PCA Case No. 2013-34

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF BARBADOS AND THE REPUBLIC OF VENEZUELA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

-between-

VENEZUELA US, S.R.L.

(the "Claimant")

-and-

THE BOLIVARIAN REPUBLIC OF VENEZUELA

(the "Respondent", and together with the Claimant, the "Parties")

DISSENTING OPINION OF PROFESSOR MARCELO G. KOHEN (ON THE RESPONDENT'S OBJECTION TO JURISDICTION *RATIONE VOLUNTATIS*)

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26 July 2016

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I. INTRODUCTION

1. With deepest regret, I feel compelled to vote against the decision of the majority rejecting the Respondent's Objection to Jurisdiction *ratione voluntatis*. Doing so is all the more frustrating since I concur in general with the Tribunal's decision that the Investor-State Dispute Settlement (ISDS) provision in Article 8 of the Bilateral Investment Treaty (BIT) between Barbados and Venezuela does not constitute a basis of jurisdiction *per se*.[1] This was the main basis for jurisdiction invoked by the Claimant. In addition, the Claimant argued that the most favoured nation treatment clause (hereinafter "MFN clause") of Article 3 was applicable to the ISDS provision in Article 8 offering another basis of jurisdiction. This argument for jurisdiction was accepted by my distinguished colleagues. I regret in particular that the majority embarked upon a different construction of Article 8 to that used first while applying it to the provisions of the MFN clause in Article 3 (2). The Tribunal unanimously agrees that "the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the BIT between Barbados and Venezuela".[2] Despite this position, and the explicit contention that it is not doing so,[3] this is unfortunately the approach that the majority has taken in its decision: to import the consent Venezuela has made regarding UNCITRAL arbitration in other BITs to the present case in which there is none. This is the first time in which a tribunal has accepted that possibility.

2. The question the Tribunal had to decide was one which constitutes the very foundation and the basis of the existence of jurisdiction for any international court or tribunal: whether a State has given its consent or not. International courts and tribunals must be extremely cautious in this regard: an exercise of jurisdiction in a dispute by which consent has not been given constitutes a serious infringement of the sovereignty of the State or States concerned.[4]

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[1] Interim Award, para. 89.

[2] Interim Award, para. 105.

[3] Interim Award, para. 111.

[4] Professor Georges Abi-Saab explains the situation in the following terms: "In international law, all tribunals — not only arbitral, but even judicial — are tribunals of attributed, hence limited jurisdiction … This is because, in the absence of a centralized power on the international level that exercises the judicial function through a judicial system empowered from above (or rather incarnating the judicial power as part of the centralized power), all international adjudicatory bodies are empowered from below, being based on the consent and agreement of the subjects (i.e. the litigants, les justiciables) themselves … This is the reason why, the fundamental principle and basic rule in international adjudication, is that of the consensual basis of jurisdiction … It explains as well the widely shared perception that the first task of an international tribunal is to ascertain its jurisdiction; and the great care international tribunals take in establishing from the outset, the existence and limits of the consent of the parties before them, on which their jurisdiction is founded." *Abaclat and Others v Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion to Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 7 and 8.

3. This requirement for such care in the exercise of the *Kompetenz-Kompetenz* principle is even more acute in the case of *ad hoc* tribunals in which arbitrators are appointed to deal with a given dispute and consequently not acting as members of a permanent pre-established judicial body. This is more acute still in investment arbitration, in which the potential number of claimants invoking any kind of formula to establish consent and thereby the creation of tribunals could be unlimited. In my view, the majority of this Tribunal has erred in the exercise of its jurisdiction to decide on jurisdiction *ratione voluntatis* for the reasons I set out below.

4. The question of the applicability of MFN clauses to ISDS provisions contained in BITs has been an object of contention at the doctrinal level and in case law. Starting with the decision in *Maffezini*, MFN provisions have been invoked as regards ISDS clauses for different purposes: (1) to avoid preconditions to arbitration such as resorting to local tribunals for a period of time (usually 18 months) before going to investor-State arbitration; [5] (2) to broaden the ISDS provision when that provision is limited to questions relating to the "amount of compensation" or to "expropriation" or similar; [6] (3) to import a definition of "investment" or "investor"; [7] (4) to apply

[5] *Maffezini v Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000; *Siemens AG v Argentina*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004; *Gas Natural SDG SA v Argentina*, ICSID Case No ARB/03/10, Decision on Jurisdiction, 17 June 2005; *Telefónica v Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006; *National Grid v Argentina*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Suez and ors v Argentina*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006; *Suez and ors v Argentina*, ICSID Case No ARB/03/19, Decision on Jurisdiction, 03 August 2006; *Wintershall v Argentina* , ICSID Case No ARB/04/14, Award, 8 December 2008; *Impregilo SpA v Argentina*, ICSID Case No ARB/07/17, Final Award, 21 June 2011; *Hochtief AG v Argentina* , ICSID Case No ARB/07/31, Decision on Jurisdiction, 24 October 2011; *ICS v Argentina*, PCA Case No 2010-9, Award on Jurisdiction (10 February 2012); *Daimler Financial Services AG v Argentina*, ICSID Case No ARB/05/1, Award, 22 August 2012; *Teinver SA v Argentina*, ICSID Case No ARB/09/1, Decision on Jurisdiction, 21 December 2012; *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan,*, ICSID Case No ARB/10/1, Award, 2 July 2013; *Dede and Elhüseyni v Romania*, ICSID Case No ARB/10/22, Award, 5 September 2013.

[6] *Salini Costruttori SpA and Italstrade SpA v Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction, 15 November 2004; *Berschader v Russian Federation*, SCC Case No 080/2004, Award and Correction, 21 April 2006, para. 185; *Telenor Mobile Communications AS v Hungary*, ICSID Case No ARB/04/15, Award, 22 June 2006; *Renta 4 SVSA and ors v Russian Federation*, SCC Case No 24/2007, Award on Preliminary Objections, 20 March 2009; *Tza Yap Shum v Peru*, Decision on Jurisdiction, ICSID Case No ARB/07/6; *Austrian Airlines v Slovakia* UNCITRAL, Final Award, 09 October 2009; *European American Investment Bank AG (EURAM) v Slovak Republic*, UNCITRAL, Award on Jurisdiction, 22 October 2012; *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v Republic of Poland*, UNCITRAL, Award, 14 February 2012; *Accession Mezzanine Capital LP and Danubius Kereskedöház Vagyonkezelö v Hungary*, ICSID Case No ARB/12/3, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), 16 January 2013; *Emmis International Holding, BV and ors v Hungary*, ICSID Case No ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), 11 March 2013; *ST-AD GmbH v Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013; *Sanum Investments Limited v Lao People's Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013.

[7] *Yaung Chi Oo Trading Pte Ltd v Myanmar*, ASEAN Case No ARB/01/1, Award; *Société Générale v Dominican Republic*, UNCITRAL, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September

the international investment agreement retroactively;[8] (5) to avoid emergency clauses or exceptions in international investment agreements;[9] (6) to invoke other dispute settlement mechanisms;[10] and (7) to incorporate investor-State arbitration into a treaty that does not have a valid investor-State arbitral provision.[11] With the exception of situation (1), where there are opposing views, tribunals have consistently rejected the use of MFN provisions to alter the scope of the ISDS provisions or to create consent, with only two exceptions (*RosInvest* and *Garanti Koza*). As for the first situation, numerous tribunals have accepted this possibility[12] while other tribunals (generally speaking more recent ones) consider that this is not possible.[13]

5. One aspect that distinguishes the present case from most cases concerning MFN and ISDS provisions — irrespective of the reasoning followed by some tribunals — is that in the first six situations, there was in the applicable treaty at least a limited but nonetheless available offer to arbitrate. In the last category (situation (7)), in which this case falls, as I will develop below, there has been no available arbitration offer in the base treaty and tribunals analysing similar situations have — prior to this case — unanimously rejected the possibility of creating consent through the MFN provision.

2008; *HICEE BV v Slovakia*, PCA Case No 2009-11, Partial Award, 23 May 2011; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Decision on Jurisdiction, 22 August 2008; *Rafat Ali Rizvi v Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction, 16 July 2013; *Metal-Tech Ltd. v Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013. See also, *Berschader v Russia, supra* footnote 6, para. 188; *Canadian Cattlemen for Fair Trade v United States*, UNCITRAL, Award on Jurisdiction, 28 January 2008.

[8] *Técnicas Medioambientales Tecmed SA v Mexico* ICSID Case ARB(AF)/00/2, Award, 29 May 2003; *MCI Power Group LC and New Turbine Inc v Ecuador*, ICSID Case No ARB/03/6, Award, 26 July 2007.

[9] *CMS Gas Transmission Company v Argentina*, ICSID Case No ARB/01/8, Award, 25 April 2005, para. 377; *Mesa Power Group, LLC v Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, 24 March 2016, para. 401.

[10] *Plama Consortium Limited v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005; *Garanti Koza LLP v Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, 3 July 2013.

[11] *Walter Bau AG v Thailand*, UNCITRAL, Award, 1 July 2009 (during the proceedings the Claimant acknowledged that the provision it was invoking was not really an MFN clause). See also *EURAM v Slovak Republic, supra* footnote 6, para. 447 and *Hochtief v Argentina, supra* footnote 5, paras. 79-82.

[12] *Maffezini v Spain, supra* footnote 5; *Siemens v Argentina, supra* footnote 5; *Gas Natural v Argentina, supra* footnote 5; *Telefónica v Argentina, supra* footnote 5; *National Grid v Argentina, supra* footnote 5; *Suez I, supra* footnote 5; *Suez II, supra* footnote 5; *Impregilo v Argentina, supra* footnote 5; *Hochtief v Argentina, supra* footnote 5; *Teinver v Argentina, supra* footnote 5.

[13] *Wintershall v Argentina, supra* footnote 5; *ICS v Argentina, supra* footnote 5; *Daimler v Argentina, supra* footnote 5; *Kılıç v Turkmenistan, supra* footnote 5; *Dede v Romania, supra* footnote 5.

6. The 2015 *Final Report of the Study Group of the International Law Commission on the Most-Favoured Nation Clause* has been very cautious while affirming that "[a]lthough controversial in some of the earlier decisions of tribunals, there is little doubt that *in principle* MFN provisions are capable of applying to the dispute settlement provisions of BITs".[14] To put it otherwise, if MFN clauses can be applied to ISDS provisions, this is not the case in any circumstance, and even less automatically applicable. As will be demonstrated in this opinion, the majority decision is the one that has gone the farthest in the use of a MFN clause in order to establish jurisdiction.

7. This dissenting opinion is divided into two main parts. The first part examines the scope of the MFN clause of Article 3 (**II.**). Here, I will demonstrate that the MFN clause of Article 3(2) cannot be applied to Article 8. Also, that even assuming that this clause were applicable to Article 8, and there were an obligation by Venezuela *to offer* UNCITRAL arbitration to Barbadian investors, there is still *no consent* by Venezuela to this arbitration. The second part of this dissent is an interpretation of the ISDS provision of Article 8 of the BIT (**III.**). I will also show that, in the current situation, it is impossible to find consent to UNCITRAL arbitration in Article 8(4). The statement of dissent will finish with some concluding remarks (**IV.**).

[14] STUDY GROUP ON THE MOST-FAVOURED-NATION CLAUSE, FINAL REPORT, ANNEX TO THE REPORT OF THE INTERNATIONAL LAW COMMISSION, 70 UNGAOR SUPP. NO. 10, UN DOC. A/70/10 (14 August 2015), p. 182, para. 162.

II. THE WORDING OF ARTICLE 3 (3) OF THE BIT AND THE DETERMINATION OF ITS SCOPE

8. To facilitate the reading of this opinion, Article 3 of the Barbados-Venezuela BIT is cited here again:

> **National Treatment and Most-favoured-nation Provisions**
>
> (1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.
>
> (2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.
>
> (3) The treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

9. In this section, I will explain why Article 3 (3) does not automatically imply the applicability of the MFN clause to Article 8 and indeed why it is not applicable **(A)**. After having interpreted Article 3 (2) (**B**), I will also demonstrate that even applying the MFN Clause of Article 3 (2) to Article 8, there is still no jurisdiction *ratione voluntatis* **(C)**.

A. ARTICLE 3 (3) DOES NOT AUTOMATICALLY LEAD TO THE APPLICATION OF THE MFN CLAUSE TO ARTICLE 8

10. Both parties to this case agree that Article 8 is governed by the MFN clauses contained in paragraphs (1) and (2) of Article 3 since its paragraph (3) states that "[t]he treatment provided for in paragraphs (1) and (2) (…) shall apply to the provisions of Articles 1 to 11 of this Agreement". They disagree just with regard to the scope of this applicability. The Tribunal is not bound by the interpretation to the provisions of the BIT followed by the parties to the case. Furthermore, the parties to this case are not identical to those of the Treaty. Only one party to the BIT is a party to this dispute. It may be that the parties to the case are simply wrong in their interpretation. I feel no need to demonstrate that international courts and tribunals can follow and indeed have followed a different interpretation of a conventional provision than those advanced by the parties to a case. The Tribunal's majority also took for granted the applicability of Article 3 to Article 8.

At first sight, this indeed appears to be the case, since evidently Article 8 is included in the formula "Articles 1 to 11". As I will demonstrate, this is not enough, however, to conclude as to the "applicability" of Article 3 (2) to Article 8, as the majority's decision contends.[15] I will proceed then to examine the content of Article 3 (3) following the rules of interpretation of the Vienna Convention on the Law of Treaties, which reflects the status of general international law in this field, as is widely agreed.

11. Article 3 (3) of the Barbados-Venezuela BIT is not drafted in an exemplary way.[16] The reference to "Articles 1 to 11" has necessarily as a condition *the material and/or logical possibility* that paragraphs (1) and (2) of Article 3 were indeed applicable to each of the aspects of these articles. It is apparent that many of Articles 1 to 11 are clearly not candidates for that. Furthermore, in some cases the attempt to apply them would even lead to ridiculous situations. Thus, it is very difficult to envisage the applicability of Article 3 (1) and (2) to Article 1 (Definitions), obviously to Article 3 itself (!), to Article 4 (which contains its own autonomous similar clause), to Article 7 (which contains exceptions to the MFN Clause itself), to Article 9 (which establishes a dispute settlement provision *between the Contracting Parties* and is not relevant at all to MFN treatment to investments or investors clauses), and to Article 11 (which imposes the application of other Rules more favourable than those provided for by the BIT, among them obviously Article 3, rendering the application of the latter impossible). This (rather long) list of non-relevant articles notwithstanding their reference in paragraph (3) suffices to demonstrate that the mere inclusion of Article 8 in the general reference to "Articles 1 to 11" is not enough for assuming the applicability of the MFN clause of Article 3 (2) to Article 8.

12. As the ILC Study Group Final Report has recognised:

> There are certain parameters (*ratione materiae, ratione personae, ratione temporis* etc.) within which an MFN provision must operate, and thus the question becomes whether the conditions relating to access to dispute settlement are themselves a relevant parameter. The application of an MFN provision cannot be completely open-ended. As draft article 14 of the 1978 draft articles provides: "The exercise of rights arising under a most-favoured-nation clause for the beneficiary State or persons or things in a determined relationship with that State is subject to compliance with the relevant terms and conditions laid down in the treaty containing the clause or otherwise agreed between the granting State and the beneficiary State." There is no doubt

[15] Interim Award, para. 102.

[16] I am aware that other BITs use the same or similar formulas. I confine my analysis to the text of the treaty the Tribunal has to examine for the purposes of the case.

> that if a State has consented in a BIT to recognize certain categories of persons as investors, an MFN provision cannot be invoked to change those categories.[17]

13. Article 3 (3) relates to "*[t]he treatment* provided for *in paragraphs (1) and (2)*". Some general observations can be taken from that limitation. First, it covers "treatment" with the scope of paragraphs (1) and (2). Second, this means also that in principle it covers not only MFN but also national treatment (hereinafter "NT") since both paragraphs (1) and (2) deal with both standards. Third, Article 3 (3) covers NT and MFN as regards "investments" (paragraph (1)) and "investors" (paragraph (2)). Fourth, it covers treatment "in its territory", a limitation that appears both in paragraphs (1) and (2).

B. THE INTERPRETATION OF ARTICLE 3 (2)

14. I will focus on Article 3 (2) since the decision considered that "MFN treatment can extend to dispute settlement provisions only through the operation of Article 3(2) of the Treaty. 'Investment' as such has no procedural rights, therefore Article 3(1) is without relevance for the purpose of the Tribunal's inquiry into its jurisdiction."[18]

15. The Tribunal should have examined the content of paragraph (2) in order to determine whether it is really possible to apply it to the provisions of Article 8. Unfortunately, it decided otherwise. It considers that since Article 8 refers to "the right" of investors, it is not necessary to analyse whether the word "treatment" in particular covers "substantial rights" and/or "procedural rights".[19] However, not *all* rights conferred to investors by the BIT fall within the scope of Article 3 (2). I will then proceed to the interpretation to paragraph (2) starting with the ordinary meaning of its terms in their context.

16. First, Article 3 (2) refers to "treatment" "as regards their management, maintenance, use, enjoyment or disposal of their investments". The question at issue is whether the right to resort to international arbitration falls under that "treatment". The text provides then a limitative list of treatments covered by the MFN clause. If the intention of the parties would have been to include *all* rights of the investors, there would have been no need to produce such a detailed list. It is my

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[17] STUDY GROUP ON THE MOST-FAVOURED-NATION CLAUSE, FINAL REPORT, ANNEX TO THE REPORT OF THE INTERNATIONAL LAW COMMISSION, *supra* footnote 14, p. 182, paras. 164-166 (footnotes omitted).

[18] Interim Award, para. 104.

[19] Interim Award, para. 102.

contention that the use of the word "treatment" is not appropriate to refer to the right to submit a dispute to international arbitration.

17. In *ICS v Argentina*, the Tribunal examined the scope of Article 3 (2) of the Argentina-United Kingdom BIT, which is similar to the text we examine in the present case. The Tribunal noted that "[t]he formulation of Article 3(2) is also different and narrower in scope than clauses which provide for MFN treatment in relation to 'all matters' or 'all issues' relating to the BIT."[20] The Tribunal went on to state that "[i]nternational arbitration against the State is not a normal activity in the sense that it only happens, *per essence*, when disputes remain unsettled, unless one already takes for granted the existence of the BIT or of another agreement providing for international arbitration."[21] The Tribunal also stated that "[o]ther recent investment treaties have similarly included provisions explicitly indicating that this language intends to specifically limit the MFN clause to substantive treatment matters."[22]

18. Secondly, Article 3 includes in its MFN and NT provisions a limitation to treatment "in its territory". Many tribunals recognise that this kind of wording is a limitation to the MFN provision.[23] In *Berschader*, the Tribunal considered that the use of the expressions "treatment" and "in its territory" in the BIT "appears to indicate that what the Contracting Parties had in view was the material rights accorded to investors within the territory of the Contracting States" and what "the Contracting Parties had in mind was a fairly standard form of MFN clause."[24]

19. In *ICS*, the Tribunal determined that "international arbitration is not an activity inherently linked to the territory of the respondent State. Just the contrary is true".[25] The Tribunal observed that "[w]here an MFN clause applies only to treatment in the territory of the host State, the logical corollary is that treatment outside the territory of the host State does not fall within the scope of the clause."[26] In *Daimler*, the decision followed a similar position as that in *ICS*.[27] In *ST-AD v*

[20] *ICS v Argentina, supra* footnote 5, para. 299.

[21] *Ibid.*, para. 300. See also *Wintershall v Argentina, supra* footnote 5, paras. 169–171.

[22] *ICS v Argentina, supra* footnote 5, para. 302. See Chile-Colombia Free Trade Agreement (2006), Annex 9.3; Canada-Peru Free Trade Agreement (2008), Annex 804.1.

[23] *Berschader v Russia, supra* footnote 6; *Impregilo v Argentina, supra* footnote 5, para. 100; *ICS v Argentina, supra* footnote 5, para. 305; *Daimler v Argentina, supra* footnote 5, para. 226.

[24] *Berschader v Russia, supra* footnote 6, para. 185.

[25] *ICS v Argentina, supra* footnote 5, para. 306.

[26] *Ibid.*, para. 308.

[27] *Daimler v Argentina, supra* footnote 5, paras. 226-229.

Bulgaria the Tribunal, relying in the *Daimler* award, considered that "a reference to the words "treatment in the territory of the other Contracting Party" cannot be reconciled with an international arbitral procedure, which is not rooted in the territory."[28] By definition, international arbitration does not occur *in the territory* of the Contracting State.

20. The reference in paragraph (2) to the treatment accorded by the Contracting Party not only to nationals of third countries but of its *own nationals* also reinforces this interpretation, since it is apparent that nationals cannot invoke recourse to international arbitration against its own State.

21. To sum up, the meaning of "the provisions of Articles 1 to 11" in context is simply "the provisions of this treaty".[29] This general reference, as explained above, renders Article 3 (2) applicable to the other articles of the BIT *insofar as the material conditions envisaged in paragraph (2) are present in those articles*. In my view, for the reason already indicated, this is not the case with Article 8.

22. The object and purpose of the Barbados-Venezuela BIT does not allow another interpretation of Article 3. The content of the treaty as well as its preamble show that its object and purpose is to promote and protect investment. The preamble also refers to the strengthening of ties of friendship, the extension and intensification of economic relations and the stimulation of flow of capital and technology and economic development of the parties. In the preamble, the parties also recognise that "fair and equitable treatment of investment is desirable". There is no reference to the establishment of international arbitration available for investors as a particular object and purpose of the treaty. As I will explain later, the protection of foreign investments does not necessarily entail the need to set up international arbitration.

23. I concur with the 2015 *Final Report of the Study Group of the International Law Commission on the Most-Favoured Nation Clause* when it states that "whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions."[30] In my view, for the reasons set out above, the ill-defined formula of paragraph (3) does not settle the issue in and of itself. The required "explicit language" could have been found,

[28] *ST-AD v Bulgaria*, *supra* footnote 6, para. 394.

[29] The only articles put aside in the description "Articles 1 to 11" are those relating to the entry into force and the duration and termination of the treaty.

[30] STUDY GROUP ON THE MOST-FAVOURED-NATION CLAUSE, FINAL REPORT, ANNEX TO THE REPORT OF THE INTERNATIONAL LAW COMMISSION, *supra* footnote 14, p. 190, para. 216.

for instance, if Article 3 (2) would have included "dispute settlement" in the enumeration of investors rights governed by the MFN clause, without any territorial limitation. No such reference is present.

24. Nevertheless, I will not close my analysis here since in my view, even following the interpretation that "procedural rights" are also included in the description of Article 3 (2), as the majority asserts, the outcome of the matter under examination in the instant case will be the same. Even assuming that the provision of Article 3 (2) would be applicable to Article 8, still there would be no jurisdiction *ratione voluntatis* in the present circumstances. This is what I examine in the following section.

C. EVEN APPLYING THE MFN CLAUSE TO ARTICLE 8, THERE WOULD BE NO JURISDICTION RATIONE VOLUNTATIS

25. Let us assume that the MFN clause of Article 3 (2) applies to Article 8 of the Barbados-Venezuela BIT. Let us also assume that investors of Barbados would be offered the best treatment Venezuela would grant to investors of other States in other BITs and this would include the possibility to submit disputes to UNCITRAL arbitration, since, as the majority indicates, other BITs concluded by Venezuela and entered into force accept UNCITRAL as the default means of arbitration or even as the principal means. Still, this assertion does not solve the crucial point here: whether Venezuela consented to UNCITRAL arbitration for investors of Barbados. At the outset, it is interesting to notice that the *Final Report* of the ILC Study Group, while accepting *the possibility* of applying MFN provisions to dispute settlement provisions, did not examine the *consequences* of the application of the MFN clause to those provisions. There is no reason to pre-judge that applying the MFN clause to dispute settlement provisions automatically creates a basis for jurisdiction.

26. Article 3 is a substantive provision containing MFN and NT *obligations*, i.e. how the Contracting Parties *must act* with regard to investments, returns and investors, neither establishing the settlement of disputes at the international level nor expressing consent to such settlement. In fact, Article 3 (2) obliges the parties to grant to particular activities of investors from the other party the most favourable treatment in their territory. Let us assume that this contains the "procedural" obligation by Venezuela to offer investors from Barbados the better dispute settlement mechanisms established in other BITs, as the majority believes.

27. Assuming that investors from Barbados are entitled to benefit from the acceptance by Venezuela of UNCITRAL arbitration with regard to investors from third countries, yet the question of *compliance* with this obligation is still open. Having a right (or an obligation) is one thing, respect or otherwise for this right (or obligation) is quite another. To put it differently, even if Venezuela is obliged to grant to Barbadian investors the right granted to Ecuadorian investors to have access to UNCITRAL arbitration, the question is whether Venezuela has indeed implemented that right to Barbadian investors, by offering them such arbitration. This is the normal way rights emerging from MFN Clauses have always been interpreted and applied, and there is no reason to treat the obligation to grant investors access to international arbitration in another manner.[31] MFN clauses may extend conventional rights and concomitant obligations, they cannot implement themselves the exercise of these rights or the execution of the concomitant obligations.

28. One of the contradictions in applying a MFN provision to issues of jurisdiction is that the Tribunal, instead of determining first that it has jurisdiction under the ISDS provision in the BIT and then analysing a claim of a breach under an MFN provision, has begun the analysis the other way around.

29. Arbitrator Christopher Thomas called that problem the "sequential issue". He explained it in the following way: "Seeking the application of a particular rule of treatment in the Treaty in order to create jurisdiction seems to me to be putting the cart before the horse (…). A tribunal cannot adjudicate someone's rights if they have not met the threshold jurisdictional requirements to be able to claim such rights."[32] The case concerned the use of a MFN clause in order to disregard the 18 months litigation period but the reasoning is entirely applicable here.[33]

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[31] See, for example, *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award on Jurisdiction and Merits, 14 August 2007, paras. 366-376; *Bayindir Insaat Turizm Ticaret ve Sanayi A v Pakistan*, ICSID Case No ARB/03/29, Award, 24 August 2009, paras. 417-420; *AES Summit Generation Limited and AES-Tisza Erömü Kft v Hungary*, ICSID Case No ARB/07/22, Award, 17 September 2010, para. 12.3.2; *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No ARB/08/16, Award, 31 March 2011, paras. 342-342; *Cargill, Inc v Mexico*, ICSID Case No ARB(AF)/05/2, Award, 13 August 2009, paras. 228-234; *Grand River Enterprises et al. v United States of America*, UNCITRAL, Award, 12 January 2011, paras. 158-172; *Convial Callao S.A. and CCI - Compañía de Concesiones de Infraestructura S.A. v. Republic of Peru*, ICSID Case No. ARB/10/2, Award, 21 May 2013, paras. 663-668; *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, paras. 8.59-8.78.

[32] *Hochtief v Argentina, supra* footnote 5, Separate and Dissenting Opinion, paras. 81-82.

[33] See also, Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT (2011), pp. 97–113.

30. Similarly, the majority in *Daimler* analysed the "timing aspect of standing" and questioned the moment when a MFN claim could be raised before an international arbitral tribunal.[34] The majority noted that the fulfilment of the 18 month domestic courts submission constitutes a condition precedent to the host State's consent to submit a particular dispute to investor-State arbitration and, as a consequence, the issue of the MFN provision was not yet properly before the tribunal.[35] The decision was supported by the reasoning of the ICJ in the *Anglo-Iranian Oil* case, where Iran's acceptance of the ICJ's jurisdiction over disputes arising under the two "basic treaties" (the Persia/United Kingdom treaties) was a condition precedent to the United Kingdom's standing to raise its MFN claims before the Court.[36] Because this condition precedent had not been fulfilled, the UK had no standing and the ICJ had no jurisdiction.[37]

31. Similarly, in *ST-AD v Bulgaria*, the Tribunal considered:

> The object and purpose of the BIT's MFN clause is to grant protected investors the most favourable treatment found in other BITs. But before being able to ask for a "more favourable" treatment, an investor has to already be subjected to what it considers to be a less favourable treatment and the conditions for access to a more favourable treatment through the MFN clause have to be satisfied. More specifically, before a tribunal can apply the MFN clause, (i) there must be a foreign investor (and the conditions for being considered as a foreign investor under the BIT cannot be modified by the MFN clause), (ii) there must be an investment (and the conditions for finding that an investment exists under the BIT cannot be modified by the MFN clause), (iii) the BIT must be applicable *ratione temporis* to the situation (and the conditions of application *ratione temporis* under the BIT cannot be modified by the MFN clause), and (iv) above all, the tribunal must have jurisdiction *ratione voluntatis* (and the conditions for access to jurisdiction *ratione voluntatis* under the BIT cannot be modified by the MFN clause).[38]

32. In short, MFN clauses do not possess the power *to express consent*, even though they would be able to impose *the obligation to consent* to international arbitration if their content allows so. To consider that it is possible to automatically enforce States' compliance with their obligations without their consent is something that the Security Council may be able to do in the exercise of its competencies in accordance with Chapter VII of the Charter, but certainly not an arbitral

[34] *Daimler v Argentina*, *supra* footnote 5, paras. 199-204.

[35] *Ibid.*, para. 200.

[36] *Ibid.*, paras. 201-203.

[37] *Ibid.*, para. 203.

[38] *ST-AD v Bulgaria*, *supra* footnote 6, para. 344.

tribunal. This would be more than extraordinary: it would disregard the basic principle of international adjudication, i.e. the principle of consent to jurisdiction.

33. The International Court of Justice is aware of this and it has consistently distinguished between what would be breaches to international obligations (even grave breaches) and the existence of jurisdiction. As the Court stated in the cases the then Federal Republic of Yugoslavia brought against NATO States: "there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law; the former requires consent; the latter question can only be reached when the Court deals with the merits".[39]

34. The same applies to international arbitration. Even if the situations are different, I believe that what the ICJ examined in its advisory opinion on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* is useful here. These three States had accepted arbitration for the settlement of disputes with the other Contracting Parties to the Peace Treaties. They had to appoint an arbitrator in order to allow the tribunal to be constituted. They did not. The question was whether the Secretary-General of the United Nations, who could appoint the third arbitrator, could also appoint the arbitrator not designed by the parties. The Court's answer was he could not.[40] Refusal to appoint their members to the Treaty Commissions by these three States would involve international responsibility for not having fulfilled a treaty obligation. However, the Commissions, whose jurisdiction was accepted by Bulgaria, Hungary and Romania, could not be constituted without these three States acting in the manner prescribed by the Treaty. The question here is not the constitution of the tribunal (something Venezuela has accepted with the sole purpose to examine its jurisdiction and constantly stating that it has not consented to jurisdiction on the merits)[41], but whether Venezuela has given its consent to settle the dispute raised by the Claimant through arbitration.

35. As such, assuming that by virtue of the MFN clause Venezuela is obliged to grant Barbadian investors access to an UNCITRAL arbitral tribunal, this Tribunal cannot go to the merits (or other

[39] See for example *Legality of Use of Force (Yugoslavia v Canada), Provisional Measures, Order of 2 June 1999*, ICJ REPORTS 1999, p. 273, para. 43.

[40] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion (Second Phase), [1950] ICJ REPORTS 221, 228-229.

[41] See Statement of Defence, 3 March 2014; Request for Bifurcation, 11 March 2014; Memorial, 11 April 2014; Reply, 30 May 2014; Hearing Transcript (in particular 10 July 2014, 10:6-10).

exceptions with regard to jurisdiction or admissibility) if it is not demonstrated that Venezuela has given its consent and therefore has fulfilled its obligation stemming from Article 3 (2).

36. This interpretation is reinforced by other articles of the treaty. Article 8 (3) provides that "[t]he arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement".[42] As already mentioned, the MFN and NT provisions in Article 3 are substantive provisions containing obligations. Thus, the only thing a tribunal having jurisdiction could do as regards an article that provides for an obligation such as Article 3 is to determine whether there is a breach or not of that obligation. In other words, the Tribunal could not use an obligation for other purposes, such as creating *ratione voluntatis* jurisdiction.

37. To sum up, if the Claimant considers that Venezuela has breached its obligations under Article 3 of the BIT, as indeed it does,[43] this is a matter that a tribunal may only decide insofar as it has jurisdiction. Article 3 (2) does not contain at the same time an obligation, on the one hand, and the jurisdictional means to decide about its compliance or breach, on the other hand.

38. Here, even assuming the applicability of Article 3 (2) to Article 8 of the BIT, there is a step that is lacking for this Tribunal to have jurisdiction. At this stage, it is crystal-clear that Venezuela has not given its consent to UNCITRAL arbitration for the case introduced by the Claimant. The majority is aware of this difficulty for justifying its decision. It tried to solve this rather insurmountable obstacle by finding an alleged permanent consent to UNCITRAL arbitration in Article 8 (4) of the BIT. In the next section, I will demonstrate that this consent does not exist.

III. UNDER ARTICLE 8 THERE IS NO OFFER OF UNCITRAL ARBITRATION TO WHICH THE MFN COULD BE APPLIED

39. In order to overcome the crucial lack of consent by Venezuela as regards UNCITRAL arbitration in the instant case, the majority makes in my view a serious misconstruction of Article 8 while trying to apply Article 3 (2) to it, for the reasons I will develop below. To facilitate the reading of this opinion, I recall here the content of Article 8:

[42] This is similar to the texts of NAFTA Articles 1116 and 1117 that provide that an investor may submit to arbitration a claim that another Party "has breached an obligation under… Section A". Section A provides for the obligations as regards "Investment" including MFN and NT.

[43] Statement of Claim, paras. 87-89.

Settlement of Disputes Between one Contracting Party and Nationals or Companies of the other Contracting Party

(1) Disputes between one Contracting Party and a national or company of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter shall, at the request of the national concerned, be submitted to the International Centre for Settlement of Investment Disputes for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18, 1965.

(2) As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules). If for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

(3) The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and if such is the case, the amount of compensation.

(4) Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

40. My colleagues consider that the parties to the Barbados-Venezuela BIT have given unconditional consent to three types of arbitration: ICSID, Additional Facility and UNCITRAL, under certain conditions. They believe that this is the way to give effect to paragraph 4 of Article 8, which otherwise would — according to them — be repetitive and without any specific meaning.[44] If another BIT offers a better condition for any of these three types of arbitration, then this other BIT can be invoked by a Barbadian investor. Since, following their reasoning, the Ecuador-

[44] Interim Award, para. 110.

Venezuela BIT institutes UNCITRAL arbitration in the event that *neither the Additional Facility nor ICSID is available*, then the Claimant may invoke UNCITRAL in this case.[45]

41. This reasoning is very difficult to sustain. The terms of Article 8 (4) do not even open the door for any ambiguity: "Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article". Article 8 does not provide to investors of the other party *options* for having recourse to international arbitration. Article 8 does not establish *mere temporal conditions* for having recourse to one or the other of the three possibilities mentioned in paragraphs (1) and (2). Article 8 contains unconditional consent to international arbitration only to the extent of this article and nothing else. Instead of giving effect to paragraph 4 of Article 8, the majority deprives the last and very important part of the paragraph ("in accordance with the provisions of this Article") of any *effet utile*. In fact, as will be explained below, it deprives the entire Article 8 of its real content and scope.

42. The Tribunal has unanimously found that at all stages there has been *just one kind of arbitration available* to the investors of the other country in the Barbados/Venezuela BIT: in the "pre-ICSID period", ICSID Additional Facility arbitration, and only if this was not available, UNCITRAL arbitration, and obviously only ICSID in the ICSID-period. In the post-ICSID period (after the Venezuelan withdrawal from the ICSID Convention), there is none.[46] The majority's decision tries to bring back to life a consent to UNCITRAL arbitration that was envisaged at the time of the signature of the BIT (when Venezuela was not a party to the ICSID Convention) but that it *has never been available* because the BIT entered into force on 31 October 1995, *after the ICSID Convention entered into force for Venezuela* (on 1 June 1995). Article 3 (2) cannot operate with regard to UNCITRAL arbitration and allegedly improve the conditions of the Barbados-Venezuela BIT, simply because the possibility to have recourse to UNCITRAL arbitration under this BIT has never existed. Investors from Barbados (or from Venezuela with regard to Barbados) only had at their disposal ICSID arbitration after the entry into force of the BIT and nothing else.

43. The majority's interpretation also disregards the entire economy of Article 8. All the elements included in the four paragraphs of Article 8 form part of the "standing offer" agreed by the Contracting Parties. All of them play a clear and important role in that offer and cannot be separated from one another: Article 8 (1), in its first part, sets out the types of *disputes* that can

[45] Interim Award, para. 127.

[46] Interim Award, para. 89.

be submitted to investor-State arbitration and, in its second part, envisages ICSID arbitration when the Contracting Parties are also Contracting States to the ICSID Convention; Article 8 (2) envisages arbitration under the Additional Facility Rules in the period during which Venezuela had not yet become a Contracting State to the ICSID Convention and arbitration under the UNCITRAL Rules for the same period "[i]f for any reason the Additional Facility is not available"; Article 8 (3) establishes the limits of the arbitral award (i.e. determining a breach of the Agreement, the existence of damages and the amount of compensation); and finally Article 8 (4) establishes the Contracting Parties' "unconditional consent" to the submission of disputes "in accordance with the provisions of this Article".

44. The expression "unconditional consent" in Article 8 (4) refers to the fact that consent to arbitration included in the BIT is without any need of a further special agreement, in other words, indicating the Contracting Parties' advance consent to international arbitration.[47] This expression cannot be interpreted as creating an "overall" "offer to arbitrate" as suggested by the majority. It follows that Article 8 (4) is not a "standing offer" to arbitrate by itself, but instead is part of the general offer to arbitrate included in Article 8. Article 8 (4), as one element of the offer to arbitration, remains as long as the conditions for the existence of an international arbitration set out in the other paragraphs also remain.

45. Today, there is no current offer to arbitrate, because the only one that has ever existed once the BIT entered into force no longer exists after Venezuela's withdrawal from the ICSID Convention. The principle unanimously underlined by the Tribunal should apply: "the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the BIT between Barbados and Venezuela."[48] Other arbitral tribunals have previously applied this principle.[49] The same reasoning should apply here where the offer to the only available arbitral means (ICSID) has disappeared and the one attempted by the Applicant (UNCITRAL arbitration) has *never* been at its disposal.

46. To sum up, it is not exact to say that paragraph 4 would be deprived of any *effet utile* if it is not read as a "standing offer" to any of the three possibilities envisaged in Article 8. The added value of paragraph 4 that refers to "unconditional consent" is to indicate that there are no other

[47] Aron Broches, *The Experience of the International Centre for Settlement of investment Disputes*, 20 STUDY IN TRANSNATIONAL LEGAL POLICY 75-97 1985, p. 83; *Churchill Mining PLC v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on jurisdiction, 24 February 2014, paras.198-199 and 203.

[48] Interim Award, para. 105.

[49] *Hochtief v Argentina, supra* footnote 5, para. 79; *EURAM v. Slovak Republic, supra* footnote 6, para. 447.

conditions for international arbitration beyond those established in Article 8. Paragraph 4 is clear: it indicates that the acceptance by the parties of arbitration in the conditions set out in Article 8 is otherwise unconditional. Nothing else and nothing less.

47. It is true that, after the withdrawal of Venezuela from the ICSID Convention, there is no possibility for Barbadian investors (or for Venezuelan investors in Barbados) to have recourse to international arbitration. This is a consequence of the possibility by the parties to the ICSID Convention to withdraw from it, a right nobody denies. It is also true that Article 8 of the BIT is still in force. As it is the unanimous understanding of this Tribunal, the parties to the BIT did not envisage the situation of the withdrawal of one of them, or both, from the ICSID Convention, which was nevertheless an existing one. Under these circumstances, the "standing offer" of Article 8 will become operational if Venezuela becomes party to the ICSID Convention again and if Barbados does not withdraw from it in the meantime.

48. The right interpretation of the text of Article 8 (1) and (2) in their context made in Section A of Part V of the decision is then contradicted in Section B. It is a serious mistake to consider that the three different arbitral proceedings mentioned in those paragraphs are simply subject to "temporal conditions"[50], as though all of them were available. A temporal condition exists for example when the possibility to start arbitral proceedings is subject to the passing of a certain period of time after the end of another dispute settlement means (negotiations, domestic judicial proceedings, etc.). In the Barbados-Venezuela BIT each of the three arbitral proceedings are submitted to a condition subsequent (*condición resolutiva*): the Additional Facility arbitration, until the entry into force of the ICSID Convention to Venezuela; UNCITRAL Rules arbitration, until the same action and only if for any reason the Additional Facility was not available during that period; ICSID arbitration, after the entry into force of the ICSID Convention and insofar as this Convention is in force between the parties. The Interim Award does not take into account this important difference between a mere "temporal condition" and the determination of the existence of a given situation, such as the entry into force of a convention or the availability of a given arbitral procedure. By doing so, the Interim Award goes far beyond any other decision in extending the scope of consent through a MFN clause.

49. The object and purpose of the BIT does not allow a different interpretation to that followed in this opinion. As we saw above, the Barbados-Venezuela BIT does not include the establishment of international arbitration for investors/State dispute settlement as a particular object and purpose

[50] Interim Award, paras. 113, 115.

of the treaty. The promotion and protection of foreign private investment does not necessarily require the establishment of international arbitration at the disposal of investors as an inherent and indispensable element of BITs, as international conventional practice in general and contracts concluded between foreign investors and States demonstrate. Many of them do not establish international arbitration and constitute nevertheless BITs or contracts providing for other dispute settlement mechanisms, including domestic fora. Hence, the object and purpose of the BIT does not allow an interpretation of Article 8 as establishing that States parties consent to international arbitration with investors in other circumstances than those established in the Article itself.

50. For the abovementioned reasons, the interpretation of Article 8 by the majority in Part V.B of the Award goes far beyond the text in its context and finds no support in the object and purpose of the BIT either. The choice of the parties of ICSID arbitration as its preferred mechanism is without any doubt. As is the fact that UNCITRAL arbitration was conceived as a second best before the entry into force of the ICSID Convention between the parties and only if the Additional Facility would not have been available, a double condition that has never existed since the very entry into force of the BIT, as explained above.

51. What Professor Laurence Boisson de Chazournes stated in *Garanti Koza v. Turkmenistan* is also relevant in the present case:

> the so-called 'right' to a more favourable treatment under Article 3(3) of the U.K.-Turkmenistan BIT can only be exercised if the foreign investor and the host state are subject to a dispute settlement relationship under one of the dispute settlement options that are provided in Article 8(2) of the U.K.-Turkmenistan BIT. In that sense, the application of Article 3(3) of the U.K.-Turkmenistan BIT is *subordinated* or *conditioned* to the prior application of Article 8(2) of the U.K.-Turkmenistan BIT.[51]

52. The decision in *Maffezini* also clearly stated that "if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration".[52] This reasoning should apply with greater force in the present situation, when there is not even an available offer to arbitrate, after Venezuela's withdrawal from ICSID.

[51] *Garanti Koza v Turkmenistan, supra* footnote 10, Statement of Dissent by Prof. Laurence Boisson de Chazournes, paras. 40-41.

[52] *Maffezini v Spain, supra* footnote 5, para. 63.

53. To sum up, the situation of Article 8 does not allow the establishment of consent to UNCITRAL arbitration on the basis of the application of Article 3(2) to it: there is no procedural relationship to which the most favourable treatment of another BIT can be applied.

IV. CONCLUSION

54. It is very regrettable that the majority decided not to follow what is a clear position sustained by different investment arbitral tribunals in not importing consent when none exists.[53] The majority, in spite of an explicit assertion to the contrary, has done so. It did it through a complicated, extensive and wrong assimilation of a provisional, limited and never active consent to UNCITRAL arbitration in the Barbados-Venezuela BIT from the existing consent of UNCITRAL arbitration in other BITs which are still in force.

55. It is to be expected that the determination of jurisdiction by an *ad hoc* tribunal must be established in a fully conclusive manner. To use the words of the ICJ, the existence and scope of jurisdiction must be *certain*.[54] Unfortunately, this is not the case here.

56. This decision to extend even further the application of a MFN clause to a situation in which no international arbitration is available in the BIT concerned is even more regrettable when practice shows the discontent of States to the extensive interpretations of these clauses through their application to ISDS made by some tribunals. This situation has led to the emergence of interpretative declarations or the inclusion of interpretative provisions in order to avoid arbitral misrepresentation of the MFN clauses. I will just give as an example the recent Canada-European Union Comprehensive Economic and Trade Agreement (CETA) of 29 February 2016. Its Article 8.7 contains the following paragraph 4:

> For greater certainty, the "treatment" referred to in paragraphs 1 and 2 does not include procedures for the resolution of investment disputes between investors and states provided for in other international investment treaties and other trade agreements. Substantive obligations in other international investment treaties and other trade agreements do not in themselves

[53] See *Maffezini v Spain, supra* footnote 5, paras. 62-63; *Plama v Bulgaria*, supra footnote 10, para. 207; *RosInvest. v Russia*, Arbitration under Stockholm Chamber of Commerce, Award on Jurisdiction of October 2007, paras. 129-130; *National Grid v Argentina*, UNCITRAL Case, Decision on Jurisdiction of 20 June 2006, para. 92; *Hochtief v Argentina, supra* footnote 5, paras. 79-82; *Euram v Slovak Republic, supra* footnote 6, para. 447.

[54] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment of 4 June 2008, ICJ General List No. 136, para. 62.

constitute "treatment", and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations.[55]

57. As the Final Report of the ILC Study Group observed, "The application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, brought a new dimension to thinking about MFN provisions and *perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements*."[56]

58. The majority of this Tribunal decided to go even further and bring back to life consent to an arbitral means that had since disappeared, and which has never been applicable. As explained in this opinion, Article 3 (2) cannot be applied to Article 8, despite the provision of Article 3 (3). Even if it were, the consequence would be the obligation for Venezuela to give consent. The possibility to examine whether Venezuela complied with this obligation is not open to this Tribunal. Venezuela's consent to arbitration is lacking. Furthermore, neither the Additional Facility nor UNCITRAL arbitration had never been available to investors because the ICSID Convention entered into force between the parties before the entry into force of their BIT. For them, this very fact renders the applicability of the MFN clause impossible.

59. The way to promote the acceptance of, recourse to and reliance on international investment arbitration is not by imposing it without the fundamental requirement of State consent. On the contrary, this would only serve to undermine its credibility.

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[55] Available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf (last visited 8 July 2016).

[56] STUDY GROUP ON THE MOST-FAVOURED-NATION CLAUSE, FINAL REPORT, ANNEX TO THE REPORT OF THE INTERNATIONAL LAW COMMISSION, *supra* footnote 14, p. 190, para. 215 (emphasis added).