INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SALINI IMPREGILO S.P.A.
Claimant

and

ARGENTINE REPUBLIC
Respondent

ICSID Case No. ARB/15/39

DECISION ON JURISDICTION AND ADMISSIBILITY

Members of the Tribunal
Judge James R. Crawford, President
Professor Kaj Hobér, Arbitrator
Professor Jürgen Kurtz, Arbitrator

Secretary of the Tribunal
Mrs. Mercedes Cordido-Freytes de Kurowski

Date: 23 February 2018

REPRESENTATION OF THE PARTIES

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I. THE PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (**ICSID)** on the basis of the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments which was signed on 22 May 1990, and entered into force on 14 October 1993 (the **BIT**)[1] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the **ICSID Convention**).
2. The Claimant is Salini Impregilo S.p.A. (**Salini Impregilo** or **Claimant**), an Italian industrial group specialising in large civil engineering projects, incorporated under Italian law.[2] On 26 November 2013 Salini S.p.A. merged by incorporation into Impregilo S.p.A. On 1 January 2014 Impregilo S.p.A. changed its name to Salini Impregilo S.p.A.[3]
3. The Respondent is the Argentine Republic (**Argentina** or **Respondent**).
4. In 1995, Argentina started a bidding process for the construction, operation and maintenance of a bridge and toll road in its territory.[4] Impregilo S.p.A. (now Salini Impregilo) formed a Consortium with other investors and won the concession.[5]
5. On 28 January 1998, Salini Impregilo, the other Consortium partners and Argentina executed the Concession Contract (**Concession Contract**).[6] The Concession Contract provided for an Argentine state subsidy to be paid during the project's construction, among other funding sources.[7]
6. The Concession Contract required that the Consortium partners incorporate a local Argentine company for the purpose of performing the contract. Puentes del Litoral S.A.

[1] Treaty between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments, 22 May 1990, entered into force 14 October 1993; C-0001. There are discrepancies in various versions of the English translation of the BIT exhibited in this arbitration. Translations used in this Decision are the Tribunal's; however, the Tribunal has had regard to the authentic Italian and Spanish versions of the BIT in reaching its Decision.
[2] Salini Impregilo, Request for Arbitration, para [5].
[3] Ibid, para [5].
[4] Ibid, para [14].
[5] Ibid, para [18]. The Consortium was made up of: Impregilo S.p.A., Iglys S.A., Hochtief A.G., Vorm Begr Helfmann, Techint Compañía Internacional S.A.C.e I. and Benito Roggio e Hijos S.A.: Argentina, Memorial on Objections to Jurisdiction, para [13].
[6] Salini Impregilo, Request for Arbitration, para [19].
[7] Ibid, para [21]; Argentina, Memorial on Objections to Jurisdiction, paras [13], [15].

(**Puentes**) was duly incorporated on 1 April 1998.[8] Salini Impregilo is a shareholder in Puentes, owning 26% of its stock (22% is directly owned and 4% is indirectly owned through its subsidiary, Iglys S.A.).[9] Salini Impregilo and its consortium partners gave up their rights and obligations under the contract by transferring them to Puentes on 17 June 1998.[10] On 14 September 1998, Puentes, as Concessionaire, signed the Concession Contract.[11]

7. Salini Impregilo invested US$36 million in the project, including equity and debt. Salini Impregilo alleges that Argentina failed to pay subsidies due under the Concession Contract.[12] Salini Impregilo further alleges that Argentina enacted emergency legislation on 6 January 2002, which had the effect of reducing the toll revenue from the project and the project's economic viability.[13] The measures included the de-pegging of the Argentine peso from the US dollar and converting public contract obligations denominated in US dollars into Argentine pesos (at a rate of AR$1 to US$1).[14]
8. The emergency legislation also provided that public service concessionaires had to comply with their obligations under existing agreements and further included an order that the government renegotiate public contracts affected by the emergency legislation within 180 days.[15] The Argentine government established a special agency, UNIREN,[16] to renegotiate public service and infrastructure concessions.
9. According to Salini Impregilo, Argentina officially started the renegotiation process in March 2002. Thereafter, Salini Impregilo alleges that Puentes asked Argentina to complete renegotiation at least 25 times during the following years.[17] Puentes and the Argentine

[8] Salini Impregilo, Request for Arbitration, para [20].
[9] Ibid, paras [3], [20].
[10] Salini Impregilo, Request for Arbitration, para [20]; Argentina, Reply on Jurisdiction, para [136]; Exhibit RA-004 (Deed of Transfer).
[11] Argentina, Memorial on Objections to Jurisdiction, para [14]; Exhibit RA-005 (Takeover Certificate).
[12] Salini Impregilo, Request for Arbitration, paras [3], [22], and [66]. Salini Impregilo alleges that by March 2001 Argentina owed Puentes US$65 million in unpaid subsidies.
[13] Salini Impregilo, Memorial on the Merits, para [62].
[14] Ibid; Salini Impregilo, Request for Arbitration, para [24].
[15] Salini Impregilo, Request for Arbitration, para [25] and Memorial on the Merits, para [62].
[16] This was a 'Public Works and Services Contracts Renegotiation Commission' under the purview of the Ministry of Economy and Ministry of Planning, Public Investment and Services: Salini Impregilo, Counter-Memorial on Jurisdiction, para [37].
[17] Salini Impregilo, Request for Arbitration, para [34].

government negotiated two Memoranda of Understanding and four transitory agreements between 2002 and 2012 to try to restore the economic balance of the Concession Contract.[18] According to Salini Impregilo none of these six agreements were ever put into effect by Argentina.[19]

10. On 11 June 2013, Puentes filed an administrative complaint against Argentina for breaches of the Concession Contract.[20] On 30 May 2014 Puentes filed a lawsuit in an Argentine court.[21] In June 2014 Puentes' board resolved to dissolve the company. In August 2014 Argentina issued a decree terminating the Concession Contract, citing, among other things, Puentes' bankruptcy and resolution to dissolve the company.[22]
11. The bridge now operates under a new concession granted by Argentina to a third party.[23]
12. Salini Impregilo argues that Argentina violated the BIT and destroyed the economic viability of Salini Impregilo's investment in Puentes, effectively expropriating Salini Impregilo's investment.[24] Salini Impregilo alleges that Argentina breached the standard of fair and equitable treatment, the most favoured nation clause (MFN), the standard of non-discrimination and the standard of non-expropriation contained in the BIT.[25]
13. On a preliminary basis (having not yet filed a Counter-Memorial on the Merits) Argentina argues that the concessionaire, Puentes, was in breach of its obligation to obtain the required financing to build the project and that Puentes was adversely affected by bankruptcy proceedings against it (unrelated to action by the Argentine government).[26]

II. FACTUAL BACKGROUND

14. In 1997, Salini Impregilo formed a consortium with a German construction company, Hochtief AG, and several other construction companies (the **Consortium**).

[18] Ibid, paras [34]-[43].
[19] Ibid, paras [35]-[43].
[20] Exhibit C-0049.
[21] Exhibit C-0009.
[22] Salini Impregilo, Request for Arbitration, paras [45]-[46] ; Exhibit C-0051.
[23] Salini Impregilo, Request for Arbitration, para [46].
[24] Ibid, paras [2]-[3].
[25] Ibid, para [10]; Argentina, Memorial on Jurisdiction, para [71]; Salini Impregilo, Memorial on the Merits, para [177].
[26] Argentina, Memorial on Objections to Jurisdiction, para [28].

15. That same year, the Consortium participated in a Bid for a 25-year contract for the construction, maintenance and operation of a toll road between the cities of Rosario and Victoria in Argentina (the **Project**). In November 1997, the Consortium won the Bid.[27]
16. The Consortium formed Puentes del Litoral S.A., a locally-incorporated company. The Claimant owned 26% of the shares in Puentes.
17. The Claimant alleges that several measures taken by the Argentine government starting in 2002 led to its economic asphyxiation which concluded with the termination of the Concession Contract in 2014.
18. The Respondent alleges that *first*, this was a State-funded Project and that Argentina fulfilled its obligations under the Concession Contract, and *secondly*, that it was the Claimant which breached its obligations by not complying with the requirements under the Concession Contract.

III. PROCEDURAL HISTORY

A. REGISTRATION OF THE REQUEST

19. On 1 September 2015, ICSID received a request for arbitration of the same date, from the Claimant against the Respondent (the **Request for Arbitration**).
20. On 17 September 2015, the Acting Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36 of the ICSID Convention and notified the parties of the registration. In the Notice of Registration, pursuant to Rule 7(c) of the ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (**ICSID Institution Rules**), the Acting Secretary-General invited the parties to inform the Centre of any agreed provisions as to the number of arbitrators and the method for their appointment. He further invited the parties to constitute the Tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.

[27] Salini Impregilo, Memorial on the Merits, paras [43], [46]; Argentina, Memorial on Objections to Jurisdiction, para [13].

B. CONSTITUTION OF THE TRIBUNAL

21. On 23 November 2015, the Claimant informed ICSID that the parties were unable to reach an agreement concerning the method for the Tribunal's constitution. Therefore, the Claimant requested that the Tribunal be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.
22. On 4 January 2016, the Claimant appointed Prof. Kaj Hobér, a national of Sweden as its party-appointed arbitrator. Prof. Hobér accepted his appointment on 11 January 2016.
23. On 18 January 2016, the Respondent appointed Prof. Jürgen Kurtz, a dual national of Australia and Germany as its party-appointed arbitrator. Prof. Kurtz accepted his appointment on 19 January 2016.
24. On 14 June 2016, the Claimant informed ICSID that the parties had reached an agreement regarding the appointment of the presiding arbitrator in compliance with Article 37(2)(b) of the ICSID Convention. Pursuant to this agreement, Prof. Hobér and Prof. Kurtz would make their best efforts to reach an agreement on the appointment of the presiding arbitrator.
25. On 25 June 2016, ICSID was informed about the co-arbitrators' agreement to appoint Judge James R. Crawford, a national of Australia as the presiding arbitrator.
26. On 11 July 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the **Arbitration Rules**), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mrs. Mercedes Cordido-Freytes de Kurowski, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

C. FIRST SESSION, THE ADMISSIBILITY OF NEW EVIDENCE, AND THE WRITTEN PHASE

27. On 6 September 2016, in accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the parties by teleconference.
28. Following the first session, on 21 September 2016, the Tribunal issued Procedural Order No. 1 recording the agreement of the parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural

languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also sets out a schedule for the jurisdictional/merits phase of the proceedings.

29. On 15 December 2016, the Claimant requested the Tribunal to decide on the admissibility of new evidence into the record, and to grant an extension to file its Memorial on the Merits.
30. On 20 December 2016, the Tribunal invited the Respondent to submit its comments concerning the Cl. Request, and granted the extension for the submission of the Claimant's Memorial on the Merits to 3 January 2017.
31. On 3 January 2017, the Claimant filed its Memorial on the Merits accompanied by the witness statements of: Mr. Guillermo Osvaldo Díaz, Mr. Martin Lommatzsch, Mr. Gabriel Omar Hernández, and the damages expert report of Compass Lexecon.
32. On 6 January 2017, the Respondent filed further comments on the Cl. Request.
33. On 10 January 2017, the Tribunal rejected the Cl. Request and invited the parties to submit any evidence in their further pleadings.
34. On 25 April 2017, the Respondent filed its Memorial on Objections to Jurisdiction. Pursuant to Section 14.9 of Procedural Order No. 1, this proceeding was bifurcated; thus, the objections to jurisdiction were to be decided as a preliminary matter and the proceeding on the merits was suspended.
35. On 5 June 2017, the Claimant proposed to the Tribunal the amendment of the procedural calendar. On June 7 2017, the Tribunal invited the Respondent to submit its comments by 13 June 2017.
36. On 13 June 2017, the Respondent rejected the Claimant's proposal of 5 June 2017. By letter of the same date, the Claimant requested the Tribunal to accept its proposal and to set a hearing date for November 2017.
37. On 14 June 2017, the Respondent requested the Claimant to confirm its schedule of submissions and asked the Tribunal to maintain the procedural calendar set forth in Procedural Order No. 1.
38. On 16 June 2017, the Tribunal invited the parties to liaise and submit an agreed revised procedural calendar for the Tribunal's consideration by 21 June 2017.

39. On 21 June 2017, the parties requested the Tribunal for an extension to submit the revised procedural calendar. As approved by the Tribunal, the parties submitted a revised procedural calendar on 23 June 2017.
40. On 24 June 2017, the Tribunal agreed to the parties' revised procedural calendar.
41. Pursuant to the parties' revised procedural calendar of 23 June 2017, the Claimant filed its Counter-Memorial on Jurisdiction on 17 July 2017, accompanied by the second witness statement of Mr. Guillermo Osvaldo Díaz.
42. On 15 September 2017, the Respondent filed its Reply on Jurisdiction.
43. On 31 October 2017, the Claimant filed its Rejoinder on Jurisdiction.

D. HEARING ON JURISDICTION

44. A hearing on Jurisdiction was held at the seat of the Centre in Washington, D.C. from 28 November to 29 November 2017 (the **Hearing**). The following persons were present at the Hearing:

TRIBUNAL	
Judge James R. Crawford	President
Professor Kaj Hobér	Co-Arbitrator
Professor Jürgen Kurtz	Co-Arbitrator

ICSID SECRETARIAT	
Mrs. Mercedes Cordido-Freytes de Kurowski	Secretary of the Tribunal

CLAIMANT	
Counsel	
Mr. Doak Bishop	King & Spalding
Mr. Roberto Aguirre Luzi	King & Spalding
Mr. Craig Miles	King & Spalding
Mr. David Weiss	King & Spalding
Ms. Eldy Quintanilla Roché	King & Spalding

Corporate Representatives	
Mr. Guillermo O. Díaz	Salini Impregilo
Mr. Eduardo Albarracín	Salini Impregilo

RESPONDENT	
Dr. Ernesto Lucchelli	Subprocurador del Tesoro de la Nación
Ms. María Teresa Gianelli	Procuración del Tesoro de la Nación
Ms. María Alejandra Etchegorry	Procuración del Tesoro de la Nación
Ms. Gisela Ingrid Makowski	Procuración del Tesoro de la Nación
Ms. Alejandra Noelia Mackluf	Procuración del Tesoro de la Nación

INTERPRETERS	
Mr. Charles Roberts	English-Spanish Interpreter
Ms. Stella Covre	English-Spanish Interpreter
Ms. Kelly Reynolds	English-Spanish Interpreter

COURT REPORTERS	
Ms. Marta Rinaldi	Spanish Court Reporter
Ms. Elizabeth Cicoria	Spanish Court Reporter
Ms. Dawn K. Larson	English Court Reporter

IV. SUMMARY OF ARGENTINA'S OBJECTIONS TO JURISDICTION AND SALINI IMPREGILO'S SUBMISSIONS

45. Argentina seeks a declaration that the dispute falls outside the jurisdiction of the ICSID and the competence of the Tribunal. Alternatively, it seeks a declaration that the *forum non conveniens* doctrine applies such that the proper venue in which to hear the dispute is an Argentine court. Argentina further seeks costs.[28]

46. Argentina presents four objections to jurisdiction:

[28] Argentina, Memorial on Objections to Jurisdiction, para [153].

(1) Extinctive prescription operates so that Salini Impregilo's claim is time-barred.

(2) The Tribunal lacks jurisdiction because Salini Impregilo has not satisfied the jurisdictional pre-conditions in relation to domestic Argentine proceedings (Article 8 of the BIT):

(i) The dispute was not submitted to local administrative process or to the local courts for eighteen months (Article 8(2) and 8(3) of the BIT). There were local proceedings but they involved a different dispute, with different parties, seeking a different remedy.

(ii) Alternatively, if domestic proceedings were brought such that Articles 8(2) and 8(3) were satisfied, Salini Impregilo did not abandon the domestic proceedings as required by Article 8(4) of the BIT.

(iii) Salini Impregilo responds that (if it did not comply with Article 8 in any respect), the BIT's MFN provision (Article 3) applies and therefore Salini Impregilo can avoid the jurisdictional preconditions in Article 8(2) and 8(3). In this respect, it relies on the earlier decision in *Impregilo v Argentina*, which upheld the operation of the MFN clause in this respect, thereby creating a *res judicata*.[29]

(3) Alternatively, if the Tribunal finds that it has jurisdiction, Argentina argues that its courts are the proper venue to hear the dispute and that the Tribunal should decline to exercise jurisdiction (in application of the *forum non conveniens* principle).

(4) Argentina (in its Reply) objects to Salini Impregilo's standing because the claim belongs to Puentes. Argentina does not identify this argument as a separate objection but raises it as part of its *forum non conveniens* argument.[30]

47. Salini Impregilo requests that the Tribunal reject all of Argentina's jurisdictional objections and proceed to decide the merits of its claims.[31]

[29] *Impregilo v Argentine Republic* (*Impregilo S.p.A. v Argentina*), ICSID Case No ARB/07/17, Award, 21 June 2011.
[30] Argentina, Reply on Jurisdiction, para [146].
[31] Salini Impregilo, Counter-Memorial on Jurisdiction, para [6].

A. APPLICABLE LAW

48. The applicable law under the BIT is set out in Article 8(7) of the BIT:

> The arbitral tribunal shall decide the dispute in accordance with the laws of the Contracting Party involved in the dispute – including its rules on conflict of laws –, the provisions of this Agreement, the terms of any possible specific agreement concluded in relation to the investment as well as with the applicable principles of international law.

49. Therefore, the applicable laws are the laws of Argentina, the provisions of the BIT, the Concession Contract and the applicable principles of international law. Article 8(7) does not however determine the relationship between these different sources.

50. The interpretation of the BIT is to be carried out according to the Vienna Convention on the Law of Treaties (**VCLT**).[32] Both states were already parties to the VCLT when the BIT was concluded (Argentina ratified the VCLT in 1972 and Italy ratified it in 1974); it is thus applicable in accordance with its Article 4.

B. THE FIRST PRELIMINARY OBJECTION: EXTINCTIVE PRESCRIPTION

(1) Argentina's submissions

51. Argentina argues that Salini Impregilo initiated the arbitration proceedings after an unreasonable delay[33] and therefore Salini Impregilo's claim, based on measures adopted more than a decade ago, is time-barred.[34] Argentina initially sought to rely on 'liberative prescription' in its Memorial on Objections to Jurisdiction, which it says applies to some of the measures on which Salini Impregilo's claim is based.[35] Liberative prescription is put forward as a principle of Argentine law and also as a general principle of law, both of

[32] Argentina and Salini Impregilo acknowledge this. See also *Hochtief AG v Argentine Republic (Hochtief v Argentina)*, ICSID Case No ARB/07/31, Decision on Jurisdiction, Washington, 24 October 2011, para [26].
[33] Argentina, Reply on Jurisdiction, para [1].
[34] Ibid, para [21]; Argentina, Memorial on Objections to Jurisdiction, para [75].
[35] Argentina, Memorial on Objections to Jurisdiction, para [31].

which are applicable pursuant to Article 8(7) of the BIT.[36] Liberative prescription is said to be widely recognised by international courts and tribunals as a principle of international law.[37] According to Argentina there are two elements for liberative prescription to apply: failure by the holder of a right to exercise that right and the passage of time.[38]

52. In its Reply, Argentina adopts Salini Impregilo's terminology of 'extinctive prescription' which Argentina appears to equate to the principle of 'liberative prescription'.[39] In relation to extinctive prescription, Argentina states that its elements include:

    i. unreasonable delay,

    ii. attributable to the claimant.[40]

53. Unlike Salini Impregilo, Argentina does not recognise two further elements of extinctive prescription, namely:

    iii. inadequate record of the facts; and

    iv. prejudice (i.e. severe disadvantage) to the respondent.[41]

54. In Argentina's view a lack of evidence that places the respondent at a severe disadvantage is a potential consequence of a situation where prescription takes place, not a requirement for prescription to apply.[42] Argentina argues that it has suffered prejudice in establishing its defence:[43] The authorities involved in the measures challenged by Salini Impregilo are no longer in office and they cannot be expected accurately to recall events that happened long ago. Further, the long period of time elapsed makes it very difficult to check factual allegations.[44]

[36] Ibid, para [4]: Argentina identifies liberative prescription through the 'comparative method' (most jurisdictions recognise the principle: paras [37]-[42]) and the 'essentialist method' (the principle is fundamental in order for any legal system to exist: paras [43]-[46]).
[37] Ibid, para [47].
[38] Ibid, para [35].
[39] Argentina, Reply on Jurisdiction, para [5].
[40] Ibid, paras [7], [12].
[41] Ibid, paras [8], [13].
[42] Ibid, para [13].
[43] Ibid, para [15].
[44] Ibid, para [15].

55. Argentina notes that domestic law is a source of law under Article 8(7) of the BIT. It follows from Article 8(7) that domestic law rules may be applied in determining whether the delay in bringing a claim is unreasonable. It maintains that extinctive prescription is a matter of substantive law and that, even if domestic law is only a source of law in relation to substantive issues in the arbitration, domestic law applies to the discussion of extinctive prescription.[45]
56. Applying its domestic law, Argentina argues that the period of prescription applicable to Salini Impregilo's claim is two years from the time when Salini Impregilo became aware of the measures that allegedly violated the BIT. This is because an arbitral claim where a violation of a BIT is invoked falls within the category of a tort claim and the Argentine Civil Code provides for a period of limitation of two years in tort claims.[46]
57. From a comparative analysis of domestic time limitations, Argentina observes that 'the temporal limit on actions [for] tort claims' is generally 'short', between two and six years.[47] From a comparative analysis of treaties, Argentina concludes that there is a 'tendency' for BITs to include short periods of prescription.[48]
58. Argentina points out that by September 2015, when Salini Impregilo filed its Request for Arbitration, thirteen years had passed since the 2002 emergency legislation and twelve years since Resolution No 14/2003 of 30 June 2003.[49] Almost ten years had passed since the first renegotiation agreement (the first MOU between Argentina and Puentes) was entered into in 2006.[50] Eight years had passed since Hochtief (a German shareholder in Puentes) brought its ICSID claim.[51] Argentina concludes that the arbitral claim, based on the 2002 emergency legislation, the failure to renegotiate the economic equilibrium of the contract and resolution No 14/2003, is time-barred.[52]

[45] Ibid, paras [10]-[11].
[46] Argentina, Memorial on Objections to Jurisdiction, para [54]. At the time the arbitration was commenced on 1 September 2015, the time limit for contract claims seems to have been 5 years: Civil and Commercial Code, Art 2560 (in force 1 August 2015). Previously it was 10 years.
[47] Argentina, Memorial on Objections to Jurisdiction, para [41].
[48] Ibid, para [56]. One example given is three years, 6 months in the Trans-Pacific Strategic Economic Partnership Agreement.
[49] Ibid, para [1]; Argentina, Reply on Jurisdiction, para [23].
[50] Argentina, Memorial on Objections to Jurisdiction, para [2].
[51] Argentina, Reply on Jurisdiction, para [26].
[52] Argentina, Memorial on Objections to Jurisdiction, para [75].

59. Argentina concedes that Salini Impregilo provided notice in 2007 of its treaty claim.[53] However, it argues that Salini Impregilo did not display any intention to continue with its claim between 2007 and 2015.[54] Argentina maintains that Salini Impregilo's delay involves an abuse of process because Salini Impregilo delayed the filing of its Request for Arbitration for merely speculative purposes.[55]

60. Argentina maintains that Salini Impregilo is a regular user of the investment arbitration system and was well aware of the need to file requests for arbitration within a reasonable period after expiration of the term for amicable negotiations. If Salini Impregilo wanted to preserve its claim after 2007, the diligent course of action would have been to file a request for arbitration and subsequently stay the proceedings.[56]

61. Argentina notes that Salini Impregilo brought a claim based on the 2002 emergency measures in relation to another of its concessions.[57] It concludes from this that Salini Impregilo cannot be allowed now to abuse the right to bring a claim based on measures which were adopted over a decade ago.[58]

62. Argentina rejects Salini Impregilo's argument that the delay was reasonable because Salini Impregilo was participating in the renegotiation process and because Salini Impregilo had to sign waivers of its rights in order for Puentes to enter into interim agreements with Argentina.[59] Argentina points to the fact that the waivers were subject to each of the agreements being implemented. Salini Impregilo cannot maintain that it had committed not to initiate arbitration under the agreements (on the condition that they entered into force), and at the same time argue that Argentina never properly executed the agreements.[60] Argentina further rejects Salini Impregilo's argument that Argentina is estopped from pursuing an objection to jurisdiction based on prescription.[61] Argentina accepts that

[53] Argentina, Reply on Jurisdiction, para [41]: 'after its 2007 notice, Salini Impregilo did not display any intention to continue with its claim'.
[54] Ibid, para [41].
[55] Argentina, Reply on Jurisdiction, para [43].
[56] Ibid, para [42].
[57] Argentina, Memorial on Objections to Jurisdiction, para [74]; *Impregilo v Argentina*. That claim was in relation to Aguas del Gran Buenos Aires, a water and sewerage company.
[58] Argentina, Memorial on Objections to Jurisdiction, paras [4], [74].
[59] Argentina, Reply on Jurisdiction, para [27].
[60] Ibid, paras [29]-[30].
[61] Ibid, para [36]; Salini Impregilo, Counter-Memorial on Jurisdiction, para [73] for Claimant's argument.

Decree No 1090/2002 established that investors had to choose from two options: bringing a claim for breach of contract or renegotiating the contract.[62] If an investor filed a claim for breach of contract outside the renegotiation process it would be automatically excluded from that process.[63] However Argentina stresses that the Decree was limited to claims based upon breaches of contract and did not cover treaty claims. It maintains therefore that the Claimant was never prevented from filing an arbitration proceeding.[64]

63. Argentina further points out that the exchanges that took place within the framework of the negotiations do not rise to an estoppel because the waiver of Salini Impregilo's right to bring an action was subject to the entry into force of the agreements: according to Argentina, a statement made conditionally cannot create a binding estoppel.[65] Argentina had not shown its clear intention to be legally bound, and the draft agreements were not binding.[66]

64. Argentina appears to say that its own conduct is irrelevant to the Tribunal's prescription inquiry. Argentina points out that prescription, and doctrines related to prescription (acquiescence, estoppel, waiver), do not take into account what happens with the other party. Rather, they are doctrines with legal consequences deriving from the conduct of one party, e.g. 'the passage of time and a failure to act that lead[s] to the belief that a given situation is true'.[67]

(2) Salini Impregilo's submissions

65. Salini Impregilo points out that the BIT does not contain any time limit for bringing proceedings.[68] It argues that Article 8(7) of the BIT does not mean that Argentine law applies to jurisdictional issues. The jurisdiction of the Tribunal is created by the ICSID Convention (Article 25) and the BIT, which are treaties governed by international law

[62] Argentina, Reply on Jurisdiction, para [32] with reference to Decree No 1090/2002, Art 1.
[63] Ibid, para [32], fn 61.
[64] Ibid, paras [32], [36].
[65] Argentina, Reply on Jurisdiction, para [36], citing K Hobér, *Essays on International Arbitration*, (New York: JurisNet, LLC, 2006), 220-221.
[66] Ibid, paras [39]-[40].
[67] Ibid, para [19].
[68] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2].

alone.[69] There is no basis for applying Argentina's domestic statute of limitations for tort claims to Salini Impregilo's BIT claim.[70] For the same reason the choice-of-law provision in the BIT (Article 8(7)) does not cause Argentine law to apply to jurisdictional issues in an ICSID proceeding.[71] Further Salini Impregilo argues that there is no basis to apply by analogy other treaty limitation periods to the BIT[72] nor to extract a general principle from diverse municipal laws on limitation.[73] Finally, to impose the proposed ten-year time limit chosen by Argentina would be arbitrary[74] and would unfairly surprise Salini Impregilo and other Italian and Argentine investors.[75]

66. Salini Impregilo argues that whether prescription is substantive (as Argentina maintains) or procedural is irrelevant. Prescription is a jurisdictional defence and the Tribunal's jurisdiction is governed by international law only. Argentina's characterisation of prescription as substantive – in order to argue for the application of domestic law – is to no avail.[76]

67. Salini Impregilo argues that no authority has recognised a general principle of limitation.[77] Rather, it seeks to distinguish prescription as a matter of substance, which aims at justice in every case, and limitation, which pertains to process and varies in different jurisdictions.[78] Prescription would only apply to the BIT claim if it were interpreted as a relevant rule of international law that is not displaced by any *lex specialis*. Salini Impregilo concedes that the BIT is not governed by any *lex specialis* that would displace the doctrine of extinctive prescription.[79]

[69] Ibid, para [8]. Salini Impregilo concedes that Argentine law is relevant to the merits of the case: ibid.
[70] Ibid, para [14]; Salini Impregilo, Rejoinder on Jurisdiction, para [10]. Salini Impregilo relies on Hobér's work on extinctive prescription, which is also relied upon by Argentina. See Salini Impregilo, Rejoinder on Jurisdiction, para [11], footnote 15.
[71] Salini Impregilo, Rejoinder on Jurisdiction, para [13].
[72] Salini Impregilo, Counter-Memorial on Jurisdiction, para [15].
[73] Ibid, para [58].
[74] Ibid, para [59].
[75] Salini Impregilo, Rejoinder on Jurisdiction, para [11].
[76] Ibid, para [14].
[77] Salini Impregilo, Counter-Memorial on Jurisdiction, para [60].
[78] Ibid, citing *John H. Williams v Venezuela* (1885) 29 RIAA 279, 286-288.
[79] Ibid, para [14].

68. Salini Impregilo rejects Argentina's articulation of the two elements of prescription.[80] It argues that under customary international law, to the extent that extinctive prescription exists, four cumulative[81] elements must be proven:

    i. Unreasonable delay: There is no fixed time limit under international law.[82] The assessment of reasonableness will take account of the circumstances of the case. One way to assess reasonableness is whether the delay is so long that it creates the disadvantage that it would be difficult for the respondent to develop evidence for its defence.[83] Salini Impregilo argues that it took part in the renegotiation process from 2002 to 2013 in support of Puentes and therefore its delay was reasonable.[84]

    ii. The delay must be due to the claimant's negligence:[85] Salini Impregilo says it was not negligent in presenting its claim because it participated in the Argentine renegotiation process.[86] Further, it argues that Argentina points to no evidence of Salini Impregilo's negligence other than the 13-year delay in the initiation of the arbitration.[87]

    iii. Lack of evidentiary record: Salini Impregilo says that under international law, if the factual record is well-established or undisputed, prescription may not be invoked even if long periods of time pass between the measures at issue and the bringing of the claim.[88] Salini Impregilo says that a well-established record exists in this case.[89] Argentina has extensive evidence relevant to its defence due to the domestic renegotiation process, the *Hochtief v. Argentina* arbitration[90] and the

[80] Ibid, para [57].
[81] Ibid, para [35].
[82] Ibid, para [20].
[83] Ibid, para [23].
[84] Salini Impregilo, Rejoinder on Jurisdiction, para [28].
[85] Salini Impregilo, Counter-Memorial on Jurisdiction, para [27].
[86] Salini Impregilo, Rejoinder on Jurisdiction, para [7].
[87] Ibid, para [26].
[88] Salini Impregilo, Counter-Memorial on Jurisdiction, para [49]; Salini Impregilo, Rejoinder on Jurisdiction, para [37], relying on J Wouters & S Verhoeven, 'Prescription', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2008), para [6].
[89] Salini Impregilo, Counter-Memorial on Jurisdiction, para [49].
[90] Ibid, para [55]. Hochtief is a German company with a 26% share in Puentes and was a member of the concession consortium. It initiated international arbitration through ICSID and a final award was issued on 21 December 2016.

domestic court actions between Puentes and Argentina (Puentes' bankruptcy proceeding and Puentes' claim before the Argentine judiciary).[91] Further Argentina was notified of Salini Impregilo's BIT claim in 2007.[92]

iv. Respondent would be prejudiced (placed at a severe disadvantage)[93] in putting forth a defence due to the claimant's negligent delay.[94] Salini Impregilo says that Argentina cannot invoke extinctive prescription because it cannot articulate any prejudice it would suffer in establishing its defence.[95] When Argentina raised difficulties verifying factual circumstances and the fact that authorities directly involved were no longer in office, Salini Impregilo responded that these cannot be deemed prejudicial.[96]

69. Thus, not a single element of 'a time-bar defense under international law' can be proven by Argentina.[97] To identify these four elements of extinctive prescription Salini Impregilo draws on the work of Hobér on extinctive prescription (on which Argentina also relies).[98] Salini Impregilo says even if the Tribunal accepts Argentina's submission that only the first two elements apply, these cannot be proven.[99]

70. According to Salini Impregilo, Argentina misrepresents Salini Impregilo's claim by maintaining that Salini Impregilo took 13 years to bring it: Salini Impregilo clarifies that its claim is not that the 2002 Emergency Law violated the BIT, but rather it seeks compensation for Argentina's failure to renegotiate and restore the Concession's economic equilibrium under the post-Emergency Law situation,[100] and specifically by its failure to implement the first renegotiation agreement in 2006.[101]

[91] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2]; Salini Impregilo, Rejoinder on Jurisdiction, para [39].
[92] Salini Impregilo, Rejoinder on Jurisdiction, para [2].
[93] Salini Impregilo, Counter-Memorial on Jurisdiction, para [33]; Salini Impregilo, Rejoinder on Jurisdiction, para [42].
[94] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2]; [27].
[95] Ibid, para [51].
[96] Salini Impregilo, Rejoinder on Jurisdiction, para [43].
[97] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2].
[98] Salini Impregilo, Rejoinder on Jurisdiction, para [16].
[99] Ibid, para [48].
[100] Ibid, para [27].
[101] Hearing on Jurisdiction, Transcript, 28 November 2017, 167.

71. Salini Impregilo states that it notified Argentina of its treaty claims in 2007 in writing[102] and therefore prescription does not apply to this arbitration. Notification renders prescription inapplicable.[103] Under international law, delay refers to the length of time taken in notifying a respondent of the claim, not the time when the claim is actually pursued.[104] This is the case because of the requirement that the delay cause prejudice; once the respondent is notified of a claim it can proceed to collect evidence in relation to the claim for its defence and will not be prejudiced by further delay.[105]
72. Salini Impregilo asserts that it did display an intention to continue with its claim between 2007 and 2015.[106] In this regard it relies on Puentes' letter of 26 April 2002 reserving its shareholders' treaty claims; the 2007 notification letter from Salini Impregilo to Argentina; the meeting between Salini Impregilo and Argentina in October 2007; the exchanges of communication between Salini Impregilo and Argentina in 2008 and the requests by Argentine officials that Salini Impregilo not pursue international arbitration.[107]
73. From 2006 to shortly before the initiation of the arbitration claim, Salini Impregilo was participating in and supporting Puentes' efforts to resolve the issues underlying the treaty claims via Argentina's domestic renegotiation process.[108] According to Salini Impregilo, participation in negotiations will effectively 'toll the time period related to extinctive prescription.'[109] Further, on 26 April 2002, Puentes notified Argentina that its participation in the renegotiation process could not be taken as its shareholders' waiver of their right to commence damage claims for Argentina's breach of the Concession Contract and violation of international treaties. Therefore, Argentina was made aware from 2002 that Salini

[102] Salini Impregilo, Counter-Memorial on Jurisdiction, para [2]; Salini Impregilo, Rejoinder on Jurisdiction, para [2]; Exhibit C-0052.
[103] Salini Impegilo, Rejoinder on Jurisdiction, paras [7], [19].
[104] Salini Impregilo, Counter-Memorial on Jurisdiction, para [24]; Salini Impregilo, Rejoinder on Jurisdiction, para [19].
[105] Salini Impregilo, Counter-Memorial on Jurisdiction, para [24].
[106] Salini Impregilo, Rejoinder on Jurisdiction, para [18].
[107] Ibid, para [20].
[108] Ibid, paras [2], [36]; Salini Impregilo, Counter-Memorial on Jurisdiction, para [2].
[109] Salini Impregilo, Counter-Memorial on Jurisdiction, para [25]. Salini Impregilo quotes *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment, ICJ Reports 1992*, in support of this proposition; Salini Impregilo, Rejoinder on Jurisdiction, para [7].

Impregilo 'may file' an international arbitration claim[110] and Argentina knew that Salini Impregilo's participation in the renegotiation process was not an abdication of its BIT claims.[111] Salini Impregilo rejects Argentina's arguments that Salini Impregilo delayed requesting an arbitration for speculative purposes and therefore Salini Impregilo committed an abuse of process.[112]

74. Salini Impregilo argues that any delay attributable to the Respondent's conduct cannot constitute the basis for extinctive prescription.[113] Here, Argentina's domestic legislation excluded a company from the renegotiation process if its shareholders initiated treaty claims.[114]

75. Further, Argentina repeatedly asked Salini Impregilo to refrain from initiating investment arbitration in deference to the domestic renegotiation process.[115] Accordingly, Salini Impregilo argues that:

> in direct recognition of Argentina's request that Salini Impregilo not initiate arbitration, Salini Impregilo did not proceed with its treaty claims, all the while hoping that Argentina would resolve the dispute…through (and as required by) its own renegotiation process.[116]

76. Salini Impregilo further points to the six renegotiation agreements signed by Argentina and Puentes, for each of which Salini Impregilo provided a written waiver of its rights to pursue its treaty claims if those agreements entered into effect.[117] Salini Impregilo says that Argentina's demand for these waivers of BIT claims belies Argentina's claims that Salini

[110] Salini Impregilo, Counter-Memorial on Jurisdiction, para [36]; Exhibit C-0024 (Impregilo – now Salini Impregilo – is listed under Puentes' logo on the letterhead).
[111] Salini Impregilo, Rejoinder on Jurisdiction, para [20].
[112] Salini Impregilo, Rejoinder on Jurisdiction, para [56].
[113] Salini Impregilo, Counter-Memorial on Jurisdiction, para [28]; Salini Impregilo, Rejoinder on Jurisdiction, paras [46]-[47].
[114] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2], [38]; Argentina's Decree 1090/2002 mandated that all breach of contract claims against the government be resolved through the renegotiation process. According to Salini Impregilo the Decree excluded from the renegotiation process any company that brought a claim outside that process, thereby constraining parties seeking to pursue a legal remedy in relation to the emergency legislation.
[115] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2], [39], [52]; Exhibit CWS-0004.
[116] Salini Impregilo, Counter-Memorial on Jurisdiction, para [40].
[117] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [40], [43]; the 6 agreements are two MOU in 2006 and 2007 and four transitory agreements in 2009, 2010, 2011 and 2012.

Impregilo did not display its intention to continue with the BIT claims.[118] Only after it became clear that Argentina had no intention to implement the agreements, did Puentes file an administrative complaint, one which expressly stated that Salini Impregilo was one of its shareholders.[119] Salini Impregilo says it initiated this arbitration shortly after Argentina expropriated its investment by terminating Puentes' Concession Contract.[120]

77. In relation to Argentina's argument that Salini Impregilo should have initiated the current arbitration given that it had initiated arbitration in relation to another investment, Salini Impregilo differentiates that case by saying that Argentina terminated the other concession contract in 2006 and did not execute a series of interim agreements as it did with Puentes.[121] Further, in response to Argentina's suggestion that Salini Impregilo should have requested an arbitration and then stayed the proceedings, Salini Impregilo responds that this would have been wasteful. At all times until the initiation of this arbitration Salini Impregilo had hoped that the dispute could be amicably resolved.[122]

78. Finally, Salini Impregilo argues that Argentina is estopped from asserting an objection to jurisdiction based on prescription because by words and conduct it represented that the dispute would be resolved via renegotiation.[123] Argentina caused the delay and should not be allowed to rely on that delay to object to jurisdiction.[124] In particular it should not be able to benefit from its own wrongdoing in failing to execute any of the six interim agreements with Puentes[125] and Salini Impregilo cannot be faulted for believing Argentina's promises that the dispute would be solved amicably.[126] Salini Impregilo counters Argentina's argument that the agreements were not enforceable by saying that they remained agreements and not mere negotiations.[127]

[118] Salini Impregilo, Rejoinder on Jurisdiction, para [21].
[119] Salini Impregilo, Counter-Memorial on Jurisdiction, para [44].
[120] Ibid, para [45]. Argentina terminated Puentes' contract on 29 August 2014 and Salini Impregilo filed its Request for Arbitration on 1 September 2015.
[121] Salini Impregilo, Counter-Memorial on Jurisdiction, para [46].
[122] Salini Impregilo, Rejoinder on Jurisdiction, para [22].
[123] Salini Impregilo, Counter-Memorial on Jurisdiction, para [73]; Salini Impregilo, Rejoinder on Jurisdiction, para [49].
[124] Salini Impregilo, Rejoinder on Jurisdiction, para [55].
[125] Salini Impregilo, Counter-Memorial on Jurisdiction, para [75].
[126] Salini Impregilo, Rejoinder on Jurisdiction, para [28].
[127] Ibid, paras [49]-[52].

79. In Salini Impregilo's view Argentina caused the purported delay in the filing of this arbitration by failing to implement the six agreements and other measures.[128] Argentina passed Decree 1090/2002, whereby companies were required to choose between the renegotiation process or raising BIT claims.[129] The legislation 'had a chilling effect on investors' and convinced them that participating in renegotiation was the better option.[130] Argentina was critical of Salini Impregilo's partner, Hochtief, for initiating investment arbitration rather than participating in the renegotiation process[131] and made public statement against investors who filed BIT arbitrations.[132] Further, Argentine authorities publicly promoted an 'antagonistic environment' against foreign investors who were encouraged to drop claims brought before ICSID.[133]
80. Argentina signalled to Salini Impregilo that filing for arbitration would jeopardise reaching an amicable solution[134] and repeatedly asked Salini Impregilo not to initiate investment arbitration.[135] According to Salini Impregilo, following Hochtief's filing for arbitration, UNIREN demanded that Puentes and its shareholders undertake not to file any complaints relating to the Emergency Law against the Government and sign an indemnity agreement in favour of the Government against complaints filed by its shareholders.[136] When Argentina terminated the Concession Contract it blamed Hochtief's decision to file an ICSID claim.[137]
81. Finally, Argentina 'dragged out' the renegotiation process for 12 years[138] and signed six agreements with Puentes that required the suspension and eventual withdrawal of treaty

[128] Ibid, para [29].
[129] Ibid, paras [31]-[32]. Salini Impregilo refers to the case of *BG v Argentine Republic*, Final Award, 24 December 2007, in which the court found that the Decree would have the effect of excluding from the renegotiation process any concessionaire that filed an investment arbitration, para [136]. See also Salini Impregilo, Rejoinder on Jurisdiction, para [50].
[130] Salini Impregilo, Rejoinder on Jurisdiction, para [30].
[131] Ibid, para [23]; Exhibit C-0392, para [161].
[132] Salini Impregilo, Rejoinder on Jurisdiction, para [29].
[133] Ibid, para [33].
[134] Ibid, para [29].
[135] Ibid, para [50].
[136] Ibid, para [34].
[137] Ibid, para [51].
[138] Ibid, para [7].

claims.[139] Salini Impregilo trusted Argentina throughout the 12-year negotiation process with the aim of an amicable resolution.[140]

(3) The Tribunal's conclusions

82. Argentina's first if not principal argument was that this is a matter governed by Argentine law under the applicable law clause, Article 8(7) of the BIT.[141] But Article 8(7) refers to both Argentine law and international law; it does not change their respective scope of operation. Salini Impregilo is not claiming in respect of an Argentine tort or contract but for breach of the autonomous standards of the BIT in respect of Argentina's failure to restore the economic balance of the concession following pesification.[142] That claim is at least plausible, as the *Hochtief v. Argentina* award shows. There is no basis in Article 8(7) of the BIT to apply Argentine time limits or the Argentine law of prescription, either directly or by analogy, to Salini Impregilo's international law claims.
83. Turning to international law, the Tribunal would first point out that there is a difference between limitation of actions due to lapse of time and extinctive prescription.
84. As to limitation of actions, international law lays down no general time limit. A 2012 OECD survey of investment treaties found that only a small proportion (7%) of surveyed treaties barred international arbitration if the claim was not brought within a certain time period.[143] NAFTA was one of the first to include such a provision: Articles 1116(2) and 1117(2) require a NAFTA claim to be commenced within 3 years of the date on which the claimant acquired, or should have acquired, knowledge of the breach and consequent damage. Some more recent BITs also include time limits. For example, the 2012 Canada-Czech Republic BIT applied a 3-year time limit to investors bringing BIT claims against a host state.[144] This particular BIT is silent about time-limits for bringing a claim. So is the ICSID Convention. No fixed limitation period therefore applies in the present case.

[139] Ibid, para [50].
[140] Ibid, para [36].
[141] Hearing on Jurisdiction, Transcript, 28 November 2017, 71-72; 29 November 2017, 263-264.
[142] Hearing on Jurisdiction, Transcript, 28 November 2017, 124-125.
[143] OECD, *Dispute settlement provisions in international investment agreements: A large sample survey* (2012, Paris), 18. 1660 bilateral agreements and 'selected' multilateral agreements were compared: ibid, 9.
[144] Agreement between Canada and the Czech Republic for the Promotion and Protection of Investments, 6 May 2009, entered into force 22 January 2012, Art X(5)(c)(i).

85. Turning to extinctive prescription as a matter of international law, this is not mentioned as a separate ground for loss of the right to invoke responsibility in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts.[145] The ILC rejected the idea that lapse of time alone might entail the loss of a claim.[146] Rather, Article 45(b) specifies that the responsibility of a state may not be invoked if the injured state has validly waived the claim or is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

86. The matter was expressed in the following terms by the International Court in *Nauru v Australia*:

> The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.[147]

87. Both ILC Article 45(b) and the *Nauru v Australia* dictum refer to interstate claims, but in the Tribunal's view similar principles apply to individual claims under international law, e.g. claims for expropriation or for breach of the fair and equitable treatment standard under a BIT.

88. The position has been summarised in the following terms:

> [A] case will not be held inadmissible on grounds of delay unless the respondent state has been clearly disadvantaged and tribunals have engaged in a flexible weighing of relevant circumstances, including, for example, the conduct of the respondent state and the importance of the right involved. The decisive factor is not the length of elapsed time in itself,

[145] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001/II) *Yearbook of the International Law Commission* 26. Cf C Tams, 'Waiver, Acquiescence, and Extinctive Prescription', in J Crawford, A Pellet & S Olleson (eds) *The Law of International Responsibility* (Oxford, 2010) 1035-1036.
[146] Ibid, 1046.
[147] *Nauru v Australia*, Preliminary Objections, Judgment, ICJ Reports 1992, 240, 253-254 (para [32]).

> but whether the respondent has suffered prejudice because it could reasonably have expected that the claim would no longer be pursued.[148]

89. To conclude, extinctive prescription is recognised as a principle that can affect the right to bring proceedings under international law,[149] although it involves an issue of admissibility rather than jurisdiction. It is for the Tribunal to determine whether the passage of time in this case is such as to render Salini Impregilo's claim inadmissible, having regard to all the circumstances.

90. The parties agree that, for extinctive prescription to operate, the delay must be unreasonable and be attributable to the claimant.[150] They do not agree on whether prejudice to the respondent is an element of prescription. But it appears from the sources cited above that prejudice to the respondent, in the sense of creating difficulties in answering the claimant's claim, is an element of prescription.[151] On this basis Salini Impregilo's notification of its treaty claims in 2007 is relevant because Argentina was on notice at least by that date that there might be a treaty claim forthcoming.

91. In the Tribunal's view, having regard to all the circumstances, the delay here was not unreasonable, did not entail any acquiescence by Salini Impregilo in the lapse of its claim and did not trigger the principle of extinctive prescription. Salini Impregilo's explanations for the delay include:

    i. Its participation in the renegotiation process. Some negotiations took place directly between Salini Impregilo and the Argentine government in 2007 and 2008,[152] quite apart from Puentes' repeated attempts to renegotiate.

    ii. Argentina's legislation which on the face of it excludes a company from the renegotiation process if its shareholders have initiated treaty claims.[153]

[148] J Crawford, *State Responsibility: The General Part* (Cambridge, Cambridge University Press, 2013) 563.
[149] *Ambatielos Claim (Greece v United Kingdom)*, (1956) 7 RIAA 83, 103.
[150] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [2], [19] Argentina, Reply on Jurisdiction, para [7].
[151] *Nauru v Australia*, 255. See also Tams, 1047; J Crawford, *Brownlie's Principles of Public International Law* (Oxford, Oxford University Press, 2012), 700.
[152] Salini Impregilo, Request for Arbitration, para [51]; Exhibits C-0053 and C-0055 (letters from Salini Impregilo to representatives of Argentina), Exhibit C-0054 (letter from Argentina to Salini Impregilo).
[153] CWS-0004, Second witness statement of Guillermo O. Díaz, 17 July 2017, para [4]; Exhibit C-0108, Decree No 1090/2002, 25 June 2002, Art 1.

iii. Salini Impregilo alleges that Argentine officials repeatedly asked it to participate in the renegotiation process and not to initiate international arbitration.[154] In this regard Salini Impregilo notes that the testimony of Mr. Guillermo Díaz remains unchallenged and that Argentina has not sought to submit testimony from the former leader of UNIREN in relation to the failed renegotiation process.[155]

iv. Salini Impregilo was obliged to waive its rights to litigate so that the six interim agreements could be signed by Puentes as part of the renegotiation process: none of these agreements entered into force.

v. Puentes' domestic actions in 2013 and 2014.

92. In addition, there is a very substantial documentary record as a result of the *Hochtief v Argentina* arbitration and the domestic proceedings.

93. The fact that Salini Impregilo initiated arbitration in relation to another concession[156] in July 2007 is not persuasive in relation to Argentina's argument as to delay.[157] That case also involved a claim relating to Argentina's emergency legislation of 2002. However, it involved termination of a concession contract by Argentina in July 2006 (eight years before Argentina terminated the Concession Contract in this case). The facts appear to be very different from the present case, where Salini Impregilo alleges extensive participation in the renegotiation program by Puentes and some participation of its own.

94. For these reasons, Argentina's objection based on delay in bringing the claim fails.

C. SECOND PRELIMINARY OBJECTION: ARTICLE 8: SUBMISSION OF CONTROVERSY TO DOMESTIC JURISDICTION FOR 18 MONTHS

95. Article 8 of the BIT provides:

> 1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party,

[154] Salini Impregilo, Rejoinder on Jurisdiction, para [35].
[155] Salini Impregilo, Rejoinder on Jurisdiction, para [20]. The Argentine witness Salini Impregilo mentioned is Mr. Simeonoff, the former leader of UNIREN. Mr. Simeonoff is mentioned in Mr. Díaz' statement as follows: 'Mr. Simeonoff also stated that filing any legal claim in connection with the issue of the Emergency Law or the renegotiation process, including an arbitration under the BIT, would mean the negotiation would automatically come to an end': CWS-0004, Second witness statement of Guillermo O. Díaz, 17 July 2017, para [13].
[156] *Impregilo v Argentina*.
[157] See Argentina, Memorial on Objections to Jurisdiction, para [3].

> regarding the issues regulated by this Agreement, shall, as far as possible, be settled through amicable consultations between the parties to the dispute.
>
> 2. If such consultations do not result in a solution, the dispute may be submitted to the competent administrative or judicial jurisdiction of the Party in whose territory the investment is made.
>
> 3. Where, after eighteen months from the date of notice of commencement of proceedings before the national jurisdictions mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration.
>
> For such purposes, and in accordance with the provisions of this Agreement, each Contracting Party hereby irrevocably consents in advance to submit any dispute to arbitration.
>
> 4. From the time arbitration proceedings are commenced, each party to the dispute shall take any such measures as may be necessary to dismiss any pending court proceedings.

96. Puentes made an administrative complaint on 11 June 2013 by letter pursuant to the Administrative Procedure Law No. 19549.[158] The administrative complaint sought a declaration of termination of the Concession Contract due to Argentina's exclusive fault.[159]
97. Puentes also filed an action with the Argentine court on 30 May 2014.[160] The court summonsed Salini Impregilo as a third party to Puentes' court action on 25 October 2016.[161]
98. Argentina argues that the following requirements 'set forth in Article 8' are part of the essential terms under which Argentina consented to submit disputes to international

[158] Exhibit C-0049 is the letter seeking to commence that action; Salini Impregilo, Counter-Memorial on Jurisdiction, para [44]; Salini Impregilo, Request for Arbitration, para [45].
[159] Argentina, Memorial on Objections to Jurisdiction, paras [27], [110]; Salini Impregilo, Request for Arbitration, para [53].
[160] Argentina appears to accept these events occurred: see Argentina, Memorial on Objections to Jurisdiction, paras [27], [105], [145].
[161] Salini Impregilo, Counter-Memorial on Jurisdiction, para [107]; Argentina, Memorial on Objections to Jurisdiction, para [148]; Exhibit C-0060.

arbitration and form a 'sequential, multiple-stage dispute settlement mechanism'[162] comprising:

i. amicable consultations;

ii. if such consultations do not provide a solution, the dispute is to be submitted to the competent administrative or judicial jurisdiction of the host state;

iii. 18 months must elapse from the initiation of proceedings before the local courts; and

iv. any domestic court proceedings that may have been initiated must be abandoned once the international arbitration is initiated.[163]

99. In the first place, it appears that the amicable consultations contemplated by Article 8(1) of the BIT have taken place. Salini Impregilo accepts that undertaking amicable consultation for six months is a requirement.[164] It points to its letter of 12 October 2007 which notifies Argentina of the existence of a dispute under the BIT, to the meeting between Argentina's Office of the Attorney-General and Salini Impregilo on 22 October 2007 and to correspondence in 2008 between Salini Impregilo and Argentina.[165] It further points to Puentes' pursuit of an amicable resolution over the twelve years prior to the arbitration proceedings.[166]

100. Argentina does not appear to allege a failure to comply with Article 8(1).[167] However, Argentina asserts non-compliance with the provisions concerning pendency of the dispute before the Argentine courts for 18 months[168] or, in the alternative, non-compliance with

[162] Argentina, Memorial on Objections to Jurisdiction, para [76]; Argentina, Reply on Jurisdiction, para [64].
[163] Argentina, Memorial on Objections to Jurisdiction, para [93].
[164] Salini Impregilo, Request for Arbitration, para [50].
[165] Salini Impregilo, Request for Arbitration, paras [51]-[52]. See letters from Salini Impregilo to Argentina, October 2007 (Exhibit C-0052), March 2008 (Exhibit C-0053) and May 2008 (Exhibit C-0055) and letter from Argentina to Salini Impregilo in April 2008 (Exhibit C-0054).
[166] Salini Impregilo, Request for Arbitration, para [53].
[167] In *Hochtief v Argentina*, Decision on Jurisdiction, Washington, 24 October 2011, the tribunal noted that the parties did not allege failure to comply with a similar obligation contained in the Argentina-Germany BIT and assumed compliance with that obligation, para [29].
[168] Argentina, Memorial on Objections to Jurisdiction, para [6].

the requirement that any domestic court proceedings be abandoned before international arbitration proceedings take place.[169]

101. Thus, as to Article 8(2)-(4), two issues arise: (a) was the dispute referred to arbitration more than 18 months after submission to the local processes referred to in Article 8(2); and (b) did Salini Impregilo comply with the withdrawal requirement in Article 8(4)? For reasons that will appear, it is necessary to analyse the two issues separately. Further questions may arise as to the operation of the MFN clause in the BIT, and the *res judicata* effect of the award in *Impregilo S.p.A. v Argentina*.

(a) Compliance with the 18-month provision (Article 8(2) & (3))

(1) Argentina's submissions

102. According to Argentina, the word 'dispute' in Article 8 should be given its ordinary meaning in its context, in accordance with the VCLT.[170] The 'dispute' submitted to the domestic jurisdiction is the 'dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, regarding the issues regulated by this Agreement'.[171] But Salini Impregilo failed to submit that dispute to the competent administrative or judicial authorities in Argentina for 18 months as required by Article 8(2) and 8(3) of the BIT.[172] Consent to arbitration required by Article 25(1) of the ICSID Convention must be express.[173] In particular Argentina argues that Salini Impregilo's interpretation of a dispute in a 'broad, subject matter' sense modifies the will expressed by the States Parties in the BIT.[174]

103. Argentina says that neither the administrative complaint brought by Puentes on 11 June 2013 nor the court action it filed on 30 May 2014 involved the claim which subsequently

[169] Ibid, para [113].
[170] VCLT, Art 31. Argentina, Reply on Jurisdiction, para [71].
[171] Argentina, Reply on Jurisdiction, para [74], using the terms of Article 8(1) of the BIT.
[172] Argentina, Memorial on Objections to Jurisdiction, paras [5]-[6], [77].
[173] Argentina, Reply on Jurisdiction, para [58].
[174] Ibid, para [67].

led to the BIT arbitration.[175] According to Argentina those local proceedings involved a different subject matter, different parties and a different remedy:

i. In relation to the parties, Argentina stresses that Puentes filed the actions in Argentina, not Salini Impregilo; Salini Impregilo cannot rely on Puentes' claim in an Argentine court to show compliance with the requirements of the BIT.[176]

ii. In relation to the dispute, Article 8 states that the dispute submitted to the arbitral body must be the same as the one submitted to the local courts.[177] The local claim must have the same subject matter as the claim underlying the arbitration, meaning that it must be based on the same legal grounds. This is because the purpose is to allow the host state to resolve the dispute internally before having access to the international jurisdiction.[178] It points to the wording of Article 8 and its reference to a single 'dispute' in each sub-paragraph.[179] Argentina says that Puentes' actions (the administrative complaint and the court action) necessarily involved a different subject matter to the treaty claims as the local proceedings were not based on the BIT[180] nor did they make any reference to any provision of the BIT or to the breach of international obligations.[181]

iii. In relation to remedies, Argentina says that Salini Impregilo is seeking different remedies through international arbitration than Puentes in the local proceedings. In the local proceedings, Puentes seeks a declaration of termination of the Concession Contract through sole fault of the 'Grantor' (Argentina) on the basis of alleged breaches by it. By contrast Salini Impregilo seeks compensation for Argentina's failure to renegotiate and restore the Concession's economic equilibrium.[182]

[175] Argentina, Memorial on Objections to Jurisdiction, paras [6], [105].
[176] Ibid, paras [108]-[109].
[177] Argentine Memorial on Objections to Jurisdiction, para [100].
[178] Ibid, para [107].
[179] Ibid, para [100].
[180] Argentina, Memorial on Objections to Jurisdiction, para [106]; Argentina, Reply on Jurisdiction, paras [76]-[77].
[181] Argentina, Memorial on Objections to Jurisdiction, para [111]; Argentina, Reply on Jurisdiction, para [77].
[182] Argentina, Memorial on Objections to Jurisdiction, para [110].

104. In response to Salini Impregilo's arguments based on the futility of submitting the claim to an Argentine court, Argentina argues that the submission to a domestic court of the claim could resolve the claim. Argentine law provides for legal actions that make a rapid decision possible. The Claimant could have opted to start an action for protection of constitutional rights (*amparo*), an expedited summary action (*acción sumarísima*), or a motion for a declaratory judgment of certainty (*acción declarativa de certeza*), or to seek precautionary measures such as an injunction to preserve the status quo (*prohibición de innovar*), among others.[183]

105. Argentina argues that the BIT foresees that no final decision may be issued within 18 months.[184] But even if that might occur, it would not justify disregard of Article 8.[185]

(2) Salini Impregilo's submissions

106. Salini Impregilo accepts that Article 8 of the BIT requires investors, before submitting a dispute to international arbitration, to submit their claims to the competent court or administrative authority of the State in whose territory the investment is made for 18 months.[186] But it argues that any administrative or judicial proceeding brought in the host state involving the same subject matter as the investment dispute under the BIT would satisfy the BIT's procedural requirement.[187] In Salini Impregilo's view this requirement has been complied with.[188] It argues that Puentes' filing of the 11 June 2013 administrative complaint (without need for reference to the later court action) in itself satisfies the BIT's 18-month requirement because the 'essence of the dispute' was before competent Argentine administrative authorities without it being resolved for at least 18 months.[189] In Salini Impregilo's view its claims in the arbitration and Puentes' claim in the administrative complaint deal with precisely the same subject matter.[190]

[183] Argentina, Reply on Jurisdiction, para [132].
[184] Argentina-Italy BIT, Art 8(3).
[185] Argentina, Reply on Jurisdiction, para [125].
[186] Salini Impregilo, Request for Arbitration, para [52]; Salini Impregilo, Counter-Memorial on Jurisdiction, para [76].
[187] Salini Impregilo, Request for Arbitration, para [53].
[188] Ibid, para [54].
[189] Salini Impregilo, Counter-Memorial on Jurisdiction, para [88]; Salini Impregilo, Rejoinder on Jurisdiction, para [3]
[190] Salini Impregilo, Counter-Memorial on Jurisdiction, para [101].

107. Salini Impregilo rejects Argentina's interpretation of Article 8 predicated on a 'triple identity' interpretation of 'dispute'.[191] In Salini Impregilo's view the 'dispute' or 'controversy' must be subjected to a 'broad, subject matter' interpretation: the controversy or dispute submitted in the local jurisdiction must have the same general subject matter as the treaty claims[192] but need not involve the same parties nor the same legal claims.[193] Furthermore, the remedy requested need not be the same.[194]
108. Salini Impregilo notes that tribunals have preferred a 'broad, subject matter' interpretation over a 'triple identity' one.[195] It argues that customary international law and the purpose of Article 8 compel the broad, subject matter interpretation of 'dispute'.[196]
109. Salini Impregilo applies its 'broad, subject matter' interpretation of 'dispute' as follows:

    i. Admittedly Salini Impregilo and Puentes are not the same party.[197] However in Salini Impregilo's view the parties to a local dispute need not be identical to the parties to the arbitration in order to satisfy the 'local-courts requirement' because the BIT requires that the 'dispute' be submitted to local authorities but does not require the claimant-investor *personally* to seek resolution through local courts.[198]

    ii. In relation to the subject matter of the dispute, Salini Impregilo agrees with Argentina that the purpose of the requirement of domestic proceedings is to allow the host state to resolve the dispute before the conduct of the host state is reviewed in an international forum. However, Salini Impregilo argues that the 'broad, subject matter' interpretation of 'dispute' serves that purpose because resolving the injury via a domestic-law claim can 'moot the international claim'.[199]

[191] Ibid, paras [78], [99].
[192] Ibid, para [82], citing *Elettronica Sicula S.p.A. (ELSI) (USA v Italy)*, ICJ Reports 1989, 15, 46 (para [59]).
[193] Ibid, paras [78], [99].
[194] Ibid, para [100].
[195] Ibid, para [91]; Salini Impregilo, Rejoinder on Jurisdiction, para [63].
[196] Salini Impregilo, Rejoinder on Jurisdiction, para [66].
[197] Salini Impregilo, Counter-Memorial on Jurisdiction, para [98].
[198] Salini Impregilo, Request for Arbitration, para [53].
[199] Salini Impregilo, Counter-Memorial on Jurisdiction, para [89].

iii. In relation to the remedy, Salini Impregilo argues that there is no authority for the requirement that the remedy requested at domestic and international level be the same.[200] In any case, Argentina mischaracterizes Puentes' administrative complaint because Puentes did seek damages in its domestic administrative complaint, as Salini Impregilo does in its treaty claim.[201]

110. Salini Impregilo argues finally that Article 8(3) in relation to local proceedings should be interpreted in light of the rule of exhaustion of local remedies under customary international law.[202] It argues that local remedies do not need to be exhausted where there are no reasonably available remedies to provide effective redress or the local remedies provide no reasonable possibility of such redress.[203] The history of Puentes' administrative complaint (which Salini Impregilo says was ignored by Argentina) and Puentes' court action (which was still pending in 2017) demonstrates that local litigation would not resolve this dispute within 18 months.[204]

111. Salini Impregilo further argues that Article 8 should be interpreted as 'subject to a futility exception' which applies based on the facts of this case. Salini Impregilo argues that the structure of Article 8 suggests that the purpose of the 18-month rule is to provide the respondent state with an opportunity to actually resolve the dispute within 18 months. Therefore, the Tribunal in applying the futility exception to this 18-month rule should analyse whether there is a realistic possibility of resolving the dispute in domestic courts within 18 months.[205]

112. Salini Impregilo argues that it would be unfair to deprive it of its right to resort to arbitration based on the 18-month requirement when the opportunity to resort to local courts was only theoretical and/or could not have led to an effective resolution of the dispute within 18 months.[206] Salini Impregilo says it would be futile for it to commence

[200] Ibid, para [100].
[201] Ibid, para [87].
[202] Salini Impregilo, Counter-Memorial on Jurisdiction, para [140]; Salini Impregilo, Rejoinder on Jurisdiction, para [63].
[203] Salini Impregilo, Counter-Memorial on Jurisdiction, para [140], quoting ILC Draft Articles on Diplomatic Protection, Art 15 (Legal Authority CL-0203).
[204] Salini Impregilo, Counter-Memorial on Jurisdiction, para [148].
[205] Ibid, paras [4], [142]; Salini Impregilo, Rejoinder on Jurisdiction, para [90].
[206] Salini Impregilo, Rejoinder on Jurisdiction, paras [90], [105].

an action before an Argentine forum and the best evidence for this is that Puentes' court proceedings have been on foot for much longer than 18 months and are still pending.[207] Argentina could also have redressed Salini Impregilo's damages through the administrative complaint Puentes initiated on 11 June 2013, but did not do so.[208]

113. Salini Impregilo notes that in its Reply on Jurisdiction Argentina offers no evidence to support its proposition that there were different mechanisms in the Argentine judicial system available to resolve the dispute effectively within 18 months.[209] It maintains that a BIT claim could not be resolved in a period of 18 months[210] and that in any case the types of expedited proceedings suggested by Argentina would not be appropriate to resolve this case.[211]

114. Further Salini Impregilo notes that the Argentine courts perform poorly in international rankings of independence and efficiency.[212] Finally Salini Impregilo would have to incur excessive and disproportionate costs in filing and prosecuting a case before Argentine domestic courts.[213]

(3) The Tribunal's analysis

115. Article 8 regulates the conditions by which arbitration proceedings under the BIT may be initiated by an 'investor' against one of the Contracting Parties. The Tribunal must therefore give careful consideration to the specific terms agreed by the Contracting Parties when extending this offer of arbitration, as mandated by the VCLT. To that end, several preliminary points should be made as to the textual construction and sequencing (and therefore contextual guidance) of the component parts of Article 8:

(1) Paragraph 8(1) refers to a 'dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, regarding the issues regulated by this

[207] Ibid, paras [3], [100].
[208] Ibid, para [89].
[209] Ibid, paras [91]-[92].
[210] Ibid, paras [94], [97].
[211] Ibid, para [96].
[212] Ibid, para [98].
[213] Ibid, paras [101]-[103].

Agreement'. It explicitly requires consultation 'between the parties to the dispute'. It appears from this language that the consultations should involve the investor and the host state, just as the arbitration will be between those parties. There is no provision in the BIT allowing the investment itself (e.g. the local investment company, here Puentes) to be a party to the arbitration.

(2) In direct contrast, Article 8(2) does not specify who may submit the dispute to the 'competent administrative or judicial jurisdiction of the Party in whose territory the investment is made'. In certain situations, it could be a third party – e.g. the investment company – which has standing to bring local proceedings or which will naturally do so.

(3) Indeed, as the *Hochtief v Argentina* Tribunal pointed out,[214] Article 8(2) (Article 10(2) of the German-Argentine BIT applicable in that case) does not in terms *require* local proceedings to be brought, it simply provides that they 'may be submitted'.

(4) As also pointed out in *Hochtief v Argentina,*[215] it would have been open to Argentina itself to have submitted the proceeding to the local courts. One might also envisage the dispute being submitted by a separate Argentine entity, whether or not an organ of the Argentine state, e.g. a state corporation which is a party to the concession agreement giving rise to the dispute.

(5) Article 8(4) only applies to 'pending court proceedings' and not to the administrative proceedings referred in Article 8(2).

(6) Article 8(4) requires each party to the dispute submitted to arbitration to take 'any such measures as may be necessary to dismiss any pending court proceedings'. This is not stated to be a precondition to submission to arbitration; rather it applies '[f]rom the time arbitration proceedings are commenced'. It could thus be regarded as a matter going to admissibility, not jurisdiction.[216]

[214] *Hochtief v Argentina*, Decision on Jurisdiction, 24 October 2011, para [36].
[215] Ibid, para [37].
[216] As counsel for Argentina all but conceded in argument: Transcript, Hearing on Jurisdiction, 29 November 2017, pages 307-308: 'if this Tribunal did not consider that to be a jurisdictional requirement, it should at least consider it as an admissibility requirement'.

116. Indeed, the Tribunal would observe that it could have been open to Salini Impregilo to accept Argentina's narrow interpretation of dispute in Article 8. On that basis it could have relied on the literal terms of Article 8(2) and (3) to argue that since no proceeding as mentioned in Article 8(2) had (on this interpretation) been commenced, neither the 18-month pendency requirement in Article 8(3) nor the withdrawal requirement in Article 8(4) had been triggered. One cannot be required to withdraw a proceeding one has never started.

117. But Salini Impregilo did not do this. It expressly accepted that the 18-month limit under Article 8(3) had to be respected, and instead argued (as noted already) for a flexible and broad interpretation of 'dispute' in Article 8.

118. Salini Impregilo's position is supported by other arbitral awards. In *Maffezini v Spain* the tribunal held that the domestic litigation provision in the Argentina-Spain BIT was a mandatory precondition to arbitration.[217] In *Impregilo S.p.A. v Argentina* the tribunal determined that pursuant to Article 8(2) of the Argentina-Italy BIT, an investor was not obliged to bring a dispute before a local court[218] but that submission to the domestic jurisdiction for 18 months pursuant to Article 8(3) of the Argentina-Italy BIT was mandatory before an ICSID tribunal could assert jurisdiction.[219]

119. In *Philip Morris v Uruguay*, the tribunal did not decide whether a similar domestic litigation requirement in the Swiss-Uruguay BIT went to jurisdiction or admissibility. However, it concluded that '[e]ven if that requirement were considered as pertaining to admissibility, its compulsory character would be evident'.[220] In that case, however, the BIT provision used 'shall' rather than 'may' in relation to submission to domestic courts.[221]

[217] *Maffezini v Kingdom of Spain* (*Maffezini v Spain*), ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para [36].
[218] *Impregilo v Argentina*, Award, 21 June 2011, para [83].
[219] Ibid, para [94]. See Separate and Dissenting Opinion of J. Christopher Thomas, Q.C. in *Hochtief v Argentina*, para [36].
[220] *Philip Morris Sàrl, Philip Morris Products S.A and Abal Hermanos S.A. v Oriental Republic of Uruguay* (*Philip Morris v Uruguay*), ICSID Case No ARB/10/7, Decision on Jurisdiction, 2 July 2013, para [142].
[221] Ibid, para [139].

120. The tribunal in *Hochtief v Argentina*[222] did not decide whether the dispute resolution clause in the Argentina-Germany BIT imposes an 18-month submission to national courts as a precondition of unilateral recourse to international arbitration. It should be noted that the Argentina-Germany BIT states that the dispute 'will' ('será') be submitted to national courts whereas the Argentina-Italy BIT states that it 'may' ('podrá') be so submitted.[223] The *Hochtief v Argentina* tribunal was doubtful that the precondition existed given that it might result in 'pointless litigation'.[224] But without deciding the point, it proceeded on the assumption that the precondition did exist.[225]

121. The tribunal in *BG Group v Argentina*[226] discussed difficulties litigating in Argentina in the period 2002-2007 in the context of the domestic litigation requirement under the Argentina-United Kingdom BIT.[227] Article 8 of the Argentina-United Kingdom BIT relevantly reads:

> ...The aforementioned disputes shall be submitted to international arbitration in the following cases:
>
> (a) if one of the Parties so requests, in any of the following circumstances:
>
> (i) Where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision…[228]

[222] *Hochtief v Argentina*.
[223] The tribunal in *Impregilo v Argentina* found that this difference in terminology did not necessarily mean that a substantive difference was intended: *Impregilo v Argentina*, Award, para [86]. In *Philip Morris v Uruguay*, the tribunal said the use of the word 'shall' evidenced that each step in the domestic proceedings provision in the Swiss-Uruguay BIT is part of a 'binding sequence'. *Philip Morris v Uruguay*, Decision on Jurisdiction, paras [139]-[140].
[224] *Hochtief v Argentina*, Decision on Jurisdiction, para [51].
[225] The tribunal interpreted the operation of the dispute resolution clause based on a broad operation of the MFN clause. It found that the MFN provision applied to the dispute resolution provision in the BIT. *Hochtief v Argentina*, Decision on Jurisdiction, paras [49]-[55].
[226] *BG Group Plc v The Republic of Argentina* (*BG Group v Argentina*), UNCITRAL Arbitration, Final Award, Washington, 24 December 2007.
[227] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, 11 December 1990, entered into force 19 February 1993.
[228] Argentina-United Kingdom BIT, Art. 8(2).

122. BG Group had not sought to litigate in the domestic courts. The tribunal found that investors acting under the Argentina-United Kingdom BIT had to litigate in the host state's courts for 18 months before they could bring an arbitral claim. However, 'as a matter of treaty interpretation' the tribunal found that it could not construe Article 8(2)(a)(i) as an absolute impediment to arbitration. The tribunal had regard to measures taken by the Argentine executive branch seeking to exclude 'litigious licensees from the renegotiation process',[229] and concluded:

> …Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation [that the domestic litigation requirement is absolute] would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.[230]

123. Salini Impregilo does not seek to rely on any action that it has itself taken in order to satisfy Article 8(2) and 8(3) of the BIT. The question is whether Puentes' actions satisfy Article 8(2) and 8(3) in order for Salini Impregilo to bring an arbitration. If so, the further question relates to the subject matter of the dispute and the form of action taken: whether either of the two actions undertaken by Puentes satisfies the requirement of submission of the dispute to the 'competent administrative or judicial jurisdiction' of Argentina for 18 months. Those two actions are:

i. an administrative complaint brought on 11 June 2013 by letter;[231] and

ii. an action before the Argentine court commenced on 30 May 2014.

[229] *BG Group v Argentina*, Final Award, para [155].
[230] Ibid, para [147].
[231] Exhibit C-0049 is the letter seeking to commence that action; Salini Impregilo, Counter-Memorial on Jurisdiction, para [44]; Salini Impregilo, Request for Arbitration, para [45].

Interpretation of 'dispute' in Article 8

124. The term 'dispute' ('*controversia*') is not defined in the Argentina-Italy BIT. The ICSID Convention also does not define 'dispute' for the purpose of Article 25(1).

125. Salini Impregilo assigned its rights and obligations to Puentes under the Concession Contract.[232] On this basis Salini Impregilo could not have litigated in domestic courts under the Concession Contract, as Argentina notes.[233]

126. In *Impregilo S. v Argentina*, Argentina argued that Impregilo had not complied with the 18-month requirement.[234] Impregilo responded that the domestic subsidiary had 'consistently resorted to local administrative and judicial courts' in relation to the dispute. It further argued that Argentine courts had had the opportunity to decide on the facts but had failed to do so.[235] The tribunal found that the condition in Article 8(3) had not been complied with, without discussing whether AGBA's action could assist Impregilo to satisfy the condition.[236]

127. However, there are numerous cases supporting Salini Impregilo's claim to have satisfied the domestic litigation requirement here, even though the proceedings in Argentina involved Puentes and not Salini Impregilo, and contractual, not treaty claims.

128. In *USA v Italy*, a Chamber of the International Court held that local remedies had been exhausted in Italy because a claim brought to the Italian courts was 'essentially' the claim that the United States was seeking to bring as a matter of diplomatic protection. This was despite the fact that 'the parties were different'.[237]

129. In *Philip Morris v Uruguay*, Abal, one of the claimants, was a *sociedad anónima* organised under Uruguayan law. In 2010, Philip Morris Brands became the direct owner of 100% of Abal.[238] Uruguay argued that even if Abal had met the requirements of negotiation and domestic litigation, the other claimants had not. The tribunal decided that

[232] Salini Impregilo, Request for Arbitration, para [20]; Exhibit RA-004 (Deed of Transfer).
[233] Argentine Reply on Objections to Jurisdiction, para [146]. Cf *Urbaser S.A. v Argentine Republic* (*Urbaser v Argentina*), ICSID Case No ARB/07/26, Decision on Jurisdiction, 19 December 2012, para [62].
[234] *Impregilo v Argentina*, Award, para [53].
[235] Ibid, para [68].
[236] Ibid, para [90]. Ultimately the tribunal found jurisdiction based on an expansive reading of the MFN clause as applying to the dispute settlement procedures in the BIT, para [104].
[237] *USA v Italy*, Judgment, ICJ Reports 1989 p 15, 45-6 (para [58]).
[238] *Philip Morris v Uruguay*, Decision on Jurisdiction, para [2].

Abal had satisfied, on behalf of the other claimants, the BIT's requirement that the parties negotiate for six months. The Tribunal held that, while the administrative oppositions were filed by Abal alone, Abal's actions were aimed at removing the effects of measures which impacted on all the claimants. The tribunal continued that 'due to the identity of positions and interests involved, Abal's actions were to the benefit also of the other Claimants'.[239] The tribunal reached a similar conclusion in relation to the domestic litigation clause: even if the domestic proceeding was filed by Abal, Abal had 'clearly acted in the interest… of the other Claimants, considering that it is wholly owned' by Philip Morris Brands and the brands Abal sells in Uruguay are sublicensed from Philip Morris Brands.[240] In its view:

> The term 'disputes' as used [in the dispute resolution clause] is to be interpreted broadly as concerning the subject matter and facts at issue and not as limited to particular legal claims, including specifically BIT claims.[241]

130. The tribunal in *Philip Morris v Uruguay* said that an investor could satisfy the domestic litigation requirement under the applicable BIT in that case by submitting a domestic law claim to the Uruguayan courts, provided that it was based on 'substantially similar facts and subject matter as the BIT claim subsequently submitted' to arbitration.[242] The tribunal determined that if the parties to a BIT had wanted to limit investor-state arbitration to claims concerning breaches of the substantive standards in the BIT, they would have said so expressly.

131. In *Teinver v Argentina* the respondent (Argentina) argued that a domestic expropriation lawsuit brought by Argentina against the claimant company's Argentine subsidiary, Interinvest,[243] could not fulfil the domestic litigation requirement under the Argentina-Spain BIT because the domestic and international claims involved different parties and

[239] Ibid, paras [95]-[97].
[240] Ibid, para [114].
[241] *Philip Morris v Uruguay*, Decision on Jurisdiction, para [113].
[242] Ibid, para [110].
[243] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic* (*Teinver v Argentina*), ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012, para [3]. Iberia, the Spanish state-owned airline, incorporated Interinvest as a fully-owned Argentine subsidiary in 1994.

different causes of action.[244] The tribunal disagreed: the fact that the domestic expropriation proceedings were brought by Argentina against Interinvest 'does not prevent those proceedings from counting for purposes of [the BIT's domestic litigation provision] when the subject matter of those proceedings was the same as that before this Tribunal'.[245]

> The Tribunal does not agree with Respondent's assertion that the subject matter of the expropriation suit in domestic court is not the same as the subject matter of this arbitration. It is true that the Argentine court proceedings only involved the determination of the value of the expropriated assets, while the ICSID proceeding raises specific issues related to the validity of the expropriation (i.e., fair and equitable treatment, arbitrary and unjustified measures, and full protection and security). As a matter of substance, however, the goal of both suits is to make the Claimants (and Interinvest, in the case of the Argentine proceeding) whole for the economic loss suffered as a result of the nationalization.[246]

132. In *Urbaser v Argentina*, the tribunal held that:

> a distinction may be made between the 'dispute' and a claim or cause of action. Article X [a rule on prior submission of disputes to the local courts of the host state] of the BIT does not require that the same cause of action must be brought before the domestic court and the subsequent international arbitral tribunal. … It also has been noted that the action brought before a local court need not allege a breach of the BIT; it is sufficient that the dispute relates to an investment made under the BIT. The claim before the local courts must be 'coextensive' with a dispute relating to investments made under the BIT. The nature of the 'dispute' brought before domestic courts may be broad. The objective of the judicial filing is indeed to provide the domestic court with an opportunity to fashion a suitable remedy that may obviate

[244] Ibid, para [85].
[245] Ibid, para [133].
[246] *Teinver v Argentina,* Decision on Jurisdiction, para [132].

> international arbitration. For such a result to be reached, it is not necessary for the domestic court to adjudicate the claim within the framework of the BIT.[247]

133. The present Tribunal agrees with the decisions on this point cited above. In its view, it is sufficient for the purposes of Article 8(2) and (3) that the substantive underpinnings of the dispute have been 'submitted to the competent administrative or judicial jurisdiction', whether by the investor or (as here) a local subsidiary. It does not matter whether the BIT claim has been in terms invoked before the administrative or judicial jurisdiction.

Was the 'dispute' submitted to the local jurisdiction

134. Consistently with this conclusion, the fact that the claims in the Argentine courts concerned the Concession Contract while Salini Impregilo's arbitration request involves claims under the BIT is not determinative.[248] The dispute submitted to Argentine forums by Puentes shared substantially similar facts with the BIT claim subsequently submitted to arbitration by Salini Impregilo. Both related to the same Concession Contract and the same sovereign acts by Argentina.

135. Salini Impregilo relies on Puentes' administrative complaint of 11 June 2013 in satisfaction of the domestic proceedings requirement in the BIT. Salini Impregilo describes the administrative complaint as 'local proceedings' initiated by Puentes.[249] The Tribunal will need to determine whether the sending of a written administrative complaint amounts to the initiation of proceedings for the purpose of Article 8 of the BIT.

136. Given the wording of the Argentina-Italy BIT when compared to other BITs signed by Argentina, it is clear that submission to an entity other than a court could satisfy the requirement of submission to the 'competent administrative… jurisdiction'. Some BITs signed by Argentina contain similar language to the Argentina-Italy BIT, without reference to courts or tribunals.

[247] Ibid, para [181].
[248] Cf also *Pantechniki v Republic of Albania* (*Pantechniki v Albania*), ICSID Case No. ARB/07/21, Award, para [61].
[249] Salini Impregilo, Rejoinder on Jurisdiction, para [89].

- The Argentina-Austria BIT requires submission to the administrative or judicial jurisdiction ('a la jurisdicción administrativa o judicial competente');[250]
- The Argentina-France BIT requires submission to arbitration or 'juridictions nationales', although the English translation of that section translates 'juridictions nationales' to 'domestic courts'.[251]

137. Other BITs signed by Argentina explicitly require submission to a court or tribunal rather than to the 'jurisdiction' of the respondent state.

- The Argentina-Germany BIT restricts submission of the dispute to 'the competent courts of the Contracting Party' ('los tribunales competentes');
- The Argentina-United States BIT requires submission to 'the courts or administrative tribunals of the Party' if an investor chooses domestic litigation;[252]
- The Argentina-Spain BIT refers to 'competent tribunals of the Party in whose territory the investment was made' ('a los tribunales competentes');[253]
- The Argentina-UK BIT refers to 'the competent tribunal of the Contracting Party in whose territory the investment was made'.[254]

138. At the Hearing, Argentina accepted that the procedure commenced by Puentes with the Argentine administrative authorities could fall within the scope of Article 8(2).[255] The Tribunal agrees.

[250] Convention between the Argentine Republic and the Republic of Austria for the Promotion and the Protection of Investments, Buenos Aires, 7 August 1992, Art. 8(2). The Spanish is the authentic text.
[251] Agreement on the reciprocal promotion and protection of investments, Paris, 3 July 1991, 3 August 1993, (1993) 1728 UNTS 297. The authentic languages are Spanish and French.
[252] Argentina-United States BIT, Art. VII(2)(a). Emphasis added. The BIT contains a 'fork' provision, e.g. a choice between domestic litigation and other forms of dispute resolution.
[253] Argentina-Spain BIT, Art X, 2.
[254] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, London, 11 December 1990, entered into force 19 February 1993, Art 8(2)(a)(i).
[255] Transcript, Hearing on Jurisdiction, 28 November 2017, 43. It maintained its arguments in relation to subject matter of the dispute and parties to the dispute.

The 18-month domestic litigation requirement: conclusion

139. Litigation in the Argentine court was commenced by Puentes on 30 May 2014. Salini Impregilo initiated its arbitration on 1 September 2015, fifteen months after Puentes' court case commenced. *Prima facie*, Salini Impregilo has not complied with the requirement to litigate in an Argentine court for 18 months. However, it would be open for the Tribunal to follow the tribunal in *Philip Morris v Uruguay* which held that it could be satisfied by actions occurring after the date the arbitration was instituted to satisfy a jurisdictional requirement.[256] In this case the litigation between Puentes and Argentina is still pending. As the tribunal said in *Philip Morris v Uruguay*, to require the claimant to start over and re-file this arbitration now that the 18 months has passed would be a waste of time and resources.[257]

140. Article 8(2) refers in the alternative to 'the competent administrative *or* judicial jurisdiction' (emphasis added). The administrative jurisdiction was triggered by Puentes more than 18 months before the arbitration was commenced, and in the Tribunal's view Article 8(2) was thereby satisfied. Indeed, aside from its argument as to the characterisation of 'dispute', Argentina does not suggest otherwise. Its claim for non-compliance with Article 8(2) and (3) accordingly fails.

(b) The issue of abandonment (Article 8(4))

(1) Argentina's submissions

141. Alternatively, Argentina complains that Salini Impregilo did not abandon the domestic proceedings, or procure their abandonment, as it should have done under Article 8(4) of the BIT. Article 8(4) reads:

> 4. From the time arbitration proceedings are commenced, each party to the dispute shall take any such

[256] See *Philip Morris v Uruguay*, Decision on Jurisdiction, para [144].
[257] Ibid, para [148], citing *Teinver v Argentina*, Decision on Jurisdiction, para [135].

> measures as may be necessary to dismiss any pending court proceedings.[258]

142. In failing to abandon pending domestic proceedings, Salini Impregilo has not accepted the terms of Argentina's offer to arbitrate under the BIT.[259]

143. Argentina claims that the failure to dismiss the pending court proceedings is a serious matter because the consent of the States Parties to the BIT was especially aligned with that purpose: Argentina only included the equivalent clause in five of its 58 BITs.[260] The purpose of the requirement is to protect the respondent state from having to litigate multiple proceedings in different forums relating to the same measure and to minimise the risk of inconsistent determination of fact and law by different tribunals and of double recovery.[261]

(2) Salini Impregilo's submissions

144. Salini Impregilo argues that it complied with Article 8(4) of the BIT. First, it points out that it relies exclusively on Puentes' 11 June 2013 administrative complaint to satisfy the 18-month rule: that proceeding is over, in its view, because Argentina failed to respond or to resolve it within the time frame provided by the law.[262]

145. Second, Salini Impregilo's interpretation of Article 8(4) is that it imposes a 'best efforts' obligation[263] and Salini Impregilo has no power to force Puentes to dismiss its claim. Salini Impregilo only owns 26% of shares in Puentes.[264] The 'broad, subject matter' interpretation of 'dispute' and the broad definition of 'investment' support a 'best efforts' interpretation because a party will not necessarily be able to dismiss claims brought by other parties in relation to the same dispute.

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[258] Argentina-Italy BIT, Art 8(4).
[259] Argentina, Reply on Jurisdiction, para [80].
[260] Argentina, Memorial on Objections to Jurisdiction, para [114].
[261] Argentina, Reply on Jurisdiction, para [79], quoting *Renco Group Inc v Peru* (*Renco v Peru*), ICSID Case No UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016, 193, Legal Authority AL RA 125.
[262] Salini Impregilo, Counter-Memorial on Jurisdiction, para [103]. Exhibit C-0374 'Ley de Procedimiento Administrativo', Arts 30-31; Salini Impregilo, Rejoinder on Jurisdiction, para [67].
[263] Salini Impregilo, Counter-Memorial on Jurisdiction, para [104]; Salini Impregilo, Rejoinder on Jurisdiction, para [67].
[264] Salini Impregilo, Counter-Memorial on Jurisdiction, para [105].

146. Finally, Salini Impregilo argues that Argentina is also in breach of Article 8(4), which imposes a 'best efforts' obligation on both parties.[265] An Argentine court summoned Salini Impregilo as a third party to Puentes' court action on 25 October 2016.[266] Therefore, Argentina is estopped from arguing that Salini Impregilo is in breach of Article 8(4) whilst Argentina itself is in breach of that article by forcing Salini Impregilo to join a domestic proceeding that it did not initiate and to which it was not a party.[267]

(3) The Tribunal's analysis

147. In *Ambiente v Argentina*, the tribunal identified two aspects of Article 8(4) which assist Salini Impregilo.

i. Article 8(4) imposes an obligation on both parties. It 'commits a Party to take the necessary steps to allow the other Party to desist from the domestic proceedings'. This is relevant in this case because Argentina joined Salini Impregilo to domestic proceedings in 2016, long after the initiation of the arbitration.[268]

ii. Once the 18-month term has expired and a party decides to proceed to international arbitration, 'the other Party must, *to the extent possible*, adopt the necessary measures so that no additional costs will arise for the former Party due to the mere fact of exercising a right expressly granted to it by the BIT'.[269] The tribunal evidently considered that Article 8(4) involves a 'best efforts' requirement.

148. The Tribunal agrees. The law does not require the impossible, and Salini Impregilo was not in a position to withdraw proceedings to which it was not a party. A 'best efforts' interpretation of Article 8(4) is consistent with the Tribunal's conclusion as to the flexible

[265] Salini Impregilo, Rejoinder on Jurisdiction, para [67].
[266] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [106]-[107] ; Argentina, Memorial on Objections to Jurisdiction, para [148]; Exhibit C-0060.
[267] Salini Impregilo, Counter-Memorial on Jurisdiction, para [108].
[268] *Ambiente v Argentine Republic* (*Ambiente v Argentina*), ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para [623].
[269] Ibid (emphasis added).

characterization of 'dispute'. To hold otherwise would place minority shareholders at a serious disadvantage in seeking to uphold their rights under the BIT. Finally, there is no danger of double recovery, having regard *inter alia* to the express assurances given by the Claimant in oral argument.[270]

(c) The Tribunal's Conclusions on Article 8

149. For these reasons, the Tribunal concludes that Article 8(2) and (3) of the BIT were complied with, and that Salini Impregilo's claim is not inadmissible under Article 8(4) by reason of the non-withdrawal of the Argentine court proceedings following the commencement of the present arbitration. Argentina's second preliminary objection fails.

150. In the light of these conclusions, the Tribunal has no need to consider the parties' arguments with respect to the MFN and *res judicata* issues. Nor is it necessary to address Salini Impregilo's arguments with respect to futility and estoppel.

D. THIRD PRELIMINARY OBJECTION: ARGENTINE COURTS AS THE PROPER VENUE

151. As noted, Puentes is currently litigating its claim against Argentina (commenced on 30 May 2014) in an Argentine court.[271] Salini Impregilo has been summonsed as a third party.[272]

(1) Argentina's submissions

152. Argentina argues that, should the Tribunal find that it possesses jurisdiction, the *forum non conveniens* doctrine applies in this case. Argentina maintains that there are reasons of sound administration of justice that lead to the conclusion that Argentine courts are the most appropriate forum to resolve Salini Impregilo's claim.[273] Therefore, the Tribunal should refuse to exercise its jurisdiction.

[270] Transcript, Hearing on Jurisdiction, 29 November 2017, 355-356.
[271] Salini Impregilo, Counter-Memorial on Jurisdiction, para [5].
[272] Salini Impregilo, Counter-Memorial on Jurisdiction, paras [106]-[107] ; Argentina, Memorial on Objections to Jurisdiction, para [148].
[273] Argentina, Memorial on Objections to Jurisdiction, para [8].

153. Argentina discusses authorities which identify a general legal principle of *forum non conveniens* and concludes that the Tribunal must take into account the existence of a more appropriate forum with jurisdiction to hear the case.[274] Argentina argues that its courts have jurisdiction to decide disputes between an Italian investor and Argentina, including claims for non-compliance with the BIT, and that they are the most appropriate forum for Salini Impregilo's claim.[275]

154. Further, Argentina refers to the reasons given by the domestic judge for issuing a summons for Salini Impregilo to appear in Puentes' pending case. These include that the claim in the arbitration proceedings and Puentes' claim are closely related and that if the claim is granted there would be an overlap in terms of compensation because it is not possible for a recovery action to be filed against the investing companies (Salini Impregilo and Hochtief).[276]

155. Argentina argues that Salini Impregilo cannot invoke an alleged violation of the Concession Contract as though it was a breach of the BIT.[277] The standards in the BIT should not be applied to contractual relations governed by Argentine law.[278] Argentina argues that Salini Impregilo's claim is contractual because Puentes seeks compensation for the consequences allegedly arising from the termination of the Concession Contract in the domestic proceedings.[279]

156. Argentina argues that its domestic courts are the forum in which contractual claims must be decided because the Concession Contract provides that it is governed by Argentine law. The contract also provides that any issue or conflict that may arise from the contract shall be submitted to the Federal Administrative Courts for the City of Buenos Aires.[280]

157. In relation to Salini Impregilo's fear of criminal prosecution of its legal counsel (should Salini Impregilo's claim be heard in Argentina), Argentina indicates that the original complaint in question was filed because of 'genuine concern for the potential commission

[274] Ibid, paras [134]-[144].
[275] Argentina, Reply on Jurisdiction, paras [77], [125].
[276] Argentina, Memorial on Objections to Jurisdiction, para [150].
[277] Argentina, Reply on Jurisdiction, para [147].
[278] Ibid, para [148].
[279] Argentina, Reply on Jurisdiction, para [163].
[280] Ibid, para [162].

of attempted fraud'.[281] Further Argentina points out that in the same case in which the possible prosecution was raised, the US judge recognised that American courts generally have found Argentina to be an adequate 'alternative forum' to decide disputes.[282] Finally, Argentina points to Salini Impregilo's long history of investment in Argentina and its current projects in Argentina to demonstrate that Salini Impregilo does not genuinely feel 'harassed' there.[283]

(2) Salini Impregilo's submissions

158. Salini Impregilo argues that the *forum non conveniens* doctrine is not set out in the BIT's text,[284] is not a recognised principle of international law[285] or a general principle of law.[286] Furthermore the BIT is a *lex specialis* that displaces any considerations of *forum non conveniens*.[287] Salini Impregilo argues that *forum non conveniens* conflicts with ICSID's exclusive jurisdiction, the *lex specialis* in the BIT,[288] basic principles of international law and international investment law.[289] If a tribunal held that it would not rule upon treaty claims over which it had jurisdiction because it believed that it was more appropriate for a local court to dispose of the dispute, an investor's right to arbitration would be negated.[290] Finally, and in any event, Argentina cannot satisfy the elements of *forum non conveniens*.[291]

159. Argentine courts are not a more appropriate forum because Salini Impregilo's treaty claims are not before those courts.[292] Salini Impregilo is only before the Argentine Courts because it was summonsed to appear.[293] It is improper for Argentina to force Salini

[281] Argentina, Reply on Jurisdiction, para [166].
[282] Ibid, para [167].
[283] Ibid, para [171].
[284] Salini Impregilo, Counter-Memorial on Jurisdiction, para [152].
[285] Ibid, paras [5], [153]; Salini Impregilo, Rejoinder on Jurisdiction, para [4].
[286] Salini Impregilo, Counter-Memorial on Jurisdiction, para [156].
[287] Ibid, para [160].
[288] Salini Impregilo, Rejoinder on Jurisdiction, para [4].
[289] Salini Impregilo, Counter-Memorial on Jurisdiction, para [157].
[290] Salini Impregilo, Rejoinder on Jurisdiction, para [122].
[291] Salini Impregilo, Counter-Memorial on Jurisdiction, para [152].
[292] Ibid, para [162].
[293] Ibid, para [163].

Impregilo to join domestic proceedings and then argue that Salini Impregilo's presence in the proceedings justifies the dismissal of its treaty claim in the arbitration.[294]

160. Salini Impregilo argues that the pending domestic litigation concerns domestic-law claims by Puentes whereas the arbitration involves treaty claims by Salini Impregilo.[295] Its treaty claims are not before the Argentine court which will not rule upon them, whatever other holdings it may make.[296] Finally Salini Impregilo 'did not and will not assert its treaty claims in that forum'.[297]

161. In Salini Impregilo's view the forum-selection clause in the Concession Contract is wholly irrelevant to determine the forum for Salini Impregilo's BIT claims.[298] Its claims are not contractual because, among other things, the acts complained of are sovereign acts.[299]

162. Salini Impregilo opposed joining Puentes' local proceedings because in its view this would violate Article 8(4) of the BIT. Further, it would force Salini Impregilo to litigate a matter that Argentina has been refusing to resolve for years. Finally, in Salini Impregilo's view, it is not a proper party to the domestic litigation because under the Concession Contract and Argentine law, it is not a party to the contract.[300]

163. Salini Impregilo states that even if it were required to continue waiting before requesting this arbitration (by the application of Article 8 of the BIT) it would, at this stage, be futile to make further attempts at amicable settlement or submission of the dispute to an Argentine court. In its view this would amount to an abuse of rights by Argentina.[301]

164. Finally, there is a fear that counsel for Salini Impregilo would be criminally prosecuted before Argentine Courts because in September 2015 Argentina announced the initiation of criminal proceedings against several of King & Spalding's attorneys (Salini Impregilo's lawyers), accusing them of having defrauded the country by participating in unrelated

[294] Salini Impregilo, Rejoinder on Jurisdiction, para [122].
[295] Salini Impregilo, Counter-Memorial on Jurisdiction, para [162].
[296] Ibid, para [162].
[297] Ibid, para [163].
[298] Salini Impregilo, Rejoinder on Jurisdiction, para [120].
[299] Ibid, para [118].
[300] Salini Impregilo, Counter-Memorial on Jurisdiction, para [107].
[301] Salini Impregilo, Request for Arbitration, para [60].

international arbitration.[302] The *Teinver v Argentina* tribunal rejected all of Argentina's underlying contentions regarding the criminal proceedings.[303]

(3) The Tribunal's analysis

165. In general terms the principle of *forum non conveniens* involves the exercise of a discretion to stay or dismiss proceedings over which a court or tribunal has jurisdiction, on the basis that some other forum is clearly more appropriate for the determination of the dispute.[304] Pursuant to the principle a court or tribunal 'has to consider how best the ends of justice in the case in question and on the facts before it, so far as that can be measured in advance, can be respectively ascertained and served'.[305]

166. Salini Impregilo argues that 'no investment tribunal has ever recognized the doctrine as a principle of international law or applied it to dismiss a claim over which it had jurisdiction',[306] and Argentina cites none in its pleadings. In *Hochtief v Argentina* the tribunal in its Decision on Jurisdiction said that '[a] tribunal might decide that a claim of which it is seised and which is within its jurisdiction is inadmissible (for example, on the ground of *lis alibi pendens* or *forum non conveniens*)'.[307] This appears to recognize the existence of a *forum non conveniens* discretion but there was no further discussion of the concept, still less was it applied in that case.

167. In *GAMI v Mexico* the tribunal rejected the argument that the claimant could not seek redress because the domestic holding company had sought redress in Mexican courts, holding that:

> ultimately each jurisdiction is responsible for the application of the law under which it exercises its mandate.[308]

168. The tribunal in *GAMI* quoted with approval the umpire in the *Selwyn* case who said that:

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[302] Salini Impregilo, Counter-Memorial on Jurisdiction, para [165].
[303] Salini Impregilo, Rejoinder on Jurisdiction, para [123] with reference to *Teinver v Argentina*, Award, 21 July 2017.
[304] 'The Principles for Determining When the Use of the Doctrine of Forum Non Conveniens and Anti-Suit Injunctions is Appropriate', in *Institute of International Law Yearbook* (2002-2003) Vol 70, Part I, Bruges, 22.
[305] Ibid, 23, quoting *Société du Gaz de Paris v Armateurs Français* 1926 SC (HL) 13, 22.
[306] Salini Impregilo, Counter-Memorial on Jurisdiction, para [153].
[307] *Hochtief v Argentina*, Decision on Jurisdiction, 24 October 2011, para [90].
[308] *GAMI Investments v United Mexican States (GAMI v Mexico)*, Final Award, 15 November 2004, para [41].

> International arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations. Such international tribunal has power to act without reference thereto…[309]

169. However, that dictum was concerned with jurisdiction, not admissibility.

170. In *Impregilo v Argentina*, Argentina's argument based on double recovery (through domestic proceedings and international arbitration) was held to be a mere 'theoretical' argument because the granting of compensation in either sphere would impact on the granting of compensation in the other.[310]

171. In favour of deference to domestic proceedings, Douglas states that 'there must be a limiting principle of admissibility of shareholder claims'.[311] He gives the example of a major oil company with thousands of shareholders affected by state action who might have recourse under a BIT with the host state. He concludes that the investment treaty regime would be 'doomed as a sustainable systems of investment protection' if each shareholder could bring an admissible claim under the BIT.[312] Douglas' comments go to admissibility, not jurisdiction. Further, Salini Impregilo is one of only six shareholders which could seek to litigate this claim (the seventh shareholder, Iglys, being a subsidiary of Salini Impregilo). In the Tribunal's view, concerns in relation to the sustainability of investment protection have no relevance to Salini Impregilo's claim.

172. Hobér discusses the possibility of a tribunal declining jurisdiction on the basis of *forum non conveniens* in favour of a parallel proceedings involving the same dispute.[313] He suggests that arbitrators should not act in a manner that contradicts international public policy and that they might decline jurisdiction where parallel proceedings are deemed to be unacceptable because of the great injustice they cause the respondent.[314]

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[309] *GAMI v Mexico*, para [39], quoting J. H. Ralston, *Venezuelan arbitrations of 1903* (Washington, Government Printing Office, 1904) 322, 327.
[310] *Impregilo v Argentina*, Award, 21 June 2011, para [139].
[311] Z Douglas, *The International Law of Investment Claims*, (Cambridge University Press, 2009), 399.
[312] Ibid, 399.
[313] K Hobér, *Res Judicata and Lis Pendens*, in (2013) 366 Académie de Droit International, Collected Courses 99, 250.
[314] Ibid, 252.

173. For its part, the Tribunal does not need to decide in the abstract whether a BIT tribunal has discretion to stay an arbitration proceeding on account of parallel proceedings pending before a national court. Salini Impregilo never committed to bringing its BIT claims (which are not contractual claims) to the Argentine courts and never did so. It only became a party to the pending Argentine court proceeding against its will, over a year after it had exercised its procedural right as an investor to bring the present arbitration. No new issue of public policy arises with respect to the bringing of a claim by a qualified investor under a BIT. The Tribunal again notes that there is no danger of double recovery, having regard *inter alia* to the express assurances given by the Claimant in oral argument.[315] Even if the Tribunal has the power to stay the present proceedings, it has not been shown that it is *forum non conveniens* and it would decline to exercise that power. The Respondent's third preliminary objection accordingly fails.

E. SALINI IMPREGILO'S LACK OF STANDING

(1) Argentina's submissions

174. Late in the pleadings Argentina raised the issue of Salini Impregilo's standing.[316] In its view Salini Impregilo cannot bring an arbitral claim as a shareholder in relation to the contractual rights of Puentes. This objection was not formally raised by Argentina as such nor was it addressed by Salini Impregilo as a separate objection to jurisdiction. Nonetheless the Tribunal will deal with it.

175. Salini Impregilo and its consortium partners gave up their rights and obligations under the Concession Contract by transferring them to Puentes.[317] Therefore, in Argentina's view Salini Impregilo ceased to be a party to the contract and Puentes stepped in to replace it.[318] In Argentina's view Salini Impregilo is not a party to the substantial legal relationship that

[315] Transcript, Hearing on Jurisdiction, 29 November 2017, 355-356.
[316] Argentina, Reply on Jurisdiction, para [139].
[317] Salini Impregilo, Request for Arbitration, para [20]; Argentina, Reply on Jurisdiction, para [136].
[318] Argentina, Reply on Jurisdiction, para [136].

gave rise to the claim filed against Argentina in the arbitration and is precluded from bringing any claim to the Tribunal in respect of that relationship.[319]

(2) Salini Impregilo's submissions

176. Salini Impregilo responds that the BIT specifically grants Salini Impregilo standing to bring BIT claims against Argentina and that this is 'established investment arbitration practice'.[320] Salini Impregilo and its investment in Puentes qualify respectively as investor and investment under the BIT.[321] Salini Impregilo did not relinquish its substantial investment in Argentina by signing the Concession Contract.[322]

177. In response to Argentina's claim that Salini Impregilo is bringing claims that are derivative and 'contractual', Salini Impregilo responds that this is not the case: Salini Impregilo, as investor, is bringing BIT claims on its own behalf against Argentina.[323] Further, its claim is not contractual because the origin of the action that Salini Impregilo complains of is a sovereign act of Argentina. It was not conduct by Argentina in the exercise of a contractual power.[324]

(3) The Tribunal's analysis

178. There is substantial authority to the effect that claims such as those presented by Salini Impregilo enjoy protection under the applicable BIT. There is no reason for this Tribunal to take a different view.[325] In particular ICSID decisions show that (absent some express provision in the BIT) there is no material distinction between majority and minority shareholders for jurisdictional purposes[326] and that this right to claim compensation is independent from that of the local subsidiary directly affected by the actions of the host state.[327]

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[319] Ibid, para [139].
[320] Salini Impregilo, Rejoinder on Jurisdiction, para [113].
[321] Ibid, paras [109], [113].
[322] Ibid, para [110].
[323] Ibid, para [111].
[324] Salini Impregilo, Rejoinder on Jurisdiction, paras [118]-[119].
[325] Cf *Impregilo v Argentina*, Award, 21 June 2011, para [140].
[326] M Valasek & P Dumberry, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes* (2011) 26 Foreign Investment Law Journal 47.
[327] Ibid, 49-50.

179. In *Maffezini v Spain,* Spain argued that the Argentine claimant company was a mere shareholder in a Spanish company and had no standing to sue in his own capacity.[328] The tribunal rejected this argument. It referred to the broad definition of 'investment' in the Argentina-Spain BIT[329] and concluded that the claimant was 'an Argentine investor in a Spanish company' with *prima facie* standing.[330]

180. In *CMS v Argentina,*[331] the tribunal discussed Argentina's argument that the claimant lacked standing to proceed with a claim against Argentina because CMS was a minority shareholder in an Argentine company.[332] It observed that Article 25 of the ICSID Convention did not attempt to define 'investment'[333] and that a broad definition of 'investment' was standardly adopted in BITs. It noted that ownership of shares was one of the specific examples of investment given during the negotiations of the ICSID Convention.[334] It concluded that there was no bar to jurisdiction for a minority shareholder in *CMS v Argentina*.[335]

181. In *SAUR v Argentina*[336] the tribunal focused on the wording of the definition of 'investment' in the Argentina-France BIT which explicitly included shares held by minority shareholders. An interpretation which did not give access to arbitration to a minority shareholder would not only be contrary to the wording of the treaty but also to the aim of the contracting parties, which was to extend the protection of the BIT to all kinds of shareholders.[337]

182. In *Hochtief v Argentina,* Argentina argued that Hochtief had no standing as it was attempting to bring a claim to enforce the rights of Puentes.[338] The tribunal held that Hochtief had standing to bring the action as an investor in Argentina under the Argentina-

[328] *Maffezini v Spain*, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, para [65].
[329] Ibid, para [67].
[330] Ibid, para [70].
[331] *CMS Gas Transmission Company v The Republic of Argentina (CMS v Argentina)*, ICSID Case No ARB/01/8, (2003) 42 ILM 788, Decision of the Tribunal on Objections to Jurisdiction.
[332] Ibid, para [36].
[333] Ibid, para [49].
[334] Ibid, para [50].
[335] Ibid, paras [53]-[56].
[336] *SAUR International v Argentine Republic (SAUR v Argentina)*, ICSID Case No ARB/04/4, Decision of the Tribunal in relation to Objections to Jurisdiction, 27 February 2006.
[337] Ibid, paras [87]-[90].
[338] *Hochtief v Argentina*, Decision on Jurisdiction, 24 October 2011, paras [10], [112].

Germany BIT.[339] In particular, it noted the wide definition of 'investment' in the BIT, including 'shares, stocks in companies, and other forms of participation in companies.'[340] The tribunal also noted that the conditions of bidding for the project (the bridge and tollway) included operation through a local company.[341] The fact that Hochtief had assigned its rights to Puentes (as has Salini Impregilo) confirmed the view that Hochtief's investment consisted in its shares in Puentes and other forms of investment recognised under the Argentina-Germany BIT.[342]

183. In *Impregilo. v Argentina*, Argentina argued that Impregilo was bringing a derivative claim on behalf of the company in which it held shares, and that the tribunal lacked jurisdiction to hear this indirect claim.[343] The tribunal found that Impregilo's shares in the Argentine company were protected under the BIT because they were included in the BIT's definition of 'investment'.[344] If it was shown that the Argentine company was subjected to expropriation or unfair treatment in respect of the concession contract, Impregilo's rights as an investor would have been affected.[345]

184. In this case Salini Impregilo, with its consortium partners, formed an Argentine company as required by the terms of the bidding for the Concession Contract. It then transferred its rights and obligations under the Concession Contract to Puentes.[346] While Argentina argues that Salini Impregilo is not a party to the legal relationship that gave rise to the claim filed in the arbitration,[347] at this jurisdictional stage the Tribunal must have regard to the legal relationship between the parties to the arbitration.

185. Article 25 of the ICSID Convention extends the Centre's jurisdiction to any legal dispute arising directly out of an investment, between a Contracting State and a national of another

[339] Ibid, para [119].
[340] Ibid, para [115]; Argentina-Germany BIT, Art. 1(1)(b).
[341] Ibid, para [116].
[342] Ibid, para [117].
[343] *Impregilo v Argentina*, Award, 21 June 2011, para [111].
[344] Ibid, para [138]. The tribunal referred to Argentina-Italy BIT, Art. 1(1)(b) which defines 'Investment' to include 'shares of stock, interests or any other form of participation…in a company'.
[345] *Impregilo. v Argentina*, Award, 21 June 2011, para [138].
[346] Salini Impregilo, Request for Arbitration, para [20].
[347] Argentina, Reply on Jurisdiction, para [136].

Contracting State.[348] Article 25 must be read together with the terms of the BIT, with its broad definition of 'investment'.[349]

186. As in the BIT applicable in *Hochtief v Argentina* the definition of 'investment' is unequivocal in stipulating that the BIT defines investments to include 'shares of stock… including minority or indirect interests'.[350] Salini Impregilo, like Hochtief, owns 26% of the shares in Puentes (though Salini Impregilo owns 4% of those shared indirectly through Iglys). Salini Impregilo's shares in Puentes are an investment pursuant to the BIT. Salini Impregilo is an investor in Puentes, a company incorporated in Argentina and Salini Impregilo is an Italian national. It therefore has standing to bring this claim.

[348] ICSID Convention, Art. 25(1).
[349] Argentina-Italy BIT, Art. 1(b).
[350] Argentina-Italy, BIT, Art 1 (b); see *Hochtief v Argentina*, Decision on Jurisdiction, para [115].

V. DECISION

187. For the reasons set forth above, the Tribunal decides as follows:

(1) To reject the Respondent's preliminary objections to its jurisdiction and to the admissibility of the claims;

(2) To reserve all questions of costs to a later stage of the proceedings.

Professor Kaj Hobér
Arbitrator

Professor Jürgen Kurtz
Arbitrator

Judge James R. Crawford
President of the Tribunal