This article will be published in a future issue of TDM (2012). Check website for final publication date for correct reference.

This article may not be the final version and should be considered as a draft article.
BACK TO THE ETERNAL DEBATE OF MFN AND DISPUTE SETTLEMENT: 
A CASE COMMENT ON ICS V. REPUBLIC OF ARGENTINA.

Antoine Martin*

TABLE OF CONTENTS

Introduction 1
The Parties’ arguments 3
A/ Pre arbitration requirements 3
B/ Applying MFN to jurisdictional matters 4
C/ Umbrella clause, Exclusive jurisdiction Clause, Acquiescence 5
The Tribunal’s conclusions 7
A/ Pre-arbitration requirements 7
B/ MFN clause and dispute settlement mechanisms 8
Conclusion on jurisdiction and final remarks 11

INTRODUCTION

Most-Favoured Nation (MFN) clauses and their possible extension to dispute settlement mechanisms are at the heart of a significant debate in international investments law. This debate is very lively but it is currently unsettled, as demonstrated by persisting disagreements between opposite Schools of thoughts and multiple inconsistencies in arbitral decisions. MFN clauses were reconsidered recently following a claim brought by ICS Inspection and Control Services Limited against Argentina before the Permanent Court of Arbitration (PCA).¹ The PCA arbitrators rendered a decision in February 2011 in which jurisdiction was rejected together with the idea that a MFN can be extended to dispute settlement clauses to allow foreign investors to benefit from more favourable arbitration clauses lacking pre-arbitration requirements. The ICS decision on jurisdiction

* LL.M International Law; PhD Fellow, University of Surrey Faculty of Business, Economics and Law; Visiting Lecturer in International Investments Law, Queen Mary University of London.

¹ ICS Inspection and Control Services Limited (United Kingdom) v Republic of Argentina (UNCITRAL, PCA Case No. 2010-9) - Decision on Jurisdiction February 10, 2012 [hereafter “ICS Inspection v Argentina”].
does not however help identifying a consistent trend. This paper provides a summary of the parties’ arguments as well as a brief commentary as to the conclusions of the arbitrators.

The ICS Inspection and Control Services Limited (United Kingdom) v. Republic of Argentina dispute was raised under the Argentina – UK BIT following the alleged failure of Argentina to respect a contract for auditing services. Argentina designed a programme aimed at detecting fiscal fraud through the inspection of international shipments in the late 1990s. ICS won a tender to audit pre-shipment inspection companies from 1998. The contract imposed a ‘10% cap’ under which ICS’s fees could not exceed ten per cent of the fees paid by Argentina to the pre-shipment inspection companies subjected to the audit. Argentina allegedly provided no framework for the claimant to operate and failed to provide any selection system for ICS to operate despite ICS’ requests. The government’s programme was terminated in 2002. An administrative claim was brought when the authorities eventually imposed new conditions on the claimant. According to ICS, the imposition of Pesos to the contract had a US $3,374,947 cost whilst a reduction of the fees requested to match the 10% cap allegedly generated a US $4,538,571 loss. In addition, the fiscal authorities requested a thirteen per cent decrease in the already reduced fees for a cost of US $90,703 and only partially paid ICS since the claimant was never remunerated for its pre-2001 activities (US $3,035,026). ICS thus initiated a dispute before the PCA under UNCITRAL arbitration rules and requested the payment of US $14,237,762 in interests included into a US $25,277,011 claim covering the costs devoted to its debt-recovery efforts.

Three arbitrators were nominated in 2009 but the tribunal was confronted with several jurisdictional issues. First, it had to determine whether the failure of ICS to disregard the obligation formulated under Article 8 of the UK – Argentina BIT to resort to local courts for an eighteen months period could represent a bar to its jurisdiction. ICS claimed that the MFN clause provided under Article 3 of the Argentina – UK BIT allowed importing the more favourable dispute settlement clause of the Argentina - Lithuania BIT in which no pre-arbitration requirements existed. Argentina rather argued that the eighteen months pre-arbitration period was a jurisdictional requirement deemed fundamental to its consent to arbitration. The parties brought additional jurisdictional arguments. ICS claimed that the tribunal had jurisdiction over the case since an umbrella clause in the treaty allowed elevating contractual disputes into treaty disputes falling under the tribunal’s mandate. Argentina rather argued that there could be no jurisdiction since ICS did not sign any ‘investment’ agreement and disrespected an exclusive jurisdiction clause. The respondent finally argued that the tribunal could have no jurisdiction over the case because the claimant had originally acquiesced to the various measures put in place by Argentina during its economic crisis. The tribunal ignored those arguments to focus on the MFN debate. It
found that (i) the eighteen months period was a prerequisite to arbitration which had to be respected for it to have jurisdiction over the dispute, (ii) added that MFN commitments did not extend to dispute resolution in this very case because the contracting states never intended to do so; (iii) considered that investment treaties without pre-arbitration period requirement are not more favourable than BITs providing direct access to arbitration because multiple recourses offer more protection to foreign investors. It finally justified its decision to reject jurisdiction by interpreting the Argentina-UK treaty but gave little consideration to the various cases mentioned by the parties, especially whilst looking at the role of MFN clauses. It however left the issue of umbrella clauses and acquiescence unanswered.

THE PARTIES’ ARGUMENTS

A/ PRE ARBITRATION REQUIREMENTS

Article 8 of the UK – Argentina BIT set a pre-arbitration period of eighteen month during which the claimant was expected to bring claims before domestic courts before resorting to international arbitration. This point was a major source of disagreement between the parties.

For Argentina, the claim brought by ICS could only fall outside the scope of jurisdiction of the tribunal because Article 8 of the BIT was to be read and understood as “a multi-layered, sequential dispute resolution system” in which the pre-arbitration period and the arbitration mechanisms “are interdependent and interlinked”. Argentina argued that the verb “shall” included in Article 8(1) of the BIT created an obligation to first refer to local courts before submitting any dispute to international arbitration. It justified its position by referring to the Maffezini v. Spain and the Wintershall v. Argentine Republic cases where provisions similar to the one at stake were identified as jurisdictional requirements rather than as mere waiting-periods or mere procedural steps. Furthermore, it added that an administrative claim brought to the attention of the local authorities was “irrelevant” since it was never formally produced before the administrative courts of Argentina despite the existence of a right and obligation of ICS to do so. In Argentina’s opinion, the BIT did not require ICS to exhaust local remedies but merely represented a chance to obtain a favourable decision rather than an excessive burden imposed on the investor. The local courts, indeed, were described as being bound by the UK – Argentina BIT. Thus, those were susceptible of rendering a decision deemed favourable to ICS whilst any decision

---

6 ICS Inspection v Argentina (n1) para 69.
7 ibid para 71.
8 Maffezini v Kingdom of Spain (ICSID Case No. ARB/97/7) - Decision on Objection to Jurisdiction January 25, 2000 [hereafter “Maffezini v Spain”] paras 34-37; Wintershall Aktiengesellschaft v Argentina Republic (ICSID Case No. ARB/04/14) - Award December 8, 2008 [hereafter “Wintershall v Argentina”] paras 133-153, 145.
9 ICS Inspection v Argentina (n1) paras 74-75 “[T]he fact that the Claimant had previously filed administrative claims is irrelevant. When faced with silence on the part of the administrative authorities, the Claimant could have resorted to the courts [...] has provided no evidence that it has been prevented from filing claims with the local courts”.
TRANSNATIONAL DISPUTE MANAGEMENT

(favourable or not) would have permitted recourse to international arbitration. Overall, Argentina qualified the pre-arbitration period under Article 8 of the BIT as an “essential prerequisite” to establishing an arbitral tribunal’s jurisdiction and a premise of its consent to submit investment disputes to international tribunals in last resort. ICS, that is, had thus failed to “comply with a jurisdictional requirement under the BIT” and was by no means allowed to resort to international arbitration.

B/ APPLYING MFN TO JURISDICTIONAL MATTERS

ICS rejected the jurisdictional nature of the pre-arbitration requirement and relied on the BIT’s MFN clause to try importing a more favourable settlement mechanism into the dispute. The BIT between Argentina and Lithuania did not include such a constraining requirement and thus allegedly offered Lithuanian investors a more favourable treatment to which ICS was also entitled under Article 3 (Most Favoured Nation) of the UK – Argentina treaty.

ICS formulated two arguments. Finding that a majority of arbitral tribunals had broadly interpreted MFN clauses as being designed to harmonize the degree of investment protection offered to foreign investors, ICS first identified a “well-settled approach in international investment arbitration recognizing the possibility of relying on MFN clauses to avoid procedural obstacles that are nonsensical and cumbersome”. It thus asserted that the MFN clause allowed importing more favourable dispute resolution procedures found in other BITs entered into by Argentina, and claimed the right to “bypass such unfavourable procedural requirements” to enjoy the benefit of arbitration notwithstanding Article 8 of the BIT. ICS especially relied on the Maffezini v. Spain case in which the MFN clause was applied to import a more favourable dispute settlement provision from a parallel BIT. It also referred to other UNCITRAL cases –such as National Grid plc and AWG Group– brought against Argentina under the UK – Argentina BIT and in which similar approaches were followed. Relying on the necessity to consider the ‘ordinary meaning’ of MFN

---

10 ibid para 76.
11 ibid para 79-80 “[T]he 18-month period during which the dispute must be filed before the local courts is an essential prerequisite to instituting arbitration proceedings and constitutes an integral part of the standing offer of the host State to arbitrate disputes. The host State’s consent to arbitration is premised on there being first submitted to the courts of competent jurisdiction in the Host State the entire dispute for resolution in local courts”.
12 ibid para 69.
13 The harmonization argument was originally developed in Maffezini v Spain (n8) para 62.
14 ICS Inspection v Argentina (n1) para 118.
15 ibid (n1) paras 125-127.
16 ibid “[T]ribunals have regularly allowed investors to bypass such unfavourable procedural requirements” paras 112-114.
17 Maffezini v Spain (n8) para 56 “[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor’s rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause”; See ICS Inspection v Argentina (n1) para 116.
18 National Grid plc v Argentine Republic (UNCITRAL Case C-LA-42) - Decision on Jurisdiction June 20, 2006 [hereafter “National Grid v Argentina”] paras 92-93. The decision concurred with the conclusions of the Maffezini tribunal by finding that “treatment under the MFN clause of the Treaty makes it possible for UK investors in Argentina to resort to arbitration without first resorting to Argentine courts”; See also AWG Group
clauses under the Article 31 of the Vienna Convention on the Law of Treaties. ICS then emphasised a lack of clear intention of the parties to exclude dispute resolution from the scope of application of the BIT’s MFN clause. The dispute resolution clause, it claimed, did not make part of the express exceptions to the MFN commitment. To this extent, the claimant referred to Suez v. Argentina where the failure to expressly exclude international arbitration from the scope of application of the MFN clause led the tribunal to the conclusion that dispute settlement could be associated to MFN clauses.

Argentina discarded those arguments. As already noted, it strongly insisted that the eighteen months period attached to the arbitration offer was a fundamental aspect of Argentina’s consent to dispute internationalisation and therefore constituted the premise of the arbitral tribunal’s jurisdiction not susceptible of being avoided through MFN manipulations. Argentina furthermore limited the scope of application of the MFN clause to the substantive rights provided to the investors but rejected the idea of applying MFN to pre-arbitration requirements described as mere procedural elements.

C/ UMBRELLA CLAUSE, EXCLUSIVE JURISDICTION CLAUSE, ACQUIESCENCE

The parties provided additional arguments to establish or reject the arbitral tribunal’s jurisdiction over the claim but the tribunal left those unconsidered. They are nonetheless mentioned in this section for informative purposes.

ICS attempted to demonstrate the tribunal’s jurisdiction by playing its umbrella clause card. Relying on the debate launched in relation to investment tribunals’ contractual jurisdiction during the nationalisation waves and more recently in SGS v Philippines, Noble Ventures v Romania or Eureko v Poland. ICS suggested that Argentina’s obligation to fulfil all its obligations under the BIT included an obligation to respect contracts entered into with foreign investors. The umbrella clause, that is, allowed elevating a contract violation into a

---

19 Article 31 General rule of interpretation (1). “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

20 ICS Inspection v Argentina (n1) para 120.

21 Suez Sociedad General de Aguas de Barcelona SA & InterAguas Servicios Integrales del Agua SA v Argentine Republic (ICSID Case No. ARB/03/17 (C-LA-56)) - Decision on Jurisdiction May 16, 2006 [hereafter “Suez v Argentina’] para 56, “In negotiating the Argentina-Spain BIT, the Contracting States considered and decided that certain matters should be excluded. The fact that dispute settlement was not covered among the excluded matters must be interpreted to mean that dispute settlement is included within the term ‘all matters’ in paragraph 2‘”.

22 ibid paras 91-92, 95 referring to Telenor Mobile Communications AS v Hungary (ICSID Case No. ARB/04/15) - Award September 13, 2006 para 92 and Berschader v Russian Federation (SCC Case No 080/2004) - Award and Correction April 21, 2006 [hereafter “Berschader v Russian Federation”] para 185 where the tribunals distinguished applying MFN to substantive rights (i.e. standards of treatment) from procedural rights.

23 SGS Société Générale de Surveillance SA v. Republic of the Philippines (ICSID Case No. ARB/02/6) - Jurisdiction January 29, 2004 para 128; Noble Ventures Inc v Romania (ICSID Case No. ARB/01/11) - Award October 12, 2005 para 51; Eureko BV v Poland - Partial Award August 19, 2005 para 246-247.
transitional dispute management

treaty breach falling under the authority of the arbitrators. ICS also argued that the tribunal would have jurisdiction over the case because the administrative measures carried out by Argentina in 2001 and 2002 reflected Argentina’s intention to impair, distort, and reduce the obligations that it had undertaken in the Contract through its emergency laws. Unsurprisingly, Argentina rather contended that such an argument omitted to distinguish between claims for violation of the BIT governed by international law (falling under the jurisdiction of arbitral tribunals) and contractual claims arising out of the alleged breach of contractual provisions (governed by Argentine law). The claim brought by ICS, that is, was described as purely commercial and thus not falling under the scope of normal treaty disputes focusing on the breach of treaty standards.

Argentina moreover contended that the arbitral tribunal had no jurisdiction over the case since ICS had breached its contractual obligation to respect the exclusive jurisdiction of “the competent federal courts of the Argentine Republic” over the dispute. Finally, Argentina argued that ICS took four years to bring the existence of a BIT dispute to the attention of Argentina and thus originally agreed with the various measures questioned in the PCA claim. ICS complained in 2006 about issues occurring in 2002-2003, but the arbitral claim was only brought years later. Argentina contended that ICS never challenged the emergency laws of 2001 and 2002 themselves, neither at the time of their enactment nor at a later stage and never alleged any violation of the BIT in that context thus suggesting the original acquiescence of ICS regarding the incriminated facts. Failure to assert a claim during a reasonable period of time, it said, reflected the implicit acceptance of the extinction of the right to bring such a claim. ICS rejected the argument as being inapplicable in this case and overall denied having acquiesced to the Respondent’s measures.

Those points were ignored by the arbitral tribunal which rather considered jurisdiction by focusing on the value and impact of pre-arbitration requirements and on

25 ICS Inspection v Argentina (n11) para 172 “The Claimant traces the history of the umbrella clause and argues that, since its origins, the umbrella clause was meant to be interpreted in a broad way [...] breaking with the dualist framework of international law and providing an enforcement mechanism for host State promises, independent of whether breaches were of a sovereign or a commercial nature”.

26 ibid para 175.

27 ibid para 141. See also para 146 “The Contract is governed by Argentine law and is subject to Argentine jurisdiction. The Parties freely agreed not to include any type of reference to the application or protection of the BIT. The Respondent contends, therefore, that the Contract is a domestic contract rather than an investment agreement”. See also Para 152 “The Respondent thus argues that not all contractual claims become BIT claims automatically by virtue of the umbrella clause. This ignores the difference between the domestic and international legal systems”.

28 ibid paras 142-144. See also para 154 “The Respondent concludes that the Contract for auditing services entered into with the Claimant falls into the category of ordinary commercial agreements”.

29 ibid para 160.

30 ibid p195, 199.

31 ibid para 196-197, 202 “In particular, the doctrine of acquiescence has the following requirements for its application: (1) that the claimant has not made a claim; (2) the failure to bring the claim should have occurred during a reasonable period of time; (3) the claimant must have been expected to act, but failed to do so [...] the Claimant has acquiesced since its conduct meets the three requirements [...] The Respondent contends that “if the foreign investor does not submit its claim within a reasonable period of time, he is deemed to have acquiesced and the claim is forfeited by virtue of the extinctive prescription rules under international law”.

32 ibid paras 209, 214.
ICS’ ability to import more favourable dispute settlement provisions under the BIT’s MFN provision.

**THE TRIBUNAL’S CONCLUSIONS ON MFN AND DISPUTE SETTLEMENT**

**A/ PRE-ARBITRATION REQUIREMENTS**

The PCA arbitrators considered the pre-arbitration requirements according to three perspectives. First, the tribunal analysed the nature of the pre-arbitral requirement and considered the importance for the parties to the BIT of submitting the dispute to domestic courts before having recourse to international arbitration. Emphasising a trend in public international law clearly favouring the strict application of procedural prerequisites, the tribunal approved Argentina’s argument that the verb “shall” left no ambiguity as to the existence of an obligation to submit disputes to the host’s courts for a period of eighteen months. It concluded that the pre-arbitration requirement included under Article 8 of the BIT was neither a mere waiting period nor a requirement of exhaustion of local remedies:

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

Second, the tribunal considered the impact of such a mandatory requirement on the parties’ disputes, in terms of jurisdiction, admissibility and procedure. Having emphasised that arbitral tribunals enjoy extensive discretion regarding procedural matters under UNCITRAL Arbitration Rules, it however insisted on the importance of consent in establishing their jurisdiction. The admissibility of a claim, that is, was to be found “somewhere in between these extremes” and was to be measured in terms of the impact of the failure to fulfil procedural requirements on the state’s consent to submit disputes to international arbitration. The tribunal concluded that the pre-arbitration requirement was so fundamental to Argentina’s consent to submit disputes to arbitration that it lacked jurisdiction over the dispute:

*As a result, the failure to respect the precondition to the Respondent’s consent to arbitrate cannot but lead to the conclusion that the Tribunal lacks jurisdiction over the present dispute.*

---

33 ibid para 250.
34 ibid paras 246-248, 251.
35 ibid paras 254-255.
36 ibid paras 256-258 “Admissibility falls somewhere in between these extremes. It is not an area where a tribunal enjoys discretion to simply disregard the requirement that has not been fulfilled, but rather one in which the tribunal enjoys some discretion as to how to deal with its non-fulfilment, such as by staying instead of terminating the proceedings [...] The question is therefore whether the requirement of prior submission to the Argentine courts falls within the “conditions to which [Argentina’s] consent [to arbitration] is subject” or whether non-compliance nevertheless does not affect the underlying consent to arbitrate the present dispute”.

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

The tribunal finally considered whether it could possibly ignore the pre-arbitration prerequisite because of their possible futility or inefficiency but it answered this question negatively. Since Argentina’s Emergency Law would have precluded ICS from normal recourses to domestic courts, the pre-arbitration requirements was found to be “only theoretical”. The tribunal however noted that the futility of the pre-arbitration requirement had not been demonstrated by ICS and thus ignored the point. It rather focused on the idea that although Argentina had made an offer to arbitrate, such an offer was unconditional and made on a “take it or leave it” basis thus granting ICS no right to “vary its terms”. It therefore concluded that:

[T]he intention of Article 8(1) was the establishment of the exclusive jurisdiction of domestic courts for a period of either 18 months or until a final decision is rendered, whichever is shorter. The Tribunal further finds that the Claimant has manifestly not complied with this prerequisite and that there is no compelling reason to exempt the Claimant from its application on the basis of futility or otherwise. The Tribunal must thus decline jurisdiction unless it can find an alternative basis for the Respondent’s consent to arbitration.

B/ MFN CLAUSE AND DISPUTE SETTLEMENT MECHANISMS

Given the jurisdictional importance of the pre-arbitration requirement, relying on the MFN clause to import a more favourable dispute settlement provision from another BIT entered into by Argentina was the main alternative for identifying Argentina’s consent to arbitration. As already mentioned, Argentina however clearly rejected the idea of subjecting the dispute settlement mechanism of the BIT to the scope of application of the MFN clause. The argument was that MFN clauses only apply to the substantive rights but not to procedural elements.

The tribunal nonetheless had to establish whether the MFN clause was intended by the parties as consent to submit disputes to arbitration as planned under other BITs. It unequivocally suggested that MFN clauses could naturally extend to dispute settlement but also insisted that MFN provisions “must” as a general principle act beyond the prevention of.

---

37 ibid para 262.
38 Referring to Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v Argentine Republic (ICSID Case No. ARB/07/5) - Decision on Jurisdiction and Admissibility August 4, 2011 where futility was successfully used to allow derogation from a similar prerequisite.
39 For the tribunal, recourse to local courts “could not have led to an effective resolution of the dispute” so that “it would have been unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the eighteen months litigation requirement”, ICS Inspection v Argentina (n138) paras 263-264, quoting Abaclat v Argentina (n) para 583.
40 ICS Inspection v Argentina (n1) para 269.
41 ibid para 272.
42 ibid para 273.
43 ibid para 95.
A CASE COMMENT ON ICS V. REPUBLIC OF ARGENTINA

of discrimination and ought to allow attracting more favourable consents to arbitrations from other BITs. Following the requirements of Article 31(1) of the Vienna Convention on the Law of Treaties, the arbitrators however insisted that importing a more favourable dispute settlement arrangement from another BIT required conformity with the ‘ordinary meaning’ of the MFN clause included in the BIT at stake. Since the BIT hardly clarified the ‘ordinary meaning’ of the MFN ‘treatment’, the tribunal interpreted the clause’s broadness as not expressly excluding dispute settlement from the scope of application of the MFN clause.

Having said that, the ICS tribunal held that the demanding nature of the dispute settlement mechanism did not in this case allow extending MFN to international arbitration. Four arguments were brought forward. First, the tribunal identified the original intent of the state parties towards MFN by analysing the general context surrounding the BIT’s signature. It concluded that, for the parties, the MFN clause originally aimed at preventing discrimination to protect the host legal regime but did not encompass dispute settlement mechanisms which remained independent:

On the basis of the above examination of sources contemporary to the BIT, the Tribunal’s view is that the term “treatment”, in the absence of any contrary stipulation in the treaty itself, was most likely meant by the two Contracting Parties to refer only to the legal regime to be respected by the host State in conformity with its international obligations, conventional or customary. The settlement of disputes meanwhile remained an entirely distinct issue, covered by a separate and specific treaty provision. Thus, when the text of the MFN clause is silent about extending its application to dispute settlement provisions and Article 8(1) of the same BIT provides a mechanism for dispute settlement between an investor and the host State in respect of all investment disputes which “arise within the terms of this Agreement”, the context represented by Article 8(1) plays a determinative role in the ascertainment of the ordinary meaning of the terms of the MFN clause.

Second, the tribunal emphasised that the MFN clause had a strictly territorial dimension. Thus, even if the scope of application of the clause could be extended to dispute settlement mechanisms, it would be limited to domestic dispute settlement solutions and would only be about guaranteeing similar access to domestic protections to all foreign investors alike. International arbitration, by contrast, appeared as a specially

44 ibid para 278 “the MFN clause must constitute more than a mere prohibition of discrimination between investors based on their provenance: the MFN clause must also be in itself a manifestation of consent to the arbitration of investment disputes according to the rules that the MFN provision might attract from other comparator treaties”.
45 Vienna Convention on the Law of Treaties 1969, Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155 “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.
46 ICS Inspection v Argentina para 283.
47 “There is no textual basis or legal rule to say that ‘treatment’ does not encompass the host state’s acceptance of international arbitration” ibid paras 285-286.
48 ibid para 296. Similarly, the tribunal questioned the idea that the protection of the “management, maintenance, use, enjoyment or disposal of” investments under the BIT was intended by the Contracting Parties as encompassing dispute settlement mechanisms, see para 300.
49 The clause reads (“Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that [...]” Emphasis added.
negotiated extra-territorial protection complementary to the dispute settlement arrangement guaranteed to all foreign investors under the MFN clause:

The instant MFN clause still does not apply to international arbitration. The host State’s obligation extends no further than providing the covered investor with “treatment” in respect of domestic dispute resolution (i.e., dispute resolution “in its territory”) that is no less favourable than the domestic dispute resolution treatment provided to investors from third States [...] It is difficult to see how an MFN clause containing this phrase could be applied to international arbitration proceedings without discounting the explicit territorial limitation upon the scope of the clause. This pragmatic incongruity prevents the Tribunal from presuming – in the absence of any affirmative evidence – that the Contracting Parties to the present Treaty implicitly intended to include international dispute resolution within the purview of the MFN clause. If such were their intent, it would seem strange that they should impose a territorial limitation so at variance with that aim.50

Third, the arbitrators refused to extend the scope of the MFN clause to include dispute settlement mechanisms on the ground that such a possibility was never considered by the contracting states.51 For the tribunal, analysis of Argentina’s BIT practice could not suggest that Argentina ever intended to extend MFN to dispute settlement provisions:

The terms of [...] the MFN clause, should not be interpreted in a way that deprives [...] the dispute resolution clause, of any meaning without a clear intention to achieve that result. The principle of contemporaneity avoids this incongruity by preferring the interpretation consistent with Argentina’s demonstrated treaty practice – namely, that Argentina did not in 1990 understand the term “treatment” to include the BIT’s international arbitration procedures.52

Finally, the arbitral tribunal considered whether a dispute settlement requesting no pre-arbitration period (such as Article 9 of the Argentina – Lithuania BIT) actually constituted a more favourable treatment in the best interest of ICS. It however considered that multiple domestic and international recourses were more favourable to foreign investors than a clause restricting dispute settlement to international arbitration only. On the one hand, the arbitrators noticed that “differential treatment does not automatically constitute ‘less favourable’ treatment”. Whether the treatment granted to the investor was more or less favourable than another could not only be about the best interest of a single investor at the time of a dispute. What matters is whether the treatment is generally more favourable, whether it is susceptible of generally preventing disparities between foreign investors.53 Thus, the specific interest of ICS did not meet this general interest requirement. On the other, the arbitrators emphasised that the dispute settlement included into the Argentina – Lithuania BIT contained a ‘fork-in-the-road’ provision forcing Lithuanian investor to make an irreversible choice between local remedies and international

50 ICS Inspection v Argentina (n1) paras 308-309.
51 ibid para 313.
52 ibid paras 316-317.
53 “The analysis cannot, however, be limited to a simple consideration of what is more or less favourable for a given investor in the particular circumstances in which they find themselves when a dispute arises. The treatment identified must be more favourable in a general manner such that the clause performs its purpose of averting distortions in the competition between investors of different provenance” ibid para 319.
Arbitration. It was therefore concluded that the selective Lithuanian dispute settlement clause could not be more favourable than a clause offering successive recourse to both domestic and international tribunals which overall "effectively gives an investor two bites at the apple".

Conclusion on Jurisdiction and Final Remarks

The tribunal overall considered that it had no jurisdiction to deal with the claim. First, the failure of ICS to comply with the pre-arbitration period disregarded a prerequisite obligation deemed fundamental to Argentina’s consent to submit disputes to international arbitrators. Second, although the decision emphasises that MFN provisions generally ought to be interpreted widely enough to apply to dispute settlement agreements, the tribunal considered that the ordinary meaning of the MFN clause contained in the Argentina – UK BIT rather suggested that dispute settlement did not fall under its scope of application in this very case. This is because the MFN clause had a territorial limitation offering uniformity in accessing domestic courts to foreign investors international arbitration would remain an extraterritorial complementary recourse. This is also because the tribunal found no indication in Argentina’s treaty practice suggesting that the parties ever intended to extend MFN treatment to dispute settlement. Last but not least, the tribunal considered that a dispute settlement clause providing less recourse to foreign investors could not be more favourable than a clause offering multiple dispute settlement venues.

The ICS decision on jurisdiction overall does not provide much help in solving disagreements as to the applicability of MFN clauses to dispute settlement agreements. It does not take a stand for one or another School of thoughts regarding the importation of allegedly more favourable dispute settlement mechanisms. A School of thoughts developed after Maffezini suggests that it makes complete sense to import more advantageous dispute settlement provisions under the MFN clause of a treaty provided that the decision to do so does not encourage treaty shopping or other excesses (Maffezini, Siemens, Gas Natural, AWG Group, National Grid, Suez, Hochtief). Another School of thoughts developed after the Salini and Plama decisions rather contends that, as a presumption, MFN clauses should not be applicable to dispute settlement mechanisms unless the contracting parties have expressly

---

54 ibid paras 322-323 “Although there are costs and delay involved in litigating before the Argentine courts if this fails to achieve a resolution, in many circumstances, this may be more favourable than direct access to international arbitration after only six months of amicable negotiations. The Tribunal therefore does not find that Lithuanian investors are necessarily accorded more favourable treatment as compared to the UK investor in Argentina”.
55 ibid para 327.
56 ibid para 326.
57 Maffezini v Spain (n8) para 56; Siemens v Argentine Republic (ICSID Case No. ARB/02/8) - Decision on Jurisdiction August 3, 2004 [hereafter “Siemens v Argentina”] paras 102-103; Gas Natural SDG SA v The Argentine Republic (ICSID Case No. ARB/03/10) - Questions on Jurisdiction [June 17, 2005] [Hereafter “Gas Natural v Argentina”] para 49; AWG Group v Argentina (n18) para 57, National Grid v Argentina (n18) paras 92-93; Suez v Argentina (n21) para 57; Hochtief AG v The Argentine Republic (ICSID Case No. ARB/07/31) - Decision on Jurisdiction October 24, 2011 [hereafter “Hochtief v Argentina”] para 66.
admitted this possibility (Salini, Plama, Berschader, Austrian Airlines, Wintershall). As recently seen in Impregilo, this theory provides a sensible adaptation of the Maffezini case (where the MFN clause was applicable to “all matters under the treaty) and a consistent case law indeed seems to suggest that MFN clauses would essentially allow importing more favourable dispute settlement provisions where the MFN clause is applicable to “all matters” under the BIT.

As tribunals emphasised in Berschader and Impregilo, the MFN v. dispute settlement debate is therefore characterised by a general uncertainty which ICS does not help dissipating. The ICS decision on jurisdiction does not simply follow one or another approach but offers a conflicting mix of both. As previously noted, the ICS tribunal considered that “the MFN clause must constitute more than a mere prohibition of discrimination between investors based on their provenance [and] must also be in itself a manifestation of consent to the arbitration of investment disputes according to the rules that the MFN provision might attract from other comparator treaties”. By saying so, the decision significantly concurs with the Maffezini tribunal’s conclusion that MFN provisions are in principle applicable to dispute settlement. It would thus seem to reject the Plama idea that MFN treatments are presumptively not applicable to dispute settlement unless otherwise and unambiguously stated. At the same time, the ICS tribunal clearly concurs with the Salini idea that the original intentions of the parties ought to prevail. It even ends-up concluding that the parties never intended to apply MFN to international dispute settlement. Hence, despite an original assumption that MFN ought to apply to international arbitration, the tribunal seems to confirm the arbitral trend started with Salini and Plama according to which international dispute settlement clauses are specifically negotiated and cannot fall under the scope of application of MFN clauses unless the latter apply to “all matters”.

ICS conflicts with other arbitral decisions on additional points. For instance, both ICS and Impregilo tribunals seem to agree that MFN cannot be systematically extended to international dispute settlement but they arrive to this conclusion through different routes. The ICS view is that the territorial nature of MFN clauses excludes international dispute

58 Salini Costrittori SpA and Italstrade SpA v Kingdom of Morocco (ICSID Case No Arb/00/04) - Decision on Jurisdiction July 23, 2001 [hereafter “Salini v Jordan”] paras 118-119; Plama Consortium Limited v Bulgaria (ICSID Case No. ARB/03/24 (ECT)) - Decision on Jurisdiction February 8, 2005 [hereafter “Plama v Bulgaria”] para 223; Berschader v Russian Federation (n23) paras 179-181; Austrian Airlines v Slovak Republic (UNCITRAL) - Final Award October 20, 2009 [hereafter “Austrian Airlines v Slovakia”] para 138; Wintershall v Argentina (n8) para 162.

59 Impregilo SpA v Argentine Republic (ICSID Case No. ARB/07/17) - Award [June 21, 2011] [hereafter “Impregilo v Argentina”], paras 104-108; This is to the exception of the Berschader decision which rejected this possibility, Berschader v Russian Federation (n23) para 106.

60 Berschader v Russian Federation (n23) paras 179-180 “While it is universally agreed that the very essence of an MFN provision in a BIT is to afford all investors all material protection provided by subsequent treaties, it is much more uncertain whether such provisions should be understood to extent to dispute resolutions. It is so uncertain, in fact, that the issue has given rise to different outcomes in a number of cases and to extensive jurisprudence on the subject”; See also Impregilo v Argentina (n59) para 107 “It appears from these awards that some tribunals have had rather strong reservations about the general development of the case law in this area. It is therefore clear that these issues remain controversial and that the predominating jurisprudence which has developed is in no way universally accepted”.

61 ICS Inspection v Argentina (n1) para 278.
settlement mechanisms because these are specifically negotiated by the parties. By contrast, the *Impregilo* view is that the specifically negotiated nature of arbitration clause has no impact on MFN provisions: what counts is whether the MFN is drafted to apply to ‘all matters’ or not. The tribunal then dealt with the difficult question of what constitutes a more favourable treatment but it again contradicted previous decisions when it decided that benefiting from both local and international courts was more favourable than direct recourse to arbitration. In *AWG Group* for instance, the absence of obligation to submit a dispute to local courts was deemed more favourable whilst the existence of a choice prevailed in *Austrian Airlines* and *Impregilo*. Moreover, although a debate as to the difference between substantive and procedural rights was raised by the parties, the tribunal’s decision hardly considered it and thus failed to contribute to the debate. Some uncertainty regarding the status of MFN clauses can finally be seen in relation to the value of pre-arbitration requirements. The *ICS* tribunal confirmed the idea developed in *Plama*, *Wintershall*, *Impregilo* that such elements could constitute mandatory jurisdictional requirements which, if not complied with, would deprive tribunals from jurisdiction because the consent of the host state to submit disputes to arbitration under specific circumstances would not be met. The point was however questioned in various decisions so there seems to be no consensus on this point so far. Inconsistencies and legal uncertainty it is, then.

62 *Impregilo v Argentina* (n59) para 100; *ICS Inspection v Argentina* (n1) para 309
63 *ICS Inspection v Argentina* (n1) paras 319-323.
64 *AWG Group v Argentina* (n18) para 57; *Austrian Airlines v Slovakia* (n58) para 100; *Impregilo v Argentina* (n59) para 101.
65 *Plama v Bulgaria* (n58) para 224; *Wintershall v Argentina* (n8) para 145; *Impregilo v Argentina* (n59) paras 90-91.
66 The opposite argument was defended in *TSA Spectrum de Argentina SA v Argentine Republic (ICSID Case No. ARB/05/5) - Award* December 19, 2008 paras 112-113; *Austrian Airlines v Slovakia* (n58) para 83 and *Suez v Argentina* (n21) para 63.