investment that promotes economic development.

234. The opening paragraphs of the Preamble state:

Considering the need for international cooperation for *economic development*, and the role of private international *investment* therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with *such investment* between Contracting States and nationals of other Contracting States; ...

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit *such disputes* if they so desire; ...³³²

³³¹ *Ibid.*, ¶ 202.

³³² ICSID Convention (1966), Preamble (emphasis added) (RL-11).

235. The reference in the second paragraph to “such investment” unmistakably points back to the kind of investment described in the first paragraph; namely, investment that plays a role in economic development. It thus makes clear that the Convention embraces only disputes that arise in connection with investments that promote economic development.

236. The fourth paragraph of the Preamble confirms this conclusion. There, the reference to “such disputes” point back to the disputes described in the second paragraph; *i.e.*, disputes concerning private international investment that plays a role in economic development. It therefore confirms the link between the Convention’s dispute resolution mechanisms and investments that contribute to economic development. Try as they might, Claimants cannot sever that link.

237. In addition to arguing that Uruguay has misunderstood the Convention’s Preamble, Claimants make two other arguments for rejecting the contribution-to-development criterion. *First*, they contend that it entails a “post hoc analysis” which would vitiate the “reasonable expectations” of foreign investors under the Convention and the BIT. *Second*, they argue that it is subjective, threatening to “transform arbitrators into policy-makers.” Both arguments lack merit.

238. Claimants’ contention that the contribution-to-development criterion would unsettle investors’ reasonable expectations is flawed on multiple levels. In the first place, it assumes its own conclusion. That is, it assumes that an investor whose activities impede a host State’s development can legitimately possess reasonable expectations of protection under the Convention. But that, of course, is precisely the question now under consideration. It is for the Tribunal – and only the Tribunal – to say whether such expectations are reasonable or not.

239. Claimants’ ostensible concern about post hoc evaluations is also at odds with the practice of other ICSID tribunals, many of which have examined investors’ contributions to the economic development of the host State with little difficulty. None of these tribunals struggled in the manner Claimants suggest. It is normally self-evident from the nature of the transaction (e.g., construction of a highway,³³³ development and exploitation of oil and gas resources,³³⁴ promotion of tourism through hotel operations,³³⁵ or financial arrangements that develop the host State’s banking system³³⁶) whether the activity contributes to the development of the host State in a substantial and positive way.

240. This case is no exception. As discussed in Uruguay’s Memorial, and as will be discussed further below, there is no serious question about whether or not Claimants’ activities contribute to Uruguay’s development. They do not, and Claimants make only the weakest effort to suggest otherwise.

241. Claimants’ second argument is that the “contribution-to-development” criterion would introduce elements of subjectivity that would transform arbitrators into policy-makers. This argument too is incorrect.

242. To begin, Claimants’ own expert disagrees with them. Professor Schreuer’s works on the ICSID Convention confirm the *objective* nature of the contribution-to-development requirement. He writes:

³³³ *Salini v. Morocco*, ¶ 57 (RL-73).

³³⁴ *Kardassopoulos v. Georgia*, ¶ 117 (RL-64).

³³⁵ *Helnan International Hotels*, ¶ 77 (RL-59).

³³⁶ *Ceskoslovenska Obchodni Banka*, ¶¶ 76 & 88 (RL-52).

The only possible indication of an objective meaning [of the term “investment”] that can be gleaned from the Convention is contained in the Preamble’s first sentence, which speaks of “the need for international co-operation for economic development and the role of private international investment therein”. ... Therefore, it is arguable that the Convention’s object and purpose indicate that there should be some positive impact on development.³³⁷

243. Professor Schreuer seems to take a different view on this issue in his legal opinion submitted in support of Claimants’ Counter-Memorial. There, he questions the “validity” of the contribution-to-development criterion.³³⁸ With respect, Uruguay suggests that Professor Schreuer’s independent views expressed outside the context of litigation constitute more reliable authority than opinions rendered on behalf of a party to the dispute.

244. Claimants’ professed concerns about arbitrators becoming policy makers “because there are infinite variables one could consider in determining an investment’s contribution to the host State’s development” is also an exercise in creative thinking. They have no application in this case. The huge costs Claimants’ activities impose on Uruguay are obvious to any reasonable observer. No close calls are required.

245. Claimants’ argue, for example, that their activities contribute to Uruguay’s development because they employ some 99 workers in the country. Yet, they kill ten times that number of people every year.³³⁹ It requires no value judgments to weigh 99 jobs against 1,000 lives a year.

³³⁷ Schreuer, *THE ICSID CONVENTION* (2009), pp. 116-117 (RL-43a).

³³⁸ Legal Opinion of C. Schreuer (2012), ¶ 65 (CWS-001).

³³⁹ In its Memorial, Uruguay showed that more than 5,000 people die from smoking related illness every year. UMJ, ¶ 170. Claimants do not dispute this figure. Based on Abal’s historical market share of just over 20%, this means that the deaths of approximately 1,000 people a year are directly attributable to Claimants’ activities. *See A.*

246. A similarly simple analysis applies to the US\$3.7 million in salaries and social security contributions Claimants say Abal makes every year. Weighed against this are the US\$150 million a year in direct health care costs smoking imposes on the Uruguayan economy (which Claimants make no effort to dispute). Using Abal's historical 20% market share,³⁴⁰ this translates into some US\$30 million in annual health care costs attributable to Claimants' activities. That US\$30 million is greater than US\$3.7 million is simple arithmetic.

247. In his dissent in the *Malaysian Historical Salvors* annulment decision, former ICJ Judge Mohamed Shahabuddeen posited the following hypothetical scenario:

In this connection, it is possible to conceive of an entity which is systematically earning its wealth at the expense of the development of the host State. However much that may collide with a prospect of development of the host State, it would not breach a condition – on the argument of the Applicant.³⁴¹

248. Claimants here turn Judge Shahabuddeen's hypothetical situation into a real one. Claimants earn their wealth at Uruguay's expense. They systematically undermine its development by killing its people and increasing its health care costs, not to mention the other social and economic costs discussed below. In Uruguay's view, such activities cannot be considered an "investment" conducive to economic development, or protected by the ICSID Convention.

Ramos & D. Curti (PAHO), *Economics of Tobacco Control in Mercosur and Associated Countries: Uruguay* (2006), p. 20 (R-20a).

³⁴⁰ Ramos & Curti (PAHO), p. 20 (R-20a).

³⁴¹ *Malaysian Historical Salvors*, Dissenting Opinion of Judge Shahabuddeen, ¶ 22 (RL-115).

C. The *Salini* Factors Are Jurisdictional Requirements

249. Claimants' Counter-Memorial also argues that even if they apply, the *Salini* criteria are not jurisdictional requirements.³⁴² Instead, Claimants say, they “reflect an effort by tribunals to identify characteristics of investments to facilitate the determination of jurisdiction under Article 25.”³⁴³ Unfortunately for Claimants, their position runs contrary to the rising tide of ICSID cases, the trend of which is to view these criteria as mandatory jurisdictional prerequisites.

250. The tribunal in *Joy Mining*, for instance, stated: “Summarizing the elements that an activity *must have* in order to qualify as an investment ... the project in question should have a certain duration, a regularity of profit and return, an element of risk, a substantial commitment and that it should constitute a significant contribution to the host State's development.”³⁴⁴

251. Similarly, the tribunal in the *Kardassopoulos v. Georgia* stated:

The ICSID Convention does not define the term “investment.” ICSID tribunals have, however, developed a set of *conjunctive criteria* to determine whether an investment was made within the meaning of the Convention. *There must be*: (i) a contribution, (ii) a “certain duration of performance of the contract,” (iii) a “participation in the risks of the transaction,” and (iv) a contribution to the host State's economic development.³⁴⁵

³⁴² CMJ, ¶¶ 193-198.

³⁴³ *Ibid.*, ¶ 193. This view of the *Salini* criteria is sometimes referred to as the “typical characteristics approach.”

³⁴⁴ *Joy Mining*, ¶ 53 (emphasis added) (RL-63).

³⁴⁵ *Kardassopoulos v. Georgia*, ¶ 116 (emphasis added) (RL-64).

Still other recent decisions have only found jurisdiction after establishing that each of the *Salini* criteria was met.³⁴⁶

252. It is true that some tribunals have taken a somewhat more flexible approach to the *Salini* criteria, viewing them instead as descriptors of the characteristics investments covered by the ICSID Convention typically possess. In Uruguay's view, the better view is that the criteria are mandatory in nature. This is especially true of the contribution-to-development criterion, for the reasons discussed above.

253. That said, whether one views the *Salini* criteria as mandatory jurisdictional requirements or instead adopts the "typical characteristics approach" is, in the circumstances of this case, a distinction without a difference. The result is the same in either event. Given the complete absence of one of the recognized hallmarks of an ICSID investment – a contribution to development – the Tribunal should determine that it has no jurisdiction even if it decides to use the *Salini* criteria only "to facilitate the determination of jurisdiction under Article 25," as Claimants suggest.³⁴⁷

D. Claimants' Activities Harm Uruguay's Development

254. Claimants fall back to an argument that even if the contribution-to-development criterion applies, they satisfy it. They are mistaken. Their paltry "contributions" to Uruguay's economy are much more than offset by the harms they inflict on Uruguay and its people.

³⁴⁶ See, e.g., *Toto Costruzioni v. Lebanon*, ¶ 86 (RL-80); *Salini v. Morocco*, ¶¶ 53-7 (RL-73); *Jan de Nul*, ¶¶ 92-95 (RL-62); *Kardassopoulos v. Georgia*, ¶ 117 (RL-64).

³⁴⁷ CMJ, ¶ 193.

255. Uruguay explained the damaging impact of tobacco consumption on world-wide economic development in its Memorial.³⁴⁸ Claimants do not deny the facts.

256. Uruguay's Memorial also showed that these global truths are mirrored in Uruguay.³⁴⁹ Claimants do not challenge those facts either.

257. Rather than argue with the truth, Claimants ask the Tribunal to focus only on a narrow slice of it by citing figures showing the number of people they employ in Uruguay, the amount of taxes they pay, *etc.* In so doing, they invite the Tribunal to join the proverbial frog at the bottom of his well.³⁵⁰ The Tribunal should decline that invitation. A broader view of reality shows the huge net harms Claimants' activities inflict.

258. Claimants' efforts to boast about their 99 employees and US\$3.7 million per year in salaries and social security contributions have already been put in appropriate context above.

259. Claimants also seek to substantiate their claimed economic contributions through tax payments to Uruguay. To this end, Claimants produce a half-page chart summarizing the taxes they claim Abal paid over a five-year period.³⁵¹ These taxes average out to just under US\$25 million per year. But even this small figure actually *overstates* the amount of taxes Abal actually pays. Out of the total US\$148 million listed, under US\$200 thousand is for income tax.

³⁴⁸ UMJ, ¶¶ 168-9.

³⁴⁹ *Ibid.*, ¶¶ 170-171.

³⁵⁰ A Chinese idiom refers to "the frog at the bottom of the well." The frog spent all his life sitting in a well. Every time he looked up at the sky, he thought "How small the world is!"

³⁵¹ ABAL Hermanos Tax Data from 2005 to 2010 (C-062).

The bulk of this amount – around US\$131 million – is excise taxes,³⁵² the costs of which are invariably passed on to the consumer.³⁵³ Notably, whenever the excise tax has been raised in Uruguay, the cost of tobacco products has increased by an equivalent amount.³⁵⁴ Similarly, the second largest amount of taxes reported by Claimants – Value Added Tax – total over \$US16 million. This amount too is typically borne by consumers.³⁵⁵ As a result, more than US\$147 million of the US\$148 million for which Claimants claim credit was actually paid by the Uruguayan people.³⁵⁶

260. Based on Claimants’ own inflated estimate, their combined contributions total around US\$29 million per year.³⁵⁷ These “contributions” are more than offset just by the US\$30 million in *direct* health care costs attributable to their activities. Moreover, the direct health care costs are only a small share of the total costs the use of Claimants’ tobacco products impose on Uruguay.

261. Uruguay also incurs huge *indirect* costs as well. These include, for example, lost economic output due to the early death and disability of tobacco users. One recognized measure

³⁵² An excise tax is a tax on selected goods and is usually collected from the producer, manufacturer, wholesaler, or at the point of final sale to the consumer. An excise tax can be specific (*e.g.*, \$US1.50 per pack regardless of price) or ad valorem (a percentage of the value of the product, as measured by the manufacturer/producer price at which the product is sold to the retailer/distributor). *See* A. Yurekli & J. de Beyer, World Bank, “Tool 4: Design and Administer Tobacco Taxes,” in *Economics of Tobacco Toolkit* (2001), p. 4 (R-80).

³⁵³ *Ibid.*, p. 24.

³⁵⁴ *See, e.g.*, “Vásquez Raised the IMESI on Cigarettes Again,” *El País* (Montevideo, 25 Feb. 2010) (R-83).

³⁵⁵ Yurekli & de Beyer, World Bank (2001), p. 5 (R-80).

³⁵⁶ Claimants also rely on an annual average payment of approximately US\$410,000 in trade allowances which includes investments in fixtures at points of sale, payments to distributors, and incentives provided to small retailers. *See* ABAL Hermanos Investment Trade Allowance Statistics for 2005 to 2009 (C-60). In context, these amounts are too small to be of relevance. They are, moreover, nothing more than marketing expenses.

³⁵⁷ This amount includes \$US3.7 million in salary and social security contributions and \$US25 million in taxes.

of these indirect costs is known as Disability-Adjusted Lost Years (“DALYs”), developed by the World Bank and used by the World Health Organization. DALYs represent the sum of potential life-years lost due to premature mortality caused by a disease, and the equivalent years of “healthy life” lost due to disease. One DALY is equal to one year of healthy life lost.

262. According to a 1997 estimate, a total of 78,771 DALYs are lost due to tobacco use in Uruguay every year.³⁵⁸ Calculated using Abal’s historical 20% market share, this translates into more than 15,754 DALYs lost in Uruguay every year as a result of Claimants’ activities. Using the WHO’s methodology for calculating the value of these lost DALYs yields a sum of more than US\$161 million per year.³⁵⁹

263. A conservative measure of the combined direct and indirect costs Claimants’ activities impose on the Uruguayan economy every year is thus *US\$191 million* (US\$30 million + US\$161 million). Even assuming Claimants could be given full credit for all the “contributions” they claim (*e.g.*, excise and value added taxes), the economic costs imposed on Uruguay are nearly seven (7) times larger than those “benefits”.

264. By way of concluding observation, it bears mention that in contrast to the enormous costs Claimants’ activities impose on Uruguay and its people, the effects on

³⁵⁸ See A. Ramos & D. Curti (PAHO), *Economics of Tobacco Control in Mercosur and Associated Countries: Uruguay* (2006), p. 4 (R-20). The total DALYs in Uruguay per year are 423,500 of which Ramos and Curti estimates that 18.6% are due to tobacco. This represents 78,771 DALYs lost per year.

³⁵⁹ According to the WHO methodology, each DALY is valued conservatively as equal to the per capita income. See World Health Organization (WHO) Commission on Macroeconomics and Health, *Investing in Health for Economic Development* (20 Dec. 2001), pp. 12 & 103 (R-81). According to the World Bank, Uruguay’s gross national income per capita is US\$10,590. See World Bank, “Data by Country (Uruguay),” available at <http://data.worldbank.org/country/uruguay> (last visited on 17 Apr. 2012) and provided in (R-87). Multiplying the number of DALYs (78,771) by Abal’s market share (20%) yields the number of DALYs attributable to Abal’s tobacco products (*i.e.*, 15,754 DALYs). One can then attribute approximately \$US161 million in Uruguay’s health annual care costs to Abal (15,754 x 10,230).

Claimants' business of the regulatory measures Claimants challenge in this case are *de minimis* to the point of being non-existent. Indeed, Claimants themselves have admitted as much publicly in their 2010 Annual Report: "PMI's market share was *stable* or *improved* in a number of markets, notably Argentina, Bolivia, Brazil, Chile, Ecuador, Mexico *and Uruguay*."³⁶⁰ If either party is being damaged in this case, it is Uruguay.

265. There is therefore no serious argument that Claimants' activities contribute to Uruguay's economic development. Accordingly, they are not an "investment" within the meaning of Article 25(1) of the ICSID Convention, and the Tribunal has no jurisdiction.

³⁶⁰ Philip Morris International, 2010 Annual Report (2011), p. 7 (emphasis added) (R-85).

CONCLUSION AND REQUEST FOR RELIEF

266. For the foregoing reasons and those previously stated in its Memorial, Uruguay respectfully requests that this Tribunal render an award: (i) in favor of Uruguay and against Claimants, dismissing Claimants' claims for lack of jurisdiction in their entirety and with prejudice; and (ii) ordering that Claimants bear all the costs of this arbitration, including Uruguay's costs for legal representation and assistance, together with interest thereon.

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